For a reasonable understanding of author's rights

1.- An old adage says, at least about Roman law, Law is the written reason ("*ratio scriptura*"). Jean Giraudoux, a French writer of the past century had one of his characters saying: "The reason of those who wrote it"… that seems more credible. But what is actually reasonable? In the IP World, there is a kind of war of religion which is, as all these kinds of wars, undoubtedly unreasonable: the (intellectual) war which divides the zealots of Copyright and those of "*Droit d'auteur*" (author's right). In my view, it's deeply ideological.

Certainly Copyright is often praised for its realism and plasticity. And it's true. It's not really possible to defend the realism of the *Droit d'auteur* when one says, for instance, that a work, each kind of works, must be considered unchanging. The work merits an absolute protection and that applies to a novel of Camus but also, as far as a work is a work, to a salad basket or a bolt! Of course, I know the bolt is an interesting meeting point between Copyright World and *Droit d'auteur* World: the French judge admitted it can be protected and the English judge, even if he is not so affirmative, rejected the argument according to which a so simple item necessarily lacked originality! But the fact is that Copyright, at least traditional and "hard" Copyright, does not really recognize moral rights and therefore the copyrighted bolt is not necessary unchanging…

In Copyright World as well as in *Droit d'auteur* World, it's entirely absurd to imagine that a bolt cannot be changed because it is considered to be the same as a novel of Camus or a play of Tennessee Williams. Such an affirmation can be only the product of a perfect dogmatism. And for me the dogmatism is contrary to a reasonable approach.

2.- Against dogmatism, if we want to "fine tune" our matter, it's necessary to favour the reasonable one, the "rule of reason". It's a concept received as such in the Common Law. But it's present also in the family of the Roman-Germanic Laws.

Let me, however, come back to the question of what is reasonable? Or what can be said to be reasonable? At first glance, it can be said that a legal rule is reasonable when it's appropriate to the searched "regulation" and when it correctly balances interests of the parties involved. This idea is important, for instance, in the German judicial approach but is unusual in France (not generally but in

the case of IP Law). I suppose I'm not a typical French lawyer… Anyway, this idea seems to me important.

It helps to answer the question of the "accurate tuning" of our IP rights firstly in terms of methodology (I).

After that, we will be able (we can hope to be able) to recommend some "tracks" in terms of substantial rules (II).

I.- Fine tuning for *Droit d'auteur* and Copyright: A tale of method

3.- Fine tuning? Sounds perfect! But first we have to ask: which tuning is good for us? The answer to this question of course depends on whether we believe that we must keep the good old *Droit d'auteur* or the good old Copyright, or if we believe that Law must be appropriate to a given situation.

I already gave my opinion. And insofar the present time is no more the time of Queen Ann or of Beaumarchais, a rereading of the *Droit d'auteur* as of the Copyright (in spite of the plasticity that it's usual to attribute to it) is, in my view, imperative. I don't believe, as P. Barlow, that "Everything you always knew about intellectual property is wrong". I'm always sceptical about the idea of "*tabula rasa*". But I notice the time of horse-drawn carriage has gone… This is the first lesson: we must adopt a forward looking approach.

But second lesson: if we have to take into account the present day practices and the present day needs in the field of *Droit d'auteur* and Copyright, one of the most significant side of the present day evolutions is not only the digitalization which alters the notion of work (and it's important), but, through the possibilities given by that digitalization, the globalization that Internet does.

If I had to choose two slogans, it would be: think future! Think global!

4.- Adopting a forward looking view: it's for me the first requirement. I don't want to say in the most ordinary way that we must look ahead. My idea is that, in a world which is deeply divided between different legal traditions, the worst attitude would be to remain in *one* legal tradition.

If everyone starts to measure the changes of the Law by the yardstick of his tradition regarded as the absolute reference, it's sure that all changes will be felt as a loss of identity and in the same time of

quality. *Droit d'auteur* is viewed as contaminated by Copyright… and Copyright by *Droit d'auteur*. It's difficult to be more sterile!

If we want to adapt the Law to the challenges all we have face, we should not look in the wing mirror! We must adopt the same kind of approach that comparative law requires, i.e. defining the function of the rights. And in this precise case, we have not only to bring to light this or those functions, but to define which kinds of functions we *want* to attach to our IP rights. The question must not be: what those rights traditionally did? But what can be pertinent today in a globalized world where everything (or almost everything) can be digitalized and so reproduced at zero cost, with new forms of creativity, with new forms of concrete ways of creations as the collaborative works are. We must also take into account ethical values as the protection of the authors in my view is or new kind of behaviours as the will of sharing the result of the creative activity which cannot be ignored.

Certainly, it's a lot! But I believe it's not possible to escape from such approach, even if it's very complex, with conflicting requirements. But the art of the legislator in particular and of the jurists in general is precisely to find the good balance between various interests. It's here a real challenge. But it's *the* challenge we have to take up.

Let me add that in order to minimize complexity we have to move away from too abstract approach. For instance, we should avoid asking question to know what the exceptions must be, but, if an exception is a space of freedom, which spaces of freedom concretely we want to make.

5.- Having said that, the difficulty in answering those questions is that we do not share the same views in Brussels, Beijing or Washington, although I spoke about a global approach.

Nevertheless, I shall say again we must adopt this approach. Let me precise my thought. I'm not saying I defend the idea of a global Copyright unaware of the geographical or cultural borders. Keeping national or local traditions can be efficient. To give an example, I'm not sure whether, with my French culture, we need a specific exception for the religious choral societies, as laid down in the European directive about Copyright and related rights in the information society. However, if that is the feeling of the Nordic countries, why not?

On the other hand, I believe it's not possible to refer to a single existing model as if it was the expression of the truth. Let us take two concrete and precise examples. In the Copyright system, the public is important. Copyright has a first function of diffusion of works, knowledge… In the system of *Droit d'auteur*, the author is on a pedestal (a French book speaks about the "coronation" of the author)

and, for many commentators, the public have not really place. I think this view is absurd. What an author can be without public? It would be possible to refer to semiotics which teaches that the reader rewrites the book he reads. More simply, is this author without public a kind of Robinson Crusoe of the art? A Robinson Crusoe before the discovery of Friday! In a reasonable approach, the public must be everywhere a part of the legal structure. Let us consider the opposed option. In the system of *Droit d'auteur*, as just mentioned and as everyone knows, the character of the author is central. But in the Copyright system, the author, the real author who creates is practically absent from the legal stage. It's unacceptable. The author is at the origin of the social and economic value. Considering the crucial role he has, his "obliteration" is perfectly unjust. He is victim of a kind of expropriation.

Negation of the public, negation of the author: it's notable that it's not necessary to choose a system against the other one, to choose author vs. public or public vs. author. Once again it's a question of balance. Of tuning…

6.- And we can do the link with my first observation. We can only expect a satisfactory evolution if we are able to distance ourselves from our tradition. We must built new rules, being not unaware of the past and the local philosophy, but importantly being *free* from the past and the local philosophy.

We really need a fine tuning.

II.- Fine tuning for *Droit d'auteur* and Copyright: A "political question"

7.- The searched fine tuning is possible since we are able to do the necessary choices in the terms drawn before, which are political in the etymological sense of the word politics.

So which tuning? I don't hold the truth. And so I will not be able to present to you the ideal model of the Copyright! By the way, does it exist?

Personally, I deeply believe that, if we try to imagine, a model – not a perfect model –, it has to be flexible: technically flexible (of course I speak about legal technique) but also upstream philosophically flexible. The bolt (my dear bolt), Camus and Tennessee Williams cannot really be put on the same level. The audiovisual industry and the potter, vaguely hippy, established in South-West of France have not exactly the same view of the life, even if their products are copyrightable. The market of music with CD, TV, different ways of broadcasting, and today Internet, is very different from the market of painting for which the original is the most important and the derivative rights secondary except for a little number of well-known painters. I could provide you with many examples.

The world of *Droit d'auteur* or Copyright is not monolithic. Does that mean that we are condemned to "casuistry" (to a case by case approach)? It could be the conclusion drawn by a jurist of Common Law. With my Roman-Germanic culture, I should not agree with such a conclusion. I consider that we have to build our Law on general principles, but with this important precision that general principles does not mean, at least for me, rigid rules. Those principles must be understood as broad lines of action which can be differently concretized.

So… which tuning? I spoke above about "tracks". I've just spoken about broad lines. If the fine tuning is a tuning always improvable, leaving out the idea of a final construction of our matter, I would just like to put forward few main items, with the maybe unreasonable purpose to find reasonable approaches to our common challenges.

If the creator is the key figure within the act of creation (and that whatever the legal solution can be), I propose to consider first the author and his work. As the author is not alone, I will later examine the author and others…

The author and its work

8.- According to the above defined approach, we have to ask the question: in the social play, what is legitimately, reasonably, the work from the point of view of the author? In my view: two things. Firstly, using the vocabulary of the 18th century, the work is certainly for its author a source of "glory". It's also obviously a source of enrichment… or at least it can be…

8.1.- Work as source of glory: the author feels the need to be recognized, socially recognized as author, as the author of a given work. In the words of the Law, we can speak – in old and sexist fashion – about "right of paternity" or – in new fashion – about "right of attribution".

The right of attribution is "bedrock" of the *Droit d'auteur* system but it's unfamiliar and even strange to the Copyright system. We know the father of Mickey because he was Walt Disney. But who knows who the father of Donald was? The Walt Disney studios were and are the right holder but Walt Disney never created Donald. And yet, if we speak about attribution and only about attribution, is there really a problem to indicate who the author is? In France, during the eighties, when the question was asked to know whether it was possible to copyright software, some people were afraid at the idea of indicating the authors. Forty years after, all the firms adopted this practice which is fully unrestrictive. It's perfectly easy to say that Mr X or Mrs Y is the author of given software or a given work.

By the way, it's very interesting to notice that in certain kinds of activities it is usual to give the names not only of the author strictly speaking but of all contributors; in a movie credits, you can find the name of the set designer, of the script girl and of the hair dresser. That shows that there exists a social demand. And it's remarkable that the Law can answer to this demand without the slightest difficulty.

8.2.- Source of glory but also source of enrichment or, simply, source of income… IP, and not only Copyright, was invented around the 17th or the 18th centuries as a very new and very creative way to bring money to the creators, authors but also for example inventors, by a mechanism of wealth allocation *ex post*. In our field, authors and/or also publishers – it was never perfectly clear – received a monopoly on the exploitation of the work, allowing them to prohibit any kind of use of their work. This right can be differently analysed. But concretely it's usually presented as a power to say no. And that can explain the hostility demonstrated against all kinds of alternative patterns, as the different imaginable compulsory licences are. Besides technical argument (the compatibility or not with the international Law), it's common to read that it would be a too radical change (right for remuneration vs. right to prohibit) and consequently that could not be admissible. But, if we don't think that *Droit d'auteur* or Copyright must be this or that, and if we prefer to consider the function of "wealth allocation" of these rights, the question is not to know whether the legal arrangements are coherent with an abstract model, but whether they are efficient. In fact, we already have compulsory licences for broadcasting purpose (even if it's possible to give an elegant academic analysis in order to explain the author has always the right to say no through collecting societies).

The question for me is to know, when the social and/or technical context, as for instance in the case of Internet, greatly deprives this power to prohibit of effectiveness, whether it's not good to explore new tracks. When I try to answer the question: who my best publisher is?, my usual answer is: that one who contributes to my fame and gives me the best royalties. At a global level, searching the best tuning implies searching the best system of allocation in a given context. And so I think that different systems can perfectly coexist. A Law which is not realistic is not a good Law.

This leads me to add that, if we reason pragmatically in terms of wealth allocation, that it's perfectly legitimate to organize a wealth sharing between the author and the other "players" as for instance the publishers. The true problem in this case is the "piling up" of different rights. Our modern IP suffers from overabundance of rights. But it's a problem in itself which deserves a peculiar paper…

8.3.- Source of "glory", source of income: is the work also something sacred for his author? Once again, I don't believe that Marguerite Yourcenar and *Excel* must receive the same treatment. I will not evaluate more on this point. I shall use this questioning as a transition towards my next remarks.

Indeed the "sanctification" of the work is not only a question of statute of the author. That poses as well the problem of the confrontation of the author and of his public. Author and others…

The author and the others…

9.- The author is not alone on a desert island… But before meeting (or not!) the public, the author needs partners, and precisely in order to meet this public. A writer needs a publisher and in the case of "cultural industries", as audiovisual industries, a creator cannot do anything without the structure of a firm. But, if in the countries of Copyright this author doesn't receive a special treatment, which means he doesn't receive any kind of protection, in the countries of *Droit d'auteur* the author is protected… against himself! He is a sort of minor. I believe the fine tuning must be found between those two extremes, and once again considering the concrete situations.

It's not absurd to give a protection to the author, for instance to provide for a compulsory frame for the contracts, when he must enter into negotiations with a great studio or a major. The match young unknown singer vs. *Universal* is not really well balanced. But the pattern is radically different when the author, this time alone, decides to put his work on the net through for example the *Creative Commons* model. In France, some academics consider that is not congruent with the legal system of *Droit d'auteur*. But practically is it possible to deny such a regulation which "catches" million of works on the net? And why no intellectually accept this simple idea that new situations call for new rules?

The legal rule must be adapted to reality and, on the chosen example, protection must be given as far as it's really necessary: not lack of protection and no more overprotection. That's exactly a question of tuning.

10.- But the measure of the tuning is not always obvious. And it becomes very difficult when it comes to "rights of the public". When the public is unknown on the stage, there is no problem… But I believe that, in this case, the play is surrealistic! The public is also a player.

We find again – but not only – the question of moral right and more precisely of the right to respect. Article 6 of Bern Convention provides that the author has the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation". It's not very much! It's really a minimum and still this text was facing the strong hostility of the United States. On another hand, I touched on this strange decision of the French Court of cassation which said, without reservation, that a work must be

considered unchanging if it was the will of the author. It's very much! A pure economic approach leads to the idea that the assignee is free to do what he wants with the work. I'm not sure it would be a good idea to change the colours of Matisse! But conversely I said that it was very difficult for me to understand why a copyrighted bolt, as the rare object of the creativity of his author, could be said unchanging! Moreover, we must notice that this right was dismiss in the EU context for software, in the *Droit d'auteur* countries as well as in the Copyright countries. The lesson to be drawn is that, if the right to respect has its *raison d'être*, the limit of this right must be also its *raison d'être*. To give frankly my opinion, the appreciation of that one would have to be entrusted to the judge. But I confess it's heretic for the *Droit d'auteur* as for the Copyright tradition! Such an idea can only flourish if we accept to free ourselves from the accepted solutions, as I proposed to do.

The difficulty is greatest if we consider what I called the spaces of liberty: which kind of spaces must be kept for the public in spite of the existence of the author's rights? Here the idea of balance of interests is very important. Because I object the argument according to which the public cannot have rights. Strictly speaking it's possible. But philosophically *Droit d'auteur* or Copyright must be understood as a tool providing the dissemination of culture or, at least, not forbidding such dissemination. So, using the words in their common meaning (and not with the legal meaning of the US *fair use*), there are unquestionably "fair uses" of works. And these uses must be recognized as such. But which uses? That's the concrete difficulty. I'm afraid there is not unanimous opinion to say that this is legitimate and that not.

Even, in technical terms, the question is open to know whether we must incline for a closed system of exceptions or for an open one as US fair use is (or is said to be). If I say again that I should be ready to have confidence in the judge, I shall be accused of preferring the US system! But, in fact, today the fair use is "channelled". I simply believe that the judge is in a good position to concretely appreciate the practical needs. For instance, the French judge decided, from his own authority, that it's not possible for the author to prohibit the communication of his work when this communication is only secondary.

It's a gamble on the reason of the judge, an act of faith in the "reasonable"… and perhaps it's not reasonable as I said above.

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11.- I does not want to finish on such a touch of scepticism… So I shall summarize my quick paper through these few words which can be the broader lines of (I hope) a reasonable program:

- Forward looking approach;
- Global view;
- Pragmatism;
- Flexibility.

The concretization of this approach could be:

- a general recognition of the right of attribution,
- a "modulation" of the economic rights considering the concrete situations and considering also all the players who took part in the chain of creativity,
- maybe also recognition of the right to respect but as far as this respect can be perceived as legitimate.

For the rest, I've my own ideas (and I think they are good…) but I'm not sure that a common tuning is for tomorrow. But who knows? Tomorrow is another day…

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