



HAL
open science

Evolution of intellectual property rights : international and regional evolution

Philippe Gast

► To cite this version:

Philippe Gast. Evolution of intellectual property rights : international and regional evolution. Evolution des échanges eurasiatiques, May 2021, Le Havre, France. ⟨hal-05536711⟩

HAL Id: hal-05536711

<https://hal.science/hal-05536711v1>

Submitted on 4 Mar 2026

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire HAL, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



Distributed under a Creative Commons CC BY-NC-ND 4.0 - Attribution - Non-commercial use - No Derivative Works - International License

Evolution of intellectual property rights : international and regional evolution

(Speech by Philippe GAST for the Colloquium organized by Pierre Chabal of Lexfeim at the University of Le Havre on May 26, 2021)

For a long time during the Ancien Régime, which was a system of services for privileges¹, intellectual property was not recognized as a right. Thus, the creators (and their heirs) were rarely rewarded by the monarch with the privilege of being able to exploit them (in an arbitrary way, therefore)! Paradoxically, printers and booksellers could even have the privilege of exploiting a work, without the authorization of the creator, or his remuneration! Faced with this injustice, and under pressure from many lawyers in the Parliament of Paris², this privilege ended up being granted to creators and their heirs (the first to benefit from it were Lafontaine's granddaughters) in a fairly systematic way under Louis 16 who established a proto-code in this area³, a little after the English had themselves begun to protect creators. The French Revolution, by abolishing privileges and services, reversed this state of affairs by creating identical rights (freedoms -including property-) for all (equality), and duties (tax service, military service, for all...).

The Revolution, through the '**Hatter's laws**', established a right of property for the creators of works of the mind, '**the noblest of properties**' (according to Diderot), because it benefits everyone and does not deprive anyone, unlike corporeal property (movable or immovable), which because of the spatio-temporal limitation of corporeal objects, cannot allow their simultaneous enjoyment by several users!

This property right (tangible or intellectual) is defined as an exclusive right to use⁴ or exploit an asset. This right therefore also applies to a work of the mind for the benefit of its creator, which constitutes intellectual property.

In the 19th century, concerning the arts, this right differed depending on whether it was pure art (fine arts) or industrial art (low art...) and it was then up to the judge to define the belonging of a creation to one or the other art, in order to apply the appropriate rules, which was shocking because of the subjectivity of the choice... which Marcel Duchamp caricatured by exhibiting an inverted urinal (upside down, it should be noted!) as a work of art, thus creating conceptual art, modern art.

Throughout the 19th century, the theory of the Uniqueness of Art was opposed to this subjectivity, until finally the protection of a work could be achieved both at the level of

¹ the priests held to religious service, the aristocracy held to the service of (military) blood, the bourgeoisie - since Philip the Fair who had granted free towns, 'freed' from feudal obligations - held to the service of taxation, and the serfs, held to the service of the construction of roads, castles, agriculture.

² Like Marion, who already in the 16th century invoked the freedom of exploitation that the author should have over his creation, taken up and developed by d'Héricourt in the 18th century, who expressly claimed the author's ownership of his work (see **Colombet, *La propriété intellectuelle*, précis Dalloz Paris, 1999.**)

³ Louis 14, for the development of the Palace of Versailles, had already freed artists from the guilds to which they had been assigned until then, by the creation of Academies open to all creators

⁴ Usus (usage), fructus (fruition), abusus (ab- usus: to lose the use by destruction or cession) according to Roman law.

literary and artistic property and at the industrial level (designs and models), a question that is therefore settled today ⁵by this simultaneous double protection.

Nevertheless, it also appeared important in the 19th century, with the industrial era in full expansion, to be able to protect all creators: not only those of literary and artistic works or ornamentation, but also of technologies, new inventions, both new products, and new machines to produce these new products in large numbers⁶ for increasingly massive consumption. This protection was achieved through patents but⁷ also through the protection of distinctive signs (trademarks, PDOs, etc.), to identify products vis-à-vis customers in order to build customer loyalty (commercial dimension, stimulated by liberalism and free competition).

At the international level, it also appeared necessary to protect authors through the rule of 'equal treatment of nationals and unionists' in various conventions.⁸

The 20th century was marked by an explosion of creativity in parallel with the development of democracy and the resulting freedom of expression⁹, but also technological (unfortunately also thanks to the world wars...) in the field of energy¹⁰, in particular allowing accelerated mass transport (container ships, high-speed trains, planes), but also in the medical field, allowing an extension of the life expectancy of baby boomer retirees who have a significant purchasing power (a great historical innovation), all in an exacerbated globalization that tends to call into question the legitimate protections of creators despite the creation of **the WTO and the WIPO**¹¹, but whose rules are often flouted and which, moreover, only minimally protect creators under the pressure of the multinationals of commerce, super-powerful lobbies

⁵ Article L112-1 of the Intellectual Property Code: the work is protected regardless of its 'destination', its 'merit'... as long as it is original and new (in its ornamental plastic for designs and models -L511-3-)

⁶ But also a new combination of already existing products, or even a new use of an already existing product or combination (for example, an already existing drug but for which a new therapeutic use is discovered) (cf. a. L 611-11 of the IPC)

⁷ Necessary inventive requirement, in addition to novelty and industrial character.

⁸ such as the Convention signed in Bern on 9.9.1886 and the Universal Convention of Geneva (1952/ Unesco), less protective but more universal, then the Convention signed in Rome on 26.10.61 protecting the rights of performers and the one signed in Geneva on 29.10.71 protecting the creators of phonograms, etc

⁹ For authors' and performers' rights, thanks also to the development of new arts resulting from the technical capacity for recording images – cinema, photography – and sound: phonograph, vinyl records, then CDs, DVDs, etc. and finally by the digitization of sound and image by computers combined with telematics: the Internet, the latest revolution in this field

¹⁰ The industrial era was born thanks to coal, its explosion in the 20th century was possible thanks to oil and nuclear power, and the 21st century will probably move towards renewable or less carbon-intensive energies at least!

¹¹ Protection of industrial property at the international level by:

Paris Convention 20.3.1883;

WIPO (established on 14.7.67 in Stockholm), attached to the United Nations

WTO (established on 14.4.1994 in Marrakesh) attached to the UN

And at the European level by:

The European Patent Organisation (established in Munich in 1973)

The European Union Intellectual Property Office (EUIPO) in Alicante since 1994 (ex OHIM): organisation registering trade marks and designs

which, moreover, try to limit the moral rights of authors as much as possible, by wishing to relegate intellectual creations to mere commodities (in WIPO in particular, where the patrimonial and commercial dimension is dominant, France appearing more and more isolated on this point, in its desire to protect creators as much as possible, going beyond all these international and European regulations in its Intellectual Property Code, by the right of withdrawal in particular!)

As we can see, it is necessary to differentiate, in intellectual property, literary and artistic property challenged by the Internet and the GAFAMs on the one hand (I) from industrial property challenged by trademark and patent infringement on the other (II), because the issues and problems are quite different, although linked to a common situation: Counterfeiting is linked to failed globalization due to a lack of political harmonization, whether material (open to dumping of all kinds) or digital (not yet mastered at the global level).

I: Evolution of the situation of literary and artistic property in the globalized context

If authors since antiquity¹² have been able to enjoy a certain fame (origin of the moral rights of authors), the patrimonial dimension only really appeared after the invention of paper¹³ and especially of the printing press in the 15th century, which allowed the existence of a sufficiently massive production to create a market and therefore a right for authors and performers. Indeed, the ability to record the performances on a sound and/or visual level allowed them to be duplicated thanks to easily accessible and transmissible media; In this way, the market and thus the rights of authors and performers were able to develop. Today, it is the new medium digitized by telematics that is the Internet, a globalized network, which is causing the upheaval of the law, whereas it had been well established for traditional material media (A) but dematerialization, especially delocalized, making criminal prosecution

¹² Period when the first authors could be identified:

1. in Hellenic Europe (-7/8th century), Homer with *the Iliad and the Odyssey*; Hesiod and his *Theogony*; Thales and Pythagoras with his *Theorem* for the Sciences, then in the classical period (-6/-3rd century) in the plastic field the architect and sculptor of the Parthenon, Phidias; Heraclitus and his *Fragments*, Plato and his *Banquet*, Aristotle and his *Politics*, and *Organon* for philosophical texts; Aeschylus and Sophocles for their theatrical tragedies (which were originally religious rituals), and Euclid, Archimedes... for scientists etc;
- 2 in the China of the Warring States (-6th): Lao zi (and his *Tao To king*) and his disciple *Zhuang zi then Li zi*, as well as Confucius (*Conversations*);
3. Finally, in ancient India, the 7 poets (rishi) who composed the *Rig Veda* (such as Atri – whose son, Dattatraya, left the *Avadhuta gita* and *Rahasya Tripura*, and Vasishta – in the ancient recension), and Agastya, Brigu... in more recent recensions - etc.) around 1400 BC (if we are to believe an objective dating of a constellation described there and which was only visible in India at that **time**) and the sum of which was compiled by Vyasa (author also of the *Mahabharata* – more than 200,000 verses in its final version! – where we find the chapter of the *Bhagavad Gita*, true Gospel of the Hindus around the 6th century); we can also mention Panini and his *Grammar* of Sanskrit in India (1st grammar in the world), Patanjali with his *Yogasutra* etc around our era.

¹³ In China about 2000 years ago by crushing, soaking and filtering the inner bark of mulberry branches, a technique transmitted by the Silk Road (in Central Asia: particularly in Uzbekistan, Kyrgyzstan) to Europe in the Middle Ages

difficult, has seen prevention and information become the essential tool in the fight against counterfeiting by Internet users via Hadopi (B).

I: A: literary and artistic property is well protected with regard to traditional media

Various conventions (Berne, Geneva, and various European regulations and directives¹⁴) protect creators of intellectual works in democracies¹⁵, texts integrated since 1992 into the Intellectual Property Code (IPC) as we have seen, by imposing an exclusive right of exploitation of representations or reproductions of their work (by assignment or concession) to authors during their lifetime and for a period of 70 years after their death for the benefit of their heirs –a. L123.1- (and 50 years for performers after the recording of their performance –a. L211.4-), under penalty of infringement¹⁶, as far as economic rights are concerned, but there is also the protection of extra-patrimonial, moral rights¹⁷.

Nevertheless, literary and artistic property is endangered by the Internet.

Indeed, the digitization of sound and image¹⁸ by computers, itself made operational by software that uses the binary computer language, (developed by Turing during the 2nd World War and which as linguistic works are therefore also subject to copyright¹⁹), makes it possible to transmit literary and artistic works instantly anywhere in the world.

The GAFAM (Google, Apple, Facebook, Amazon, Microsoft), which allow a great deal of freedom of expression due to the decentralization of the Internet²⁰, also pose a

¹⁴ Treaty of Rome: free movement of goods (a.3a); freedom to provide services (s. 59); free competition, cartels, agreements (A.86); Abuse of Dominance (s.86)

Secondary legislation:

1 : Council Directive 91.250 of 14.5.1991

2 : D C: 92.100 of 19.11.1992 rental, loan, related rights

3 : D C: 93.8327.9.1993 broadcasting right (author and neighbours)

4 : D C: 93.98 of 29.10.1993 (DA and neighbours)

¹⁵ For a long time, communist countries rejected the notion of property, including intellectual property

¹⁶ Punishable by 3 years' imprisonment and a fine of €300,000 (a. L335-2 of the IPC for counterfeit works by authors, L335-2-1 for counterfeit software, L335-4 for counterfeit phono or videograms of performers or producers)

¹⁷ Right to authorship (cite the name of the author -a. L121-1- or of the performer -L212.2- on the medium), right to the integrity of the work -a. L121-1- or interpretation –a. L212-2- (not to modify the work or interpretation without the authorisation of the author or performer) common to authors and performers; but there is a right of disclosure (L121-2), and of withdrawal specific to authors (L121-4), like the right of resale (a.122-8) ... Although interpreters also have the right of disclosure but indirectly.

¹⁸ Imagined by Philips in the 80s by the invention of the CD and the DVD which replaced the magnetic cassettes and analog recordings on vinyl that had preceded

¹⁹ A. L122-6 and 121-7: so software can itself be counterfeited!

²⁰ Hence the attempts of totalitarian states - in particular China and Russia - to control the Internet, first by banning certain Western platforms (Facebook, Google, banned in China) replaced by a copy-paste of local platforms such as Alibaba (Chinese Amazon look-alike) or Facebook (Wechat Chinese look-alike and Vcontact Russian look-alike) and Google (Baidu Chinese look-alike); but also on the technical level to free themselves from the internet technology invented by the Americans, by trying to create an autonomy of Domain Names and encryption (which in itself is relevant, and the Europeans should also guarantee themselves an independent internet, and competing platforms, because they depend

problem for the use of personal data²¹: violation of privacy, the right to be forgotten, invasive and manipulated advertising, manipulation of information²².

dangerously on American companies, the Trump episode having shown the limit of alliances!)

²¹ Obviously these totalitarian states, by wanting to control the exchange of information and especially criticism, allow the Chinese and Russian oligarchies to have systematic access to all the data of their users... and to pursue the deviants! see the article by Mickael of 14.2.2019, in Hitek: https://hitek.fr/actualite/russie-internet-chine-censure_18606

²² Thus, for example, the manipulations of Cambridge Analytica, at the origin of the election of Trump and Brexit, by using the personal data of Facebook users to send anxiety-provoking messages to people identified as fragile, to encourage them to vote for falsely 'reassuring' opportunistic politicians... cf. the article by L. Ronfaut in Le Figaro of 2.3.2018 <https://www.lefigaro.fr/secteur/high-tech/2018/03/20/32001-20180320ARTFIG00140-pourquoi-l-affaire-cambridge-analytica-plonge-facebook-dans-la-tourmente.php>;
And the article by W. Audureau in Le Monde of 22.3.2018 https://www.lemonde.fr/pixels/article/2018/03/22/ce-qu-il-faut-savoir-sur-cambridge-analytica-la-societe-au-c-ur-du-scandale-facebook_5274804_4408996.html

European regulations have tried to stem this danger after long debates in which the GAFAM lobbies led a fierce opposition, in particular against Article 17 of this directive²³. But in the end, the directive was adopted in particular, on the point that the GAFAMs feared, namely that the platforms are now responsible for the content disseminated by Internet users via their service²⁴: thus, if an Internet user broadcasts a protected work, the platform is jointly responsible²⁵, so in order to avoid counterfeiting, it must sign a license agreement with the authors and performers, or more simply with the societies of authors and performers to which they belong²⁶ (which thus guarantees authors and performers remuneration for the use of their works).

²³ **DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC of <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=celex:32019L0790>**

²⁴ As in the press law of 1881 in France which makes the editorial medium (newspaper for example) co-responsible (civilly) for the articles disseminated ...

²⁵ *CHAPTER 2 Specific uses of protected content by online services Article 17: 'Use of protected content by online content-sharing service providers 1. Member States shall provide for an online content-sharing service provider to carry out an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyrighted works or other subject matter that have been uploaded by its users. A provider of online content-sharing services must therefore **obtain authorisation from the rightholders** referred to in Article 3(1) and (2) of Directive 2001/29/EC, for example by **concluding a licence agreement**, in order to communicate to the public or to make available to the public works or other subject-matter. »*

²⁶ A.17-2: "Member States shall provide that, where a provider of online content-sharing services obtains an authorisation, for example by **concluding a licence agreement, that authorisation shall also cover acts carried out by users of services** falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting in a commercial capacity or when their activity does not generate significant revenue. »

But the directive grants some qualifications ²⁷ when providers react to a complaint from a rights holder ²⁸ ; when certain uploaded content, such as *memes* or *GIFs*, which are also expressly excluded from the directive; so do hyperlinks to news articles, accompanied by "isolated words or very short excerpts"²⁹, may be shared freely; for their part, journalists must receive a share of any income related to copyright obtained by their press publisher; and finally "start-up" platforms³⁰ are subject to less strict obligations.

²⁷ A.17.4: "If no permission is granted, online content-sharing service providers shall be liable for unauthorized acts of communication to the public, including making available to the public, copyrighted works and other subject-matter, unless they demonstrate that: (a) they have made their best efforts to obtain permission; and (b) they have made their best efforts, in accordance with the industry's high standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which rightholders have provided service providers with relevant and necessary information; and in any event (c) they have acted promptly, upon receipt of a sufficiently reasoned notification from the rightholders, to block access to the works and other subject matter subject matter that is the subject of the notification or to remove them from their websites, and have made their best efforts to prevent their uploading in the future, in accordance with point (b). 5. In determining whether the service provider has complied with its obligations under paragraph 4, and in the light of the principle of proportionality, the following factors shall, inter alia, be taken into account: (a) the type, audience and size of the service, as well as the type of works or other subject matter uploaded by users of the service; and (b) the availability of appropriate and effective means and their cost to service providers. »

²⁸ A.17-9: "Member States shall provide for the establishment by providers of online content-sharing services of a mechanism for **the handling of complaints and rapid** and effective redress, available to users of their services in the event of a dispute concerning the **blocking of access to works** or other protected subject matter uploaded or removed. 17.5.2019 L 130/120 Official Journal of the European Union EN (20) Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). **Where rightholders request that access to their specific works or other subject matter be blocked or that such works or other subject matter be removed ... »**

²⁹ A.17-7: "Cooperation between providers of online content-sharing services and rightholders shall not lead to the prevention of the making available of works or other subject-matter uploaded by users that do not infringe copyright and related rights, including where such works or other subject-matter are covered by an **exception or limitation**. Member States shall ensure that users in each Member State can avail themselves of any of the following **existing exceptions or limitations** when uploading and making available user-generated content on online content-sharing services: **(a) quotation, criticism, review; b) use for the purposes of caricature, parody or pastiche**" (cf. L122-5 and L211-3 of the IPC)

³⁰ A.17-6: 'Member States shall provide that, in respect of new providers of online content-sharing services whose services have been publicly available in the Union for less than three years and which have an annual turnover of less than EUR 10 million calculated in accordance with Commission Recommendation 2003/361/EC (20), The conditions under the liability regime set out in paragraph 4 shall be limited to compliance with paragraph 4(a) and to acting promptly, upon receipt of a sufficiently substantiated notification, to block access to the notified works or other subject matter or to remove them from their websites. Where the average number of unique visitors per month of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they are also required to demonstrate that they have made their best efforts to avoid further uploads of the notified works and other

The same reasoning (but it is not in the directive) can be extrapolated in the case of press offences (defamation, insult, incitement to hatred, etc.) but with more difficulty because from one country to another there are more or less great limits to freedom of expression³¹!

The control of these GAFAMs also involves an attempt at taxation already in force in France³², which sees some European countries opposing it (Ireland, etc.) because some GAFAMs (Apple, Facebook) have set up their European headquarters there because of the low local corporate tax (13%).

Thus, the lobbying of these financially overpowered GAFAMs manages to block the European process³³.

Nevertheless, the new Biden administration seems to be in favor of a minimum global tax on multinationals³⁴, including GAFAM.

subject matter for which the rightholders have provided the relevant and necessary information. »

³¹ However, we have seen GAFAMs such as Twitter intervene by deleting Trump's remarks in terms of serious disinformation for public health, but also in political matters in the case of the invasion of the Capitol on the incitement of the outgoing president, refusing the sanction of the ballot box... platforms from which Trump has been excluded (see the article by S. Mastandreas in Les Echos of 13.1.2021: <https://www.lesechos.fr/monde/etats-unis/apres-twitter-et-facebook-youtube-suspend-le-compte-de-donald-trump-1280541>) But this certainly poses a problem in terms of private censorship (but freedom allows you to change platforms... which is what Trump is doing by creating his own! <https://www.capital.fr/entreprises-marches/donald-trump-va-lancer-son-propre-reseau-social-1397674>)

³² LAW No. 2019-759 of 24 July 2019 on the creation of a tax on digital services (amending Article 299 of the General Tax Code) cf:

https://www.legifrance.gouv.fr/download/pdf?id=vQhycwR0pIwjxOK8QpQMgIstvrBvW7vibSIX3L_C8eE=

This tax led to retaliation by the Trump administration against French products, which were then overtaxed (suspended by the Biden administration pending an agreement at least between allies)

³³Gafa tax: the European Union divided over the signal to give to the Americans - The Commission intends to unleash a tax on Internet companies in June. States are slowing it down, fearing to upset the Americans, who are finally constructive at the international level. Article by LENA Published on 19/03/2021

<https://www.lefigaro.fr/international/taxe-gafa-l-union-europeenne-divisee-sur-le-signal-a-donner-aux-americains-20210319>

European tax abandoned in favor of a global tax: Euro-American negotiations interrupted by Trum cf *Global GAFAM tax: the OECD and the European Union join forces against the United States* **article** by Anne Michel and Alexandre Piquard **article** Published on June 19, 2020 in Le Monde https://www.lemonde.fr/economie/article/2020/06/19/taxe-gafa-mondiale-l-ocde-et-l-union-europeenne-font-front-commun-face-aux-etats-unis_6043403_3234.html

³⁴ https://www.lemonde.fr/economie/article/2021/04/06/l-administration-biden-lance-le-combat-pour-une-taxation-minimale-des-multinationales_6075654_3234.html

All this could be easily solved if we changed the tax system ³⁵ by introducing a transaction tax, which is easy to implement with appropriate algorithms, and which could affect all sectors, without being able to escape it³⁶.

To fight against illegal downloads of intellectual works, France has established the Hadopi... contested from its creation!

I: B: The High Authority for the Dissemination of Works and the Protection of Rights on the Internet (Hadopi)

In the early 2000s, we applied criminal legislation on counterfeiting with very (too) heavy penalties against downloading Internet users (sometimes minors) at first, then we made legislation sanctioning platforms offering access to works on their hard drive (but outsourced, almost impossible to sanction) or subsequently, sanctioning *Pear to Pear* sites that do not centralize works, but only the IP addresses of Internet users (which in itself is not illegal) who have them on their hard drive, but it comes down to the same as the result: counterfeiting!

Faced with these difficulties, in France, the Hadopi was created,³⁷ which gradually punished Internet downloaders: after the sending of e-mails at first, then registered letters, information and then threats (a. L 331-25), ³⁸Hadopi has the power to require Internet service

35 Taxation of GAFAMs: the court decision that changes the game for the tax authorities, thanks to a recent decision of the Council of State, the State will be able to tax the digital giants more easily on their profits. The permanent establishment was recognised as an online advertising company with its registered office in Ireland. A first. The tax authorities lost a dispute in 2018 involving the notion of 'permanent establishment'. "Digital companies that evade taxes in France have something to worry about. On 11 December, the Council of State issued a decision which, although it went unnoticed by the general public, had the effect of a bombshell among tax specialists. ": according to the article by **Isabelle Couet**, published on January 13, 2021 in Les Echos:

<https://www.lesechos.fr/economie-france/budget-fiscalite/taxation-des-gafa-la-decision-de-justice-qui-change-la-donne-pour-le-fisc-1280590>

³⁶ on the condition, however, that fiat money disappears, which will be done sooner or later despite the reluctance of fraudsters! (Germans in particular) cf the article by S. To Arnaud in Challenges: https://www.challenges.fr/monde/europe/un-solide-attachement-des-allemands-pour-le-liquide_24584

³⁷ A.L331-12 to 37 of the Intellectual Property Code

³⁸ [Article L331-25 \(Amended by LAW No. 2009-1311 of 28 October 2009 - art. 12 Amended by LAW No. 2009-1311 of 28 October 2009 - art. 3\)](#)

When it is seized of facts likely to constitute a breach of the obligation defined in Article L. 336-3, the Commission for the Protection of Rights may send to the subscriber, under his stamp and on his behalf, by electronic means and through the intermediary of the person whose activity is to offer access to online public communication services who has entered into a contract with the subscriber, a recommendation reminding him of the provisions of Article L. 336-3, enjoining him to comply with the obligation defined therein and warning him of the penalties incurred pursuant to [Articles L. 335-7 and L. 335-7-1](#). This recommendation also contains information for subscribers on the legal offer of cultural content online, on the existence of security means to prevent breaches of the obligation defined in Article L. 336-3 as well as on the dangers for the renewal of artistic creation and for the economy of the cultural sector of practices that do not respect copyright and related rights.

providers to cut off Internet access to recalcitrants... or, as a last resort, to open criminal proceedings for counterfeiting.

But two problems appear with Hadopi:

or interference with private correspondence (**forbidden without the authorization of a magistrate**³⁹) if one wants to prove the downloading of illegal, unauthorized content;

or a violation of the principle of the presumption of innocence (by assuming that by connecting to a *peer to peer site* one is making an illegal download.)

Despite all these criticisms, Hadopi has survived, due to its certain effectiveness: warnings and other threats have seen a very large reduction in illegal downloads!

But there remains a fundamental problem: democracy implies the protection of the general interest, the majority, and almost all citizens are Internet users (the majority likely to download) and are likely to download works by authors or performers (minority), which would suggest that downloads are accepted... even illegal. But if we don't sanction this majority, we disadvantage the owner minority, who will then have to work outside of their creation to live... and creation will be affected!

As we can see, it is a difficult choice, hence the legislative trial and error that led to the Hadopi.

But the danger for the owners of intellectual works is not limited to literary and artistic property, it also concerns industrial property!

In the event of a renewal, within six months of the sending of the recommendation referred to in the first paragraph, of facts likely to constitute a breach of the obligation defined in Article L. 336-3, the committee may send a new recommendation containing the same information as the previous one by electronic means under the conditions provided for in the first paragraph. The recommendation must be accompanied by a letter delivered against signature or by any other means capable of establishing proof of the date of presentation of the recommendation.

The recommendations made on the basis of this article shall mention the date and time on which the facts likely to constitute a breach of the obligation defined in Article L. 336-3 were established. However, they do not disclose the content of the protected works or subject matter affected by that breach. They shall indicate the telephone, postal and electronic contact details where the addressee may, if he so wishes, send observations to the Commission for the Protection of Rights and obtain, if he so expressly requests, details on the content of the works or protected objects concerned by the infringement of which he is accused.

³⁹ Investigating judge (Article 100 et seq. of the Code of Criminal Procedure) or the judge of freedoms at the request of the prosecutor (s.706-95) in the event of an investigation of flagrancy or preliminary, for offences committed by an organized gang or particularly serious

II: Evolution of the Industrial Property Situation at the Risk of Globalization

In the industrial field, globalization also poses a certain number of problems that are grouped under the term counterfeiting and which oppose democracies to dictatorships for the dumping generated, the WTO and the WIPO often circumvented, both for patents (A) and distinctive signs (B)

II.A: Manufacturing methods: patents

Patents for inventions, which are well protected in France, Europe and international law by various registration procedures requiring verification of prior art (a. L611-11 et seq. of the IPC), inventiveness (a. L611-14: not obvious to a skilled person who knows the state of the art of everything that has been published) and industrial application (a. L611-15), which constitute the 3 characteristics necessary for patentability, have, since the 19th century, mainly benefited Western democracies, which have registered most of the inventions.

This situation provoked an important debate in the 2nd half of the 20th century (after decolonization): developing countries, because of the low standard of living of the populations concerned, could not obtain new products or machines before the inventions entered the public domain (i.e. after 20 years -a. L613.1 of the IPC-). The question was glaring in the medical field, in particular, with the first triple therapies against HIV: poverty and the high price of medicines let thousands of Africans die, in particular!

The question is still being found today with the vaccines against Covid 19!

On the other hand, laboratories mention the fact that if they cannot make a profit from their inventions, they will no longer have the means to research it and therefore to find new drugs!

The solution would then be for international institutions to finance these therapies for poor countries!

But globalization from the WTO onwards has upset this imbalance.

Indeed, industrialists, by relocating their production to developing countries (at low production costs due to very low wages – sometimes 10 times less than in the West!) and by importing the products manufactured in this way into the West, practically tax-free, have on the one hand made considerable margins (often without taxes because these trade multinationals are often based in tax havens - Singapore etc-), and on the other hand, they have allowed people to have products (medicines in particular) at prices corresponding to their standard of living, and therefore to have access to these therapies, which has also contributed to increasing their standard of living (by creating an enriched class that has a standard of living comparable to that of the West: about 300 million people in China and India!)... to the point of finally encouraging Chinese manufacturers themselves to relocate their production and invest in Africa (Ethiopia in particular) where wages are still very low.

But if an opening of markets is indeed useful for developing countries, it is on the condition that this economic liberalism is coupled with trade union and political liberalism, which is not at all the case in China and Africa, where these freedoms are flouted for the benefit of corrupt and corrupting ruling classes (by these investors, by the way, but also more directly by the Chinese government, for example, which militarily supports local dictatorships – Burma, Ethiopia etc-!)

This Chinese expansion (particularly towards Europe), since China's entry into the WTO in 2001⁴⁰, has allowed it (16% of Chinese production is imported into Europe⁴¹) to have had a

⁴⁰ which does not respect the rules of economic liberalism of the WTO in entire sectors that are still planned and subsidized (ceramics, aluminum, etc.) cf. Richard Hiault in Le Figaro of 1.1.2018:

double-digit growth rate for nearly 20 years, allowing it to become the world's 2nd largest economy with nearly \$3118 billion in financial reserves in July 2018⁴², available for its investments⁴³... and in particular for research, which explains why it is now the leading country filing patents at the global level.

Maurice Allais, first French economics prize in 1989⁴⁴, warned at the time against such globalization which would in a way create millions of semi-slaves in emerging countries⁴⁵ and millions of unemployed in the West... which has been quite well verified, but above all which has seen France, in particular, lose 36% of its workforce⁴⁶ and globally 40% of its

https://www.lesechos.fr/01/01/2018/lesechos.fr/0301073040549_commerce---le-systeme-economique-chinois-dans-le-viseur-de-bruxelles.htm

⁴¹in 2017: \$2300 billion in exports for 1800 billion in imports, i.e. \$500 billion in trade surplus: 372 billion in exports to the EU for 244 billion in imports

<https://www.tresor.economie.gouv.fr/Pays/CN/commerce-exterieur>

⁴² see the article in Capital of 7.8.2018: <https://www.capital.fr/entreprises-marches/chine-hausse-inattendue-des-reserves-de-change-1301981>

⁴³ without respecting the rules of liberalism, in particular for foreign investments which must make joint ventures with Chinese companies but without exceeding 49% of the capital! cf. I.8 of the EU Commission report of 20.12.2017 http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf

⁴⁴See his book: *La mondialisation: la destruction des emplois et de la croissance*, Clément Juglar, Paris, 1990, where he develops the idea that:

"Globalisation can only bring instability, unemployment and injustice everywhere" and "generalised globalisation is neither inevitable, nor necessary, nor desirable"; finally, it also considers that "unemployment is due to relocation, itself due to excessive wage differences", thus "reasoned protectionism between countries with very different incomes is not only justified but absolutely necessary"

Cf: http://www.liberation.fr/futurs/2010/10/11/deces-de-maurice-allais-prix-nobel-liberal-et-protectionniste_685598 [archive]

⁴⁵ Thus the demonstrations repressed in Bangladesh by the militias of the textile industrialists; cf. the article of 14.1.2019 in the newspaper Le Monde https://www.lemonde.fr/international/article/2019/01/14/au-bangladesh-des-milliers-d-ouvriers-du-textile-en-greve-pour-reclamer-de-meilleurs-salaires_5408710_3210.html; or https://www.francetvinfo.fr/replay-radio/un-monde-d-avance/bangladesh-apres-la-greve-vient-la-repression-pour-les-ouvriers-du-textile_3126955.html and finally the article in L'Express of 26.4.2013 by L. Martinet: https://lexpansion.lexpress.fr/actualite-economique/immeuble-effondre-au-bangladesh-les-entreprises-qui-sous-traient-connaissent-les-risques_1452142.html

but also and above all the forced labour camps for Uyghurs and Tibetans in China under the pretext of 'eradicating poverty' (cf S. Leplatre's article in Le Monde of 21.12.2020 https://www.lemonde.fr/international/article/2020/12/21/en-chine-les-internes-du-xinjiang-passent-directement-des-camps-a-l-usine_6064059_3210.html) and who, in retaliation, prohibit access to the Chinese market to Western companies that refuse to use the work of these prisoners like H and M (see the article in Capital of 24.3.2021: <https://www.capital.fr/entreprises-marches/ouighours-la-chine-va-sanctionner-hm-qui-nachete-plus-de-coton-du-xinjiang-1398027>)

⁴⁶See the article by Mr. Viso in Le Figaro of 20.2.2010: <https://www.lefigaro.fr/conjoncture/2010/02/20/04016-20100220ARTFIG00193-l-industrie-francaise-a-perdu-36-de-ses-effectifs-en-30-ans-.php>

industrial production⁴⁷ in 20 years of the WTO because of this social, trade union and political dumping, whereas for the economy to be balanced, it is necessary to have a certain agricultural and industrial autonomy (energy in particular, but also manufacturing), services (private and public), without which interdependence becomes dependence and dependence drifts towards economic downgrading, impoverishment, or even a reverse neo-colonization. The industrial loss also has the consequence that the reduction in dividends reduces research budgets and therefore patent filing budgets, which is very noticeable in France, which is steadily falling in the world ranking (8th place in the world in 2018, -behind India- with 10 times fewer patents filed than by China, which has become 1st).⁴⁸ But the question also exists for distinctive signs.

⁴⁷ See the article by AS Bellaiche in Usine nouvelle, 13.6.2019 <https://www.usinenouvelle.com/editorial/pourquoi-en-moins-de-deux-decennies-la-france-a-perdu-40-de-ses-entreprises-industrielles.N854070>

⁴⁸See <https://atlasocio.com/classements/economie/innovation/classement-etats-par-nombre-de-depots-de-brevets-monde.php> (even if the size of the population obviously plays a very important role in these patent filings!)

II.B: Distinctive signs

In a liberal system where competition is the rule, if the ornaments of a product make it more attractive⁴⁹ compared to products from other origins with the same function⁵⁰, the identification of their origin is just as important, because it allows customers to be able to find the quality they are looking for in a product or service. both in terms of the company, through the trademark (a) and by its traditional or geographical origin (b)

a: Trademarks

Trademarks are distinctive signs (shapes, colors, sounds, registered and recognized by the INPI and protected for a particular product or service – a. L711.1 et seq. of the CPI-) that make it possible to identify the company that is at the origin of a product or service. In collectivist countries, the brand (as at the time of the guild brands in the Ancien Régime), had the vocation of the traceability of the product. Some consider, from this point of view, that the liberal brand is a useless and futile title that simply aims to flatter the ego of the *'fashion victim'* who will choose a particular 'chic' brand... *'Because I'm worth it'*: for example, the L'Oréal or Lancôme brands will not have the same social impact – brand image – as the Tati brand! Nevertheless, liberal globalization will respond that it is up to each person to position himself and that everyone is free to choose according to his or her personal choices this or that brand, and that it is not up to the State to judge the private life and motivation of its citizens!

Brands also impose a quality and therefore a price that citizens of developing countries find difficult to afford because of their standard of living. But the same remark as for patents can be made: since globalization, even luxury brands have often relocated their production to these countries... making products affordable for locals.

In addition, the locals acquiring the know-how of these brands have become able to produce products of almost as good quality as that of these brands... but at a much lower cost... hence a growing counterfeit reproduction in these countries, and in particular in China which has become the empire of counterfeiting especially thanks to its commercial spearhead that is Alibaba combined with Tik tok.⁵¹

Moreover, counterfeiting in these countries is difficult to prosecute before local courts because corruption is often widespread, or as in China where the courts, on the orders of the Communist Party, impose **nationalist judgments!**

Here again, in addition to the seizure of counterfeit goods on arrival in the West, the tax weapon seems to be one of the only effective weapons: a kilometre carbon tax would make it possible to curb these uncontrolled imports (for example, 0.001 e per km per kg of product).

While waiting for a more radical solution that would consist in excluding dictatorships from trade liberalism: the economic liberalism of trade should indeed be conditioned by trade union and political liberalism; but for this to happen, the oligarchies (including Western ones) that hide behind the multinationals via tax ⁵²havens would have to be cannot lobby; not to mention

⁴⁹ Hence the protection of designs and models – in terms of copyright, but also industrial as we have seen

⁵⁰ Patent-protected inventive function

⁵¹ See the article E. Moreira in Les Echos of 18.1.2019 <https://www.lesechos.fr/industrie-services/conso-distribution/comment-les-vendeurs-en-ligne-chinois-contournent-la-loi-sur-les-contrefacons-614433>

⁵² Thus, for example, Cahuzac, former socialist minister of the budget, who had hidden hundreds of thousands of Euros in banks in Singapore (via shell companies in the Seychelles and Dubai) (see the article in Le Monde of 4.2.2016: <https://www.lemonde.fr/politique/article/2016/02/08/jerome-cahuzac-doit-repondre-de-son->

the necessary reciprocity (imposed by article 55 of our constitution) which means that a Chinese can buy castles in France (150 in Bordeaux⁵³) while it is practically impossible for a Frenchman to buy a building in China unless he marries a Chinese woman. and even the right to property in communist China is only a usufruct that must be bought back from the state every 70 years!

b: Appellations of Origin (AO protected, Indication of Origin)

They are also distinctive signs, such as trademarks, but which indicate the origin not of a company, but the geographical origin of a product, which must meet certain traditional criteria of local manufacture and production. Originally, AOCs were born in France to designate cheeses and wines, so that for example the consumer would not be deceived (for example, *Camembert* is not made in Japan, nor *Champagne* in Chile). Thus, these wines and cheeses, which use a PDO to indicate their real origin, must correspond to a production in the indicated area. Thus, the distinctive sign *Camembert* or *Champagne* must be produced in the corresponding geographical area, and according to the traditional method, described in a specification!

[compte-bancaire-cache-devant-la-justice_4861054_823448.html](https://www.capital.fr/economie-politique/cest-tres-simple-levasion-fiscale-expliquee-au-proces-cahuzac-1272901) and in Capital of 19.2.2018 (<https://www.capital.fr/economie-politique/cest-tres-simple-levasion-fiscale-expliquee-au-proces-cahuzac-1272901>)

and 2.5 million Euros in the Isle of Man (see the express of 18.11.2014

https://www.lexpress.fr/actualite/politique/ps/un-deuxieme-compte-cache-pour-jerome-cahuzac_1623368.html)

for which he was sentenced by the Paris Court of Appeal on 15.5.2018 to 2 years in prison, 300,000 euros in fines and 5 years of ineligibility in application of article 324-1 of the penal code, (in addition to the tax adjustment!)

... which banks of course invest in this type of multinational...

And as we can see, this happened in a democracy where the freedom of the press ended up revealing these embezzlements, which were finally sanctioned by the courts... Unlike dictatorships that start by muzzling the opposition, the media and the judiciary (Putin's Russia, Erdogan's Turkey, and of course Xijngpgi's China... but also the attempts of apprentice dictators such as Duda in Poland or Orban in Hungary in this direction etc (see the minutes of 10.10.2018 in the National Assembly -<https://www.assemblee-nationale.fr/dyn/docs/RINFANR5L15B1299.raw>- and the Senate of 18.3.2021: -<http://www.senat.fr/rap/r20-457/r20-4578.html>-).

It is then understandable that these corrupt oligarchies are slowing down any restriction on globalization for their own benefit, and especially for the benefit of these megalomaniac dictators who cling to power to leave an illusory trace in history to give themselves the impression of existing (in addition to the fortunes accumulated on the backs of their people!)

Thus Putin has accumulated the largest fortune in the world according to some analysts heard by the US Senate (see the article of 18.3.2018 in Capital: <https://www.capital.fr/economie-politique/vladimir-poutine-est-il-lhomme-le-plus-riche-du-monde-1277920>)

, and according to some opponents such as Navalny, reason for the attempts to eliminate him!

⁵³ See the article by H. Prolongeau in Le Monde of 26.1.2019 (https://www.lemonde.fr/m-le-mag/article/2019/01/26/vins-de-bordeaux-une-passion-chinoise_5414817_4500055.html)

The PDO has become an acronym for the EU⁵⁴, with the AOC still in use in France on wines in particular.

There are also other signs such as the PGI which sanctions local know-how... but whose products can come from anywhere... (sic!)⁵⁵ and other acronyms such as the Red Label, organic (AB etc) but which contain a lot of exceptions, which means that the consumer is better protected by some independent labels such as Demeter...

Philippe GAST

Lecturer at the University of Normandy-Le Havre

Former lawyer at the Paris Bar

In France, there are 50 dairy PDOs, 50 agri-food AOPs (fruit and vegetable oils, etc.) and 363 wines.

Agri-food PDOs:

Regulation (EU) No 1151/2012 of 21 November 2012 of the European Parliament on quality schemes for agricultural products and foodstuffs

Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down detailed rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs

1. Wine-growing PDOs:

Regulation (EU) No 1308/2013 of 17 December 2013 on the common organisation of the market in agricultural products (wine products)

Regulations incorporated into the Rural and Maritime Fishing Code , Articles R.641-1 to R.641-10<https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protgee-controlee-AOP-AOC>

⁵⁵ <https://www.economie.gouv.fr/particuliers/aop-aoc-igp-stg-labels-certification-alimentation>