Studies by

José de Oliveira Ascensão

ON COPYRIGHT LAW & THE INFORMATION SOCIETY

The mission of *Instituto Observatório do Direito Autoral* – IODA is to stimulate studies and academic reflections on Intellectual Rights in the Information Society, observing the opportunities provided by technology for greater social, technological and cultural inclusion.By means of multidisciplinary research and institutional partnerships, IODA carries out studies on the Information Society, analyzing the legal, social, economic, technological and cultural dimensions of the Information and Communication Technology Revolution.

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PREFACE

I could only receive with immense happiness the invitation that was made to me to preface the present posthumous work of the esteemed professor José de Oliveira Ascensão. I refer to this great master not only from my position as professor and director of the School of Law at the Federal University of Paraná (UFPR), but mainly as someone who knew personally and who admired dear professor Ascensão (as he was affectionately called by everyone).

The Federal University of Paraná has a deep affection and a great intellectual debt to Professor Ascensão. From the 1990s on he always participated actively and in person in the events of our School of Law in the area of copyright and intellectual property; he brilliantly taught his students using his intellectual background and openness to dialogue, as well as showing his love for law and for his classes.

The great contribution left to everyone by Professor Ascensão, who we affectionately consider as a professor of this house, is also marked by his presence in the Congresses of Copyright and Public Interest (CODAIPs). They are held at UFSC and at UFPR, and coordinated with mastery by Professor Marcos Wachowicz, through the Study Group on Copyright and Industrial Law (GEDAI), which is currently linked to the Graduate Program in Law at the Federal University of Paraná.

This piece of work portrays and reaffirms the undeniable importance of the legacy left by Professor Ascensão as a great jurist, intellectual, pioneer of knowledge in various areas of civil law, legal theory and mainly copyright over the last five decades.

The articles selected to compose this work reflect the studies of the last fifteen years of the intellectual production of Professor Ascensão. These articles were revised, updated and published bilingually in order to reach a greater number of people interested in the sources of knowledge that guide possible solutions and answers to questions not yet consolidated in the legal area.

Finally, I would like to express my sincere gratitude to Professor Marcos Wachowicz and to all the members of GEDAI – the largest research group in the area of Copyright and Industrial Law in Brazil, recognized nationally and internationally for its exhaustive and tireless struggle in the production of knowledge and encouragement to research – who conceived and produced this fair and deserved tribute to our professor Ascensão.

Prof. Dr. Sérgio Said Staut Júnior
Director of the School of Law at UFPR

FOREWORD

This posthumous piece of work by José de Oliveira Ascensão, a lawyer, jurist and professor, born in Luanda, Angola, on November 13, 1932, is a project of the Study Group on Copyright and Industrial Law – GEDAI. It encompasses Ascenção's main writings on Intellectual Rights and the challenges facing the new information and communication technologies, with the aim of paying tribute to the man who contributed so much to the training of generations of researchers here in Brazil. Therefore, the translation of his writings into English provides his thoughts and writings with a major breadth of diffusion, as his work is still of great relevance to scholars of Intellectual Rights worldwide.

Nevertheless, in the course of preparation of this book project, while compiling and revising the originals for publication in Portuguese and English, we were taken by the sad news of our dear professor's death, on March 6, 2022.

Under permission of Professor Ascensão's family, we continued working on our project and managed to finish this book, now with an even greater gratitude. This represents a tribute to such a wonderful person whose legacy can be found in his books – the understandings and fundamental interpretations for the study of the Theory of Law, and especially of Copyright.

Professor Ascensão graduated in July 1955 from the School of Law at the University of Lisbon – Portugal, where he was also granted a doctorate degree in legal-historical sciences in 1962, with the thesis "The Real Legal Relations". He bravely practiced law throughout his life since October 24, 1956.

As a retired professor from Lisbon College of Law (Faculdade de Direito de Lisboa), he built a solid career over decades, followed by a fruitful and constant academic production. His works in the area of General Theory of Law and later in Copyright Law have been referenced all over the world.

Jurist José de Oliveira Ascensão dedicated himself to the studies of Copyright for many decades, having even participated as a representative of the Portuguese State in the emblematic Stockholm Convention on July 14, 1967, when the World Intellectual Property Organization – WIPO, Geneva was founded.

Professor Ascensão's international presence goes far beyond his numerous articles, which provide us with his own and enlightening understandings of the most diverse and stormy issues of Intellectual Law.

His activity as a professor in several European countries, as well as for years here in Brazil, for he took up residence in Recife in the 1970s, left his students (including his Brazilian pupils) great lessons. And above all, his own example of life, so dedicated to the study of law, was a lesson taught by professor Ascensão.

During his time in Brazilian land, he was a professor at the Federal University of Pernambuco – UFPE in the 1970s,

and in the last two decades he performed several academic works with other renowned educational institutions. Among them we can emphasize his work with the Federal University of Paraná – UFPR and the Federal University of Santa Catarina – UFSC, where he regularly taught courses and seminars.

A feeling that is common among all the people who had the privilege of shared part of their lives with our dear professor Ascensão is that he always left an indelible mark of kindness and incomparable intellectual generosity when dealing with people.

It is estimated that a collection of more than 350 works by this great master have been published in the most diverse languages. Over the last years of his performance and academic production, he dedicated himself to the studies of copyright, intellectual property and unfair competition.

He was president of both Gestautor – Association for Collective Management of Copyright and the Portuguese Association of Intellectual Law, in addition to being a permanent representative of Portugal on the Standing Committee of the Union of Bern.

Regardless of the area of activity, Professor Ascensão will forever be recognized and remembered for his brilliance, intelligence and generosity. That is so not only for his important scientific contribution to the Academy but also for the numerous generations of students who attended his classes, and even for all of those who are scholars in the area of law and related areas. The immense joy and friendship of having been able to meet and live with a human being with such a unique personality was a great experience.

Professor Ascensão leaves a legacy for the history of legal sciences, as one of the most famous Portuguese-Brazilian professors and jurisconsult of recent times.

This posthumous piece of work, which is now published, represents a small retribution to Professor Ascensão's intellectual generosity, as he always participated in the activities promoted here at GEDAI – Group of Studies on Copyright and Industrial Law, always being active, participating in cycles of debates, meetings, seminars, training courses. He was a brilliant professor who captivated everyone with his reflections and ideas.

He was present from the first Congress on Copyright and Public Interest, which is now in its 16th edition, always holding the opening conference, with core and sensitive themes about the borders involving Intellectual Rights and New Technologies. Since then, the event entitled CODAIP and also our GEDAI group have focused their research on new technologies and the information society.

For all that, this posthumous piece of work is a timely and well-deserved tribute to Professor José de Oliveira Ascensão. It is now published for the entire legal and academic community, with open access so that further studies of his work can generate reflections and open new paths for future generations of researchers and jurists.

Thank you Professor Ascension for all you've taught, your friendship, the life lessons and the magnificent work that you bequeathed to us; they will forever be present.

Marcos Wachowicz

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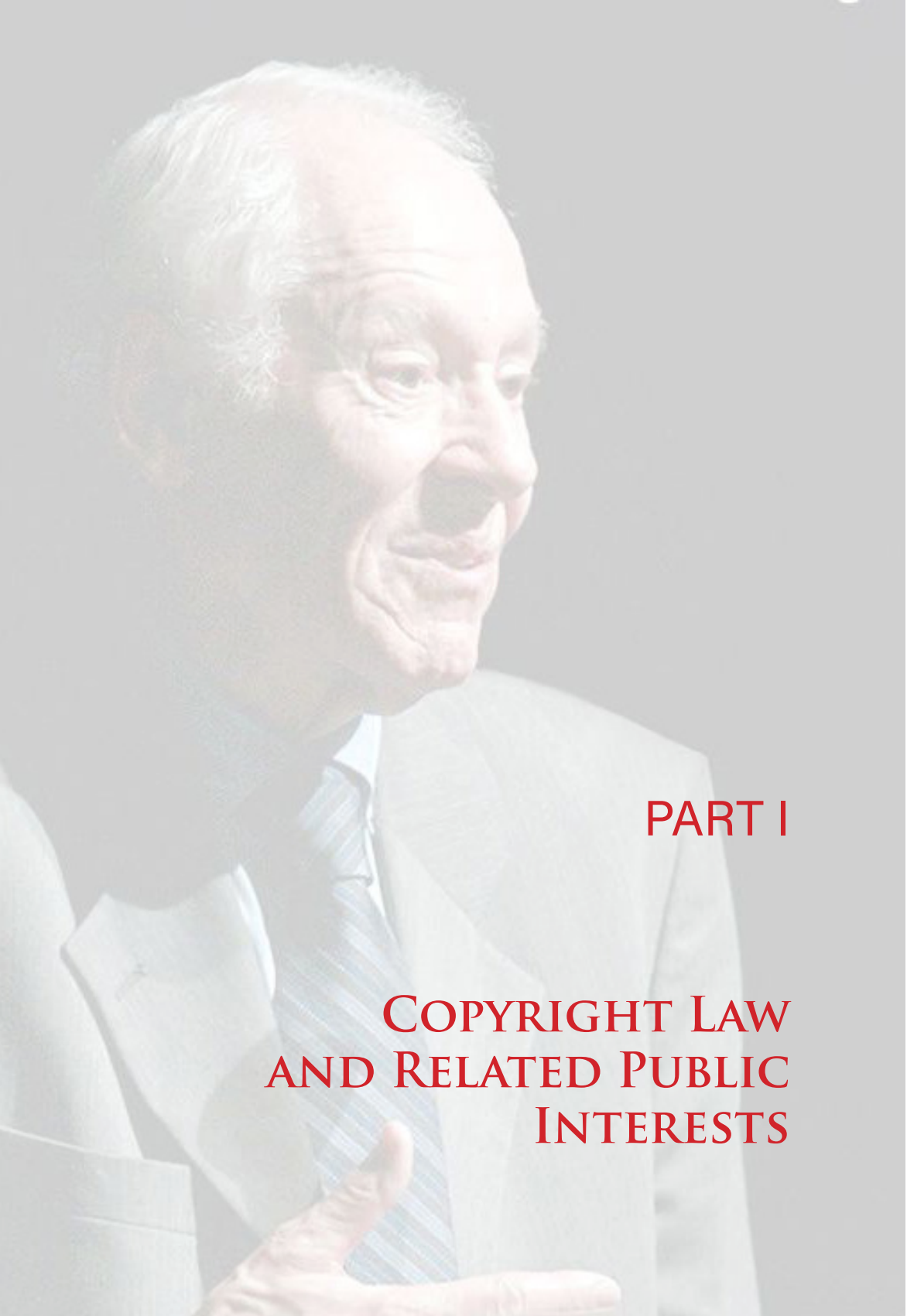

PART I

Copyright Law and Related Public Interests

THE MATTER OF THE PUBLIC DOMAIN[1/2/3]

SUMMARY

1 PRIVATE APPROPRIATION AND PUBLIC DOMAIN

We are given as our subject the public domain and the matters it raises.

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1 This article is the translation into English of the original text in Portuguese: ASCENSÃO, José de Oliveira. A questão do domínio público. In: WACHOWICZ, Marcos; SANTOS, Manoel Joaquim Pereira dos. *Estudos de Direito de Autor e Interesse Público*: Anais do II Congresso de Direito de Autor e Interesse Público. Fundação Boiteux. Florianópolis, 2008.

2 This article is a translation of the paper titled "A QUESTÃO DO DOMÍNIO PÚBLICO", from 2007, intended for the Studies in Homage to Prof. Dr. Maristela Basso.

3 Translator: Lukas Ruthes Gonçalves

But it is not bad to start by observing that intellectual goods have been in the public domain throughout most of human history, without raising the slightest question. The creation of exclusives[4] on intellectual property only appears with the Modern Age.

In spite of everything being in the public domain, intellectual creations and amazing inventions have been made for millennia. This in itself demonstrates that exclusivity over intellectual property is not, ultimately, indispensable for the progress of the sciences and arts.

However, from certain justifications of intellectual rights, it would seem the contrary was inferred.

On the economic side, what has been called the theory of the Tragedy of the Commons was developed. If intellectual goods were expropriated, they would not be properly cared for; as it is said of the collectively owned lands of the inhabitants of a place that constitute the commons. Exclusive rights would enhance the value of intellectual property.

The so-called Economic Analysis of Law also focused on this matter. In Europe it was particularly welcomed by Michael Lehmann, in relation to computer programs, who extolled the great benefits that would result from the appropriation of these programs.

I do not intend to enter into the economic discussion of the matter, but I cannot help making a very simple observation:

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4 Translation note: Professor Ascensão often uses the word "exclusives" (*exclusivos* in Portuguese) when referring to rights in a legal sense. So, for instance, instead of writing "intellectual rights" Professor Ascensão writes "intellectual exclusives". This translation attempts to keep his unique writing style in this regard.

if there were all these advantages, then the logical consequence would be the perpetuity of intellectual rights! They should never fall into the public domain.

In fact, systems of perpetuity of author's rights[5] have historically existed.

I am not referring specifically to the perpetuity of the so-called *moral* author's rights: this will be considered later. I warn you now that I am speaking of *personal* author's rights and not of moral rights, because the adjective *moral* is an importation from the French language[6] that justifies nothing in our language.

But for the moment I limit myself to the patrimonial aspect of author's rights. Perpetuity was in force in several countries; in Spain, for example, as early as 1823. It only lasted a short time, as indeed happened with several other historical manifestations.

Portugal also had its perpetuity system, instituted in 1927[7]. The legitimizing syllogism, inspired by the collective management entities, was clear: property is perpetual; author's rights are property; therefore author's rights are perpetual. On the basis of this primary reasoning, based on two wrong premises, author's rights were made perpetual[8].

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5 Very often used in that country: remember the "moral people", for example.

6 Translation note: To preserve Ascensão's intentions: (i) the word "copyright" refers to common-law copyright; (ii) rights based in the *droit d'auteur* tradition will be referred to as "author's rights"; (iii) "Copyright Law" refers generically to the legal system.

7 According to a draft law by Cunha Gonçalves, who also worked on Brazilian Law.

8 Although, naturally, only works that had not yet fallen into the public

The consequences were calamitous. Thus, already classic works of compulsory use in education, which were owned by publishers, were exploited through bad and expensive editions, because they had no competition. The situation only ended with the Portuguese Author's Rights Code of 1966. Even so, this code still guaranteed a transitional period for existing exclusives until the works fell into the public domain, as this paper will show.

Does exclusive appropriation add value to the intellectual work? The Portuguese experience allows us to give a positive answer. But, unfortunately, this valuation has not been for culture, for the public or even for the author: it has gone back to the businesspeople.

2 THE GENESIS OF THE EXCLUSIVE RIGHT OF THE AUTHOR

Let us follow more prudent paths, which are, in fact, the paths that we believe are universal today. Let us see in which framework the authorial exclusive came about.

It is agreed that author's rights are a result of technological advance. It is originally linked to the printing press; just as the various subsequent steps correspond fundamentally to other advances in technology.

But the technique did not have as immediate consequence the appearance of the legal institute of the author's rights. The first manifestation was the privilege, with the inherent business character. And the privileges started by

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domain at the time of entry into force of the law were subject to this regime.

being attributed to the printers, who thus gained a monopoly of printing. The beginnings of the institute are entrepreneurial.

In time, privileges were also attributed to authors. We may say that it is by a reformulation of these privileges that emerges something that we may already consider to correspond to author's rights, in its modern aspect: the exclusive granted to the author by the British Statute of Queen Anne of 1710. It was granted to the author a privilege of exploitation for 14 years. The privilege could be renewed for a further 14 years if the author was still alive once the first period had elapsed.

With the French Revolution another major change takes place: the alchemy of privilege into property, to allow the right to survive the solemnly decreed abolition of all privileges. Since then, author's rights protection has not stopped increasing.

As we have seen, time limits started out very modest. These deadlines have been constantly inflated, in a movement that reaches our days. It passed by the lifetime protection and overflowed to the post-mortem protection of the author. The Berne Convention came to adopt the term of protection of 50 years post-mortem in the Berlin Act of 1908[97].

The protection of entities other than authors, which were more or less closely related to the intellectual work, then emerged. The 1961 Rome Convention established for the three classic categories of related rights a term of protection of 20 years. This deadline has also been repeatedly inflated, even when it was set for the benefit of pure businesspeople.

Regarding author's rights, several countries have been exceeding the duration of 50 years post-mortem. Thus,

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9 But in that Act the deadline was still set only indicatively.

in Brazil, while its Law 5988 was in force, the protection was lifelong for certain successors and otherwise for 60 years post-mortem. In Europe, Germany increased the term to 70 years post-mortem[10]. This was the pretext used by the European Community for the "harmonization" of the term of protection: it became 70 years after death for author's rights and 50 years for related[11] rights for all countries.

However, the trend towards longer periods has not stopped. In the United States of America, a general increase in the term of protection of 20 years has been approved! In the case of *work made for hire,* protection lasts for 95 years, or 120 years if the work has not been published[12].

The influence of Disney in this process was evident, to avoid the fall into the public domain of characters whose creation dated back to the beginning of the 20th century. The constitutionality of the term extension was challenged, but the US Supreme Court accepted it, with the mere consideration that it was a constitutional competence attributed to Congress. How 95 or 120 years are compatible with the US Constitution, which attributes to Congress the possibility of establishing exclusives "for a limited time" for the benefit of authors and inventors *for the progress of sciences and useful arts* is a mystery, which will be up to US jurists to unravel.

And it does not stop there. Mexico, the United States' NAFTA partner, has already extended the deadline not to 95 but

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10 Which represented a gift to publishers at the expense of consumers: thus Manfred Rehbinder, *Urheberrecht*, 14th ed. C. H. Beck, 2006, § 41 II, no. 535.

11 Not post-mortem. It was the subject of Directive No. 93/98 of 28.10.93 on duration, arts. 1 and 3.

12 By the *Sonny Bono Copyright Term Extension Act* of October 1998.

to 100 years. This is a sign that when the extended time limit comes to an end in the United States, there will be another extension to avoid the fall into the public domain.

So we're on the path to Mickey Mouse perpetuity!

3 SCOPE OF THE PUBLIC DOMAIN

Let us now move on to the public domain. What does it cover?

On the negative side, there is public domain when the work is not under anyone's exclusive appropriation. Consequently, works that everyone can use without authorization would be in the public domain. However, we immediately warn that "without authorization" is not equivalent to "without payment". The caveat will be clarified when we speak later of the so-called "remunerated public domain".

The Brazilian Law No. 9610 of 19 February 1988, which governs author's rights, states that works belong to the public domain (art. 45):

– in respect of which the term of protection "in property rights" has expired

– those of deceased authors who have left no successors

– those of unknown authors.

It does, however, in the case of unknown authors, "provide for the legal protection of ethnic and traditional knowledge". This is a matter that we will not delve into.

The scope of the public domain may however vary, depending on the classification criterion adopted. It can be seen

that art. 45 deals only with works that have originally been protected. But there is no reason not to include in the public domain the multitude of works which have never enjoyed protection, such as all those created before the exclusive author's rights were established.

Even for the other types of works, such scope is contestable. Thus, works of unknown authors are not automatically in the public domain: the authors may reveal themselves at any time and claim the rights, provided that the term of protection has not yet expired. At most, it may be argued that from Article 45, section II, of this Brazilian law, which is the one in question, a (rebuttable) presumption is drawn that works of unknown authors are in the public domain.

Another issue concerns the works that the law originally excluded from protection. This is the case of treaties, laws, court decisions and others, provided for in art. 8, section IV, of the Brazilian law. These are works, but there are no exclusive rights over them. There is no reason not to consider them in the public domain.

Author's rights are not a function: they are not inalienable. There is no reason why the author cannot renounce the ownership. As a result of the *renunciation,* the work remains free, not benefiting namely the successors. It becomes a work in the public domain.

In this context, strictly defined by the freedom of use by everyone (the reverse of submission to the exclusive) the public domain covers the entire body of intellectual works common to all and usable by all[13].

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13 "The seas that all must and can sail", to use the poetic language of Dom João III, of Portugal.

4 EXCLUSIVE RIGHT OR PUBLIC DOMAIN?

Why are there works that do not belong to the public domain, when every work is part of a cultural-historical universe to which it is a tributary? Here we cover again the justification of exclusive rights, which we focused on slightly at the beginning of this text, when referring to the economic justifications for exclusivity. Such justifications could be distinguished into:

I - *Technical-legal (property)*

This justification is usually sought in the very qualification of author's rights as property. It is a false qualification[14]. We will say something about it later, but in any case, a legal qualification does not represent by itself the justification of a legal institution.

II - *Individual*

The individual justifications of author's rights are spread over several items:

– reward for the intellectual creator

– giving the creator conditions for economically independent creations

– stimulus for the author to create more

– encouragement for other people to create as well.

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14 We developed this statement in our book *The alleged intellectual "property"* (*A pretensa "propriedade" intellectual*, in Portuguese), destined for the Studies in Homage to Prof. Dr. J. M. Arruda Alvim.

The justification would be sectoral at best. It does not explain the attribution of mere business rights, either in the field of author's rights or in that of neighboring rights (those of phonogram producers and broadcasters, in the latter case).

It is also denied by practice, given the frequent reversion of the right (which is even dominant in the field of the most economically significant works) to the ownership of *copyright* companies.

Lastly, justification through the cultural purposes of exclusivity over intellectual works contradicts the growing trivialization of author's rights, which means that in most cases there is no content worthy of protection and encouragement.

III - *Corporate*

Alongside the individual justifications and gaining more and more importance we find the business justification: author's rights are the object of the exclusive to give protection to the investment made.

The protection, we said, already today reverts directly or indirectly to the benefit of *copyright* companies, to the extent that the work has economic value. This aspect has been successively accentuated, much under the influence of the *common law* system, which is not based on the creation but on the work: the work which is the object of business exploitation. Today this has become the fundamental justification, even in the Romanistic systems that were based on the act of creation.

This is what explains the continued expansion of author's rights protection: namely, that it has become a major objective of international harmonization. There is no sudden

concern for creators or culture, but rather a favoring of the big so-called *copyright* companies.

This movement is flagrant in the international instrument known as the TRIPS Agreement: Trade-Related Aspects of Intellectual Property Rights, annexed to the Treaty that established the World Trade Organization. It has become the decisive instrument at a global level, because no country can afford to be excluded from international trade. It is not, however, protected by UNESCO, for the defense of culture, or by WIPO, for the affirmation of intellectual creation, but by the WTO. In other words, author's rights have been reduced to a commodity.

This business commitment leads to paradoxical extremes. Thus, computer programs, as soon as they appeared, soon became protected by Copyright Law, for 50 years in general and today in many countries for 70 years post-mortem, as literary works. This has as a result that the first computer programs, which today can be considered museum pieces, still have a vast period of protection ahead of them!

However, even on the grounds of investment protection, are such exclusivity periods justified?

Let us make a comparison with patents[15]. A patent, if the requirement to have an invention at its core is taken seriously, requires ingenuity and can involve a large investment: think of pharmaceutical patents. However, the term of protection of patents is 20 years from the application. How can it be understood then that the protection of the investment by author's rights mean an exclusive of 70 years after death? And that mere technological products, such as computer programs,

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15 These even have the analogy with computer programs of equally referring to technical productions.

have a term of protection so inconsistent? And that the related rights protect for 50 years the releases of phonogram producers and broadcasting organizations?

5 THE INFORMATION TECHNOLOGIES

The development of information technologies has been welcomed in the shadow of author's rights protection. As a result, very specific problems have arisen.

Digitization was invoked in order to justify increased protection. Copying has become easy. The subliminally expressive reference to "piracy" is therefore widespread. The great damage caused to companies[16] was invoked and counted.

The ease of reproduction, on the other hand, leads to the establishment of indirect and universal charges on the public, such as charges for private reprography and copying. Everyone pays when buying a printer, whether that printer is used to reproduce intellectual works or just commercial receipts. It is a tax, but a tax that only benefits private entities.

The same eagerness to protect investments in the field of information technology leads to the Copyright Law coverage of products of technological activity. We have already talked about computer programs. The same happens in part with the topographies of semiconductor products. This phenomenon is also clear in the protection of electronic[17] databases.

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16 Based on a vicious reconduction of unpaid amounts to loss of profit. But there is no valid reason to maintain that, if copying were not possible, the person copying would have purchased the goods concerned on the market.

17 English law reaches its apex with copyright protection for computer-generated works.

But this picture also has its opposite.

The Internet allows a universal expansion of intellectual works.

It becomes possible to repay the investments made, however large they may be, in a short period of time.

And the proposal can be reversed. It is not necessary to increase protection periods, but rather reduce them, in this feverish short-term economy. For this reason, several authors defend a reduction of the protection period.

But they were not listened to. The terms of protection kept getting longer and longer. The increases ended up being a pure gift to the *copyright* companies, which almost always own the most profitable works.

We are witnessing yet another paradox. Maximum protection is achieved through author's rights. But this maximum exploitation goes hand in hand with a minimum of public disclosure of the exploited good, as far as technological goods, or at least certain categories of them, are concerned.

Let's compare it again with the patent. The patent effectively grants an exclusive right to the inventor. But the granted exclusive is the counterpart of the inventor disclosing their invention to the community. They could keep it secret, depriving the community of knowledge of the technological advance. The patent does not allow this: it is subject to the principle of descriptive sufficiency or adequate disclosure, in the teachings of Denis Barbosa[18].

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[18] Cf. from this author *Public domain and cultural heritage* (*Domínio público e patrimônio cultural*, in Portuguese), *in* "Direito da Propriedade Intelectual. Estudos em Homenagem ao P. [e]Bruno Jorge Hammes",

This author recalls the obligation of the state, as prescribed by article 215 of the Brazilian Constitution, to guarantee the instruments of access to works in the public domain; but on the contrary it also refers to the copies of films that fall into the public domain but remain in the possession of the previous owners, the plastic artworks that are inaccessible to reproduction, the mechanisms of derivation of works for the sole purpose of frustrating the expiration of the author's rights...

To this list I may add the non-disclosure of the source code of the computer programs, which will have serious consequences when they fall into the public domain. In the patent, as we said, the holder must disclose the invention, in terms of a technician being in conditions to make its industrial application; but for a computer program to be considered object of author's rights, no disclosure is required. The programmer can thus always keep the source code secret and even after it falls into the public domain continue the exclusive exploitation of the program without competition, because the public continues to have no access to the knowledge of such code. There will therefore be no possibility of making derivative programs or other forms of exploitation by third parties.

6 THE PUBLIC DOMAIN AS A GOAL

In the previous issues we discussed the fundamental justifications given for intellectual exclusives and their durations. But could not the question of the rationale also be

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coord. Luís Gonzaga Adolfo / Marcos Wachowicz, Juruá (Curitiba), 2006, 113 s. (127).

made to the public domain? What reasons will justify this legal institute?

Is it based on the fact that the useful time of exploitation of the work has already elapsed, presuming that no further use can be made of it after that period? Some statements point in that direction.

Some people justify the maintenance of the exclusive right to films from the silent era on the grounds that some of these films *still* lend themselves to commercial exploitation.

But this justification of exclusivity is unacceptable.

There is no principle by which every economic advantage must necessarily accrue to the author and his successors or assigns.

The public domain is not justified by being the graveyard of works that interest has been lost.

Quite the contrary. **The public domain is the normal situation for the intellectual work**. It is the space of free social dialogue.

It translates that the work, which was only produced in a community, has as its natural destiny the availability for use by that community.

Understood this way, it is not the public domain that will have to be justified: it is, on the contrary, the exclusive, as an exception to that free communication in community, that must demonstrate its justification.

Let me clarify. No one with any common sense would question the institution of intellectual rights. They are certainly justified in the technological society in which we live in. It is

such a clear issue and so universally accepted that we do not even have to dwell on this justification when we are dealing with the public domain.

But what is essential is to be aware that the exclusive intellectual right is not an absolute, which justifies the increasing exaggeration we are witnessing; and which constitutes, in our specific field, the march towards perpetuity.

On the contrary: the **exclusive right is an exception to natural freedom. And as an exception, it is strictly dependent on its justification.** It can in no way exceed the ends that justify it, because otherwise private gain would come at the expense of social freedom.

The "high level of protection" of intellectual rights, incessantly proclaimed in international forums and repeated by domestic stakeholders, is neither evidence nor a one-way street. Protection is strictly measured by the ends that justify it.

On the contrary, the public domain is neither the exception nor the rest. It is the normal situation, moreover, the goal towards which society strives, so that the space for social dialogue and freedom of access to culture do not suffer unnecessary hindrances. Therefore, this natural freedom cannot be restricted without a powerful reason that justifies it.

It is therefore necessary to reflect carefully and constantly on the basis and extent of exclusivity. Placing freedom as an objective or goal of the legal system requires a review of the terms of protection, eliminating any excesses.

But the reflection must then extend to the whole topic of limits. As these refer to the content of rights, they do not directly concern our subject matter. We only draw attention to

the fact that here, too, we are witnessing a merciless erasure of limits, particularly in the digital domain. Forgetting that the limit is the instrument that allows reconciling social objectives, namely expansion and access to culture, with the exception represented by exclusive rights.

But, as we said, it is not a topic that we can develop here[19].

7 ON THE PATH TO PERPETUITY: A) THE PERSONAL ASPECT

Nevertheless, the pressure to increase protection terms is immense[2018]. For better understanding, we should distinguish:

– the personal level

– the patrimonial level

At the *personal level*, the issue is raised particularly in the legal systems which separate author's rights into a personal

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19 Cf. our *The Social Role of Author's Rights and the legal limitations* (*A função social do direito autoral e as limitações legais*, in Portuguese), *in* Direito da Propriedade Intelectual - Estudos em homenagem ao Prof. Bruno Jorge Hammes, Juruá Editora (Curitiba), 2006, 85-111. On current aspects of the problematic of limits in the European Community, see our *Author's Rights and the Internet: In particular the recent European Community guidelines* (*O Direito de Autor e a Internete. Em particular as recentes orientações da Comunidade Européia*, in Portuguese), no. 4.

20 On the general problematic of the duration of intellectual rights, cf. the collective work *La Duración de la Propiedad Intelectual y las Obras en Dominio Público,* coord. Carlos Rogel Vide, Colección de Propiedad Intelectual, REUS / AISGE, Madrid, 2005, in which we ourselves participated with a study, *En torno al dominio* público de pago y a *la actividad de control de la administración en la experiencia portuguesa,* pages 269-287.

right and a patrimonial right. The personal right is commonly called *moral right* – terminology which, as we have already said, we consider rejecting in the Portuguese language. Such dissociation being made, the personal right may be subject to different vicissitudes from those of the property right. This would give the opportunity to extend the term of protection.

France is the standard-setting country in this area. The personal right has been the subject of a very great expansion of its content. This expansion allows it to overlap the economic exploitation of rights, even after sale to third parties, in terms of becoming in practice a second property right, which the author would always retain.

As regards duration, it has led to the defense of perpetuity. In our view, the position is completely unjustified.

Thus, the Paris Court of Appeal recently ruled in favor of a so-called descendant of Victor Hugo, who opposed the publication of a novel that would be a continuation of *Les Misérables*, on the grounds of the "moral" author's right, which would be perpetual[21].

The continuation of others' literary works is a recurring historical phenomenon, given the value of intellectual communication and dialogue.

Let us then project the French doctrine into the past. Virgil, in the *Aeneid*, continued Homer's *Odyssey*. If this French orientation had been in force at the time, Virgil would have been a criminal, perhaps a pirate, for having violated Homer's "moral" right!

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21 Judgment of 31.III.04, published in *Revue Internationale de Droit d'Auteur (RIDA)*, 202 (2004), 292.

Let there be at least a little common sense. We cannot transform author's rights into a weapon against culture. The perpetuity of the "moral" right is an enormity.

Countries, such as the German speaking ones, escape from such exaggerations and much more correctly conceive author's rights as a unitary right, which has simultaneously personal and patrimonial aspects. Under this view, the duration of the author's rights are necessarily the same for the totality of its aspects.

Let us also note that the excessive swelling of the "moral" right, as advocated in France, represents one of the greatest obstacles to the approximation of the Romanist and common law legal systems. The latter radically reject it.

8 B) THE PATRIMONIAL ASPECT

Let us move on to the patrimonial aspect of author's rights.

There, whether the constructions are monistic or dualistic, one hardly finds the defense of the perpetuity of intellectual rights. This does not hinder that we also witness the swelling of rights and the successive lengthening of terms, which accompany the growing business destination of these rights.

A comparison can be made with industrial rights. These are divided essentially into distinctive signs of trade (trademarks), and industrial innovations (e.g.: patents).

The distinctive signs of commerce tend to be perpetual, by effect of successive renewals. There is no disadvantage in

this. As long as they enable the public to distinguish goods or services, there is no reason to require that they be temporary.

The situation is different in the field of industrial innovations, of which the patent is a paradigm. The exclusive granted deprives society of continuing on the path of that invention and arriving at other inventions. That is why the patent was granted for a period of 15 years after it was granted. The term was extended to 20 years after the application (or filing)[22].

But here too there is a tendency to extend the term limit. Regarding medicines, several countries, taking into account the need to conduct clinical trials before obtaining the authorization to place the drug on the market, which can take years, have instituted what is called the "supplementary medicine protection certificate", which gives the exclusive right to medicines for an additional period of up to 5 years: this is the case in the European[23] Community countries. In Brazil another path is taken, but which results nevertheless in an extension, indirectly though, of the protection term: art. 40, sole paragraph, of the Brazilian Industrial Property Law guarantees a patent term of not less than 10 years, under the requirements it establishes.

These precepts give us a curious lesson, which is not immediately understandable. If the idea is to compensate for the time during which, although the patent was ultimately granted, the patent holder was not in a position to exploit it,

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22 See now art. 40 of Brazilian Law no. 9.279, of 14.V.96, on industrial property.

23 And now there are calls to extend the deadline to five and a half years for pediatric medicines!

why is it not simply laid down that the period of protection is of 20 years after this obstacle ceases to exist?

The essence of the patent explains it. The patent is an exclusive right. Exclusive rights are based on prohibitions directed to third parties: they take away from everyone what would be a natural freedom – that of exploiting the invention.

To all – except the patent holder. Their right has the distinct characteristic of not being based on the granting of powers over the invention (for they naturally have them, it is not the State that grants them), but on the effect of the prohibition imposed on others.

However, if in the case where the patent cannot be exercised because it is conditioned to obtaining the license to introduce a drug, the holder can effectively benefit from a new period to compensate for their investment, even this does not allow the duration of the exclusive right to exceed a reduced period. Because, if the patent has not had all the useful commercial effect, in any case its basic negative effect, the prohibition directed to third parties to use the invention, has been fully verified. The public is already deprived of that exercise for a period of up to 25 years.

The public interest does not allow exceeding this limit. There is the need for the invention to pass to the public domain, not barring others from advancing through that inventive sector. That is why a limited extension is established, either based on the number of extra years of prohibition to third parties, as in the European Community, or on the number of years of effective enjoyment, as in the Brazilian law; but always for a short period, so as not to delay more its entry into the public domain.

But the pressures for other forms of enhanced protection are being felt by many sides.

With regard to European Community Law, Directive 93/98/EEC of 10.29.93, in its Art. 4, grants a protection period of 25 years to anyone publishing for the first time a work whose protection period has already expired! It now bites seriously into the public domain.

Regarding related rights, the increase of the terms of protection continues. There is an objective that is not confessed, but that is common to the USA and the European Community: to equalize the protection of related author's rights. Particularly active in this domain are the producers of phonograms, who are pure businesspeople.

The latter are now campaigning for the term of protection they enjoy to be increased to 70 years. At the moment, opposition is being voiced within the European Commission, as part of its critical review of the unilateralism that has characterized the past years in this area. An opinion delivered by Bernt Hugenholz in November 2006 also concludes negatively on this claim.[24] But the battle front is open.

Also in this sector, with or without the designation of related rights, we see new figures appearing. This is the case with the so-called *sui generis* right over the content of databases, which is a right over information. The beneficiary is its "manufacturer" – meaning the businessperson. The period laid down for protection is 15 years, but changes to the database make the right granted indefinitely extendable – or

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24 Commissioned by the European Commission. It is available on the Internet.

threaten to do so. However, this right has only been accepted by the European Community and is expressly rejected by the United States Congress.

In all this there is a need to bear in mind what in German is called *Freihaltebedürfnis* – the need to maintain inappropriable areas, because it is indispensable to social dialogue that they remain so.

9 PROBLEMS ARISING FROM THE SUCCESSION OF LAWS. THE ACQUIRED RIGHTS

The Brazilian Civil Code of 1916 contained in Article 649 a system on succession by death and fall of the copyright to the public domain, which would basically occur 60 years after the author's death.

Brazilian Law no. 5.988 (concerning author's rights, which was in force before law no. 9.610 came to be), under Article 42, paragraph 1, made the protection of children, parents or spouse succeeding the author lifelong, maintaining for the remaining successors the term of 60 years after death. This system caused great difficulties, which we analyze in our book *Direito Autoral*[25].

The current Law No. 9.610, in art. 41, brings back a uniform term of duration for the benefit of successors, but extends it to 70 years. The term is thus identical to that in force in the European Community. Despite being unreasonably long, it will have its justification in the Brazilian legal system,

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25 Cit. numbers 202 et seq. and 245 et seq.

if this was the price to pay to get out of the frustrating system in force until then.

But this succession of laws causes a great deal of litigation.

The successors who enjoyed ownership of rights at the time the current law came into force naturally take different positions:

– if the previous term limits were longer, they defend the application of those

– if they were shorter, they defend the application of the new term limits.

The underlying individual interest is obvious, but that interest has in itself no legal value. The purpose of the law is not to give the successors the maximum possible advantages. The law establishes term limits to serve the public interest in the free enjoyment of intellectual property. It is therefore only necessary to interpret the law, by recourse to general principles, to ascertain what implications result for the time limits in force.

A preliminary question is, however, whether we should distinguish between what concerns personal rights and what concerns property rights.

We have seen that the supporters of dualist conceptions, particularly, come to the defense of a persistence of the personal right, which they autonomize beyond the life of the author and even the subsistence of the patrimonial right. In the French extremist position, the personal right would be perpetual.

We have already mentioned the falsehood of such a doctrine[26]. We now limit ourselves to this conclusion: there is nothing to support an extension of the personal right, after the death of the author, that exceeds the duration of the patrimonial right. We have made this demonstration for the previous right and[27], *mutatis mutandis*, the argument remains valid.

In Brazil, the debate about the situation of the successor, who would have a longer term of protection under the old law than under the current law[28], is even more complex, given the widespread recourse that continues to be made, first and foremost in the Constitution itself, to the theory of *vested rights* in the case of succession of laws.

This concept is now outdated in most countries as a basic criterion for resolving the problem of conflict of laws over time. The attempt to distinguish between vested rights and mere expectations has proved futile. In practice, what is normally done represents a pure methodological inversion: if the old law is to be applied, it is said to have acquired rights; if the new law is to be applied, it is said to have mere expectations.

For our part, we defend an interpretation of the Brazilian Decree-Law no 4.657, from 1942, which refers to the introductory norms to the Brazilian Legislation, (as well as other codes within Brazilian law) that allows a coherent overall systematization of the legislative position. This understanding

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26 Position referred to and criticized *supra*, number 7

27 In our *Direito Autoral* cit., numbers 249 and 250.

28 An example of this is the case of the son and successor of the deceased author, who enjoyed lifelong rights under Brazilian Law no 5.988 and now sees this period reduced to 70 years post-mortem.

is reinforced, in our opinion, by art. 2 035 of the Brazilian Civil Code of 2002. We refer to the writings in which we defend it[29]. It is enough for us to point out that we exclude the most radical theories, which are also the crudest, on vested rights.

10 THE GENERAL SOLUTION CRITERION

In our view, we should limit ourselves to applying the general criterion to resolving the intertemporal law

The principle is that the new law is of immediate application.

Thus, it reaches deadlines in progress, unless otherwise provided, therefore special rule of Transitional Law.

Consequently, if the term limit was longer, the new law shortens it. If it was shorter, it extends it.

This is the normal consequence of the presumption that the new law is more suited to reality than the old law. It is precisely to achieve progress that there has been a change of law.

Of course, this position will be reacted to in cases where an attempt is made to take advantage of the possibly longer term of the older law by invoking acquired rights.

We note that such cases will be rare, because hardly any prior right, even a lifelong one, will exceed in its duration the term of 70 years *post mortem auctoris*.

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29 Cf. our *Introduction to* the *Science of Law* (*Introdução à Ciência do Direito*, in Portuguese), numbers 313 and 329, and, as regards to art. 2.035, our preface to the book *Problems of the Intertemporal Law in Civil Code* (*Problemas* de *Direito Intertemporal no Código Civil*, in Portuguese) by Mário Luiz Delgado, Saraiva, 2004, XIII to XVIII.

In any case, whether rare or not, such a position could only work if there was a derogatory provision for the law.

But there is no such provision. Therefore, the new law is applicable in all cases, even when it results in the immediate extinction of the rights in force at the time the law was passed.

The only distinction that would deserve to be considered concerns those situations where there is ongoing business. The owner of the right would have authorized the use by third parties. What is the consequence for the contract? In particular, what implications could the expiration of the author's rights term have on the payment of the amount due?

It is certain that thereafter the former owner cannot make any further demands. But the past dispositions were correct, whether there was total transfer of rights or licenses or permits.

These are undoubtedly situations that require legal solution. But such solution cannot pass through the maintenance of the author's rights in the cases in which there had been assignment of rights and its extinction in the remaining cases, for absolute lack of normative basis.

The new law applies immediately. The question that may arise from contracts in progress or from previous provisions is in the contractual field and not in the author's rights field. It will be necessary to ascertain what repercussion the extinction of the right may have on existing relations. Contracts lapse because the activity has become free, but the relationship between the parties may have to be regulated, taking into account the change of circumstances or any other institute proper to the theory of legal business.

That is an area that no longer concerns us. In the field of authorship, the principle is not affected: the rights of the successors expire 70 years after the death of the author, whether those successors have retained ownership of those rights or have transferred them to third parties.

In favor of the immediate extinction of the rights of the successors who have already reached the term limits established by the new law, it may also be invoked what has happened in the countries where the system of perpetuity of the author's rights were in force.

If we considered the duration of these rights as an acquired right, *the perpetuity could never end* – It would be an acquired right. At least, it could not end without the Constitution being amended, if the consecration of the vested right had a constitutional basis.

Nevertheless, these systems, as they had been set up, were also abolished. A vested right to perpetuity was not seriously invoked. This necessarily means that the duration of the established exclusivity results from the law and can therefore be changed by a new law as well.

What happened in Portuguese law is enlightening. As we said, a law from 1927 consecrated the perpetuity of the right[30]. It was only in 1966, with the approval of the Portuguese Author's Rights Law, that the term of 50 years post-mortem was reestablished. No allegation of unconstitutionality or violation of vested rights was raised.

Even so, the Portuguese Author's Rights Code provided that works which had been subject to the perpetuity regime

30 Cf. *supra*, number 1.

would only fall into the public domain after an additional period of 25 years (art. 37/2). Therefore, it was only in 1991 that such works would fall into the public domain.

As this deadline was too long, the delay for falling into the public domain was later abolished by Law No. 25/79 of September 6.

This shows that the establishment of term limits is at the discretion of the legislator, who can extend or shorten them. The claim of acquired rights would lead to the absurdity that the most anomalous situations, those of perpetuity, could never cease!

The legislature may, if it sees fit, establish transitional arrangements. If it does not do so, the new law shall apply immediately.

11 TIME EXTENSIONS AND THE WORKS ALREADY IN THE PUBLIC DOMAIN

Other problems may arise when a law increases the term of protection. Suppose a work whose owner was protected for 60 years after death by the Brazilian Law No. 5.988. The term is completed, and the work falls consequently in the public domain. Then, Brazilian Law No. 9.610 comes into force, before the 70-year term after the author's death. Do the author's rights resurface, to be enjoyed by the successor for the years remaining until the completion of 70 years after death, or are they excluded from protection?

The principle that seemed firmly established was that the work, once it fell into the public domain, no longer

returned to the exclusive, even in the event of a term extension that benefited the works still protected at the time of the law's entry into force.

However, this principle is also being eroded at the international level. In the European Community, Directive 93/98/EEC, of October 29, on the term of protection (now replaced with little modification by Directive 06/116/EC, of December 12), makes room for a resumption of protection in article 10/2. As a result, paragraph 3 preserves the acts of exploitation previously carried out and requires Member States to adopt the necessary provisions to protect acquired rights of third parties.

Regardless of the qualification, it seems certain that a potential resumption of the exclusive right cannot harm the businesses concluded in the meantime during the period in which the work was in the public domain. And this, not because a subjective constitutional right was granted to the persistence of the work in the public domain[31], but simply because legally constituted property rights cannot be freely suppressed, since that would be equivalent to a confiscation.

The directive was transposed into Portuguese law by Decree-Law no. 334/97 of November 27th, but this expressly states the re-establishment of protection in relation to works already in the public domain[32]. This "reactivation" of rights was particularly important in relation to the works of Fernando

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31 As Denis Borges Barbosa observes in his book *Public Domain* (*Domínio Público*, in Portuguese) cit., 4.3.5.

32 In Article 5/2, with this text: "The successors of the author shall benefit from the reactivation of rights arising from the provisions of the preceding paragraph, without prejudice to the acts of exploitation already performed and the rights acquired by third parties".

Pessoa, which had already given rise to a plurality of editions when they fell into the public domain and were once again protected.

And what about Brazil, where there is no law whose text covers this situation?

There is no vested right to the public domain, but neither is there a right to a revival of protection. The fall into the public domain is irreversible. The principle that the law only disposes for the future is enough. The right that is extinct has no title to be reborn.

It will not be so only if there is an exceptional provision to the contrary. No such provision is found. Therefore, a law that eventually extends the term of protection of an intellectual right only applies to the rights in force at the time of inception[33].

12 CHARACTERIZATION OF THE PUBLIC DOMAIN

In this area, as in many others, we must not banish or exacerbate opposition, we must reconcile it.

We are faced with justifiable needs for protection under intellectual rights (notably exclusive intellectual rights), on the one hand, and on the other hand with the requirement that the collective interest in free social dialogue should not be overly sacrificed.

In any case, the fatal destiny of all intellectual goods will be the public domain.

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[33] Neither do the justifying arguments of Author's Rights give way to a different understanding.

How is the public domain characterized?

We observe three hypotheses. The public domain:

A Is it a state property?

B Is it the mitigated persistence of private appropriation?

C Is it a property *nullius*, therefore not appropriated?

A - *State Property*

This understanding can call in its support the art. 24 § 2 LDA: "It is up to the State to defend the integrity and authorship of the work fallen into the public domain".

Does this mean that the State acts as an author's rights holder in this case?[34]

No. It really has nothing to do with author's rights.

The State does not have to get involved in any disputes over expired author's rights. It is even less responsible for a kind of perpetual "moral" right, which is the origin of the rights that are provided for.

The vast majority of intellectual works are completely outside the purview of the state. Author's rights, in its shocking trivialization today, are indifferent to the state.

What is then up to the State, if it is not the defense of author's rights, owned by it or other people?

It is the defense of Culture. It is the State's job to preserve it. But that being so, its object is not letters to a girlfriend or scribbles on the walls, but goods that have significant cultural value.

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[34] In particular, by virtue of the ambiguous reference in that provision to the defense of the "authorship" of the work.

It then becomes clear that the position of the state is a functional position. It does not act in defense of its own interests but in the position of guarantor of collective goods.

This leads us to conclude that this precept is ultimately out of place. It has nothing to do with author's rights. And so much so that the same function of defending culture is also exercised during the term of the right, particularly in the period between the author's death and the work's fall into the public domain.

There is therefore no attribution of ownership to the State.

B - *Softened persistence of private rights*

The rights referred to in Art. 24 §2 are personal rights. This leads us to ask whether the idea of an extension of the personal right, perhaps in perpetuity, which the State would support, might not be underlying.

In fact, there is a movement of stakeholders in defense of this extension. Many heirs or other successors seek to extract advantages from their position, under the cover of personal rights, or stifle competition from those who exploit works in the public domain.

But we have already said that with the fall into the public domain the personal right is also extinguished. The intended subsistence of the right, behind the position of the State, is not in the law; nor does the law allow such a direction of the cultural action of the State.

C - *Bens* nullius

Assets in the public domain are truly unappropriated assets, free goods.

We have said elsewhere[35] that intellectual goods are not goods that can constitute objects of property. They can naturally be enjoyed by all without loss or alteration of nature. It is the law which artificially rarifies them to create an exclusive. It does so by prohibiting certain forms of enjoyment to all but the person who it wants to benefit. With that in mind, it creates for the benefit of the latter a right that is essentially negative, because it does not give the holder anything that he would not naturally have. Simply, this fact puts him in a condition to benefit from the exclusion of all others.

Therefore, when the power to exclude is extinguished, the natural rights of use of the goods by the others automatically resume, without the need for private authorization or initiative.

13 THE REMUNERATED PUBLIC DOMAIN

The public domain, as an area of free exercise, is not necessarily an area of unpaid free exercise. This is because the institute called *remunerated* or *paying* public domain may arise. It consists of imposing the payment of rights in return for the exploitation of works that are in the public domain.

The public domain, like any area of freedom, arouses great greed, because it can provide the opportunity to make

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35 *The alleged intellectual "property"* (*A pretensa "propriedade" intellectual*, in Portuguese), destined for the Studies in Homage to Prof. J. M. Arruda Alvim.

money out of nothing. The highest justifications are given, culminating with the defense of Culture, but in reality, what is at stake is the instrumentalization of the public domain as a source of income. The actions of the State may also be driven by third parties, particularly entrepreneurs in the so-called *copyright* industries, who aim to overcome competition from those who exploit public domain assets, making them more expensive (due to the rights that competitors would have to pay). Whatever the arguments used, they lack legitimacy to seek to curtail a sector that is naturally open to free competition.

There has been worldwide establishment of the remunerated public domain in several countries. Almost all experiments have been short-lived.

Beneficiaries can be:

– public bodies

– former rights holders

– authors (or artists) as a category.

There are also mixed modalities.

The Portuguese experience is curious, due to the system's evident connection with the cessation of perpetuity.

As we said[36] , the fall into the public domain of works that had been subject to perpetuity was delayed, coming to occur in 1979.

For soon after, Law no. 54/80 of 25 March came into force, introducing what was called the "remunerated public

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36 *Supra*, no. 12.

domain". It is self-justified by objectives of cultural defense, but the *fee* established in return for the "authorization" of use was intended:

– to the Cultural Promotion Fund

– to the Authors' Assistance Fund.

It was therefore a mixed system.

But it did not actually consist of a fee, because a *fee* is understood as a compensation for the provision of a specific public service. Here there was no service in return. It was a real tax.

The initiative was overwhelmingly poorly received[37]. Therefore, in the same year, Decree-Law no. 393/80, of 25.IX. was published, restructuring the institute. The main alterations consisted of no longer talking about *authorization* and the amount collected being exclusively destined to public purposes.

However, the system did not succeed. It was soon abolished and never came into force.

14 THE BRAZILIAN EXPERIENCE

The Brazilian experience is not far from this framework.

Brazilian Law No. 5988, on author's rights, established in its article 93 that "the use... of intellectual works belonging

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37 We ourselves reacted with an article: *Paid public domain: a misstep* (*Domínio público remunerado: um passo em falso*, in Portuguese), published in "Expresso" of 3.V.80, page 14.

to the public domain depends on authorization from the National Author's Rights Council". According to the sole §, it would have to be paid 50% "of what would befit the author", except in the case of educational purposes, because then the percentage would be 10%.

Subsequently, article 120, section I, integrated the amounts thus collected into the Author's Rights Fund.

Apparently, there would be a survival of the author's rights– only this would justify the mention of *authorization*.

We criticize the system in our book *Direito Autoral*[38]. As there is no right by nature, it would not be justified to speak of authorization; if it were required, it would be unconstitutional. The best hypothesis would be to admit that the reference to "authorization" would be a mere euphemism to mean payment.

But this payment did not correspond to a fee as consideration for services rendered, because there was no such service from the State to the payer to which it corresponded. It was a tax and not a royalty[39].

Therefore, under the invocation of cultural purposes, a mere source of income was sought, even if consigned to cultural purposes.

Now, Culture needs to be supported, and not seen as a source of revenue for the State. The most shocking cultural

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38 2nd ed. cit., numbers 264 and 265.

39 Since it had a tax nature it could not be demanded for the use made in other countries. However, it seems to us that it affected the exploitation of a work in Brazil that had as country of origin a foreign country conventionally linked to Brazil, because what was at stake was the use of a work in the public domain; to the contrary, Vieira Manso, *Direito Autoral,* 2nd ed.

effect is that it reduces, through the tax burden, the space that should be of free use.

The collecting societies have promoted the system. But they do not have the legitimacy to do so either. They are legitimate to defend their members, not to aggravate the situation of the public in the free space, in order to reap indirect benefits.

In the face of opposition, this system did not come into force either: Law No 7 123 of 12 September 1983 repealed the two aforementioned provisions of Law No 5 988.

There are still voices advocating the revival of the institute, such as that of António Chaves[40], but by far the dominant position is on the opposite direction. Bruno Jorge Hammes was even extremely severe: "competition issues cannot be solved with free-riding"[41]. We find the same severity in foreign authors, such as Manfred Rehbinder: "Copyright Law is not a social welfare or cultural policy right"[42].

Indeed, the scope of the exclusive is strictly set by the ends which justify it and must not go beyond them. Freedom of expression may be restricted only to the extent that these purposes require. But to restrict the scope of free use for purposes other than those justifying author's rights exclusivity would undermine collective purposes related to the fluidity of social dialogue. This would have to be considered illegitimate.

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40 This author also, in an Opinion on public hearings issued after the abolition of the remunerated public domain, on 14.IX.83, for which he was rapporteur at the CNDA, resumes the defense of the institute: cf. Rev. Forense, no. 297, January-March 1987, 145. But the institute was definitively buried.

41 *The Intellectual Property Law* (*O Direito de Propriedade Intelectual*, in Portuguese), 3rd ed., Unisinos, 1996, No. 281.

42 *Urheberrecht* cit., § 41 II, no. 535.

INTELLECTUAL RIGHTS, EXCLUSIVITY AND FREEDOM[43/44]

SUMMARY

1 THE OCCUPATION OF FREE SPACES BY RIGHTS OF EXCLUSIVITY

The complexity of the technical society implies an increasing use of structuring into abstract categories: ideal beings increasingly overlap with real beings. This also explains the growth of the category of intellectual rights.

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43 This article is the translation into English of the original text in Portuguese: ASCENSÃO, José de Oliveira. Direito intelectual, exclusivo e liberdade. In: *Revista da ABPI – Associação Brasileira da Propriedade Intelectual*, nº 59, Jul/Aug, 2002, p. 40-49.

44 Translator: Bruna Werlang Paim

The object or point of reference of these are intangible goods or intangible things - literary or artistic works, inventions, trademarks and so on.

The category is in full expansion. Thus, computer goods, of recent genesis, were soon accepted as the subject of intellectual rights. This growth has taken place in many other areas, , as in the rights of artists, phonogram producers and other entities - the so-called rights related to copyright.

Intellectual rights are essentially exclusive rights or monopolistic rights[45]. They reserve to their holders the exclusivity of exploitation, protected from competition. They are often qualified as property rights, particularly in the modalities of literary or artistic property and industrial property. But the qualification was born at the end of the 18th century and still exists with a clear ideological function: to cover the crude nakedness of monopoly under the venerable mantle of property.

The expansion of the scope of intellectual rights is accompanied by a constant strengthening of the powers granted to the holders. One of the most striking aspects is the incessant reduction of the limits[46] to the intellectual rights. This is worrying because, through the limits, general objectives enter into these fields, namely those reflecting common interests. When they are not abolished, the limits are often transformed into rights of remuneration: the use is

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45 In addition to the exclusive right - and with increasing frequency - there are remuneration rights, such as those granted for reprography and private copying.

46 Also called restrictions or exceptions. For instance the case of the right of citation.

not dependent on authorization, but the beneficiary is instead obliged to pay the holder for the use they make. This is largely the case under the recent European Community Directive on copyright and related rights in the Information Society.[47] In any event, what was free ceases to be free: it is yet another area that is appropriated.

This development has taken place in almost total ignorance of the public interest. In the United States of America, because the advantaged place they occupy in the *copyright* industry explains the search for ever-increasing protection for their exports. In Europe, because integration is economic, it is a common market: merchants always want to increase their profits. Because of that, culture or public interest is reduced to a kind of musical background for official speeches.

But this has continuous consequences that, since they are gradual, are still extremely worrying. The space of freedom is constantly being restricted.

In fact, the ordinary citizen is increasingly coming up against the barbed wire. Every day, more and more areas are prohibited or restricted. As a result, social dialogue is not as smooth as it could be. Our freedom becomes a conditioned freedom: what we do or can do depends less and less on our spontaneity and more and more on those who have secured themselves positions of privilege in the social space.

The Internet has enhanced these dangers.

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47 Translator's note: in this case, Ascensão was referring to EU Directive No. 01/29/EC of 22 May, which was the most recent Copyright Directive in the early 2000's.

On one hand, it beckons to a *network society* in which a wellspring of new potentialities is open to all. It exalts the role of the common man who, thanks to the interactivity made possible by the highways of communication, would become a universal conversationalist and not merely a passive receiver of messages.

But on the other hand, we see that the Internet, which would appear as a space of freedom, is already appropriated. More and more it is a space of constriction.

The Internet emerged, interestingly enough, as a closed military communications system in the United States. It was generalized to scientific institutions and presented as a network for disinterested dialogue and exchange. It was then universalized as a means of communication that would unlock its secrets to the entire world and put everyone in contact with everyone else.

But, even more quickly still, it has been appropriated as a commercial vehicle. Today, the great mass of the problems it brings are linked to electronic commerce. With this, the whole vision that was made of the Internet in its early days necessarily changes.

The appropriation of information was made through numerous steps.

Firstly, basic IT assets have been reduced to the subject of exclusive rights.

And even more: they were protected by the granting of a copyright. That is: through the granting of the most powerful exclusive intellectual right offered by the legal system. A right that extends to some absurd 70 years after the author's death,

falling on merely technical realities that are very far from reaching, even in the most archaeological manifestations, even 70 years of life!

The following IT assets are regarded as such:

- the topographies of semiconductor products
- computer programs
- databases.[48]

However, the legal appropriation of the network takes many other forms. The general idea is to consider all uses on the internet as reserved and already covered by the international treaties on copyright in force. Placing the work on the internet would be the object of the right of public communication; its display on the user's screen would imply the exercise of the reproduction right, understood in terms of covering mere technological transmissions; the production of copies on the user's terminal would already be covered by the distribution right.

Appropriation goes even further. It is intended that the mere establishment of a *hyperlink* to a third-party website will be subject to the authorization of the owner of that website. At the same time, electronic commerce is increasingly being regulated.

A parallel development is taking place in the field of "industrial property".

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48 There are variations from case to case, particularly in relation to the topographies of semiconductor products, which have not managed to obtain full and perfect copyright protection in Europe. In other cases it goes further: English law protects by copyright works produced by computers, which obviously do not have the personal touch that is the basis of copyright.

We need only look at two phenomena that occur in the field of trademarks and patents.

The *trademark* is a distinctive sign of a series of products or services before others. It is dominated by the principle of specialty: it does not give the appropriation of the sign, but only the reservation of use in the goods or services to which it applies.

However, in the case of the so-called prestigious or highly reputed brands, an absolute monopoly is now being sought, which would reserve the use of the brand for everything. The right to a trademark then becomes a right in its own, regardless of its distinctive function: a right that allows for staggering profits when it is marketed and sometimes represents the most important asset of a large company.

The *patent* is an exclusive industrial exploitation granted in return for the effective use of the trademark.

But the intention today is to turn it into a commercial exclusive: the patent would be exploited provided that the products resulting from its application were marketed - even if by importation. This means that the country granting the patent would be reserving a market for a foreign company that would not contribute to its development, without receiving anything in return.

2 THE LOSS OF AWARENESS OF THE PUBLIC INTEREST

This development should lead us to reconsider the rationale for granting exclusives.

At the beginning of the 19th century, when this matter took on its present form, the privileges granted under the old regime, to authors in particular, were maintained, but now justified on the grounds that they were property.

Nevertheless, there was a very clear awareness of the *public interest* involved in the grant of the exclusive right. Exclusivity was detrimental to economic freedom. It should therefore be limited and temporary. It would only be extended long enough to reward the social contribution made and stimulate the emergence of new creations.[49]

Paradoxically, this sense of public interest was almost totally lost in the 20th century, which claimed to be the "age of the social". Exclusive rights are getting bigger and bigger, increasingly justified by mere private interests. The space of freedom is being dangerously restricted.

In fact, the debates we are witnessing today are less about pitting public and private interests against each other and more about pitting *the various private interests against each other in* their appetite for protection. They are those that pit authors against phonogram producers or broadcasters, those that pit Internet service providers against content rights holders, and so on. And as history teaches, deals between the biggest parties are made at the expense of smaller ones. Exclusive rights have grown ever larger, at the expense of *the public interest*, which has become worse and worse; and at the expense of the *public interest,* which the ruling neoliberalism only shamelessly allows to be mentioned.

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[49] This justification covers copyright and patents, but not distinctive signs such as trademarks.

The situation has only taken a turn for the worse in recent years, with the formation of *libertarian currents* on the Internet. Curiously, this is all happening in the North American context.

The Internet was born as a space of freedom. Scientific activity, in particular, had become attached to this free communication.

The Internet's abrupt transition into a kind of giant shopping center, in which everything is by its very nature for sale, has had its supporters on the one hand - and how could it not have had its supporters when computer companies have themselves emerged among the most profitable companies in the world? - on the other hand, it has also provoked reactions. A libertarian current appeared, which wanted the Internet to be a "space free of law". In this case, that it would not be subject to the exclusive rights that governed life outside the network.

Anti-legalist claims can have many meanings, which we cannot analyze here. If the law is removed, Internet companies will have free reign. Their domain is consolidated with the very technical instruments that condition the use of the network. This may mean that there is only a transfer of the domain. The legal domain is substituted by the domain of the technical structures - the *code*, which Lessig talks about.

But there is also an understanding, not just anti-legalist but libertarian, which became very clear in the controversy over Napster; but it is also active in other less well-known areas, such as that which led to the rejection of the so-called *sui generis* right over databases. There is therefore a living movement, which will necessarily have defeats but which also had victories.

And above all, for what concerns us, it has forced us to reposition the meaning and reasoning behind exclusive rights.

3 EXCLUSIVE INTELLECTUAL RIGHTS IN THE CONSTITUTION

We take as our starting point a constitutional placement of the matter. We ask the distinguished constitutionalists present not to take this attitude as an audacity, but as recognition that the constitutional basis must be sought in all sectors of the legal order.

The references in the Brazilian Constitution to this matter are not many.

Let us begin with the most general, linked to freedom of expression. We have in particular art. 5 IV, on the *free manifestation of thought*, and art. 5 IX, on the *free expression* of intellectual activity and communication.

Freedom of expression occupies a very important position in the American legal system. In particular, the First Amendment is often used to oppose obstacles to intellectual dialogue.

The meaning of the Brazilian constitutional rules is clearly to establish freedoms, and not to establish exclusive rights. The principle is that of freedom - including, very importantly, freedom of communication. If what is instituted is freedom, it is the restrictions that will have to be justified. Any concessions by ordinary law cannot be carried so far as to undermine the principle of freedom.

With this background, let us see which precepts provide for exclusive rights.

Above all, clauses XXVII and XXIX of art. 5.

Subsection XXVII assures authors the exclusive right of use, publication and reproduction of their works, transferable to heirs for the time established by law.

The higher law thus guarantees authors an exclusive right that is:

- Inheritable
- temporary.

What is the *content of* this exclusive?

The poor technical precision of the constitutional statement of faculties has been observed. Not only is use too generic a term, but *publication* and *reproduction* largely overlap.

The core will be in the reference to *use*. But it would not make sense for the law to be guaranteeing private use. We all have the right to private use. What is at issue is *public use*, which is conditioned to the author's authorization.

The reason for reserving public use to the author is mainly to guarantee him **exclusive economic exploitation** of the work. The law sees that the way of paying for the creative creation of the author is in reserving for them the proceeds that the work produces, while the right lasts.

There is thus at the basis of this provision a concern with the property. *A* concern that will continue in item XXVIII *a* - protection of individual participation in *collective works* - and in item XXVIII *b* - the *right to inspect* the economic exploitation of the works.

The *personal (or "moral") rights of the author* are not directly provided for. Their constitutional protection is based

predominantly on reasons of personality protection, which cannot fail to be taken into account by the supra-constitutional force of the principle of the protection of human dignity.

Nor is the guarantee of the so-called related rights affirmed in general. But performers benefit from a reflex reference in subsection XXVIII *a,* which protects the reproduction of the human image and voice; and above all from the provision in subsection XXVIII *b*, which grants performers the right to supervise the economic exploitation of the works in which they participate, which implies that they are granted rights.

As far as *industrial rights* are concerned, a basic distinction must be made between two categories:

- industrial innovations, such as inventions
- distinctive signs of commerce such as trademarks.[50]

They are all covered by art. 5 XXIX of the Brazilian Constitution, which refers to them as a "temporary privilege", "given the social interest and the technological and economic development of the country".

There is an obvious accentuation of the social interest here. These rights are granted insofar as there is an interest of the country in granting them. And they are expressly presented as temporary.[51] A concern for the public interest is visibly expressed, much more explicitly than in the case of copyright and related rights.

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50 Other concepts, such as unfair competition, which have been associated with these, are of no relevance in this field: the rules relating to them protect interests, but do not grant exclusive rights.

51 In relation to trade marks and other distinctive signs, this emphasis should be understood without prejudice to the possibility of renewal of the exclusive right which may lead economically to a perpetuity.

There is a further precept that is particularly important in this respect.

We refer to art. 5 XXIII - "property shall serve its *social function*".

In itself, it represents a limit to the right to property. It imposes an intrinsic functional limit on it: the performance of a social function.

It is not an isolated statement. Thus, Article 170 III proclaims the "social function of property" as a principle of the economic order. And in many other places, the Constitution affirms this social function.[52]

If we are not to limit everything to an empty declaration, the principle must be extended to positive regimes.

This implies that private property, which is indelibly linked to the performance of a *personal* function, will have to be reconciled in its existence and exercise with the *social* function it also performs.

The social function refers to *property*. The importance this has for exclusive rights will be further specified below.

4 THE PATENT AS A COMMERCIAL EXCLUSIVE

Against this backdrop, the phenomena we have mentioned above open up worrying prospects. For we find no coverage for them, constitutional or otherwise.

Let us begin with what concerns the patent and the claim that the duty to exploit the patent is satisfied by

[52] See in particular arts. 156 § 1, 182 § 2, 184, 185 § 1 and 186

the importation of the products that are the result of that invention.[53]

But if that is so, the patent loses all justification.

The patent has always been understood as an industrial exclusive right. The exclusivity is granted to the inventor in return for the industrial exploitation that they must perform, thus contributing to the public supply and the economic progress of the country.

The Paris Convention, in its Article 5bis (1), determines that the importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent. However, this does not contradict the exploitation obligation: the importation of the objects is only tolerated if it is cumulative with industrial exploitation, and not when it is a substitute for it.

Recently, however, the claim has emerged that the exploitation requirement would be satisfied by the *mere importation of the objects resulting from the patented process*. This would turn the patent into a mere commercial exclusive. Someone would manufacture wherever they wanted, but the patent would guarantee exclusivity for the whole world.

This claim was justified on the basis of Article 27/1 of the TRIPS Agreement, annexed to the Treaty establishing the World Trade Organization. According to this article, concerning the patentable subject matter, discrimination as to "whether products are imported or locally produced" would be excluded. This would imply that it would be at the discretion of the patent holder to import such products or to produce them locally.

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53 Cf. above paragraph 1.

As a result, art. 68 of the Brazilian Law no. 9279/96, of May 14 (Law of the

Industrial Property), which establishes a compulsory license in such a case, would be in contradiction with TRIPS.

Behind this effort is the United States of America, which is moving internationally to obtain, in the favorable forum of the WTO, a condemnation of Brazil.

In fact, the interpretation that is made of art. 27/1 of the TRIPS agreement is erroneous.

First of all, because the passage being invoked is found in art. 27, which concerns patentable *subject matter*, and not in art. 28, which regulates the *content of* the law. If such a radical change in the regime and nature of the patent were disguised in an article on the subject matter of the patent, there would at least be bad faith - which is never to be assumed in an international instrument.

The explanation of the quoted passage is very different. It should be sought in the very nature of TRIPS, as a trade agreement; unlike the Paris Convention, which is an industrial convention.

The Paris Convention lays down the obligation to exploit. It also allows complementary importation of the products covered by the patent, but it does not concern itself with laying down the arrangements for this, since it is not a commercial convention.

On the contrary, this is the specific object of TRIPS. It does not touch upon the obligation to exploit, in its true sense of obligation to produce. It determines that products validly imported cannot be discriminated against in the market in

relation to domestically produced products. It could well be the case that the additional importation has no impact on the patent system, but the imported products are then discriminated against in their marketing.

The understanding of that passage being thus clear, the contrary interpretation is artificial and inadmissible.

From the constitutional point of view, which is what prevalently interests us, such an interpretation hurts the Brazilian Constitution.

Art. 5 XXIX is categorical in establishing that the privilege of use will be granted "given the social interest and the technological and economic development of the country".

There would be no social interest in giving a commercial monopoly, turning Brazil into a sewer of foreign industrial products, without leaving even the possibility to interested parties to import them from places where the price was more favorable.

And on the other hand, the exclusivity is constitutionally granted with a view to "the technological and economic development of the country". A patent that would lead to such consequences would benefit in nothing, quite the contrary, such development.

This claim is therefore unconstitutional. The appropriate consequences must be drawn from it.

5 THE OWNERSHIP OF THE TRADEMARK WITH A REPUTATION OR WITH A HIGH REPUTE

As we said, it was intended that the mark of prestige, or fame, or of high renown, would be protected even if it did not respect identical products or services. This would assert ownership of that mark.

The famous mark, in the prevailing understanding in Germany, would be that

it was known to 80% of the population.

Let us first understand what "brand ownership" means.

Article 5 XXIX of the Brazilian Constitution itself speaks of trademark ownership. But it does so inadequately because there is in fact no ownership at all. Just think of the principle of the *specialty of* the mark. If the holder of the trademark can only use it on certain products or services, and not on all of them; and if he has to eventually coexist with holders of the same trademark, as long as it refers to different or dissimilar products or services; this means that he has no ownership of the trademark. Now, the law is binding by the regime it establishes, and not by the qualifications to which it resorts.

But is there any justification for recognizing genuine ownership of famous trademarks?

Even then we thought that the qualification would be wrong and that there is no true property. But the question is not one of qualification, but of judgment as to the value of such a discipline.

And it has, in our view, no value whatsoever.

The trademark is based on a public interest: that of providing information to the public at large, enabling them to distinguish certain goods or services from others and preventing them from being misled. The private interest of the proprietors is protected only in the background, as long as it serves that purpose of general interest.

But extending the exclusive granted by the trademark to all products or services, regardless of whether or not they are exploited (branded) by the holder of the mark of prestige, is to increase the monopoly, with no counterpart in any social interest. It arbitrarily gives the owner a casual gain, when the public interest would lead precisely in the opposite direction: limiting the spaces of freedom restriction.

In Brazilian law, we do not speak of a famous or prestigious trademark but of the *brand of high repute*. Art. 125 of the Brazilian Industrial Property Law (LDI) provides: "To the trademark registered in Brazil considered to be of high renown will be ensured special protection, in all fields of activity".

It is not our purpose to go into the exegesis of this precept, which poses many difficulties. In addition to the interpretation of the scope of the category itself, it is necessary to know what is meant by "special protection", which the law leaves completely unexplained.

But it adds: "in all branches of activity". One possible interpretation of the phrase would be that protection was provided, independently on the satisfaction of the principle of specialty.

Such an approach would not meet the requirements of the Constitution. It would bring an exclusive right, therefore

a restriction of freedom, which strongly benefits the most powerful brands, without any counterpart in the social interest. This arbitrary protection of the most powerful would be contrary to the constitutional vision.[54]

6 THE CURTAILMENT OF FREEDOM

We cannot fail to be concerned at the corrosion of the area of freedom that we are witnessing.

Very varied manifestations are reducible to this common denominator. The space of freedom has become extremely desirable because it is in it that exclusive rights can be established. The space of communitary freedom is thus increasingly reduced.

In fact, around us, more and more areas that were free have become reserved. Everything that can bring in money is coveted. The open areas are surrounded by barbed wire.

This phenomenon, which is always very serious, reaches its extreme when it comes to *freedom of information*.

We are living a paradox today. We are in an information society. Never has the amount of information and its social

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54 Additionally, it should be noted that Article 16/3 of the TRIPS Agreement in no way supports the orientation that we criticize. This provision extends the application of Article 6 bis of the Paris Convention to goods (or services) that are not identical or similar to those for which a trademark was registered, when the usage of that trademark for those goods or services indicates the existence of a relationship with the owner of the registered trademark and may harm the latter. This is an extension of the traditional scope of the principle of specialty but has nothing to do with the absolute protection of the sign itself which is intended to be conferred on the trademark with a reputation.

significance been so great. And yet, never has freedom of information been so threatened!

The creation of the great world information networks, if it brought gigantic possibilities of accumulation and diffusion of information, also brought great risks to it.

First of all, because of the *concentration of* information *companies*. This is visible and in the public domain, in all sectors. But it appears as a fatality in what concerns the network service providers and particularly, for what concerns us, the content providers.

In fact, the big companies that will compete tomorrow for the preferences of Internet users, besides being gigantic, will have to be universal - to present content that satisfies all the demands of their clientele, in order to gain their loyalty. Only two or three colossal conglomerates will be able to do this. The rest will have to limit themselves to regional audiences, or settle for niche markets. But it is quite clear that, when all information is decanted by just two or three giants, freedom of information is at risk.

Many other threats weigh on information, however, in the nascent information society.

One of them, and a very significant one, is found in the *limitation of the search tools themselves*.

The Internet makes available, theoretically for everyone, a fantastic quantity

of information. But the Internet user can only access this information through search engines or tools.

The fact is, however, that search tools only provide access to a tiny percentage of the wealth of information

available. The rest is lost - or is available only to those who have private knowledge. The universe of information is thus greatly narrowed for the lack of ability to retrieve it.

The issue is made much worse by the distortions in the *information retrieval tools* themselves.

They can be structured so as to preferentially conduct users to certain content, and not to others.

And the websites themselves can be prepared, through descriptors or *metatags*, to *attract* web *surfers,* sometimes without them realizing that what they are being shown is not what they were looking for.

In addition, the browsers or search engines themselves can be programmed to gather information about the searches made by users and to draw up a profile of that user,[55] that allows them to *present material already selected according to the* preferences shown. This means that the user thinks that they are in the process of making a choice, but in the end it is determined: it is the machine that takes the decisive role in the material that is presented.

It follows that the web today is a far cry from the free information field that is apparently available to Internet users.

7 THE TRANSFORMATION OF KNOWLEDGE INTO MERCHANDISE

It is worth giving some thought to what freedom of information means.

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[55] This is the case with so-called cookies, which have the amazing feature that they are stored in the user's own computer.

Let's start from the Brazilian constitutional text: art. 5 XIV, which ensures to everyone access to information.

This passage needs to be interpreted because many meanings can gravitate around the reference to the right or freedom of access to information.

The Portuguese Constitution distinguishes between the rights to inform and to be informed.

In fact, a restrictive interpretation of the right to information would be dangerous. It would easily be confused with a right to consume information. Internet users would be reduced to consumers so that all their demands would be met as long as the information was available for consumption.

But with this, the noblest and most meaningful aspects of the right to information would be lost.

One must be aware of the changing meaning of information in contemporary society. Information is less and less knowledge, and more and more a product.

It is less and less knowledge, with its individualized character. It is more and more an object, as a reality that is separated from the one who knows.

It is said that in the information society information becomes a new *production factor*, in addition to those classically listed.

Without going into economic digressions, we will say that what seems clear is that information has become a *commodity*. It is appropriated and traded. The domination of the sources of information gives power. And this power is possibly the strongest of all the factors of denomination today, replacing

even atomic terror, which has proved ineffective because of its excessive and reversible character.

But the right to information cannot be separated from the right to truthful information.

This is practically absent from the surrounding information society.

Information is measured in terms of *quantity and usefulness*. This is a commodity. The *truth of* information is a reality that is becoming more and more distant, like metaphysics. First of all, because all criteria of truth have been lost or are ostensibly rejected.

Thus, what is developed is *useful* information. It will be said that the usefulness of information is dictated by the market. Surely it will be dictated first and foremost by the forces behind the market.

But with this, the fundamental right has lost almost all meaning. It has been reduced to a guarantee of access to the sources of information which has almost no meaning for the ordinary citizen. And to placing the general public in the position of *consumers* of *the "truth" provided to them*.

8 INFORMATION OWNERSHIP

What is happening in the area of databases is particularly worrying.

Information is free. That is a fundamental principle. As long as I have acquired it lawfully, I can use it as I wish.

But this area of freedom is also the target of the greatest greed. In various ways, the ownership of information is sought.

The most significant, and most worrying, is the admission of the so-called *sui generis* right over databases.

The European Community has created, in addition to the copyright on original databases, a so-called *sui generis* right of the producer of the database.

This is a right that concerns the very content of the information in the database. The producer would be able to oppose acts of *extraction or re-utilization of* the content of the database, provided that this would have required considerable investment, whether in quantitative or qualitative terms.

In this case, it is information itself that is being appropriated. And through a series of ambiguous statements, fundamental freedoms and the fluidity of social dialogue are called into question.

Let us be clear about what we are talking about. Everyone agrees that it would be unacceptable that, having one organized a database, their competitors were allowed to use it freely - even in much better price conditions because they would not have to amortize any investment. But to avoid this, *unfair competition* is enough, because the act would typically be parasitic. It is not necessary to create an exclusive right for this purpose.

Let us suppose, however, that a researcher, basing himself on data he collected from the existing databases, makes it the basis of a dissertation, which he publishes. He *has* undoubtedly *reused* these data. Does this mean that his activity is no longer free and that he will have to collect the numerous necessary authorizations so that the book can be made public?

It is evident that in this way the greatest impediments to university and scientific research and to social dialogue in general, are created. Information has been appropriated; it has

become a venal product like any other. The barbed wire net is widening, now reaching what should be the fundamental value of the information society. The information society turns out to be the society of privatization of information.

Such a development would be seriously undermining the Brazilian Constitution.

Article 5 XIV guarantees everyone access to information. Once again, constitutional declarations cannot be undermined. Access to information is guaranteed to everyone: not just information professionals.

Access to information can be costly. Understandably, those who organize a database should be paid to compensate for the expense and work it entails. But once the conditions for access are met, the use of the information obtained is free. There would be no point in guaranteeing access to information if it, as information, could not be used.

It is only unfair competition that is excluded. The marketing of this same data as a form of *misappropriation* - as a parasitic use of this same data as a business object - is excluded. Its use as information, as the basis of one's own work, is not, however, ruled out or, on the contrary, is guaranteed. Even if this work translates to results that are commercialized in their turn.

These principles come up against a general limit, which is obvious: the limit of bad faith. It is clear that if the work, presented as one's own, is merely the pretext for marketing the data of others, fraud is taking place and this disguised competition cannot be tolerated.

Outside of this, however, the great principle of freedom of information prevails. The transformation of information into pure merchandise violates constitutional principles.

9 SOCIAL FUNCTION AND LIMITATIONS OF EXCLUSIVE RIGHTS

Everything we have said so far concerns the justification and configuration of exclusive rights, per se.

But there is yet another aspect where the exclusive right is very relevant from a constitutional point of view.

A right of exclusivity, where admitted, never represents an absolute. Moreover, *there are no absolute rights*, pure and simple. All rights, exclusive or not, must admit limits.

This is the direct consequence of the principle of social function. Because it has a *social function*, the exclusive right is subject to limits, which make the exercise by the holder compatible with the social interest.

The Brazilian Constitution repeatedly speaks, as we have seen, of the social function of *property*. We have already made it clear that strictly speaking, exclusive rights are not property, they are a different category of rights. But the frequent reference to intellectual property would be enough for the exclusives to also be covered by these provisions.

There is, however, another stronger reason that impels us in this sense. It is that property, in the constitutional sense, is not only one real right among others. It is not even the set of property rights. When we speak of property in the Constitution it covers *all private patrimonial rights*. These are the ones that are justified, that are secured, that are limited.

Exclusive intellectual rights are undoubtedly private property rights. The possible presence of personal faculties does not remove that characteristic from them. As a matter of

fact, we have already seen that in the Brazilian Constitution that the personal aspect is practically omitted. Even in ordinary law, the personal faculties are clearly depressed, in comparison with the patrimonial ones.

Exclusive rights, therefore, have limits; and they cannot be without them, under the constitutional principle of the social function of property. The exclusive rights, which are created given a social interest, cannot in their existence ignore the social function that justifies them.

Here, too, however, we are witnessing an anomalous development.

We have already said that a general offensive has been launched against the limits on exclusive rights. Or else these limits will be transformed into payment rights, which also means putting an end to an area of freedom.

Absurd arguments are put forward, starting with the very qualification as *property* that would make such rights absolute - when precisely the constitutional principle of social function falls expressly upon the property.

Exclusive rights, which in themselves represent undesirable monopolies, can only be subject to limits that bring them into line with the social interest.

But here, too, the European Community has reached a maximum.

In the recent Directive on Copyright in the Information Society[56] a typicity or *numerus clausus* of limits was established.

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[56] Translator's note: again, in this situation Ascensão is mentioning EU Directive No. 01/29 of 22 May.

A list is drawn up, which the Member States are prevented from exceeding.

This is very serious because it reveals a lack of social sensitivity and also kills off any possible development of copyright. It can no longer adapt to changing circumstances, and it is precisely the balanced use of limits that makes such adaptation possible.

This has created a *serious rift between the North American system and the European system*. In North America, the principle of *fair use* prevails - restrictive practices are accepted, provided that they comply with this general clause. In Europe, on the other hand, author's rights have just become completely rigid. An extreme monopolistic orientation is thus enshrined, which disregards social aims.

It is very much to be hoped that this orientation will not be communicated to other places. We have no doubts in stating that in Brazil a drastic restriction of the limits of exclusive rights, particularly concerning private use, would go against the constitutional principle of social function.

10 GLOBALIZATION

But should we not conclude that all this is ultimately the result of globalization?

Today this magic word appears everywhere, justifying everything that happens. The world is marching towards a unification in which particular positions are being erased. Therefore, national interests will have to bend in the name of technical rationality.

We have already heard about this globalization, which would entail a restriction on sovereignties.

But it is necessary to think. That the world is coming together, marching towards global coexistence, is nothing new.

It has a very precise origin: the Portuguese discoveries, which brought together all the peoples of the earth.

From then on, globalization has always progressed. Often peacefully and spontaneously. Other times by force: let us remember the British gunboat that imposed in the 19th century the opening of Japan's ports to Western trade.

Today new steps are being taken in this direction. Peaceful or not. Using new methods, such as the economic and financial pressure exerted by the World Trade Organization or the International Monetary Fund.

What is happening in the field of communications is very important. Privatization and the open network ensure that information - a strategic element - can circulate equally everywhere.

But is globalization the key and reason for everything that happens? It would only be so if we admitted a new determinism, with a new inexorable course of history.

We must distinguish between the reality of people coming together and the need for coordination to solve common problems, and the very different reality of domination by the major powers in the way that interests them.

Globalization is not a one-way, predetermined movement. Like all technical realities, it presents alternatives. How it is achieved is a matter of human choice.

It could be done by the empire of the most powerful, successively absorbing free zones and making transitory pacts among themselves at the expense of the rest. In this case, invoking the public interest would be pointless, since only the interests of the conglomerates (with which the interests of the great powers are practically intermingled) would be at stake.

But there is another way of doing globalization. It is to establish, instead of relations of subordination, relations of harmonization and coordination. In this case, the principles of freedom can be safeguarded. There is nothing that justifies the incessant expansion of exclusive rights, which represent part of the ties of subordination that the great powers weave.

In this sense, globalization is a pretext. There is no objective requirement that imposes the incessant growth of exclusive rights.

11 CONCLUSION

We cannot prolong this analysis.

The various topics analyzed reveal to us that exclusive rights are umbilically linked to a social interest that they are intended to serve. There is therefore a priority on freedom. Exclusive rights must be justified, and are only admissible when they are based on a social interest.

Exclusive rights, therefore, fall into the category of restrictions that are indispensable to pay for socially useful contributions.

The constitutional ideal, therefore, is not the society of monopolies, in that everything becomes secretive and venal. It is the society of freedom, in which social dialogue is subject

to as few obstacles as possible, and in which, when there are any, these obstacles reflect the public interest rather than the supremacy of private interests.

I was asked though:

Is the dream of a world without subordination by the great powers unrealizable?

It is.

There is no society definitively appeased. There is no world in which the most powerful do not abuse.

Kant's "perpetual peace", as has rightly been pointed out, is a slogan that fits very well in cemeteries. It has nothing to do with the real world.

Formulating utopian goals has a perverse effect: it distracts us from the real battles we must fight in a world where disorder and injustice will always be present. An unrealistic goal makes our actions idle and even counterproductive.

But this does not mean that we are pessimistic.

There is no disorder definitively installed. Time destroys by itself the most apparently solid situations. Let us remember the division of the world into two great powers, which already seemed to be part of our existence: it crumbled almost overnight.

Also, the existing forms of domination will not always impose themselves. Because spirit will prevail over matter. The vicious structures of power will themselves generate the antibodies that will destroy them. And above all, there is the Spirit, which hovers incessantly above the waters, which blows where it wills and there is no information highway or exclusive right that can channel it.

FAIR USE IN COPYRIGHT[57/58/59]

SUMMARY

1. Limits and "exceptions"; **2.** Technical ways of the limitation of rights; **3.** The Roman-based systems; **4.** *Fair Use*; **5.** The confrontation of systems; **6.** Computer science constraints; **7.** New patch in an old cloth; **8.** The intervention of other branches of the Law in Copyright.

1 LIMITS AND "EXCEPTIONS"

I must deal with the theme, of great sensitivity and complexity, of *fair use* in Copyright Law.

Fair use appears as a clause essentially in United States[60] law. It has no direct correspondence in the roman systems of

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57 This article is the translation into English of the original text in Portuguese: ASCENSÃO, José de Oliveira. Direito intelectual, exclusivo e liberdade. In: Revista da ABPI – Associação Brasileira da Propriedade Intelectual, nº 59, Jul/Aug, 2002, p. 40-49.

58 T.N. The original text's title is "O 'fair use' no Direito Autoral'". While there are material and formal differences between Copyright and what is understood to be "Direito Autoral", the translator has opted to translate it to "Copyright", as it is the more reasonable term to embrace the meaning contained within the Portuguese term.

59 Translated by Eduardo Miceli F. Fajardo

60 It has a different meaning than the one in the United Kingdom legal system, as a form of *fair dealing*, as it will be demonstrated.

Copyright. I must build the bridge between *fair use* and the regime of other legal systems.

The general problem to be faced is that of the *limits of* Copyright.

It can be said that such problematic sets considerable traps.

During the 18th Century, in order to escape from the characterization of Copyright as a privilege, the theory of (intellectual) property right arose.

Such theory was widely accepted throughout the following centuries. However, in the second half of the 20th century, it was inferred from the conception of intellectual property as property that Copyright should not theoretically have limits - because it was property. The limits started being called *exceptions*. And exceptions, precisely because they are exceptional, should tend towards being abolished.

It was inaugurated the era of 'exception hunting'. They were subject to a drastic reduction, which continues today.

All of this is worng:

– Copyright is not property

– Limits are not exceptions.

The first affirmation cannot be developed here. The concept of intellectual rights as property was born with ideological functions, in the bad sense of the expression, at the end of the 18th Century, and continues to be sustained with identical function.

Regarding the second statement, it suffices to recall a general principle of Law. Every subjective right is the result

of a plurality of dispositions, some positive, some negative: of powers and binding dispositions, so to speak. There are no absolute rights. Bindings are no exceptions; it is a manifestation as usual as that of power. Subjective right is the result of that complex of concepts.

Copyright is a right like any other right. Therefore, like any right, it has limits.[61]

Limits, as a common occurrence, shape the transfers and attributions that are made. It is normally through them that the requirements of public or general interests can develop, such as those aimed at the promotion of culture or education; or general public interests such as private use. Nevertheless, there is always at the foundation of a limit, as at the foundation of any legal concept, a motivation for the general interest. It can be, for example, the expansion of the means of communication, in terms of reaching as many people as possible.

The issue of limits is therefore a technical-scientific question, to be debated without any kind of passion. The right balance between the remuneration awarded to intellectual creators (and today, with even greater intensity, also the stimulus to *copyright*[62] industries) and the interests that are specified by the restriction, however temporary, of the freedom to use cultural assets has to be found.

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61 This is particularly delicate in Brazil, where the Constitution so insistently stresses, namely when it refers to intellectual rights, the principle of social function. On this matter our *Direito Intelectual, exclusivo e liberdade*, *in* Rev. Ordem Advogados (Lisbon), year 61-III, Dec/01, 1195-1217; and *in* Revista da ABPI (São Paulo), nr. 59, Jul/Aug 2002, 40-49.

62 T.N. The author here utilizes the English word "copyright".

That is technical problem that we propose to address, by referencing *fair use*.

2 TECHNICAL WAYS OF LIMITATION OF RIGHTS

Besides setting traps up, the matter of limits has been obscured. Inherent capabilities and faculties[63] that do not pertain to Copyright are presented as limits. Everything that is outside the content of the attribution of the right is not a limit, it is an issue alien to Copyright.[64]

A distinction should be made between *extrinsic* and *intrinsic* limits. Extrinsic limits are those that derive from the need for composition with other rights.

Within the extrinsic limits, those resulting from the collision of the content of Intellectual Law with other branches of Law are also of particular significance. Conflicts with Competition Law, Information Law, and Consumer Law, particularly, will be at stake. We will have the opportunity to

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63 T.N. While the author utilized the Portuguese word "faculdades", the translator opted to clarify with more terms instead of translating to just "faculties".

64 Thus, Article 5/3 *k of* the recent European Community Directive No. 01/29 of 22 May on Copyright and Related Rights in the information society admits as a limit the use for caricature, parody and *pastiche* purposes. But in reality, there is not even a limit, because the matter is outside the scope of Copyright. There is free use, which is a different figure, and which is an emanation of everyone's freedom of intellectual creation. On this subject, cf. André Lucas/H. J. Lucas, *Traité de la Propriété Littéraire et Artistique,* 2nd ed. Likewise, when art. 8 of Brazilian Law No. 9610 of 19.02.98 excludes ideas and other realities from the object of protection of the right, it does not establish limits, but exclusions from the scope.

return to this subject later. Only the intrinsic limits, which are parts of the content of Copyright itself, interests us now.

Fair use occupies itself with the matter of intrinsic limits. We are interested in knowing what they are and how restrictions belonging to Copyright itself are defined.

There are two basic ways of expressing the limits of Copyright:[65]

– Through a general clause;

– Through specifying restrictions.

Mixed guidelines are possible. Enumeration of restrictions may be completed by a general clause.[66]

The *fair use* clause is a typical general clause, of evaluative character. The conducts contemplated by it are not considered Copyright infringement.

However, the use of a general clause can also fulfil very different functions, depending on whether its impact is positive or negative.

It is positive if the exercise is free or permitted, as it is not in violation of Copyright.

It is negative when its intends to restrict the permitted limits, keeping them within the framework of tolerability.

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65 The expression covers Copyright and Related Rights, but it is the former that will be our primary concern. On the contrary, we are not interested in *fair use* concerning other intellectual rights, such as industrial rights.

66 Or the reverse, the general clause be supplemented by exemplary specifications of limits.

Let us immediately look for a concretization. Such is the case of Article 10 of the WIPO Copyright Treaty. It allows limitations or exceptions to the rights granted in such Treaty or in the Berne Convention, in "certain special cases which do not affect the normal exploitation of the work nor cause unjustifiable prejudice to the legitimate interests of the author". This formula is commonly referred to as the "three-step rule".

This provision must be interpreted. The first question is: does it represent a restriction on the issuing of norms and standards? Or does it command application to the facts of a particular case?

In the first hypothesis, the restriction would have a generalizing character: the reference to the special cases would mean that it would be necessary to demarcate every type, one by one, which would admit a restriction. Thus, there would be limits on citations, on uses that benefit disabled persons, on reproductions for the purposes of criticism, etc.

On the second scenario, the formula would have an individualizing character. It would refer to the moment of application and determine whether a particular restriction is compatible with those parameters.

Which understanding to favor?

In reality, there is no dilemma. The precept is compatible with any understanding. As an international binding obligation of great general nature, it is not intended to impose a single technical-legal solution on Member States. There are several ways to satisfy that orientation.

And indeed, we notice that in this field the legal systems are different. The European system, particularly the continental European system, shows a preference for a tendency towards a generally exhaustive typification of admissible clauses. The North American system is dominated by the general evaluative clause of *fair use*.[67]

We shall begin by briefly characterizing the Roman-based systems, which are derived from the Continental European system. We will then move on to the system of *fair use*, which is the one we are particularly concerned with.

3 THE ROMAN-BASED SYSTEMS

Roman-based systems tend to define a list of admissible exceptions.

This phenomenon was most recently manifested in European Community Directive No. 01/29 of 22nd of May[68] on Copyright and Related Rights in the Information Society.

Article 5 of the latter draws up a long but supposed to be exhaustive list of admissible limits. Virtually all the limits

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67 On the other hand, Herman Cohen Jehoram, *Some principles of exceptions to copyright*, *in Urheberrecht Gestern-Heute-Morgen*, *Festschrift für Adolf Dietz zum 65. Geburtstag,* C. H. Beck (Munich), 2001, 381-388, considers (384-385) that the doctrine of *fair use* is incompatible with the legal certainty implied by the restriction to 'special cases'. However, André Lucas, *Le "triple test" de l'article 13 de l'Accord ADPIC,* in the same *Festschrift,* 422-433, devoted to the analysis of the Report of the Special Group of the WTO "United States - Art. 110/5 of the Copyright Act", is not entirely in agreement, and seems to be content (430) with the fact that the restriction pursues a "special purpose".

68 T.N. The original text has the typo "32 of May". The directive is actually from May 22nd, 2001.

on rights are thus frozen; but the list is optional (which also goes against the stated aim of harmonization)[69].

Interestingly, the precept ends with a paragraph 5, which reproduces the limiting clause of the WIPO Treaties: restrictions shall only apply in certain special cases, as long as it does not affect the normal exploitation of the work or cause unjustified prejudice to the legitimate interests of the author.

This is paradoxical. If you make an exhaustive list, how can you then say that the restrictions only apply in certain special cases? Does this mean that the various provisions are still restricted in their application because they can only be applied in special cases?

The same will be said of the following requirements, of the "normal exploitation" and of the "unjustified prejudice". They bring a subsequent double valuation, in which the rule of art. 10 of the Copyright Treaty is applied in a clearly restrictive sense, and not positive, as if it were based on a general clause. But how to submit typical clauses to this valuation? Justly so, the restrictive enunciation of the types admitted was already the result of the consideration that these admitted figures would obey the general criteria of the Treaties.

The system that has been put in place, with an exhaustive list + evaluative restriction, seems contradictory. Third countries[70] have no advantage in following it. What

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69 Except with regard to the provision of Article 5/1. The list is also "supposedly" exhaustive because, in spite of all the rigidity that was intended, it was necessary to add at the end the provision for admission of cases of minor importance already existing in national legislation (Article 5/3).

70 Brazil uses the formula of art. 9/2 of the Berne Convention in art. 46 VIII of Law n. 9610, by reference to reproduction, which admits when

matters is to take advantage of the clause's value-added nature and move towards it in order to make the system more flexible.

This is the case in the context of *fair use*, which we will now examine.

4 FAIR USE

The American legal system was based on *common law*. It involves an assessment on an equitable basis, by examining all the relevant circumstances to determine whether that type of third-party use of the work is *fair*.

It has the character of a *defense*; we would say of an *exception*. Faced with the accusation of copyright infringement, the alleged infringer can defend himself by demonstrating that his use of the work is *fair*.

However, in 1976, copyright[71] *became* "statutory", through the enactment of Title 17 of the United States Code. Fair use becomes the content of Section 107, in which means and ends are exemplarily indicated, which allow the use not to be an infringing on copyright. And criteria are indicated, also exemplarily, that allow the conclusion that one such use is *fair*[72].

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the reproduction is not the main objective of the new work.

71 T.N. Once again here the author used "copyright", not "direito autoral".

72 See also Alexandre Dias Pereira, *Informática, Direito de Autor e Propriedade Tecnodigital*, Coimbra Editora, 2001, 534 nt. 937 and 518 and following. Carlos Rogel Vide, *De los limites a las infracciones del derecho de autor en España*, *in* "Estudios sobre Propiedad Intelectual", J. M. Bosch, 1995, 137-154, is critical as to the possible reception of the doctrine of *fair use in* the Romanistic system of Law.

Does the fact that the institute has become legal make it lose its basis in equity? In fact, the criteria applicable are general clauses: the application of a general clause, however individualizing, is not to be confused with recourse to equity, because the criterion of equity is Justice. But the general clauses are not exhaustive, they leave spaces open. In these open spaces, it is possible to find the maintenance of the resource to equity as a basis, at least supplementary, of the functioning of the system.

Indeed, if neither the methods of use, nor the purposes admitted, nor the criteria of valuation are exhaustive, there is room left for a discovery of what is *fair* that goes beyond them; and this presupposes, at least in terms of *common law*, recourse to equity.

Fair use puts us in *the user's point of view*. The question is not whether the use is or is not covered by the exclusive right, but whether that use is *fair*. This is inherent in the character of *defense* that we have seen it has. But it also implies that it is the user who has the burden of proving that his use is *fair*.

The openness of *fair use* also allows the use of unpublished works to be admitted as *fair*, provided that it is subject to the other criteria.

Fair use is not to be confused with British *fair dealing*. Fair dealing also involves *fair use* considerations, but it does not represent a general and central clause that can be applied in all areas. Since 1911 it has evolved into legislative specifications bringing the system closer to that of continental Europe. Private use is not a general ground for exemption, and in particular, the right of use for research and private study is discussed.[73]

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73 Cf. W. R. Cornish, *Intellectual Property,* 3rd ed.

The fair use criteria legislatively enshrined in Section 107 of Title 17 of the U.S. Code are:

1) *the purpose and nature of the use, including whether such use is of a commercial nature or is for non-profit educational purposes*

But it should be noted that this outlining is not exhaustive, because other weightings are considered, and no criterion is automatically applicable.

In any case, the commercial nature of the use is a negative indicator since Copyright is economically based on an exclusive exploitation of the work.

2) *the nature of the copyrighted work*

It is to be assumed that in the more factual works the scope of *fair use* is greater than in the more imaginative works.

3) *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*

For example, even quotations can be called into question if they are so long and repeated that they practically represent an appropriation of the whole work.

4) *the effect of the use upon the potential market for or value of the copyrighted work*.

This is presented by some as the most relevant of all the criteria.

Whatever its importance, however, it is always one criterion among others. It is one of the elements of valuation,

from which will result in a global assessment. This is a manifestation of the malleability of the institute.

The American fair use system is not a pure general clause system. It is supplemented by positive specifications and guidelines.

The *positive specifications* are found from Sections 108 onwards, in the same Title 17 of the U.S. Code. They have also been supplemented by later acts and legislation, such as the Digital Millennium Copyright Act.

For example, a very important point is that concerning the possibility of reproduction of works by libraries and archives. It is the subject of Section 108. As is characteristic of Anglo-American legislation, it goes into great detail, specifying what can and cannot be done.

In this realm, the specification rules out the application of the general clause. The system thus becomes mixed: it is made up of an evaluative criterion and positive specifications. These tend to increase as a response to new problems.

But the general clause of fair use does not lose its autonomous meaning. It remains the source of solutions in areas not specifically regulated, which are very broad. The clause itself feeds the legal system, through the privileged route of case law.

On the other hand, there are also the guidelines, particularly in areas such as libraries and education.

This is connected to the nature of the sources in the American legal system, which sometimes bewilders jurists from other legal backgrounds and systems. The official sources are complemented by particular orientations or guidelines, so

to speak, but issued in such a way that they come to have a very particular weight in shaping the legal system. We could qualify them as unofficial.

Of particular importance was the *Conference on Fair Use* (CONFU), whose final report was presented in 1998 by the Commissioner General, Bruce Lehman, Chairman of the Working Group on Intellectual Property Rights of the Information Society Infrastructure. The purpose of the work was mainly to materialize, by delimitating, the application of *fair use* in the digital environment, particularly in the field of use of intellectual works by libraries and educational institutions. It is recognized that the information society offers numerous opportunities for the fair use of works.

The results obtained were uneven regarding the various topics on the agenda. The guidelines that were adopted as a result of the conference were subject to a preamble[74] and may be subject to a trial period. As is characteristic of Anglo-American regulations, they are extremely detailed and very long.

Thus, the proposed *Directive on distance learning*, after its preamble and description of the current regulatory situation, determines the applicability to works lawfully acquired but excludes asynchronous network distribution for distance learning. The Directive applies to non-profit educational institutions of all levels, but only for the benefit of students officially enrolled therein. Any reception must take place in a classroom or other location controlled by the institution. There is a limit of the recording or copying to 15 days of classes. There is in everything a very thorough breakdown of what is and is not allowed.

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74 Which is identical in all *Guidelines*.

With all their characteristics, although exotic to lawyers from other backgrounds, the guidelines, the proposals, and the discussion made make very valid contributions to the clarification of the North American system, integrating it and making the fair use clause more concrete.

5 THE CONFRONTATION OF SYSTEMS

Let us quickly compare the two systems: the United States fair use system and the Roman-based system, as it has developed, particularly in the European Community.

Let us begin by observing that the *merits*, which at first sight present themselves as the cause of the respective *demerits*.

The North American system is malleable, whereas the European system is precise. However, observed in the negative, the North American system is imprecise, while the European system is rigid. The North American system gives no prior assurance as to what may or may not be considered fair use. The European system, on the other hand, shows a lack of adaptability.

But, weighing merits and demerits, we allow ourselves to conclude the superiority of the North American system. Besides not being contradictory like the European one, it maintains the capacity to adapt to new circumstances, in times of such rapid evolution. On the other hand, the European Copyright systems have become dead organisms. States and governments have lost the capacity to create new limits, and, with that, to adapt to emerging challenges; we have already said that limits are constitutive of the content of rights. There

can only be creation at central level, in the cumbersome Brussels procedure.

An evaluative criterion, corrected by legislative specifications in doubtful cases, allows on the contrary the appreciation of each circumstance, and therefore the constant adherence to reality. The placement from the user's point of view is much better than placement from the exclusivity beneficiary point of view.

There is another aspect, little considered until now, which is that of the *private autonomy*.

Can the limits on Copyright be adjustment by an agreement between parties? This would most certainly reduce the protection of the weaker party, which is the user of intellectual rights.

I believe that, in the North American system, there is nothing that restricts negotiating autonomy in this area. We can therefore agree on the exclusion of what would result from the application of the general criterion of fair use, or of any of the legal specifications.

Roman-based law goes in a different direction of evolution.

It is true that in the Directive on Copyright and Related Rights the permitted limits are all provided for as being purely optional, with the exception of the limit provided for in Article 5/1 on purely technological methods of reproduction, which represents in any case a separate figure. The States will adopt them or not, as they see fit.

However, the tendency to make the limits admitted in each country injunctive is emerging. It appeared in

specific situations, as in the Directive on computer programs, regarding the limits intended to ensure the interoperability of the systems (art. 6/1 and 9/1, for example), or in the Directive on databases.

With such purpose, the limits were transposed to domestic legislation. And perhaps by contagion, the tendency will be to make national limits binding as well. Thus, in Belgium, the limits have been generally declared mandatory.[75]

It is natural that Consumer Law has an influence here. The user who is the beneficiary of the limits often coincides with the consumer; this was clearly the case with software. This led to making those limits injunctive. Generally, the injunctive nature came to benefit the general public.

At the very least, it would seem to be appropriate to specify the areas in which boundaries are binding, so their proclamation does not represent a deception, since they are easily removed to the detriment of the weaker party.

6 COMPUTER SCIENCE CONSTRAINTS

The great experimentation lab, in this as in other areas, is now computer science.

Informatics, representing a new means for the use of works of authorship, should bring, from a legal perspective, new solutions. Even if the foundations of Copyright were maintained, it would be necessary to regulate what would be

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75 Cf. Fernand de Visscher / Benoît Michaud, *Précis de Droit d'Auteur et des Droits Voisins*, Bruylant (Brussels), 2000, n. os114, 115 and 167 (even covering limits in the field of communication to the public).

imposed by this new field. This is how it is always done when technological innovations emerge.

In the field of information technology, there is a great debate between those who claimed that traditional Copyright Law was sufficient and those who argued that everything needed to be built from scratch.

Today we can say that this stage is outdated. The thesis of the maintenance of the fundamental structure of the Copyright Law has apparently emerged as victorious. But there is a succession of laws that regulate, in particular, the informational domain. After all, the sufficiency of the classic construction was not so great, as it became necessary to legislate a lot, and with a progressive distancing of what the established principles imposed.

This tension is deeply felt in the area of limits. Regarding the discipline of isolated computer goods, such as software, databases and the topographies of semiconductor products, specific limits were still provided for. But when it comes to the discipline of network communications - of the Internet, if we want to simplify it - *there are practically no new limits*. Everything is happening as if this profound innovation was contemplated by the existing provisions!

But this is unacceptable. If every right is the result of positive and negative rules, a discipline that only strengthens the exclusive, without counterpart for other interests, is a unilateral discipline. The appropriate path for the Internet has yet to be found.

Here again, the United States system is in a much better starting position. Not because it has made much progress in

specifying the limits in the field of network communications; but because the general clause of fair use shows its malleability, allowing it to cover even areas where the law is silent. In Europe, on the other hand if the law is silent, nothing can be claimed. The system is archaic because it is incapable of responding to new needs.

And yet the problems are extremely serious. We need only take as an example what is happening with *technological devices to* protect access or certain forms of copyright use on Internet sites.

"Technological devices" make access or use conditional. To overcome them, conditions must be met - i.e., for what it's worth, paying for it.

Thus, use is no longer free: the limit no longer works. In order to restore users' freedom, they should be allowed to use technical means to circumvent the protective devices. However, this would require that the legal discipline allow it. Otherwise, the technical means would eliminate the restrictions established by law.

Once again, we must distinguish between the North American response and the European response.

In the United States the device that conditions access can be circumvented, but not the one related to reproduction.

In Europe no such distinction is made. The issue is addressed in the Directive on Copyright and Related Rights in the Information Society. Article 6 eventually admits that circumvention or circumvention for certain purposes, moreover in a scheme that leaves major questions as to the effectiveness of future application.

But it does not extend it to the other restrictions, which are not even contemplated in Article 6. This means that the limits, so parsimoniously admitted, are subsequently restricted once again, entailing very serious consequences from a cultural point of view.

Just think about what is happening with *quotations*. Let us say that this is the first of all limits: it is deeply based on the need to ensure intellectual dialogue. And yet, Art. 6 of Directive No. 01/29 does not contemplate it. It is not possible to circumvent the protective devices for the purpose of making a quotation.

Thus, the author who wishes to quote a work by others, and even if he has met the conditions for access to a site where a protected work is found, cannot reproduce it, for the purpose of citation, if it is protected by a technological device against reproduction.

It is not a purely abstract matter. The *quotation may be long*[76]: what matters is that it is justified by the purpose to be achieved. Thus, inciting a polemic, it may be necessary to reproduce several passages from the work of others, to illustrate the opposing positions defended. But if it is not possible to reproduce, what can be done? Only by copying by hand? Or will one have to pay to reproduce? But then the right to quote is no longer free. Another blow, and a profound one, to the fluidity of social dialogue.

On this point, as far as we believe, the various systems are in a similar position. This obstacle to reproduction is found

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76 It should be recalled that the 1967 revision of the Berne Convention eliminated the requirement that the quotation be *short*: see Article 10/1.

both in America and in Europe. This means that there is still a long way to go to find the true balance required by the new technological processes of communication.

7 NEW PATCH ON OLD CLOTH

It is possible that in all this evolution we are facing the anomaly of putting new patches on old cloth.

Information technology innovates exploration techniques too much for one not to have to conclude that the body of Copyright Law needs more than mere adaptations.

In the field of limits, it is very significant what happens with *private use*. Technically speaking, private use was more than a limit to Copyright: it was a matter alien to it. Copyright granted an exclusive economic exploitation of the work in the public sphere. The private sphere was simply considered a free zone.

But information technology has subverted this state of affairs. Integration of computer programs within intellectual works brought with it the restriction of private use as well. As the typical use of the computer program is made through private use, it was necessary to also reserve this to the rights holder. With this, one of the fundamental pillars of the Copyright collapsed.

A new balance is now being painfully sought. This is the case of *time shifting*. A user can record content in order to watch or listen to it later at a more convenient time. In doing so, he makes private use. But is it allowed, in terms of Copyright?

Also here, North American law has demonstrated its malleability. Regardless of legal provision, the courts have reached the conclusion of its admissibility, by applying the doctrine of fair use. We have the important *Sony* case. The non-profit nature of the use was considered. This orientation has the potential to be extended to several types of online uses.

In Europe there was no such malleability. It was United Kingdom law that introduced the permissive rule. Today, in principle, *time shifting* should be considered generically admitted. But only by effect of specific permission, and not by application of general principles.

Outside the regulated domains, the controversy on the admissibility of private use continues. We would say that it would represent a general possibility, outside the computer domain. But there is a tendency to apply the three-step rule. It must then be asked whether a type of computer use affects the normal exploitation of the work or causes unjustified prejudice to the legitimate interests of the rights holder.

The assessment is difficult. *One* act of private use does not have this consequence. But the accumulation of acts, even if each one is effectively justified by private use? It may indeed have economic significance. This is very important in case of storage of contents available on the network.

The position of the legal systems once again diverges. Some take a very restrictive position. The three steps rule, as understood, would lead to attribute economic significance, and therefore to consider private use prohibited, or restricted. On the contrary, the North American system again shows greater malleability, since the impact on the economic exploitation of the work is only one of the criteria to be considered, and

therefore avoids radical positions and allows the assessment of the concrete case.

We would thus have that in these countries the *economic relevance* of private use is *presumed*. Going forward along this path, the European Community, in the referred Directive on Copyright and Related Rights in the Information Society, allows photographic or similar reproductions (art. 5/2 *a*) and reproductions for private use by a natural person for non-commercial purposes, directly or indirectly (art. 5/2 *b*); but in both cases it imposes the counterpart of an equitable compensation for the rights holders. This means that, instead of a free use, there is now a right to remuneration for the copyright holder. The scope of freedom has narrowed considerably.

The issue of restricting the private uses ends up proving to be averse to the technological evolution itself. In Germany there is the amazing precedent of the courts having declared the photocopy machine illicit because it allowed Copyright infringement! Once again, the North American position has revealed greater sensitivity, allowing a better social use of technological means.

The path taken, by leading to the restriction of the potentialities of exploitation by society of the technological means, is very dangerous. It makes Copyright Law appear to the eyes of many as an enemy of the information society. And with this doctrines arise which intend cyberspace to be a law-free space; or which intend to leave to technology the solution of conflicts.

The reaction is also wrong, because without law, as a social regulator, nothing can be solved. But the question is alive. In the European *Economic* Community, the economic mark

is clearly preponderant, depreciating the other factors that should intervene in the conversation. But even in the United States of America, which we consider to be in a much better position from a legal standpoint, the problems are candent, with the legal system adapting too slowly to social needs. That is why a jurist of Raymond Nimmer's stature has warned of the urgency of addressing the problem: to avoid, he says, creating tensions which could have unforeseeable consequences.[77]

We must therefore avoid the temptation to patch up old cloths. We are dealing with new and amazing technological means from which very great social benefits can be derived. A balanced legal framework needs to be created in which all interests can be accommodated. This presupposes that we find appropriate limits for the new technology. If, on the other hand, not only are new limits not created, but old ones are restricted, there is a danger that the patch will not be supported and the whole thing will be ruined.

8 THE INTERVENTION OF OTHER BRANCHES OF LAW IN COLLISION WITH THE COPYRIGHT LAW

The legal order, as a living body, constantly finds means of reacting against unfavorable situations.

This is also the case in this part of the law. In the Roman systems, the scarcity and narrowness of the legal provisions, therefore of the intrinsic limits, tends to be compensated by an increasing recourse to extrinsic limits. This is particularly

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77 Raymond T. Nimmer, *Napster and the "New" Old Copyright*, Cri 2/2001, 46-49 (46).

visible regarding the intervention of other branches of Law in the scope of the exclusivity granted by the Copyright Law.

We have already said that the conflict with other branches of law is particularly with regard to law:

– of Competition Law

– of Information Law

– of Consumer Law.

This is not an exhaustive enumeration. The question may arise for several other branches of law. This will be the case with *human rights*. The *Court of Appeals* has expressly warned that further restrictions on exclusive rights may be necessary for the protection of human rights.

Restricting ourselves, however, to the enunciated branches, we observe that consequences on the Copyright Law have already been drawn from all of them.

Concerning Competition Law, the European Community has a long history of combining the primary purpose of defending free competition with the exclusivity ensured by intellectual rights.[78]

A particularly significant recent case was the Magill case, in which the invocation of Copyright was rejected on the grounds of abuse of a dominant position. The case concerned the publication of television programming guides. The BBC,

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78 At a recent international conference held in Santiago de Compostela, from 16 to 18 June 2002, Bo Vesterdorf, European copyright revisited, observed that the increase in Community protection is likely to create tensions with the policy pursued in Community competition law and particularly with Article 82 of the Treaty.

within the logic of copyright, which is based on the ability to reproduce, objected on the basis of its exclusive right. This point was not rejected, but the Court of Justice of the European Communities considered that the ban went beyond what was necessary to ensure the protection of Copyright, and thus constituted an abuse of a dominant position.[79]

The overlap with Consumer Law is felt in several fronts. But in the case of online communications there is a very important field of application which is only initially being explored. It concerns *general contractual terms* and conditions established by intermediary service providers and site owners.

The general conditions established by these entities for the use of services and for e-commerce are typically general contractual terms. Like all general contractual terms, they may contain unfair terms or be unlawful for other reasons. They must therefore be supervised just like any other terms. This can lead to the absolutism of copyright if the established terms of use are to be rejected for their content.

It is also very significant what concerns the Right to Information. There is no need to emphasize its relevance, precisely in the field of the Information Society. And yet, certain practices may jeopardize this fundamental freedom.

A recent case decided by the Paris Court is important. An exhibition of paintings was held. A television station reported the news, focusing on several paintings. The owners claimed infringement of the right of communication to the public.

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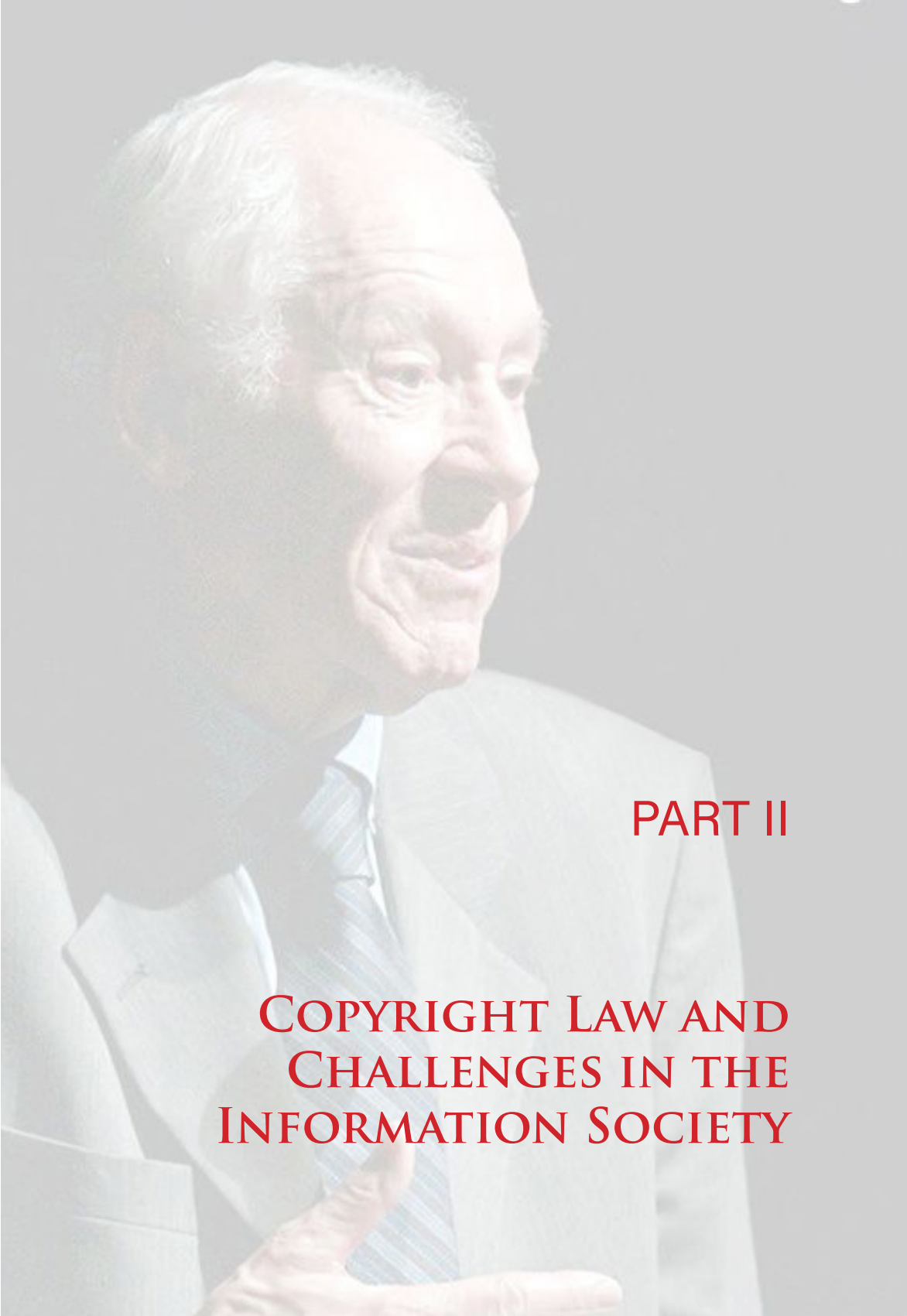
79 Judgment of 6 April 1995.

The Court, while accepting the claim, did not fail to expressly emphasize that copyright has limits, in particular those derived from the right to information. But it considered that they had been exceeded in the present case.

It is very significant. The French legal system is the most unilateral in protecting the "absolute" right of the author. The recognition that, in addition to the intrinsic limits, it is necessary to consider those brought by other branches of Law opens new paths in the demarcation of the content of copyright.

The result of all this is that we are dealing with a subject that is boiling. We have compared the European and North American systems in particular. This confrontation interests all of us, namely for the very important contribution that fair use, notwithstanding the diversity of the legal system in which it is integrated, may bring to the improvement of our system. The starting position is much superior, as it allows keeping alive the body of the Copyright Law, simultaneously satisfying the cultural and other purposes which are indelibly in its origin.

The WIPO Treaties play a very important role in this area. They have the advantage of not belonging to one field - they preside over both. It will be necessary to maintain the openness of the system, avoiding the temptation to make the field of exclusivity more and more crowded. The Copyright is not a one-way street. It is a right of all, which, through positive and negative rules, conciliates all in a perspective of general interest.



PART II

Copyright Law and Challenges in the Information Society

INTELLECTUAL LAW IN METAMORPHOSIS[80/81]

SUMMARY

The evolution of Intellectual Law is often associated, quite rightly, to technological development. But we must not forget another equally important factor, which is the increase of abstraction in contemporary society.

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80 This article is the translation into English of the original text in Portuguese: ASCENSÃO, José de Oliveira. O Direito intelectual em metamorfose. *Revista de Direito Autoral*, year II, nº IV, p. 12, Feb. 2006

81 Translator: Maria Helena Japiassu Marinho de Macedo. LLM student at UFPR. MBA in Intellectual Property, Law and Ethics (UCAM), Certificates in Arts Management and Fundraising (Boston University), Chancery Officer at Ministry of Foreign Affairs of Brazil.

The growing appeal to abstract categories, even in the world of Law, is the result of long historical evolution. The Romans, although brilliant jurists, did come up with concepts such as institutes so common today as the representation in legal business, the subjective right, the transmission of obligations...

The development of abstraction took place gradually, but it has accelerated in recent times. Today we usually work with virtual realities; sometimes even with 2nd degree virtual realities, such as stock derivatives, which can fall into mere evidence or digital securities.

This is why the training of jurists is so essential, in order to make them capable of working with realities without any sensory support, beyond the primary manifestations of the interests at stake and even the formulation of legal provisions.

Intellectual Law is prototypical of this movement, which allows us to move from the materiality of the book or the painting to the immateriality of the "literary or artistic" work as such. We are at the end of the 18th century/beginning of the 19th century, at the time when abstractions such as legal persons are consolidated and pandectistics launches that abstraction which is the General Part of Civil Law.

The construction of a copyright centered on the work as an immaterial asset is then designed. At first, this concept was crude and restricted to literary manifestations. In the transition from the 19th to the 20th century, it reached its maturity with the Germanic doctrine of copyright as an emanation of individual creativity. In this way, the view of this right as an entity free from the corporeal ballast of its

eventual materialization is formed, and then it irradiates to the remaining countries of the Romanistic system.

The evolution is not so clear in the Copyright System, which is not based on the creator figure, but on the object; and has at its core a reproduction right, which appeals more to materiality.

In any case, certain remnants of the past persist. Concerning this vision, Article 2 of the Berne Convention is very enlightening. In it, "books, brochures and other writings" are listed as literary works. No capacity was shown to overcome this materializing reference: instead of literary works, the media in which they may be incorporated are designated.

2 THE PRIMACY OF PUBLIC INTEREST

Since the beginning, the Copyright Law has been prevalent in the form of granting exclusive rights to the holder in relation to the work; in parallel with what has occurred in the Industrial Law, in relation to the goods subjected to it.

There was a very clear awareness that granting exclusive rights implied a restriction to the freedom of others. The basis to it was found in the public interest: the restrictions were to be temporary, and were justified by the fact that granting the rights stimulated creativity by rewarding the author. After the normal period of protection, it would fall into the public domain.

This idea implied a predominance of the public interest over "private interests. The extent of protection was not dictated by these private interests, but instead by the public benefit derived from the temporary grant of the exclusive.

Therefore, copyright is seen as a harmonic complex, in which attributive rules coexist with restrictions. The limits of copyright are not taken as exceptions, but as a way of simultaneously satisfying individual and community interests. In particular, they prevent the most harmful consequences of monopolization and allow forms of social enjoyment compatible with the assigned exclusivity.

Perhaps this orientation is nowhere more apparent than in countries governed by Anglo-American law. In the United States of America, there is the constitutional provision that authors have limited rights over their works in order to promote the development of science and the arts. This rule leads to the general denial of any kind of natural right of the author and to finding a primary ground of public interest. Within these limits, the authors' interest would coincide with the public interest.[82]

Lawrence Lessig also strongly emphasizes the idea of *commons*[83] (or public domain) and recalls the statement by the Supreme Court judge Joseph Story that copyright "is beneficial (...) to authors and inventors (...) and to the public, to promote the progress of the sciences and the arts and ultimately to enable the public, after a short interval, to have full possession and enjoyment of all writings and inventions without restriction". But he adds that this is obtained not against property, but with property. The question is not whether it is property or not, but how to combine property and *commons*.[84]

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82 Cf. Gillian Davies, Copyright and the Public Interest, HC Studies, VCH, Weinheim / New York, 1994, namely at pp. 54, 57, 58, 60 and 68.

83 Code and the Commons, lecture delivered at Fordham Law School on 9.II. 99.

84 Open Code and Open Societies, Tutzing (Germany), 1.V1.00, pp. 5-6.

3 THE LEGITIMIZING DISCOURSE

On this basis mentioned, the legitimating discourse of copyright was founded, and these terms reach the present day. Copyright represents a reward to the author, for the contribution brought to the world, and this is an incentive to literary, artistic and scientific creation, whether for that author or for others.

This legitimizing discourse, based on stimulating creativity through exclusive rights, necessarily places the author in the foreground. Their creation is a social benefit that should be rewarded and encouraged.

This also implies that creativity represents the essential requirement for the work to be protected. Only creative work deserves stimulation and protection, because it alone justifies the restriction of freedom that is imposed on society.

Classical copyright law reinforced the requirement of a level of creativity as a condition for the protection to be granted. The work should express the author's individuality. Commonplace or repetitive productions, which offered no interest to the community, would not be protected. In fact, they could hardly even be called creations, because they would add nothing to social representations.

The legitimizing discourse thus also involved a cultural consideration. The work was protected because it represented a cultural enrichment for the community. This helped to make the exclusivity acceptable, with the inherent limitation of the area of freedom that was imposed on others in return for the granting of the right.

In any case, this underlining of the moment of creativity has not been affirmed in the same way in all legal systems. Here, it is the Anglo-American system that is most reluctant to move forward with this personalization of the law.

The Anglo-American vision has always differed from the Romanistic one: copyright, as the name indicates, is the right to copy. It starts from the object and protects it against copying, guaranteeing the holder a value that is protected just because it can be coveted by third parties.

The Romanistic system, on the other hand, starts from the author. Because the author brought an individualized contribution, he must be protected. The protection of the work is a corollary of the protection of the author.

In the end, this forces us to verify that there are two coexisting and intertwined systems, which solve the same problem without confusing the lines of solution. The Anglo-American system, which is pragmatic, focuses on the producer, and the Romanistic system, which is more principled, focuses on the creator.

4 THE PERSONAL (OR "MORAL") ATTRIBUTES

In the case mentioned, if the person of the author occupied the first plan, it was natural to develop the idea that such protection also involved personal aspects.

Paradoxically, this aspect did not become visible at first, because it was sought in substitute of the old privileges. It only appeared in the transition of the 19th century to the

20th century. In order to allow the expansion of the author's prerogatives in aspects not provided by law, it started to be called moral rights of the author.

The fate of this perspective was not coincidental. In the French legal system there was an overstatement. A moral right was affirmed, opposed to patrimonial right. This moral right would be perpetual. It would allow the author to control countless uses, even going beyond the negotiating ties that had been assumed.

At the opposite pole are the Anglo-American legal systems. It is true that in the United Kingdom the Copyright, Designs and Patents Bill of 1988 provided in Arts. 76 to 88 some moral rights. But these rights are renounceable, contrary to what happens in most countries. In fact, the Berne Convention, in Art. 6 bis, does not impose the non-renounceability of these rights. The United Kingdom is not therefore in breach.

The situation is different in the United States of America. Despite that country's accession to the Bern Convention, its domestic law has not been amended to provide for personal rights. It is argued that various institutes of domestic law would lead to a similar result; but the justification does not seem acceptable.

Another approach is that of German law and Germanic countries in general. A "moral right" is not autonomous. There is a single copyright, which contains both personal and patrimonial faculties.

This one seems to us the best solution. Many subjective rights integrate personal and patrimonial faculties, without making it necessary to autonomize a personal right. The same

thing should happen here, without breaking the unity of the copyright.

The French solution, apart from its absurd perpetuity, brings with it the danger of distorting the aims of the "moral right", leading it to be exercised in sectors where no ethical considerations are at stake. It becomes a sort of second property right of authorship. It poses a danger to the normal exploitation of rights by third parties. This exaggeration partly explains the Americans' fears of accepting it.

5 THE FORESHADOWING OF CHANGE

In broad strokes, this is the drawing of what we may call classical Copyright Law.

This is fundamentally how we arrive at the Stockholm Diplomatic Conference to revise the 1967 Berne Convention; extended later at the 1971 Paris Diplomatic Conference.

But we can say that some signs of change were already visible.

It is true that the legitimizing discourse remained entirely the same - the protection of creativity, to stimulate and reward the author.

But the facts kept getting further and further away, yielding to the pressure of industries and consumer culture. No longer was only merit or individuality that were depreciated, it was the whole trail of creation that was being erased.

We can say *copyright* was victorious. The right of authors had already started the path to be the protector of copyright industries, much more than the personal creation that brought

contribution to culture. Thus, almost silently, the object gains prevalence over the creator. It is the Anglo-American scheme.

On the other hand, new competitors for copyright protection are emerging in addition to authors.

The 1961 Rome Convention had founded the joint protection of performers, phonogram producers and broadcasting organizations.

It is true that this protection was not achieved by the grant of a copyright, as had been intended. But an intellectual right was also granted, whose affinity with copyright was expressly affirmed.

It is also true that nothing authorizes taking it as an axiom that only authors should be holders of intellectual rights. There may be other candidates for protection. And the growing abstraction, which allows autonomizing more and more contributions in this field, incessantly increases the number of these candidates.

However, the most significant element is that, alongside personal contributions - such as those made by performers - corporate contributions are also protected by intellectual property rights. These contributions benefit phonogram producers and broadcasting organizations.

We thus see the field that was initially exclusive to copyright, attributed and justified by the eminent dignity of creation and intellectual, ending up being invaded by corporate entities, which * are removed by nature from all personal performance.

Therefore, even excluding what concerns Industrial Law, Intellectual Law is now used not only to stimulate

creation, as it was initially justified, but also to grant protection to companies, which today are generically known as *copyright* companies.

There would be nothing surprising about the protection of performers: they also bring a personalized individual contribution. But the protection of companies by intellectual law shows a paradigm shift.

6 THE MEANING OF COMPUTER PROGRAMS PROTECTION

The metamorphosis of the Copyright Law, thus announced, happened in the most recent times. Let's say that it erupted in the last 15 years, or at most in the last 20.

The catalyst element was the invasion of this field by information technology. First, it focused on the framework to be given to computer programs. To a lesser extent, a similar dispute arose with regard to the regime of topographies of semiconductor products.

The long and comprehensive debate led to the protection of computer programs by copyright, or at least by an analogous right. It was asserted for this purpose that the right rested on the form of the program - that is, on the expression of the program, in whatever language that might be.

The result, as far as we are concerned, is consolidated. But we must try to understand it.

The reason, which then became systematic, to copyright law protection of computer goods has several justifications:

- copyright grants the broadest protection in the field of intellectual rights;
- copyright grants automatic protection as soon as it is created, irrespective of registration;
- copyright does not require the disclosure of the algorithm on which the program is based, unlike what would happen if protection were provided by means of an invention patent,
- copyright allows protection to be obtained irrespective of the issue of new laws, thus giving a kind of retroactive protection.

We can therefore understand the efforts made worldwide to achieve this protection. And this was achieved extremely quickly.

But this step cannot fail to have very important consequences for the very nature of copyright.

On the one hand, because the computer program is a technical reality, which lies outside the literary, artistic or scientific field that is proper to copyright.

It will not be the most significant. But there are consequences associated with it. In particular, it makes it much easier for the copyright to revert to the company. This shows - and history confirms this - that this is much more a matter of protecting companies than individual programmers.

Above all, however, the admission of computer programs as the subject of copyright conflicts with fundamental coordinates in this area.

It has been stated that the computer program, in its expression, is a literary work.

But the computer program expression has a very different meaning from the literary expression.

Literary expression, the basis of literary work, is free expression -- arbitrary, if we wish to emphasize this aspect. It varies according to the creativity of each person. The form can be of one kind, as it could be of another.

On the contrary, the expression of the computer program is a binding expression. It is the obligatory representation of a technical procedure. No variation is possible, for if you vary it, there is error - it no longer fictitiously expresses that reality.

This means that the protection of mandatory expressions was admitted as an object of copyright protection. These had always been excluded from copyright - chemical or mathematical formulae, for example. But the reference to the formula hides the reference to the process, which is the substantive reality at stake. The protection of the program is the superstructure found for what is ultimately the protection of a process through copyright.

7 THE FORM DICTATED BY FUNCTION

Thereafter, a substantial change in the Copyright Law is witnessed.

The business product now aspires to copyright protection by invoking the form.

This is already the case in the field of computer goods. These are databases, websites and multimedia productions.

In the UK, copyright protection for computer-generated works already exists.

To the extent that the creation aspect is erased, the protection ends up referring to any outside manifestation or representation so that the legitimating discourse loses meaning.

The comparison with industrial designs also allows us to have an interesting overview.

In the industrial design and model, the creation is not protected. The European Community Directive n.º 98/71, of 13 October, in art. 1 "a", defines it even as "the appearance of the whole or a part of a product...a". It is only required "that it is new and has a unique character" (art. 3/2). In other words, in this case only innovation in the field of forms is protected, whatever the degree of creativity linked to that innovation.

If copyright no longer requires creativity but only the final expression of the product, then the conditions for protection as a design and as an artistic work appear to be equivalent. The same reality would allow for two different types of protection.

But if we apply these criteria to computer programs, there is another difference. Paradoxically, design protection would be more demanding than copyright protection.

The characteristics of the appearance of a design dictated exclusively by its technical function are not protected by the registration of the design (art. 7/1 of the Directive).

Whereas the form of expression of the computer program, which is dictated solely by the function it is intended to perform, would still be protected by copyright!

It is a reversal of everything we thought about copyright, which has important consequences on the way we conceive it.

8 THE PROTECTION OF INVESTMENT

It became clear that the legitimizing discourse no longer corresponds to reality.

The spiritual and noble nature of intellectual creation continues to be invoked to obtain increased protection by copyright. However, the basis of this increased protection lies rather in a change of objectives, and this is what is driving the commercialized world in which we live. There is another purpose that takes precedence over that of protecting the intellectual creator: it is the protection of investment.

Copyright has come down from the spiritual pedestal on which it was placed to play the role of a weapon in the economic struggle. Above all, it is now directed to protect investments, as they say. Therefore, the companies are its beneficiaries, particularly the copyright companies, to whom the copyright protection mostly reverts in the end. Hence, the interest that copyright started to arouse in economic circles and entities, national and international.

There is no anomaly in investment protection. Investment can and should be protected, for the many ways in which this occurs in today's world.

What is strange enough is that investment is protected by copyright. In other words, a highly protectionist branch of law has been created, invoking the dignity of intellectual creation, so that this branch can ultimately be used to protect

investment. This is a distortion, because copyright law is equipped for very different purposes.

This discrepancy between the legitimizing discourse and the final result should be overcome. It would be necessary to gradually specialize means of investment protection, different from copyright protection. It is an anomaly that a computer program is protected until 70 years after its creator's death, when its purpose is to protect the company to which it reverted.

But this is one of the paradoxes created by the metamorphosis of copyright.

9 THE TRANSFORMATION OF COPYRIGHT INTO COMMODITY

The most important aspect of this evolution is what we may call, in figurative language, the transformation of copyright into a commodity. Now it is increasing the significance of copyright in the negotiating movement, with a primary impact on world trade.

The most spectacular manifestation of this phenomenon is the submission of Intellectual Law to the tutelage of the World Trade Organization.

Intellectual rights are now regulated by an Agreement on Trade-Related Aspects of Intellectual Property (1994), known by the initials APDIC or TRIPS. This agreement is annexed to the Treaty that created the World Trade Organization and must be accepted by all members of that organization.

The consequences of this process are far-reaching.

Firstly, because of the effectiveness of subordination to these precepts. Until now, countries signed or ratified international conventions on the subject if and when they wished. The movement of acceptance was thus slow and asymmetric. Now, because countries cannot stop participating in world trade, they are forced to accept the disciplinary rules of intellectual rights.

It is equally striking what the process represents on what concerns the subordination of Intellectual Law to Commerce.

The adhesion to this agreement is not made by considerations proper to Intellectual Law. It is done by the need to participate in world trade. Intellectual Law is now presented as a by-product of International Trade Law. Countries do not accept it for themselves - they accept it because they do not want to be excluded from international trade.

The commercialization of Intellectual Law is rapid. The discipline of these rights is handed over to the disciplinarians of international trade. The interested parties are often consulted, but the interested parties are almost exclusively the representatives of the economic interests, in contrast. As far as copyright is concerned, the cultural aspect is being erased. Or rather: the promotion of culture is always understood as the promotion of cultural industries, or of copyright.

This process goes hand in hand with a great deal of obliteration of the public. Consumer representatives are also heard, but they have little power. The public itself, which is more than the final consumer, has no one to represent them.

At the same time, the original concern for the public interest is being lost. Now the interests of economic operators are being discussed. And as this evolution coincides with the height of liberalization, the public interest loses significance in itself. It is now seen as an afterthought, or a result of the functioning of the international trade system itself. If this works well, the public interest will ipso facto be assured.

At the same time, more and more forms of self-regulation are being promoted. The regulators are thus no longer the public, but the market operators themselves. Like the intention of the public, the public interest is also losing its representative.

10 THE DOWNTURN OF "MORAL" RIGHTS

In such an evolution, personal or moral rights no longer have room for affirmation. They are simply ignored. Trade is regulated, and trade has nothing to do with personal aspects: it focuses on goods.

All recent developments show a great constraint in the discipline of the "moral" right. While the patrimonial aspects were developing rapidly, the personal aspects remained confined to the provision of Article 6 bis of the Berne Convention. The European Community gave up regulating the personal aspect of copyrights and the United States of America was not concerned by the fact that it had adhered to the Berne Convention, continuing without regulating the personal faculties of copyright.

With TRIPS, the exclusion becomes explicit. Members are obliged to observe the provisions of Articles 1 to 21 of the

Berne Convention, which contain the substantive discipline of copyright (Article 9/1). Thus, these precepts are imposed on all countries, regardless of whether they belong to the Berne Union or not. But Article 6 bis, which focuses precisely on the author's personal rights, is expressly excluded.

We thus have the Copyright Law split into two segments. What is universalized is the patrimonial copyright, which still receives the impulse of new forecasts. The personal rights, already in crisis, are abandoned, remaining in a situation of decadence. This happened despite the fact that the WTO's driving countries are all members of the Bern Union.

It is possible to recognize that an anomalous development that has occurred within the "moral right" is co-responsible for this situation. As we have said, in France there has been an exacerbation of the "moral right" that is so extreme that it has lost its meaning. The moral right has become an arbitrary power (because it does not need to be based on ethical grounds) that allows the author at any time to intervene and hinder the normal exploitation of works. The United States of America is very afraid of this intervention because it is on the side of *copyright*, and therefore of the companies that exploit the works. There is no longer a bridge between the two understandings. The result was the defeat of the "moral right".

Lessons must be learned from this. We must seek a normal integration of personal and property rights within a single copyright, limited in time, which will make the category acceptable at international level.

11 THE GROWING INCIDENCE OF LAW ON THE MATERIAL SUPPORT

We note that the copyright gained its full relevance with the release of the material support in which the work would eventually incarnate. The copyright is affirmed in the strength of its purely immaterial reality.

This is always a continuing movement. By abstraction, new intellectual goods are successively emerging, which also aspire to protection by intellectual rights.

From a certain point of view, though, this movement, although it continues in progress, coexists with another one that we might consider in the opposite direction: the copyright starts to reach more and more the objects in which it is embodied.

This movement has a plurality of manifestations.

This is the case with the resale right, meaning when works of art are subsequently alienated.

Or the author's asserted personal right to oppose destruction of his work.

Or that of the architect, to oppose the modification of the building constructed according to his plan.

But in no case is it as clear-cut as with respect to the distribution right.

A right is now enshrined for the holder in relation to the marketing, or widely, in relation to any form of distribution of material copies of his works.

This would mean that the author could thus command that distribution, determining the places where those copies would be accessible, and those where they would not.

It is true that it has also been stated that this right would be exhausted with the first sale of the copy. If that were so, it would be the same as the right to put the work into circulation, or to launch it into marketing.

But it also emerged the assertion of exceptions to exhaustion, particularly international exhaustion. This would allow a holder to permanently command the permissible movements.

And the exacerbation of this faculty also appeared with the French *droit de destination*. The holder would thus permanently maintain a copyright link on the marketing of copies of the work,

This is a long-winded change, especially because of the paradoxical results it leads to.

As a result of an increasingly absolute free exchange rate, barriers to trade are being lowered. Countries cannot create closed markets for reasons of public interest,

But at the same time, for reasons of private interest, the owners of intellectual rights are being allowed to carry out this zoning themselves! International trade is thus dependent on the individual authorizations of those who have already placed these products on the market!

12 THE ASSIMILATION OF ALL INTELLECTUAL RIGHTS

Another manifestation of great relief consists in a tendency towards the approximation of all intellectual rights. Starting with a homogenization of what we call the Copyright Law. The diversity of expressions allows one to distinguish the Copyright Law in a strict sense, focused on the protection of the author of the literary or artistic work, and the Copyright Law, which, in addition to the latter, would also comprise the related rights to the copyright.

The trend is towards a relentless reinforcement of the latter, leading to a rapprochement of related rights to the level of protection afforded by copyright. Equivalence is still a long way off, but the trend is visible. This has been shown very clearly in the recent WIPO Treaties, where provisions concerning the author have been generally extended to performers and these in turn have been extended to phonogram producers.

In this way, business rights are assimilated with the rights of intellectual creators. And, quite consciously, on both sides of the North Atlantic this rapprochement is encouraged.

On second thought, such an evolution is not surprising.

If creativity is no longer the distinguishing feature and attention is focused on the goods, all rights play more or less the same role, whether it is the right of the author, the artist or the company. Ultimately, they accrue to the *copyright* company, and are a tool in the *copyright* company's strategy.

This is why related rights are increasingly becoming exclusive, like copyright. And they are all directed towards the goal of a great single copyright, to which the personal aspects,

which there is effectively no way to extend to companies, are not in a position to offer great difficulties.

13 INCREASED EFFECTIVENESS AND CRIMINAL SANCTIONING

The developments described have brought about a strengthening of effectiveness in the enforcement of intellectual rights.

Through the WTO, countries are themselves subject to infringement proceedings, which make it difficult to evade the introduction of the rules on intellectual rights to which they are bound.

But individual infringements are also encountering an increasingly severe response. International conventions focus in particular "on counterfeit goods by imposing rules hindering their transit.

Another significant aspect can be found in the applicable sanctions.

Traditionally, it is up to each country to decide on what its effective applications are, particularly sanctions. And so, they could establish criminal sanctions or not.

But TRIPS has changed the situation. The implementing provisions, particularly the procedural ones, are the subject of minute detail - so much so that it is difficult to reconcile them with national systems.

As far as sanctions are concerned, Article 61 requires incrimination "at least in cases of deliberate trademark counterfeiting or copyright piracy on a commercial scale".

Therefore, this matter ceases to be under the discretion of the States and opens the door to the imposition of criminal sanctions.

This trend is rapidly expanding. Various proposals are multiplying the cases of criminal sanction imposed everywhere.

We need to reflect on this point. The expansion of criminal reactions would end up removing the ethical basis of the sanction and, therefore, questioning its legitimacy. And, curiously, this movement is being developed in parallel with the decriminalization or debug of the classic Criminal Law, which is seeking to reduce itself to a nucleus substantively reprehensible and indispensable.

The paradox is such that, a short while ago, we observed a situation in Portugal in which unauthorized entry to another person's site on the Internet received a higher penalty than violent entry into another person's home!

We must guard ourselves against excesses. Even for reasons of efficiency. After a certain point, the results are the opposite of what was intended. Social rejection of the violence of punishments creates a barrier to their effectiveness; and the judges themselves always find an argument not to apply a penalty that is repugnant to them.

14 THE COPYRIGHT OF POSITIONS ON THE INTERNET

The expansive trend doesn't stop there.

We have already seen how the integration in Copyright Law of the protection of computer property was operated. But

the next step consisted in the extension of the protection to positions acquired in cyberspace. Thus, sites on the Internet, or websites, are considered subjects of protection by Copyright Law.

The conditional access is protected by copyright for the benefit of the owners of the rights existent. The truth is that such protection is no different from the protection given against unauthorized access of the owner of the site, which is intended to guarantee the basis of economic exploitation of the content, whether that content is protected by copyright.

This is one of the characteristics of this evolution. Little by little, the presence of authorial content becomes irrelevant. A dramatic performance is as protected as a football match, even though the football match enjoys no copyright protection.

All this shows that we are moving towards protection of intangible business content, which encompasses but goes beyond the protection of intellectual property.

This expansion is multifaceted. Thus, in Europe, much emphasis is placed on the protection of personal data, [85]in contrast and even in conflict with what is happening in the United States. Here too, however, an expansionist tendency may be revealed, leading to the conception of this protection as a kind of *ownership of personal data*. We would have discovered a new intellectual asset, which would also be in a position to benefit from an exclusive right and enter the marketing circuit.

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[85] See Directive No 02/58 of 12 July on privacy and electronic communications.

15 THE RELATIONSHIP WITH COMPUTER LAW

Nowadays, the expansion of Copyright Law leads to an overlapping of boundaries with Informatics Law.

The relevant IT positions seek, as we said, the protection of Copyright Law. Furthermore, the same themes end up being frequently discussed in both branches under different titles.

Thus, in e-commerce, it is not easy to distinguish where copyrights stop. The same issues are discussed in parallel, like *browsing* or navigation on the Internet and *caching* or intermediate storage. This reality became very clear during the discussion of the two European Community guidelines, on electronic commerce and on copyright and related rights in the Information Society, in which these issues were debated.

However, the same thing should be said of conditional access and protection of condition access' devices; of what is known as "information for rights management"; of legitimization of mechanisms for associating content, such as *hyperlinks,* in which it is discussed above all whether they enjoy protection through copyright; of the system of devices that restrict the reproduction of content; and so on.

All of these discussions well reflect the expansive trend of the Law. Copyright is invoked whenever immaterial content arises, which is, or can be, commercially exploited. Its scope is constantly expanding, at the same time that it ultimately becomes indifferent whether the content in question is an intellectual work or a reality of another nature.

16 SERIOUS BORDER ISSUES

All this new reality inevitably brings serious border problems with it.

As long as we were based on (relatively) limited figures, such as the intellectual work or the artist's performance, we were on firm ground. But when we move on to undefined realities, characterized only by the vague notion of an intangible element that can be economically exploited, everything vanishes. This happens because the expansion of the reserved area is always at the expense of the area of social freedom.

In many cases, the contrast is already visible. Thus, the protection of databases in Europe has led to the creation of a new right - the so-called *sui generis* right of the "maker" of databases - over the content of the database itself, and therefore over the information it contains. It is a pure business right.

But a right over information is a worrying reality. Up until now, the rule has been that information should be free for all. The emergence of a right to information raises the specter of information monopolies, which perversely restrict social dialogue.

In another field, the protection of biotechnological inventions is making progress. Patents on gene sequences are allowed. But this jeopardizes the principle of freedom of discovery. It is not clear what distinguishes this 'invention' from the discovery. And by making discoveries a subject of exclusive rights is to pay a serious price for scientific progress.

That is why we said that this expansion of intellectual protection to new areas does not happen without creating

critical points, by restricting fundamental freedoms that must continue to be guaranteed.

17 GLOBALIZATION AND PUBLIC INTEREST

All this process is rapidly expanding through what is known as "globalization". The new rights are quickly finding their way to generalization. Except for specific cases of clashes between dominant powers, they are soon communicated through guidelines that are now given at the global level. [86]

And here we find again the problem of public interest. Until now, the public interest was guaranteed by the national State. But with globalization, this control is largely out of its hands.

What consequences does that have on the assumptions of the protection of intellectual rights? We have seen that the pursuit of public interest was at the genesis of the creation of exclusions on intellectual property.

It is clear, as we said above, that private interests currently prevail. The expansion of reserved areas is being done under the impulse of private interests, and not to serve configured public interests.

This is very visible throughout Intellectual Law. For instance, if we take the parallel domain of trademarks, we can evidence as an example what happens with the prestige mark.

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[86] As in the case of computer goods, by action of the G-7.

The noblest basis for trademark protection was to prevent the public from being misled. But today protection is strengthened without any basis in the public interest, but rather in the private interest of the trademark owner. According to the European Community Trademark Directive, a mark with a reputation is protected even in relation to goods or services that are not identical or similar to those for which the mark was registered, when the use of that sign, without due cause, takes unfair advantage of, or is likely to damage, the distinctive character or the repute of the mark (Article 5/2 of Directive 89/104, dated December 21, 1988). The act of taking advantage is repressed and the private interest of the proprietor of the mark is protected, but there is no consideration of public interest, or of the interest of the public, at the basis of this provision. It is not decisive whether it is misleading the consumer.

A parallel debate was recently brought before the US courts, when the raising of the term of protection of copyright from 50 to 70 years and then to 95 years was challenged. It was argued that this would imply an increase in protection with no counterpart in the "public interest, focused on the development of sciences and arts, contrary to what is required by the Constitution. The Supreme Court, however, ended up affirming the constitutionality of the law.

18 THE RIGHT TO PROTECTION OF INNOVATION

This path seems a fact to us. But a fact is not a fatality. Globalization itself is not a one-way street, nor is it a justification for all policies.

Foremost, we must make an effort to understand what this evolution means. Copyright based on creativity is undoubtedly in crisis. It is being absorbed by a broader wave of protection of intangible realities that are useful to the functioning of the system, regardless of the merit and even regardless of the creative element of such productions.

The matrix idea became innovation. What represents innovation is protected. In an economy in permanent forward imbalance, innovation ensures incessant renewal and expansion to new areas, essential to the functioning of the system. [87]

But if innovation is the focus, Copyright Law is becoming closer to Industrial Law. The latter, in one of its basic facets, protects industrial innovations.

Also in Industrial Law, the evolution was made in the sense of the reduction of the merit requirements. It is very visible in the field of patents, where the inventive level has less and less significance. The decisive factor is now the novelty.

Copyright Law also evolves to a kind of right to protection of innovations. It protects what is novelty, and not only what is creative. By this mean, it is possible to disregard the creative act and the attribution of protection to entities which, by themselves, are incapable of creating. Mainly to

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87 In April 2008, an OMPI summit on Intellectual Property and the Economy of Knowledge was held in Beijing. It was based on the attribution to intellectual property of the predominant function of 'fostering creativity and innovation in order to promote economic growth through the creation of wealth and the development of industry and trade'. And this economic phenomenon is expressed by reference to innovation; in reality, creativity takes second place.

companies. The latter is presented as a source of innovations, with a claim to protection identical to that of natural persons.

Therefore, it is necessary to proceed to an even more profound review of the current Copyright Law. Starting with the legitimating speech.

The discourse centered on rewarding and stimulating the creativity of the author is exhausted. We must recognize this and draw the necessary consequences.

The evolution preceded the formulation, since in practice the Copyright Law was based on a foundation that coexists with it, based on the protection of investments; and, due to a quick evolution, this protection gained primacy. This is what justifies the current changes.

Thus, the explanatory hypothesis of the formation of an Innovation Protection Law arises, which would absorb the Copyright Law as we currently know it. Innovation, and not creation, would be the basic element. The generic function of this new branch would be the protection of innovation, blurring, or even erasing, the outlines of the several branches of Intellectual Law currently existing.

19 THE JUDGING OF EVOLUTION

Considering this prospect, how should we react?

On the one hand, we cannot adopt a static perspective, as if the current division of the branches of law were the only possible one and represented an unchanging point of arrival.

The branches of Law vary according to contexts and needs of each era. And this also happens with the Copyright Law.

It was born "based on the social interest of protecting creativity, in the transition from the 18th to the 19th century. It may move "to a different framework, if faced with a new situation.

We say this with eagerness, because we do not consider that something as a "natural right" is on the basis of Copyrights. This understanding would fatally impose granting the protection in these terms. A natural right would be referable at most to the personal aspects, ethically grounded, of the intellectual creation.[88] On the other hand, the patrimonial aspects depend on positive options, since its ultimate basis is to pursuit collective interests.

This, on the other hand, does not induce us to fold our arms and passively accept the metamorphosis that is taking place.

Historical evolution is based on changes in social circumstances, but these do not suppress the intervention of human choices. Globalization itself, having at its base technical realities, is also politics, which are driven towards the satisfaction of interests that enjoy primacy at the world level.

We must guarantee our freedom, by trying to understand the "new reality, making the judgment on what regards its intrinsic justification.

Grasping the new paradigm of the primacy of innovation, how can Copyright Law be called to play the role of investment protection?

One cannot help but find the evolution of the system shocking. The logic behind protecting innovation is different from the logic behind protecting creativity. The instruments used to achieve one or the other objective cannot be the same. It is anomalous, for example, that an invention is protected

88 Which are, as we have seen, the most abandoned.

for 20 years and another innovation labelled as copyright is protected for 70 years *post mortem*.

The evolution that is taking place, as it is based on a different logic from the one that sustained the historical development of the Copyright Law, must lead to produce the instruments and rules in which this new logic is expressed. There is no need to be afraid of creating new figures of rights, when the situation justifies it.

The framework we rehearsed, of Copyright Law being a kind of emerging Innovation Law, gives us a label, but does not give us a finished solution. There is a whole reorganization to be carried out, in the light of the objectives that are currently been configured.

It is necessary to discuss each new step along this path, in order to conclude whether the proposed solutions are justifiable. From the outset, the creation of a monolithic intellectual law that would amalgamate such distinct situations does not seem compatible with the maintenance of regimes that were created in the light of completely diverse purposes. To become acceptable, it imposes a vast task of distinction of types and revision of legal regimes.

In other words: we must be aware that we are at the heart of the very process of metamorphosis.

COPYRIGHT WITHOUT AN AUTHOR AND WITHOUT A WORK[89/90]

SUMMARY

1. "Intellectual property": a strategic and controversial designation; **2.** *Droit d'auteur* versus copyright[91]; **3.** Personal (or "moral") right's late dis-

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89 This article is the translation into English of the original text in Portuguese: ASCENSÃO, José de Oliveira. Direito de autor sem autor e sem obra. In: DIAS, Jorge de Figueiredo; CANOTILHO, José Joaquim Gomes; COSTA, José de Faria (org.). *Boletim da Faculdade de Direito* – Universidade de Coimbra. Studia Juridica 91 - Ad Honorem 3. Ars Iudicandi. Estudos em Homenagem ao Prof, Doutor António Castanheira Neves. Vol. I: Filosofia, Teoria e Metodologia. Coimbra: Coimbra, 2008. p. 87-108.

90 Translator: Pedro de Perdigão Lana

91 [Translation note: To preserve Ascensão intentions: (i) the word "copyright" refers to common-law copyright; (ii) rights based in the *droit d'auteur* tradition will be referred to as "author's rights", which may also be used to identify the system as understood by the Portuguese scholar; (iii) "Copyright Law" refers generically to the legal system in different countries and worldwide, used here when Ascensão identifies the concept with uppercase letters.
However, some of the original intent is inevitably lost in translation. It is sometimes hard to fully understand when Ascensão is refering to the general system of Copyright Law or the European continental tradition if he has not capitalized the words. Besides that, the Portuguese scholar sometimes refers to the system as "Direito Autoral", meaning "author's and related rights", and sometimes as "Direito de Autor", referring to the original form of the system, aimed at intellectual creators. This differentiation may also have been used considering the

covery; **4.** The hegemony of the business aspect over intellectual creation in the 20th century; **5.** Intellectual property's current paradigm; **6.** Economic impact; **7.** Globalization and information; **8.** Political impact; **9.** Copyright Law opposition to the right of access to information and culture; **10.** IT technologies absorption by Copyright Law. Technological devices which forbid access or reproduction on the internet; **11.** Rights Management Information; **12.** The appropriation of information; **13.** Transition to an Investment Protection Right: authorless Copyright Law; **14.** Electronic management: workless Copyright Law.

1 "INTELLECTUAL PROPERTY": A STRATEGIC AND CONTROVERSIAL DESIGNATION

The very expression "Intellectual Property" provides us with a fruitful gateway to the controversies and strategies in this field.

This expression has its origins in the 18th century, when the French Revolution heralded the end of all privileges. The privileges granted to authors (printing privileges, for example) were thus threatened.

Nevertheless, soon a new qualification is created, to remove that obstacle. Copyright Law would not be a privilege, but a property. The author has the property of the work. Even more: it was the most sacred of all properties. The men of the pen largely generated the French Revolution; as the property revolution par excellence, it is not surprising that the authors'

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differences in legal language between Portugal and Brazil. The precise translation of these last two concepts is of little consequence to this specific text because they often seem to be used interchangeably, so using different words would probably confuse the reader, leading us to unify them here under the term "Copyright Law"]

interest was protected under a new label in this favorable domain.

The expression was thus born aiming to prepare an understanding favorable to the recognition and expansion of author's rights. In fact, from then on, the qualification as property supported the permanent reinforcement of the faculties attributed to the author.

This is still the case today. Thus, in Germany, it is practically consensual to qualify it as "spiritual property" (*geistiges Eigentum*). In reality, this is a name, not a technical categorization. Copyright Law is not property: the ubiquity of the work does not allow it to be subject to the spatially determined regime of the thing that is the subject of the property. In the bad sense of the word, the reference to property (*Eigentum*) has an *ideological* purpose of justifying the almost indefinite stuffiness of the author's right. The qualifier "spiritual" (*geistig*) has no actual function, because it does not turn into property something that property is not.

2 *DROIT D'AUTEUR* VERSUS COPYRIGHT

Contrary to what the increasing globalization of copyright and related rights protection might lead one to believe, there has never been historically a unitary conception of copyright.

Common law remained within the view of printing privileges: it was basically unaffected by the French Revolution. This led to a certain materialization of author's rights. The basis of the right was the copyable work; the paradigmatic faculty was that of reproduction (copy-right). Copyright was thus

based primarily on the making of copies, so that the copies' economic utility became more relevant than the creativity of the subject matter to be copied.

The evolution in the countries of the Romanistic system of Law was different. Since justification there was based on the extreme dignity of intellectual creation, the basic element resides in creativity, therefore in something that concerns the author more than the work itself. German scholarhsip, above all, took this idea to its ultimate consequences in the 19th century.

The 20th century allowed, in several aspects, to shorten this gap between systems. Intense international contracting, predominance of the North American economy and mercantilism of the European (Economic) Community contributed in this direction. But they did not eliminate the phenomenon: it alone explains the divergences that still exist today. International Copyright Law is a bridge between distinct systems. It brings them closer, however, by the nature of a right that has intellectual assets as reference.

3 PERSONAL (OR "MORAL") RIGHT'S LATE DISCOVERY

A very telling element in this historical journey is the late discovery of the author's personal right - or personal aspect of author's rights.

Initially, there were no mentions of moral rights. Author's rights were a unitary reality that attributed an exclusive right to compensate creations. It was not thought

of separating a patrimonial right from a personal right of the author.

The autonomization of "moral" rights is a French discovery of the late 19th century. Previously we would have qualified it as personal rights; *moral* is more related to the French language.

This was a discovery at law's boundaries. It aimed to justify the additional granting of faculties that the law did not contemplate. To this end, in addition to a patrimonial right, **a** moral right was conceived.

French scholarship has taken this "moral" right to the paroxysm. It discovers an ever-increasing number of faculties that it imputes to the moral right. It links the moral right to personality rights, so that this former right becomes independent of the extinction or transmission of patrimonial rights. This leads to the dualist conception of author's rights: there would finally be two distinct rights, one personal, the other patrimonial. Finally, in an extreme act of foolishness, the moral right is considered perpetual. Even today, claims by descendants or pseudo-descendants of Victor Hugo, for example[92], are recognized in French courts.

The "moral" right has widened the rift between author's right systems. The United States of America does not recognize it, joining the Berne Convention without even bothering to change the domestic law. However, even within

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92 See Court of Appeal of Paris' judgment, 31.III.04, *in* RIDA 202, Oct. 2004, 292, which recognized the legitimacy of Pierre Hugo, as one of Victor Hugo's heirs, and held that a publication "posing as" a continuation of *Les Misérables* violated Victor Hugo's moral right to this work.

the Romanistic system there is diversity. Germanic countries do not accept the dualistic conception: author's rights are a unitary right, which like many others comprises personal and patrimonial faculties, without forming separate rights[93].

Patrimonial and corporate evolution of Copyright Law, which develops from the 20th century to the present one, is reflected in the application that is made of the "moral" right. It appears more and more as a tool to make money, and not as an institute of personality protection. It became possible to profit cumulatively from both the author's patrimonial right and his "moral" right.

This is a very dangerous evolution. It manifests itself in the normative and jurisprudential orders of countries that suffer the influence of the French scholarship. It represents today one of the greatest obstacles to Copyright Law systems' harmonization worldwide.

Fortunately, this conception has not advanced outside the french's sphere of influence. It is radically opposed by the United States, which wants to preserve its companies, particularly film companies, from "moral" claims by authors or their successors. Moreover, the Romanistic system has the counterpoint of Germanic rights, which maintain their monist conception of author's right. This is, in our view, much more refined.

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93 See, about this matter, our *O futuro do "direito moral"*, *in* "*Em torno a los derechos morales de los creadores*", AISGE/REUS, 2003, 249-271; *in* Revista de Direito do Tribunal de Justiça do Estado do Rio de Janeiro, n. º 54, Jan-Mar. 2003, 47-67; and *in* Revista da ESMAFE (Recife), vols. 7/8, n os16/17, Jul.-Dec. 2002-Jan.-Jun. 2003, 377-408.

Such diversity represents one of the causes (although not the main one) of the international instruments always leaving aside the personal aspects of author's rights. About this, almost everything is limited to the provision of art. *6 bis of* the Berne Convention.

4 THE HEGEMONY OF THE BUSINESS ASPECT OVER INTELLECTUAL CREATION IN THE 20TH CENTURY

As Copyright Law is linked to technology, one must always consider the position of the entrepreneur who controls the technique. This was evident from the very beginning of Copyright Law, with the invention of the printing press: the first privileges were not granted to authors, but to printers.

The evolution until the end of the 19th century was not uniform. Under common law, the work-based reproduction right naturally gave a relevant position to the entrepreneur: he was easily considered the copyright owner. In the continental European system, a very strong emphasis on creativity made the producer occupy a secondary place in the attribution of rights[94].

The 20th century thwarted this picture. Cultural industries have developed and demanded ever greater investments. What happens in the cinematographic work is illustrative. On the other hand, the influence of intellectuals declines in a market-dominated society.

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94 This did not prevent the practical subordination of authors to those they had to turn to for the economic exploitation of the work.

Despite this evolution, the declared justification of Copyright Law does not change: it would always consist in rewarding and stimulating the intellectual creator, or the intellectual creation. But, in practice, copyright industries are the drivers of this motivation, because they indirectly benefit from the author's exclusive rights.

Direct protection for producers were expanded. Related (or neighbouring) rights emerge. While the right of performers still rewards a personal performance, phonograms (and videograms) producers and broadcasting organizations are purely corporate. *Direct* copyright protection for corporations is thus admitted.

European economic integration movements have made an important contribution in this regard. They are very much inspired by the United States and its protection of copyright industries. The promotion of culture has to this day hardly any communitarian significance: the European community is still basically a common *market*. Therefore, when people talk about protecting culture, it is really cipher language meaning to strengthen benefits of "cultural" industries. And this benefit is achieved by increasing the costs of using intellectual works - that is, by making culture more expensive and therefore harder to access.

Another justification for Copyright Law was then clearly presented. References to the creator and his protection are maintained, but adding the protection of cultural (or copyright) businesses. This is the basis to explain almost all the legislative innovations that have been introduced. United Kingdom's entrance into the European Community facilitated this evolution.

The current trend is towards unifying author's rights and related rights terms. In fact, if we consider business concerns as the basis of both, everything justifies their convergence. To this end, provisions established for authors are applied to artists, and those of the latter are applied to producers almost entirety. This is literally what happened in the 1996 WIPO treaties for the benefit of phonogram producers.

5 INTELLECTUAL PROPERTY'S CURRENT PARADIGM

We argue that Intellectual Property's paradigm, which has been glossed over to exhaustion since the turn to the 19th century, is exhausted. It is impossible to continue to claim that Intellectual Law has as its objective the defense of the intellectual creator. Because, if this were the case, the most relevant aspects of today's evolution would be left unexplained.

We even speak of Intellectual Law in such a way that it also covers so-called "Industrial Property", as the evolution is very similar in the field of *industrial innovations*. Thus, it is clear that patents protects the companies, and only very secondarily the inventors. Inventors will ultimately have to cede their inventions to companies; except in rare cases, they do not even bear the enormous costs they would have to incur when aiming to register their patents in various countries, to defend against the use of third parties. In fact, inventions became a by-product of companies, with isolated inventors' genius being the marginal exceptions

Let us equate the issue. Copyright Law was born in the transition from the 18th to the 19th century under a well-

characterized paradigm: protection and encouragement of the intellectual creator. The argument is based on the maximum dignity of the creative act, on the situations of helplessness and even misery to which the author would be condemned and on the advantages granted by the community in granting the exclusive right to have at the end of a short period the free and full enjoyment of the intellectual work. It is important to note how, in a time of exaltation of liberalism, the primacy of the public interest commanded the structuring of the Copyright Law: read the North-American Constitution, for instance[95].

Subsequent developments move further and further away from this model.

Instead of focusing on valuable works, Copyright Law protects the banalities of mass society; instead of being an institute of reconciliation of public and private interests, Copyright Law tends to become an absolute right, where limits are named *exceptions;* instead of an exclusive for a limited time, exclusive author's rights will often reach 150 years, if the works are created in the author's youth;[96] economic advantages gained are much more that of copyright companies (often the direct rights holders) than that of the intellectual creators.

How can this inversion be explained?

Because another entity that competes with the author and surpasses him as beneficiary of the right has appeared,

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95 Article 1, section VIII, cl. 8, of this Constitution vests in Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.."

96 Works of the impressionist painter Monet have not yet fallen into the public domain!

as we said: the copyright company. Copyright Law is today a hybrid, in transit to become a pure investment protection right, or at most of "cultural innovations".

Let's be clear. It is not anomalous that investments are protected. Law must intervene here, creating conditions so that those who innovate and take risks are not subject to be overtaken by those who did nothing and now compete in a superior position because they did not have to support the investment. This is a parasitic and penalizing attitude for those who innovate and invest, which the law should dissuade.

Investments must therefore be protected. What is anomalous is that this protection is done through Copyright Law.

It is time to highlight the blatant contradiction of the usual authorialist panegyric. Intellectual creators' nobility is praised to the extreme, only to then protect trivial innovations, for the benefit of companies and not those who are responsible for intellectual creation[97].

This paradigm must be questioned. We must directly address the problem of corporate protection and avoid confusing it with a branch of law based on creation, that grants personal faculties and that is inseparable from justifications of promoting true culture.

No doubt, the goal is bold and immediately meets great resistance. But everything always starts with the spirit: we

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97 Right from the start, software and database laws have greatly expanded situations in copyright that the rights revert to the company, and not to the physical creator of the program.

have to understand what is going on and clearly define our objectives.

The path before us is the specialization of corporate rules, which must be distinguished from Copyright law.

In this sense (and only in it), assigning *sui generis* rights to databases's content follows a good path. This entrepreneurial right is separated from copyright. The entrepreneur ("maker") of the database is protected in his investment, without dependence on whether it is a creative database, and therefore whether it is subject to author's rights[98]. It is the corporate contribution that is protected. From this angle, which is the one we are looking at here, it is correct.

This is a distinction that seems indispensable to us for the clarification and credibility of Copyright Law in the 21st century.

6 ECONOMIC IMPACTS

Economic impacts of intellectual property profoundly marks our times.

Even in the field of Copyright Law, numerous studies done on the so-called copyright companies have pointed out their large and ever-growing share in the gross domestic product of industrialized countries.

A dematerialization of the economy is taking place, making strategic goods increasingly abstract, further and further away from realities immediately capturable. This

[98] It has not even been called a related right but, anodyne, a *sui generis right*.

understanding applies to intellectual rights, which are by nature perfectly adapted to the predominantly virtual character of contemporary economic life.

Intellectual rights allow the establishment of exchange relations that consolidate holders' positions of domination. They imply a type of subjection, excluding the possibility of profoundly altering relative situations in the foreseeable future.

Naturally, positions assigned are favorable to the industrialized countries. Until recently, these positions acceptance by developing countries (not to mention the least industrialized among developed countries) was burdensome and time consuming. Results came from economic and diplomatic pressure that only had long-term effects. Even international conventions in this area were subject to a slow accession process that created great asymmetries and largely deprived them of the desired effectiveness.

The situation changes radically with the establishment of the World Trade Organization.

This is part of an Agreement on Trade-Related Aspects of Intellectual Property, known as TRIPS. Countries have to accept it in order to participate in world trade. As it becomes almost unthinkable for a country to exclude itself from such trade, submission to the rules on intellectual property is in practice compulsory, whatever their content.

By this agreement (art. 3/1), the member states undertake to accept the substantive principles of the Berne Convention and of the Paris Convention, those of the 1989 Treaty on Semiconductors, and partially those of the Rome Convention on Related Rights. In other words, fundamental

principles of the conventions on Intellectual Property, which were secured so slowly and strenuosly by the existing multilateral conventions, are imposed at a stroke, whether or not the states directly adhered to them.

The TRIPS is not self-applicable. Its principles are binding only on States; they must then be transposed by them into domestic law. But the WTO has means to ensure the effectiveness of that obligation.

WTO foundation, and with it the imposition of the TRIPS, does not limit itself to accepting the international previsions in force. It strengthens them considerably. Thus, even countries that cannot even meet the primary needs of their populations must grant a high level of protection to intellectual goods that they are not in a position to produce.

Bringing this matter under the scope of the WTO[99] reveals yet another significant aspect.

Intellectual rights are regulated by the WTO because they (or their subject matter) *have been turned into a commodity*. Namely, Copyright Law is so regulated because it is stripped of all personalistic or cultural meaning. The WTO ignores "moral" rights; and no considerations are valid before it other than those translatable in economic impact.

In practice, the spiritual aspects of author's rights are abrogated. It is a commodity like any other, a mere component of international trade.

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[99] Making the position of the World Intellectual Property Organization (WIPO) secondary.

7 GLOBALIZATION AND INFORMATION

Globalization cannot be ignored in this area.

Everything in technological development points to globalization.

It emerges from the universality of the Internet. The Internet has no borders, in fact, except for the fragile ties that can still be found in the location or headquarters of the network services intermediary providers and in the eventual national assignment of domain names. Besides that, all content tends to be available to everyone. This implies a powerful integration factor.

It also emerges from the dissolution of one of the two conflicting blocs during the cold war and the primacy acquired by the other, with few restrictions. The economy becomes globalized, lifestyles are increasingly homogeneous, and standardized information is simultaneously served almost everywhere in the world.

Much could be said about the phenomenon, but not everything belongs in this story here[100]. We limit ourselves to stressing two aspects.

The first is that the driving instrument of globalization is information.

Globalization is fostered by the standardization of people, in their points of reference, in their tastes, in their

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100 See on this subject our *Sociedade da Informação e mundo globalizado*, *in* "Globalização e Direito", Universidade de Coimbra/Coimbra Editora, 2003, 163-179; *in* Revista Brasileira de Direito Comparado, Rio de Janeiro, n. 22, 1st semester 2002, 161-182, and *in* Intellectual Property and Internet, Curitiba, Juruá Editora, 2002, 15-31.

values or devaluations, by means of what is pompously called information. And information requires fast communication channels that make it reach people directly and immediately. This is guaranteed today in almost totality: the globalization of communications is a fact.

Next is the globalization of content, which is very much grounded in the Law. There is a whole expanding branch of IT Law preparing this unification. E-commerce is one of the sectors in which this globalization is advancing rapidly.

The second aspect relies on an evaluation of the phenomenon.

Globalization is a fact. That fact is largely a inevitabilty. It is the result of technological evolution and other historical circumstances, which prefigure the circumstances in which mankind will live afterwards.

But globalization is not only a fact: it is also a policy. The way globalization is done is not disconnected from human choice. Within broad limits, it can be driven in one direction or another. Like all politics, it presupposes a minimum of collective freedom of determination and individual freedom of participation.

Therefore, absolving everything in the name of globalization neither explains nor justifies anything. What is necessary is to distinguish the points at which human intervention is possible and those that are the result of historical circumstances of collective existence.

8 POLITICAL IMPACT

It is also paramount that we weigh in the political impact of Copyright Law and new technologies.

We assume that it is a sociological law that in contact between various peoples, the more developed one prevails. Or, as Toynbee states, the more technologically developed culture prevails over the others, even if from other points of view, namely that of spiritual development, the others are superior.

It is indeed evident that a movement towards global integration, served by dizzying technological development, will particularly benefit the most developed countries. The advantage of the others could only come in the very long term, after they have paid the price of the creative destruction of their current productive structures, which lack competitive capacity.

But to this is added the *expansion of intellectual property*, which is the topic we specifically address. The imposition of standards favorable to the more developed ensure the freezing of current relative positions. The less developed countries will only get out of the situation they are in through the good will of the donors. They become dependent on this unpredictable factor.

Very sophisticated schemes have been devised, with the result that ever-growing areas of life are subject to exclusive regimes. Those who participate have to obtain authorization, that is, to pay royalties. This maintains and aggravates dependence.

This manifests itself in the most varied aspects of life.

The less developed countries need to computerize themselves quickly. However, to do this they will have to buy equipment they don't produce and pay royalties for the programs they use.

The least developed countries are dealing with major epidemics. However, to fight them, they have to pay for very expensive drugs, if they are protected by patents; or, if they are not, they have to overcome the greatest resistance if they want to use generic drugs or import them from third countries.

Agriculture would seem to be a refuge zone. But to use transgenic products one will have to import them and also pay royalties to maintain production.

What about trade? Mini-commerce escapes for now. But if one wants to take it up a notch, one will have to resort to franchises and pay corresponding *royalties*.

This brief excursion is intended to draw attention to a phenomenon that seems to us to be of the utmost importance. The space of freedom of life has not expanded; on the contrary, it narrows more and more. Areas that were free are becoming the object of reservation. This weighs heavily on countries where the intellectual rights in question do not originate from[101].

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[101] On the perplexities surrounding information in the "information society", see our *O Direito de autor no ciberespaço, in* "Portugal-Brasil ano 2000", BFDC, 40, Coimbra Editora, 1999, 83-103; *in* Revista da EMERJ (Rio de Janeiro), vol. 2, n. º7, 1999, 21-43; and *in* RDR (Renovar), n. 14, May-Aug. 1999, 45-64. It is published in our collections "Estudos sobre Direito da Internet e da Sociedade da Informação", Almedina, 2001, 149-171, and "Direito da Internet e da Sociedade da Informação. Estudos", Forense, 2002.

The second aspect concerns the importance of information in the political aspect.

The world is "hot" controlled by guns. But it is "cold" controlled by information.

Information appears as the alternative to war, to get the same results but without antibodies generated by war.

The slogan never openly proclaimed by those it concerns - *whoever dominates information dominates the world* - is a reality today.

Information is thus not only the decisive factor in today's economy. It is also a factor of domination, which erodes, prepares the onrushes of those who receive it, and allows anticipation by those who possess it.

In his excellent book *Code and other laws of cyberspace*, Lawrence Lessig states that a spying and intrusive network controlled by Washington is not foreshadowed[102]. It is to be feared that this is already out of date[103].

The theme of information and its control is definitely at the core of the whole issue of Copyright Law and technological development. It is not a lateral aspect, a peripheral discipline. World control and the future of our civilization depend on its technical-legal structuring.

So the topic of information will require further remarks.

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102 *El Código y otras Leyes del Ciberespacio* (Spanish translation), Taurus Digital (Madrid), 2001, 12.

103 The progress made by the Spanish government in the fight against ETA since the United States accepted the classification of ETA as a terrorist group has been spectacular.

9 COPYRIGHT LAW OPPOSITION TO THE RIGHT OF ACCESS TO INFORMATION AND CULTURE

We live in the "information society". This is the slogan that is universally displayed. And today we go even further and talk about "knowledge society".

It would be wiser, however, to stick with "*communication society*". Broad and universalized communication is the irrefutable fact. As to whether it is or is not an information society would require delving deeper and making distinctions that go beyond our objectives[104].

But it was also intended that the information society is the cultural society.

We can hardly claim to live in a *cultural society*. A society that moves according to audience ratings; in which books sell because they are *best sellers*, not because of their content; in which the media and advertising appeal to the most base sentiments in order to attract attention (i.e., sell), is certainly not a cultural society[105].

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104 See the penetrating analysis of Castanheira Neves, *Uma perspectiva de consideração da comunicação e o poder - ou a inelutável decadência eufórica,* in "Estudos de Direito da Comunicação", Instituto Jurídico da Comunicação, Coimbra, 2002, p. 89-105. Neves distinguishes communication-communication, communication-information, and communication-publicization, analyzing them successively. Socio-cultural entropy, controling public opinion as the most effective weapon of power, and organizing communication in companies aimed at economic exploitation are masterfully pointed out in what he presents simply as "Notes for a reflection outline".

105 The same imbecilizing effect is produced by political propaganda.

It is a society heavily nourished by today's so-called *content industries*.

We fear that this diet is quite indigestible. This "culture" injected into the people is not popular culture, because in it the people are not active agents, but rather passive consumers[106].

Let us specifically attend to the contraposition between Copyright Law and the right to access information/culture.

In fact, amazing possibilities of access to information and cultural manifestations are created. How can Copyright Law clash with this explosion that multiplies the number and the potential use of protected works?

What happened in Germany with the photocopy machine is shocking, and at the same time most enlightening. In 1955, the conspicuous BGH (Federal Court of Justice), ordered manufacturers of recording and reproduction devices to cease what it considered to be illegal activity[107]. The court relied on the fact that photocopying threatened the rights of authors, but made no showing that the practice actually caused harm to authors: it was satisfied with the consideration that the machine is by its nature capable of causing such harm.

This case is elucidative of the way in which Copyright Law can act as an obstacle to technological development and its inherent cultural and sociological advantages[108].

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106 As noted by José Afonso da Silva, *Ordenação Constitucional da Cultura,* Malheiros (São Paulo), 2001, V, n. 8.

107 Judgment of May 18, 1955, in BGHZ, 17, 266-269.

108 Something similar is currently happening with MP3 programs that allows network exchange of computer files.

Copyright Law has always been the superstructure of a technology. It only became possible with the printing press; it evolved according to the subsequent technological transformations. ITs'[109] impact is quite elucidative.

Nevertheless, the relationship between Copyright Law and technologies is a love/hate relationship. They were celebrated because they opened new fields of expansion and economic exploitation under the cover of Copyright Law; but they were feared and even persecuted because they allowed the expansion of difficult-to-control ways of using works that were intended to be reserved.

The defensive attitude towards a new technology has always been the prevalent one in periods of emergence of innovation and is certainly the most primary one. With this, the extreme defenders of Copyright Law become Malthusians, because they end up turning against the very progress of technological means.

But there is also another way of reaction. It consists in extending Copyright Law to the new technological tools, in order to transform them into the object of exclusive rights, even if at the cost of disfiguring the traditional bases of this institute.

This is what happened with IT, which we will examine specifically below. But we already note that this did not prevent the Malthusian tendency from manifesting itself there simultaneously.

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109 [Translation note: In Portuguese, there is a preference to use concepts based on the idea of "informatics", such as "informatics goods". However, English speakers refer more commonly to "computer"-based concepts, such as "computer sciences". We chose to base the translation on the idea of "Information Technology" or "IT", which seemed closer to the original intention]

10 IT ABSORPTION BY COPYRIGHT LAW. TECHNOLOGICAL DEVICES WHICH FORBID ACCESS OR REPRODUCTION ON THE INTERNET

The first intervention occurred in the very modeling of the legal nature of the new IT goods. They were considered *works*, therefore, reality protected by Copyright Law, notwithstanding their nature of mere technical instruments.

This happened with computer programs and databases. So it was with computer-produced "works" in the UK. It has also happened, although only partially, with topographies of semiconductor products. The position to be taken with regard to multimedia productions is still under discussion.

However, the very corporate exploitation of the Internet will also be protected through Copyright Law.

It is very important to take note of what is happening with "technological protection measures" and "rights management information".

The uncharacteristically so-called *technological measures* condition access to Internet sites, or prevent certain operations such as reproduction from taking place, generally making them dependent on authorization.

Access to online sites can be conditional, however, whether or not the content is authorially protected. Sites that reports stock market quotations can be of conditional access, in the same way as virtual museums. There is no distinction based on whether or not it contains protected intellectual goods.

Other laws already generally prohibited[110] the circumvention of any conditioning devices on the Internet. What has happened is that author's right protection has been given to the integrity and operation of these devices. The author is now considered to have a right to oppose such incursions, regardless of whether he or she is the site's rightsholder.

This assignment is intended to characterize the circumvention of these devices into author's rights infringement. But circumvention is exactly the same whether or not there is authorially protected content on the site in question. What's more, the "authorial" protection of the devices does not protect the author, since he has in principle already given his consent for the work to be made available and is prevented from commercial exploitation. It is the rightsholder of the site who is protected. If the site is commercial, it is a corporate entity who benefits from "authorial"[111] protection. So, we have here a recourse to Copyright Law to benefit essentially the business exploitation of content.

In particular, the erasure of legal rules that results from the legally determined inviolability of technological protection devices must be emphasized.

Author's rights, like every subjective right, are the result of a complex of positive and negative rules. From their interaction results the balance of the result intended to be achieved.

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110 Therefore, regardless of whether or not there is a protected intellectual work. See Decree-Law n. 287/2001, of November 8th, on the regime applicable to the conditional access offer to television, radio broadcasting and information society services, transposing Directive n. 98/84/CE, of November 20th.

111 Or who it is intended to benefit.

The negative rules of author's right are the limits or restrictions of the right; they are also spoken of as *exceptions*, but without justification, because they are as normal as the positive rules. The limits allow the exclusive right granted to the author to be reconciled with the public interest and with the positions of other holders. They are fundamental to the fair attainment of the purposes of author's rights.

But if technological devices indiscriminately forbid access or reproduction, the *consequence is the practical suppression of author's rights limits in cyberspace*. The balance so laboriously worked out disappears. Author's rights become absolute rights, in the sense of unlimited rights. It will be a unique case - a monster in a legal universe characterized by the functional pursuit of interests.

How to solve this anomaly?

The European Community, in the Directive 2001/29, of May 22, on certain aspects of copyright and related rights in the information society, has proceeded to a restrictive delimitation of the limits of author's rights, in art. 5; and in art. 6 it has inserted a list of those limits that, in order to be exercised, would allow circumventing protection measures.

The solution is terrible in every way. The exhaustive list lacks the malleability that results from the general clause of *fair use* in American law; and if the limits are justified, they must all allow the circumvention of technological measures. The result is that there are truly fundamental limits, such as the right to quote, which are in Art. 5 but are omitted in Art. 6![112]

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112 Moreover, the envisaged solution is based primarily on self-regulation, and is structured in such a way that it is difficult to see how the circumvention, even when authorized by law, will ever be effectively realized.

The solution was transposed, and had to be, by Law n. 50/2004, of August 24th, that added articles 217 to 222 on this matter to the Copyright and Neighbouring Rights Code. Art. 221 now filters the limitations whose exercise allows the use of circumvention devices.

This illustrates well the problems that arise. Technical changes altered the law, but the law had no courage to intervene.

But what interests us is the general theme. We want to elucidate how serious the issue is[113].

11 RIGHTS MANAGEMENT INFORMATION[114]

As for the so-called "rights management information", it qualifies those instruments that allow detecting the uses that are made of a work or performance on the network[115]. With them it will be possible to know whether or not an excerpt available on the network has been reproduced, a song listened to, and so on.

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113 Thus, Brazilian Law n. 10.695, of July 1st 2003, came, according to some interpretation, to exempt private use in general, and not only the reproduction of small excerpts, as established in art. 46 II of the Copyright Law. What meaning can this rule have on the Internet, if access or reproduction is conditioned?

114 [Translation note: albeit similar in some aspects, this should not be confused with the concept of Digital Rights Management, since the latter is much broader]

115 On this matter, as well as on the technologica lprotection measures that we have already mentioned in the previous issue, see our *O direito de autor no ciberespaço, in* "Portugal-Brasil ano 2000", BFDC, 40, Coimbra Editora, 1999, 83-103; *in* Revista da EMERJ (Rio de Janeiro), vol. 2, n. 7, 1999, 21-43; *in* RDR (Renovar), n. 14, May-August. 1999, 45-64; *in Estudos sobre Direito da Internet e da Sociedade da Informação,* Almedina, 2001, 149-171; and *in Direito da Internet e da Sociedade da Informação - Estudos,* Forense, 2002.

These devices significantly improve the knowledge that one can have of the uses actually made. They have strategic importance at various levels. They provide management security. They give a new role to rightsholders, who can now precisely control the uses instead of being passively subject to unreliable calculations by collectve management societies.

In addition, a radical change is foreshadowed in the collective management of online works. If the machine says it all, the intermediation of the collective management entity becomes superfluous. The rightholder himself, particularly the large original or derivative rightholder entities, can carry out the management directly. This opens up the possibility of a whole new relationship.

But these methods also carry dangers.

The provisions for "rights management information" raise other questions, in addition to those previously mentioned.

What is granted, as happens with the so-called technological protection devices, is a guarantee of a procedure, which is foreseen as having an authorial character but which will directly benefit the one who exploits the work, i.e., the online site entrepreneur. He is the one who is protected by a sanction that is presented as being of Copyright Law. This is yet another manifestation of the universal recourse to this branch of law to obtain business protection for IT assets.

But the strategic significance of these devices goes far beyond what it might appear.

The information is ineluctably associated with the presentation of the protected work or performance. Any network use (for our purposes) is detected. This allows for the imposition of Copyright or Neighboring Rights charges.

But the one who determines what is protected material is the rightholder, or, to be more exact, the network businessman.

The user has minimal possibilities to react against the qualification of a content as protected. He can only do it *ex post*, but how?

The existence of a protected work or performance is not the result of a fact, but of an assessment. The mechanism will thus be able to qualify as such a daily news item, a work in the public domain, the *Odyssey,* and so on. A country that has more extensive protection than another will impose its rules, without giving the national user any chance to react. And in this case, Directive n. 2001/29/CE, which we mentioned above, does not even foresee the possibility of circumvention of the devices that provide information on the use made.

In reality, all this goes in the direction of erasing the intellectual rights holder and replacing him with the economic operator. All content tends to get confused, so that rights will be charged on national anthems or pictures of streets in Chicago, as they are charged on truly protected works or performances.

12 THE APPROPRIATION OF INFORMATION

Another sector, no less important surely than those examined so far, is information.

It represents a fundamental aspect in collective life: the information society could not fail to highlight it.

We have already[116] touched on an aspect that we could not go further develop, but which is extremely significant: information today represents the most important instrument of domination at world level. The bellically strongest power can, after all, lose a war, or at least come out of it with deep wounds that embitter the military victory. Information is the alternative: it is increasingly able to achieve the same objectives without incurring the same risks[117].

Information is also fundamental in the economic aspect. This is why it is said that information has become a production asset in the society we live in; or, more understandably for the uninitiated, that the use of information transformed in knowledge makes the difference in the economic performance of various countries.

But information is first and foremost fundamental in the everyday lives of all of us. People's culture also depends on the accessibility of the information they need.

That is why information has always been considered a free good. I must respect the author's right on the book I read; I can't plagiarize it, or trade this right without permission. But the information I have taken from it is completely available and I can use it as I see fit, even for commercial purposes.

However, just as we are witnessing the assault on private use, we are also witnessing the assault on the freedom of information. After all, information is being appropriated by various means in this information society. Information itself is being sold. I can no longer use it freely.

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116 *Supra*, n. 8.

117 Of course, we imply that in politics, particularly in international politics, the information disseminated is neither neutral nor objective.

The phenomenon has many facets, in the most diverse sectors. We will limit ourselves to considering one, which mainly concerns the field of information technology itself.

The European Community has created a so-called *sui generis* right over the contents of databases[118]. Whether or not they are creative, in any case the "maker" of the database has the reserve or exclusive right over the extraction and commercial use of substantial parts of the contents of the database.

It is a pure right over information.

The content of the database is the data or information it contains, as an intangible element.

Restraining the commercialization of third-party databases (or their contents) by those who wish to avoid spending the same investments as the database maker is a goal to support, although it could be achieved by unfair competition.

However, prohibiting the reuse of information seriously affects the availability of sources in the information society. Scientific and cultural dialogue in general presupposes the availability to all of the existing elements of information. Monopolizing information creates very serious obstacles. Think of the doctoral student who needed to collect scientific data for his dissertation. Will he now have to pay for the use of this data if he later wants to publish it?

There is no need to elaborate further here, but it is worthwhile to be aware of the dangers involved in adopting this right.

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118 We have already mentioned this *above*, n. 5.

13 TRANSITION TO AN INVESTMENT PROTECTION RIGHT: AUTHORLESS COPYRIGHT LAW

We have now entered the conclusive phase. In many aspects, it has become clear the deep metamorphosis that the Copyright Law undergoes in a very short period of time. IT was the closest catalyst to these transformations.

As a sum of all of them, we have the emergence of the copyright company, today the central entity of Copyright Law. The author is being erased: the personalistic aspects are practically absent in this evolution. But the concern with commercialization is omnipresent, to the point that one could say that author's rights themselves are treated as commodities.

In this way, we can say that we are facing the reality of author's right without an author.

There has been talk of the "death of author's rights". It is necessary to understand what is meant by this metaphor.

We do not foresee the disappearance of the Copyright branch in Law, with the consequent return of intellectual assets to a regime of freedom. On the contrary, we see the author's protection being swallowed by the protection of countless other applicants for exclusive protection. The branch may even continue to be called Copyright Law: what happens is that it is not the author who is actually the fulcrum or the ultimate addressee of this branch. The author's protection tends to be dissolved in the protection of a plurality of contributions. And behind everything and unifying everything is the copyright entrepreneur, as the ultimate referent of protection.

And so. When author's right and related rights are equated, or when banalities without a minimum of creativity are protected, Copyright Law remains; but the author is no longer the nuclear reference point. After all, "cultural" productions are protected, whether or not there is an author. Therefore, there is not the death of Copyright Law, but rather the even more dangerous reality of Copyright Law without an author.

This authorless Copyright Law cannot fail to undergo a thorough revision, because it is no longer founded on the high degree of creativity that led to the granting of such an exacerbated level of protection.

14 ELECTRONIC MANAGEMENT: WORKLESS COPYRIGHT LAW

But we not only have authorless author's right: we also workless author's rights.

The intellectual work would seem to be the unsurpassable milestone in the structuring of the Copyright Law. More materialized in the common law, more dignified in the romanistic systems, in any case it was the apparently well-delimited object of the rights granted.

But a development towards transferring protection to the company will not be concerned with these concerns. What matters is the reservation of content that can be commercialized, whether or not these are works. In fact, the very vulgarization of the uncharacteristic reference to *content* is significant of this uncompromising understanding.

The trivialization of the object of copyright, as well as the European Community's proposal, which is being developed, to

replace *creativity* with *originality* as a characteristic of the work, follow this path

Similarly, IT goods are protected as works - even if they are technical realities, in relation to which it makes no sense to even speak of intellectual creation[119].

At the same time, performances/services as the subject of related rights protection are being equated with intellectual works.

We will limit ourselves to one particular aspect, which is precisely related to the exploitation of online works. We are referring to the IT processes that allow the electronic (networked) management of the content available on the Internet.

Copyright Law was invoked for its acceptance. It was explained that it was indispensable for the protection of the author that all uses that were made of the works were marked.

The system was immediately extended to the performances protected by related rights[120] (which are dominantly corporate services, as already mentioned).

But as with technological protection devices, there is nothing to stop there. Electronic management can apply to any online content under the same conditions, without any real possibility of control by the recipient. This means that the justification found, of authorial protection, is fallacious: any

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119 J. Gómez Segade, *Desafios de futuro para el Derecho de Autor en la EU*, *in* "Actas de Derecho Industrial", XXII (01), 275-284 (281), warns for the need to curb the "technological Copyright Law", that has already enough amplitude. We would say that it is already too broad.

120 And also, in those countries that accept it, to the *sui generis* right of the database maker.

content can thus be subject to such management, whether or not it has the nature of a work, and whether or not it is protected[121].

This means that what is still presented today as a manifestation of Copyright Law goes far beyond its basic assumptions. After all, protection falls on any networked content, because it is no longer fundamentally aimed at protecting intellectual content.

We are thus moving not only towards a Copyright Law without an author, but also towards a Copyright Law without a work, or even a protected performance. The Copyright Law becomes a branch that aims prevalently at the protection of copyright companies. What content is made available on the net is indifferent, for the purposes of satisfying the interests of the businessman.

121 See *supra*, n. 11.

AUTHOR'S RIGHTS[122/123] IN CYBERSPACE[124]

SUMMARY

Introduction: **1.** communication and information; **2.** the author's rights inherent to the computerized use of on-line works; **3.** the right of making the network available to the public; **4.** the integration in the right of communication to the public; **I -** Author's rights and business: **5.** The reversion of the protection of the author to the businessman; **6.** Author and business in cyberspace; **II -** Author's rights and cultural dialogue: **7.** The "hunting for exceptions"; **III -** Author's rights and conditioned access: **8.** The conditioned access as a producer's right; **IV -** Author's rights and information on rights: **9.** The identification of the use of the works; **10.** The unprotection of the public; **V -** Author's rights and information society: **11.** The information society and its antitheses; 1**2.** Conclusion.

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122 This article is the translation into English of the original text in Portuguese: ASCENSÃO, José de Oliveira. O direito de autor no Ciberespaço. In: *ESTUDOS sobre direito da Internet e da sociedade da informação*. Coimbra: Almedina, 2001. p. 139-171.

123 Translator's note: the original article depicts *droit d'auteur* (in Portuguese "direito de autor"). The concept is technically different from copyright. The reader should be cautious about the concerning differences throughout the article.To depict that difference, the translator used "author's rights" to designate *droit d'auteur* and copyright only when used exactly like that by the author himself in the original.

124 Translated from Portuguese to English by Érico Prado Klein.

INTRODUCTION

1 Communication and information

We have witnessed in amazement an extraordinary flourishing of the media.

The ideal of the integral communication society seems to be within our reach.

We are approaching a situation where potentially everyone will be able to communicate with everyone by computerized means.

Powerful information highways, of which the Internet is the model, ensure the flow of large quantities and messages, in conditions of unsuspected speed and reliability.

Interactivity will allow the receiver to leave the merely passive position, which he only escaped practically with the telephone. It is not the maximum interactivity, which is merely an empty paradigm - that in which the message results from the contribution of all. But it tends toward something more than minimal interactivity, which is reduced to the formulation of requests: the addressee passes from the round table to being invited to the dinner table.

All this goes hand in hand with the creation of gigantic databases, made possible, not least by electronic means, which will accumulate all the goods that can be transmitted online than the recipients may want[125].

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[125] On another level, we are witnessing the development of digital broadcasting, which is also of great importance but which does not have interactivity.

It is said that this is how we reach the "information society". This is an obvious overstatement of the term: what we have is an integral communication society, not an information society. The content of the message transmitted is not necessarily information - or only is if we understand information in such a broad sense that it loses all precision. Anyone accessing an erotic website or playing a game is not informing themselves.

However, it is also true that, in parallel with the advance of these media, a type of society is developing in which information is playing a much more decisive role than before.

The qualitative leap in the field of information allows some to qualify it as a new *factor of production*, which would distinguish even more radically the countries that possess it from those that do not.

Logically, the countries that possess the information technology seek to protect, develop and value it before others, imposing protection schemes ranging from guaranteed secrecy to disproportionate exchange values.

We can express it in the most radical way: whoever dominates information dominates the world.

Therefore the control of information is increasingly the concern of States, now, through indirect and subtle means that prove to be much more effective than the previous ones.

The information society is thus a society that emerges with a fundamental contradiction inherent in it. It is born under the aegis of a universal and, in this sense, egalitarian communication, but on the basis of a profoundly unbalanced position with regard to control over information.

2 Author's rights in the computerized use of online works

How does the problem of author's rights arise in this environment?

We always rely on means of communication between computers. Signals are transmitted. These signals carry encoded messages. The content of these messages can be an intellectual work.

If such an intellectual work is protected by author's rights, the question is how its protection is to be ensured. A parallel problem also arises in relation to performances protected by rights related to author's rights. But we shall focus on what concerns the latter, since the author's rights remain a paradigmatic figure.

We begin by radically distinguishing two situations: the private use and the public use of the work.

If a work is transmitted digitally, between private terminals, this is purely **private use**: the problem of public use never arises. However, author's rights essentially consist of an exclusive public use of the work. Private use escapes it, apart from the exceptions provided for by law, which do not concern us here.

The question really arises in the case of public use: that is, when a work is placed on the network so that an indeterminate number of people can access it. Today's widespread experience of Internet access does not require us to specify further the conditions under which this can happen

The major technical-legal problem in this field has been to determine how the protection of the work thus made accessible is to be achieved.

If it is the author himself who puts the work on the network or online, he exercises a faculty that no one disputes. He may even do so by renouncing the exercise of his rights; or at least by leaving the work ostensibly open to all, by which he implicitly renounces any remuneration for the uses made of it.

However, let us make it clear from the outset that *whether the work is patented or encrypted is, from the author's rights point of view, irrelevant*.

Even if the work is encrypted, it remains available to indeterminate persons, provided they meet the conditions for access.

Now, placing the work on a network is something that everyone understands can only be done with the author's consent. author's rights grants a set of universal faculties leading to the author's exclusive right of public use of the work. A third party placing the work on the network without authorization would certainly be invading the exclusive right reserved to the author.

But what exactly is the right, included in author's rights, that is not respected in making such use?

The issue is an urgent one, both at the Portuguese and international level.

Nationally because, although the author is given the general right of public use of the work, the determination of the right in question is not irrelevant. Because the legal regime to which each right is subject varies.

At the international level the difficulty is greater. The rights that are guaranteed internationally are typical: only those that are specified in an international convention. It was therefore necessary to know whether the use of network works affected any of the rights provided for; and, if not, to regulate the new right that should be granted.

Most of the opinions expressed in this respect tended to consider that the computerized use of works was already prohibited by the existing conventions as it would correspond to some of the typical possibilities already provided internationally.

However, there was a striking division: almost all the powers already provided for were invoked. There was no agreement between the authors as to which type of power would be concerned.

It is known that the property right of the author comprises essentially three types of rights, or faculties:

– reproduction

– distributing

– communicating to the public.

For they have all been spoken of.

There was talk of author's rights, invoking the merely technical figures of reproduction that entering the computer memory would imply.

Distribution was mentioned, even though distribution necessarily refers to copies, that is, to materialize objects. This was the position of the United States of America; and even

more strangely that of the European Community, which argued that it was a rental right!

At last, there was talk of communication to the public, although the notion of "the public" used until then had nothing to do with the asynchronous and individualized access that networking provides.

Why this great disparity and these illogicalities?

This is because those who have spoken have demonstrated more opportunism than scientific impartiality. An attempt was made to force the new figure into one of the known types in order to draw the conclusion that international protection was already mandatory and guaranteed. In other words, this was an attempt to give retroactive effect to protection, without admitting that this was being done.

In reality, however, this form of use had not been envisaged internationally up to that point, but was the creation of a new faculty. This was also supported by a strong current of thought.

3 THE RIGHT TO MAKE THE NETWORK AVAILABLE TO THE PUBLIC

The international solution to the issue arises with the WIPO Copyright Treaty of 20 December 1996; as well as, regarding related rights, with the WIPO Performers and Phonograms Treaty of the same date.

Taking as basic the Copyright Treaty, the key text is art. 8, which has as heading: "Right of communication to the public". And of this tenor: "Without prejudice to the provisions

of Articles 11 1) (ii), 11 *bis 1)* (i) and (ii), 11 *ter* 1) (ii), 14 1) (ii) and 14 *bis* 1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right to authorize any communication to the public of their works, by wire or wireless means, including the making available to the public of works in such a way that members of the public may have access to these works from a place and at a time individually chosen by them."

We therefore have, at first sight, three characteristics:

– the non-specialization of the computerized use of works regime; this is referred to by way of illustration of a general regime

– integration into the right of communication to the public

– the definition of the essential core as a right to make works available to the public.

It is then clarified, very much in line with the electronic transmission that was actually intended, that this making available is done in such a way that members of the public can access these works at different times and from different places.

Therefore, the moment that is taken as decisive is when the work is made available to the public; it is at this moment that the author's authorization must fall. But it is added that this right is integrated in the right of public communication.

The first part is true; the second is not.

It is true that what is independent is the prior act of authorization, without which the work cannot be put on a

database or otherwise made available to the public. This act is independent of any use. It is an instrumental act in relation to the envisaged public use, but it cannot be done without the author's authorization. It is therefore this act and not the transmission, distribution or reproduction that must be the focus of protection.

But it is no longer true that such an act represents a mode of communication to the public.

There is communication to the public, by nature, only when there is an act of communication. An act of communication is a voluntary act, for the purpose of communicating. It supposes by nature a communicant and an addressee of the message.

But there is nothing like this when it comes to making the network available to the public. Everything is exhausted by the act of uploading itself. Any subsequent act of transmission is already, in terms of author's rights, irrelevant. The position of the law is very clear: what is decisive is the very act of making the network available to the public. That act is reserved by itself, even if no subsequent transmission has yet taken place.

Why then did the Treaty proceed in this way? For several reasons, including the will to consecrate a generic provision of a public communication right, which was not included in the Berne Convention. It manifests the ampliative tendency, proper of the current international instruments. But mainly, as we said, to create the illusion that that activity was already reserved and, with that, to propitiate the retroactive application in the Member States.

It has yet another effect: by fully integrating this activity into the right of public communication, the Treaty allows the application to this situation of the restrictions that applied to the right of public communication and dispenses with the need to create restrictions appropriate to the new situation of making the networked work available to the public.

The result is deeply unsatisfactory. The restrictions in the Berne Convention did not concern the right to communicate in general, which was not envisaged in the Convention. They concerned specific forms of communication to the public, such as representation, broadcasting and so on. These are very different from making available to the public on a network, so they will not be directly applicable here.

On the other hand, the Treaty dispenses itself from providing appropriate restrictions. Admittedly, Article 10 allows, in a limited way, "limitations and exceptions" to be created. But the indications given by the Treaty would be very important in this area.

4 INTEGRATION INTO THE RIGHT OF COMMUNICATION TO THE PUBLIC

What, however, is meant by the classification of the right to make available to the public on the network as a right of communication to the public? Is it binding in the domestic legal order?

It is not, precisely because it is a mere qualification. The domestic legislature, in complying with the Convention, must observe all the legal effects flowing from the qualification made; but it does not have to assume the qualification itself.

Each party is free to structure its own fundamental legal frameworks.

In this sense, the Brazilian author's rights law (Law No. 9,610/98 of February 19), proceeded correctly, adopting its own qualifications. Without going into the interpretation of the provisions of this law, what is certain is that making the work available to the public on a network is not integrated into the right of communication to the public. We may or may not agree with the adopted qualifications; what we cannot affirm is that there is a discrepancy between Brazilian law and the treaties, because the former has chosen its own qualification.

It is curious to note that this situation is not repeated in the other WIPO treaty of the same date, concerning interpretations or performances and phonograms. There, it already simply speaks of the right to make available, without linking this right to the right of communication to the public. The reason is easy to understand: we did not want to give the holders of related rights a right of communication to the public, which would be too extensive. Everything comes down to ensuring the right to make available, without necessarily qualifying it as a right of communication to the public, and therefore without dragging along with it any of the effects that might result from that qualification.

In any case, we have fixed the fundamental point: the basic right enjoyed by the author in cyberspace is that of making the work available to the public by computerized means. The decisive is the initial moment of the introduction of the work in the system. In this way, the author seems to have a well-protected position and occupies the central place:

since other actors, namely the producers, are either omitted or a much more modest place is reserved for them.

This may not, however, be the case. Many problems remain, visible as soon as we look more closely at the position of author's rights in the actual operation of the network.

Of these problems, we will select five major sectors:

I - author's rights and business exploitation

II - author's rights and cultural dialogue

III - author's rights and conditional access

IV - author's rights and rights information

V - author's rights and freedom of information.

I AUTHOR'S RIGHTS AND BUSINESS EXPLOITATION

5 The reversal of the guardianship of the author to the entrepreneur

An unaware observer will be surprised at the extraordinary increase in author's rights protection that has taken place in recent times

In the European Community in particular, after many years of lack of attention to the subject, the 1990s saw an escalation in author's rights protection. Harmonization was its watchword; in fact, its aim was both to bring author's rights protection to the highest levels.

The observer will be surprised. The European Community is an economic community; culture is the least of its concerns. Why, then, this extreme zeal for author protection?

And the surprise is even greater when we note that, in the same fundamental vein, the United States of America has successively extended author's rights protection to new areas. The movement is universal with respect to the most developed nations.

Looking further, we see that this movement touches only the patrimonial side of author's rights. Personal rights are barely mentioned. The United States of America has acceded to the Berne Convention, but still does not even provide for protection of the personal or 'moral' rights of authors. The European Community is carrying out the harmonization movement but is always postponing the harmonization of personal rights, despite the great disparities existing in this field between its members: France and the United Kingdom represent the extremes.

In reality, the protection that is carried out is not the protection of the Intellectual creation: it is the *protection of the investment*.

The author only apparently has the protagonism, because the rights granted to him are destined to revert to the so-called *copyright* companies - that is, the companies that make the exploitation of intellectual works.

Just as, from another point of view, performers are only protected so that the same protection will immediately apply to phonogram producers - who are pure businessmen and as such should occupy a very differentiated position.

How does this transformation from an author's right to a company right take place?

Through the original or derivative assignment to companies of the rights of the creator, in those countries that provide for it; or through the transfer, as a clause in fatal practice, of the author's rights to the *copyright* company in the contract of exploitation of the work.

In some European countries the situation is not so clear-cut, notably in those such as Germany, which prohibit the assignment of author's rights. But the result, in the end, is not very different. The company always benefits from the useful exercise of the rights that are formally attributed to the author. Therefore, the more rights are granted to the author, the more rights the company enjoys.

This is why the expansion of author's rights to works that do not justify it is understood. Such as computer programs, which are not the free expression of an intellectual creation, but the bound expression of a process.

The protection granted by author's rights is the most extensive of all intellectual rights. Recourse to author's rights means that the company has reserved for itself the most extensive protection among those granted to intellectual rights.

The reason given for this increased protection is the need for investment protection.

The reason is true: investment must be protected. Particularly in relation to cutting-edge activities, which require major investment, and which cannot then be subject to parasitic exploitation by third parties.

It is not, however, the protection of investment that is being disputed, but rather that this protection should take the form of author's rights.

What is wrong is not investment protection: it is the hypocrisy of contemporary authoritarian discourse. Beethoven is invoked, only for everything to ultimately revert to Bill Gates.

Direct protection of the investment is only exceptionally realized. The most striking case is the so-called sui generis right granted to the producer of the database.

In other cases, however, protection takes the form of appropriation of author's rights. The protection of author's rights is extended, invoking the protection of creativity, and in the end everything is attributed to the company. This means that the company benefits from a protection that was created and structured with a different purpose. The entire legal system is being distorted.

And so, we come to what characterizes the present reality. There is a lot of talk about protecting authors, but in reality, it is the businessman who is being protected. The businessman is already today the main beneficiary of the protection formally granted to the author.

6 AUTHOR AND COMPANY IN CYBERSPACE

Naturally, this situation also applies to the exploitation of literary and artistic works on computer networks.

Let's suppose the normal case of a work in a database with online access.

In order to make this integration, the author's consent was necessary. The right to make the networked work available to the public was thus exercised.

However, from that moment on, the author erases himself.

Except in the unlikely event that the contract contains a special clause to the contrary, the exploitation will be carried out exclusively by the owner of the database, using computerized means allowing access to the public.

This also means that from then on there is no longer any author's rights proper. The actual exploitation of the work gives rise to contracts like any other, but not author's rights contracts. Just as, for example, the purchase of a ticket for a cinema screening is not an author's rights contract.

In fact, the subsequent acts do not represent the author's rights business.

The *transmission* that is made, from the database to the terminal that requests it, does not represent it. There is no power of transmission, included in the author's rights; there is not, in the content of the author's rights, a right of transmission, in the sense of power to authorize the technological transmission. Moreover, when the author admits that the work is available to the public, he implicitly admits the technical act of transmission. No new authorization is therefore required to transmit it.

Nor is there any right emanating from the *communication of the work to the user*.

Take for example the viewing of the work on the recipient's computer. There is no act of communication here

that needs to be authorized. First of all, because there is no communication to the public. The viewing is done in private, presumably, and thus escapes the author's rights.

Nor does reproduction induce us to adopt a different position.

Reproduction has a technical meaning in author's rights law: it is the production of copies, from an original.

By extension, it has been extended to cover the very fixation of works. And a spurious sense, which is not yet the general sense of the Portuguese author's rights.

But we tried to go further, and cover the technological "reproductions" themselves, invisible to the human eye, which arise in the computer communication of works. Thus, the entry of the work in a computer would cause a reproduction in its memory. And there were those who sought, as mentioned above, to base author's rights protection on this act of reproduction.

All this should now be set aside. Since the central protected act is making the work available to the public, purely technological reproductions are no longer relevant. They are covered by the primary authorization given by the author - even forgetting that they generally represent acts of private use.

Reproduction can thus return to its original meaning, that of the production of copies, which should never have been abandoned. In the IT field, it is only relevant when copies are produced by gaining access to the work on the network. Everything else is a different matter. That is why the 1996 WIPO Treaties do not mention reproduction.

Unfortunately, the Commission of the European Community has taken a different attitude. The proposal for a directive on author's rights in the information society contains a very complex set of restrictions/permissions on technological reproduction, which ultimately aims to conceive of technological reproduction as a private act. We find this phobia of restricting every area of freedom regrettable.

As this is not the current law, however, we may conclude that all acts of computer communication subsequent to making the work available online to the public are free.

These conclusions are very important. It follows from them that this whole phase is ultimately outside the bounds of author's rights. There are business relations, between the producer and the users, but there is no author's rights relationship.

Of course, author's rights can be infringed at any time from the work that has been communicated. The user can unlawfully reproduce it and market the copies. Just as he may communicate it to the public.

But anyone can do that, as long as they have access to the work, even outside the computer medium. I can multiply and sell the book I've bought: not even then does the purchase of the copy become an author's rights contract. No change to this normal situation arises from the fact that we are dealing with an intellectual work that was transmitted by a computer network.

This has further consequences.

If the subsequent contracts are not author's rights contracts, their breaches do not concern author's rights law either, but general contract law.

And acts of exploitation by third parties that may arise, in relation to the work available in the database, do not bring or may not bring author's rights infringement. We will see this better below, when talking about the reserved access to the database.

II AUTHOR'S RIGHTS AND CULTURAL DIALOGUE

7 The "hunting for exceptions"

Culture is defended through freedom, not prohibition.

The statement would appear to be unnecessary, but it is not. When culture is mentioned today, it is often only as a pretext for new author's rights levies.

But intellectual rights represent exclusives, and therefore restrictions of the space of freedom.

Their justification lies in the stimulus and reward for the author's creation. They should therefore be as brief as possible in order to achieve the ideal, which is freedom of cultural dialogue.

And not only that. In author's rights, as it was correctly understood at the beginning of the last century, there is a strong component of public interest. Throughout the entire duration of author's rights, its content must be shaped in such a way

that the satisfaction of its objectives is made with the least possible prejudice to other purposes, namely of cultural order.

This is possible because there is no "absolute" right, in the sense that it is not susceptible to any limitation; and neither is author's rights. Every right is a complex of powers and duties, in which the various purposes are adjusted towards their optimal composition.

In author's rights law, these purposes or interests are multiple, so the need for their composition is particularly imposed. There is the public interest, the interest of public agencies and the interest of the public, which are distinct realities among themselves. There is the author's interest and the interest of companies. There is the interest of culture in particular.

Reconciliation takes place through the limits or restrictions on author's rights. We speak improperly of exceptions, for no reason: because the positive content of author's rights is as normal as its negative content.

It is therefore to be supposed that in each concrete normative manifestation of author's rights we see manifested with equal acuity the protectionist concerns of the author and other intervening parties, expressed in positive rules, and those emanating from other interests involved, expressed in restrictions.

Unfortunately, we have seen a disappointing development.

The savage hyperliberalism in which we live manifests itself, in the field of author's rights, in what could be called the "Hunting for Exceptions". Every restriction is pursued

by invoking the qualification of author's rights as property - when, even if this qualification were true, "property" would still be subject to the requirements of social function.

The European Community, within the economicist prism that characterizes it, shares this spirit. In its documents, the fight against all restrictions is becoming increasingly intense.

This battle reaches its climax in the proposal for a directive on the information society.

It was to be expected that the establishment of a new right, the right to make available to the public on a network, would require the development of specific restrictive rules, which would take appropriate account of interests other than those of the author, leading to a balanced composition. The WIPO Treaties allowed such a realization.

But none of this has happened. We note with regret that there is not a single new restriction foreseen, adequate to safeguard any interest to be preserved. Only the interest of the author/entrepreneur is considered. The effort to bring about a new reality was left undone.

Worse than that, though.

The draft directive sets out a typical list of permissible restrictions.

In fact, Article 5 of the Proposal, after defining in paragraph 1, always restrictively, the possibilities of technological reproductions, definitively establishes the admissible 'exceptions' to reproduction rights (paragraph 2) and public communication (paragraph 3). This puts an end to

all malleability in this field, which has always existed under the aegis of the Berne Convention.

Furthermore, in paragraph 4 it extends to all restrictions the general clause contained in Article 9/2 of the Berne Convention, which was limited to the right of reproduction. In this article, there was no list of permissible restrictions to the right of reproduction, but a general clause covering them was established. Now, for fundamental rights, there is a closed list of exceptions and, in addition, a general limiting clause.

It is regrettable that this should be the case. Restrictions on author's rights allow author's rights to be constantly adapted to the conditions of the times. Now, not only are appropriate restrictions not provided for in the light of technological developments, but all future adaptation is prevented, author's rights becoming rigid, insensitive to all developments.

But there is always the possibility of making bad things worse. The proposal for a directive was sent to the European Parliament and came back considerably worse in this respect.

All the planned restrictions are subjected to a fine-tooth comb in order to further restrict the area of freedom.

We are therefore living during a regime of harmonization-prison. Without any need for harmonization with a view to the internal market, the European Parliament is the place where the lobbies run wild, seeking to extract ever larger chunks for themselves, at the expense of the public interest and of each country's area of autonomy.

It is interesting to add that the German Senate, the Bundesrat, which plays an important role in the treaty approval process, had already on 27 March 19 openly spoken out against

the unbalanced original proposal. It stressed that author's rights should prevent, through strengthened protection of authors, exclusive rights from acting as obstacles to the exploitation of works and the free exchange of information.

There is therefore still a hope that the result will not be as bad as the threat.

III AUTHOR'S RIGHTS AND CONDITIONAL ACCESS

8 Conditional access as a producer's right

In the construction of the information society, the issue of conditional access to works available on the network has become of great interest. The WIPO treaties already included a provision aimed at protecting technological devices that ensure access and conditional access (arts. 11 of the author's rights Treaty and 18 of the Performances and Phonograms Treaty),

The importance of this issue is understandable, as the economic exploitation of network works would be practically non-existent without the guarantee of conditional access[126].

The proposal for a Directive of the European Community on author's rights in the Information Society reinforces this

126 Is sceptical about the encryption or codification of works André Lucas, *Le droit d'auteur et les droits voisins dan la Société de l'Information: besoin de continuité, besoin de changement?* in Proceedings of the Conference on Copyright and Related Rights at the Dawn of the 21st Century, European Commission, Florence 1996, 33 ff. (40)

provision, in Article 6, under the colorless title "Obligations concerning technological measures".

At the same time, another proposal for a Community directive, the proposal of 9 June 1997 on the legal protection of services based on, or consisting of, conditional access, is in the process of being adopted. The two directives have been dealt with in parallel.

The reason given for the duality is in the protected object. In one case, one reacts against the violation of author's rights; in the other, against a form of unauthorized access, in which it would be the producer or entrepreneur who would be defended.

This justification is not, in our view, convincing.

The objective of both proposals is exactly the same: to ensure that access is reserved by penalizing activities which seek to circumvent or result in the circumvention of protection measures. A guideline alleged to relate to author's rights thus extends to problems which in Community jargon are called horizontal problems; they relate to author's rights as well as to other matters[127].

However, it is not even true that, in the discipline of this matter, what is at stake is the protection of author's rights

If the core of author's rights protection is in the right to make the network available to the public, unauthorized entry into the on-line database, for example, does not represent

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127 Contradictory to what happens in other fields, such as the responsibility for the content of messages on the Internet. This matter, which could affect author's rights, was dealt with earlier in the 1998 proposal for a directive on electronic commerce, because such liability could arise in fields that have nothing to do with author's rights.

author's rights infringement; just as sneaking into a cinema without paying for a ticket does not represent author's rights infringement, to maintain the same simile.

The author has already authorized the work to be made available to the public. Unauthorized access to the database does not infringe author's rights: it infringes the producer's right to maintain reserved access.

Consequently, the problem is only the general problem of conditional access. That is why the content of the two draft directives is practically identical; and where it is different there is no justification for the difference, because there are no material reasons to justify it.

Of course, the author may also be interested in keeping access reserved. He may even have stipulated that the consideration for the authorization would depend on the income obtained from the exploitation of the work. But this is a practical interest, not a legal one. Your right has already been exercised and is satisfied. The database invader does not violate the author's rights, but the producer's right.

And with that something else is revealed to us, in the ambiguous position of author's rights in the information society. In these cases, there is no protection of the author who, after all, would benefit the producer; there is, instead, direct protection of the producer, under the (inaccurate) allegation that works protected by author's rights are being violated[128]. It is now the producer who is directly in the foreground.

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128 Only exceptionally, the producer will himself be the holder of the intellectual right in question: for example, where the *sui generis* right of the producer of the database is infringed.

And since it makes no difference whether or not there are protected works, because the crucial thing is that access is restricted, we must recognize that in all of this, not only is *the* author erased, but *also the author's rights itself*.

What matters, in the Information Society, is that the producer is remunerated. Whether or not there are protected works within the content transmitted will become secondary, because remuneration will normally be for time or contract, regardless of the content of the message transmitted. Only in special cases, when a specific remuneration for a category of works is agreed upon, the fact that the work is protected may still have some significance.

But it is not only because the remuneration for access is per work that author's rights have an impact on it. Access to a classical symphony can take place under the same conditions as access to a contemporary work, even though that symphony is not a protected intellectual work.

Everything is therefore mixed up. The legal problem of the information society is the problem of protecting online messages themselves. It is the author's responsibility to authorize the incorporation of the work into the network, but after that, it loses all meaning. The proposal for a directive, although it refers to author's rights, is actually intended to protect the producer.

IV AUTHOR'S RIGHTS AND RIGHTS INFORMATION

9 The identification of the use of the works

The panorama is ultimately very similar when we consider another point that is also at the heart of contemporary debates: the so-called information on rights.

Work is currently in progress on mechanisms to enable precise computerized knowledge of the uses actually made of literary and artistic works. For example, an electronic 'tattooing' of works on the network could be carried out, so that the number, time and location of uses actually made would always be known.

The WIPO Treaties already provide for this matter[129]; it is taken up in the proposal for a Directive on the Information Society, in Article 7.

It provides, with considerable development, for the suppression of any form of removal or alteration of electronic rights management information, as well as the distribution or use of any form of copies in which such removal or alteration has been carried out.

It should be added that Article 8 of the same proposal imposes sanctions and appropriate means of enforcement for infringement of all the provisions of the directive, which thus

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129 Art. 12 of the Copyright Treaty and Art. 19 of the Performances and Phonograms Treaty.

also covers both technological measures" and "information for rights management".

Here we have an area which has been hailed as very beneficial for authors. They would be able to effectively and directly control the use made of their works. It was even said that authors would regain the leading role that the mass media had caused them to lose to the benefit of collective management bodies. In particular, they would be able to manage their rights directly, without recourse to the mediation of these entities.

All this, however, is very relative.

The great hopes placed in these mechanisms do not seem likely to be fulfilled in the short term.

The dispensability of collecting societies is not in sight. The plurality of uses will continue to make individual management impossible.

In reality, the greatest benefit is that an opportunity for control has arisen which has not existed up to now. At present, the originator is subject to the information which users and public authorities provide him without the possibility of verification. Now he will have the opportunity to check the accuracy of this information.

But the main thing, as far as we are concerned, is whether it is really the author who is the main beneficiary of this protection.

For similar reasons to those given in relation to technological devices, we conclude that here too, primarily not the author, but the producer is protected.

The author, as we said, has the fundamental role of authorizing that his work be put online at the public's disposal. But from then on, it is erased. The agent, exclusive or at least the main one of the exploitation of the works available online, is the entrepreneur or producer. It is he who provides services or makes works available online and is paid in return.

It is above all the producer who needs to know precisely what uses will be made. This technology provides him with information that he would not otherwise receive.

The author is fundamentally unaware of this exploitation. He left the scene when he authorized the work to be put online.

With this the author's rights are exhausted in relation to that use. The owner of that right is the entrepreneur who acquired it. And, in that capacity, he performs the economic exploitation of the work. But the contracts he signs for online use are no longer author's rights contracts.

Two situations can still be distinguished:

a) the author who assigned the work was paid a lump sum;

b) the author is remunerated, wholly or partially, by a percentage which varies according to the revenues or profits obtained.

In the first case, the author is no longer financially interested in the effective exploitation of the work.

In the second, the author has an interest in determining actual exploitation. Electronic information on the use of the

rights can be accounted for. The development of the system will allow for an increase in such contracts.

But also here, it is a matter of general aspects of contracts and not of faculties comprising author's rights. The relationship is no longer authorial; it only concerns the consideration.

In any case, the real beneficiary is the producer. This is so true that the system can be used even if the work is not protected by the author's rights.

It is obvious that 'tattooing' can also be used when no author's rights are involved. Through these processes, the producer is able to accurately ascertain the actual use of works or performances, whatever their content or author's rights.

So, we see that the issue is presented as relating to the protection of the author. But once again we have what is called a horizontal problem: it is applicable to all uses on the network, whether there are protected works, which are its content.

On this side also, the decline of the right of self-determination is intensifying! The protection of the intellectual work becomes an accident, because what is in the foreground is the protection of the producer's network services.

10 THE UNPROTECTION OF THE PUBLIC

All of these problems are accompanied by major dangers. We cannot dwell any further on these points, but will limit ourselves to a brief note

The producer will mark the protected works, one supposes; and one charges particularly for that use.

What if the work is no longer protected, for example because exclusive rights have expired?

What if the work is not actually protected?

What if the work is protected under the law of the country of the producer but not under the law of the legal system in which it is used?"

The consumer / recipient has no defense. They are subject to the determinations of those who control the use of the work on the network.

The producer subtly removes not only authors' rights. It also removes the author's rights in force in the legal orders of destination. It becomes the producer who imposes the law.

In such cases, the use of keys or instruments that neutralize the information on the use of the right could be permitted. It is to be expected, however, that the directive will restrict this by any means[130].

These are therefore new areas of concern, particularly for countries such as Portugal, which are predominantly message receivers. But basically - for almost every country in the world, too.

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130 As in the parallel domain of technological access devices.

V AUTHOR'S RIGHTS AND THE INFORMATION SOCIETY

11 THE INFORMATION SOCIETY AND ITS ANTIBODIES

Let us allow ourselves some final reflections, in which we relate the legal panorama we have reached with the information society in which it is framed.

We witness a society in which information occupies a central place. This, in itself, represents a tribute to the spirit, allowing man to rise to the potentialities of his rational nature and providing a better basis for the realization of his personality. And it gives society new means to overcome the challenges of the present time, namely the injustice and exclusion that characterize it today in so many areas. There is no need to insist on this point, which is obvious.

And yet, when we reflect, we cannot help but express a certain anguish, which leads us to ask whether the information society does not also have its opposite within it.

And so:

1 - The information society is not also the society of disinformation?

The manipulation to which information is constantly subjected does not mean that the flow of information is already prevalently channeled towards the distortion of the truth?

Does not what is happening under our eyes, with regard to the war in Yugoslavia, reflect this phenomenon about all the parties involved? In the leading democratic nations themselves, manipulation is systematic and there is no reaction from the highest authorities to the media or similar bodies. They misinform and nothing happens. Everything is in line with freedom of information.

2 - Isn't the information society also the society of information excess?

Has not the information that assails us from all sides exceeded the measure of human capabilities?

Information is provided for the sake of information, accumulating data that man is no longer capable of assimilating. It accumulates useless information that dominates man, instead of being dominated by him.

This is even more serious because over-information is one way of not informing. In business information, for example, it was discovered a long time ago that greatly increasing the volume of information is one of the best ways to miss essential information. By informing oneself, one avoids that the addressees are ultimately informed.

3 - The information society is not, on the other hand, the society of the reduction of information?

Doesn't the overwhelming mass of information end up being reduced to the same sources or the same orientations? Are not the events themselves that are propagated worldwide

the same, selected by uniform criteria or provided by the same channels?

Globalization brings with it this reduction of available information, because only that which conforms to certain prevailing standards is valid as such.

In reality, the plurality that existed before is at risk. Diversity is no longer of interest or is only maintained in information niches whose subsistence is still problematic.

The copiousness of information is thus compatible with a considerable reduction in its scope.

4 - Isn't the information society also the society of information monopolization?

A great principle of our society is freedom of information. Information is free; whoever wants it takes it, wherever it is, and uses it as they wish. This was considered basic for everyone's unhindered participation in social dialogue.

But this, like other freedoms, is being continually eroded.

In the field of author's rights, the so-called sui generis right on databases appears. This is, definitely, a right whose object is the information data itself. The information becomes the object of rights, in such a way that its use is reserved to the consent of the producer or entrepreneur of the database - besides, of course, the limitation already represented by the conditioned access itself to that database.

But there is more to it than that. The worldwide concentration of media companies - and, much more broadly,

of information society companies - leads to the formation of large blocks that dominate communication and available information.

This movement is underway, and no action is being taken at global level to discipline the information society in order to counter it. Quite the opposite: in the field of author's rights itself, the restrictions permitted by the Berne Convention are being fiercely combated, in the broadcasting sector, for example, which were intended to prevent abuse by bodies which had acquired monopolistic positions for themselves.

Thus, we have that, insensitively, free information passes to information appropriated or dominated by large conglomerates. Where there was freedom, there is now more and more space for domination. Information becomes an object of private commerce and has the destiny of all merchandise.

This also means that the dawn of the information society may also be the twilight of a "fundamental" freedom: the freedom of information.

12 CONCLUSION

Sometimes, when I hear the justifications of economists, I wonder whether they are not the prophets of the past. They explain everything, but predict nothing. The Far East crisis? It had to happen, given the indebtedness of companies and other factors... But nobody predicted it. You make a prophecy of the past.

But aren't we jurists, after all, living under the temptation of being the prophets of the present?

Do we not tend too much today to explain and comment on what is happening, and thus to sacralize, presenting it as an irreversible fact, a development in progress? Do we not take factors such as globalization as dogmas, presenting a historical sense as fatal, and thus making us lose sight of the alternative that is intrinsic in everything that happens?

The future is always open. It is not the jurist's job to be the herald of what happens, but rather to be a builder of a balance of factors that truly serves the society in which he or she is inserted.

By merely explaining what happens, the jurist is a "prophet of the present". He betrays the true prophetic function or the construction of the future, which it is his duty to perform.

BIOGRAPHY

José de Oliveira Ascensão was born in Luanda, Angola, on November 13, 1932. He graduated in July 1955 from the School of Law at the University of Lisbon – Portugal, where he was also granted a doctor's degree in legal-historical sciences in 1962 with the thesis "The Real Legal Relations".

Throughout his life he bravely practiced law from October 24, 1956 on. As a retired full professor at the Lisbon Faculty of Law, he built a solid career over the decades, followed by a fruitful and constant academic production, with works referenced worldwide, in the area of General Theory of Law and later in Copyright Law.

While in Brazil, he was a professor at UFPE (Federal University of Pernambuco) in the 1970s, carrying out several academic works with other renowned educational institutions such as the Federal University of Paraná – UFPR and the Federal University of Santa Catarina – UFSC.

A collection of more than 350 published works by him is estimated, in the most diverse languages. Over the last years of life his performance and academic

production were dedicated to the studies of copyright, intellectual property and unfair competition.

He was president of Gestautor – Association for Collective Management of Copyright, and also of the Portuguese Association of Intellectual Law, in addition to being a permanent representative of Portugal on the Standing Committee of the Union of Bern.

Regardless of the area of activity, Professor Ascensão will forever be recognized and remembered for his brilliance, intelligence and generosity, not only for the important scientific contribution given to the Academy or for the numerous generations of students who attended his classes, or even for all of those who are scholars in the area and related areas, but mainly for the immense joy and friendship we all had when meeting and living with a human being with a unique personality.

Professor Ascensão died on March 6, 2022, leaving a legacy for the history of legal sciences, as one of the most famous Portuguese-Brazilian professors and jurisconsult of recent times.

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This posthumous work by José de Oliveira Ascensão, a Portuguese-Brazilian lawyer, jurist and professor, born in Luanda, Angola, on November 13, 1932, is a project of the Study Group on Copyright and Industrial Law – GEDAI. It encompasses the great master's main writings on Intellectual Rights and the challenges facing the new information and communication technologies that were published throughout his life, and which are extremely important for the studies of intellectual property in the 21st century. Thus, in order to pay tribute to Professor Ascensão, who greatly contributed to the education of generations of researchers here in Brazil, we also carried out the translation of his writings into English, so we can provide readers with a greater breadth of diffusion of his thought. His writings are relevant to the understanding of our technological reality and to scholars of Intellectual Rights.

In the course of preparing this book project, while compiling, reviewing and updating the originals for publication in Portuguese and in English, we were taken by the sad news of the death of our dear professor on March 6, 2022. However, only with the authorization of Professor Ascensão's relatives made it possible for us to connue and, thus, be able to finish this work, now with a greater degree, as a tribute to this wonderful person who bequeathed us in his books unique understandings and fundamental understandings and interpretations for all studies of Civil Law, having as a masterpiece the “Introduction to the Study of Law”, and studies in the area of Copyright. It is a fundamental work for the studies of Intellectual Rights and essential for the legal interpretation of the Information Society, which reveals all the strength and depth of the thought of Professor José de Oliveira Ascensão.

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