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Recommended Citation
Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y U.S.A. 269 (1989).
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PART I

ARTICLES

65. FRENCH COPYRIGHT LAW: A COMPARATIVE OVERVIEW*

By JANE C. GINSBURG

French copyright law has attracted considerable recent attention in the United States. Debate over the nature and scope of legislation permitting U.S. entry into the Berne Union for the Protection of Literary and Artistic Works spurred some of this interest: because France was a founding member of that Union, some participants in the Berne adherence process perceived "Berne level" copyright protection to be synonymous with "French" copyright protection.[1] As Congress continues to consider modifications to the U.S. copyright law, particularly in the area of moral rights,[2] France again supplies a leading example. And the on-going litigation in France concerning the attempted broadcast of a colorized version of the late John Huston's film *The Asphalt Jungle*[3] provides yet another source of publicity about French

*This comment is based in part on a presentation made at the Library of Congress symposium on Publishing and Readership in Revolutionary France and America, May 3, 1989.

Copyright 1989, Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law.

[1] *See, e.g.* Statement of the "Coalition for Preservation of the American Copyright Tradition," in Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, on the "Berne Convention Implementation Act of 1987," 337.

[2] *See, e.g.* Visual Artists Rights Act of 1989, S. 1198 ("Kennedy bill"), H.R. 2960 ("Kastenmeier bill").

[3] The most recent decision in the *Huston* case was rendered by the Paris Court of Appeals on July 7, 1989 (unpublished), *reversing* Tribunal de Grande Instance of Paris, Judgment of November 23, 1988, 139 RIDA (January 1989) p. 205. Pending full hearing, the Paris Court of Appeals (differently composed), had by Judgment of June 25, 1988, 138 RIDA (October 1988) p. 309, applied French law to enter an interim order restraining the broadcast. After full hearing, the lower court had sustained the Huston heirs' claim, holding: (1) French law applied; (2) under French law, Huston was the "author" of the film, and by virtue of that status could invoke the benefits of French moral rights protections; and (3) colorization distorted the film's integrity. The Paris Court of Appeals in its July 1989 decision reversed both on choice of law grounds, and on the merits of the moral rights claim. The court held: (1) U.S. law applied; (2) under U.S. law Huston was not an "author" and therefore could not assert moral rights; (3) application of U.S. law did not violate French public policy

copyright law.

These and other developments suggest the desirability of a brief review not only of the general outlines of the French law (with appropriate parallels or contrasts to U.S. copyright law), but of some of the recent problems that have emerged.[4] The issues are of general relevance to the publishing community.

I.

The French revolutionary copyright laws of 1791 and 1793 served as the essential legal test until 1957. The French law of 1957, as amended in 1985,[5] states the present French copyright law. I will discuss the following questions under this statute and its judicial interpretation: Who is protected; What subject matter is protected; and What rights are protected?

A. Who is Protected?

Article 1 of the 1957 law reads:

> The author of an intellectual work shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work. . . . The existence or the conclusion by the author of an intellectual work of a contract to make a work, or an employment contract, shall imply no exception to the enjoyment of the right recognized in the first paragraph.[6]

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because even French law provides instances in which the actual creator is denied authorship prerogatives; and (4) even if French law applied, colorization would not violate Huston's moral rights because colorization produces an original derivative work.

For commentaries on earlier stages of the *Huston* case, *see, e.g.*. Françon, observations, 42 Rev. Trim. Dr. Com. 70-73 (discussing Paris trial and appellate court interim orders and Paris trial court decision of November 1988); Guabiac, note, 138 RIDA (October 1988) pp. 312-14 (discussing Paris Court of Appeals interim order); Ginsburg, *Colors in Conflicts: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures*, 36 J. Copyr. Soc'y 81, 95-96 (discussing Paris Court of Appeals interim order).

[4] I do not propose to discuss moral rights cases in France in general, or the *Huston* case in particular here. There is an extensive U.S. law review literature concerning the first topic, see, e.g., Sarraute, *Current Theory on the Moral Rights of Authors and Artists under French Law*, 16 Am. J. Comp. L. 465 (1968); Merryman, *The Refrigerator of Bernard Buffet*, 27 Hastings L.J. 1023 (1976); DaSilva, *Droit Moral and Amoral Copyright: A Comparison of Artists' Rights in France and the U.S.*, 28 Bull. Copyr. Soc'y. 1 (1980). Concerning the second, the Paris Court of Appeals decision in *Huston* of July 6, 1989 is very likely to be appealed; a full or partial reversal by the Cour de cassation may well be anticipated.

[5] France, Law of July 3, 1985, *amending* Law of March 11, 1957.

[6] France, Law of March 11, 1957, art. 1 (UNESCO translation).

There are two important points to signal. *First.* The French law expresses a highly personalist view of copyright: the beneficiary of copyright is the author; she holds the copyright simply because she is a creator.[7] She enjoys the prerogatives of authorship regardless of employment status, and independent of formalities. Modern French copyright does not arise out of, or depend on, compliance with state-imposed conditions such as inclusion of notice of copyright on published copies, or deposit and registration of the work. Until the early 20th century, France conditioned the exercise of copyright upon compliance with the deposit formality, but it abandoned the condition as a result of its adherence to the Berne Convention for the Protection of Literary and Artistic works.[8] (By the same token, in light of its recent ratification of that same international copyright treaty, the U.S. has substantially muted the role of formalities in ensuring copyright protection.)[9]

In principle, French copyright devolves upon the author, the physical creator of the work. According to the personalist notion of copyright, a *personne morale*, that is, a fictitious legal person such as a corporation, cannot be an "author," and thus cannot enjoy initial copyright ownership.[10] One leading French copyright scholar evoked the personalist concept in particularly graphic, and Gallic, fashion: "One cannot dine with a *personne morale*."[11] By contrast, under U.S. copyright law, employers, and, under certain circumstances, commissioning parties, including corporate entities, are considered "authors" and initial copyright holders.[12]

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[7] On the personalist view of copyright, *see, e.g.*, C. COLOMBET, PROPRIETE LITTERAIRE ET ARTISTIQUE 17-22 (4th ed. 1988), and works cited therein.

[8] France was a signatory to the initial text of the Berne Convention promulgated in 1886. The 1908 Berlin revision eliminated all formalities as a condition on the exercise or enjoyment of copyright. *See, e.g.*, UNION INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTERAIRES ET ARTISTIQUES, ACTES DE LA CONFERENCE REUNIE A BERLIN DU 14 OCTOBRE AU 14 NOVEMBRE 1908 (Berne 1909); A. BOGSCH, THE FIRST HUNDRED YEARS OF THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Geneva 1986).

[9] The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988), eliminates the requirement that notice of copyright accompany all published copies of the work, and relieves foreign works originating in Berne Union countries other than the United States from the obligation to register and deposit copies of the work with the Library of Congress prior to initiating a suit for copyright infringement. *See generally* Ginsburg and Kernochan, *One Hundred and Two Years Later: The United States Joins the Berne Convention*, 13 Colum.-VLA J. Law & the Arts 1, 9-24 (1988).

[10] *See, e.g.*, A. FRANÇON, COURS DE PROPRIETE LITTERAIRE ARTISTIQUE ET INDUSTRIELLE, 64-66 (1980-81); Françon, observations, 40 Rev. Trim. Dr. Com. (Oct.-Dec. 1987) pp. 512-14.

[11] Remarks of Prof. André Françon, University of Paris II.

[12] 17 U.S.C. § 101 (works made for hire). The U.S. Supreme Court recently has

Second. The French principle of author-ownership in fact admits a number of exceptions. The coordinating entity, including a corporation, of a collective work, such as a newspaper, dictionary or encyclopedia, is considered the initial copyright holder.[13] This rule probably originates in a Napoleonic-era decision of France's highest civil law court, the Cour de cassation, in a controversy involving ownership rights in the *Dictionnaire de l'Academie française.*[14] There, demonstrating a less personalist orientation, the court sustained the government advocate's argument that: "The word [authors, as employed in the 1793 copyright law] designates not only those who have themselves composed a literary work, but also those who have had it written by others, and who have had the work done at their expense. . . . The rights which belong to the nation belong to it because it is the nation which itself instituted and paid the Académie française to compose this dictionary." Agreeing, the court held: "In the letter, as well as the spirit of the law, the true owner to compensate for the infringement is the owner of the original publication, that is, the publisher, because under the tort of infringement only the publisher's interests are harmed by the infringement of the original edition."

Another exception to the rule of author-ownership prevails in the domain of audiovisual works, where the existence of an employment contract gives rise to a presumption of transfer of exploitation rights from the creative participants to the producer.[15] The 1985 law extends a similar presumptive

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affirmed a restrictive construction of the 1976 Act's definition of commissioned works for hire. *Committee for Creative Non-Violence v. Reid,* 109 S. Ct. 2166 (1989).

The French analogue to a joint work is termed a "collaborative work." France, Law of March 11, 1957, art. 10. As in the U.S., such a work may result from the combination of interdependent contributions, for example, music and lyrics, or from the merger of inseparable contributions, for example jointly written text. (*See* 17 U.S.C. § 101.) By contrast, while in the U.S. a joint author may alienate rights in the work without her co-author's accord (subject to a duty to account), in France all joint authors must agree to grant rights in the work. In case of impasse, the statute authorizes the civil tribunals to determine whether the opposed grant should occur. *Id.*, art. 10, cls. 2 & 3. Clause 4 of this article provides that separable contributions may be exploited separately, without all other co-authors' agreement, so long as the exploitation does not prejudice the exploitation of the work as a whole.

[13] France, Law of March 11, 1957, art. 13.

Although the coordinating entity of a collective work is the initial copyright owner of the work in its ensemble, the authors of the component parts retain rights in their individual contributions. These they may exploit separately, so long as the exploitation does not prejudice the collective work. *Id.* art. 36, cl. 3.

[14] Cass. 7 prair. XI, Dev. & Car. 1791-An XII.1.806; J. Pal. An XI-Floréal-An XII.293, *Bossange c. Moutardier.*

[15] France, Law of March 11, 1957, *as amended* July 3, 1985, art. 63-1.

transfer rule to commissioned works created for advertising.[16] In both these cases, however, the statute requires the employer or commissioning party to compensate the author for the various modes of exploitation of the work. Finally, the recent amendment governing computer programs vests the prerogatives of authorship in the employers of software writers.[17]

The actual author retains primacy in the area of traditional book publishing: here, the 1957 law sets forth several mandatory contract provisions, guaranteeing the author proportional royalties, and settling rights in future modes of exploitation of the work.[18] In other words, subject to certain exceptions,[19] the publisher cannot proffer a lump sum payment and thereby alienate the author from further participation in the exploitation of the book.

B. What subject matter is protected?

Article 2 of the 1957 law proclaims the coverage of "all intellectual works, regardless of their genre, form of expression, merit or purpose." The law accommodates new media of expression, and thus permits copyright to adapt to new technologies, such as electronic publishing. The statute's exclusion of "purpose" as a limitation on the subject matter of copyright is a reflection of the doctrine of the "Unity of Art."[20] According to this doctrine, copyright protects not only works of "pure" art, but also the artistic components of useful objects. Thus, in France, unlike the United States, copyright may protect designs for furniture and household objects.[21]

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[16] Law of July 3, 1985, art. 14. For commentary on the legislative text, *see generally*, C. COLOMBET, *supra* note 7, at 354-56, and works cited at 354 n.1.
See also Court of Cassation, first civil chamber, Judgment of Feb. 4, 1986, 129 RIDA (July 1986) p. 128; Françon, observations, 40 Rev. Trim. Dr. Com. (April-June 1987) p. 198 (holding no conflict between the presumption of transfer of rights in works commissioned for commercials and art. 33 of the French copyright law's general prohibition on broad grants of rights in future works).

[17] France, Law of July 3, 1985, art. 45.

[18] France, Law of March 11, 1957, Title III (performance and publishing contracts, Chapter II (publishing contracts); see also *id.* arts. 30, cls. 3 & 4; 33; 37; 38 (general protections of authors against their grantees).

[19] *Id.* arts. 35, 36.

[20] *See generally* Y. GAUBIAC, LA THEORIE DE L'UNITE DE L'ART (Thesis, Paris, 1980).

[21] *See, e.g.*, Court of Cassation, decision of May 2, 1961, [1961] JCP II 12.242 (salad shaker). *Compare* 17 U.S.C. § 101 (restricting definition of copyrightable "pictorial, graphic or sculptural works" to those whose artistic elements are "separable" from their utilitarian features). U.S. courts have encountered some difficulty enunciating when art is "separable" from utility. *See, e.g.*, *Brandir Int'l. v. Pacific Cascade*, 834 F.2d 1142 (2d Cir. 1987), and cases cited therein.
France also protects the designs of useful objects under a design patent statute, Law of July 14, 1909. In France, a work may simultaneously enjoy copyright and design patent protection. *See generally* C. COLOMBET, *supra* note 7, at

By specifying that works enjoy protection regardless of their merit, the French law codifies a principle long enunciated by the courts. Copyright does not cast judges as literary critics or as censors. No matter how humble or outrageous the expression, it enjoys copyright. This is true on both sides of the Atlantic. For example, in both France and in the U.S., courts have rejected arguments that a pornographic work was not "worthy" of copyright protection.[22] To show that "plus ça change, plus c'est la même chose," I might add that a defendant unsuccessfully advanced the lack of merit defense before the late 19th-century French courts in an infringement action involving the allegedly licentious work, "Les Galanteries du Chevalier de Faublas."[23]

Although the 1957 law does not explicitly set forth the condition, copyright protects only "original" intellectual works.[24] What does "originality" mean in French copyright law? As in the U.S., and contrary to the lay meaning of the term, an "original" work need not be unique or new. Thus, unlike a patent, a copyrighted work need not manifest objective novelty or nonobviousness. Under the French copyright law, originality is a subjective notion: it is possible to have two identical protected works, so long as they were independently created. Each work is an expression of its author's conception and personality.[25] Moreover, a subsequent author may adopt her predecessor's ideas, so long as the form in which she expresses them is her own. The

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96-101. *Compare*, Regulations of the U.S. Copyright Office, 37 CFR § 202.10(a) (". . .The potential availability of protection under the design patent law will not affect the registrability of a pictorial, graphic or sculptural work, but a copyright claim in a patented design or in the drawings or photographs in a patent application will not be registered after the patent has issued.").

[22] *See, e.g.*, *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979); Court of Cassation, Criminal chamber, Judgment of May 6, 1986, 130 RIDA 149 (Oct. 1986), *Gérard Gil v. Sté. Vidéo Marc Dorcel.*

[23] *Précis pour Edme Bidault libraire à Dijon, pour servir à sa requette présentée à la Cour de cassation*, at 3, 5 and 7 (1806) [Bn 4o Fm 2955] (arguing, *inter alia*, unsuitability of copyright for licentious work; defendant's advocate brands the work: "The most seductive and libertine work that one can imagine against the morals of both sexes"). The courts had already admitted the principle of protecting such works, by affirming the power of the State to bring a criminal infringement action for infringement of novels, including the amorous adventures of the Chevalier de Faublas, Cass. 27 ventôse IX, *Ministére Public c. Louvet*, Dev. & Car. 1791-An XII.1.439.

[24] *Compare* 17 U.S.C. § 102(a).

[25] *See, e.g.*, H. DESBOIS, LE DROIT D'AUTEUR EN FRANCE 5 (3d ed. 1978) (employing example of two painters who depict the same scene; the works will closely resemble each other, but each is "original" in the copyright sense). *Cf. Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) ("All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something

French concept of originality covers a work's form, but excludes ideas and facts from protection.[26]

C. What rights are protected?

The French copyright law represents a dualist system of rights: the law protects both rights of economic exploitation, and rights related to the author's personal, artistic interest in the work, so-called "moral rights."[27] The U.S. copyright law, by contrast, sets forth essentially economic rights, although these may also serve as an indirect vehicle for the safeguard of certain moral interests.[28]

The economic rights protected under French law are the rights of reproduction and public performance. The reproduction right includes rights over "partial reproductions,"[29] or what U.S. law calls "derivative works," that is, works based on and incorporating some portion of a prior work, such as a film derived from a novel.[30] Economic rights generally endure for fifty years following the author's death, although the 1985 amendments conferred on musical works a special life-plus-seventy year term.[31]

Moral rights include the right of "divulgation," the right to make the work known to the public.[32] The U.S. right of first publication roughly corresponds to this right.[33] While both French and U.S. authors have the right to release the work to public scrutiny, French law includes a corollary unknown in the U.S.: in France the author also has to right to "repent" of that release, and to withdraw the work from distribution.[34] However, this right is almost entirely theoretical, because the law's requirement that the author in-

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recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' ").

26 *See, e.g.*, H. DEBOIS, *supra* note 25, at 22-31 (ideas are "de libre parcours"); Brossard & Durnerin, *L'absence de protection des idées par le droit d'auteur*, Gazette du Palais, January 27-28, 1988, pp. 4-7. *Cf.* 17 U.S.C. § 102(b).

27 France, Law of March 11, 1957, art. 1.

28 17 U.S.C. § 106 (setting forth exclusive rights under copyright). For a discussion of the use of economic rights to safeguard moral rights, see, e.g., Ginsburg & Kernochan, *supra* note 9, at 31-32.

29 France, Law of March 11, 1957, art. 40.

30 17 U.S.C. §§ 101, 106(2).

31 France, Law of March 11, 1957, as amended by law of July 3, 1985, art. 21. For collaborative works, the term is 50 (or 70) years following the last author's death; for anonymous, pseudonymous and collective works, the term is 50 or 70 years.

32 France, Law of March 11, 1957, art. 19.

33 17 U.S.C. § 106(3) (distribution right). In *Harper & Row Pubs. Inc. v. Nation Ents.*, 471 U.S. 539 (1985) the Supreme Court majority discussed author's personal and creative interests protected by the right of first publication in terms reminiscent of the French moral right of divulgation.

34 France, Law of March 11, 1957, art. 32.

demnify the publisher serves as a strong disincentive to exercise of the right of repentance.

The French law also addresses problems regarding divulgation of works unpublished at the time of their authors' deaths. The law permits a claim against the author's successors or heirs for "notorious abuse" of the disclosure right by publication of the work, as well as by refusal to publish it.[35] The law explicitly confers standing on the Minister of Culture to bring such a claim. In 1985, this provision of the law was expanded to cover abusive exercise of (or refusal to exercise) economic rights, for example reproduction rights, in the work.[36]

The principal moral rights, also set forth in the Berne Convention, are the rights of "paternity," and of integrity.[37] These rights remain with the author even after transfer of economic rights, and in France may be exercised against the grantee of economic rights.[38] In addition to stating the "inalienability" of the moral rights of paternity and integrity, the law also declares these rights to be "perpetual."

The "paternity" right, better labelled the right of attribution, ensures the author's right to be receive credit for the work she created.[39] The right of integrity allows the author continuing control over the work, to prevent its

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[35] *Id.*, art. 20. *See*, Tribunal de Grande Instance of Reims, Judgment of January 9, 1969, [1969] D. Jur. 569, note Desbois (holding abusive refusal to publish letters when facts indicated deceased author desired their publication); Tribunal de Grande Instance of Paris, Judgment of Dec. 1, 1982, 115 RIDA (Jan. 1983) p. 165, note Gautier (rejecting claim of abusive publication of letters when facts did not show deceased author's hostility to publication).

[36] For a decision applying the amended law, see Court of Appeals of Versailles, Judgment of March 3, 1987, 136 RIDA (April 1988) p. 160, *Dame Foujita v. S.A.R.L. Art Conception Réalisation, rev'd,* Court of Cassation, First Civil Chamber, Judgment of Feb. 23, 1989, 141 RIDA (July 1989), p.257 (discussed *infra*).

[37] Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*.

[38] France, Law of March 11, 1957, art. 6.

[39] A right of attribution is not yet a feature of U.S. copyright law, but analogous interests may to some extent be protected under U.S. doctrines of unfair competition. *See, e.g.*, *Lamothe v. Atlantic Records*, 847 F.2d 1403 (9th Cir. 1988) (recognizing co-author's right under unfair competition portion of federal trademarks statute to claim attribution when all credit given to another co-author); *Follett v. New American Library*, 497 F.Supp. 304 (S.D.N.Y. 1980) (applying same federal statute to co-author's claim that he received *too much* authorship credit).

For an interesting discussion of the authorship status and attribution rights of ghostwriters in France, see, Gautier, *L'Oeuvre écrite par autrui*, 139 RIDA (January 1989) pp. 63-101. Professor Gautier concludes that under French law ghost writers are entitled to authorship status, but may—revocably—renounce their right to attribution. He also suggests that, under certain circumstances, publishers should be able to obtain damages from ghost writers who revoke their renunciation of authorship recognition.

alteration or mutilation. Examples of exercise of the right of integrity include artist Bernard Buffet's claim against the purchaser of a refrigerator whose panels Buffet had painted, when the purchaser dismembered and sought to sell the panels,[40] and Charlie Chaplin's claim against the French film distributor for the addition of a third-party's musical soundtrack to his silent film *The Kid*.[41]

II.

I turn now to certain recent developments in French copyright law that may be relevant to the publishing community. One concerns the new claim for the abusive refusal by successors of deceased authors to authorize the exploitation of economic rights. The others bear on private copying and electronic publishing.

A. Abusive Nonexploitation of Economic Rights

A 1987 decision of the Court of Appeals of Versailles applied the new claim for "notorious abuse" of economic rights in a controversy involving a biography of the Japanese/French painter Léonard Foujita.[42] Foujita's biographers had repeatedly and unsuccessfully sought his widow's permission to include reproductions of published artworks. The trial and appellate courts determined that Mme. Foujita's refusals were unjustified, and constituted a "notorious abuse" because no French biography of Foujita was available. Mme. Foujita had generally attempted to suppress biographies of her husband, and the evidence indicated that Foujita himself hoped for posthumous renown. The trial court ordered Mme. Foujita to permit the incorporation in the biography of 1200 reproductions of the late artist's published work, cautioning that her "right to royalties must be respected," but not setting a rate for the de facto compulsory license thus imposed.[43] The High Court held that the judges below had not established the existence of notorious abuse

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[40] Paris Court of Appeals, Judgment of May 30, 1962 [1962] D. Jur. 570, *Buffet v. Fersing*. *See generally* Merryman, *The Refrigerator of Bernard Buffet*, 27 Hastings L.J. 1023 (1976).

[41] Paris Court of Appeals, Judgment of April 29, 1959, JCP 1959 II 11134, *Sté. Roy Export & Charlie Chaplin v. Sté. Les Films Roger Richebé*.

While U.S. copyright and other law may offer partial analogues to the right of integrity, proposals for full adoption of the doctrine have encountered fierce resistance from some sectors of U.S. copyright industries. *See generally* Ginsburg & Kernochan, *supra* note 9, at 27-31.

[42] Judgment of March 3, 1987, 136 RIDA (April 1988) p. 160, *Dame Foujita v. S.A.R.L. Art Conception Réalisation*.

[43] Tribunal de Grande Instance of Nanterre, Judgment of September 15, 1986, 131 RIDA (January 1987) p. 268. Professor Françon queries how Mme. Foujita's right to royalties can be "respected" when the decision deprives her of power to bargain over the reproduction of her late spouse's works, Françon, observations, 40 Rev. Trim. Dr. Com. (Jan.-March 1987) pp. 60, 63.

because Mme. Foujita had authorized a Japanese publisher to issue a collection of the painter's works (with the widow's collaboration), and there was no showing that the Japanese book would not be distributed in France.[44]

Although the French law is generally considered more protective than U.S. copyright law, the French statute's "notorious abuse" qualification of the post-mortem exploitation right and its judicial application may seem to forge an exception to copyright coverage far more drastic than the copyright exemptions in U.S. law. For example, however capacious Section 107 of the U.S. Copyright Act's fair use exception may at times seem,[45] it appears unlikely a court would apply it to compel the copyright owner to authorize the reproduction of *1200* works (even accompanied by some form of remuneration).[46] Indeed, while U.S. courts may be more apt to apply the fair use doctrine when it appears that the copyright owner is wielding its monopoly to prevent disclosure of information,[47] both the amount and the nature of the works sought to be copied in the *Foujita* affair seem to exceed even the admonitory reach of the fair use excuse. As a general matter, under U.S. law, copyright entitles its owner even unreasonably to withhold the work from exploitation.[48] Similarly, French copyright contains no general obligation to exploit a work, and the High Court reversal in *Foujita* suggests a very cautious, even begrudging, interpretation of the statutory prohibition of abusive nonexploitation.[49]

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[44] Court of Cassation, First Civil Chamber, Judgment of Feb. 28, 1989, 141 RIDA (July 1989) p. 257.

[45] *See, e.g., Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) ("timeshifting" of broadcast television programs held fair use).

[46] *Cf. Belushi v. Woodward*, 598 F. Supp. 36 (D.D.C. 1984) (declining on general equitable grounds to enjoin infringing inclusion of a single photograph in biography).

[47] *See, e.g., Rosemont Ents. v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (concerning use in unauthorized biography of magazine articles to which Howard Hughes held the copyrights). *But see New Era Pubs. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) (rejecting biographer's fair use defense to quotations from Scientology founder L. Ron Hubbard's unpublished works despite evidence that Hubbard's successors sought to suppress unfavorable biography).

[48] *See, e.g., Fox Film Co. v. Doyal*, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property").

However, other limitations on this principle exist in addition to the fair use doctrine. *See, e.g.*, 17 U.S.C. §§ 111 (compulsory license for certain cable transmissions); 115 (compulsory license for making phonorecords); 116 (compulsory license for jukebox performances); 118 (compulsory license for public television broadcasts); 119 (compulsory license for certain secondary transmissions by satellite carriers).

[49] It is worth noting that the contract with the Japanese publisher on which the

Moreover, on further examination, the French law's limitation on copyright exclusivity becomes less startling. The subjects of "notorious abuse" are not authors, but their heirs or successors. The *author* may dispose, or decline to dispose, of her work as she wishes. The few decisions construing the "notorious abuse" proviso compare the copyright holder's conduct with the expressed or extrapolated wishes of the deceased author.[50] Where the copyright holder's acts are found to defeat the author's desire for privacy, or for publicity, the court may override the copyright holder's decision. In other words, in keeping with its general author-orientation, the French law endeavors to promote the creator's intentions, even beyond the grave.[51]

B. Private Copying and Electronic Publishing

In 1985, the French legislature amended the copyright law to impose a royalty on private copying of audio and audiovisual works, and provided explicit protection for computer programs.[52] Although the home taping royalty is not directly relevant to the publishing and library communities, I mention it because it represents a fairly successful, if limited, attempt to address the problem of private copying.[53] In 1985, the legislature recognized that private copying had become "a new mode of exploitation."[54] The prior law had exempted private copying, but in 1957, few anticipated that private reproduction would compete with commercial distribution of copyrighted works.[55] The home taping law imposes a surcharge on the copying material, that is, the blank tape. The sums collected are distributed by authors', performers' and producers' associations to their members. The French parliament recognized that private law methods of enforcement of copyright, by means of individual law suits, or even by collective licensing of large users such as broadcasters, does not respond to the problem of private copying because it presumes a middleman between the copyright owner and the ulti-

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High Court relied was entered into *after* the biographers initiated their claim of notorious abuse. For other observations about the contract and the High Court decision, see Françon, note following the decision, 141 RIDA (July 1989) at 259.

[50] *See, supra* note 35.

[51] *Cf.*, France, Law of March 11, art. 6, cl. 3 (moral rights are declared "perpetual").

[52] France, Law of July 3, 1985, Title III "On Remuneration for Private Copying of Phonograms and Videograms," arts. 31-37.

[53] On the French home taping measure, see generally Ginsburg, *Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985*, 10 Colum.-VLA J.L. & the Arts 83, 92-104 (1985).

The U.S. Congress in 1986 considered, but did not adopt, a home taping royalty applicable only to audio tape and equipment.

[54] Assemblée Nationale, *Rapport de la commission des lois* No. 2235 at 12 (June 26, 1984).

[55] See Ginsburg, *supra* note 53, at 93-94.

mate consumer. When the ultimate user is also the person creating the reproduction, the exploitation becomes so diffuse that some form of government intervention may become necessary. In the case of home taping, the least intrusive form involved, in effect, taxing the media of copying. As print works yield to digital format, one can envision that a similar compensatory technique may be applied to computer copying media, such as disks, printers, and optical scanners.

Another 1985 amendment explicitly extended French copyright coverage to computer software.[56] The legislators' action reflects a pragmatic response to business pressures, in the face of objections from the academy. France is Europe's largest producer of computer software. A substantial industry lobby sought to preserve the French advantage by securing surer coverage than the courts had yet afforded through interpretation of the 1957 text.[57] Some copyright scholars lamented the eruption of a "foreign body" into the artful edifice of French copyright. For these observers, copyright is about the *beaux arts*, not about prosaic, useful productions such as software.[58] In responding to economic compulsion, the legislature, I believe, was not only confirming copyright's adaptability to new technology, but was acting consistently with the principles underlying the inception of French copyright during the Revolution. The French sought from the start at once to reward authors, to improve public education, and to spread French achievements beyond France's borders. As a prosecutor in Year VII of the Republic emphasized: "It is to the wise men, . . . to all literary authors that we principally owe the uncontested superiority of the French language over all the languages of Europe. It is they who render all nations tributaries to our arts, to our tastes, to our genius, to our glory; it is through them that the principles and rules of a wise and generous liberty penetrate beyond our borders and sphere of activity."[59] Computer software, after all, not only represents a growing portion of the modern French publishing industry, but is a domain of creative expansion, whose further development the legislature

[56] *Supra*, note 52. The term of protection, however, is only for 25 years. *Id.* Article 48.

[57] Sénat, *Rapport de la commission spéciale*, No. 212 vol. 1 at 70-72 (March 20, 1985). *See generally* Ginsburg, *supra* note 53, at 85-87.

Following enactment of the computer program amendments, the Full Assembly of the Cour de cassation held that the 1957 copyright law protected computer programs, so long as the programs were "original." Cour de casssation, full assembly, Judgment of March 7, 1986, [1986] D. Jur. 405, concl. Cabannes, note Edelman, 129 RIDA (July 1986) p. 136, note Lucas.

[58] *See, e.g.*, Desjeux, *Logiciel, jeux vidéo, et droit d'auteur*, Expertises, Nov. 1984, p. 277, and articles *cited in* A. LUCAS, LEDROIT DE L'INFORMATIQUE 212-13 & n.92.

[59] Bureau criminel, No. 5380. D.3, Paris, 21 Nivôse, year VII, *excerpted in* IV RIDA (July 1954) at 98-99.

seeks to encourage. Protecting and promoting computer software affords one means of making other nations "tributaries to the uncontested superiority of [French expertise]."

Finally, I will to address a recent high court decision concerning electronic publishing. The case, known as the *affaire Microfor,* involved the unauthorized preparation of a database index of *Le Monde* and *Le Monde diplomatique.*[60] Defendant Microfor's production consisted of an alphabetical index crossreferenced to a subject matter indices which also included summaries of *Le Monde* articles. The lower courts held that the indices, and particularly the summaries, constituted a "partial reproduction" in violation of *Le Monde*'s copyright. The lower courts then considered whether, under the French analogue to the U.S. copyright fair use doctrine, the summaries might be excused. The French law exempts from copyright liability "analyses and short quotations justified by the critical, polemical, pedagogical, scientific or informational character of the work in which they are incorporated," so long as the user identifies the author and title of the copied work.[61] The lower courts had held that Microfor's summaries of Le Monde articles could not be excused because Microfor's production, composed entirely of material drawn from Le Monde, was not the kind of independent work contemplated by the exemption.[62]

The Cour de cassation reversed. It first held that an index compiled for documentary purposes and consisting solely of references to the indexed work was not a reproduction within the meaning of the law, if the index did not substitute for consulting the complete articles.[63] Turning from the purely

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60 Court of Cassation, plenary assembly, Judgment of Oct. 30, 1987, JCP 1988 II 20932, 135 RIDA (January 1988) pp. 78-94, concl. Cabannes. Commentaries on this decision include, Françon, observations in Revue Trimestrielle de Droit Commercial (January-March 1988), pp. 57-61; Kéréver, *Les arrêts Microfor,* 137 RIDA (July 1988) p. 17; Huet, *Pour une poignée de données,* observations in JCP 1988 II 20932; Vivant, *Pour une compréhension nouvelle de la notion de courte citation en droit d'auteur,* JCP 1989 I 3372.

61 France, Law of March 11, 1957, art. 41, cl. 3.

62 *See* Tribunal de grande instance of Paris, Judgment of Feb. 20, 1980, 108 RIDA (April 1981) p. 180, *aff'd,* Paris Court of Appeals, Judgment of June 2, 1981, 111 RIDA (Jan. 1982) p. 182, *rev'd,* Court of cassation, first civil chamber, Judgment of Nov. 9, 1983, 119 RIDA (Jan. 1984) p. 200, *on remand* Paris Court of Appeals, Judgment of Dec. 18, 1985, [1986] D. Jur. 273, note J. Huet, JCP 1986 II 20615, obs. Françon.

The case was twice decided by the Court of cassation because, under French principles of judicial organization and authority (if not always in fact) precedent is not binding. Accordingly, lower courts are not obliged to follow the ruling of the High court when it first reverses and remands an appellate decision. Although the appellate court to which the case is remanded generally does bend to the High court ruling, in this case, the Paris court of appeals on remand rebelled, and adhered to its original ruling.

63 Court of cassation, first civil chamber, Judgment of Nov. 9, 1983, 119 RIDA (Jan.

referential component of Microfor's work to the synopses and excerpts of *Le Monde* articles, the court expressed a broader view than the lower courts of the kind of production entitled to the "short quotations" exemption. It ruled that summaries consisting entirely of the gathering and arrangement of quoted material, and which did not dispense the user from recourse to the source work, could be an "informational work" within the meaning of the statute.[64] The court thus indicated that a database may itself be a protected work of authorship. Partisans of the print community have not greeted the decision with enthusiasm, to say the least.[65] Advocates of electronic publishing and database producers, by contrast, have cheered the court's apparent consecration of "la libérté documentaire"—freedom to document.[66] It is indeed possible to read the *Microfor* decision as, on the one hand, allowing database producers reasonable, non-competitive, access to print works, and on the other hand, protecting databases against piracy by each other.

Equally significantly, the High Court appears to be expressing a conception of copyrightable works sufficiently generous to encompass the kinds of informational endeavors in which the compiler's "personality" is less than manifest. In other words, aspects of *Microfor*'s elaboration of the notion of "informational works" suggest a receptivity to "sweat of the brow" justifications for copyright. Thus, in endorsing defendant Microfor's argument that its index constituted a work of authorship, the government advocate's report to the High Court reminds the judges that copyright has already been extended to almanacs, telephone books, calendars and catalogues; why treat computerized indices differently?[67] The report goes further: it first observes that a long-standing principle recognized copyright protection for works whose elements have been "chosen with discernment,"[68] but then states that "the criterion [for copyright] consists in the assembly and organization 'in an ordered whole' of diverse nomenclatures, at the cost of much effort."[69] The report thus articulates a vision of copyright embracing not only subjective

1984) p. 200. The court first made this declaration in its initial reversal, in 1983. It reiterated this holding in the second, and final, reversal of the Paris court of appeals in 1987.

64 *See supra* note 60.

65 *See, e.g.*, Françon, *supra* note 60.

66 *See, e.g.*, Huet, *supra* note 60.

67 Report of the First Advocate General Jean Cabannes, in 135 RIDA (Jan. 1988) at 86.

68 *Id.*, *citing* Court of cassation, criminal chamber, Judgment of Nov. 27, 1869, [1870] D. Jur. 186.

69 Report of First Advocate General Jean Cabannes, *supra* note 67, at 87. *But see*, First Civil Chamber, Judgment of May 2, 1989 (unpublished), in which the Court of Cassation reversed an appellate court decision which had recognized copyright on grounds of the labor invested in the work's creation; stating that labor alone did not suffice to confer protection, the High Court remanded for a determination of the originality of plaintiff's work.

compilations ("chosen with discernment"), but apparently also those in which the compiler's major contribution is the investment, rather than the inspiration, brought to the work.

The *Microfor* affair invites comparison with a U.S. decision involving indices of periodicals, *New York Times Co. v. Roxbury Data Interface.*[70] There, defendant sub-indexed the New York Times Index, creating a print-format "Personal Name Index to the New York Times Index." On fair use grounds, the court denied a preliminary injunction, finding that defendant copied information, but not expression; that "the personal name index will serve the public interest in the dissemination of information" and that the impact of defendant's index on the potential market for the New York Times Index "appears slight or nonexistent."[71] Both decisions thus show a disposition toward fostering the creation of works which enhance the dissemination of information, although the French decision addressed a greater degree of borrowing from the referenced work: the *Microfor* defendant summarized and quoted from *Le Monde* articles, while *Roxbury Data* simply retrieved page references and endowed them with an independent organization.

By contrast, in *West Pub. Co. v. Mead Data Central,*[72] the Eighth Circuit held the LEXIS electronic database's inclusion of references to internal pages of the West case reports an appropriation of the West print law reporters' "arrangement" of public domain material, and therefore copyright infringement. While one may contend that the *West/Lexis* court's ruling distorts the idea/expression dichotomy and privatizes the public domain of court decisions,[73] the court's disposition recalls the position of the Cour de cassation in *Microfor*: if the database's appropriation of material spares the user recourse to the referenced work, copyright infringement will be found. One consideration almost certainly underlying the *West/Lexis* dispute (in addition to competition between LEXIS and West's electronic database WESTLAW) was the concern that LEXIS' inclusion of West "jump cites" would eventually obviate LEXIS subscribers' need for acquisition of West print reporters. Ultimately, *West/Lexis* and *Microfor* demonstrate the permeability of both French and U.S. copyright law by unfair competition principles,[74] particularly in the realm of new information technologies.

This comment is not the place for an essay on the infusion of unfair

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70 434 F. Supp. 217 (D.N.J. 1977).

71 434 F. Supp. at 226.

72 799 F.2d 1219 (8th Cir. 1986), *cert. denied,* 107 S. Ct. 962 (1987).

73 *See, e.g.*, Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations.* 36 U.C.L.A. L. Rev. 719 (1989).

74 *See also Worlds of Wonder, Inc. v. Vector Intercontinental, Inc.*, 653 F. Supp. 135 (N.D. Ohio 1986); *Worlds of Wonder, Inc. v. Veritel Learning Sys.*, 658 F. Supp. 351 (N.D. Tex. 1986) (holding infringement by cassettes independently produced for insertion in plaintiff's copyrighted Teddy Ruxpin dolls).

competition notions into copyright law, but some further comparative law observations may be worthwhile. The Cour de cassation's mode of determining the absence of "partial reproduction" in *Microfor* may be seen as an example of this phenomenon. By holding that a "partial reproduction" has not occurred when the borrowed material does not substitute for consultation of the original, the court in effect seems to be saying that copying is not "copying" in the legal sense, unless it produces the competitive effects of copying. To an American lawyer, this aspect of the French court's analysis conflates the questions of prima facie infringement and fair use. The collapsing of the issues of actionable copying and market harm, however, is not unique to France, as *West/Lexis* and other U.S. decisions finding infringement indicate.[75] Moreover, in the U.S., the equation of the two questions is not confined to analysis of plaintiff's claim. It can also be a technique used by defendants, particularly in the wake of the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios*.[76] Following that decision, the fourth fair use criterion ("effect of the use upon the potential market for or value of the copyrighted work")[77] may be assuming inflated importance.[78] In any event, whether one approaches the problem either as one of proving actionable copying (prima facie infringement), or of excusing proven copying (fair use), one may wonder if the inquiry into the economic harm posed by defendant's use will not ultimately engulf all of copyright analysis.

To return to other consequences of the *affaire Microfor*, if a database is a protected work of authorship under French law, who is the author? Under certain circumstances, a database may be ranked a "collective work," in which case, current French law would vest the employer/producer with initial economic rights ownership. But, even though they may be created at a publisher's instance and expense, not all databases may fit the present French law definition of a collective work. Indeed, there are many other modern productions which represent a good deal more "investment" by a publisher or other *personne morale* than "authorship," at least in the romantic sense of that term perhaps implicit in the 1957 French law, but which fail to meet the statutory criteria of collective works. As a result, many French publishers

[75] See *supra* note 74. Inferring infringement from evidence of economic harm is not a recent development in U.S. Eighteenth century jurists appear to have equated the two. See, e.g., *Drury v. Ewing*, 7 F.Cas. 1133 (C.C.S.D. Ohio 1862) (No. 4095) (citing *Story v. Holcombe*, 23 F. Cas. 171 (No. 13,497) (C.C.D. Ohio 1847)) ("[I]n the case of a copyright, if the work alleged to be a piracy is of a character to render the original 'less valuable by superseding its use in any degree, the right of the author is infringed.' ").

[76] *Supra* note 45.

[77] 17 U.S.C. § 107(4).

[78] *See, e.g., Harper & Row. Pubs. Inc. v. Nation Ents.*, 471 U.S. 539, 566 (1985) (fourth fair use factor is "undoubtedly the single more important element of fair use").

are today advancing their own claims to being "authors." Vincent Brugére-Trélat, Vice President of the Syndicat National de l'Edition [the French publishers' Union] asks: "May one extrapolate and recognize in all *personnes morales* who participate in the creation of a work the status of author? That could be the case of publishers who are tending more and more to play the role of a true creator, for example of how-to books, guide books, art books [sic]. . . ."[79] From the personalist perspective on copyright, this is an astonishing claim.[80] From a historical perspective, it recalls the assertion of the government advocate in the 1803 affair of the *Dictionnaire de l'Academie Française*.[81] Plus ça change . . .

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79 Unpublished memorandum, April 1989.

80 *Cf.*, *Soc. Steiner v. Soc. Cinna*, Court of Cassation, commercial chamber, Judgment of April 7, 1987, 133 RIDA (July 1987) p. 192; observations Françon, 41 Rev. Trim. Dr. Com. (Oct.-Dec. 1987) p. 512 (rejecting "collective work" characterization of sofabed created on commission by design studio [recall that French copyright law protects the original designs of useful objects]; Professor Françon perceives a tendency of the High Court toward a restrictive characterization of collective works).

81 Cass. 7 prair. XI, Dev. & Car. 1791-An XII.1.806; J. Pal. An XI-Floréal-An XII.293, *Bossange c. Moutardier.* See *supra* text at note 14.