

Duquesne University

Duquesne Scholarship Collection

Law Faculty Publications

School of Law

1994

An Eco-esc Pendulum of Copyright: A Deconstructive Perspective of the Copyright/Authorship System

Dana Neacsu

Duquesne University, neacsue@duq.edu

Follow this and additional works at: <https://dsc.duq.edu/law-faculty-scholarship>



Part of the [Intellectual Property Law Commons](#)

Repository Citation

Neacsu, D. (1994). An Eco-esc Pendulum of Copyright: A Deconstructive Perspective of the Copyright/Authorship System. Retrieved from <https://dsc.duq.edu/law-faculty-scholarship/2>

This Article is brought to you for free and open access by the School of Law at Duquesne Scholarship Collection. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of Duquesne Scholarship Collection.

AN ECO-esc PENDULUM OF COPYRIGHT/

(A DECONSTRUCTIVE PERSPECTIVE OF THE COPYRIGHT/AUTHORSHIP SYSTEM)

ILS
K
1420.5
.N43x
1994

A LL.M PAPER 1993-1994
written by Elena-Daniela Neacsu

NOTICE: The Harvard Law Library holds this paper pursuant to a regulation adopted by the Faculty of Harvard Law School on May 12, 1999.

Harvard Law School

This material is protected by Copyright Law (Title 17 U.S. Code).

Short extracts may be quoted or paraphrased if the source is acknowledged.

Extensive quotation or copying requires the prior consent of the author.

Contents

ACKNOWLEDGMENT.....	6
INTRODUCTION.....	7
BOOK I. GENESIS.....	13
A. AS A COMMERCIAL REGULATION.....	13
a) A ROYAL COMMERCIAL LAW.....	21
b) A ROYAL FAILURE FLOURISHED INTO REVOLUTIONARY DECREES.....	24
c) A NEW COMMERCIAL POLICY.....	27
B. AS A COMMERCE WITH INFORMATION...	30
a) ADVOCATING CITIZEN'S KNOWLEDGE.....	30
1. SHORT HISTORY.....	32
2. THE ENGLISH PRE-INFORMATIONAL SOCIETY.....	33

3. THE FIRST INFORMATIONAL	
SOCIETY: THE UNITED STATES.....	35
4. INFORMATION POLICY ON THE	
OLD CONTINENT.....	38
b) GOVERNING THE PUBLIC KNOWLEDGE	
.....	41
1. GENERALITIES.....	41
2. THE ENGLISH PUBLIC CENSORSHIP.	
.....	43
3. A CONTINENTAL ATTITUDE.....	44
i) THE FRENCH ATTITUDE.....	44
ii) A GOTHIC ATTITUDE.....	45
4. THE UNITED STATES	
AND CENSORSHIP.....	47
BOOK II. SEASONING.....	55

A. COPYRIGHT IN THE 20TH CENTURY	
GENERALITIES.....	55
B. AMERICAN COPYRIGHTED MUSIC.....	59
a) THE RIGHT TO REPRODUCE THE	
MUSIC IN PHONORECORDS AND TO	
AUTHORIZE SOUND RECORDINGS.....	59
b) THE MUSIC PERFORMING RIGHT AND	
ITS EXPLOITATION.....	60
C. COLLECTIVE PROTECTION OF	
EUROPEAN MUSIC.....	84
BOOK III. RESURRECTION.....	100
A. THE BERNE CONVENTION.....	100
B. THE COPYRIGHT BATTLE OF THE	
TWO ROSES: THE USA AND THE EEC.....	103
C. THE INTERNATIONAL COMMUNITY	

FACES HYDRA.....	107
INDEX.....	118
TABLE OF CASES.....	122
BIBLIOGRAPHY.....	127

ACKNOWLEDGMENT

The author wants to express her gratitude to Prof. Arthur R. Miller for his thoughtfulness in supervising this paper.

She also acknowledges the priceless help given by Prof. Michael H. Davis who made this paper coherent and understandable for the English reader.

INTRODUCTION

The thesis of this paper is neither new, nor subtle. It has, in fact, been a recurrent theme in many writings concerned with the interests in copyright¹ and their effects in the present world.

When I first started to think about this paper I imagined an incendiary introduction: "Whereas the author's interests were originally the focus of both the Copyright² and the Authorship systems³, this is no longer true. Both systems promote other, quite different, even opposite, interests." I abandoned this introductory passage discovering that the author's interests have never been

¹. I use the term "copyright" in its broadest sense, or in other words, to designate the legal protection of non-functional ideas expressed in a tangible form. Here, it is virtually synonymous with "literary and artistic property".

². In this case I use Copyright" as a generic term for any kind of literary property protection in countries of common law origin (by common law or statute), as opposed to the protection conferred by the civil law system. For an overview of the differences between these two major legal systems, see A. T. von Mahren, and J. R. Gordley, "The Civil Law System. An Introduction to the Comparative Study of Law" Little, Brown and Co., Boston, 1957; A. T. von Mehren, "Law in the United States", Kluver, Boston, 1989.

³. I use the expression "Authorship protection", as synonymous with "author's rights system", and as a generic appellation of literary property protection conferred by the civil law system, and opposed to that of the common law system. See supra note no. 2.

the focus of copyright⁴ (or at least the real interest of such laws). On the other hand, authors have never obtained such great benefit from their intellectual productions as today. (Though this is reliably the case only in societies where there is a productive industry producing intellectual goods, and a large number of consumers of intellectual production⁵.)

Aside from such speculations over the focus of copyright statutes⁶, my concern is also with the perversion of domestic copyright provisions from an incentive for learning and progress⁷--within whatever limits that goal was fairly found in statute and case decisions--into an insurmountable international obstacle to learning and education. The position taken by **GATT**⁸ in its **TRIPs**

⁴. See supra note no. 1.

⁵. About the relationship between the consumers, their degree of literacy, and the real possibility of different financial rewards for authors, see M. J. Holland, "A Brief History of American Copyright Law", Copyright Dilemma, (ed. H. S. White), American Library Association, Chicago, 1978, at 3.

⁶. See note no.1.

⁷. See, i.e. the English and American copyright systems where the ultimate goal is expressly stated.

⁸. Within **GATT** the partners were the winners of a world war (1947). They decided to rationalize their international economic interdependencies, at an institutional level. (**GATT**, 1947, for some purists, but not for Keneth Dam, was not an International Organization. "The **GATT**. Law and International Economic Organization", Chicago UP, Chicago, 1970, at 335.)

an eco-esc pendulum of copyright

exemplifies why the use of intellectual works, even if technically free for educational purposes⁹ become in fact unavailable for developing countries¹⁰,

Initially they seemed oblivious of the very existence of their "less-developed partners". This is partly true and understandable because some of the present developing countries were covered by colonial "representation". They were either the United Kingdom (Annex A), or the United States of America (Annex D), or incorporated in the French Union (Annex B), or in the Customs Union of Belgium, Luxemburg, and the Netherlands (Annex C). Dam, *The GATT*, 448-9. And partly because the remaining part of the current "less-developed" countries, were simply not yet members.

Of the former socialist countries, the former republic of Czechoslovakia "was a contracting party before it adopted socialist institutions", and Poland, since 1967, "has participated in the work of the GATT under special and highly limited arrangements." Hungary and Romania were accorded "only observer status," and the remaining East European countries (Bulgaria, Albania and the former countries included in the Soviet Union), excepting the former Yugoslavia, had no relations at all with the GATT. The best position was probably occupied by the former Yugoslavia, which was regarded as a possible future partner with a market economy. Dam, *The GATT*, 317.

⁹. The Berne Convention, the Paris Act (1971) ensures free access to foreign educational sources under certain conditions. For the text of this amendment, V. Porter, "Beyond the Berne Convention: Copyright, Broadcasting and the Single Market," John Libbey, London, 1991, 101-8 [hereinafter Porter, *Beyond the Berne Convention*].

About the goal, from a publisher's perspective, of educational achievement in relation to the economic level in developing countries, such as India, D. N. Malhorta, "The Publishing and Copyright Situation in India," Copyright. Economic and Cultural Challenge, (Publishers' International Union 2d Symposium, April 1990) LITEC Paris, 1990, 143-7.

On the younger component of the population which interests the World Bank as an important potential market (more than one out of two children worldwide does not own a textbook), B. Salomé, "World Bank Activity in Support of Publishing in the Developing Countries," *id.*, at 164.

About the functions of the UNESCO's International Copyright Information Center, which primarily assists users in the developing countries to secure copyright clearance on favorable terms, especially in the case of educational works, J. Phillips, R. Durie, and I. Karet, "Whale on Copyright," Sweet & Maxwell, London, 1993, at 154 [hereinafter *Whale on Copyright*].

an eco-esc pendulum of copyright

when practical access to them becomes subject to limited or even monopolized technological means, such as data bases. Consequently, Copyright¹¹ and so called author's rights¹² have become another powerful instrument to control and dominate this world of sound and fury.

This paper is structured in three parts. The first (Book I) addresses the original interests of copyright and the insinuated mutual international interactions between different national copyright regimes. It attempts to reveal the commercial essence of copyright¹³ generated by its educational (in the non-ideological sense) and censorial side¹⁴. The second part (Book II) is focused on

¹⁰. Among many other tasks, UNESCO uses data bases in developing countries to keep abreast of domestic copyright developments as well as about international treaties. See, A. Garzón, "UNESCO and Copyright in the Developing Countries", *id.*, 170-3.

¹¹. See, *supra* note no. 2.

¹². See *supra* note no. 3.

¹³. See *supra* note no. 1

¹⁴. A premise of this paper is that the commercial exploitation of any copyrighted work is the plain evidence of its social importance. And, as I will try to explain, this social value is conferred either by the work's informational content ("informational" in its broadest sense)--when the public has an interest in it--, or by the "secondary meaning" of that content--when, originally the lay, and/or religious authority, and later the owner of the copyright in that work (distinct from its author), developed an interest in it. For a correlation between the "social value" and "social importance" of a book, and its "commercial exploitation", see Justice Brennan's opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413; 86 S. Ct. 975; 16 L. Ed. 2d 1; 1 Media L. Rep. 1390 (1966).

an eco-esc pendulum of copyright

the 20th century moment in the evolution of national and regional or multinational statutes focused on literary and artistic works. The commercial focus--even obsession-- found in the copyright regimes of the United States and the European Economic Community and its members, presented from the same previous perspective, is exemplified by the policies governing musical compositions created by members of collective societies. The third part (Book III) addresses the same issues from an even larger international perspective than the European Community and the United States, discussing the impact of copyright¹⁵ upon the developing countries and the growing role of plainly commercial international institutions such as GATT in this domain.

In this paper I totally disagree with both express theories of the Copyright and Authorship systems' goals: In the first, the dissemination of information for the public welfare though private incentives, as the expressed legislative purpose, and in the second, the protection of the author as an author.

Explained in a few words, I disagree because, in the first, as I try to demonstrate, a copyright statute--in any common law country--, represents a purely commercial public policy, because of the special "social value" of the traded goods, and, concerning the second, essentially a truism--belonging to civil law systems--, an author, in order to be protected as an author, has to have authored something, and that something will define his legal position, which consequentially will delimit her protection. Thus, in civil law countries as well though, the author is promoted as the central figure, what really interests national legislation is the eventual copyrighted goods, and their commercial distribution.

¹⁵. See, note no. 1.

an eco-esc pendulum of copyright

Unfortunately, this paper fails to reach either a radical or an optimistic conclusion. This is the result of two prudent observations. First, due to the specifics of the exploitation of literary and artistic productions, authors have never succeeded without an "exploiter"¹⁶. It appears they must accept in one way or in another, their own spoliation--directly by an investor, or indirectly by authors' guilds¹⁷. Secondly, at the international level the transfer of information and technology has always been unidirectional (from developed to less developed peoples), and thus, present circumstances are hardly new. Consequently, this paper has only a very constrained, if any, importance; it marks what may well be a new style in legal writing--the "open paper"--, a counterpart to Umberto Eco's open novels.¹⁸

¹⁶. Since the invention of the movable type printing press the author-writer has remained dependent on her publishers. On the origin of this reciprocal servitude, see A. R. Bertrand, "Le droit d'auteur et les droits voisins," Masson, Paris, 1991, at 24 [hereinafter Bertrand, *Le droit d'auteur*].

¹⁷. Usually they are called collective societies.

¹⁸. See for a theoretical approach of "open works", e.g., U. Eco "Opera aperta: forma e indeterminazione nelle poetiche contemporane" Milano: Bompiani, 1976.

an eco-esc pendulum of copyright

BOOK I. GENESIS

A. AS A COMMERCIAL REGULATION

When Medieval Europe¹⁹ reached the sustainable level of a commercial exchange economy, the division of labor and its specialization and professionalisation increased sequentially, because communities produced more than they needed themselves, the trade had developed²⁰. By the latter part of the 13th century, this phenomenon generated a peculiar appreciation of cultural productions, even if restricted to a small elite²¹. Cultural and economic value started to merge. (As an example, books became worthy as something more than mere manuscripts, because of their rarity, and therefore became "such valuable

¹⁹. For the basic historical information discuss in this paper, see H. G. Koenigsberger, & A. Briggs, "A History of Europe", t.I. Koenigsberger "Medieval Europe 400-1500", and t.II. Koenigsberger, "Early Modern Europe 1500-1789" Longman Inc., New York, 1991 [hereinafter Koenigsberger, t.I and Koenigsberger, t.II].

²⁰. On the beginning of trading in urban areas governed by professional corporations or guilds, see Koenigsberger, t.I. 144-7.

²¹. Usually only monks and clerks could then read and write. For example, Magna Carta, signed in 1215, was signed with signet rings, because the greater part of nobles couldn't write. On the social scale of that time, "Men of letters"--the literate--were inferior to "Men at Arms". See R. W. Jones, "Copyright and Trade-Marks". E.W. Stephens Co., Columbia Missouri, 1949, at 9 [hereinafter Jones, Copyright]. Accordingly, it seems reasonable to assume that the number of books was not too important, and the literate 'elite' was really very restricted.

an eco-esc pendulum of copyright

articles of property that they were often pledged as securing for loans."²²)

Later²³, efforts to develop mechanical inventions grew²⁴. Cities developed a new social and psychological environment²⁵ where people invested both in business ventures and in the patronage of artists, thus encouraging a great flowering of creative activities²⁶. Education and literacy spread to the lay urban public and provided the market for the enormously increasing output of the printing press. Thus, a new form of industry and trade appeared: the book trade²⁷.

²². In Paris a public scandal was caused by exorbitant prices demanded for books by booksellers--also called stationarii--, and bookbrokers--also known as librarii. See H. G. Ball, "The Law of Copyright and Literary Property", Banks and Co., Albany, Mathew Bender, NY, 1944 at 8 [hereinafter Ball, The Law of Copyright].

²³. Koenigsberger, t.I. 343-364.

²⁴. An example of a mechanical invention from those days is the movable type printing press.

²⁵. Koenigsberger, t.I at 364.

²⁶. It was in the Italian cities where the artists first became conscious of their potential social role. Leonardo, when he portrayed himself as a wise old man with a beard, imitated "the traditional representation of God the Father". Durer might have thought of his role as creator "after the Creators", when he portrayed himself suggesting the image "which was usually given to Jesus Christ". Koenigsberger t.I, 374-5.

²⁷. Koenigsberger, t.II at 155. By the time printing was invented in Europe, both stationarii and librarii were carrying on their trade in most of the European cities. See S. C. Masterson, "Copyright--History and Development", 28 Calif. L. Rev. 620, cited in Ball, The Law of Copyright at 9. On the connection between the printing press and the industry of printing and selling books, see also, A. C. Yen, "Restoring the Natural Law: Copyright as Labor and

an eco-esc pendulum of copyright

From its beginning, this trade was no different than any other. As for any other trade it needed special guild protection against competitors. It was conscious perhaps, of the potentially free marketability of books at any place and time²⁸, theoretically by almost anybody, without requiring a hard apprenticeship. Therefore, different categories of professionals involved in the book industry and the book trade asked authorities for so-called "exceptions," or "book-privileges" to protect them from competition in new printed books²⁹.

These privileges were first enforced in the Italian³⁰ and German cities,

Possession", in Ohio S. L. J., 523-5 (1990) [hereinafter Yen, Restoring the Natural Law].

²⁸. "Books were the first commodity that was mass-produced", and booksellers saw that profits would be greater if the exclusive right to make copies could be secured. Koenigsberger also noticed that the later European industrial revolution was inconceivable without this preliminary industrial-intellectual revolution. On the strict dependence between the books and printing technology, see. E. Eisenstein, "The Printing Press as an Agent of Change", Cambridge: Cambridge UP, 1980.

The "*copy-right*" as the "*right to make copies*" is underlined in Jones, Copyright, at 69.

On "copyright" as both the practice of securing marketable rights in texts that are treated as commodities, and as a modern creature of the printing press, see M. Rose, "Authors and Owners. The Invention of Copyright", Harvard UP, Cambridge, Massachusetts, London, 1993, at 3 [hereinafter Rose, Authors and Owners].

²⁹. For more details, see E. Armstrong, "Before Copyright. The French Book-Privilege System. 1498-1526" Cambridge UP, 1990, at 1 [hereinafter Armstrong, Before Copyright].

³⁰. The practice of protecting mechanical inventions through privileges originated in Venice in the 15th century. One century later it was adopted in other European states. In England these privileges first appear in 1518. See F. S. Siebert, "Freedom of the Press in England. 1476-1776"

an eco-esc pendulum of copyright

highly commercialized areas. From a simple commercial monopoly--forbidding all other printers from the manufacture and sale of printed books³¹ in a certain sovereign geographic area--the privilege soon imposed restraints on two levels: First, the restrictions devolved from restraints applying to all books generally to specific protections of particular books³²; and second from protections solely for the benefit of inventors³³, then expanding for the benefit of publishers³⁴,

Urbana: U of Illinois P, 1952, 33-40.

³¹. This commercial monopoly was first established in favor of the inventor or of the first person who introduced printing into a country or city where it had hitherto not been practiced. A privilege of this kind was successfully sought by Johann de Spira in September 1469 from the government of Venice, threatening anyone else who tried to start a press there with fines and with confiscation of his tools and his books. See, Armstrong, *Before Copyright*, at 2. Another example is provided by the Haller's privilege. He originally introduced printing in Cracovia, and obtained a general commercial privilege in any of the books he printed, *id.*, at 8. In England and in France, these privileges appeared later, because those governments did not need to offer such exhaustive privileges in order to induce printers to come and work in their cities, *id.* at 21.

³². The earliest book-privilege introduced in a Germany city dates from 1479, Wurzburg, *id.*, at 3.

³³. For example, Jojann Schoeffer of Mainz, seeking a privilege in 1518 from the Emperor Maximilian I, made the plea, among others, that his grandfather was the inventor of printing. On this ground he obtained the grant, *id.* at 1.

³⁴. In France, for example, by the early sixteenth century, a very large number of firms were making their living out of the manufacture or sale of printed books. Therefore, a highly competitive situation developed especially in the protection of copies. In this context, by 1507, a leading Paris publisher secured a three-year grant for any book for which he should be the first person to publish it. *Id.* 21-2.

an eco-esc pendulum of copyright

and finally for authors³⁵. This eventual variety of recipients of similar privileges suggests that "making books" was regarded as a unitary industrial activity. Even if they occupied different professions, each of them were entitled to protection³⁶ on roughly equal grounds³⁷.

Therefore, both future different modern systems of protecting literary and artistic works³⁸ evolved from a pure commercial book-monopoly. Perhaps it

³⁵. Undoubtedly, authors could become professionals, and ask for a professional privilege, only when a certain level of production and consumption of printed materials was attained. However, even before that, authors might have obtained a commercial privilege. "The first author's privilege was one granted in Venice, in 1486." According to the grant, the author could choose which printer would publish his book, and any other printer who published it would be fined 500 ducats. For more details, see Rose, *Authors and Owners*, at 10.

³⁶. Certainly the most powerful members of the book trade were those who secured book-privileges. In France, for example, with the statute of 1686, printing gained a general privilege belonging only to printers. I use "printer" to translate "libraire"-- "term utilisé pour designer les imprimeurs à partir du XVIème siècle"; it could also be translated as publisher. See Bertrand, *Le droit d'auteur*, at 24.

Thus, a contest between those who controlled the trade through the right to print the most valuable works and those excluded from power became fated. This struggle has continued within the metaphysical frame of the "copyright" through the succeeding centuries. See, Rose, *Authors and Owners*, 9-12.

³⁷. In France, for example, the grant of a privilege was the result of a request directed to the state, whether to the royal chancery, to the Parliaments, or to officers of the Crown. It was regarded as a personal favor which cost the Crown nothing to give. Either printers or authors relied on virtually the same economic arguments in seeking privileges: The author invoked his labor and expenses, including the cost of printing, if he paid or intended to pay for it. The publishers put forward economic arguments for what "they had incurred or planned to incur in securing and printing a new item." See, Armstrong, *Before Copyright*, 78-84.

³⁸. Within the common-law system and the civil law system. see *supra* notes nos. 2 -3.

an eco-esc pendulum of copyright

had aimed to encourage commerce in a new industry without costing its grantors anything. (Contrary they earned popularity through an act of genuine charitable humanitarianism.)

However, its grantors' good deed was the result of the professional subjects' request when they felt the threat of competition. Whoever was involved in the book industry in a sovereign area sought as broad protection as possible--a general prohibition against any competitors from practicing the same activity³⁹ in that geographic area.

For example, in early England, the principal publisher was not an individual, but a corporate entity--the Stationers' Company.⁴⁰ They sought to

³⁹. Another manner of book trade regulation--developed in England--was the guild system. See *supra* nos. 36-8, and the text accompanying them.

⁴⁰. For a detailed history, see, C. Blagden "The Stationers Company: A History, 1403-1959", Allen & Unwin, London, 1960.

The right to print a book was established through entry onto the Stationers' Company's register. They used the term "copy" to designate both the original manuscript and the right to print forever a particular book. It was the guild that authorized the system and also administered it: only its members--booksellers and printers--might own the copies. For details, see Rose, *Authors and Owners* 12-13.

The stationers' copyright was an ideal instrument of monopoly for its owner. It was thought by its grantor to ensure a strict control of published material, providing, at the same time (as will be discussed), "a superior device of censorship." See, L. R. Patterson & S. W. Lindberg, "The Nature of Copyright: A Law of Users' Rights" at 19, 1991 [hereinafter Patterson, *The Nature of Copyright*], L. R. Patterson, "Copyright Overextended: A Preliminary
an eco-esc pendulum of copyright

protect their industry under the threat of Scottish competitors⁴¹.

In this stage they first used the term "**copy right**". It was never used in the meaning of a common law right, but as a "**right**" grounded on by-laws of the company in favor of its members⁴², and in this way they tried to use it later through legislative statutes. Therefore, the history of statutory copyright in

Inquiry into the Need for a Federal Statute of Unfair Competition", in 17 Dayton L. Rev. 385, 389 [hereinafter Patterson, Copyright Overextended].

⁴¹. Until the first quarter of the sixteenth century, a high proportion of the printed books required in England was imported from abroad. For details, see E. Armstrong, "English purchases of printed books from the Continent 1465-1526", in English Historical Review, XCIV (1979), 268-90, cited in Armstrong, Before Copyright, at 21.

The English publishers, who imported their product and faced competition, were the ones who promoted the future legislation--the Statute of Anne--in order to export their copyright control to Scotland. See D. Saunders, "Authorship and Copyright," London, 1992, 55-6 [hereinafter Saunders, Authorship].

This, of course, is an early but surely significant example of the use of copyright as a means of international trade regulation.

⁴². In the Company's records the term "copy right" appeared for the first time in 1701, as a 'right' grounded on by-laws of the company in favor of its members, empowered in this sense by the Charter of Incorporation granted by Queen Mary in 1557. This Charter allowed the London printers, bookbinders, and booksellers to form themselves into a recognized guild of traders. In this regard, see A. Latman, "Latman's the Copyright Law" 6th ed. 1986, 3-4 [hereinafter Latman's Copyright]; M. A. Leaffer, "Understanding Copyright Law" Matthew Bender, 1989 2-3 [hereinafter Leaffer, Understanding Copyright]; Saunders, Authorship, 47-8.

According to Saunders, the copyright that legislators knew in 1710, despite the fact that the term is nowhere mentioned inside the statute, was this stationers' copy right, "a device formed in and by the book trade for the express purpose of protecting individual stationers' ownership of the right to print copies of works whose titles had been registered with the Company." Saunders, Authorship, at 48.

an eco-esc pendulum of copyright

England⁴³, and its practice, which doubtless influenced both the Continent's laws⁴⁴ as well as the English Colonies⁴⁵, illustrates quite well that copyright⁴⁶, has meant at least historically, a commercial regulation⁴⁷.

⁴³. For details see, B. Kaplan, "An Unhurried View of Copyright", 1967, 3-9 [hereinafter Kaplan, *An Unhurried View*]; L. R. Patterson, "Copyright in Historical Perspective", 1968, at 27. "If it can be said that 'copyright' existed before 1709, it might best be defined as 'stationer's copyright' or 'publisher's copyright'." "Copyright. Current Viewpoints on History, Laws, Legislation" (A. Kent, & H. Laucour, eds), RR Bowker Co., New York, 1972, at 2.

⁴⁴. At least for the reason that it was the first important legal regulation that benefitted everybody interested in the book trade--governmental authorities, businessmen, and authors--, France and the future Germany could not have escaped its influence.

⁴⁵. On the heavy borrowing from England's Statute of Anne by the American Congress, see, Latman's Copyright, at 6; Leaffer, *Understanding Copyright* at 4; A. Latman, R. A. Gorman, and J. C. Ginsburg, "Copyright for the Nineties. Cases and Materials", 3d ed. 1989, at 4. L. Benjamin, "Tuning Up the Copyright Act: Substantial Similarity and Sound Recording Protections", in 73 Minn. L. Rev. 1177 (1991); Boorstyn, N. "Copyright Law," LCP BW, 1981, at 4.

On the relation between the American constitutional copyright clause--Art. 1, §8--, and the English common law copyright, see Saunders, *Authorship* at 152; L. H. Amdur, "Copyright Law and Practice". Clark Boardman Co., Ltd., New York, 1936, at 1.; Fenning, "The Origin of the Patent and Copyright Clause of the Constitution", in 17 Geo. L.J. 109 (1929); Howell, "Howell's Copyright Law", BNA Inc., Washington, D.C. 4th ed., 1962 at 4 [hereinafter, *Howell's Copyright*].

On the general influence of the English common law copyright in American courts, see R. R. Shaw, "Literary Property in the United States", Scarecrow Press., 1950, at 9 [hereinafter Shaw, *Literary Property*].

⁴⁶. See *supra* note no. 1.

⁴⁷. This is obvious for the book-privileges, considered by Mark Rose the first "genuine anticipation of copyright." (A different opinion concerning the connection between the two types of monopolist protection is expressed in *Whale on Copyright* at 2: "The system of privileges is not, however, the true ancestor of statutory copyright." [hereinafter *Whale on Copyright*]). It explains the mechanism by which "the rights conferred by copyright" have been used "to restrain

an eco-esc pendulum of copyright

a) A ROYAL COMMERCIAL LAW

The Statute of Anne⁴⁸--"A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors, or Purchasers, of such Copies, during the Times therein Mentioned"⁴⁹ --was the final act of Parliament's resistance to the full force of the booksellers' pleas to restore their control of the trade⁵⁰ they had previously enjoyed, and which during the 17th century suffered a series of setback⁵¹. The stationers' arguments that they

trade competition." MacQueen, "Copyright, Competition and Industrial Design". Aberdeen U.P. 1989, at 2 [hereinafter MacQueen, Copyright, Competition].

⁴⁸. Reprinted in H. Ransom, "The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710", Austin: U of Texas P, 1956, 109-17.

⁴⁹. The original title was "A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners thereof", Rose, Authors and Owners, 45-6.

⁵⁰. On the similarity between the interest of publishers in having a monopoly over the production of books and the interest of medieval guilds in having control over the production of a new technology, see A. R. Miller, and M. H. Davis, "Intellectual Property. Patents, Trademarks, and Copyright", West Publishing, 2d ed. 1990, at 280 [hereinafter Miller and Davis, Intellectual Property].

⁵¹. By virtue of the decree which established the Stationer's Company in 1556, all published works in England had to be entered upon its register and in the name of some member of that company. In this way, and supported by the Star Chamber, the stationer successfully claimed the right to print and publish the work for himself, his heirs and assigns forever. See, Howell's Copyright at 2. Throughout the entire century before to codification, the publishers had the book trade comfortably to themselves. See P. Jaszi, "Toward a Theory of Copyright: The Metamorphoses of "Authorship", Duke L. J. at 468 (1991) [hereinafter, Jaszi, Toward a Theory of Copyright].

an eco-esc pendulum of copyright

merely sought to vindicate the interests of the "rightful owner"--the rights of the author--had an unexpected effect.

Certainly, the booksellers sought to secure their interests, through the new legal fiction⁵² of the author's rights instead of the now hopeless traditional claim of protection of their profession⁵³. But ironically, Parliament adopted this strategy as a weapon against stationer's monopoly itself⁵⁴.

Although labelled "An Act for the Encouragement of Learning," the statute was, "in fact, promoted primarily by the London-based fraternity of British publishers" (then designated "stationers" and "booksellers").

⁵². The very passage of the Statute of Anne as well as substance has to be related to the political and cultural conditions, to the evolution of juridical thoughts, favorable to certain conceptions about ownership and rightful ownership, such as those developed by W. Blackstone, in his "Commentaries". In this cultural environment, the publishers found it more effective to use "the author's rights as a blind for their interests", see, Jaszi, *Toward a Theory of Copyright*, at 468.

⁵³. Their "initial pleas were for new censorship legislation to protect the government (and themselves). Only when these pleas failed did they make their plea for a copyright to protect the author." L. R. Patterson, "Copyright and the 'Exclusive Right' of Authors" 1 *Georgia J. of Intel. Prop. L.* (1993) 1, 12.

⁵⁴. With the expiration of the Licensing Act in 1694, and the invasion of independent printers into the sacred domain of the Stationer's Company, stationers could have applied to Parliament for a law to protect their alleged rights in perpetuity against those pirates. But, the Parliament, instead of recognizing their perpetual rights, proceeded to pass a law limiting the stationers' exclusive right of publication. For details, see Drone, "Law of Property in Intellectual Productions", 1879, at 69. Patterson, *Copyright in Historical Perspective*, at 147.

"Parliament enacted the Statute as a response to the booksellers' undesirable monopoly in the book selling business." Yen, *Restoring the Natural Law*, at 526.

"The history of copyright law is largely the story of judicial and statutory reactions to an eco-esc pendulum of copyright

Therefore, the adoption of this new legal argument--the author's rights to property in his work⁵⁵--to contemporary and present commentators alike, expressed nothing more than a compromise between commercial private demands and a government understanding of the power of the new merchandise. (Virtually all commentators have since agreed that the new statute was still "in its practical effect" a protection of "the publisher's right to copy."⁵⁶)

the resulting monopolistic restraints." Miller and Davis, *Intellectual Property*, at 280. However, despite codification, during the greater part of the eighteenth century, "the trade of bookselling and the facilities for printing and binding books were under the control of a small group of London booksellers, who pursued a policy of exclusion and exercised a monopoly which they successfully maintained and profitably exploited until the last quarter of the century." Ball, *The Law of Copyright*, 15-6.

⁵⁵. "The right brought into statutory existence in 1710 was the perfectly alienable right--it could be sold and traded--to engage in certain economic exchanges based on the mechanical duplicates of a work. As a trade regulation statute, the Act of 1710 neither assumed nor required any equivalence between the person of the copyright holder and the moral or aesthetic personality of the writer; rather, it delineated and attributed the legal capacity to own copyright in a manner designed for the regulation of a specific economic activity--the making and trading in a printed commodity." Saunders, *Authorship* at 10.

⁵⁶. For "some 150 years copyright was quite simply the right to copy and, except for the implied right to publish, nothing else." Whale on Copyright" at 11.

Kaplan also suggests that publishers rather than authors were the intended beneficiaries of the Statute of Anne. An *Unhurried View of Copyright*, 6-9.

Even commentators who emphasize the anti-monopolistic (and anti-censorship) goal of the statute, agree that it was "in fact a trade regulation statute." Patterson, *Copyright Overextended* at 399.

an eco-esc pendulum of copyright

b) A ROYAL FAILURE FLOURISHED INTO REVOLUTIONARY DECREES

In the 18th century, the situation under the French *ancien regime*⁵⁷, was similar to the English copyright regime: the author became a nominal partner within the book trade⁵⁸. As in England, the author's right remained just "a routine instrument of publishers' interests."⁵⁹

In the 1770s, France, perhaps under the English challenge was seeking a general national codification of existing customary laws⁶⁰. This desire would be fulfilled later under revolutionary ideology⁶¹.

⁵⁷. Fundamentally commercial principles marked the French book-privilege system for its complete duration. R. Birn, "Malesherbes and the Call for a Free Press", in *Revolution in Print. The Press in France, 1775-1800*, (R. Darnton, and D. Roche, eds), Berkeley: U of California P. 1989, 131-5.

⁵⁸. See, Bertrand, *Le droit d'auteur*, at 25; Saunders, *Authorship* at 83.

⁵⁹. Saunders, *Authorship* at 83.

⁶⁰. The Napoleonic Civil Code—a post revolutionary codification-- was also the result of general and legal cultural accomplishments during the previous centuries.

⁶¹. The ancient network didn't fit neatly into an "aesthetic schema where the *persona* of the Romantic author provides the singular goal to which all earlier forms of authorship had to lead." Saunders, *Authorship* at 89. (The change in the legal language concerning the author's rights might be related to the ideology of the times. For example, it is likely that a central political figure of that time, Lamartine, the revolutionary poet, had a defining role in the language of the revolutionary codification.)

an eco-esc pendulum of copyright

The eventual revolutionary decrees⁶² changed nothing⁶³ "either in ideas or in legislation," except "the word property, it is true" replaced the word privilege, Laboulay, a 19th century French commentator, noticed⁶⁴. Thus the only real effect of codification⁶⁵ was to transform what had been a royal privilege into a legal right of the publisher using the language of the right of the author, who reminded an incidental figure. The very fact, though, that the new legal scheme was articulated in terms of author's rights eventually allowed the author to participate formally in the publication process with no change, however, in his economic status.

⁶². See, Bertrand, *Le Droit d'auteur*, 26-8.

⁶³. If there was a change it was political: instead of a royal privilege, it became a legal privilege. A capricious human choice was replaced with the power of the nation, perhaps in a sincere desire for a more stable and equitable 'justice'. In the Age of Enlightenment and the Declaration of Human and Civic Rights, Le Chapelier agreed--concerning the real change in this field-- that "what was formerly effected in France by virtue of **privileges** granted by the king; henceforward it will be by the virtue of a **law**, a far wiser method and the only one that it is appropriate to use." D. Becourt, "The French Revolution and the Authors' Right for a New Universalism" 143 R.I.D.A. 230, 258 (1990).

⁶⁴. E. Laboulaye, "Etudes sur la propriété littéraire en France et en Angleterre. Suivies de trois discours prononcés au Parlement d'Angleterre par Sir T. Noon Talfourd", Auguste Durand, Paris, 1858: This "property is still a **charitable grant** from society." (Actually this was the nature of the book-privileges.)

⁶⁵. See supra note no. 55 and the accompanying text.

an eco-esc pendulum of copyright

This commercial grant adopted by revolutionary statutes⁶⁶, with their formal attention to the author's role, however impotent it might have been in practical terms, influenced the future continental domestic statutes. (This might be explained using the ripples theory⁶⁷). Their influence is due either to an attachment to what has been praised as an individualistic system for the author's protection⁶⁸ and which would achieve its culmination in German legislation⁶⁹,

⁶⁶. About the purely commercial effects of the revolutionary texts, see C. Hesse, "The Dilemmas of Republican Publishing, 1793-1799", unpublished paper, Library of Congress Symposium on Publishing and Readership in Revolutionary France and America, 20-1, cited in Saunders, *Authorship*, at 93.

⁶⁷. The ripples theory, if it first appeared as a linguistic theory, explaining how new linguistic changes influence the pre-existing languages from center to margin, and at the margins of a certain geographic area the pure language might be found, now is used in almost all sciences to explain correlations between step by step changes, irrelevant the direction center-margin. For example, see B. Diefenbacher, "Ripples of technology; new technologies impact companies from the outside in" *Midrange Systems*, November 9, 1993.

⁶⁸. Contrary to the opinion expressed in this paper is the view that the French system is traditionally author-centric. In this sense, see B. Edelman, "Une loi substantiellement internationale. La loi du 3 juillet sur les droits d'auteur et droits voisins", *Journal du droit international*, 114:563 (1987); J. C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America". *Tulsa L. Rev.*, 64:1009 (1990), and 147 *R.I.D.A* (1991) 125; Saunders, *Authorship* 89-105; Monta, "The Concept of 'Copyright' versus the 'Droit d'Auteur'", 32 *So. Cal. L. Rev.* 178 (1959).

⁶⁹. In Germany, the lack of a centralized legal regulation of the book market--the modern unified German state was not created until 1870--left the book trade uncontrolled. In this context the author and publisher stood together "as partners in alliance" to protect their common merchandise against any unpaid use of it. Saunders *Authorship*, 106-9.

Consequently, the Germanic countries, before unification and national legislation, had joined the interests of both business partners: the publisher and the author. The future German statutes, despite their very 'romantic' language might be understood in this sense. On the an eco-esc pendulum of copyright

or simple because the French legal code was widely adopted *in toto* (or nearly so) across Europe and beyond, and as a result, so were its literary and artistic property rules.

c) A NEW COMMERCIAL POLICY

In the United States⁷⁰, unlike any other nation, the statutes passed by Congress dealing with copyright are founded upon Constitutional provisions⁷¹. The United States was the first political system which understood the real value of copyrighted works, establishing publishing and knowledge ("writings" and "science") as constitutionally valued. And the presence of the Copyright Clause proved it. The 1790 Act⁷², is above all an instrument of governmental

influence of both English and French legislation in Germany, see G. Boytha, "The Justification of the Protection of Author's Rights as Reflected in Their Historical Development" 151 R.I.D.A. 53, 84 (1992)

⁷⁰. See *supra* note 43.

⁷¹. See *supra* note no. 43.

For the Constitutional provisions respecting copyright, see M. B. Nimmer, "Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works" 2d ed. West Publishing Co., 1978, 912.

⁷². See *supra*, note no. 43.

This was the first American Copyright Act, modelled on the Statute of Anne, and setting the tone for future American statutes. Leaffer, *Understanding Copyright*, at 4.

an eco-esc pendulum of copyright

"policing,"⁷³ the regulation of an otherwise a free market, aimed simply at developing an infant publishing industry. It was clearly not necessary to impose protective legislation in those years at the very beginning of the establishment of American publishing⁷⁴, so much as to encourage its development. Its relative lack of commercial restrictions, its implied freedom to publish widely--today called "piracy"--was a boon to publishers.

⁷³. Without seeking to narrowly circumscribe the present paper within any philosophical context, in the circumstances of an American copyright law pursuant to the express constitutional infrastructure, it seems reasonably to postulate that its original purpose was encouragement of a "national uniformity" within the frame of a very important trade. Here, similarly to the Commercial Clause, the Framers "must have referred to a system of law coextensive" with and operating uniformly in, the whole country.

There are cases in which commercial or maritime issues are expressly solved by at least passing reference to the Patent and Copyright Clause: *Dred Scott v. John F. A. Sandford*, (60 U.S. 393; 15 L. Ed. 691; 19 How. 393. term: 1856); In *Chae Chan Ping v. United States* (130 U.S. 581; 32 L. Ed. 1068; 9 S. Ct. 623. 1889) the Supreme Court said that the United States "form, and for most important purposes, a single nation", and in all "commercial regulations, we are one and the same people."

What else might the Framers of the American Nation have imagined when they established the Copyright Clause, without benefit to any other foreign constitution, if not to encourage a single book-market within the new federation's borders? By promoting the spread of a sole language for the entire population, they facilitated the fabrication of a new common civilization, and the rise of a new nation.

Advocating this idea, see *The Fred E. Sander* (208 F. 724, D. C. W. D. Washington, N. D. 1913).

⁷⁴. On the mutual relationship between the beginning of an American publishing industry which copied without cost the products of British authors and publishers, and the provisions of American copyright statutes, see Saunders, *Authorship*, at 155.

an eco-esc pendulum of copyright

This brief review of copyright laws as private commercial regulations suggest the following:

The regulation of book production and distribution appeared and spread in the world as a direct consequence of very pragmatical concerns⁷⁵. The book-privileges--a creation of the Italian and German cities--expanded across Europe in order to secure an industry and a profession: printing and printers. When the English Statute of Anne--and later other continental and overseas statutes⁷⁶--invoked author's rights, it was to legitimize emotionally the existence of a

⁷⁵. Certainly, that set of rules was induced by the technological revolution. "The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other." Kaplan, *An Unhurried View*, vii-viii.

(For more about the necessity of the enforcement of copyright law for new technological methods of both reproduction and dissemination of works covered by such a law, see Nimmer, "Foreword: Two Copyright Crises", 15 *UCLA L. Rev.* 931, 931.)

However, even if technology is regarded as the direct inducement of copyright laws, it might be understood by the fact that technology is an element immanent in human progress, and that the rise of economic, social, and psychological conditions which supplied the world information and made society informationally depended would have been impossible without technological progress. In such circumstances the application of a rule to police and to promote information, it became unavoidable and that rule was called "copyright."

⁷⁶. On the relativity of which is influenced by which, see Ball, *The Law of Copyright*, at 18, criticizing the claim that the Statute of Anne owes its origin to Dutch influence and customs respecting monopolies.

an eco-esc pendulum of copyright

national industrial policy in otherwise free market economy⁷⁷, for the rest of society⁷⁸.

The result is an extraordinary consideration given to the book trade. Why this occurred in publishing and, apparently, nowhere else (except perhaps mechanical inventions) is almost inexplicable. Perhaps, publishing received such consideration due to some premonition of its future role in the worldwide distribution of power.

B. AS A COMMERCE WITH INFORMATION⁷⁹

⁷⁷. "Although the rights could have been awarded to the publishers directly, the chosen solution was to vest the rights initially in 'authors', with the understanding that the publisher eventually will assume control." Jaszi, *Toward a Theory of Copyright*, at 468.

⁷⁸. On an identical phenomena of legitimacy in another area of intellectual property --trade marks--, see M. H. Davis, "Death of a Salesman's Doctrine: A Critical Look at Trademark Use", in 19 Ga. L. Rev. 233 (1981).

⁷⁹. If "copyright statutes" are commercial regulations, they have to regulate the trade of goods, meaning objects with social value. Indeed, they regulate commerce in information. Information interests the public at large and the government. The public at large is interested in knowledge for reasons unknown to me, and the government is interested in information in order to use it for reasons which are only slightly less unknown.

an eco-esc pendulum of copyright

a) ADVOCATING CITIZENS' KNOWLEDGE

Copyright regulations⁸⁰, may be easier understood if they are divided into Copyright--common law--, and Authorship--civil law-- systems⁸¹. While the Copyright system⁸² has protected communication of knowledge based both on a pragmatic economic calculus as well as respect for personal authorial values⁸³, the Authorship system⁸⁴ has sought legitimacy with obstination based

⁸⁰. See, note no.1.

⁸¹. See supra notes nos. 1-3.

⁸². See supra note no. 2.

⁸³. In my opinion, the modern text used by the American Framers to break with the old civilization and whose transparent purpose was to encourage the formation of a new nation through cultural production, created not only a pedestal but also its cage. Encouraging a new industry become a cage, in the sense that in the name of the author new formerly unimagined economic rights were vested and for a longer period of time than the few older rights which had been known. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) the Supreme Court utilized the "authorship" concept to justify that copyright could constitutionally extend to photographs. See, Jaszi, *Toward a Theory of Copyright*, 480.

A strong relation has been created between authorship and the extension of copyright subject matter, in the sense that everything which is originated by a human author could be copyrighted. The "authorship" concept continued "(and continues) to be strategically deployed to extend copyright protection to new kinds of subject matter", *id.*

Today, the irony is that "authorship," seen as a quality of human beings advantaged impersonal and corporate entrepreneurs who paid only a simple wage for the appropriation of their human-employees' creations. Consequently, all the advantages of this powerful exclusive monopoly do not seem to be used now, in the majority of cases, either to encourage creativity, or benefit the author, even if as secondary policy of the law (e.g. *Fox Film Corp. v. Doyal*, an eco-esc pendulum of copyright

solely on the authorial values as its reason for the protection of literary and artistic works⁸⁵.

1. SHORT HISTORY

Before the invention of printing, the right of transcribing copies of a book was the right of every man⁸⁶, justified by natural justice and the public welfare, which necessitated the widest possible diffusion of learning⁸⁷. In the Italian and German cities, very advanced communities, a segment of society appeared, "which had virtually been absent from Europe since the collapse of the Roman

286 U.S. 123, 127 (1932) characterized this author's reward as a secondary consideration).

⁸⁴. See supra note no. 3.

⁸⁵. Henry Desbois is France's leading modern exponent of the theory postulating substantial difference between Copyright and the "Droit d'Auteur", on the ground that the French system unconditionally protects the author. In "Le droit d'auteur en France" (3rd ed., Paris, Dalloz, 1978, at 538), he writes that the French Parliament has repudiated the utilitarian concept of protecting works of authorship in order to stimulate literary and artistic activity. To the contrary, he concludes the author is protected in the new legislation just because of his own status of author.

⁸⁶. See Ball, *The Law of Copyright*, at 21.

⁸⁷. A revealing example of the deep connection between literature and mass communication in the Middle Ages, is that of the Italians who were so impressed with the achievements of Dante, Petrarch and Boccaccio, that the Tuscan dialect in which they wrote became the literary language "per excellence of the whole of Italy." Koenigsberger, *t.I*, at 369.

an eco-esc pendulum of copyright

Empire." This educated laity⁸⁸, which represented not only the market, but whose very existence represented the reason for disseminating ideas, influenced the Europe intellectual life.

2. THE ENGLISH PRE-INFORMATIONAL SOCIETY

In England, a singular "path of economic rationality", demanded the enforcement of statutory protection of expressed ideas. In comparison with the previous system based on guild protectionism⁸⁹, the new commercial statutory regime was regarded as progressive. (1) By limiting any owner's copyright monopoly --and in this way promoting dissemination of ideas and values of

⁸⁸. Even if Koenigsberger (t.II, at 19), expressly referred only to the Christian laity, it does seem to me that his assumption applying equally to the entire community of literate European people.

⁸⁹. Not only was competition between businessmen in the literary market eliminated by abolition of guild-type protection, but this eradication had also injured authors. Under guild protectionism, book production was encouraged, at least for the reason that stationers could afford publishing costs, by sharing them.

About the damage the stationers' perpetual monopoly would have produced, see the opinion of Lord Kames in *Hinton v. Donaldson* (1773) Mor 8307. Perpetuating that monopoly, he said, " will unavoidable raise the price of good books beyond the reach of ordinary readers."

an eco-esc pendulum of copyright

mass-education--⁹⁰, and (2) authorizing others besides the stationers to join the book business⁹¹ the statute had liberal effects. Scholars agreed that it was the right policy for a prosperous 18th century⁹²: within a growing demand for consumer goods, a rapidly increasing number of local newspapers developed which reciprocally influenced the demand for literary entertainment and "people's desire for knowledge."⁹³

The English legislation had the important intuition, in order to support the dissemination of ideas to emphasize the importance of dispatching works, that is of relating publication and the genesis of "copyright." It makes the benefit of the book trade subject to **publication**. But this was decided by the case law;

⁹⁰. In his opinion in *Hinton v. Donaldson*, Lord Kames said that "a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals." (Cited in MacQueen, Copyright, Competition, 3-4.)

To emphasize that the scope of copyright policy was to support mass education, the Act of 1842 began with the following words: "Whereas it is expedient to amend the law relating to Copyright and to afford greater Encouragement to the Production of Literary Works of Lasting to the World..." Whale on Copyright, at 15.

⁹¹. I.e. the authors, proprio nomine.

⁹². R. D. Mayo, "The English Novel in the Magazines 1740-1815," Evanston, IL: Northwestern UP, London: Oxford UP, 1962; R. A. Posner, "Law and Literature, A Misunderstood Relationship," Cambridge MA: Harvard UP, 1988, at 351; Saunders, Authorship, 54-5.

⁹³. Koenigsberger, t.II, at 299.

an eco-esc pendulum of copyright

Donaldson v. Becket⁹⁴ found that an exclusive right of publication could only be established by statute for a limited period after publication⁹⁵.

3. THE FIRST INFORMATIONAL SOCIETY: THE UNITED STATES

In America, the importance of publishing⁹⁶ was stressed as in no other place⁹⁷. Congress, exercising for the first time its power vested in it by the Constitution in Art. I, § 8⁹⁸, "to promote the progress of science and useful

⁹⁴. 4 Burrows, 2303, 98 Eng. Rep. 257 (1774), citation from Latman's Copyright, at 3 (The quotations differ from Rose's: 4 Burr 2408, 98 ER 257, in Rose, Authors at 172)

⁹⁵. In this sense, see Latman's Copyright at 3, Yen, Restoring the Natural Law, at 528.

⁹⁶. About the meaning of "publish" and its derivatives, see Jones, Copyright, at 11, where the word 'published, is used in the sense of "to reveal" or "to make known", and "publish" means to issue copies to the public. See in the same sense *Am. Inst. Architects v. Fenichel*, 41 F.S. 146 COB 24: 45 (1941).

⁹⁷. This is so perhaps because in the United States, as in no other place, the codification of common law copyright was prompted by new communications technology, which generated a new "national" economic sector: the entertainment industry.

"The development of a medium of mass communication almost inevitably results in the development of a service industry", Patterson explains, making a parallel with development of the printing press which "led to copyright." Copyright Overextended at 392.

⁹⁸. The Patent and Copyright Clause was adopted in final form without debate in a secret proceeding on September 5, 1787. Leaffer, Understanding Copyright, at 4. In the language of an eco-esc pendulum of copyright

arts"⁹⁹, articulated its extraordinary significance¹⁰⁰. At the end of the 18th century, when most American cemeteries contained no more than one or two generations, at most, of graves, publication was extremely important for the task of creating a new sense of nationhood.

In a technical sense, publication meant that commercial protection under state laws of book exploitation ceased¹⁰¹, with the possibility of either: (1) a broader copyright protection under the federal regime, or (2) its definitive loss. (The federal statutory protection was not originally received automatically by

the Copyright Clause, "the dominant idea is to promote the dissemination of knowledge to enhance public welfare." *id.*

⁹⁹. See *Wheaton v. Peterson*, 8 Pet. 591, 8 L.Ed. 1055 (1834). This case, Saunders says, "is the American counterpart of *Donaldson v. Becket*." See also *Banks v. Manchester*, 128 U.S. 244, 225, cited Shaw, *Literary Property*, at 174; *Thompson v. Hubbard*, 131 U.S. 123, 151, *id.*

Even before the first federal statute was adopted, the states passed copyright acts with the same declared purpose, e.g., Connecticut passed a copyright act in 1783, which was entitled "An Act for the Encouragement of Literature and Genius", in *Act and Laws of Conn.* Jan. Sess. 1783.

¹⁰⁰. Even if its meaning might seem obvious, due to the secrecy of the "committee proceedings which considered the copyright clause", there is no helpful American legislative history available to determine the real meaning or extent of the first copyright law. 1 M. Nimmer, "Nimmer on Copyright" (MB) @ 1.01 [A] (1985); S. Shoenfeld, "The Applicability of Eleventh Amendment Immunity under the Copyright Acts of 1909 and 1976", 36 *Am. U. L. Rev.* 163, 163 (1986).

¹⁰¹. "Publication was the trigger mechanism that terminated state protection and activated federal protection." Boorstyn, *Copyright Law*, at 4

an eco-esc pendulum of copyright

publication alone¹⁰².)

The drafters of United States copyright emphasized and relied upon the English model and rationale: to raise the level of mass education through the fruits of commerce in published works¹⁰³. Accordingly, the 1790 statute allowed the free importation, vending, reprinting and publishing of any book written or published abroad by any person not being a citizen of the States, to provide "affordable English-language reading matter for the growing population."¹⁰⁴

¹⁰². See above note no. 91.

For more on the importance of the moment of publication, see *Bobbs-Merrill v. Straus*, 210 U.S. 346, 347: When "a work is published in print, the owner's common law rights are lost, and unless the publication be in accordance with the requirements of the statute, the statutory right is not secured." This case, even if dated 1907, articulates a long legal tradition.

(Common law copyright, for the purpose of this paper, may be defined as the perpetual right of "an author to his unpublished creations", which included "the right to decide when, if, and how to publish the work", granted by each state inside its borders. See, Miller and Davis, *Intellectual Property*, 281.)

¹⁰³. "The federal Act of 1790 --'for the encouragement of learning by securing copies of maps, charts and books, to the authors and proprietors of such copies'-- treats copyright as being a protection for works that are 'useful'." Saunders, *Authorship*, at 155.

¹⁰⁴. With a population smaller than Britain's but a reading population that was larger, the United States represented the largest literate public there had ever been, and larger editions and lower per-volume prices were the rule. J. Tebbel, "A History of Book Publishing in the United States: the Creation of an Industry 1630-1865", R.R. Bowker, NY, 1972, 157-9. If copyright was meant to create a literate population and it was effective at all, it certainly effective in the U.S..

an eco-esc pendulum of copyright

4. INFORMATIONAL POLICY ON THE OLD CONTINENT

The continental moral right¹⁰⁵ belonging to authors, always a source--often a stereotype, sometimes a caricature--of the difference between English-American and continental systems¹⁰⁶, might be described as clear evidence of the state interest in promoting learning, the spread of knowledge, and communication. Even if adopted later than the "opposite," common law, copyright statutes, and thus that model was waiting to be pragmatically improved, in fact, the French revolutionary law explicitly provided just the author's pecuniary right in his work¹⁰⁷. Far from being a legislative creation, the moral right¹⁰⁸ is a sort of continental "common law" creation, in the sense

¹⁰⁵. See the definition in "Whale on Copyright", at 14.

¹⁰⁶. See Gainsburg, A Tale of Two Copyrights, R.I.D.A. 125.

¹⁰⁷. See, "La loi des 19-24 juillet 1793 relative aux droits de propriété d'écrits en tout genre, des compositeurs de musique, des peintres et des dessinateurs", in Bertrand, Le droit d'auteur, 27-8.

¹⁰⁸. Each country member to the Berne Convention have ensured "moral rights" from the moment it joined it. United States, however, ensure "moral rights" very limited to just visual arts.

Nevertheless, when *Monty Python--Gilliam v. ABC*, 538 F.2d 14 (2d. Cir. 1976) is seen an eco-esc pendulum of copyright

that at its origin is the case law¹⁰⁹.

as a famous case of moral rights, it became very interesting for the purpose of this paper, because it makes clear that so-called moral rights are granted not for the author's sake, but to protect the work. (For different opinions about this topic, see E. M. Brooks, "Titled' Justice: Site-Specific Art and Moral Rights after U.S. Adherence to the Berne Convention," 77 Calif. L. Rev. 1431 (1989); J. Ginsburg, "Moral Rights in a Common Law System," Moral Rights Protection in a Copyright System, P. Anderson, and D. Saunders, eds., Institute for Cultural Policy Studies, Griffith U., 1992, 13-50.)

In civil law countries, providing the other type of author's rights, is not a large or meaningful one: the author enjoys the right of recognition of his authorial quality, which means the right to be identified under his real/chosen name; the right to be designated as the real author; and the right to be identified with her work. (For example, the 1957 French Copyright Act provides in art. 6:

"L'auteur juit du droit au respect de son nom, de sa qualité et de son oeuvre.

"Ce droit est attaché à sa personne.

"Il est perpétuel, inaliénable, et imprescriptible.

"Il est transmissible à cause de mort aux héritiers de l'auteur.

"L'exercice peut en être conféré à un tiers en vertu de dispositions testamentaires." For the original textx, see Bertrand, *Le droit d'auteur*, 723-44.)

(I do not enjoy the role of forcing Gods from Olympus' cloudy peak. Actually I believe in them and in fact, they are innate to human thoughts. But, Gods live in Olympus because the public want them there, and authors in any legal system receive almost nothing more than what is due any other worker or investor. With or without an elaborate legal fiction, Shakespeare created plays and remains Shakespeare, needing no explanatory footnotes. Wherefore, why do we have such elaborate structures evidencing such legislative concern for the author's welfare, when all that is important for the society where she is living is his work? Isn't it because many others hide their own interests, behind the authors', and legitimize them using the socially manipulated false belief, that the strong commercial monopoly is for the author's benefit? And what better way to stop any suspicious if not with the "moral rights" argument?)

¹⁰⁹. Beginning with 1828, the "droit moral" surfaced in French judgments. See the decision of the Paris Appellate Court/ Cour de Paris, 11 January 1828.S.1828/30.2.5; *Marquam c./v. Lehuby*, Paris Lower Court/Tribunal Grande Instance, 22 August 1845, Table D.1845, cited in Bertrand, *Le droit d'auteur*, at 219.

The new right owes its appellation as "**droit moral**" to a scholar, Andre Morillot. He first used it in his article "De la personnalité du droit de publication qui appartient à un auteur vivant" in *Revue critique de legislation* at 29 (1872).

an eco-esc pendulum of copyright

Grasping the inner nature of this right --that it cannot be assigned, remaining in the work itself¹¹⁰--, and its duration --lasting the work's life and

The Moral Right/le droit moral was incorporated in the French legislation between 1900s and the 1930s. Id. 218-20.

¹¹⁰. Usually it is said that the moral right is a right of personality, and that it is misunderstood as an author's grant. But, when in 1785 Kant interpreted the content of the book as the speech of the author, and characterized it as "*jus personalissimum*" he created a doctrine ideally suited to protect books against distortion.

Thus when a book's content is assimilated with human personality, an infringer can then easily be perceived in the public eye, that is in the sense of legitimacy, as a criminal. For a concise history of the evolution of "*Urheberrecht*", Boytha, *The justification of the Protection*, at 85.

Another persuasive example that the moral right is not established for the author's benefit, but for the benefit of the work, to preserve the integrity of its content--that is to secure the social value of the work-- is the relatively recent *Huston* case. As Prof. Françon remarked (About the decision of the Appellate Court of Paris--*Cour d'Appel*, 4e Chambre--Juin 6, 1989, in 143 R.I.D.A. (1990) 339) its solution was predetermined by the case involving "*The Kid*" (the French Supreme Court--*Cour de Cassation*, 1re Civ.--May 28, 1963. With respect to "*The Kid*", the French Court acknowledged Charlie Chaplin's right to oppose any alteration of his work's integrity--such as adding music to his silent film.)

Concerning *Huston's "Asphalt Jungle"*, the French Supreme Court--*Cour de Cassation*, May 28, 1991--, reversing the intermediary court decision, ruled also in favor of the work's integrity, and against its colorization.

About that decision's echoes, see A. Kerever, "*Addendum*", 149 R.I.D.A. (1991) 15, and J. Ginsburg, and P. Sirinelli, "*Author, Creation and Adaptation in Private International Law and French Domestic Law. Reflections Based on the Huston Case(1)*" 150 R.I.D.A. (1991) 3.

Therefore, what else is the effect of so called "moral rights"-- as rights of paternity and integrity--, if not to secure protection of the work's content, and of its original social value, preserving not only its initial information, but the consumer's right of access to and payment for the genuine material?

See also above note no. 104.

an eco-esc pendulum of copyright

not subject to author's or her assignee's longevity¹¹¹--, it might be suggested that the rationale of moral right is to protect the communication of knowledge against any distortion or falsification. The moral right safeguards the public's interest in an undistorted work for its whole existence not the author's. In this way, it may be argued that in the last instance the moral right protects consumers against confusion and deception¹¹², though clearly this the traditional domain of trademarks and unfair competition laws, not copyright. Accordingly, the moral right appears to be actually created in a desire to secure a mass-communication morality.

b) GOVERNING THE PUBLIC'S KNOWLEDGE

1. GENERALITIES

The new product--the published book--had a major disadvantage for an

¹¹¹. See Bertrand, *Le droit d'auteur*, at 237: "Contrairement au droit moral qui est 'perpetuel', les 'droits patrimoniaux (...) d'auteur sont limités dans le temps.'/ While the moral right is forever, the economic rights are limited in time.

¹¹². In this sense it may be argued that the function played by the moral right is as a kind of trade mark of the work, identifying for the consumer a reliable source: its author. For an overview of American trade mark protection, see Miller and Davis, *Intellectual Property*, 146-279.

an eco-esc pendulum of copyright

article of commerce: instead of vanishing with the first act of consumption—as an apple—, to become no more than a memory, it remains capable of nourishing friends and generations, and to be used continually for shaping minds and filling needs. The same popular princes who encouraged printing as a Renaissance vogue¹¹³ were first to apprehend its danger. The printed word might imperil their popularity, for instance by spreading news and ideologies subversive to political regimes as never before. Consequently, the production of this new commodity became supervised. Not only were the secular princes interested in it, but so were religious leaders¹¹⁴.

In Venice, where the first form of legal protection of literary production appeared --the book privilege--, the intertwining of the privilege system with censorship first surfaced. The compromise between copyright as a source of incentive and a means of censorship which the Venice solution represented was,

¹¹³. H. S. White, "The Copyright Dilemma". ALA. Chicago. 1978. at 4: "The attitude toward printing and publication, although favorable because of the Renaissance and Reformation, in some ways resembles the contemporary attitude toward plutonium. Both were considered good, perhaps even necessary, but fraught with the possibilities of explosive harm to church and state were they to fall into the hands of any but godly and loyal subjects." [hereinafter White, *The Copyright Dilemma*]

¹¹⁴. The Catholic "officials" were also threatened by the Reformation propaganda. Koenigsberger, t.II, 64-70.

an eco-esc pendulum of copyright

for centuries, the European model¹¹⁵.

2. THE ENGLISH PUBLIC CENSORSHIP

The Statute of Anne appeared to be a formal separation of copyright and censorship¹¹⁶. Even though it was "a successor to a series of privileges,

¹¹⁵. Rose, *Authors and Owners*, at 11: In Venice, in the middle years of the sixteenth century, "a guild of printers and booksellers was organized as an instrument for government surveillance of the press."

¹¹⁶. Rose, *Authors and Owners*, at 16 and 48.

"In 1556 Queen Mary incorporated the Stationers Company with extensive powers for the suppression of obnoxious books.(...) In 1585 a decree of the Star Chamber required the licensing of every book or other publication and prohibited the printing of any book in violation of any ordinance of the Stationers Company." Ball, *the Law of Copyright*, at 9.

Printing was subject to the orders of the Star Chamber so that the Government and the Church could exercise effective censorship and prevent seditious or heretical works from getting into print. Hallam, 1 "Constitutional History", 238, cited in Latman's *Copyright*, at 2.

Henry VIII's printers' regulation act, officially titled "An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing and Printing Press" was designed to prevent the printing and sale of "heretical schismatical blasphemous seditious and treasonable Bookes, Pamphlets and Papers" ("Statutes of the Realm" 5:428); Rose, *Authors and Owners*, at 31.

Queen Elizabeth I was also concerned about controlling what was published, and used a "very stringent and efficient system of licensing." The stationers were "essentially printers or publishers, to whom the government gave" for censorship reasons, a monopoly which "carried the seeds of copyright." White, *The Copyright Dilemma* at 4.

"Copyright in Historical Perspective" 1968. This function might explain the Crown's claims of rights regarding the use of Bills, Acts of Parliament, Statutory Rules and Orders, an eco-esc pendulum of copyright

monopolies, decrees, and licensing acts in sixteenth- and seventeenth-century" primarily designed to maintain governmental control of printing¹¹⁷ it was nevertheless regarded as severing the merged interests of government and the book industry.

3. A CONTINENTAL ATTITUDE

i) THE FRENCH ATTITUDE

A similarly express system of monopolistic control of the book market could have been found under the French *ancien régime*. The system of book privileges was described as a "coalition of interests between censors and traders --the royal government and the printer-bookseller associates of the *Communauté des Imprimeurs et Libraires de Paris*."¹¹⁸ Governmental censorship continued

Statutory Instruments, Parliamentary Papers, Hansards, papers of Government departments, Ministry of Defence maps and Ordinance Survey publications, "independently of any question of prerogative." J. A. L. Sterling & M. C. L. Carpenter, "Copyright Law in the United Kingdom and the Rights of Performers, Authors and Composers in Europe", Legal Books PTY, London, 1986 at 105 [hereinafter Sterling, Copyright Law].

¹¹⁷. Copyright. Current Viewpoints on History, at 1.

¹¹⁸. The "cement of this coalition was the reliable power of exclusion, both of counter-orthodoxy and of non-establishment Parisian and provincial printers and booksellers." Saunders, Authorship, at 84.

an eco-esc pendulum of copyright

in France until the Revolution, when for political reasons--the radical rejection of the oppressive practices associated with the *ancien régime*--it was abolished along with the privilege system¹¹⁹.

ii) A GOTHIC ATTITUDE

When a "national" regulation of the book market was enforced in Germany in the 1840s, it was influenced by the powerful German philosophical texts¹²⁰, which self-consciously promoted its authors' interests. It did not specifically or expressly embrace censorship, due perhaps to two phenomena: (1) German nationalism had arrived making it less likely that the loyalty of German subjects towards their secular heads could be threaten. (2) And on the other hand, in Christian terms, Germany was the Reformation country, which would not tolerate reminders of religious censorial system¹²¹.

¹¹⁹. On August 4, 1789 the privileged were abolished and on August 26 "La déclaration des droits de l'homme et du citoyen" was adopted. This became an opportunity to change the literary property policies. On the author's rights in this context, see "Bienvenue à la loi" 19 R.I.D.A., 1958, at 9.

¹²⁰. See, I. Kant, "The Metaphysics of Morals. Part 1: The Metaphysical Elements of Justice", trans. J. Ladd. Bobbs-Merrill. NY. 1965.

¹²¹. For logical reasons it couldn't be against it.

an eco-esc pendulum of copyright

In this context, the metamorphosis of what had been book privileges metamorphose into statutory form assumed a very sophisticated and commercial profile. For better or worse, legal fictions legitimized the author's right in his work. But even if the German statutory language may be regarded as "romantic"—for instance, the author's right cannot be assigned, only licensed—nothing suggests an "author-centric" system, that is that the author was the sole and true object of legislation¹²².

Germany is the place where the author was first identified, in a sense of immanency, with his work, and, unfortunately, the place where people have always been most effectively controlled by government. Excluding any intermediary assignee between the author and his work, the German legislation in a sense ratified German philosophy concerning authorship. From the moment of its genesis the only responsible party for a book's content was its author. Thus, the statutory language might be read more as a philosophical statement

¹²². A relevant example is offered by the present German Copyright Law of 1965. By its terms, "Copyright shall protect the author with respect to his intellectual and personal relations to the work, and also with respect to the utilization of the work." (UNESCO translation). Since one element of the author's right is conceived of as unassignable, and that element "is an integral part of a single right, it follows that the right cannot be assigned (that is, the ownership transferred), although it can pass by testamentary disposition." Whale on Copyright, at 15.

an eco-esc pendulum of copyright

and less as a democratic proof¹²³.

4. THE UNITED STATES AND CENSORSHIP

The form of copyright protection promoted and adopted by the United States seems formally oriented towards one major goal: mass education¹²⁴. As one example, the earliest statutory subject matter was obviously limited to works of sheer information such as maps and charts, and in the formal sense, it was at the end where the word books appears.

It may be more than mere speculation to suspect early American copyright for a reluctant treatment of books¹²⁵; the Framers' attitude towards works of

¹²³. Fichte and Kant constructed the rationale for literary property in Germany, known as "Urheberrecht". For details, see Saunders, *Authorship*, 106-21.

¹²⁴. I say "formally", because American copyright law is also viewed as "a descendant of the British Crown's program of censorship through an elaborate licensing scheme for publishers." "Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era". 96 *Harvard L. Rev.* at 450.

¹²⁵. By the terms of the Copyright Act of 1790, indeed, technically "books" were copyrightable without qualification. As Jefferson's contemporaneous comments show, works of fiction were not at all desirable and/or necessary for the intellectual formation of a new nation. This particular attitude seems to have influenced American case law concerning the allowance of statutory copyright protection.

The idea of "authorship" as a major condition of book protection developed as the beginning and end of any further subject matter. And I suggest, with it developed a an eco-esc pendulum of copyright

fiction was certainly rather equivocal. Certainly works of fiction did not really satisfy the federal policy of encouraging mass learning¹²⁶ understood in light of Jefferson's precepts¹²⁷. (Not only did this attitude arguably influence the cultural tastes of the Framers' epoch, but it has marked the overall jurisprudential attitude towards copyright subject matter, which was never subject to any recognition or assessment of aesthetic values¹²⁸.)

transformation of the idea of author and his/her protection from the object of protection to simply the right holder. The "cornerstone of American copyright law"--**Wheaton v. Paterson**, decided in 1834--, narrowed the quality of the copyright owner to simply the one originating the "book". In this order of the development of ideas, the only articulable goal of copyright becomes simply the protection of the fruits of human labor. How this umbilical relationship evolved is a later question for this paper.

¹²⁶. Perhaps, a distinct relationship could be postulated relating to the development or encouragement of a facility for assimilating information, i.e. science, in order to encourage its more informational production later.

127. "A great obstacle to good education is the inordinate passion prevalent for novels, and the time lost in that reading which should be instructively employed". T. Jefferson, "The Writings of Thomas Jefferson" vol. 15. ed. A. A. Lipscombe, Washington, D.C. 1903 (no pub) at 166, cited in Saunders, Authorship, at 254.

¹²⁸. Perhaps, to achieve mass education it was necessary also to encourage a homogenization of cultural tastes, and to support works of nude information, which the 18th century novel definitely was not. The Constitutional Copyright Clause, in light of the First Amendment, is usually treated as a form of protection of free expressed thoughts, with the only early condition being that they be originated by American citizens.

In 1903, Justice Holmes decided as a logical extension of this axiom, that no matter how "poor artistically the 'author's' addition, it is enough if it be his own." **Bleistein v. Donaldson Lithographing Co.**, 188 U.S. 239.

On the incorporation of free speech values the copyright clause of the Constitution, see, an eco-esc pendulum of copyright

Thus with a copyright regime embracing a very narrow range of purely informational works, a stated policy supporting mass education, and an underlying goal of encouraging a national publishing industry, it would be difficult to imagine governmental censorship as even a disguised policy¹²⁹. The sole role of the government seems to have been effectively intervention cabined within the express terms of an admittedly narrow copyright statute.

Thus, aside from the statute, the publishing industry was almost uncontrolled. At that time the publishing industry was concentrated more on imported books, and this apparent lack of federal policy effectively advantaged both businessmen and consumers by lower prices on the American market, and in fact on average four times less expensive than those on the British

L. R. Patterson, "Free Speech, Copyright, and Fair Use", in 40 Vand. L. Rev. 1987, p.1.

¹²⁹. See also *infra* note no. 138.

There could be no governmental censorship in the classical meaning of enforced rules prohibiting certain publications. However, censorship of information, whether directly by the government or indirectly by other institutional groups for purportedly economic or other reasons is a part of any society, the difference being basically ideological.

The new kind of censorship accomplished by virtue of copyright law in the 20th century is basically exercised by the owner of copyrighted work, usually distinct from the author, ergo by a private authority.

an eco-esc pendulum of copyright

market¹³⁰.

* *

*

Quite obviously, books were the first important copyrighted works in human civilization: Through them people were informed while, paradoxically, governments were protected.

The economic history of book production and the history of copyright¹³¹ are one and the same. Over several centuries, the economic role of books changed, altering their authors' and publisher' rank also. Books have obviously unique social value, because of their advantage of being both a depository and accelerator of knowledge, as well, of course, as an irreplaceable source of pleasure. Therefore, a wide range of social groups including but going far

¹³⁰. The biggest American firms grew "to dwarf their transatlantic counterparts." There was nothing in London to rival **Harper Brothers** who, by mid-century, occupied seven five-store buildings and turned out over 2,000,000 volumes a year.

And, the same author adds, "as a rule of thumb, the American operated at four times the size of edition and a quarter of the cost of the British publishers." However, when the British author or publisher "had authorized an American publisher to reproduce their works for the American market, in some instances they received *ex gratia* payments from the latter." Saunders, Authorship, at 156.

¹³¹. See note no. 1.

an eco-esc pendulum of copyright

beyond merely, lay and/or religious authorities, have always had a keen stake in their commerce.

Among other economic and cultural qualities, books possess an unchallenged superiority over any other source of information: When they ceased being an élite source of information or of culture they became relatively cheap commodities, and with their greater dissemination they have tended to become even cheaper. Many economic and political factors have been favorable to book production (e.g., educational systems, library policies, as well as the increase in leisure time), and they in their turn demonstrate their own sensitivity to the increasing influence of books in society.

During this time, while the author's role has been more as an object of social gratitude and philosophical schools (generating for instance, an enlightened statutory language, especially in Europe¹³²), the publishing community has been more keenly aware of its social tasks and functions, developing an economically powerful base. Organized in professional guilds, publishers had originally received only the commercial monopoly in the authors' works

¹³². See, Ph. Gaudrat, "Le point de vue d'un auteur sur la titularité"/"An Author's Point of View about Authorship," *Le droit d'auteur aujourd'hui*, Lamberterie, I. (ed.) C.N.R.S 1991, 43.

an eco-esc pendulum of copyright

produced with the publishers' money. Later, on the basis of their ideological justification--the author's natural rights--, publishers shared the potential economic benefits, theoretically, with the works' authors.

With the increasing task and burden of the distribution and dissemination of books, the role of the publisher has changed dramatically in the last two centuries. Had publishers never regarded their income until then as due to anything but the authors' creations, and not necessarily to their own activities, they would certainly do so now with the intensive development of book exploitation. With the maturation of the publishing professions (editorial, production, and distribution), and the alienating effects of modern industrial Western civilizations, the publisher gained the apparently good reasons to explain to the author, that royalties "do not fall from heaven, but are largely the fruit"¹³³ of the publishers' efforts. Publishing as an economic activity certainly

¹³³. L. van Krevelen, "The Information Society and the Right of the Publisher", Internationales Urheberrechts-Symposium, Heidelberg, 24-5 April 1986, J. Schweitzer Verlag, München, 1986, 100-1 [hereinafter Internationales Urheberrechts].

According to van Krevelen, the publishing monopolies' escape the abolition of the French revolution thanks to the theory that they were in fact property rights (property was regarded as a fundamental right) and not feudal rights. Internationales Urheberrechts at 90. (Perhaps this means an implied acceptance of the publisher's real status as a Venician merchant who uses his relationship with the author to promote his own interest, justifying that interest as a property right.)

an eco-esc pendulum of copyright

flourished and the role of the publishers was so economically key that the role of the author inevitably diminished.

Consequently, it seems more accurate to claim that the publisher's saga (not the author's) and copyright history¹³⁴ are one and the same: The publisher forced the legislator's hand in adopting favorable copyright statutes, and these laws have reflected commercial policies of an ordinary (though so protected that "ordinary" seems to insult those other entrepreneurs forced to contend with truly competitive conditions) trade.

What remains wrong in this calculus is its terms. Publishers, and others with an interest in copyrighted works, did not play the game on their own

On the **current** relations between publishers and authors, like the author's payment under different national statutes, see C. Colombet, "Grands principes du droit d'auteur et des droits voisins dans le monde. Approche de droit comparé" Litec, UNESCO, 1990, 88-93, although, unfortunately, this is not a very reliable source for many domestic statutes.

Although troublesome in many respects, a case such as **Harper & Row, Publishers v. Nation Enterprises**, 471 U.S. 539; 105 S.Ct. 2218; 85 L.Ed. 2d 588; 53 U.S.L.W.4562; 225 U.S.P.Q. (BNA) 1073; 11 Media L. Rep. 1969 (1985) might be regarded as a case of unfair competition between two publishers in the battle for the optimum profit from an author's manuscript. This is even more like an unfair competition case when the (mis?)conduct of the defendant is considerably key, as seems to be the case upon a close reading.

¹³⁴. See note no. 1.

On the similarity between Anglo-American copyright and the author's right/droit d'auteur system with respect to author-publisher relations, see D. Ladd, "The Utility of a Publisher's Right", *Internationales Urheberrechts*, at. 90.

an eco-esc pendulum of copyright

merits, but instead relied on the argument that they were only vindicating the author's natural rights in her own work. This situation, however, generally accepted with little or no question, should by rights last **nevermore**, because that which publishers claim to have secure under copyright¹³⁵ is not Poe's raven, but its commercialization.

¹³⁵. See *supra* note no. 1.

BOOK II. SEASONING

A. COPYRIGHT IN 20TH CENTURY. GENERALITIES

My unequivocal opinion that historically, copyright merely regulated a particular business concerning an even more particular merchandise, and never attempted for romantic or other reasons to vest meaningful rights in the author, remains the same for events in this century. Ideas are valuable by their very essence: but they become marketable only when they achieve a social value, that is when communicated to others, and that occurs when they became published "writings."¹³⁶

As described above¹³⁷, they produce a benefit if secured by commercial monopoly¹³⁸. This monopoly, however, only advantages its actual recipients

¹³⁶. The term "writings" is used in its broad American constitutional meaning.

¹³⁷. See, Book I, first part.

138. These beneficiaries are the merchants of writings. To legitimize their interests in the eyes of rest of an otherwise free market society the author's own right was created and included in this lucrative game. This legitimacy has been so impeccably managed that for almost 300 years under its protection, merchants have been able to expand their rights to an approximate 75-100-year monopoly, and it remains apparently honest to everybody.

Under the Berne Convention, which made the first attempt toward copyright universalization, while promoting the commercial monopoly in the author's name, the one who's interests was served was in the 19th century the publisher, and today the author's employer, an eco-esc pendulum of copyright

of course, while inhibiting the others' access to such writings, and therefore paradoxically restricts their social significance.¹³⁹

assignee, or licensee. From the perspective of a *qui pro quo* in copyright Boguslavsky's words might contain some truth, when he argued that the Convention was established "in the interests of publishing and other companies." M. M. Boguslavsky, "Copyright in International Relations: International Protection of Literary and Scientific Works" (trans. N. Poulet), *Catena*, Sidney, 1979, at 190.

139. The originally public censorship is now exercised by the private owner, often inhibiting others' cultural and political access to 'their' works. Perhaps in this sense, Gordon speaks about a "balkanization" of this issue. "Towards a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship", in 57 *U. Chi. L. Rev.* 1009, 1032-49 (1990). The complete control of the copyright holder to perform her work, as a specific form of private censorship is discussed also by Patterson, *Copyright Overextended* at 393.

The corporate owner--the prominent copyright holder--exercises a truly effective censorship: it has the power to decide what, when and in which way the work will be disseminated. When "The New York Times" tells its readers that they will find inside "All the News That's Fit to Print", that is a sly consequence of private censorship. (There is of course the possibility that the government itself could control its copyrighted items. However, the Supreme Court ruled against a tax limited just to the press, exempting other media, because it "raises concerns about censorship of critical information and opinion." *Leathers v. Medlock*, 113 L. Ed. 2d 494, 111 S.Ct. 1438 (1991))

The American "fair use" doctrine, it might be described originating as a policy "promoting the diffusion of ideas." "Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values" 104 *Harv. L. Rev.* 1289, 1306 (1991). (Until 1976 the fair use doctrine was a case law creation, and before the 1980s, the Supreme Court granted certiorari in only two cases implicating this doctrine. *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam* by an equally divided Court sub nom. *Columbia Broadcast Sys. v. Loew's, Inc.*, 356 U.S. 43 (1958) and *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam* by an equally divided Court, 420 U.S. 376 (1975). W. W. Fisher III, "Reconstructing the Fair Use Doctrine" 101 *Harv. L. Rev.* 1661, 1663 (1988).)

"An expanded fair use doctrine can be used to limit the inherent ability of television broadcasters to control and limit access to their works through the protections granted by the copyright laws." S. S. Zimmermann, "A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict", in 35 *Emory L.J.* 163, 189, (1986).

an eco-esc pendulum of copyright

Consequently, even if the technical legal and social status of today's writings remains the same, it has gained in fact a host of new aspects¹⁴⁰

The seemingly endless discussion about the goals of the American Copyright Clause might also be explained as an effort to find ways to elude private censorship. In numerous cases judges have emphasized that ultimately the goal of the Copyright Clause--and Act--is to serve the cause of promoting broad public availability of literature, music, and other arts. See, *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

This goal, if real, does not contradict the commercial character of the Copyright Clause and Act. It merely provides a justification for government regulation of this market, acknowledging its failure as a free competitive one.

¹⁴⁰. In their recent book, L. R. Paterson, and S. W. Lindberg, ("The Nature of Copyright: A Law of Users' Rights" Athens: Georgia U.P. 1991 [reviewed by, Loren, L. P. "1992 Survey of Books Relating to the Law; VII. Tort and Commercial Law: The Nature of Copyright: A Law of Users' Rights" in 990 Mich. L. Rev. 1624 (1992), and "Recent publication: The nature of Copyright: A Law of Users' Rights" in 106 Harv. L. Rev. 975 (1993)]) address different interpretations of American copyright law. They propose another reading of the law, as a matter of policy choices-- a statutory grant of a "limited monopoly designed to maximize the distribution of information", also providing "reasonable rights" for its users (p.14).

Facing a "public myth" based on "philosophical precepts of Hohfeld, Hegel, Locke (discussed in J. Hughes, "The Philosophy of Intellectual Property", in 77 Geo. L. J. 287 (1988), L. J. Lacey, "Of Bread and Roses and Copyrights", in 1989 Duke L.J. 1532, Yen, Restoring the Natural Law), and opposing the economic analyses of copyright law (augmented in S. Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs", 84 Harv. L. Rev. 281 (1970), W. J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors", 82 Colum. L. Rev. 1600 (1982), J. Cirace, "When Does Complete Copying of Copyrighted for Purposes Other than Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases", in 28 St. Louis U. L. J. 647 (1984), Fisher, Reconstructing the Fair Use Doctrine, 1698-1744; W. M. Landes, R. A. Posner, "An Economic Analysis of Copyright Law", in 18 J. Legal Stud. 325 (1989), J. Litman, "Copyright as Myth", 53 U. Pitt. L. Rev. 235 (1991)), they deal with a recurrent issue: copyright as a product of the community of industries it affects. Recently these particular aspects of "writings" regime under the copyright law were discussed in A. R. Miller, "Copyright Protection For Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since Contu?" in 106

an eco-esc pendulum of copyright

generated by new commercial interests, with new and more wide-ranging aims and powers. Because of the special configuration¹⁴¹ of musical works, and their a distinctive assortment of "copy rights", they serve the best to support my opinion regarding current national copyright policies.

Harv. L. Rev. 977 (1993), and C. H. Settlemyer III, "Between Thought and Possession: Artists' 'Moral Rights' and Public Access to Creative Works", in 81 Geo. L. J. 2291 (1993).

¹⁴¹. In the U.S. Copyright Act of 1976, for example, musical works, which are already copyright subject matter--§ 102 (a)(2)--, if performed and recorded become new copyright subject matter: sound recordings-- §102 (a)(7), and also newly exist as "derivative works"--§101.

A movie soundtrack is considered a literary work at both the national and international levels, but the same recorded music released as a sound recording will be treated differently, under both domestic and international regimes. See N. Turkewitz, "Authors' Rights Are Dead" 38 J. Copyright Soc'y U.S.A. 41, 44, (1990) [hereinafter, Turkewitz, Authors' Rights].

With respect to producers of sound recordings, in Europe they hold neighboring rights even if they have or not copyright as such in sound recordings. See Council of Europe. Human Rights. Mass Media Files no. 5. Intellectual Property Rights and Cable Distribution of Television Programs. Strasbourg 1983, 6-8. The English producers, and those whose domestic laws are influenced by U.K. statutes have copyright in sound recordings, see P. Stone, "Copyright Law in the United Kingdom and the European Community". The Athlone Press, London, 1990, at 27 [hereinafter Stone, Copyright Law]; P. Groves, "Copyright & Designs Law. A Question of Balance. The Copyright, Designs and Patents Act 1988", Graham & Trotman, London, 1991, 31; Sterling, Copyright Law at 414.

The Cyprus Copyright Law, for example, was identical to the 1911 U.K. Copyright Act until 1978 when a domestic law influenced by the U.K. law came into force. See A. C. Evangelou, "Intellectual Property Law" 29 Cyprus L. Rev. 4644, 4646 (1990).

This kind of copyright, in both sound recordings and broadcast transmissions, is called "entrepreneurial copyright," by W. R. Cornish in "Intellectual Property", London, 1981 at 300.

an eco-esc pendulum of copyright

B. AMERICAN COPYRIGHTED MUSIC

Musical works have been subject to copyright under American law since 1831¹⁴². Authors have been vested with all the exclusive rights provided in each version of the copyright statute¹⁴³.

When a composer doesn't work for hire¹⁴⁴, and theoretically therefore, is the holder of all statutory rights, he actually enjoys a far less powerful

¹⁴². In 1831 the first general revision of the original act of 1790 occurred. With the Act of February 3, 21st Cong., 2d Sess., 4 Stat. 436, the Copyright Act extended its protection to musical compositions. See Latman's Copyright at 7.

¹⁴³. The exclusive rights in copyrighted works under 1976 Act U.S.C. are the following:

- (1) to reproduce it in copies or phonorecords;
- (2) to prepare derivative works based upon it;
- (3) to distribute its copies or phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical (...) works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical (...) works, to display it publicly.

¹⁴⁴. In the most common circumstances, the producer of television programs and films retains a composer to write the music for the production. (E.g., Tr. 3303). In the typical "composer-for-hire" agreement, the composer is required to perform various service in addition to composing. These includes orchestration, conducting, hiring of musicians and spotting. (e.g., AX 312 at 23) Under such "composer-for-hire" contracts, the producer commonly arranges for the performance rights to be assigned to its own in-house publishing subsidiary or affiliate. Thus the publisher typically retains the copyright and the right directly to license the performance of the music, and "the composer and publisher share equally in performance fees." (Tr. 565-66, 1433, 1615-16, 3300-02, 3463-66; AX310 at 41-43, 46-48 & Exh. 1 at P 3(h); AX 312 at 11-13; AX 358 & DX 857, Tab 1 at 16-21; AX 345 & DX 858, Tab 2 at 1802-05; AX 351 & DX861 at 87-88.) *United States of America v. American Society of Composers, Authors and Publishers*, Civ. 13-95 (WCC) S.D.N.Y., 1993, Copy. L. Rep. (CCH) P27,088; 1993-1 Trade Cas. (CCH) P70,153.

an eco-esc pendulum of copyright

position than all other authors. In many ways she is just a legal smoke screen for the entertainment industry, playing the role of its totem (in the freudian sense¹⁴⁵), as well as that of a pedestal for American celebrities.¹⁴⁶

a) THE RIGHT TO REPRODUCE THE MUSIC IN PHONORECORDS AND TO AUTHORIZE SOUND RECORDINGS

Prior to the 1909 Act, composers had no rights in phonorecords¹⁴⁷.

¹⁴⁵. S. Freud, "Totem und Tabu" [authorized English translation with introduction by Brill, A.A., "Totem and Taboo; Resemblances Psychic Lives of Savages and Neurotics"], Moffat, Yard and Co., NY, 1918.

¹⁴⁶. These celebrities include those mentioned in C. Vinzant, "How Celebrities Cost You, the Little Guy, Big Bucks Through the Fabulousness-Added Tax", *Spy*, February 1994, 35-40.

The role of the musical composer in present American society is a product and a cause of the influence of the North American pop-culture across the world. See e.g., J. Rockwell, "The New Colossus: American Culture as Power Export", *NY Times*, January 30, 1994, sect. 2, at 1.

¹⁴⁷. The 1909 copyright revision gave "some protection to the composers of underlying musical works in order to vitiate part of the harshness of *White-Smith*." *White-Smith Music Publishing Co., v. Apollo Co.* (209 U.S. 1, 28 S.Ct. 319, 52 L.ed. 655 (1908)) which held "that piano rolls were not copies of the underlying musical composition they caused a piano player to reproduce, because piano rolls could not be read or deciphered by the naked eye." *Miller and Davis, Intellectual Property*, at 313.

an eco-esc pendulum of copyright

Under the 1909 legislation, composers gained the exclusive right to authorize the production of a special kind of copy of his music--the phonorecord. If it were just a copy in another medium of the musical composition, the sound recorded in it would soon be statutorily treated as an independently copyrighted subject matter¹⁴⁸, and at the same time, a derivative work of the underlying musical composition.

A **sound recording** (as treated by the 1976 Act), is the merged product between recording technology, musical performance and the underlying music, or otherwise the result of an affixation of captured or recaptured sound of the performed music¹⁴⁹. In terms of the composer's legal interest, a second **sound**

¹⁴⁸. In the music industry, Neil Turkewitz notices, "the record company invests in the performances of musical compositions of authors and creates a new and original work,"--a phonorecord. The sale of that end product "produces benefits for all the creative parties--the author of the musical composition, the performers, musicians, sound engineers, etc."

Accordingly, the author concludes that "to ensure adequate compensation for all the parties, it is essential that record companies are able to protect their works for at least fifty years and to make decisions about how to control the distribution of their works to the public." Authors' Rights, 43.

¹⁴⁹. About the music industry--including music publishing and sound recording--, see D. E. Biederman, E. P. Pierson, M. E. Silfen, J. A. Glasser, R. P. Berry, "Law and Business of the Entertainment Industries" 2nd ed. PRAEGER, NY, 1992, 383-512.

an eco-esc pendulum of copyright

recording guarantees only statutory royalties¹⁵⁰: once he authorizes the first fixation of her music in a phonorecord (again as treated by the 1976 Act), he accepts the resulting compulsory license. However, a composer who has at least some right in a new subject matter--the phonorecord--can be expected to be less

¹⁵⁰. When the Court decided in *White-Smith* that piano rolls "constituted merely parts of devices for mechanically performing the music", the seeds of the composer's compulsory license were planted.

The legal concept of such a license was introduced by the 1909 Copyright Act revision. "Because of what seemed at the time a well-grounded fear of monopolistic control of music for recording purposes, Congress qualified the right of mechanical control by providing in subsection (e) of Section 1 that if the copyright proprietor himself used or sanctioned the use of his composition in this way, any other person was free to do so upon paying a royalty of two cents for each part (each roll or record) manufactured." Latman's Copyright at 206.

The 1976 Copyright Act also provides a limitation in the case of recording nondramatic musical works for commercial purposes in § 115: "Scope of exclusive rights in nondramatic musical works: Compulsory license for marketing and distributing phonorecords." The compulsory license concerns any kind of mechanical reproduction, by record, cassette, or compact disc or any future material fixation.

The royalty rate was, in the 1980s, five cents per composition per recording, or .95 cent per minute of playing time, whichever is greater. 37 C.F.R. @ 115(c) (1982). Although the Copyright Act of 1976 indicates that the royalty rate is "two and three-fourth cents, or one-half of one cent per minute of playing time of fraction thereof," 17 U.S.C. @ 115(c) (2) (1982), this rate has been increased administratively several times under the authority of 17 U.S.C. @ 804 (a)(2)(B) (1982). For details, see S. L. Bach, "Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law". 14 Hofstra L. Rev. 379, 380, (1986). See also, Henn, "The Compulsory License Provisions of the United States Copyright Law" (1956), reprinted in 2 Studies on Copyright--Arthur Fisher Memorial Edition 877 (1963); Blaisdell, "Economic Aspects of the Compulsory License in the Copyright Law" (1958), reprinted id., 937.

an eco-esc pendulum of copyright

likely to disturb commerce within a rapidly evolving music industry¹⁵¹. (Or, differently expressed, and perhaps more methaphisically, the composer's royalty was granted anticipating a far more lucrative market in the sound recording¹⁵².)

This expansion of copyright subject matter--even if accompanied by a less expansive right in it by the original authorial composer--represented the creation

¹⁵¹. "Congress adopted this compromise position between *White-Smith Music Pub. Co. v. Apollo Co*, 209 U.S. 1, 28 S.Ct. 319, 52 L.Ed. 655 (1908) and full copyrightability", Miller and Davis wrote, as an ameliorative device against totally control of production by the composer and the domination of the market by the company which at that time effectively monopolized the recording market. *Intellectual Property*, at 314.

¹⁵². Usually, commentators and courts (e.g., *Sony Corporation of America v. City Studios*) assume that the law of copyright has developed in response to significant changes in technology, that the invention of a new form of copying equipment gave rise to a new need for copyright protection. For example, the development and marketing of player pianos and perforated rolls of music determined the creation of the new exclusive right over the production of such copies, and *White-Smith* preceded the enactment of the Copyright Act of 1909. Supposing this to be true, why do the new statutory rights, instead of benefiting the genuine author, created entirely new copyright owners, and/or instead of going to individual creators, are in fact overextended to companies and other non-creative commercial enterprises?

It is very important for the purpose of this paper to realize that a recorded performance-- a sound recording-- is better protected than the original music. While anybody can perform and record previously recorded music, upon payment of statutory fees, without any fear that a recognizable product constitutes infringement of the music, a re-recording of an original album will constitute infringement of the copyright owner's right in the first sound recording as long as "the final product [is] 'recognizable' as the same performance as recorded in the original." *United States v. Taxe*, 380 F.Supp.1015, 184 U.S.P.Q. 7(C.D. Cal. 1974) aff'd, 540 F.2d 961, 192 U.S.P.Q. 204 (9th Cir.1976). That is slavish performance of a composition that is already recorded is free for the taking--compulsory licenses being paid--but a slavish recording of an existing sound recording (the product of entrepreneurial and technological resources, and not artistic creativity) is forbidden.

an eco-esc pendulum of copyright

of a new monopoly for the benefit of a new class of copyright holders: the music-businessmen, which has encouraged the music industry in general, but not necessarily the individual author¹⁵³, who usually works for a more limited remuneration. What this legislation accomplished was to grant a very powerful

¹⁵³. At the risk of being redundant, I repeat that the vast majority of creators are corporate employees.

What before 1909 wasn't even addressed by U.S. copyright statutes--the employed "author"--, with the 1909 Act became a "controversial innovation", coming a few years after the initial judicial "doctrine of works made for hire", and with the 1976 Act the exception changed into the rule.

Jaszi considered this fact (Toward a Theory of Copyright at 487), as a departure from copyright ideology. I would disagree with him because copyright regulation has never been truly a protection of "Romantic authorship," but, basically, a commercial regulation. If the copyright monopoly has been accepted to protect almost any kind of non-functional expression, why is an emotional defense-- the necessity for a "creative incentive"--, advanced to protect the naked entrepreneurial interest, when the employed author is treated as any other employee. (Related with this background I would like to advance the idea that the author is generally regarded as an "intellectual worker." I find this astonishing and close to inexplicable, explained only by the inherent conflict these entrepreneurs face: proud members of a free market economy, they exist only through massive government intervention!)

I have not discussed here the conditions of copyrightability, but in the case of a sound recording it is interesting to see that originality may proceed from the performer's unique contribution or the producer's technical employees, or both. Neither party has a copyright interest under American law. Another perspective which emphasizes the producer's and performer's authorship, on the copyrightable elements of sound recording, appears in H.R.REP. NO. 1476, 94th Cong., 2d Sess. 56, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5669; also H. REP. NO. 487, 92D Cong., 1st Sess. 5, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1570.

I still wonder why a performance which is not copyrightable, recorded, has as a result copyright subject matter--the **sound recording**. The only reasonable answer is that copyright is commercial protection which was **corrupted** by the false argumentation of "authorial protection and incentives for creation" and, which in the last instance is justified only by the public interest in dissemination of information.

an eco-esc pendulum of copyright

commercial monopoly--in particular sound recordings--, more extraordinary than any other legal protection ordinarily enjoyed by a class of mere entrepreneurs. (An incentive designed to motivate art has no justification here any more than for a Texas farmer's motivation to raise cattle, for example: Both 'investors' seek to procure an identical benefit, or rent in economic terms. The most obvious and perhaps only difference between musical art and agriculture from the point of view of the ordinary entrepreneur is that after aircraft, American musical and other entertainment art is the most heavily and successfully exported.¹⁵⁴)

Assuming that commerce in music demands a special monopoly, different from agricultural subsidies, for instance, at least "the evil ought not to last a day longer than is necessary" for its purposes¹⁵⁵, and not simply as long as appear politically possible to secure the music-businessmen the most outrageously

¹⁵⁴. See Rockwell, *The New Colossus*.

¹⁵⁵. However, commentators cannot help complaining about the inequitable treatment suffered by sound recording companies as copyright holders. "The Copyright Act affords less protection to sound recordings (...) than to written musical works and other kinds of copyright works. Musical score copyright owners have the exclusive right to perform and reproduce their work. Sound recordings copyright owners hold no corresponding right of exclusive performance. Similarly, sound recording copyright holders' exclusive right of reproduction is narrower than the corresponding right granted to musical score copyright holders." L. Benjamin, "Tuning Up the Copyright Act: Substantial Similarity and Sound Recording Protection", 73 *Minn. L. Rev.* 1175, 1175 (1989).

an eco-esc pendulum of copyright

profitable return on their investment¹⁵⁶. But, of course, that is not the case and these entrepreneurs receive a benefit only justifiable if they were, in fact authors, supplying on more example to interpret the copyright statute, not as a securing authors' rights, but as a pure commercial reglementation¹⁵⁷.

b) THE MUSIC PERFORMING RIGHT AND ITS EXPLOITATION

In the process of promoting and endorsing desirable copyright regulation, the American music industry succeeded not only in subverting the individual copyright owner, but it also has alienated another copyright right from the

¹⁵⁶. Ironically, almost every American commentator sympathizes with the copyright owners of sound recordings in comparison with other owners. They do not seem to understand that even if, as merchants, producers have some claim to their status they have no moral claim to such a powerful monopoly to the natural rights of individual author.

¹⁵⁷. The reason for the 1972 statutory revision was the fact that "rival manufacturers would simply obtain masters or copies of the authorized producer's phonorecords and proceed to reproduce and sell pirated copies (...) paying nothing to anyone." Miller and Davis added that "recognizing this untenable situation, Congress finally granted record companies a copyright in their phonorecords in 1972 and empowered them to bring infringement actions against pirates." Intellectual Property, at 315.

an eco-esc pendulum of copyright

composer--the performing right¹⁵⁸. While the owner of copyright in a sound recording does not possess a statutory right of performance¹⁵⁹, the composer is only theoretically more privileged.

The performance right in a musical composition, "the most important of the performance rights,"¹⁶⁰ long described as problematic due to private

¹⁵⁸. Section 1(e) of the 1909 Copyright Act gave the owner of the copyright of a musical composition the exclusive right to perform it publicly for profit. Under this provision there are three elements of a cause of action for infringement of the "performing rights" by or in connection with motion pictures, radio, and television: there must be a "performance" of the copyrighted work, the performance must be "public," and "for profit."

As a result of the 1947 amendment of § 1(e) of the Copyright Act the owner of a copyright for music has the exclusive right to make any arrangement or setting of the composition or melody for the purpose of public performance for profit and also for the purpose of printing, reprinting, publishing, copying, and vending the copyrighted composition. But this provision did not give the copyright owner the exclusive right to make an arrangement of the music for the purpose of making a record. 23 A.L.R. 2d 244, *2.

¹⁵⁹. Under § 106 (1)(2)(3) and (4) the owner of the copyright has no performing right in his sound recording.

§114. Scope of exclusive rights in sound recordings, in 1976 Act. Latman, Copyright for the Nineties. Statutory Appendix, at 27.

For a doctrinal analyses, Meyers, "Sound Recordings and the New Copyright Act" 22 N.Y.L. SCH. L. Rev. 573 (1977); Lang, "Performing and the Right of the Performing Artist", 21 ASCAP COPYRIGHT L. SYMP. 69 (1974); Nimmer, Cases and Materials on Copyright 206-39; H. G. Henn, "Henn on Copyright Law. A Practitioner's Guide", (3d ed), 1991, p. 205.

¹⁶⁰. Nimmer, Cases and Materials on Copyright, at 237.

For a new approach to performance rights (which have been in existence since the 1897 amendment to the Copyright Act), as a distinct form of neo-copyright--the performance an eco-esc pendulum of copyright

enforcement and policing difficulties¹⁶¹, does not actually belong any more to the composer, but to abstract entities, such as the American Society of Composers, Authors and Publishers, ASCAP.¹⁶² (ASCAP has always been presented as an immanently contemporary and modern way to protect copyrighted compositions.)

When copyright collectivization began, the movement was considered by commentators as well as its initiators as progressive and exclusively in the interest of authors, designed to maximize their commercial benefit. The copyrighted musical work has often appeared not economically feasible for

copyright-- defined as "a private copyright use tax," see Paterson, *Copyright Overextended*, 393-4.

¹⁶¹. "Musical works, however, by their very nature may be performed on such an extensive basis as to render it impossible for individual composers and publishers to enforce effectively their performance rights on an individual basis." *id.*

¹⁶². In order to take full advantage of the new statutory right, the performing right, "a group of prominent popular composers--among them Victor Herbert and John Philip Sousa--" formed the "first performing rights organization in the United States. The purpose of the organization was to serve as clearinghouse for performing-rights licensing (thereby reducing the cost of individual licensing) and an agency to monitor performances and police infringements. With the aid of their able and dedicated attorney, Nathan Burkan, ASCAP embarked on a litigation campaign to establish their rights." Latman, *Copyright for the Nineties*, at 521.

On ASCAP's purpose and history, see *International Korwin Corp. v. Kowalczyk*, 855 F. 2d 375, 376 n.1 (7th Cir. 1988).

an eco-esc pendulum of copyright

copyright holders "to monitor and obtain payment for each such use."¹⁶³ Composers, as copyright owners, were convinced that collective societies would overcome this difficulty. By providing centralized administration, more transactions would occur at lower costs¹⁶⁴ and by pricing jointly, collective action would lead to potential market power.

Therefore, together with judicial cooperation, they considered it requisite for composers to form umbrella associations and pool their resources in order to effectively guard against unauthorized use of their compositions.¹⁶⁵ Their societies¹⁶⁶ have succeeded to exercise so "aggressively" their performance

¹⁶³. S. M. Besen, S. N. Kirby, S. C. Salop, "An Economic Analysis of Copyright Collectives," 78 Va. L. Rev. 383, 383, (1992) [hereinafter, *An Economic Analysis*].

¹⁶⁴. On the rationale for an institutionalized and bureaucratic collective administration versus a personalized administration of owners rights see, *An Economic Analysis*, p. 384: "Collective administration of the copyrights of a group of owners increases production efficiency when its cost is lower than that of administering the copyrights of all possible subsets of the same group of owners." (I use these authors' opinions taking into account their recognition that there is a conflict between their analysis and the fact that these are instances in which it is relatively easy for users to obtain licenses directly from authors. However, except for the situation of movie producers, virtually all other music users license the performing right through ASCAP.)

¹⁶⁵. This stereotype rationale is common place in many cases. See, for instance *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association*, (W.D. Ok. 1982) 546 F. Supp. 1276; 1982-2 Trade Cas. (CCH) P64, 943, 943 (1982).

¹⁶⁶. Nimmer calls them "performing rights societies", in *An Economic Analysis*, they are called "copyright collectives," and G. W. G. Karnell, "collecting societies" in "Collecting Societies in Music", *Collecting Societies in the Music Business* (D. Peeperkorn, C. van Rij, D. Lester, L. Faulder, eds), MAKLU Publishers, Apeldoorn/Netherlands--Antwerpen/Belgium, 1989, 15-21.

an eco-esc pendulum of copyright

right that, apparently, it might not even be subject to the doctrine of fair use (which is supposed to be available "regardless of the type of work involved"¹⁶⁷).

When **ASCAP** was created perhaps both, music publishers and composers imagined that they had truly collective interests, perhaps a fraternal sense¹⁶⁸, and that they could equally control their exploitation. After only a few decades, however, **ASCAP** was subjected to the terms of a series of consent decrees which provide that its members have no individual economic powers upon acceptance of member-status in **ASCAP**¹⁶⁹:

1. Its role as an intermediary between members and user is in fact fluid: when it is a question of a direct loss, such loss falls upon its members, because

¹⁶⁷. Paterson, Copyright Overextended at 39.

¹⁶⁸. In **Schwartz v. Broadcast Music**, 180 F. Supp. 322, 325; 1959 Trade Cas. (CCH) P69,543; 124 U.S.P.Q. (BNA) 34, (S.D.N.Y. 1959), the 33 composers-plaintiffs alleged that the other major American collective society, **Broadcast Music, Inc.**, (BMI) is "wholly owned by radio and television broadcasting companies. BMI is engaged primarily in the acquisition and licensing of performance rights in musical compositions."

¹⁶⁹. About **ASCAP's** acquisition of performance rights in musical compositions that have been synchronized with motion pictures, see **United States v. ASCAP**, 1950-51 Trade Cas. (CCH) P62, 595, at 63,752 (S.D.N.Y. 1950). Another consequence of **ASCAP's** membership is that its members must grant such rights to motion picture producers simultaneously with synchronization rights., i.e., the rights to record the music in the sound track. See, **Alden-Rochelle, Inc. v. ASCAP**, 80 F. Supp. 888, 896 (S.D.N.Y. 1948)

an eco-esc pendulum of copyright

ASCAP is only an agent, "the middle-man between the songwriter and the user"--effectively a collection agency, or "co-operative society."¹⁷⁰ When it is a question of recovery of damages, the Second Circuit has stated that such funds "would go to the society," and the "plaintiffs were necessary parties merely because they hold their respective causes of action in trust for the society."¹⁷¹

2. Sometimes, ASCAP's conduct has a negative impact on its members interests. For instance, in a recent infringement case involving ASCAP's members' performance rights, the defense was that "plaintiffs are estopped from claiming infringement because ASCAP allegedly violated a consent decree issued by the Southern District of New York in *United States v. American Society of Composers, Authors, and Publishers*."¹⁷²

¹⁷⁰. See *Schwartz v. Broadcast Music*, where a loss is supported by ASCAP's members rather than by the agent itself.

¹⁷¹. See, e.g., *Buck v. Elm Lodge, Inc.*, 83 F.2d 201, 202 (2d Cir. 1936). There are many cases where the vindication of the right of public performance of members' songs was brought in the name of ASCAP, e.g. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 (1931).

¹⁷². Trade Reg. Rep.(CCH) P 62,595 (S.D.N.Y. March 14, 1950). The district court refused to address the estoppel argument or to add ASCAP as a party in the case, concluding that any dispute between defendant-infringer and ASCAP should be brought as a separate suit. *Bourne Co., Henry Mancini, d/b/a Northridge Music Co., SBK Robbins Catalog, Inc., v. Hunter Country Club, Inc.*, 990 F.2d 934; Copy. L. Rep. (CCH) P27,079; 1993-1 Trade Cas. (CCH) P70,179; 25 Fed. R. Serv. 3d (Callaghan) 546 (7th. Cir. 1993). The court's attitude in rejecting the defendant's claim against ASCAP in this case confirms once more that ASCAP's and its members' interests diverge, and maybe, even conflict. One is left to wonder ASCAP real

an eco-esc pendulum of copyright

3. ASCAP's members agree to an "impersonal"¹⁷³ determination of the terms of the licenses and the rates to be charged. "Individual members do not pass upon, approve, ratify or object to license terms agreed to by the Board."¹⁷⁴ ASCAP determines the work's license fee and the rate its member will share from the total fund, and ASCAP has the final decision subject to judicial review in cases of disagreement between it and its members.¹⁷⁵

4. Even though for over fifty years, now, ASCAP was required to allow its members to have some economic power to negotiate outside ASCAP, many members, like the thirty three composers-plaintiffs in *Schwartz*, have not granted a single license since they became ASCAP members, although they possess this theoretical equal right to grant non-exclusive licenses.¹⁷⁶ The

interest is if not that of its members!

¹⁷³. ASCAP's Board of Directors decides these problems. *Schwartz*, 180 F. Supp. 322, 330.

¹⁷⁴. *id.*

¹⁷⁵. In *United States v. American Society of Composers, Authors and Publishers*, (S.D.N.Y. 1993) petitioner Karmen--a jingle writer--, raised the issue of federal over state court jurisdiction in a matter concerning the value weighted by the ASCAP's Board of Directors for jingles. The court ruled for defendant.

¹⁷⁶. *Schwartz*, 180 F. Supp. 322, 332: "While the 1941 decree voided the exclusive licensing right in ASCAP, the fact is (...) that no plaintiff granted nondramatic public performance licenses." Plaintiffs in their interrogatories categorically stated: "The license for nondramatic performance for profit for all compositions... have, since 1940, been issued by ASCAP."

an eco-esc pendulum of copyright

Board of Directors controls and disposes of all funds received, and determines the net amount to be distributed among the members. **ASCAP** members under the Articles of Association by which they are bound¹⁷⁷ have executed agreements which unequivocally transfer to **ASCAP** a nonexclusive right to license public performances for profit of their compositions. In practice then, it is from **ASCAP** alone, which negotiates the licenses' fees, that fellow members receive royalties in an amount determined and controlled by **ASCAP**¹⁷⁸. **ASCAP** is hardly a fraternal organization, but a big business and courts have noted that "even were it accepted that **ASCAP** is a 'cooperative society' which renders services exclusively in the interests of its members, this would 'not remove its activities from the sphere of business'¹⁷⁹." ¹⁸⁰

5. What makes the composer's status even more puzzling is that even if **ASCAP** members resigned, while it would terminate all existing assignments, the resignation would be subject to certain rights or obligations existing between

¹⁷⁷. *Gem Music Corp. v. Taylor*, 294 N.Y. 34, 38, 60 N.E.2d 196, 198 (1945).

¹⁷⁸. *id.*

¹⁷⁹. *American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943).

¹⁸⁰. *Schwartz*, 180 F. Supp. 322, 331.

an eco-esc pendulum of copyright

ASCAP and its licensees. Specifically **ASCAP** would continue to have the right to grant nonexclusive licenses in a resigned writer's composition as long as his publishers and collaborators remained members of **ASCAP**.¹⁸¹ One must wonder: If a maximization of profit results due to the existence of such collective societies, whose interest is protected besides the collectives own interest as a separate entity?¹⁸²

6. It seems that the composer's status in this situation, is similar to that of 18th century English authors, who were tolerated in order to justify for publishers benefits of the book-business. First of all, they seem to have no chance to exploit their copyright monopoly as outsiders from collective societies. Secondly, inside the collective societies, as members, they have a disadvantaged status in comparison with **ASCAP**'s music-businessmen members--the music publishers:

On one side, the net royalty amount, which **ASCAP** designates for its members, is divided in equal shares between composers and publishers by the

¹⁸¹. *Broadcast Music, Inc. v. Taylor*, 10 Misc.2d 9, 55 N.Y.S.2d 94 (S.Ct.N.Y. 1945).

¹⁸². It is clear, at least that the interest in question is a commercial one.

an eco-esc pendulum of copyright

Board of Directors.¹⁸³ On the other side, the large majority of publishing contracts are concluded in fact with **ASCAP** publisher houses¹⁸⁴. Thus, **ASCAP**'s composers depend economically upon their publishers, their assignees. In theory this position obliges **ASCAP**'s publishing houses to exploit their co-members' works in good faith for their mutual benefit¹⁸⁵, because everything depends on this exploitation. In reality, as plaintiffs in **Schwartz v. BMI** proved¹⁸⁶, "some publishers, who were **ASCAP** houses, organized **BMI** companies and although in theory functioning separately, in fact, because of special concessions granted by **BMI** to the publishers, refrained from promoting non-**BMI** music or curtailed its exploitation."¹⁸⁷

¹⁸³. The amount to be distributed is divided into two equal parts: one for allocation among publisher members and the other for allocation among writer members. Articles of Association of **ASCAP**, Article XV.

¹⁸⁴. In **Schwartz** the plaintiffs had entered into agreements with 300 music publishers who were also **ASCAP** members. The agreements covered approximately 5,800 of the 7,000 compositions written by plaintiffs.

¹⁸⁵. **Broadcast Music v. Taylor**, see supra note no. 180.

¹⁸⁶. Plaintiffs identified a number of firms engaged in this practice.

¹⁸⁷. In **Schwartz** plaintiffs charged that music publishers with whom they had contracts were induced by subsidies, restrictive covenants, incentive payments and other devices including payments of salaries of publishers' employees, to refrain from publishing and exploiting plaintiffs' songs, and that "these activities were all for the purpose" of discrimination in favor of **BMI** songs. They also alleged that concessions were granted by **BMI**. **Schwartz**, 180 F. Supp. 322, 335.

an eco-esc pendulum of copyright

Assuming that composers cannot efficiently protect their performance rights, this is certainly relevant for the establishment of ASCAP, but only or at least mostly with respect to the unique situation in which composers' copyright interests are the issue. Nevertheless, whether it is ASCAP, BMI¹⁸⁸ or other similar so-called non-profit organizations, one can hardly say that they routinely or even often act for the benefit of their members' individual interests.¹⁸⁹

¹⁸⁸ The public performing rights to most copyrighted musical works are licensed by two major performing rights societies ASCAP and BMI (Broadcast Music, Inc.) See, Nimmer on Copyright, §8.19; S. Shemel, & M. Krasilovsky, "This Business of Music" (rev. ed. 1977), at 163.

While ASCAP boasts a repertory of over 3 million compositions, BMI gloats over a million of them. *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274, 277 (S.D.N.Y. 1982); J. M. Fujitani, "Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation" 72 Calif. L. Rev. 103, (1984).

On behalf "of its more than 50,000 members [in *United States of America v. American Society of Composers, Authors and Publishers* (S.D.N.Y. 1993), this number is given as 40,000], ASCAP licenses thousands of radio and television stations, restaurants, nightclubs, concert halls, and other establishments whose owners desire to perform copyrighted musical compositions." *Pedrosillo Music v. Radio Musical Inc. and Thomas Carrasquillo*, 815 F.Supp. 511; 27 U.S.P.Q. 2D (BNA) 1153 (D.P.R. 1993).

BMI, a nonprofit corporation owned by members of the broadcasting industry--CBS was among the broadcasters who formed BMI-- was organized in 1939, and affiliated in 1979 some 10,000 publishing companies and 20,000 authors and composers, operating in the same manner as ASCAP.

¹⁸⁹. Under fiduciary law, ASCAP and any other collective society, must act on behalf of its members. One might say that an élite and a riffraff are reduced to a common denominator. In this act of membership, hardly a matter of free choice where the collective acts for everybody, it appears very progressive per se, but is very perverse in fact. It masks an oppressive burden upon the individual creator, who has to sustain not only his business partners, her publishers,

an eco-esc pendulum of copyright

Depriving their members of performance rights, and exercising them autonomously through nonexclusive licenses of those rights, collective societies emerge as the reification of the relationship between the individual composer and his abstract intermediary. This reification has as a result the substitution, for human uniqueness, of a bureaucratic mechanism which pretends to represent the best interests of the author.

In fact, however this reification is deceptive and false for it would be accurate only if the members of collective societies had been only individual composers. But collective societies operating in the music industry¹⁹⁰ join composers, publishing houses, members of broadcasting industries, individuals

but also his benefactor, the collective society.

"The manner in which performing rights societies operate is a most complex and voluminous subject raising problems primarily of an antitrust rather than copyright nature." Nimmer on Copyright, §8.19. It is astonishing, but not unusual, for the legal technician like Nimmer to avoid this problem by such a definitional leap, for collective societies are nothing if not purely, entirely, and only, a creature of the copyright regime which framed and sustained them. Also Sobel, "The Music Business and the Sherman Act: An Analysis of the 'Economic Realities' of Blanket Licensing," 3 Loyola Ent. L. J. 1, 3-4 (1983); Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950," 19 J. Law & Contemp. Probs. 294, 298 (1954).

¹⁹⁰. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total, in 1979, of three million compositions, or of BMI, with one million.

an eco-esc pendulum of copyright

and corporations¹⁹¹, indeed almost anybody meaningfully involved in the commerce of music.

While the Copyright Clause, represents government intervention in this commercial area, the collective societies represent a private bureaucratic intervention, under the rubric of the author's interests. However, ASCAP and other similar organizations are the primary beneficiaries of this interventionism. On one hand, the users have an all-or-nothing choice¹⁹² in choosing to accept the collective's fee schedule, and on the other hand, its members are in the same

¹⁹¹. One might say, in other words, that the act of joining intellectual workers and their exploiters together is another example of how capitalism goes on its triumphant march.

¹⁹². ASCAP through its licensing department grants performance licenses to users of music. They are of two kinds: (1) a blanket license, which is the type generally issued; and (2) a program license. The terms of the licenses and the rates to be charged are decided by ASCAP's Board of Directors. Individual members do not pass upon, approve, ratify or reject terms agreed to by the Board.

All royalties and license fees collected by ASCAP are pooled in a common fund. Controls over and disposition of all funds received is vested in the Board of Directors. The funds are first disbursed to meet operating expenses and payments owed to affiliated foreign societies. Upon payment of the foregoing plus reserves which may be established, the net amount remaining is distributed among the members upon order of the Board of Directors. The amount to be distributed is divided into two equal parts: one for allocation among publisher members and the other for allocation among writers members. See, for details, Articles of Association of ASCAP, Article XIV and XV.

For a recent case see, e.g. *United States of America v. American Society of Composers, Authors and Publishers*, Civ. 13-95 (WCC), 1993 U.S. Dist. LEXIS 7058. May 1993, S.D.N.Y.

an eco-esc pendulum of copyright

situation are having no choice concerning their remuneration and other interests. While its members retain the right to individually license public performance, even if ASCAP grants a nonexclusive license, a member has almost never competed with it. Created as a common agent¹⁹³ to minimize the license's cost, by its own existence, ASCAP discourages users from licenses with individual members¹⁹⁴.

The remarkable success and effective monopolies enjoyed by performing collective societies makes it more obvious as nothing else that copyright was and remains a commercial regulation of a failed free market. This bald assertion receives considerable support from the case law involving the relations between collective societies and their users.

¹⁹³. On ASCAP as agent, see, e.g. **Knight Kitchen Music, v. John J. Pineau**, Civ. No. 92-0169-B, 149 Bankr. 239; Bankr. L. Rep. (CCH) P75,097; Copy. L. Rep. (CCH) P27, 052; 23 Bankr. Ct. Dec. (CRR) 1427.

The 2d circuit Court of Appeal, however, has recognized that ASCAP is not a mere agency nor a single conduit for its members, **Buck v. Elm Lodge**.

¹⁹⁴. A recent suit against ASCAP and BMI, decided in October 1992, at the district court level, contesting their dominant position in the music market, is **International Show Car Association v. American Society of Composers, Authors & Publishers, and Broadcast Music, Inc.**, 806 F. Supp. 1308; 1992 U.S. Dist. 1992-2 Trade Cas. (CCH) P70, 056. (E.D.Mic. 1992)

an eco-esc pendulum of copyright

In **Broadcast Music**¹⁹⁵ one of the three national commercial television networks—**CBS**¹⁹⁶—sued the two major collective societies in the music industry on the ground that the blanket license system constituted illegal prices under antitrust law.¹⁹⁷ **CBS** was, of course, the world's largest manufacturer and seller of records and tapes¹⁹⁸ and also a leading music publisher, with publishing subsidiaries affiliated both **ASCAP**¹⁹⁹ and **BMI**. Justice White held, in his majority opinion²⁰⁰, contrary to **CBS**' claim, that the blanket license is

¹⁹⁵. **Broadcast Music v. Columbia Broadcasting System**, 441 U.S. 1; 99 S. Ct. 1551 (1979). See also, P. Areeda, "Antitrust Analysis. Problems, Text, Cases" Little Brown, Boston, Toronto (3d. ed. 456-66), 4th ed. 232-242.

¹⁹⁶. It supplies programs to approximately 200 affiliated stations telecasting approximately 7,500 network programs per year.

¹⁹⁷. However, **CBS** would have preferred that **ASCAP** make all its compositions available at standard per-use rates within negotiated categories of use. If the first were illegal, **CBS** urged that **ASCAP** be forbidden to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works. **Broadcast Music**, 441 U.S.1, 17; 99 S.Ct. 1551, 1561.

¹⁹⁸. "The giant of the world in the use of music rights", and the "No.1 outlet in the history of entertainment," quoting a **CBS** witness, **Broadcast Music**, 441 U.S. 1, 4; 99 S.Ct. 1551, 1554.

¹⁹⁹. On the evolving relationship between **CBS** and **ASCAP**, see also **United States of America v. American Society of Composers, Authors and Publishers**, (S.D.N.Y. 1993).

For more details about litigations involving **ASCAP**, see "Copyright in Free and Competitive Markets" (W. R. Cornish, ed.), ESC Publishing, Oxford, 1986, 92-6.

²⁰⁰. Mr. Justice Stevens, in his dissenting opinion thought that such a request was entirely proper and that "the blanket all-or-nothing license is patently discriminatory". "The user an eco-esc pendulum of copyright

"not a species of price fixing categorically forbidden by the Sherman Act," an unreasonable restraint of trade²⁰¹.

purchases full access to ASCAP's entire repertoire, even though his needs could be satisfied by a far more limited selection." In the end Justice Stevens observed that "the ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what is 'reasonable' for the access they are getting, may well be far higher than they would choose to spend for music in a competitive system."

"The all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms." Cirace, "CBS v. ASCAP: An Economic Analysis of a Political Problem" 47 Ford. L. Rev. 277, 286 (1978)

Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply for a judicial determination of a "reasonable fee." *United States v. ASCAP*, 1950-1951 Trade Cases para. 62, 595, p. 63,754 (SDNY 1950). The BMI decree contains no similar provision for judicial review.

²⁰¹. The Department of Justice first investigated allegations of anti-competitive conduct by ASCAP in the 30s and 40s. See, Cohen "Music, Radio Broadcasters and the Sherman Act", 29 Geo. L. J. 407, 424 n. 91 (1941). A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged the blanket license, which was then the only license offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool. *United States v. ASCAP*, Civ. no. 13-95 (SDNY 1941), pp. 3-4. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations. *United States v. ASCAP*, 1940-1943 Trade Cases para. 56, 104 (S.D.N.Y. 1941). Following complaints relating to the television industry, successful private litigation against ASCAP by movie theaters (*Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jenson*, 80 Supp. 843 (Minn. 1948), appeal dismissed sub nom.; *M. Witmark & Sons v. Berger Amusement Co.*, 177 F. 2d 515 (CAB 1949)), and a Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950. *United States v. ASCAP*, 1950-1951 Trade Cases para. 62,595 (S.D.N.Y. 1950).

The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business

an eco-esc pendulum of copyright

This opinion shows that competition law and copyright law are complementary, and represents an exquisite demonstration of the idea that copyright is a commercial regulation. First, Justice White touted the economic benefits of ASCAP's blanket license, and minimizing the coercion involved, citing similar coercions present in both compulsory and secondary transmission cable requirements.²⁰² Secondly, if it is true that the economic exploitation of performing rights attains its zenith through a bureaucratic agency²⁰³, this can

under the decree. The courts have twice held the decree does not require ASCAP not to issue licenses for selected portions of its repertory. *United States v. ASCAP* (Application of Shenandoah Valley Broadcasting, Inc.), 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (CA2), *cert. denied*, 377 U.S. 997 (1964); *United States v. ASCAP* (Application of National Broadcasting Co.), 1971 Trade Cases para. 73,491 (S.D.N.Y. 1970). See also, *United States v. ASCAP* (Motion of Metromeda, Inc.), 341 F.2d 1003 (CAZ 1965).

²⁰². Some examples of this kind of coercion are the compulsory license for secondary transmission by cable television systems, 17 U.S.C. App. §111 (d)(5)(A), and the license for the use of copyrighted compositions in jukeboxes, which is usually payable to the performing rights societies such as ASCAP, *id.*, §118(b).

²⁰³. It is often explained that the interest in collective societies belongs not only to composers who elsewhere are unable to control all uses of their compositions, but also to users who instead of having to make a separate contract for each use with each composer, conclude just one contract with ASCAP for all its 3,000,000 compositions. As is well known, the blanket license 'price' is composed of the price of individual compositions **plus the administrative costs**. Theoretically, ASCAP's interest, independent of those of its members or of non-member users, can be calculated.

["Users of music" in the current Articles of the Society are any person, firm, or corporation who or which: 1. owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or 2. is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit. See W. B. Emery, "Broadcasting and Government: Responsibilities and Regulations" Michigan State UP, 1971,

an eco-esc pendulum of copyright

certainly only be possible because of the structure of copyright law, vesting commercial privileges which can be optimally used only in a certain way.²⁰⁴

373.]

Accepting the arguments of efficiency--assuming them to be true--are the courts ready to embrace, as a solution of all difficult circumstances, bureaucratic mechanisms, which then primarily, and in the first place, are destined to serve their own interests? [About the role of bureaucratic agencies in the American society see, Emery, *Broadcasting and Government*; M. A. Franklin, & D. A. Anderson, "Mass Media Law" 4th ed. 1990, 762-3; M. Seidenfeld, "A Civic Republican Justification for the Bureaucratic state" 105 *Harv. L. Rev.* 1511, 1519-20 (1992)]

²⁰⁴. The development and growth of organizations involved in monitoring reproduction of works, using new technologies which rapidly facilitate the reproduction of all forms of intellectual property has made the maturation of collective administration of copyright a reality. It is motivated by the apparent necessity to counterattack the widespread and decentralized phenomenon of reproduction, assisting individual owners in enforcing their copyrights.

Nevertheless, if copyright is a monopoly legitimized by the public interest in intellectual production, and as a logical extension of this assumption collective administration is a necessity, the issue is how strong this monopoly has to be, and, accordingly the administrative bodies as well. In copyrighted works, production involves both authors and entrepreneurs, but it is the latter who have the dominant position among the copyright holders.

In other words, the public interest actually vindicated in this field is the businessmen's commercial not author's creative interest. With this in mind, the strength of the copyright monopoly gains little legitimacy from its present level: around 75-100 years, covering almost any tangible expressed 'thought'. First, because among businessmen, those involved in intellectual production are obviously uniquely protected by monopoly power, secondly because among those involved in copyright, a member of an administrative collective society gains administratively a dominant commercial position, and thirdly, an individual author has no real ability to penetrate the copyright business without a private or collective "agent". Consequently, the present status of the copyright monopoly as actually administered seems no more amenable to more rational solutions than to square the circle.

an eco-esc pendulum of copyright

C. COLLECTIVE PROTECTION OF EUROPEAN MUSIC

In Europe²⁰⁵, the collective copyright administration—including music-, is basically the same as the American practice²⁰⁶. If collecting societies were

²⁰⁵. Europe, for purposes of this paper, means EEC, or that Europe, presented suggestively by P. Y. Gautier, as "a matron who is in good health, has twelve children, so far, and endeavors to secure the prosperity of all her family." "The 'Single Market' for Works of Art" 144 R.I.D.A. 12, 12 (1990)

On the Treaty of Rome, the Treaty establishing the European Community (EEC), see e.g., N. Green, "The Legal Foundations of the Single European Market" Oxford; New York: Oxford UP, 1991.

²⁰⁶. Apparently everything is quite similar: The majority of authors' societies are societies concerned with private rights although the Italian society, Società Italiana degli Autori ed Editori (SIAE) is a society concerned with public rights. Not only is SIAE subject to continuous supervision by the Presiding Committee of the Italian Society of Ministers, but its articles of association must be confirmed by a Presidential decree.

Even if the majority of societies are involved with private rights, they are watched over, in one way or another by public authorities, ranging from governmental appointment of a number of the administrators (in the Nordic countries) or of an official (the Netherlands performing rights organization, Het Bureau voor Muziek-Auteursrecht--BUMA--is subject to permanent supervision by the Minister of Justice), to the obligation to account for its administration to a protective body (in the Republic of Germany), or directly to the Secretary of State (in France). Except for Luxembourg, which has no collecting societies of its own, in each EEC member state the licensing of music performance rights abroad is orchestrated by a single organization. See A. Dietz, "Copyright Law in the European Community" 212-37 (1978).

On the United Kingdom, where apparently there are two powerful collective societies, see, Whale on Copyright 134-5; Fujitani, Controlling the Market, 129-31.

an eco-esc pendulum of copyright

originally established to handle the right to perform alive music to audiences²⁰⁷, when recordings came about, they quickly expanded their function with the aim of administering the right to mechanical reproduction and distribution of musical recordings. From authors' rights, collective administration spread to other rights, such as performers' rights, the rights of audio and audiovisual producers', and broadcasters rights, as well as expanding their focus from the national to the international level²⁰⁸.

Unlike the American system, most European countries make a distinction between the author's right to royalties and the protection of producer's rights. As the materialization of authorship, the author's copyright is vested only in the individual author. The sound recording producer is endowed with so-called

. The first performing rights society, Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) was formed in 1851, in France. See H. C. Jehoram, "Basic Principles of Copyright Organizations" 26 Copyright 214, 215 (1990).

On the French domestic basic regulation of collective societies, see Bertrand, *Le droit d'auteur*, 740-2.

²⁰⁸. There is a specialized private international organization for musical performing rights, which establishes an international system of reciprocity between collecting societies all over the world, the Confédération Internationale des Sociétés des Auteurs et Compositeurs--CISAC. For details, Karnell, *op. cit.* 18-21. ASCAP itself has, as well, agreements with 41 foreign organizations. B. Korman, I. F. Koenigsberg, "Performing Rights in Music and Performing Rights Societies" 33 J. Copyright Soc'y U.S.A. 332, 353-54 (1986).

an eco-esc pendulum of copyright

neighboring rights²⁰⁹. (This difference, however is often neglected, and it is not uncommon that authors and producers become members of the same society. However, in this paper I will discuss only the relationship between composers, performing rights societies and EEC law²¹⁰.)

²⁰⁹. This term of art is an abbreviation of "rights neighboring to copyright." It was first used in 1948 at the Brussels Diplomatic Conference for the Revision of the Berne Convention. In this way, for first time, a wish to protect three other interests was expressed--those of performers, phonogram producers, and broadcasters--independently from the author's rights. Finally it led to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the Rome Convention of October 10/28, 1961. See, Porter, *Beyond the Berne Convention*, 20-1; H. Cohen Jehoram, "The Relationship between Copyright and Neighboring Rights" 144 R.I.D.A. 81, (1990) [hereinafter Cohen, *Copyright and Neighboring Rights*].

In Europe, the European Communities have embarked on a whole range of proposals aimed at improving neighboring rights protection, primarily for performers and phonogram producers. These measures might be considered as a first step, not to protect carriers of information at the same level as the authors, but "to replace authors by industry." Cohen, *Copyright and Neighboring Rights*, at 123.

These propositions started with the Green Paper on Copyright of the Commission of the European Communities [Com (88) 172 final, Brussels, 7 June 1988], and include in particular a recommendation from a Council decision concerning accession of all Member States to the Rome Convention by December 1992. See, W. Rumphorst, "Neighboring Rights Protection of Broadcasting Organizations" 10 EIPR 339 [1992].

²¹⁰. For the purpose of this paper, EEC law includes Articles 30 to 36 of the EEC Treaty which deal with the free movement of goods--and especially Article 36 which allows, as the permissible grounds for restrictions on imports, "the protection of industrial and commercial property"--, Article 59 in respect of the free movement of services, and Articles 85-6 which prohibit certain agreements which prevent, restrict or distort competition within the Common Market and may affect trade between Member States. See, H. E. Pearson, and C. G. Miller, "Commercial Exploitation of Intellectual Property" Blackstone Press Ltd., 1990, 235-47 [hereinafter Pearson, *Commercial Exploitation*]; E. McKnight, "Copyright and a Single Market in Broadcasting" 10 EIPR 343, 344 [1992].

an eco-esc pendulum of copyright

As is often noticed, the author who becomes a member of a copyright society relinquishes to a great extent his "proprietary right." Since the society has as its declared objective to maximize its repertoire revenue, it cannot be choosy in licensing. "The composer who wants to have his symphony performed by the Wiener but not by the Berliner Philharmoniker"--du Bois, the legal head of the Dutch BUMA once remarked--"should not become a member of a copyright society". And yet, as an outsider, a composer has no meaningful chance to exploit his work.

The European collecting societies claim legitimacy for their activity on two grounds: (1) Authors' rights, perhaps owing their genesis to more philosophically aesthetic arguments, as well as neighboring rights, have actually

A prestigious European collective legal work "left aside the case law concerning the application of Article 86 to authors' right societies", for the reason that "does not concern the specific character of copyright." See Copyright in Free and Competitive Markets. I politely disagree.

However, I use in this section "reproduction" according to the French definition, consisting of physical copying of the work by any process which enables it to be communicated directly or indirectly to the public. It is characterized by the creation of physical sound media, such as the manufacture of a record. "Performance," in the same terminology, consists in "the direct communication of the work to the public." It may be done by performers before the public or by means of physical recordings of the work. See *id.*, at 21.

Also, not be discussed here, is the case law of the Court of Justice in consideration with the European Free Trade Association (EFTA) and the copyright market.

an eco-esc pendulum of copyright

become effective economic rights to remuneration. (2) As economic rights, there is only one way to handle them efficiently, which is collectively. This analysis also explains the single-minded determination of these societies to seek profits so aggressively because the membership whose sole interest is defined as pecuniary depends on income received from the society.

However, after collection the revenues have to be distributed, apparently not a simple matter. After deduction of costs--including the societies' considerable expanses--and assigning a portion of revenue for social and cultural purposes--, the rest belongs to authors on the basic principle that the money should be paid to the authors whose works have been played or performed during the time for which the money is collected. Here occurs the problem, common to all collective societies, the problem of gathering program information. It appears this intractable problem cannot be solved, only compromised. Consequently, each society applies its own system of distribution, using its criteria and inevitable imperfections.

From the beginning of his career the composer knows that he has virtually no chance to exploit his composition on his own. Accordingly, he accepts the

an eco-esc pendulum of copyright

process of fees distribution²¹¹, as well as the possibility of an eventual open conflict with his society. To the contrary, collective societies share no such reluctance or ambivalence and enjoy and cultivate their composer-members support, because they are their apparent source of income.

Thus, the relations between the European (and U.S.) collective societies and their members are structured on the dominant position of the first, who in turn logically feel free to promote their own interests even at the risk of damage to its members. For example, before the 1970s, the German collective society insisted on an all-or-nothing assignment: A member had to choose between assigning all his present and future rights to **GEMA** or, lose his membership status.

The Commission of the European Community²¹² has intervened directly in the structure and management of these societies in countries within the **EEC**. A detailed account of the functioning of these collecting societies, the

²¹¹. On blanket license system and fees distribution, see also P. Goldstein, "Commentary on 'An Economic Analysis of Copyright Collectives'" 78 Va. L. Rev. 413, (1992).

²¹². The Commission of the European Communities, based in Brussels, has the primary responsibility for the enforcement of EEC competition law, Articles 85-6 of the Treaty. The Commission is the equivalent of the EEC civil service, which derives most of its power from orders of the Council of Ministers, representing the governments of the Member States. Decisions of the Commission can be reviewed by the European Court of Justice (ECJ), based in Luxembourg. Pearson, Commercial Exploitation 242-3.

an eco-esc pendulum of copyright

Commission and the European Court provided in two major decisions, in **Re GEMA**²¹³, which involved the German society²¹⁴, and in **Belgische Radio en Televisie v SABAM**²¹⁵(no.2)²¹⁶. Those decisions made clear that whatever practices a collective society uses, they may not be abusive. It was emphasized that an abuse may arise either "from the terms of the constitution of a collecting society, or from its internal decisions, or from its transactions with members or outsiders; and that a practice may be abusive in its unfairness either to members or potential members or to users of the works."²¹⁷ Thus, even if

²¹³. (no.1)[1971]C.M.L.R. D35 OJL 134/15, and (no.2)[1972]C.M.L.R. D115.

²¹⁴. Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte/Gennossenschaft zur Verwertung Musikalischer Aufführungsrechte.

²¹⁵. **SABAM** is the Belgian Association of Authors, Composers and Publishers. It is a cooperative association whose object is to exploit, administer, and manage all copyrights and kindred rights, for its members and associates and for its clients and affiliated undertakings. Almost all authors resident in Belgium seek the help of **SABAM** in collecting their royalties.

In **BRT v. SABAM** (1974 E. Comm. CT. J. REP. 51, 2 COMM. MKT. L.R. 238) the Commission pointed that copyright collective societies are undertakings within the meaning of Article 86: By acting as agencies which safeguard the rights of musical composers, they perform the function of an undertaking engaged in the provision of services. Furthermore, because these societies have a **quasi-monopoly** in the field of authors' rights in their respective countries, they are deemed to have a **dominant position** in a substantial part of the Common Market. For more details, see F. L. Fine, "The Impact of EEC Competition Law on the Music Industry" 12 J. Intl. L. Bus. 508, 519-20 (1992) [hereinafter Fine, The Impact of EEC].

²¹⁶. Case 127/73, [1974] E.C.R. 313.

²¹⁷. Stone, Copyright Law, at 126

an eco-esc pendulum of copyright

noticed only in passing, that a collective society will act in its own interest, ignoring its charge to protect its members' interests, is significant enough to merit discussion in EEC case law.

Re GEMA (No. 1) represents the most detailed examination of the internal regulations of a collecting society primarily from the viewpoint of EEC competition rules. The Commission issued that **GEMA** had abused its dominant position (a) by discriminating against nationals of other Member States²¹⁸ and (b) by binding its members to excessive obligations. The Commission said that "the abuse also lies in the fact that **GEMA** binds its members by obligations which are not objectively justified." These were: (i) the restriction on members freedom to divide rights, its members being required to assign their rights for all categories and regions; (ii) The unfairly complicated rules governing the transfer of membership to other societies, including assignment of future works and long waiting periods; (iii) the absence of judicial recourse of members over internal procedures and rights; and (iv) the denial of ordinary status for members

²¹⁸. That society refused to conclude contracts with others if they are established in Member States other than Germany.

who are economically dependent on, or employed by, a user of musical works²¹⁹.

It was also held in **Re GEMA (No. 1)** that, "insofar as membership depends on income received from the society, credit must be given for similar income from similar societies established in other Member States; that a society must not confer economic benefits on some members at the expense of others without reasonable justification," and "that it is an abuse for a collecting society to attempt to exclude the jurisdiction of the courts to review the society's decisions at the request of its members."²²⁰

In addition to this problem of discrimination regarding membership or members' rights, the Commission also condemned excessive requirements related to assignments. Thus, both **GEMA** decisions established that a collecting society must not insist on receiving an assignment from its members of rights for countries in which the society does not carry out direct administration of its rights, but authorizes a foreign society to act as its agent.

The issue of abusive internal relationships between the collective society

²¹⁹. However, in 1981, the Commission permitted **GEMA** to amend its rules to protect its members against pressures from financially powerful music users.

²²⁰. Stone, Copyright Law, at 127.

and its members, addressed in the 1970's was extended in the 1980s to the international arena concerning abusive representations of each collective society of a Member State by the analogous collective society in another State. In 1989, The European Court, in a case involving the French collective society for musical works--**SACEM**--, ruled in a very delicate issue concerning reciprocal representation agreements between collective societies in connection with Article 85 of the **EEC Treaty**²²¹.

The Court ruled also in regard to the abuse of a dominant position, contrary to Article 86, through the demand for excessive royalties (the continental performing societies practice, as do their American counterparts, the

²²¹. **Ministère Public v. Tournier**, Case 395/87, decided 13 July 1989, Stone, Copyright Law at 212. Normally, **SACEM** is involved in cases of unfair trading conditions under both Articles 85 and 86--which means dominant positions in their relationship with music "users," which is not this paper's topic. (Usually, discotheque operators claim that **SACEM**'s tariffs are higher than those applied by the authors' societies in the other member states, and oppose its lump sum clause found in **SACEM** standard contracts concluded with these operators. The lump sum clause requires, as does the **ASCAP** blanket license, one payment for its entire repertoire. The irony of this situation is that only seldom do European discotheques play other than American music.)

About the two similar rulings of 13th July in the Court of Justice, concerning **SACEM** and the discotheque operators, see Françon, A. "The Conflict between **SACEM** and Discotheques before the Court of Justice of the European Communities" 144 R.I.D.A. 50 (1990).

an eco-esc pendulum of copyright

blanket license system²²²). The significance of these reciprocal representations between admittedly dominant national collective societies for the purpose of this discussion is that it becomes impossible for an outsider composer to penetrate the business. There is no choice in order to exploit his composition, otherwise than by accepting a membership within a collective society. The corollary of this is that the collective societies exercise complex control over the copyright music market.²²³

²²². With respect to this practice and its effects, a very suggestive case was decided by the Italian Constitutional Court, (decision no. 241 of the 3rd of May, 1990). It found constitutional article 180 of the Italian Copyright Act, under articles 3, 23 and 41 of the Italian Constitution, reversing a lower court decision. (Under art. 180-3, of the Italian Copyright Law/ L. 22 April 1941--Protezione del diritto d'autore e di altri diritti connessi al suo esercizio--the Italian collective society, la Società italiana degli autori ed editori (S.I.A.E.), is the sole Italian licensor of copyright. In these circumstances it is not difficult to imagine that there are no negotiations, just that imposed by this organization.

Article 3 della Costituzione Italiana provides equal treatment among partners to negotiations, and article 41 regulates any public activity--which might be considered S.I.A.E.'s activity and social goal. With respect to article 23, about fiscal attribution, the users claimed that the S.I.A.E. actually fixed taxes for the use of any copyrighted work of its repertoire. See the Italian Constitution and Copyright Act in E. B. Benucci, and M. Fabiani "Codice della proprietà industriale e del diritto d'autore" AG--Milano, 1982)

This decision is important not because it doesn't consider that the lack of equal treatment by S.I.A.E., is sufficient proof of on unconstitutionality. It is suggestive because the Constitutional Court doesn't seem interested in the danger of monopolizing potentially important information by a bureaucratic organism, by ignoring important social needs. 146 R.I.D.A. 257 (1990).

²²³. Towards the end of 1960 and in the 1980s the Commission examined the rules of the societies and the agreements for reciprocal representation in the light of Articles 85 and 86 of the Treaty of Rome. Articles 85 and 86 are known as the EEC competition rules. Article an eco-esc pendulum of copyright

In the early 80s the Court of Justice also had the opportunity to interpret Articles 30 and 36 of the **EEC Treaty**²²⁴ with respect to the activity of music collective societies. **GEMA** unsuccessfully sued²²⁵, under German Copyright Law, the importers of recorded music legally manufactured in another Member State--with the consent of the owner of the copyright in the works concerned--, for a charge of 1.75 per cent of the retail price. **GEMA** demanded from the

85(1) prohibits agreements and concerted practices which have the object or effect of restricting competition within the Common Market, subject to the possibility of an exemption (individual or in block) on public policy grounds pursuant to Article 85(3). In order to qualify for an exemption under Article 85(3), an agreement must satisfy two "positive" and two "negative" criteria. The "positive" criteria are that the agreement must either contribute to improving the production or distribution of goods or to promoting technical or economic progress. The "negative" criteria are that the agreement must not impose restrictions which are not "indispensable" nor which may eliminate competition with respect to a "substantial part" of the products or services in question.

Article 86 prohibits the abuse of a dominant position in the Common Market or a substantial part of it. In contrast to Article 85, however, Article 86 does not provide any possible exemption from a finding of abuse.

These Treaty provisions are supplemented by the Manager Control Regulation--MCR--, adopted by the Council of Ministers in December 19889 and which went into effect on September 21, 1990. (33 O.J. EUR. COMM. (No. L257) 14 (1990). See also Fine, The Impact of EEC, 508.

²²⁴. The French Government had contended that Article 30 *et seq.* of the **EEC Treaty** was not applicable owing to the specifics of copyright arising from moral rights. Cornish (ed), Copyright in a Free Market, at 29.

²²⁵. **Musik-Vertrieb Membran v. GEMA**, Judgment of the Court of justice of 20 January 1981, in Joined Cases 55 and 57/80, [1981] ECR 147.

an eco-esc pendulum of copyright

importers the difference between the royalties paid in the United Kingdom--the country of first marketing--and the royalties which it would have received if the records had been first marketed in Germany (8 per cent of the retail price).

This is another clear example of the reification of the relationship between the membership and the collective society, when the copyright owner's interest becomes undeniable distinct, even opposed, to that of the collective administration's interest²²⁶: Even if the individual owner assigned or licensed his performing right to a manufacturer, from another Member State, which has no contractual relations with **GEMA**, after considering that this is in her best interest, **GEMA** attempted to prevent this. There is no individual composer, even hypothetically, whose interest is being served, there is just very clearly the separate and divergent interest of **GEMA** in its repertoire and its decision to

²²⁶. Another attempt of the same type also belongs to **GEMA** when in 1984 it announced its intention to charge German copyright royalties on all custom pressings performed in West Germany, even where the record company had obtained a mechanical license from the mechanical copyright society of another Member State. The Commission found **GEMA**'s practice would have infringed Article 85. In the Commission's view, a license granted by the copyright collecting society of a Member State is valid throughout the Community and authorizes the manufacture of sound recordings, even by means of custom pressings, in any Member State. See Fine, *The Impact of EEC*, 514.

As is quite obvious, the Commission sees its interest as regulating the business relationship, to give as equal a chance of bargaining as possible equal chances of bargain to sound recording manufacturers, conclusively assuming that composers, for example, are already protected by their mere status as members in collective societies.

an eco-esc pendulum of copyright

maximize its institutional interest.²²⁷

This has been often noticed if not routinely deplored by European scholars. Concerning the French practice, for example, if copyright is regarded as a proprietary rather than aesthetic right, scholars have characterized the result as a nationalization of the composers' rights by the use of equitable shared royalties among owners²²⁸. Thus, the price for membership is the alienation of the author's rights as the price of a remuneration, which is based more on purely economic criteria, than on other factors even though continental authorship rights are based on theories that reject an economic fundament.²²⁹

²²⁷. It would be good to remember that Europe is the continent which provides author's moral rights. Then, what of the author's unassignable moral right to decide which environment is the best for the cultural and economical exploitation of his own work?

²²⁸. In original: "expropriation en matière musicale: la rémunération équitable". P. Y. Gautier, "Propriété littéraire et artistique," Presses Universitaires de France, Paris, 1991, 135-8. The author seems more concerned about the situation of neighboring rights than that of author's rights owner.

²²⁹. This may be a good opportunity to emphasize that in both systems, Copyright and Authorship, the rights are vested in the author or owner of the intellectual work—other than industrial—by the fact of a legal relationship with that work. That neither authorship nor any intellectual relationship caused by the mere fact of creation generates the copyright/author's right. Contrary, the intellectual work, defined by each domestic statute, as any piece of real property, generates to any of its "possessors" special monopoly rights. By "possessor" I mean the person or corporation with the right of control over the work, drawing the means of its future exploitation.

The only perceptible difference between the Copyright domestic statutes and the Authorship statutes is their underlying philosophy: In Copyright system the intellectual work—
an eco-esc pendulum of copyright

It may dampen competition among composers members, but in any case it proves that the so-called economic incentives implied by copyright/author's rights theories have no more role here than it had at the beginning of its history. Working for the collective societies, effectively as mere employees, composers will create more or less following their own capacities and predilections, and not by the effective salary they receive "working for a collective society."²³⁰ The incentive theory is not dead, it was never more than a myth.

* *

*

In the U.S. or in Europe, the music business is structured in the same way: The composers are the workers, normally, and their "agent" is the true

other than that with industrial functionality-- has value due to its potential commercial exploitation; while in the Authorship system, the same kind of work has legal importance due to its capacity of imposing a national culture and identity.

These maybe subtle observations are more and more touchable in the present international environment dominated by new strategies of world colonization.

²³⁰. While ASCAP worldwide (non-domestic) receipts were \$358 million in 1990, the British Performing Right Society collected approximately \$220 million, and the French SACEM total revenues for the same year were about \$431 million. Besen, at 385.

an eco-esc pendulum of copyright

beneficiary. Assuming that this is the only way to run the music business, and the only way to assure composers a share in the benefit of their music, what is the justification for the long copyright monopoly?

What about the theory of reward for authorial efforts? What about economic and "moral" incentives? How does one justify a commercial monopoly in an age of free trade and free markets?

In this context, what about the ultimate basis of copyright statutes (in U.K. and in the U.S.A), to support and promote learning and mass education? Has that been just language, or, if it had a real meaning is it now outdated? Or if true as national domestic policy might it not reflect international realities? Some of these issues are addressed in the third part of this paper.

BOOK III. RESURRECTION

Because the ideology of copyright is so deep-seated the reader may be tempted to fabricate new theories to save it from the argument so far presented that copyright is just a private commercial regulation. But a close examination of the earliest and still most important international treaty should serve us as antidote to this temptation.

A. THE BERNE CONVENTION

The **Berne Convention** represents not only the climax of 19th century universalism, but the framework within which (what were then the representatives of) the dominant players in the international community have been promoting and securing their intellectual property interests. The first **Berne Conference** took place in 1883, and "set the business like tone for the whole operation."²³¹ This tone is colored by a Romantic (Victor) Hugo-ian vision of

²³¹. Saunders, Authorship, at 175.

an eco-esc pendulum of copyright

cultural politics²³². Even if this vision is different from the purely industrial and commercial vision underlying the U.S. refusal of joining the **Treaty**²³³, both visions ultimately influenced **Berne** protections.²³⁴

²³². In the last half of the 19th century, national creations became particularly valued as "an exportable product and a source of cultural legitimacy." See Saunders, *Authorship*, at 171.

With France seeking its place as the Humanity of the world, as Victor Hugo it expressed in the **Guide to the 1867 Universelle Exposition** (P. Greenhalgh, "Ephemeral Vistas. A History of the Expositions Universelles, Great Exhibitions and World Fairs" Manchester UP, Manchester, 1988, at 16) the twelve countries present at the 1886 **Conference**-- Switzerland, Germany, France, the UK, Belgium, Spain, Italy, Tunisia, Liberia, Haiti, and the USA and Japan as observers--, realized that the **Berne Convention** had important justification preserving their identities within an evolving cultural trade, and if possible encouraging its export.

²³³. The United States refusal is consistent with its prior approach to Copyright. The copyright industry was too important to allow a "single" person to control a work's exploitation for all countries. (S. Ricketson, "The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986" Centre for Commercial Law Studies, Queen Mary College and Kluwer, London, 1987 at 56.)

Even if that individual was not in fact the author, but his publisher, or his agent, that is a commercial party, Copyright did not implicate a free market where competitors would have had unlimited powers. The decision to publish a work was supported not only by economic, but by political reasons, whether or not cultural, educational or informational logic reinforced it. On the other hand, the American domestic market was still sufficient to satisfy the industry. The United States would change its attitude toward the **Berne Convention** not when the external market became dominant, but when the domestic market no longer relied upon cultural imports. In other words, when piracy ceased to be a national policy, because the domestic market had sufficiently developed--in fact became internationally dominant!

Thus, the international extension of American copyright becomes justifiable because practically it works no harmful impact domestically upon a rich American society where the "tax" for the work's use is affordable and is an ideal way of maximizing the external market.

²³⁴. It is very important to note that originally, the **Berne Convention** did not mention "moral rights", which always were considered the bridge between the Common-law copyright and the Civil law author's right. The international protection of copyrighted works actually

an eco-esc pendulum of copyright

Almost from the beginning, the idea of a real universal framework of uniform regulation was rejected, and instead, the national treatment principle was adopted. Under that, each member country, appreciating best its own interests, will adopt the domestic statute which suited it best, and will impose it not only upon to its own citizens but upon any foreign author seeking protection. This policy of national treatment is adjusted by a minimum level of protection ensured by the treaty's terms. The work of the **Berne Convention** continues within the World Intellectual Property Organization (**WIPO**), the umbrella organization which oversees the operation of this treaty and the other main multilateral conventions. It persists in giving a general impression of an institutional effort to respond universally to everybody's particular needs.²³⁵

lacked any Romantic basis behavior. What was Romantic was the national desire to accede through culture to a dominant world position.

However, the '**moral right**' was embraced by the **Convention** at the 1928 Rome Revision. Before the 1928 Conference, there was no mention of this right. "Only when the Conference began did the Italian delegation propose that the right of attribution, the right of integrity and the right of disclosure be adopted as part of the Convention." (Saunders, *Authorship*, at 182. E. See Piola-Caselli, "Codice del diritto di autore. Commentario della nuova legge 22 aprile 1941--XIX, n. 633" UTET, Turin, 1943.)

In this context, I confess I suspect the international community of a philanthropic, good deed after all. Who proposed this "right"? The representatives of a country in which the author has no economic power, all license contracts being made by S.I.A.E..

²³⁵. For an overview of the connections between the main international copyright organizations, see Porter, *Beyond the Berne Convention*, 69-100.

an eco-esc pendulum of copyright

B. THE COPYRIGHT BATTLE OF THE TWO ROSES: THE USA AND THE EEC

In many ways the concern of copyright policy is to confer monopoly protection on intellectual goods which cannot be patented²³⁶, such as technologies in computer programs, semiconductors, and electronic transmission of signals and data. Regarding computer programs, "most industrial countries have moved to provide standard copyright protection since programs are

²³⁶. On the international protection of intellectual property, it is generally accepted, that the Berne, Rome and other conventions, negotiated through a series of international conferences, allow individual states the freedom to consider the advantages and disadvantages of joining a particular convention, and of deciding how best to take advantage of each of them. On the other hand there are supranational treaties, such as NAFTA and EEC. They establish not just alternative procedural arrangements, to the World Intellectual Property Organization (WIPO)—which administers the Berne Convention—, but substantial means to protect and promote their members interests.

What is revealing is that today, copyright protection inside the EEC uses the same method to escape harmonization, as it did in 1789 to escape abolition: Even if today it claims that its philosophy is the "natural author's right" in his work, which legitimizes as long a term as possible, Article 222 of the Treaty of Rome exempted it from the common market in goods and services, on the same old reason that it is included in the system of property ownership of the Member States. Porter, *Beyond the Berne Convention*, at 26.

A comparison of WIPO's and EEC's efficiency would yield one of the reasons for the Stockholm conference: The Berne Convention was accepted to protect literary and artistic works against new technological developments, but did not reconcile the demands and needs of the First and the Third World. See, Porter, *Beyond the Berne Convention*, 9-10.

an eco-esc pendulum of copyright

expressed in a literary medium and do not have direct industrial utility."²³⁷

With respect to semiconductors, **industrial countries**, including the European Community, have recognized the need for a unique protective mechanism for chip topographies. In this case, because they are not "easy" copyrightable, the companies involved in such a technology resigned themselves to a 10 year monopoly (subject to limited exceptions).

Within the area of electronic signal transmission, the problem of payment involves not only the copyright owner's earnings, but also another, more subtle and interesting issue of economic, political and cultural interests. Nevertheless, this second echelon problem of payment is doubly important. First, it shows that

²³⁷. "The European Community as a World Partner", 52 *European Economy*, 1, 175 (1993) [hereinafter *The European Community*].

Within the EEC there is now legislation specifically providing for copyright protection of computer programs in France (by an Act of 3 July 1985), in Germany (by an Act of 24 June 1985), in Spain (by an Act of 11 November 1987), as well as in the United Kingdom (under the 1988 Act, which replaces a similar provision contained in the Copyright (Computer Software) Amendment Act of 1985). Moreover the EC Commission, in its recent **Green paper** on Copyright and the Challenge of Technology- Copyright Issues requiring Immediate Attention (Ch. 5, pp. 170-204 of the Green Paper deals specifically with computer programs), envisaged the adoption of a directive under Article 100A of the EEC Treaty, designed to harmonize the laws of the Member States in relation to the protection of computer programs within copyright. In January 1989 the Commission filed with the Council a proposal for such a directive. See [1989] O.J.E.C. C9/13, [1989] 2 C.M.L.R., Stone, Copyright Law, 14, 178.

Even so, there are claims that copyright provides insufficient protection for software; that copyright may be easily circumvented by imitators who need only to rewrite the code sufficiently to convince the courts that the imitating program did not result from "slavish copying."

an eco-esc pendulum of copyright

actually there is no individual copyright author, and thus no or far less reason for copyright to be considered an economic incentive for any author. The payment is made to corporate entities: (i) the program's producer which owns the copyright and (ii) its broadcaster which owns the neighboring right. Second, both payment solutions advanced by the EEC and the USA necessarily imply a bureaucratic system: The European Community attempts to establish a harmonized policy in its member countries that would transfer greater payments to broadcasters, through **collective societies**. The US compromise provides that broadcasters get limited copyright protection plus remuneration from cable operators **at a price set by government!**

An interesting though collateral issue involving the transmission of electronic signals is related to the incestuous economic interests of both producers of broadcasting equipment and of broadcasting systems. States' political and cultural considerations merge and complicate the picture²³⁸.

When the Japanese proposed a unique image-production of 1125 lines and

²³⁸. The cultural concern for broadcasting "real European programs"/"programmes européens proprement dits" evolved on a large scale with the use of the two TV satellites--Astra 1A and Astra 1B. P. Werner, "Une façon de faire de la télévision Européenne" 355 *Revue du Marché Commun et de l'Union Européenne* 168, 169 (1992).

an eco-esc pendulum of copyright

60 Hz it acquired considerable influence because of the already wide spread MUSE system of distribution²³⁹. The European Community immediately had its broadcasting equipment and broadcasting system industries create the rival EUREKA system. The European EUREKA system of signal-distribution, and the TVHD/HFTV (Télévision à Haute Définition/HiFi Television)²⁴⁰ are central issues within the European Community cultural environment. Even more

²³⁹. This is the French abbreviated denomination of the Japanese system. Y. Guinet, "Sur la genèse du program Européen de TVHD EUREKA 95," 127, 127, id.

²⁴⁰. "L'arrivée de la TVHD constitue un enjeu mondial très complexe qui touche autant l'industrie électronique que l'industrie des programmes et les téléspectateurs, et trois protagonistes rivalisent dans la bataille internationale des normes: le Japon, l'Europe et les États Unis." /HFTV constitutes a very complex worldwide issue which affects not only the electronic industry, producers and consumers, but also involves a rivalry between the interests for world supremacy: between Japan, Europe and the United States. (Europe in this context means Western Europe, and its TV systems are PAL and SECAM, and the American system is NTSC. In this context that which first developed the most advanced broadcasting system is Japan, with MUSE). J. M. Cruzate, "L'Europe et la Communauté: fondu-enchaîné vers la télévision haute définition" id. 101, 101 [hereinafter, Cruzate, L'Europe].

Broadcasting represents for the European Community an opportunity to unify Europe. But their problem is not only how to establish a common political goal of creating an internal market, in the "agricultural style"--broadcast formats, for example, "would be prescribed, as there are standards for chickens' eggs"-- but the Member States wish to preserve their hope that European harmonization, on one hand "will go along with a recognition of national standards and features," and on the other hand, they will be able to "defend" themselves "against American predominance." The defensive strategy includes show business also. For details about this interference between the economic, cultural and political aspects of broadcasting, see "European Co-production in Film and Television. IId Munich Symposium on Film and Media Law" J.Becker/M. Reh binder, (eds), 1-5, 1989.

an eco-esc pendulum of copyright

since the Maastricht Treaty²⁴¹, they are determined to ensure a Western European hegemony²⁴² marshalling blatant commercial regulation, protectionism, and copyright doctrine to achieve that goal. As discussed here, the line between those techniques is illusory.

C. THE INTERNATIONAL COMMUNITY FACES HYDRA

An objective understanding of international copyright²⁴³ is useful. Without it, there is the danger of being manipulated by efforts to legitimize on the basis fabricant public benefits through private rights acting as incentives for

²⁴¹. See, X. Fels, "Présentation", id. 99, 99.

Even before Maastricht, HiFiTV constituted one of the EEC's priorities, especially in December 1988, and in 1989 when its legal content was articulated in The Directive 89/337/CEE. Cruzate, *L'Europe*, 105.

242. It is beyond doubt that the EEC is dominated by its competition with its overseas partner. A recent article compared NAFTA and EEC law, emphasizing their common politics concerning industrial property, including copyright. The author also noticed that it was in the context of the Uruguay Round, that NAFTA first established important rights in intellectual property. "C'est à partir des travaux réalisés dans le cadre de la Ronde Uruguay que l'ALENA a établi pour la première fois d'importants droits et obligations en matière de propriété intellectuelle." J.-Y. Grenon, "L'Accord de libre échange nord-américain comparé à la Communauté économique européenne" 367 *Revue du Marché Commun et de l'Union Européenne* 306, 313.

²⁴³. See supra note no. 1.

an eco-esc pendulum of copyright

creativity one of the most powerful commercial monopolies in the world. And because the copyright mystique is commonly presented in very different terms to developed nations than to less developed ones the following respond to the arguments addressed to the former.

Unlike users in the developing countries--the developed ones have a long tradition acknowledging that literary and artistic works provide social, cultural and economic benefits that each society wishes to secure for their population. These works involve significant economic costs, including training, time, materials, and technology acquisition. To cover these costs and to reward creativity, allowing ultimately the dissemination of ideas, only the copyright system,²⁴⁴ it is argued, is suitable.²⁴⁵

However, a large part of the costs²⁴⁶ are due to the corporations

²⁴⁴. See *supra* note no. 1.

²⁴⁵. On the property rights system, the reward system and the use of contracts in establishing the property rights value in information, see Shavell, "Economic Analysis of Law," item #11, Chapter 8. Property Rights in Information, Class Notes, Harvard Law School, Fall 1993. The author pleads for property rights in information which value of use might be fairly established by contracts.

²⁴⁶. For one of the major analyses of the effect of copyright inefficiencies in the cost of the product, see Breyer, *The Uneasy Case*.

an eco-esc pendulum of copyright

expenses, as long as they own the copyright²⁴⁷. As long as the author is an employee²⁴⁸, their argument that reducing the returns of creativity will result from uncompensated infringement, is a false or at least, deceptive one. On one hand the retail price of copying machines in Europe includes a percentage dedicated for copyright and other related rights owners²⁴⁹. And on the other hand, in developing countries, relatively free access to copyrighted works has to be endorsed for the sake of human rights, such as the right to access to information²⁵⁰.

²⁴⁷. See J. F. Hornick, "Computer Program Copyrights: Look and Feel No Evil," *Software L. J.* vol. 5 355, (1992).

²⁴⁸. This is the status of the author today in developed countries, who is either an employee of companies producing software, and other technological products, or an employee in the entertainment industry, such as broadcasting. For a comparative presentation of the employer--employee (author) relationship, in the United Kingdom and the United States, see N. J. Wilkof, "Continuity and Discontinuity in the Law of the Author as First Owner" 8 *EIPR* 288 (1991). For a general presentation of the author-employee under U.S law, see R. C. Dreyfuss, "The Creative Employee and the Copyright Act of 1976" 54 *U. Chi. L. Rev.* 590 (1987).

About the distinction between the "natural author" and "the author-in-law", called also "the corporate author", see Patterson, *Copyright Overextended*, 390.

²⁴⁹. See, for example, the pricing of VCR and video tape in France. Those percentages are collected by specialized collective societies.

²⁵⁰. "Le droit d'accès aux informations, qui est plutôt garanti qu'assuré, est placé dans le contexte d'un droit de l'homme, ce qui contraint à ne le limiter que dans des cas exceptionnels, mais non au territoire et aux citoyens de la Communauté." / The right of access to information, which is merely recognized than secured, is defined as a human right. In this context, it can be limited only exceptionally, and never with regard to EEC citizens. L. Krämer, "La Directive 90/313/CEE sur l'accès à l'information en matière d'environnement: genèse et perspectives

an eco-esc pendulum of copyright

At the legislative level, there is an urgency in the pleas for greater enforcement of copyright which should be understood in the context of a new era of truly international trade. Most of the interested companies-- intensive copyright owners--, are multinational, meaning net paid profit at many levels and regions. They earn both in the parent corporation country, in national currency, and, by establishing subsidiaries which produce copyrighted goods, foreign income, usually by license fees, with a keen interest in maximizing the foreign income²⁵¹.

d'application" 353 *Revue du Marché Commun et de l'Union Européenne* 866, 866 (1991).

When the right to be informed is accepted, even if in a very narrowed way, as a human right, in the benefit of the citizens of developed nations, at least in the same way, due to its importance for human life, *mutatis mutandis* it should be so in the benefit of the developing countries. There, information might not be considered subject to anti-piracy legal measures, and a copyright owner infringement suit might be pre-empted by the user's right to access to information.

The subtle implications for human welfare in developing countries of restricting unauthorized copying have been broadly acknowledged. See, Johnson (1985), Novos and Waldman (1984) and Liebowitz (1985), all of them cited in *The European Community*, 175.

²⁵¹. For example one international debate provoked by the large software companies in order to improve their competitive position invokes reverse engineering. While all companies, such as IBM, Ashton-Tate and Microsoft, based their production on it, they are those "who wish to outlaw reverse engineering" by other's practices. A. Johnson-Laird, "Reverse Engineering of Software: Separating Legal Mythology from Actual Technology" *Software L. J.* vol. 5. 331, 354 (1992).

See also the EEC position concerning software copyrightability, in A. Fakes, "The EEC's Directive on Software Protection and its Moral Rights Loophole," *Software L. J.* vol. 5 531 (1992).

an eco-esc pendulum of copyright

It is true, however, that the magnitude of royalties and fees paid depend on government policies, which are often subject to capricious external pressures demanding what the producer considers an "optimal pricing of information." While the international trade of copyrighted goods (as a part of the overall trade in intellectual merchandise) the predominant tone is sounded given by the concerns of **GATT**, The General Agreement on Tariffs and Trade²⁵².

GATT is the flip side of the attempt to control or at least regulate international efforts²⁵³ following the idea that "trade continues to serve a

²⁵². See supra note no. 8.

The Original U.S. proposals for an international trade organization "did not include more than passing reference to economic development." The U.S. position was that the "less-developed countries could best develop by participating fully in a multilateral nondiscriminatory system with the lowest possible levels of tariffs and no quantitative restrictions." Dam, *The GATT*, 225. But after the 1955 Review Session, Article XVIII--the principal provision dealing with the problems of "less-developed" countries--emphasized that those countries "should be freer than developed countries to impose quantitative and other restrictions in order to protect infant industries and to combat payment imbalances." *id.*, 227. (The text of this article, *id.*, 418-26)

²⁵³. The **GATT** negotiations, even if obscured at the last Round by the events in the Soviet Union and the Persian Gulf (and for many that represents the "fact" that crisis and war are the dominant factors in international relations, "while trade and economic relations are recessive elements"), are probably even more a significant because they represent a peaceful, potentially more successful bid to control the world. G. R. Winham, "The Evolution of International Trade Agreements," Toronto UP, 1992, 3 [hereinafter Winham, *The Evolution of International Trade*].

an eco-esc pendulum of copyright

communication function." GATT is similarly pursuing copyrighted goods as just another element of the world commerce. For instance, the draft of Uruguay Round agreements²⁵⁴ promotes the underlying notion that domestic copyright statutes can be simply another form of government trade regulation²⁵⁵. The Uruguay Round presented, for the first time in GATT's history, on its ideas protection agenda²⁵⁶ under "new issues"-- Trade-related Intellectual Property (TRIPs)²⁵⁷. TRIPs has since been included in GATT at the so-called "successful" conclusion of the Uruguay Round at the end of 1993.

About the real US expectations concerning GATT, see P. Behr, "Pre-Summit Trade Deal Seen Unlikely; Bentsen Views Accord on Tariffs as Elusive" *The Washington Post*, July 2, 1993: "A successful GATT negotiations" would stimulate "an expansion of trade that could add \$5 trillion to worldwide economic output in the next 10 years," Treasury estimates," and the US share would be \$1 trillion. (The negotiations had failed for 6 years because of the endless debate between the EEC and the USA over farm subsidies.)

²⁵⁴. See "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations," GATT doc. MTN,TNC/W/35 of 26 november 1990, which was updated in a document bearing the same title and tabled by the GATT director-general on 20 December 1991. Winham, *The Evolution of International Trade*, 71.

²⁵⁵. "The idea that over 400 pages of government-sponsored trade rules would be a move toward freer trade would have simply astounded Adam Smith," *id.*

²⁵⁶. See M. Jussawalla, "The Economics of Intellectual Property in a World without Frontiers. A Study of Computer Software" Greenwood Press, NY, 58 1992.

²⁵⁷. This issue was the 13th from the originally 15 issues enumerated in the Punta del Este ministerial declaration. "The Uruguay Round: A Handbook for the Multilateral Trade Negotiation," J. M. Finger, and A. Olechowski (eds.), World Bank, Washington, 1987, appendix 3.

an eco-esc pendulum of copyright

What is revealing about the complex function of copyright on the international level is the start and evolution of **TRIPs**. First of all, it was the developed countries which started the debate. From their perspective inadequate protection of intellectual property was a serious non-tariff barrier to trade. They thus framed the issue as one of **counterfeit goods**. For their part, the developing countries put into question intellectual property rights (thus "copy-rights"), saying that "developed countries could use them to maintain a competitive edge relative to countries lacking sophisticated technological infrastructure."²⁵⁸

Boldly, and without apparent embarrassment, what the United States proposed was to demand more from the developing countries, including them in a new international code of intellectual property²⁵⁹, opening their domestic

²⁵⁸. Winham, *The Evolution of International Trade*, 81. India and Brazil also viewed harmonical international protection of intellectual property as a barrier to trade. *id.*

²⁵⁹. Copyright, together with other intellectual property and technology issues have not traditionally been seen as trade "(or even 'trade-related') issues." The United States and others think, however, that if they could be treated as a trade, rather than a copyright violation, intellectual property disputes could be resolved by "the enforcement of the GATT, rather than the apparently ineffectual one of local courts" or alternatively the traditional international agency, **WIPO**, could be used. S. Page, M. Davenport, and A. Hewitt, "The GATT Uruguay Round: Effects and Developing Countries," Overseas Development Institute, London, 1992, 47 [hereinafter Page, *The GATT*].

See also "GATT or WIPO? New Ways in the International Protection of Intellectual Property", (F. K. Beier, and G. Schriker, eds.), 1990; "Intellectual Property Rights: Global Consensus, Global Conflict?" (R. M. Gladbaw, T. J. Richards, eds.), 1988; "Trade-Related Aspects of Intellectual Property (pts. 1 & 2), 22 *Vand. J. Transnat'l L.* 223, 689, (1989),

an eco-esc pendulum of copyright

market to American intellectual products²⁶⁰. At the same time they did not plan to change American copyright law, which indicates that at the international level the negotiations and copyright relations are one sided²⁶¹. This policy was imperiously assembled in one overall package which "all participants are expected to accept," changing the Uruguay Round approach from a bargained gradualist negotiation into an "all or nothing" edict.²⁶²

Since the developed countries are the global supplier of technology and information and the developing countries are net importers, aside from GATT, other unilateral actions (mostly bilateral treaties between the First and Third

reprinted in "Trade-Related Aspects of Intellectual Property" (L. Brown, & E. Szweda, eds.), 1990; P. E. Geller, "Can the GATT Incorporate Bene Whole?" 4 World Intell. Prop. Rep. 193 (1990).

²⁶⁰. The developing countries occupy a different economic position. The partly developed ones, such as Brazil and India, opposed including intellectual trade-related issues in the Round, because access the technology was very important to them and the trade interests relatively small. But yet, they are the most desired market, and it is expected that India will give way on pharmaceuticals, and the Brasilia to computers, without regard to the least developed countries. The latter are too small to matter for lost profits, but, nevertheless they have to support "all-or-nothing" politics.

And in all this, the textiles and agriculture are important enough for the South-Asian and Latin American countries, so that it is expected they too will accept strategy, thus imposing it upon all developing countries. Page, The Uruguay Round, 48-9.

²⁶¹. The reaction of U.S. trade negotiators "can be summed up as follows: 'we didn't get into the intellectual property negotiation to change our own laws' (comment from personal interview)." Winham, The Evolution of International Trade, 93.

²⁶². Winham, The Evolution of International Trade, 85-6.

an eco-esc pendulum of copyright

World nations), described by some Western experts²⁶³ as a potential source of fragmenting or targeting the world trade²⁶⁴, have achieved much the same result, in the sense of procuring desired legislative changes in developing countries²⁶⁵. Their main trait seems to be a lack of commercial justification. While the US, Western Europe and Japan possess most of the world computer population²⁶⁶, the only effect of an international success at harmonizing

²⁶³. The authors of *The European Community*, 2d part, are: D. Greenaway, (University of Nottingham), P. A. Messerlin, (Institut d'études politiques de Paris) and K. Maskus, (University of Colorado).

²⁶⁴ What cultural exchange means for EC countries with Central and Eastern--including former Soviet Union-- European partners is a very delicate issue. Sometimes it seems, that before all else, the EEC is concerned with "economic culture", that is with the creation of legal frameworks and market institutions which will ensure "equal opportunities for any company or individual to enter the market and to start business activity in a market economy." Y. Kuzminov, "Problems of Economics Culture Change" 49 *European Economy*, 217, 223 (1993).

On an attempt to integrate the former "socialist" countries in research-programs, see E. G. Sanchez, "Coopération scientifique et technique avec les pays de l'Europe Centrale et de l'Est dans le cadre COST", 353, *Revue du Marché Commun et de l'Union Européenne*, 877 (1991); E. Dévoué, "L'Europe et la régionalisation des pays en voie de développement: le cas de la coopération régionale en recherche-développement" 371 *id.*, 718 (1993). On the poor results of technological and cultural cooperation between Western and Eastern Europe, when both partners know how vital this cooperation is for a decent future of the latter, see K. Szymkiewicz, "Le difficile 'retour à l'Europe' des pays de l'Est" 369 *id.*, 527 (1993).

²⁶⁵. Legislative changes have been enacted since 1986 or are under consideration in Brazil, Mexico, Korea, Taiwan, Malaysia, Indonesia, Thailand, Turkey, and Poland, among other countries. See the EEC rapport, *The European Community*.

²⁶⁶. The US controls about 90% of the computer sector of the international market and its manufacturers supply almost 100% of home market. IBM alone supplies about 65% of the US market. The major data banks are located in this same part of the world: Lockheed, which in 1977 possessed 100 of the 500 publicly available data bases in the world, and SDC (System

national regimes into so-called "coherent international regulations" using as a model the domestic statutes of industrialized countries, will be to increase Third World dependence upon developed countries²⁶⁷.

"Information is inseparable from its organization and form of storage. The knowledge will end up by modelling itself--as it always has done--on the stocks of information. The location of data banks constitutes an imperative of sovereignty."²⁶⁸

Development Corporation) which accounts for 75% of the European market and 60% of the US market. J. Becker, "Information Technology and a New Informational Order" Transnational Data Reporting Service--Studentlitteratur, Amsterdam, 1985, 57-60.

²⁶⁷. While these countries desire self-reliance and independence, and to protect themselves against further domination of their economic, social, cultural and political life, they also need to participate in the international exchange of views, knowledge, and commodities.

In the context of digitalization of information, when TDF (transborder Data Flows) become the main source of information for news, education, scientific, and political decisions, this desire is unlikely to be achieved. Becker, Information Technology, 65, 67.

At the same time the reader must remember, there are experts and others who really believe that the "economic embargo" (what is not economic?) was "the principal cause of the historic changes in the Soviet and communist world." And self-reliance in itself might not be desirable. D. E. McDaniel, "United States Technology Export Control. An Assessment" PRAEGER, Westport, 1993, 199.

²⁶⁸. S. Nora, "Report" in Advertising World, October, 1978, 20 cited in Becker, Information Technology, 67. S. Nora, and A. Minc, "L'Informatisation de la société," La Documentation Française, Paris, 1978, 72, cited in C. J. Hamelink, "Transnational Data Flows in the Information Age" Studentlitteratur, Amsterdam, 1984, 89.

an eco-esc pendulum of copyright

Certainly **GATT** functions in part as just another tool to achieve global supremacy. The U.S., in the Uruguay Round, simply initiated a policy also supported by firms in also the European Community and Japan engaged in significant product and technology innovations and artistic creation. Their desire for "strong and non-discriminatory minimum standards" for protecting copyrighted products within **GATT** is partially true. It might represent just a transparent mechanism, that is, one in which power relationships and not expressly drawn--for a world dominated by multinational firms. But these interests are not above national or at least regional interests.

This truly irresistible force of the relationship between national copyright and its national subjects, and international copyright and dominated international trade makes somewhat ridiculous debate against extension of a commercial monopoly in the author's interest, both in time--duration of copyright-- and subject matter, as long as its basis of legitimacy--incentives for authors--is no longer true. If the ideology of authorship and incentives has been captured, as seems to be true, by institutional--national, international and multinational--interests, which seem to profit so directly and naturally by that ideology, any hope or attempt to dismantle it at this point is probably naive.

an eco-esc pendulum of copyright

INDEX

A

ancien régime (French), 24, 44

ASCAP, 68-85

Author

author's interest 7

author's guilds, 11

(see also collective societies and authors' societies, 84)

author's rights, 22

authorship system 7, 35

(see also civil law system, 7)

"romantic authorship," 64

B

BMI, 75-89

bookbrokers, (librari) 14

booksellers, (stationarii) 14

book trade, 15

book privileges, 15

British Performing Right Society, 96

BUMA, 84- 87

C

Censorship,

exercised by, 41

English, 43

French, 44

German, 45

U.S., 47

C.I.S.A.C., 75

Collective societies, 8, 9

(see also ASCAP and BMI)

European collective societies, 84-100

compulsory license, 60

Convention

The Berne Convention, 38, 100-117

(the Paris Act), 8

The Rome Convention, 103

Copyright

Act

an eco-esc pendulum of copyright

the first U.S. Copyright Act, 24

the 1909 Act, 59-64

the 1976 Act, 59, 61-64

Clause, 28, 82

commercial essence 8-9, 13-38

commerce with information, 33-40

English, 33

continental, 38

U.S., 35

commercial regulation, 13

English, 21- 24

French, 24- 26

U.S., 27

definition 7, 8

exclusive rights (U.S.C.A. 1976), 62

goals, 57

music, (American copyrighted music) 59-

European copyrighted music, 84-

commercial monopoly, 70

performing right, 63

national regimes, 11

owner, (individual and corporate entity) 20

stationer's copyright, 20-

subject matter, 70

"composer-for-hire," 59

D

data bases 11, 103

(see also data banks, 105-106)

droit d'auteur, 27

E

EEC (Treaty of Rome), 84- 107

EFTA, 90

EUREKA, 106

F

fair use, 55-56, 70

G

GEMA, 89- 96

an eco-esc pendulum of copyright

In Re GEMA, 89-
GATT, 8- 11, 111- 117
 partners, 8
 Uruguay Round, 111-
Green Paper, 104

J

jus personalissimum, 40

M

moral right, 39, 58, 95, 97, 102
 (*see droit moral*, 39)
Maastricht Treaty, 103

N

NAFTA, 103- 107

O

open novel, 12
 (*see also open work*, 12)

P

phonorecords, 60
piracy, 28
published book, (*printed word*) 36
publishers,
 professional guilds, 35

R

revolutionary statutes (French), 24

S

SACEM, 93-
SABAM, 90-
SIAE, 84- 94, 102
sound recordings, 61-67
Stationers' Company, 20-
 stationers' monopoly, 21-
Sherman Act, 77
Statute of Anne, 21-
statutory royalties, 61-

an eco-esc pendulum of copyright

T

totem, 60

TRIPs 8, 112-

Treaty of Rome, 103-

U

Urheberrecht, 46

UNESCO 9- 10

W

WIPO, 102- 3, 113

writings, 27, 55-

"works made for hire" (doctrine), 61

TABLE OF CASES

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413; 86 S.Ct. 975 (1966), 10

Alden-Rochelle, inc., v. ASCAP, 80 F. Supp. 888, 896 (S.D.N.Y. 1948), 62-71

Am. Inst. Architects v. Fenichel, 41 F.S. 146 COB 24; 45 (1941), 37

Am. Medical Ass'n v. United States, 317 U.S. 519, 528 (1943), 73

Banks v. Manchester, 128 U.S. 244, 225, 36

Benny v. Loew's, Inc., 239 F.2d. 532 (9th Cir. 1956), 56

Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, (1903), 48

Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, W.D. Ok., 546 F. Sopp. 1276 (1982), 69

Bobbs-Merrill v. Straus, 210 U.S. 346, 347, 37

Bourne Co., Henry Mancini, d/b/a/ Northridge Music Co., SBK Robbins Catalog, Inc., v. Hunter Country Club, Inc., 990 F.2d. 934; 25 Fed. R. Serv. 3d (Callagan) 546 (7th Cir. 1993), 71

Broadcast Music, Inc. v. Taylor, 10 Misc.2d 9, 55 N.Y.S.2d. 94 (S.Ct. N.Y. 1945), 74-76

Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1; 99 S. Ct. 1551 (1979), 80

an eco-esc pendulum of copyright

BRT v. SABAM, E. Comm. CT. J. REP. 51, 2 COMM. MKT. L. R. 238 (1974), 90

Buck v. Elm Lodge, Inc., 83 F. 2d 201, 202 (2d Cir. 1936), 71-79

Buck v. Jewell-LaSalle Reality Co., 283 U.S. 191 (1931), 71

Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 277 (S.D.N.Y. 1982), 76

Burrow-Giles Lithpgraphic Co. v. Sarony, 111 U.S. 53 (1884), 31

Chae Chan Ping v. United States, 130 U.S. 581; 9 S.Ct. 623 (1889), 28

Columbia Broadcast Sys. v. Loew's, Inc., 356 U.S. 43 (1958), 56

Dred Scott v. John F. A. Sadford, 60 U.S. 393 (1856), 28

Donaldson v. Becket, 4 Burr 2408 (1774), 35-6

Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932), 32

Gem MusicCorp. v. Taylor, 294 N.Y. 34, 38, 60 N.E. 2d 196, 198 (1945), 73

Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976), 38

Harper & Row, Publishers v. Nation Enterprises, 471 US. 539 (1985), 50

Hinton v. Donaldson, Mor 8307 (1773), 33

Huston ("Asphalt Jungle"), Cour de Cassation, 1re Ch. Civ. 28.05.1991, 149 R.I.D.A. 15 (1991), 40

an eco-esc pendulum of copyright

International Korwin Corp. v. Kowalczyk, 855 F. 2d 375, 376 n.1 (7th. Cir. 1988),

68

International News Serv. v. Associated Press, 248 U.S. 215 (1918), 57

International Show Car Association v. American Society of Composers, Authors & Publishers, and Broadcast Music, Inc., 806 F. Supp. 1308; (E.D.Mic. 1992), 79

Jewell-LaSalle Reality Co. v. Buck, 283 U.S. 202 (1931), 63

Knight Kitchen Music v. John J. Pineau, Civ. No. 92-0169-B, 149 Bankr. 239, 79

Leathers v. Medlock, 113 L.Ed. 2d 494, 111 S.Ct. 1438 (1991), 56

Marquam v. Lehuby, Paris, T.G.I. 22.08.1845, Table Dalloz 1845, 39

Ministère Public v. Tournier, Case 395/87, (13.07.1989), 81

Musik-Vertrieb membran v. GEMA, Joined Cases 55 and 57/80, ECR 147 (1981), 95

M. Witmark & Sons v. Jenson, 80 Supp. 843 (Minn. 1948), appeal dismissed sub nom. *M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (CAB 1949), 81

Pedrosillo Music v. Radio Musical Inc. and Thomas Carrasquillo, 815 F. Supp. 511; D.P.R. (1993), 76

an eco-esc pendulum of copyright

Re GEMA (no. 1), C.M.L.R. D 35 OJL 134/15 (1971), 91-

Re GEMA (no. 2), C.M.L.R. D115 (1972), 91-

SBK Robbins Catalog, Inc., v. Hunter Country Club Inc., 990 F.2d 934 (1993), 63

Schwartz v. Broadcast Music, 180 F. Supp. 322, 325; 124 U.S.P.Q. (BNA) 34, (S.D.N.Y. 1959), 71-76

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984), 57, 63

The Fred E. Sander, 208 F. 724, D.C.W.D. (1913), 28

"The Kid," Cour de Cassation, 1re Ch. Civ., 28.05.1963, 143 R.I.D.A. 339, (1990),

40

Thompson v. Hubbard,, 131 U.S. 123, 151, 36

Twentieth Century Music Corp. v. Aiken,, 422 U.S. 151, 156 (1975), 57

United States v. ASCAP, 1940-19443 Trade Cases para. 56, 104 (S.D.N.Y. 1941),

80

United States v. American Society of Composers, Authors and Publishers, Trade Req.

Rep. (CCH) P 62.595 (S.D.N.Y. March 14, 1950), 71-

United States v. ASCAP, 208 F. Supp. 896 (S.D.N.Y. 1962), cert. denied, 377 U.S.

997 (1964), 80

United States v. ASCAP, 341 F.2d 1003 (CAZ 1965), 82

an eco-esc pendulum of copyright

United States v. ASCAP 1971 Trade Cases para. 73,491 (S.D.N.Y. 1970), 82

United States v. American Society of Composers, Authors and Publishers, Civ. 13-95

(WCC) S.D.N.Y., (1993), 59, 72- 78, 80

United States v. Taxe, 192 U.S.P.Q. 204 (9th. Cir. 1976), 68

Wheaton v. Peterson, 8 Pet. 591, 8 L.Ed. 1055 (1834), 36-

White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908), 60-

Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975), 56.

BIBLIOGRAPHY

P. Areeda, *ANTITRUST ANALYSIS. PROBLEMS, TEXT, CASES*, Little Brown, Boston, 3d. ed. and 4th ed.;

L. H. Amdur, *COPYRIGHT LAW AND PRACTICE*, Clark Boardman Co., NY 1936;

E. Armstrong, *ENGLISH PURCHASES OF PRINTED BOOKS FROM THE CONTINENT 1465-1526*, *English Historical Review*, XCIV (1979);

E. Armstrong, *BEFORE COPYRIGHT. THE FRENCH BOOK-PRIVILEGE SYSTEM. 1498-1526*, Cambridge UP, 1990;

S. L. Bach, *MUSIC RECORDING, PUBLISHING, AND COMPULSORY LICENSES: TOWARD A CONSISTENT COPYRIGHT LAW*, 14 Hof. L. Rev. 379 (1986);

H. G. Ball, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY*, Banks and Co., Albany, Mathew Bender, NY, 1944;

EUROPEAN CO-PRODUCTION IN FILM AND TELEVISION. IID MUNICH SYMPOSIUM ON FILM AND MEDIA LAW, (J. Becker/M. Reh binder, eds.) 1989;

an eco-esc pendulum of copyright

J. Becker, *INFORMATION TECHNOLOGY AND A NEW INFORMATIONAL ORDER, Transnational Data Reporting Service--Studentlitteratur, Amsterdam, 1985;*

GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY, (F. K. Beier, G. Schricker, eds.) 1990;

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY (L. Brown, E. Szweda, eds.) 1990;

L. Benjamin, *TUNING UP THE COPYRIGHT ACT: SUBSTANTIAL SIMILARITY AND SOUND RECORDING PROTECTION, 73 Minn. L. Rev. 1175 (1989);*

E. B. Benucci, M. Fabiani, *CODICE DELLA PROPRIETA INDUSTRIALE E DEL DIRITTO D'AUTORE, AG--Milano, 1982;*

Blaisdell, *ECONOMIC ASPECTS OF THE COMPULSORY LICENSE IN THE COPYRIGHT LAW, 1958;*

G. Boytha, *THE JUSTIFICATION OF THE PROTECTION OF AUTHOR'S RIGHTS AS REFLECTED IN THEIR HISTORICAL DEVELOPMENT, 151 R.I.D.A. 53 (1992);*

an eco-esc pendulum of copyright

L. Benjamin, TUNING UP THE COPYRIGHT ACT: SUBSTANTIAL SIMILARITY AND SOUND RECORDING PROTECTIONS, 73 Minn. L. Rev. 1177 (1989);

D. Becourt, THE FRENCH REVOLUTION AND THE AUTHORS' RIGHT FOR A NEW UNIVERSALISM, 143 R.I.D.A. 230 (1990);

P. Behr, PRE-SUMMIT TRADE DEAL SEEN UNLIKELY; VIEWS ACCORD ON TARIFFS AS ELUSIVE, *The Washington Post*, July 2, 1993;

N. Boorstyn, COPYRIGHT LAW, LCP BW, 1981;

C. Blagden, THE STATIONERS COMPANY: A HISTORY, 1403-1959, Allen & Unwin, London, 1960;

A. R. Bertrand, LE DROIT D'AUTEUR ET LES DROITS VOISINS, Masson, Paris, 1991;

S. M. Besen, S. N. Kirby, S. C. Salop, AN ECONOMIC ANALYSIS OF COPYRIGHT COLLECTIVES, 78 Va. L. Rev. 383 (1992);

D. E. Biederman, E. P. Pierson, M. E. Silfen, J. A. Glasser, R. P. Berry, LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES, 2nd ed. PRAEGER, NY 1992;

an eco-esc pendulum of copyright

BIENVENUE A LA LOI, 19 R.I.D.A. 9 (1958);

R. Birn, MALESHERBES AND THE CALL FOR A FREE PRESS, in REVOLUTION IN PRINT. THE PRESS IN FRANCE, 1775-1800, (R. Darton and D. Roche, eds.), Berkeley: California UP, 1989;

M. M. Boguslavsky, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORKS, (trans. N. Poulet), Catterns, 1979;

S. Breyer, THE UNEASY CASE FOR COPYRIGHT: A STUDY OF COPYRIGHT IN BOOKS, PHOTOCOPIES, AND COMPUTER PROGRAMS, 84 Harv. L. R. 281 (1971);

E. M. Brooks, TITLED JUSTICE: SITE-SPECIFIC ART AND MORAL RIGHTS AFTER U.S. ADHERENCE TO THE BERNE CONVENTION, 77 Calif. L. Rev. 14331 (1989);

CLARIFYING THE COPYRIGHT MISUSE DEFENSE: THE ROLE OF ANTITRUST STANDARDS AND FIRST AMENDMENT VALUES, 104 Harv. L. Rev. 1289 (1991);

J. Cirace, WHEN DOES COMPLETE COPYING OF COPYRIGHTED FOR PURPOSES OTHER THAN PROFIT OR SALE CONSTITUTE FAIR USE? AN ECONOMIC ANALYSIS

an eco-esc pendulum of copyright

OF THE SONY BETAMAX AND WILLIAMS & WILKINS CASES, 28 St. Louis U. L. J. 647 (1984);

C. Colombet, *GRANDS PRINCIPES DU DROIT D'AUTEUR ET DES DROITS VOISINS DANS LE MONDE. APPROCHE DE DROIT COMPARE*, Litec, UNESCO, 1990;

H. Cohen Jehoram, *THE RELATIONSHIP BETWEEN COPYRIGHT AND NEIGHBORING RIGHTS*, 144 R.I.D.A. 81 (1990);

W. R. Cornish, *INTELLECTUAL PROPERTY*, London, 1981;

COPYRIGHT IN FREE AND COMPETITIVE MARKETS, (W. R. Cornish, ed.) ESC Publishing, Oxford, 1986;

J. M. Cruzate, *L'EUROPE ET LA COMMUNAUTE: FONDU ENCHAINE VERS LA TELEVISION HAUTE DEFINITION*, 355 Rev. Marché et l'Union Euro, 101 (1992);

K. Dam, *THE GATT. LAW AND INTERNATIONAL ECONOMIC ORGANIZATION*, Chicago UP, Chicago, 1970;

M. H. Davis, *DEATH OF A SALESMAN'S DOCTRINE: A CRITICAL LOOK AT*

an eco-esc pendulum of copyright

TRADEMARK USE, 19 Ga. L. Rev. 233 (1981);

H. Desbois, *LE DROIT D'AUTEUR EN FRANCE*, 3d ed., Dalloz, Paris, 1978;

E. Dévoué, *L'EUROPE ET LA REGIONALISATION DES PAYS EN VOIE DE DEVELOPPEMENT: LE CAS DE LA COOPERATION REGIONALE EN RECHERCHE-DEVELOPPEMENT*, 371 Rev. Marché Com. et l'Union Euro. 718 (1993);

A. Dietz, *COPYRIGHT LAW IN THE EUROPEAN COMMUNITY*, 1978;

B. Difenbaucher, *RIPPLES OF TECHNOLOGY: NEW TECHNOLOGIES IMPACT COMPANIES FROM OUTSIDE IN*, Midrange System, November 9, 1993;

R. C. Dreyfuss, *THE CREATIVE EMPLOYEE AND THE COPYRIGHT ACT OF 1976*, 54 U. Chi. L. Rev. 590 (1987);

Drone, *LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS*, 1879;

U. Eco, *OPERA APERTA: FORMA E INDETERMINAZIONE NELLE POETICHE CONTEMPORANE*. Milano: Bompiani. 1976:

an eco-esc pendulum of copyright

B. Edelman, *UNE LOI SUBSTANTIUELLEMENT INTERNATIONALE. LA LOI DU 3 JUILLET SUR LES DROITS D'AUTEUR ET DROITS VOISINS*, J. D. I., 114: 563 (1987);

E. Eisenstein, *THE PRINTING PRESS AS AN AGENT OF CHANGE*, Cambridge: Cambridge UP, 1980;

W. B. Emery, *BROADCASTING AND GOVERNMENT*;

A. C. Evangelou, *INTELLECTUAL PROPERTY LAW*, 29 Cyprus L. Rev. 4644 (1990);

A. Fakes, *THE EEC'S DIRECTIVE ON SOFTWARE PROTECTION AND ITS MORAL RIGHTS LOOPHOLE*, Software L. J. vol. 531 (1992).

Fenning, *THE ORIGIN OF THE PATENT AND COPYRIGHT CLAUSE OF THE CONSTITUTION*, 17 Geo. L. 109 (1992);

F. L. Fine, *THE IMPACT OF EEC COMPETITION LAW ON THE MUSIC INDUSTRY*, 12 J. Intl. L. Bus. 508 (1992);

THE URUGUAY ROUND: A HANDBOOK FOR THE MULTILATERAL TRADE NEGOTIATION (J. M. Finger, A. Olechowski eds.) World Bank, 1987;

an eco-esc pendulum of copyright

W. W. Fisher III, *RECONSTRUCTING THE FAIR USE DOCTRINE*, 101 Harv. L. Rev. 1661 (1988);

A. Françon, *THE CONFLICT BETWEEN SACEM AND DISCOTHEQUES BEFORE THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES*, 144 R.I.D.A. 50 (1990);

M. A. Franklin, D. A. Anderson, *MASS MEDIA LAW*, 4th ed. 1990;

S. Freud, *TOTEM UND TABU*, [authorized English trans with introduction by A. A. Brill, *TOTEM AND TABU; RESEMBLANCES PSYCHIC LIVES OF SAVAGES AND NEUROTICS*], Moffat, Yard and Co., NY, 1918;

J. M. Fulitani, *CONTROLLING THE MARKET POWER OF PERFORMING RIGHTS SOCIETIES: AN ADMINISTRATIVE SUBSTANTIVE FOR ANTITRUST REGULATION*, 72 Calif. L. Rev. 103 (1984);

A. Garzon, *UNESCO AND COPYRIGHT IN THE DEVELOPING COUNTRIES*, in *COPYRIGHT. ECONOMIC AND CULTURAL CHALLENGE* (Publishers' International 2d Symposium, April 1990), LITEC Paris, 1990;

Ph. Gaudrat, *LE POINT DE VUE D'UN AUTEUR SUR LA TITULARITE*, in *LE DROIT*

an eco-esc pendulum of copyright

D'AUTEUR AUJOURD'HUI, Lamberterie, 1st ed. C.N.R.S. 43, 1991;

P. Y. Gautier, THE "SINGLE MARKET" FOR WORKS OF ART, 144 R.I.D.A. 12 (1990);

P. Y. Gautier, PROPRIETE LITTERAIRE ET ARTISTIQUE, Presses Universitaires de France, Paris, 1991;

P. E. Geller, CAN THE GATT INCORPORATE BERNE WHOLE?, 4 World Intell. Prop. Rep. 193 (1990);

J. C. Ginsburg, A TALE OF TWO COPYRIGHTS: LITERARY PROPERTY IN REVOLUTIONARY FRANCE AND AMERICA, Tulsa L. Rev., 64: 1009 (1990), 147 R.I.D.A. 125 (1991);

J. C. Ginsburg, MORAL RIGHTS IN A COMMON LAW SYSTEM, in MORAL RIGHTS PROTECTION IN A COPYRIGHT SYSTEM, P. Anderson & D. Saunders, eds., Institute for Cultural Policy Studies, Griffith UP, 1992;

J. C. Ginsburg, P. Sirinelli, AUTHOR, CREATION AND ADAPTATION IN PRIVATE INTERNATIONAL LAW AND FRENCH DOMESTIC LAW. REFLECTIONS BASED ON THE HUSTON CASE (1), 150 R.I.D.A. 3 (1991);

an eco-esc pendulum of copyright

INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? (R. M. Gladbaw,, T. J. Richards, eds. 1988)

P. Goldstein, COMMENTARY ON "AN ECONOMIC ANALYSIS OF COPYRIGHT COLLECTIVES," 78 Va. L. Rev. 413 (1992);

W. J. Gordon, TOWARDS A JURISPRUDENCE OF BENEFITS: THE NORMS OF COPYRIGHT AND THE PROBLEM OF PRIVATE CENSORSHIP, 57 U. Chi. L. Rev. 1009 (1990);

W. J. Gordon, FAIR USE AS MARKET FAILURE: A STRUCTURAL AND ECONOMIC ANALYSIS OF THE BETAMAX CASE AND ITS PREDECESSORS, 82 Colum. L. Rev. 1600 (1982);

J. Y. Grenon, L'ACCORD DE LIBRE ECHANGE NORD-AMERICAIN COMPARE A LA COMMUNAUTE ECONOMIQUE EUROPEENNE, 367 Rev. Marché Com. et l'Union Euro. 306 (1990);

Y. Guinet, SUR LA GENESE DU PROGRAM EUROPEEN DE TVHD EUREKA 95, in 355 Rev. Marché Com. et l'Union Euro. 127 (1992);

an eco-esc pendulum of copyright

N. Green, *THE LEGAL FOUNDATIONS OF THE SINGLE EUROPEAN MARKET*, Oxford UP, 1991;

P. Greenhalgh, *EPHEMERAL VISTAS. A HISTORY OF THE EXPOSITIONS UNIVERSELLES, GREAT EXHIBITIONS AND THE WORLD FAIRS*, Manchester UP, 1988;

P. Groves, *COPYRIGHT & DESIGNS LAW. A QUESTION OF BALANCE. THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988*, Graham & Trotman, London, 1991;

C. J. Hamelink, *TRANSNATIONAL DATA FLOWS IN THE INFORMATIONAL AGE*, Studentlitteratur, Amsterdam, 1984;

Henn, *THE COMPULSORY LICENSE PROVISIONS OF THE UNITED STATES COPYRIGHT LAW*, 1956;

H. G. Henn, *HENN ON COPYRIGHT LAW. A PRACTITIONER'S GUIDE*, 3d ed. 1991;

C. Hesse, *THE DILEMMAS OF REPUBLICAN PUBLISHING, 1793-1799*, (unpublished paper) Library of Congress Symposium on Publishing and Readers in Revolutionary

an eco-esc pendulum of copyright

France and America;

M. J. Holland, *A BRIEF HISTORY OF AMERICAN COPYRIGHT LAW, COPYRIGHT DILEMMA*, ed. H. S. White, A. L. A., Chicago, 1978;

J. F. Hornick, *COMPUTER PROGRAM COPYRIGHTS: LOOK AND FEEL NO EVIL*, in *Software L. J.* vol. 5, 355 (1992);

Howell, *HOWELL'S COPYRIGHT LAW, BNA*, 4h ed. 1962;

J. Hughes, *THE PHILOSOPHY OF INTELLECTUAL PROPERTY*, 77 *Geo. L. J.* 287 (1988);

P. Jaszi, *TOWARD A THEORY OF COPYRIGHT: A METAMORPHOSES OF "AUTHORSHIP"*, *Duke L. J.*, 498, (1991);

H. C. Jehoram, *BASIC PRINCIPLES OF COPYRIGHT ORGANIZATIONS*, 26 *Copyright* 214 (1990);

R. W. Jones, *COPYRIGHT AND TRADE-MARKS*, E. W. Stephens Co., Columbia Missouri, 1949;

an eco-esc pendulum of copyright

T. Jefferson, *THE WRITINGS OF THOMAS JEFFERSON*, vol. 15, ed. A. A. Lipscombe, 1903;

A. Johnson-Laird, *REVERSE ENGINEERING OF SOFTWARE: SEPARATING LEGAL MYTHOLOGY FROM ACTUAL TECHNOLOGY*, in *Software L. J.* vol. 5, 331 (1992);

M. Jussawalla, *THE ECONOMICS INTELLECTUAL PROPERTY IN A WORLD WITHOUT FRONTIERS. A STUDY OF COMPUTER SOFTWARE*, Greenwood press, NY, 1992;

I. Kant, *THE METAPHYSICS OF MORALS. PART I: THE METAPHYSICAL ELEMENTS OF JUSTICE*, (J. Ladd, Bobbs-Merill trans) NY 1965;

B. Kaplan, *AN UNHURRIED VIEW OF COPYRIGHT*, 1967;

G. W. G. Karnell, *COLLECTING SOCIETIES IN MUSIC*, in *COLLECTING SOCIETIES IN THE MUSIC BUSINESS*, (D. Peeperkorn, C. van Rij, D. Lester, L. Faulder, eds.) MAKLU, 1989;

L. van Krevelen, *THE INFORMATION SOCIETY AND THE RIGHT OF THE PUBLISHER*, J. Schwetzer Verlag, Munchen, 1986;

an eco-esc pendulum of copyright

H. G. Koenigsberger, A. Briggs, A HISTORY OF EUROPE. MEDIEVAL EUROPE 400-1500 (t.I) and EARLY MODERN EUROPE 1500-1789 (t.II), New York, 1991;

COPYRIGHT. CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION, (A. Kent & H. Laucour, eds.) RR Bowker Co., NY. 1972;

B. Korman, I. F. Koenigsberg, PERFORMING RIGHTS IN MUSIC AND PERFORMING RIGHTS SOCIETIES, 33 J. Copyright Soc'y U.S.A. 332 (1986);

A. Kerever, ADDENDUM, 149 R.I.D.A. 15 (1991);

L. Kramer, LA DIRECTIVE 90/313/CEE SUR L'ACCES A L'INFORMATION EN MATIERE D'ENVIRONNEMENT: GENESE ET PERSPECTIVES D'APPLICATION, 353, Rev. Marché Com et l'Union Euro. 866 (1991);

Y. Kuzimov, PROBLEMS OF ECONOMICS CULTURE CHANGE, 49 Euro. Ec. 217 (1993);

L. C. Lacey, OF BREAD AND ROSES AND COPYRIGHTS, Duke L. J. 1532 (1989);

D. Ladd, THE UTILITY OF A PUBLISHER'S RIGHT, Internationales Urheberrechts;

an eco-esc pendulum of copyright

E. Laboulaye, *ETUDES SUR LA PROPRIETE LITERAIRE EN FRANCE ET EN ANGLETERRE. SUIVIES DE TROIS DISCOURS PRONONCES AU PARLEMENT D'ANGLETERRE PAR SIR T. NOON TALFOURD*, Auguste Durand, Paris, 1858;

W. M. Landes, R. A. Posner, *AN ECONOMIC ANALYSIS OF COPYRIGHT LAW*, 18 J. L. S. 325 (1989);

Lang, *PERFORMING AND THE RIGHT OF THE PERFORMING ARTIST*, 21 ASCAP Copyright L. Symp. 69 (1974);

A. Latman, *LATMAN'S THE COPYRIGHT LAW*, 6th ed. 1986;

A. Latman, R. A. Gorman, J. C. Ginsburg, *COPYRIGHT FOR THE NINETIES. CASES AND MATERIALS*, 3d ed., 1989;

M. A. Leaffer, *UNDERSTANDING COPYRIGHT LAW*, Matthew Bender, 1989;

J. Litman, *COPYRIGHT AS MYTH*, 53 Pitt. L. Rev. 235 (1991);

L. P. Loren, 1992 SURVEY OF BOOKS RELATING TO THE LAW; VII. TORT AND COMMERCIAL LAW: THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS,

an eco-esc pendulum of copyright

990 Mich. L. Rev. 1624 (1992);

D. N. Malhorta, *THE PUBLISHING AND COPYRIGHT SITUATION IN INDIA*, in *COPYRIGHT. ECONOMIC AND CULTURAL CHALLENGE* (Publishers' International Union 2d Symposium, April 1990), LITEC Paris, 1990;

A. T. von Mahren, J. R. Gordley, *THE CIVIL LAW SYSTEM. AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW*, Little, Brown and Co., Boston, 1957;

A. T. von Mahren, *LAW IN THE UNITED STATES*, Kluver, Boston, 1989;

MacQueen, *COPYRIGHT, COMPETITION AND INDUSTRIAL DESIGN*, Aberdeen U.P. 1989;

S. C. Masterson, *COPYRIGHT--HISTORY AND DEVELOPMENT*, 28 Calif. L. Rev. 620;

R. D. Mayo, *THE ENGLISH NOVEL IN THE MAGAZINES 1740-1815*, Evanston, IL: Northwestern UP, London, 1962;

D. E. McDaniel, *UNITED STATES TECHNOLOGY EXPORT CONTROL. AN*

an eco-esc pendulum of copyright

ASSESSMENT, PRAEGER; Westport, 1993:

E. McKnight, COPYRIGHT AND A SINGLE MARKET IN BROADCASTING, 10 EIPR 343 (1992);

Meyers, SOUND RECORDINGS AND THE NEW COPYRIGHT ACT, 22 N.Y.L. Sch. L. Rev. 573 (1977);

Monta, THE CONCEPT OF "COPYRIGHT" VERSUS THE "DROIT D'AUTEUR," 32 So. Cal. L. Rev. 178 (1959);

A. R. Miller, M. H. Davis, INTELLECTUAL PROPERTY. PATENTS, TRADEMARKS, AND COPYRIGHT, West Publishing, 2d ed. 1990;

A. R. Miller, COPYRIGHT PROTECTION FOR COMPUTER PROGRAMS, DATABASES AND COMPUTER--GENERATED WORKS: IS ANYTHING NEW SINCE CONTU? 106 Harv. L. Rev. 977 (1993);

B. Nimmer, COPYRIGHT AND OTHER ASPECTS OF LAW PERTAINING TO LITERARY, MUSICAL AND ARTISTIC WORKS, 2d ed., West Publishing, 1978;

an eco-esc pendulum of copyright

B. Nimmer, FOREWORD: TWO COPYRIGHT CRISES, 15 UCLA L. Rev. 931;

M. Nimmer, 1 NIMMER ON COPYRIGHT (MB) @ 1. 01 [A] (1985);

S. Nora, A. Minc, L'INFORMATISATION DE LA SOCIETE, La Documentation Française, Paris, 1978;

S. Nora, REPORT, Advertising World, October, 1978;

L. R. Patterson, S. W. Lindberg, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS, 1991;

S. Page, M. Devenport, A. Hewitt, THE GATT URUGUAY ROUND: EFFECTS AND DEVELOPING COUNTRIES, Overseas Development Institute, London, 1992;

L. R. Patterson, COPYRIGHT OVEREXTENDED: A PRELIMINARY INQUIRY INTO THE NEED FOR A FEDERAL STATUTE OF UNFAIR COMPETITION, 17 Dayton L. Rev. 385;

L. R. Patterson, COPYRIGHT IN HISTORICAL PERSPECTIVE, 1968;

L. R. Patterson, COPYRIGHT AND THE "EXCLUSIVE RIGHT" OF AUTHORS, 1 Geo.

an eco-esc pendulum of copyright

J. of Int'l. P. L. (1993), 1;

L. R. Patterson, FREE SPEECH, COPYRIGHT, AND FAIR USE, 40 Vand. L. Rev. 1987, 1;

L. R. Patterson, S. W. Lindberg, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS, Athens: Geo. UP 1991;

H. E. Pearson, C. G. Miller, COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY, Blackstone Press, 1990;

J. Phillips, R. Durie, I. Karet, WHALE ON THE COPYRIGHT, Sweet & Maxwell, London, 1993;

E. Piolla-Caselli, CODICE DEL DIRITTO DI AUTORE. COMMENTARIO DELLA NUOVA LEGGE 22 APRILIE 1941--XIX, No. 633, UTET, Turin, 1943;

V. Porter, BEYOND THE BERNE CONVENTION: COPYRIGHT, BROADCASTING AND THE SINGLE MARKET, John Libbey, London, 1991;

R. A. Posner, LAW AND LITERATURE, A MISUNDERSTOOD RELATIONSHIP,

an eco-esc pendulum of copyright

Cambridge: Harvard UP, 1988;

H. Ransom, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710*, Austin: Texas UP, 1956;

RECENT PUBLICATION: THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS, 106 Harv. L. Rev. 975 (1993);

S. Ricketson, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, Centre for Commercial Law Studies, London, 1987;

J. Rockwell, *THE NEW COLOSSUS: AMERICAN CULTURE AS POWER EXPORT*, NY Times, January 30, 1994;

M. Rose, *AUTHORS AND OWNERS. THE INVENTION OF COPYRIGHT*, Harvard UP, Cambridge, MA, 1993;

W. Rumphorst, *NEIGHBORING RIGHTS PROTECTION OF BROADCASTING ORGANIZATIONS*, 10 EIPR 339 (1992);

B. Salomé, *WORLD BANK ACTIVITY IN SUPPORT OF PUBLISHING IN THE*

an eco-esc pendulum of copyright

DEVELOPING COUNTRIES, in COPYRIGHT. ECONOMIC AND CULTURAL CHALLENGE, (Publishers' International Union 2d Symposium, April 1990), LITEC, Paris, 1990;

E. G. Sanchez, COOPERATION SCIENTIFIQUES ET TECHNIQUE AVEC LES PAYS DE L'EUROPE CENTRALE ET DE L'EST DANS LE CADRE COST, 353 Rev. Marché Com et l'Union Euro, 877 (1991);

D. Saunders, AUTHORSHIP AND COPYRIGHT, London, 1992;

M. Seidenfeld, A CIVIC REPUBLICAN JUSTIFICATION FOR THE BUREAUCRATIC STATE, 105 Harv. L. Rev. 1511 (1992);

C. H. Settlemyer III, BETWEEN THOUGHT AND POSSESSION: ARTISTS' "MORAL RIGHTS" AND PUBLIC ACCESS TO CREATIVE WORKS, 81 Geo. L. J. 2291 (1993);

F. S. Siebert, FREEDOM OF THE PRESS IN ENGLAND. 1476-1776, Urbana: Illinois UP, 1952;

S. Shavell, ECONOMIC ANALYSIS OF LAW, item # 11, ch. 8. PROPERTY RIGHTS IN INFORMATION (class notes) Harvard Law School, Fall, 1993;

an eco-esc pendulum of copyright

R. R. Shaw, *LITERARY PROPERTY IN THE UNITED STATES*, Scarecrow P, 1950;

S. Shemel, M. Krasilovsky, *THIS BUSINESS OF MUSIC*, rev. ed. 1977;

S. Shoenfeld, *THE APPLICABILITY OF ELEVENTH AMENDMENT IMMUNITY UNDER THE COPYRIGHT ACTS OF 1909 AND 1976*, 36 Am. U. L. Rev. 163, (1986);

Sobel, *THE MUSIC BUSINESS AND THE SHERMAN ACT: AN ANALYSIS OF THE "ECONOMIC REALITIES" OF THE BLANKET LICENSING*, 3 Loyola Ent. L. J. 1 (1983);

J. A. L. Sterling & M. C. L. Carpenter, *COPYRIGHT LAW IN THE UNITED KINGDOM AND THE RIGHTS OF PERFORMERS, AUTHORS AND COMPOSERS IN EUROPE*, Legal Books PTY, London, 1986;

P. Stone, *COPYRIGHT LAW IN THE UNITED KINGDOM AND THE EUROPEAN COMMUNITY*, The Athlone Press, London, 1990;

K. Szymkiewicz, *LE DIFICILE "RETOUR A L'EUROPE" DES PAYS DE L'EST*, 371 Rev. Marché Com. et l'Union Euro. 527 (1993);

J. Tebbel, *A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES: THE*

an eco-esc pendulum of copyright

CREATION OF AN INDUSTRY 1630-1865, R. R. Bowker, NY, 1972;

THE EUROPEAN COMMUNITY AS A WORLD PARTNER, 52 Eu. Ec. 1 (1993);

Timberg, THE ANTITRUST ASPECTS OF MERCHANDISING MODERN MUSIC: THE ASCAP CONSENT JUDGMENT OF 1950, 19 J. Law & Contemp. Probs. 294 (1954);

TOWARD A UNIFIED THEORY OF COPYRIGHT INFRINGEMENT FOR AN ADVANCED TECHNOLOGICAL ERA, 96 Harv. L. Rev, 450;

N. Turkewitz, AUTHORS' RIGHTS ARE DEAD, 38 J. Copyright Soc'y U.S.A. 41 (1990);

C. Vinzant, HOW CELEBRITIES COST YOU, THE LITTLE GUY, BIG BUCKS THROUGH THE FABULOUS-ADDED TAX, Spy, February 1994;

H. S. White, THE COPYRIGHT DILEMMA, ALA. Chicago, 1978;

P. Werner, UNE FAÇON DE FAIRE DE LA TELEVISION EUROPEENNE, 355 Rev. Marché Com. et l'Union Euro. 168 (1992);

an eco-esc pendulum of copyright

G. R. Winham, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS*, Toronto UP, 1992;

N. J. Wilkoff, *CONTINUITY AND DISCONTINUITY IN THE LAW OF THE AUTHOR AS FIRST OWNER*, 8 EIPR 288 (1991);

A. C. Yen, *RESTORING THE NATURAL LAW: COPYRIGHT AS LABOR AND POSSESSION*, Ohio S. J. L. (1990);

S. S. Zimmermann, *A REGULATORY THEORY OF COPYRIGHT: AVOIDING A FIRST AMENDMENT CONFLICT*, 35 Emory L. J. 163, (1986).

an eco-esc pendulum of copyright