

Create, share and protect

The agility of intellectual property
facing the challenges of the Digital
Single Market



**FORUM
D'AVIGNON**
Culture is future



Building a better
working world

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About Forum d'Avignon

Launched in 2007 the Forum d'Avignon is a crucible of ideas and dialogue between culture and the cultural and creative sector, on one hand, and the economic and digital world on the other. Since 2011 offshoots have spread to Germany (Forum d'Avignon@Ruhr) and Spain (Forum d'Avignon@Bilbao). The Forum d'Avignon has focused attention upon the economic importance of the cultural and creative sector and the multiplier effect of cultural investment on economic growth, and quantified its importance in regional attractiveness.

www.forum-avignon.org [@forumavignon](https://twitter.com/forumavignon) [#FABdx](https://twitter.com/FABdx) [#PrixStartupFA](https://twitter.com/PrixStartupFA)

Cover: Palmyra in 2014

This report can be downloaded from the websites of EY
www.ey.com/FR/fr/Industries/Media---Entertainment

www.ey-avocats.com

www.ey.com/FR/ForumAvignon



Key findings

Forecasts proven wrong: the digital revolution has not brought about the end of the cultural industries, but of the cultural industries as we know them. The digital ecosystem has broadened the palette of cultural diversity across creativity, production and distribution, transforming all.

An unexpected result: culture you can touch and feel is alive and well. Despite forecasts of its demise, culture in physical form is holding up well and in some cases resurgent, whether in the form of books, vinyl recordings, venues or retail outlets.

New rules of the game: the cultural economy is at the heart of the collaborative and digital economy and must continue to evolve. Meeting user expectations will require new, equitable economic models. Success will depend upon trying-out innovative hybrid solutions that combine high levels of quality and service.

Towards a new frontier: if Europe wants to achieve a winning harmonization it is essential to first ensure that each ecosystem is euro-compatible. It is equally essential to ensure Europe pursues its own, original, harmonization policy, rather than one cobbled together from foreign concepts. And finally, it is crucial to restore an effective judicial framework so that all involved - artists, companies and consumers - understand the meaning and scope of intellectual property.

Intellectual Property:

Challenges and proposals for the Digital Single Market



Create

- ▶ **Adapt the national ecosystems at the Union's borders**

The complete harmonization of national legislation on copyright cannot happen without prior agreement on appropriate economic models for each ecosystem involved, including audio-visual, music, publishing and multi-media.

- ▶ **Bring together intermediaries to develop a ground-breaking collaborative solution**

that meets the challenge of innovation by Google, Apple, Facebook and Amazon (GAFA)

- ▶ **Facilitate the emergence and development of hybrid economic models**

Let the most flexible, appropriate and best-adapted economic models emerge and thrive through natural selection.

- ▶ **Adapt and harmonize systems of remuneration and equitable compensation**

Royalty payment systems need to be adapted and harmonized. Compensation for private copy, in particular, must be adapted to the needs of cloud computing and be designed at European level.



Share

► Open-up the public domain

Develop meta-search engines for public domain works, and tools to fight copyfraud (false copyright claims over public domain works), copyright trolling, etc.

► Reduce, harmonize and simplify the calculation of copyright duration

This is necessary to ensure copyright has the necessary clarity and coherence within the European Union, and to find a fair balance between copyright and freedom of access within the public domain.

► Develop a secured legal framework for the second life of digital works (including exchange and loan)

Create a framework for the concept of distribution rights exhaustion and better define the concept of communication to the public, to avoid stripping authors of control over their works or cannibalizing production cycles.

► Make it easier for companies to understand and secure rights on their creations

Modernize the legal regime governing transfer of rights on employees' creations, by clarifying the nature of collective works, using the regime applied to software as a model.

► Adapt and harmonize exceptions to Copyright

Completion of the Digital Single Market requires prior harmonization of copyright regimes. This harmonization must be progressive and involve all economic actors concerned. The first steps of this harmonization could cover access to published works by the blind and visually impaired (Marrakesh Treaty, 27 June 2013), or the recognition at a EU level of the fortuitous inclusion exception.



Protect

► Extend the obligation of financial transparency to new media

Launch consultations to achieve remuneration transparency for new medias, as it has been done in the cinema industry.

► Fight online counterfeiting and develop a 'follow the money' strategy

Adapt our 'graduated-response' system and put more onus upon intermediaries to act against infringement on the Internet. Harmonize sanctions across the European Union.

► Strengthen protection for our cultural heritage

Require the custodians of our cultural heritage to preserve and protect it and to make works available in an open-source format, and develop funding mechanisms to ensure easy public access to heritage material.

EY and the Forum d'Avignon

8 years of partnership between EY and the Forum d'Avignon

The primary aim of the Forum d'Avignon is to bring together the economic and cultural worlds so that we may together define the issues that matter for those involved with art and creativity. The partnership which has now linked EY with the Forum for eight years bears witness to our common commitment, alongside leading players in the media and entertainment universe.

Since 2008 EY has analyzed the grand themes of the Forum program. By taking advantage of our expertise and experience in this sector, we aim to translate them into powerful insights into the issues.

Year after year, EY has observed and interpreted what is happening in the media and content industry in the face of a digital revolution that has redistributed power among those involved. We have produced a series of reports.

- ▶ In *La propriété intellectuelle à l'ère du numérique* (Intellectual property in the digital era) we reviewed the importance of intellectual property
- ▶ *Monétiser les médias numériques* (Monetizing digital media) looked at generating revenue streams
- ▶ *Maîtriser le tempo, organiser la relation entre le temps et la valeur dans l'industrie des médias et du divertissement* (Mastering the tempo, organizing the relationship between time and value in the media and entertainment industry) examined distribution speed issues.

We also looked at the structure of the ecosystem of Internet companies, telecoms operators and media groups in relation to personal data. This included the cultural behavior and personal information at the heart of big data, and the shifting balance between privacy and users as economic power moves. We submitted our conclusions to UNESCO in the form of a preliminary declaration of digital human rights.



Preliminary declaration of the digital human rights #DDHN

- I. Every human being's personal data, in particular digital data, conveys information on his cultural values and private life. Personal data cannot be reduced to a commodity. #DIGITAL_DNA
- II. The reasonable exploitation of data is an opportunity for the development of research and the pursuit of the general interest. It must be governed by a universal code of ethics that protects each individual's dignity, privacy and creative works, and the diversity of opinions. #ETHICAL #FAIR
- III. Everyone has the right to respect for his dignity, private life and creative works, and shall not be discriminated against on the basis of access to his personal data and the use made thereof. No private or public entity may use personal data to manipulate access to information, freedom of opinion or democratic procedures. #PRIVACY
- IV. Everyone has the right to inspect and control his personal data, including that resulting from his behavior and objects connected to him. Everyone has the right to the confidentiality of his personal data, and to the protection of his anonymity when he so requests. #RIGHT_OF_INSPECTION
- V. Any exploitation of the data or creative works of any individual requires his free, prior, informed, time-limited and reversible consent. #CONSENT
- VI. The users of personal data, whatever their level of accountability, including States, public and private authorities, companies and individuals, shall show total transparency in the collection and use of any individual's data, and shall facilitate each individual's access to his data, as well as its traceability, confidentiality and security. #TRANSPARENCY_OF_THE_USES
- VII. Open research and innovation, based on the sharing, subject to consent, of any individual's anonymized data, with respect for his dignity and for cultural diversity, are in the general interest. #RESEARCH #GENERAL_INTEREST
- VIII. Cooperation between civil society and businesses is required to put the human being back at the center of a trustworthy society, aided by the reasonable use of disclosed and inferred personal data.
©#COOPERATION #DATA-HELPED_SOCIETY

Editorial



Bruno Perrin

Partner, EY
Technology, Media and Telecom Market Segment
Leader in France

The vitality and diversity of culture and creativity are leading indicators of the health of a society. What state are they in as we leave an ownership economy era and enter one where economic models are based upon usage, and where digital technologies change the economic balance?

Consumers and cultural industries are faced with new concepts, such as Uberization, and the user revolution and disruption, in a complex environment transformed by quasi-tectonic changes in economic models and consumption habits arising from the digital revolution. Intellectual property, a pillar of economic, social and societal stability in the cultural sphere, swings from one disruption to the next, and institutions are rocked by bruising Europe-wide debates over the Digital Single Market.

So it is urgent to ask how the concept of intellectual property should evolve. How can we ensure the protection and remuneration of creativity; ready access and distribution to the greatest number; and the conservation of our heritage for future generations? These are the three indivisible issues that underpin an enduring cultural world.

EY's aim in this study is to analyze the changes unleashed upon the world of culture by the digital transition and measure the challenges they pose for intellectual property. The collision between culture and digital seems to have occurred in three successive waves. The technological surge was followed by a content resurgence, now being transformed by a powerful and dynamic partnership between culture and digital which now feed each other. This hybrid rests upon delicate balances and an increasingly flexible approach to intellectual property.

The digital revolution and its new economic models have called into question the nature of intellectual property in a quite unprecedented way. Every element is affected, from patents to copyright. The very notion of intellectual property is under attack as never before, by both civil society and new economic players. It is condemned as worthless, ill-adapted to new ways of collaborative working, ignored by the new economic powers, a nuisance even. Against this backdrop, the European Commission's Digital Single Market is one of the most ambitious and promising initiatives we have seen.

EY has therefore decided to stress test the agility of intellectual property in the face of the Single Digital Market, so as to break down once and for all the widespread idea that culture, digital technologies and intellectual property are somehow incompatible. We aim to assess the maturity of the digital ecosystem and seek ways to encourage the dynamism and diversity of creativity and the development of intellectual property law to protect culture in a digitized world.

This study reminds us that we can only meet the digital challenges if we advance on two fronts, anchoring the cultural world in intellectual property rights that are simultaneously agile and robust, and simultaneously enabling innovative economic models which meet the ultimate needs of consumers to flourish by providing varied, high quality cultural content.



The background of the page is a photograph of ancient stone ruins, likely from a classical civilization, under a clear blue sky. A large, fluted column stands on the left, and various stone blocks and walls are visible in the foreground and midground. A bright yellow rectangular box is superimposed on the right side of the image, containing the title and table of contents.

Cultural agility - a response to the digital revolution

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«The world of art is not one of immortality, but of metamorphosis»

André Malraux,
Artistic Creation



FORUM
D'AVIGNON
2012

Digital versus Culture: from the forecast death of the cultural industries to a new economic order

When the consumer cared more about the device than the content

The first wave of the digital revolution, based upon technological innovation, aroused a powerful fascination among consumers for digital devices (MP3 players and laptops, and later smartphones and tablets), offering them free and unlimited access to an infinite variety of cultural content. It was a technological wave, reinforced by development of the Internet, which was detrimental to the purchase of cultural content for four main reasons:

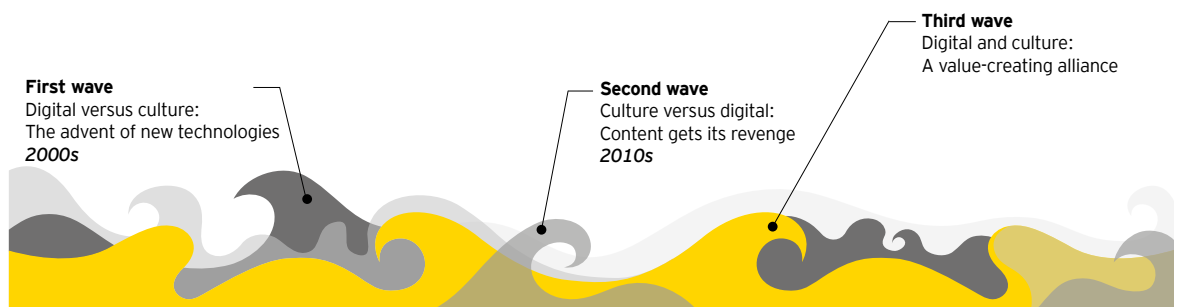
- ▶ The progressive arrival of new devices met user expectations in terms of mobility, ease of use and design, while development of the Internet led to less consumption of physical content (including photographs, CDs and DVDs)
- ▶ Spending on devices and Internet access cannibalized spending on content

- ▶ The arrival in the early 2000s of almost unlimited access to virtual cultural content, often bolstered by availability of pirated content, encouraged expectations that content would be free, and abusive behavior in respect of cultural content
- ▶ Finally, digitization of legal content was held back by fear among creators that the process would facilitate piracy.

This reduced propensity to spend on legal cultural content called the business models of entire industries in the sector brutally into question. In France, the cultural industries saw their revenues from physical content (including books, CDs and DVDs) fall by €716 million between 2011 and 2013. This was not compensated by a matching rise in revenues from sales of digital goods, such as e-books, streaming and video-on-demand¹.

¹ "Panorama des Industries Culturelles et Créatives, Création sous tension", EY, 2015

The three waves of the digital revolution

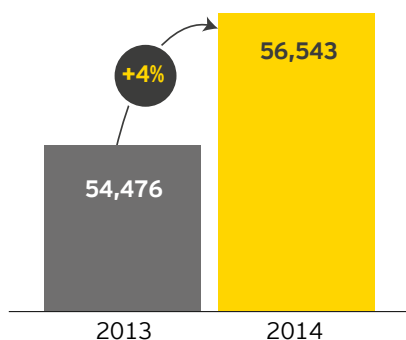


Digital-only won't happen

The digitization of cultural content and the digital revolution have not brought about a complete switch from physical to virtual. On the contrary, analysis of consumer behavior shows that physical cultural goods have not been displaced by 100% digital.

- ▶ Books: e-books are far from displacing paper. Sales of e-books in leading countries (US, UK) seem to have hit a ceiling. In the US, bookstores are reopening.
- ▶ Museums: although many works are now online, the number of museum visits continues to grow steadily. The world's 10 most-visited museums achieved a near 4% rise in visitor numbers between 2013 and 2014².

Visits (in million visitors) to the world's top 10 museums

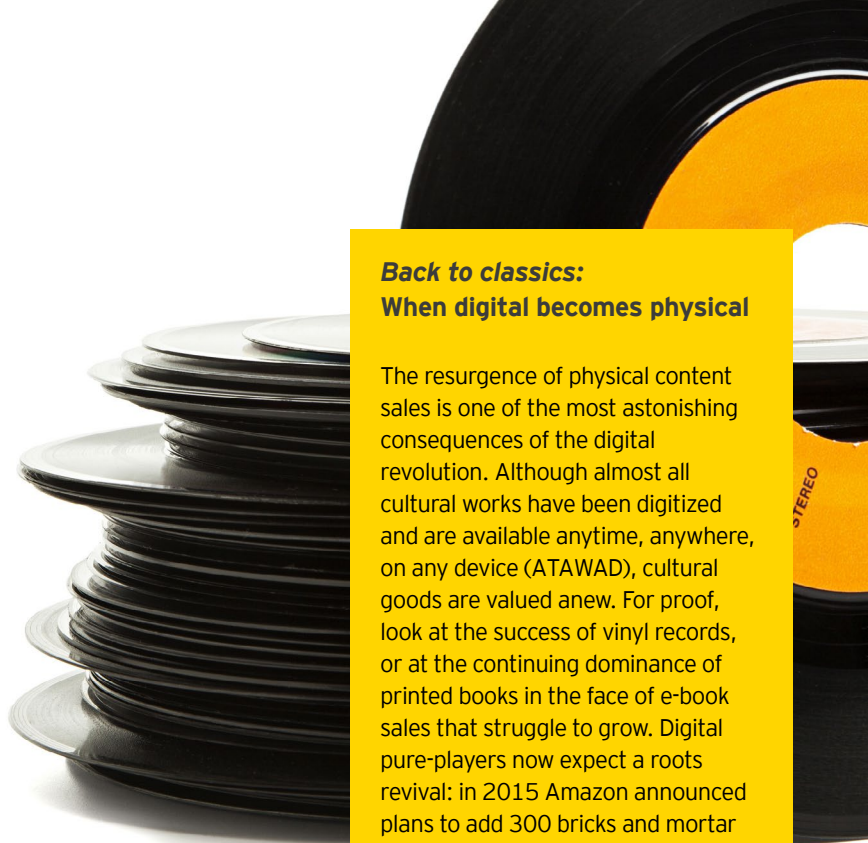


Source: The Art Newspaper, 2015

- ▶ Live performance: demand for the concert experience continues to grow. Recent years have seen a take-off in the entertainment economy, with turnover up 12% in two years³, aided by strong development of derivative products.
- ▶ The entertainment economy is also boosting the video game sector, via theme parks and player community gatherings.
- ▶ Yet even without a 100% digital transition, it's true that, as at Palmyra and other Middle-Eastern cultural jewels, digital is sometimes paradoxically a rampart against the total disappearance of the world's cultural heritage.

³ "Panorama des Industries Culturelles et Créatives, Création sous tension", EY, 2015

² The Art Newspaper, 2014 and 2015



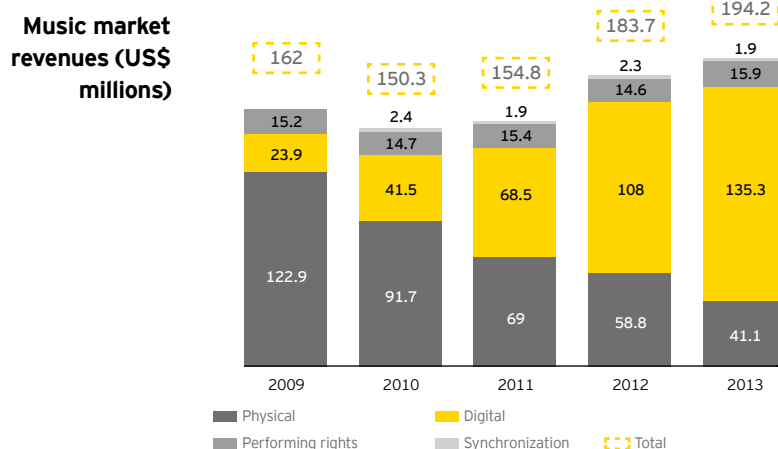
Back to classics: When digital becomes physical

The resurgence of physical content sales is one of the most astonishing consequences of the digital revolution. Although almost all cultural works have been digitized and are available anytime, anywhere, on any device (ATAWAD), cultural goods are valued anew. For proof, look at the success of vinyl records, or at the continuing dominance of printed books in the face of e-book sales that struggle to grow. Digital pure-players now expect a roots revival: in 2015 Amazon announced plans to add 300 bricks and mortar bookshops to its virtual network, after opening its first store, in Seattle, in 2014.

Even video games, a digital native, are evolving into live events, with the development of tournaments held in venues, beamed out on dedicated channels.

The resilience of physical content, linked to the introduction of viable digital business models, highlights the robustness and capacity for renewal of cultural industries that some were too quick to write off. The music industry was first and hardest hit by the digital shock. It is now being reborn with a new business model. Look at Sweden, which after a nadir in 2010 saw its music market resume growth in 2011 with revenues up 20% between 2009 and 2013 thanks to streaming. There's a similar pattern in the UK, Norway and in Germany where the music market resumed growth in 2015. A similar turnaround is expected within the next two years in France, where streaming subscribers are forecast to grow from 3 million to 8 million.

After the rain, comes the sun? Evolution of the Swedish music market



Source: IFPI, 2014

Culture versus Digital: content gets its revenge

Standardization or diversification of cultural content?

The second wave of the digital revolution, the content revolution, has shown that digital is neither the death knell of the cultural economy, nor a force which will reinforce today's economic models. On the contrary, digital has shown its power as a source of cultural transformation, both of content and of the ways in which it is produced and consumed.

Digital favors the burgeoning of creativity and broadens cultural diversity

The digital economy is heavily concentrated around a small number of producers and distributors including Google, Apple, Facebook and Amazon (GAFA), with the US and Asia occupying leading roles. Yet this has not caused the standardization of content that was feared.

Look at the scale of local cultural consumption and the importance of national markets. In the music industry, for example, the top 10 album sales are largely national products .

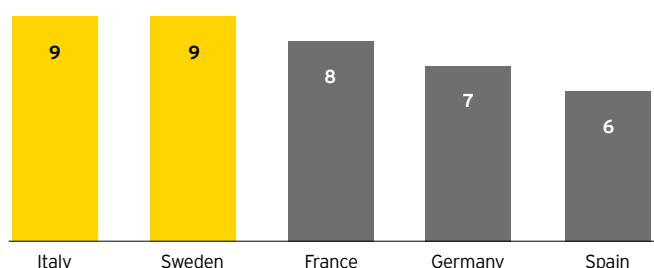
The consumer preference for national products can be seen in many cultural markets, especially in Asia where little output is designed for export. Despite some notable exceptions, such as video games and manga comics in Japan, Psy and K-Pop in South Korea, Asian content achieves limited export success, and viral success like that achieved by the song Gangnam Style are outliers which do little to standardize the consumption of cultural goods, especially in Europe.

In the audiovisual sector, internationalization and ease of access made possible by streaming sites have not led to standardization of content or tastes. The American market, still dominant, remains highly competitive. Thanks to competition, its hallmark is a race for innovation and originality which in turn generate diversity. This is expressed in the wide range of formats, content and stories delivered by a peerless community of story-tellers and scriptwriters.

This content diversity has also benefited from the emergence of a new category of authors, facilitated by changing behavior, the spread of digital devices, and broadband, which have allowed web-surfers to become creators. This trend is exemplified by Vine, a Twitter app that enables subscribers to post and exchange six second videos. Professional or amateur, anyone can easily create and share their works. The spectator is also a creator, or at least contributor.



Number of domestic albums in the top 10 sellers, 2013



Source: SNEP, IFPI 2014

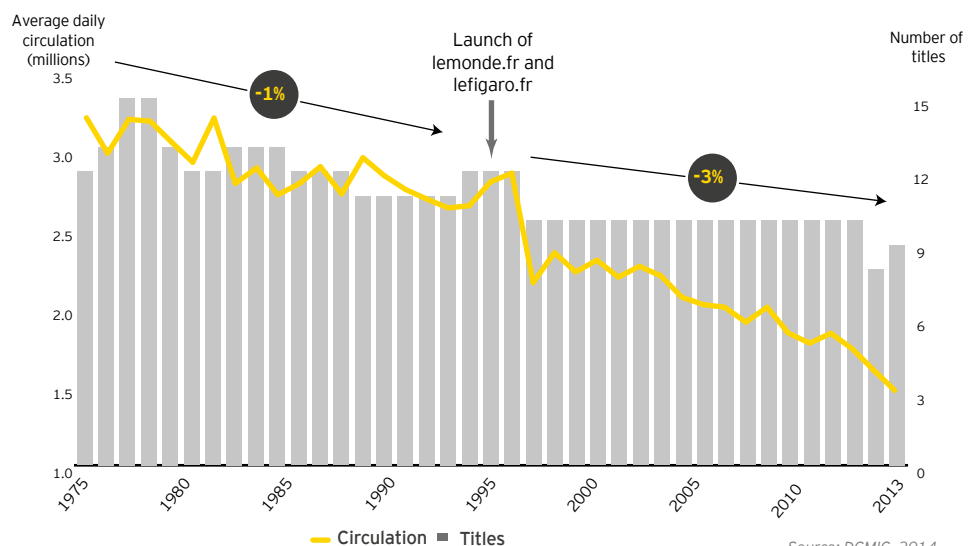
Digital: a gateway to infinite culture

Development of the digital world has enabled an extraordinary increase in access to cultural content, which is reflected both in the quantity of culture consumed and by a rise in the number of cultural consumers.

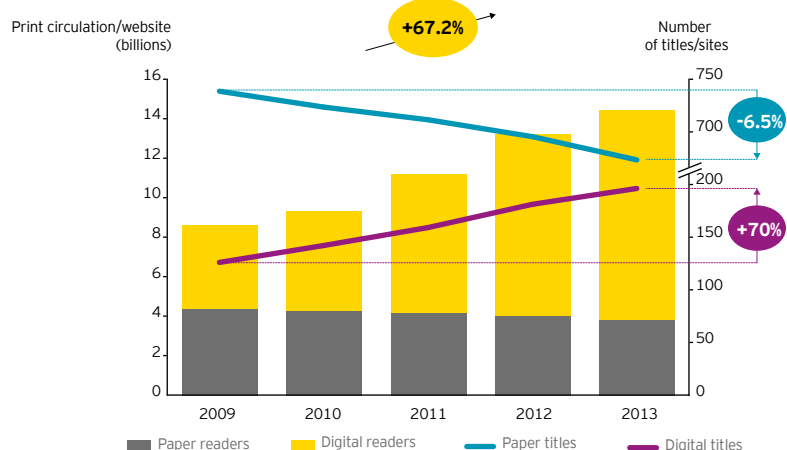
The digital transition has not only enriched what is on offer, but increased popular appetite for culture.

- ▶ In newspapers a 32% fall in turnover in France between 2000 and 2015 is reflected in both a fall in circulations and in the number of titles. The long-term decline began in the late 90s, as news began to move online.
- ▶ But although the newspapers' legacy business is in difficulty, the amount of information consumed by French readers increased by 67% between 2009 and 2013. In news transmission, digitization amply compensated for the contraction of physical distribution channels. If we look at the amount of news that consumers read, including both via physical newspapers and visits to a publication's website, news reading has increased sharply in recent years. Meantime, the closure of print titles is amply exceeded by the establishment of new online titles.
- ▶ During the same period, there has been a powerful upsurge in 24-hour news programs, on the back of the digital TV revolution and triple-play offers.
- ▶ In video games, the number of players registered in France grew by 10% between 2014 and 2015. Overall, 47% of French people say they play video games, and the average age of players is 41¹.

Average daily circulation and number of national newspapers (France)



Print circulation of general news publications and total annual visits to news websites



¹ SNJV - Sociologie - www.snjv.org/sociologie/



43 million
titles available via streaming¹



800,000 print titles available
on Amazon France²



3.5 million e-books available for
download on Kindle devices



+7% a year growth in the number of
TV series produced worldwide, 2002-2014³

¹ Snep & Ifpi - «digital music report 2015» - <http://www.snepmusique.com/wp-content/uploads/2015/04/DMR-2015-Synth%C3%A8se-.pdf>

² Amazon.com, Press section - graphic -- <http://amazon-presse.fr/Apropos-d-Amazon/Amazon-partenaire-de-la-culture.html>

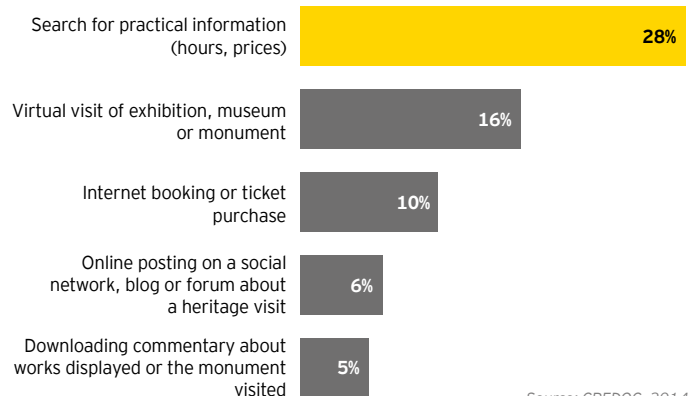
³ Data: Allociné

The digital era enables rediscovery of culture

The third wave of the digital revolution, the user revolution, makes it easier for people to discover culture, especially their heritage. This rediscovery is enabled by two characteristics of the digital transformation:

- ▶ Digital technologies provide a powerful, sought-after way for people to enrich their cultural experiences. In France 16 million people use the Internet in connection with visits to heritage sites². A study by CREDOC, a state-sponsored social monitor, found that 35% of visitors to museums, exhibitions or monuments used the Internet in connection with their visit.
- ▶ Digital technologies facilitate or protect cultural history. They help preserve culture, for example in the digitization by Google Books of academic books which are rare or difficult to access. They also enable the 3D reconstruction of archaeological sites that are lost, threatened by destruction (such as Palmyra in Syria) or enable recordings, for example of oral storytelling traditions in Polynesia.

Reasons for Internet use in relation to visiting a museum, exhibition or monument



Source: CREDOC, 2014

² Credoc.fr - juin 2012 - rapport « La visite des musées, des expositions et des monuments - Étude pour la Direction Générale des Patrimoines Département de la politique des publics »



Culture + Digital: digital, cockpit of cultural metamorphosis

Metamorphosis of creativity

The growing power of digital creation tools has multiplied our capacity to re-use, transform and distribute works. We are now seeing emerge a digital culture owned by the generation of digital natives. This phenomenon has enabled the birth of new, so-called transformative works, including:

- ▶ The mash-up, an assembly of two or more visual or audio elements within a unique work
- ▶ The remix, a modified version of a musical or audiovisual work
- ▶ The supercut, defined as an assembly of short, similar audiovisual scenes (such as a phrase or gesture)
- ▶ The lipdub, a video sequence showing several people miming to a song
- ▶ Shredding, which involves remaking or modifying a video or soundtrack, usually on a low budget.

This transformation of cultural creation requires a new perspective on or interpretation of the rules of intellectual property. Transformative work, spread by social media, is rarely driven by a direct commercial motive (though it can generate revenues) and is more often a form of homage, parody, or attempt to share or gain attention. It is usually easy and cheap to create, and can be produced with the kind of good quality photo and video equipment that is now widely available.

LE MARCHÉ DU LIVRE
A BAISSÉ DE 14%,
CEUX DE LA MUSIQUE
EST DESTÉ STABLE!

ALORS ON VA CRÉER
DES LIVRES MUSICAUX!





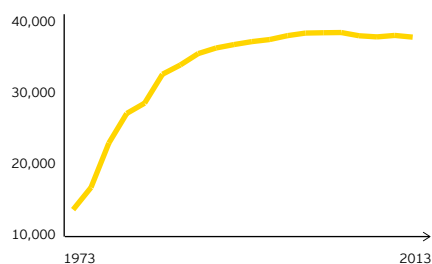
The transformation of creative trades and the distribution of cultural goods

The new cultural economy is being nourished by digital technologies which are reshaping trades, talents and distribution channels for culture.

- ▶ Trades are evolving thanks to and because of digital technologies: in the world of journalism talent continues to diversify. Although sector revenues have fallen, paradoxically, the number of journalists is unchanged. But the processes by which they research, analyze, write and distribute their work have changed enormously.

The Internet has not killed journalism

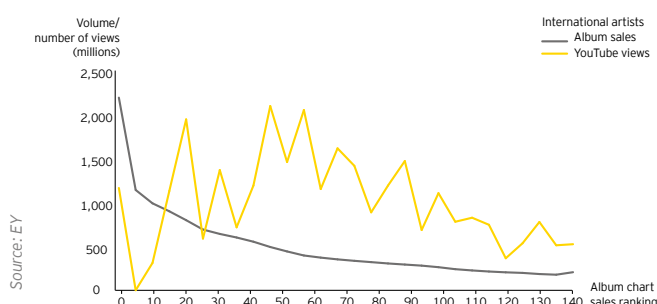
Evolution of the number of press cards in France



Source : CCIJP, 2015

- ▶ Yet the industry's concentration as titles merge has not caused viewpoints to homogenize. The journalist's trade has become more individualistic. Each must build their own brand and personal positioning, relying heavily upon digital tools including blogs, social networks and podcasts.
- ▶ It is now impossible to envisage marketing and distribution of content today without digital means. Social networks are involved in the sale and distribution of cultural content, as shown in the graphic below comparing album sales and YouTube views.

Correlation analysis between album sales and YouTube views



Source: EY

Towards revised and hybrid cultural economy models

The digital era has raised many challenges for the cultural economy, especially how to capture value and attract customers. The answers lie in developing new hybrid economic models, including digital solutions. These are an integral part of new cultural offerings, whether in consumer markets (such as legal streaming for music) or via other cultural experiences. Digital solutions writ large, including apps, augmented reality and visitor communities are also one of the biggest development levers for museums, enabling them to enrich the visitor experience and preserve an authentic artistic experience in spaces with growing numbers of visitors¹.

Electre software, used by networks of bookshops, allows booksellers to have a common catalogue. Its powerful search tool adds value for bookshops by enabling them to respond instantly to customer expectations. Connected to a shared stock control system Electre enables network members to obtain a particular book for a customer on the day or within 24 hours, matching or bettering the service offered by the online market leader which delivers within one working day.

The development of hybrid economic models matches the development of hybrid cultural practices. Netflix, the video-streaming platform, has complemented its core distribution service with original productions, becoming a distributor-creator. House of Cards, its first in-house series, tumbled barriers between digital creation and distribution and between cultural sectors when the National Portrait Gallery in Washington DC exhibited a portrait of Frank Underwood, a character in the series played by actor Kevin Spacey. This hybrid connection between the worlds of galleries and audiovisual production should be seen as both an opportunity for audiovisual and a source of original artistic content creation.

¹ Jean-Paul Clusel speaking on the program Soft Power, 10/01/2016, France Culture

What it shows:

There is a clear correlation between the sales of an album and its YouTube views. YouTube views are especially important for mid-chart albums, and less important for top 10 albums.





The agility of intellectual property to meet the Digital Single Market challenges

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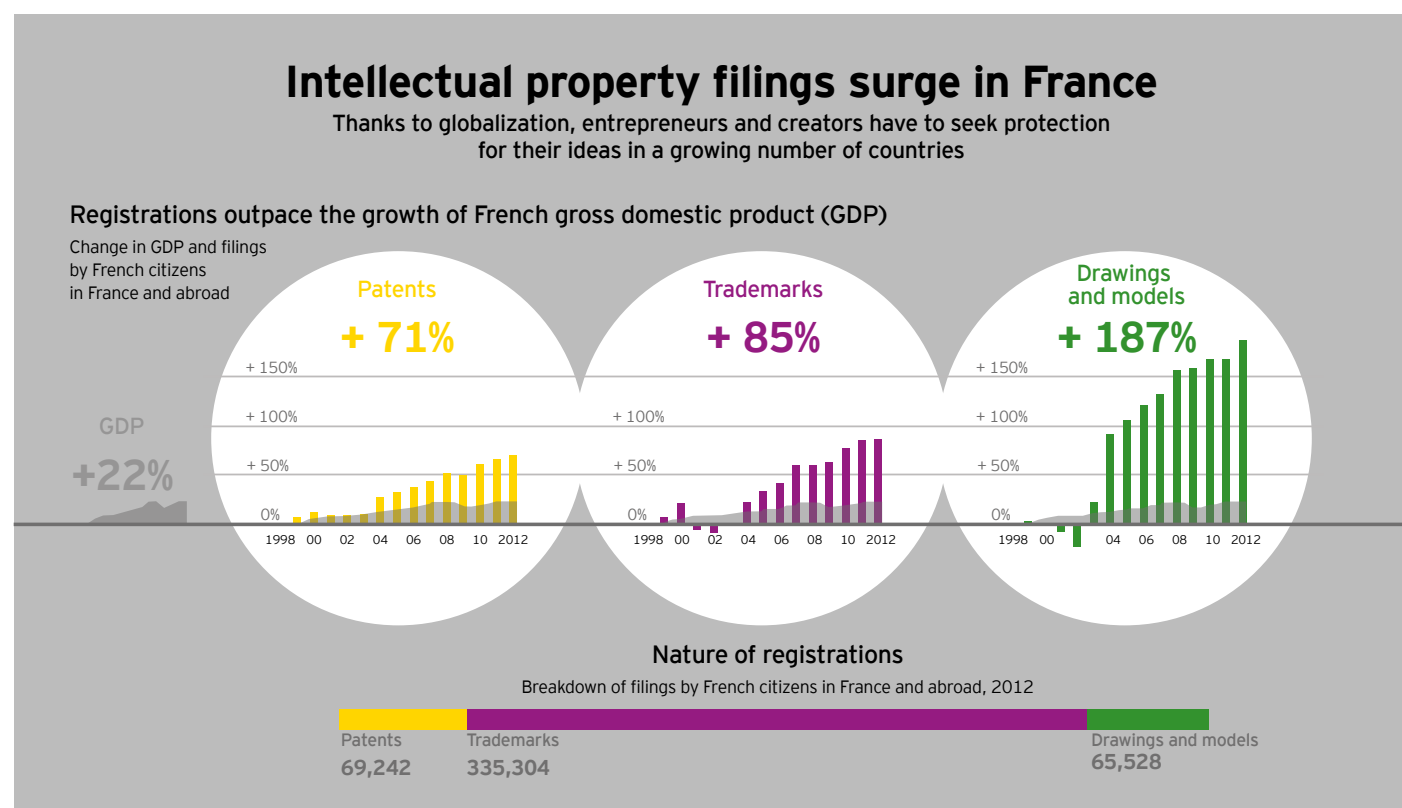
In this era of the digital revolution, the concept of intellectual property is being called into question as never before. Each and every IP right, from patents to copyright, is being challenged.

The Digital Single Market, instigated by the European Commission, is simultaneously one of the most ambitious and one of the most promising challenge for intellectual property, and in particular for copyright. .

The very notion of intellectual property is questioned, both by civil society and by the new economic giants. It is said to be pointless, ill-adapted to new collaborative development models and ignored by the new economic champions. Some think it should be filed away as a 20th Century tool.

But according to the French Patent Office (INPI), between 1998 and 2012 patent filings increased 71%, trademark filings by 85% and registrations of drawings and models by 187%¹.

1 www.inpi.fr/fr/innovation-la-galerie/data/brevets-marques-dessins-modeles-les-francais-deposent-de-plus-en-plus



Source: INPI, 2014

In its 2015 annual report, the European Patent Office highlighted the growth in patent applications in Europe, up 4.8% in 2014 to 160,000 patents².

As the President of the European Patent Office, Benoît Battistelli, remarked: "Europe continues to be a hub for innovators from all over the world, and an attractive technology market³. The introduction of the European unitary patent in coming months could accelerate this trend.

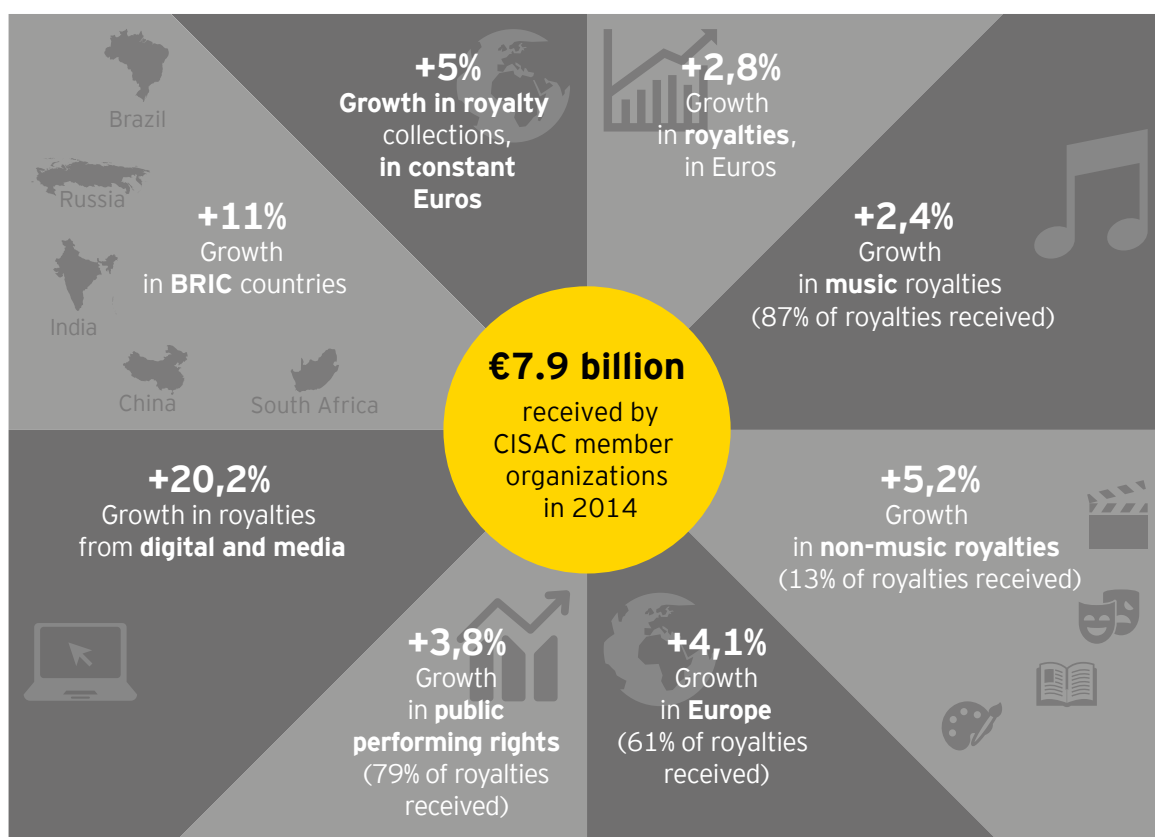
3 Source: www.lesechos.fr/industrie-services/industrie-lourde/021741196382-une-annee-2015-record-pour-les-brevets-en-europe-1204551.php

2 Source: www.epo.org/about-us/annual-reports-statistics/annual-report/2015.html

Obtaining data on the state of copyright protection is more difficult, since copyright in France does not have to be registered.

However, according to the International Confederation of Societies of Authors and Composers (CISAC) copyright collective management systems seem to be working well, especially in collecting digital earnings.

Royalty collections around the world 2014, growth year-on-year



Source: CISAC, 2014

A study by the EU's Office for Harmonization in the Internal Market (OHMI) found that:¹

- ▶ 96% of Europeans believe that IP is important because it supports innovation and creativity by rewarding inventors, creators and artists
- ▶ 86% of those questioned agree that protecting IP contributes to improving the quality of products and services
- ▶ 69% value IP because they believe it contributes to the creation of jobs and economic well-being.

So assessments on the health of intellectual property in the digital era need be read with caution. Debate about intellectual property is nevertheless essential to ensure its adaptation to the new economy.

¹ https://oami.europa.eu/ohimportal/nl/web/observatory/ip_perception



The shape of the Digital Single Market

The European Union is encouraging Member States to set up a Digital Single Market designed to reinforce, stimulate and protect Europe's cultural and creative economy.

Existing EU law on copyright in a digital environment is limited, comprising only the Information Society Directive of 22 May 2001 (Directive 2001/29/CE).

But since the directive was adopted the cultural and creative economy has changed profoundly, and an overhaul of the legal framework is appropriate. This framework was adopted before the birth of Facebook (2004), YouTube (2005) and Twitter (2006).

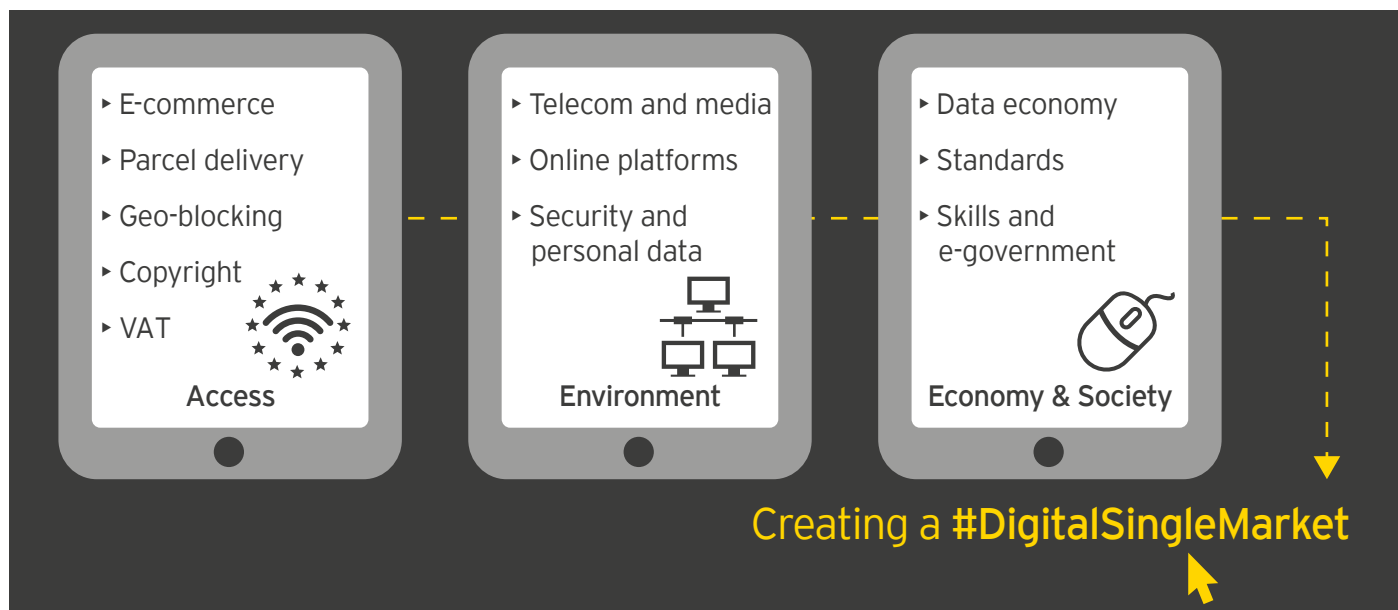
On 6 May 2015 the European Commission unveiled the thrust of its drive to achieve a Digital Single Market within the EU by 2020. Its aim: to unite the 28 national markets and strengthen the EU's cultural economy in the face of huge US and Chinese companies. Some months earlier, Julia Reda, a member of the European Parliament for the Pirate Party, delivered a draft report on the implementation of Directive 2001/29, the cornerstone of European copyright legislation.

The draft Reda Report aimed to embrace the two major issues raised by the idea of a Digital Single Market: adding to European integration by creating a pan-European copyright, and adapting the legal framework to the digital revolution by liberalizing some content usage.

Member states were already being confronted with the growing challenge of finding an appropriate balance between safeguarding the great liberties (freedom of expression, free movement of goods) and of preserving intellectual property and cultural heritage.

In her draft report, Ms Reda proposed several radical reforms, including the creation of a single European copyright, reducing the duration of rights, and harmonizing rules governing exceptions across Europe. The Reda draft had considerable impact, especially in France. Though there were some strong criticisms, sometimes well-founded, the report nonetheless opened a debate within civil society about copyright. This ambitious and somewhat provocative project was then heavily reshaped by the European Parliament, which produced a more widely-supported text. But subsequently, in a Communication dated 9 December 2015, the European Commission included some proposals from the Reda report in a new, more ambitious set of proposals for a Digital Single Market.

Debates on the future of copyright now take place at a EU level. That's largely because intellectual property and heritage conservation have always been foundations of European cultural policy. From the very beginning of EU construction, member states have made clear their desire to promote cultural and linguistic diversity and to ensure that Europe's cultural heritage is preserved and developed.



Source: European Commission - Press release

"A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen". 6 mai 2015 (http://europa.eu/rapid/press-release_IP-15-4919_en.htm)

Completing the Digital Single Market requires the ongoing search for equilibrium delicate balance. It offers a chance for member states to develop a flexible economic framework within the world's second-largest market after Asia.

The rules are changing in France too

The "Lescure" Report on the future of the French so-called cultural exception in a digital era, ordered by the Ministry of Culture from journalist and TV executive Pierre Lescure, set out back in 2013 a full panorama of the challenges posed to copyright by digital transformation. It has remained a major reference for any lawyer specializing in intellectual property.

France's Conseil Supérieur de la Propriété Littéraire et Artistique (Council for Literary and Artistic Property) has also been working on the future of Copyright in a digital society. A study lead by Professor Pierre Sirinelli looked at core problems posed by cloud computing, online references to works, and the "second life" of the digital cultural property. These too are issues when adapting intellectual property laws to create a Digital Single Market.

As we write these words, the first reforms are taking shape, in the form of France's law pour une République Numérique (For a Digital Republic¹) brought forward by the Secretary of State responsible for digital matters, and the draft law sur la liberté de création, de l'architecture et du patrimoine (For the freedom of creation, architecture and heritage) filed by the Culture Ministry. These two drafts try, through parliamentary amendments, to align French legislation with European Commission objectives.

Article 167 of the Lisbon Treaty, on the functioning of the European Union

In Title XIII (Culture) the Lisbon Treaty provides that action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- «Improvement of the knowledge and dissemination of the culture and history of the European peoples,
- Conservation and safeguarding of cultural heritage of European significance,
- Non-commercial cultural exchanges,
- Artistic and literary creation, including in the audiovisual sector.»

However, EU law approaches intellectual property from the standpoint of its overriding governing principles, notably the free movement of people, goods and capital.

But as draft EU regulations on content portability show, the EU's ambition for a single market tends to put the consumer or user centre-stage. It is up to Member States to ensure that these changes do not override the interest of rights holders and the ecosystems that ensure the financing and protection of creative works.

¹ Draft law sent to Senate on 26 January 2016. Details (in French): <http://www.senat.fr/dossier-legislatif/pjl15-325.html>



Common misunderstandings about the Digital Single Market

To analyze issues surrounding the Digital Single Market we need to set aside some received ideas about intellectual property law.

The idea of a legal vacuum

One common view is that intellectual property law simply made no provision for the digital environment and that new practices exposed a legal vacuum. But legal vacuums are less common than claimed. Intellectual property has demonstrated its agility and its ability to adapt to new means of communication. French copyright, for example, covers every creative work, whatever its form, merit or purpose, provided it is sufficiently original and formatted. That extends to functional creations, such as software, which can hardly be protected by patents.

Similarly, the notion of *composite work* embraces transformative works without much difficulty.

The scope of intellectual property is still broad enough to cover new creations, inventions and new forms of use.

At last, the clever and balanced reform of publishing contracts achieved by the French Statute of 12 November 2014 is an example of the way contractual relations between authors and publishers can be adapted to the digital age by modifying historic practices. This Statute was developed after lengthy consultations between representatives of publishers and authors under the guidance of the Culture Ministry. In particular, this text provides with an obligation for the publisher to ensure permanent exploitation of both printed and digital works, contains clauses that enable contractual conditions to be renegotiated, and provides new possibilities to terminate contracts.

Intellectual property kills creativity and freedom of expression

Another common false belief is that intellectual property kills creativity. The digital revolution is sometimes seen as a chance to get rid of this threat.

In reality, creativity would exist with or without intellectual property. But except for cultural patronage, the ecosystems that finance creativity rely upon a fragile balance between private rights and freedom of expression. Exploiting what is in the public domain does not necessarily imply to override intellectual property.

The “absolute” powers copyright would confer upon the creator are also criticized for paralyzing freedom of expression. But analysis of recent case law shows on the contrary that courts are constantly seeking a fair balance between copyright and freedom of expression.

Although Intellectual property is protected by Article 17, Paragraph 2 of the European Union’s Charter of Fundamental Rights the European Court of Justice considers that this is not an intangible right, whose protection must be absolute. Rather, the Court recently ruled that: “the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights¹.”

¹ Source: CJUE, 24 nov. 2011, aff. C-70/10, Scarlett Extended SA c/ Sté belge des auteurs, compositeurs et éditeurs (SCRL): JurisData n° 2011-032131 ; Comm. Com. Electr. 2012, com. 63, note A.Debet.



Fair Use

Fair use is a system of open exceptions, left to the discretion of the judge, based on four criteria defined by Section 107 of Title 17 of the U.S. Code, which deals with copyright. Pursuant to this text, in determining whether the use made of a work fall within the scope of fair use the judges must take into account:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
2. The nature of the copyrighted work. (For example, the usage will be more easily considered a fair use if it borrows from a utilitarian usage, rather than from a work of pure art).
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.

By allowing the judge to determine the scope of copyright exceptions, the U.S. system creates important judicial uncertainty. It also leaves grey areas not yet filled-in by case law

In order to lower this uncertainty, a regulatory body, the US Copyright Office, will now be responsible for defining in advance certain exceptions to copyright provisions.

In a ruling issued on 15 May 2015² based on Article 10 Section 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the French Supreme Court (Cour de Cassation) urged judges ruling on cases involving alleged breaches of copyright to find a “fair balance” between copyright and the freedom of expression. Thus even when copyright infringement is proved (and that no copyright exceptions apply) judges should take into account the freedom of expression of the infringer and exclude penalties, sanctions or remedies.

Intellectual property is not Euro-compatible

The idea that intellectual property rights within the Digital Single Market can only exist at national level is also false. The contribution of the 2001/29 Directive and of European Court of Justice case law illustrates that intellectual property is “Euro-compatible”. Though criticized for its liberal positions, the ECJ has helped Member State jurisdictions to understand and develop complex concepts such as the principle of exhaustion of rights within the EU or the definition of public communication.

Every misunderstanding bears witness to a lack of clarity. Intellectual property law remains a complex matter. Too often, it is seen as an obstacle to creativity or an inappropriate method of regulation, which has been overtaken by technological advance and provides excessive protection for rights-holders.

This lack of readability is a major issue for users, who have difficulties to understand the outlines and the scope of intellectual property rights. It is therefore common to hear, for example, that “viral” contents can be redistributed without any authorization, or, on the contrary, that copyright blocks any use or reference to works.

Said mistrust is reinforced by the behavior of certain economic players, who seek to establish artificially private rights over material in the public domain (copyfraud), or to block intellectual property rights without any intention to use it, with the sole aim of perceiving royalties (patent-trolling / copyright-trolling).

The lack of clarity of national laws is sometimes compounded by a distorted view of the U.S. system and its sacrosanct principle of “fair use”. We should not forget that the concept of fair use is also subject to criticism in the U.S., particularly because of the judicial uncertainty which it causes by giving ample discretion to the judge in each case - which can backfire on those who replicate works.

Though it is useful to seek inspiration from existing legislative models it is wise to remember that judicial concepts always spring from a context, history and judicial tradition.

² Source: Cass 1re Civ, 15 mai 2015, n°13-27.391, P. Klasen c/ A. Malka: JurisData n°2015-011061, Comm. Comm. Elect. N°7, Juillet 2015, comm. 55 (C. Caron).



The real challenges of the Digital Single Market: the copyright's “stress test”

Civil society now takes a close interest in debates about intellectual property rights, witness the success of public consultations over France's Digital law and discussions about the Reda report.

But that is no reason to take seriously the claims of some of those seeking to abolish copyright that “intellectual property is theft”¹.

On the contrary, the digital transition and the EU legal overhaul are a chance to restore confidence in the rule of law. This means paying close attention to all economic players, by keeping in mind three imperatives:

- ▶ Creators must be protected and fairly rewarded
- ▶ Access to information and culture must be assured
- ▶ Our cultural heritage must be protected



¹ Source: «La propriété intellectuelle, c'est le vol !» Joost Smiers, le Monde Diplomatique, septembre 2001 <http://www.monde-diplomatique.fr/2001/09/SMIERS/8040>



The territoriality of intellectual property rights

The draft EU Regulation on cross-border portability of online content services in the internal market² published on 9 December 2015 has been an opportunity for the Commission to renew its ambitions regarding copyright. Though it may be too early for a Single European Copyright Title, ultimately the Commission seeks complete harmonization of copyright legislation within the European Union.

EU unique titles already exist for trademarks, with the recent European Trademark package. Harmonization of patents will follow, with a Unitary European Patent which from 2017 on will provide a uniform protection for all Member states.

But such harmonized protection will be more difficult to implement for copyright.

Some economic sectors are based on a national approach of copyright. That's especially true of the French cinema industry which relies upon a national distribution system. This makes it absurd to think of the cultural economy as a uniform, and easy to recast via a single legislative framework. It is vital to take account of the peculiarities of each sector.

That's why the European Commission's approach is based on a policy of small steps. Only a well thought-through and cautious policy will make it possible to achieve an optimal copyright law harmonization in the single market

Before breaking down national copyright borders, it is essential to agree on a common European cultural policy and on appropriate economic models.

² http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2015/0627/COM_COM%282015%290627_EN.pdf

Copyright exceptions

The lack of an EU definition of what is covered by copyright, and of a harmonized list of copyright exceptions, is often seen as a major obstacle to the Digital Single Market.

Directive 2001/29 provided only for an optional list of exceptions, leaving Member States to choose the scope of their national rights.

In its 9 December 2015 Communication, the European Commission demonstrated its desire to harmonize legislation and make some exceptions compulsory.

Access to works for disabled people

The European Commission has called for ratification of the Marrakesh Treaty signed in 2013 which the European Union has yet to implement. This treaty allows those who have acquired legal copies of works to replicate them in formats accessible to people who are blind or visually-impaired if such formats are not commercially available in accessible conditions.

Panorama and fortuitous inclusion

The European Commission intends to introduce throughout the European Union a harmonized so-called Panorama exception, covering works made to be located in public places. This proposal was already contained in the first draft of the Reda report, but left out of the final version.

The absence of panorama exception in French law triggered concerns. Therefore, when the French National Assembly approved the Law on a Digital Republic (Loi sur la République Numérique) on 26 January 2016 members included a Panorama exception for “copies and representations of architectural and sculptural works, placed permanently in public places, made by individuals but not for profit” (Article 18 ter).

The scope of this exception is however very limited. It applies only to architectural works and sculptures, and excludes all other creative works such as paintings, photographs and graffiti. And it applies only to works placed permanently in public places and “made by individuals but not for profit”. Not much remains of the Panorama exception proposed in the 2001/29 Directive.

In that regard, another exception, created by Case Law deserves attention: the so-called “fortuitous inclusion” or “background” exception, which allows the reproduction of works in public places which are fleetingly captured by a video camera or appear in a photograph but do not cause the eye to linger. This exception, which is more flexible than the future Panorama exception, is not confined to reproduction by individuals, and therefore allows video-makers to work in public places. This exception is particularly important for the audiovisual realm.

Its adoption across Member States would provide better legal protection for audiovisual sector professionals.

New uses: the example of data mining

Data mining is a big theme in the digital revolution. It covers the systems that automatically collect and analyze data from digital content. Like machine learning, data mining is billed as a major innovation. It is already energizing most sectors and has considerable potential for stimulating growth.

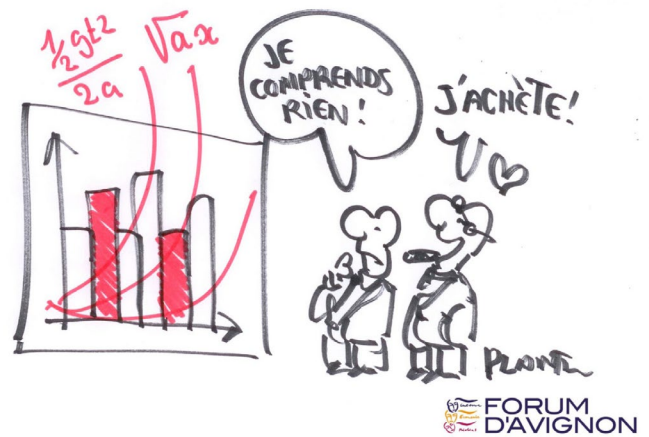
So far as copyright is concerned, although data mining involves collection of unformatted bulk data, it can involve not just accessing documents but also copying them, even if temporarily.

In its roadmap of 9 December 2015, the European Commission announced its intention to free data mining from unintended constraints that could act as brakes on research and innovation.

France immediately followed the Commission’s lead, by including a clause in its draft Digital Republic law that allows digital copying for the purpose of exploring text and data, provided the originals are lawfully obtained. However this exception is strictly limited to the needs of public research, and excludes all commercial use.

Because of demand from part of the scientific community, there are already plans to reduce further barriers that might block data mining.

These issues will be examined by a working party lead by the President of the Groupement Français des Industriels et de l’Information (GFII) at the behest of the Culture Ministry and the Secretariat of State for Higher Education.



Enable innovative enterprises to manage rights effectively during collaborative projects

Adapting copyright to the Digital Single Market would be an opportunity to clarify the chain of titles on original works that incorporate multiple contributions. In that regard, today's French copyright laws are ill-suited to collaborative working.

When a work is the fruit of multiple contributions, in France two opposed regimes are likely to apply: the collective works regime and the collaborative work regime.

The collective works regime, set out in L.113-2 al.3 of the French Code of Intellectual Property Rights, allows the person or company who initiates and publishes in its own name a work to own, from the outset, the copyright over contributions by co-authors.

The collective works regime constitutes an exception to the ordinary-law scheme, applicable to collaborative works, which provides that each author remain the sole owner of all rights over his or her contribution.

Though the collective work regime is attractive, it applies only under strict conditions.

Firstly, pursuant to consistent Case Law, it does not apply to audiovisual works. Secondly, to qualify for the collective works regime, the beneficiary must be able to show that the contributions of the authors "are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created".

Software creations by employees

French Intellectual Property Code contains specific provisions for software written by employees. Article L.113-9 of the Intellectual Property Code gives employers copyright for software written by employees as part of their employment, in accordance with instructions given to them.

If said provision could be extended to other creative work by employees, this exception to the rules governing collaborative work would provide employers with the legal flexibility and security needed to develop their businesses.

In reality these criteria, applied case-by-case by the courts, rarely overlap, even where a clear connection is established between a creative or scientific director and those carrying out the detailed work.

Entrepreneurs who manage and finance creative projects need more legal certainty when it comes to copyright ownership rules, in order to secure their chain of titles properly.

Improved legal certainty would reduce the competitive disadvantage suffered by French creative individuals and enterprises, compared to US companies, which benefit from the concept of "work-made-for-hire".

Similarly, for cases where the collective work rules do not apply, it would be good to overhaul French rules governing the transfer of copyright from employees to employer. These are ill-adapted to the challenges faced by innovative enterprises.

Patent law gives employers the rights over inventions discovered by employees in the course of their work, and preferential rights over certain inventions that were not part of their initial mission (so called attributable inventions).

By comparison, copyright law is notably inflexible, except in respect of the automatic transfer to an employer of rights over software developed by an employee (see box).

Under French law, the signature of an employment contract does not carry transfer of copyright to the employer, nor can said contract stipulate that copyright over future inventions will belong to the employer. So these rights are normally covered by successive contracts, dependent upon how original the employee's contributions are thought to be. This copyright regime is therefore ill-suited to the needs of companies, and needs to be simplified and clarified.

The future of private copy in the cloud computing era

French law provides consumers with the right to make personal copies of music, film and other creative works since 1985. To compensate the loss suffered by right holders, a specific tax ("for private copy") has been created on the sale of recording devices, such as smartphones.

Similar regimes were adopted in many other EU Member States in diverse forms. However, these compensation mechanisms are now being called into question across Europe. An attempt by the UK government to introduce a law allowing personal copies was declared unlawful by the High Court of Justice on 17 July 2015, on the grounds that it failed to provide a balancing mechanism to compensate copyright holders³.

Moreover, thanks to the rapid development of cloud computing, consumers often no longer need to buy the devices upon which copies are stored. So the system of taxing copying and storage devices needs to be modified.

In its Communication of 9 December 2015 the European Commission set out its desire to overhaul the personal copy system and its compensation mechanism, to make it more transparent and ensure equitable remuneration.

In that regard, French draft law for the freedom of creation, architecture and heritage contains provisions which aim at reforming the private copy system and extend it to cloud-based copies.

This amendment would allow private copy provisions to be substantially extended and in particular to cover online aggregation sites. As a corollary, it would increase the amount of compensation collected for copyright holders.

Exhaustion of rights and the new public

The necessary clarification of the concept of exhaustion of rights

The concept of exhaustion of distribution rights was drawn up in the days when users still owned the device which contained the copyright material. The law's aim was to ensure that copyright owners would not obstruct the free movement of goods principle. Pursuant to this principle, Copyright owners cannot object to the resale of the devices they agreed to commercialize in the first place. This principle was upheld in the Directive of 14 May 1991 relating to the legal protection of computer programs .

It might have been expected that the digital revolution would cause the principle of exhaustion to disappear. Instead, the principle has been adapted to digital economy by the European Court of Justice in the UsedSoft ruling of 3 July 2012⁴. In this ruling, the European Court of Justice extended the principle of exhaustion not just to software sold on physical recording devices, but also to software downloaded from online services. In principle, it gives the holder of a license of use the right to transfer that license to any third party of its choice.

Legally, the precedent set by the UsedSoft ruling applies only within the context of a special legislation applicable to computer programs. But it raises the possibility that sales of pre-owned software could cannibalize sales of new software.

The scope and limits of the principle of exhaustion should therefore be clarified.

³ High Court quashes regulations allowing people to copy CDs, The Guardian, 17 July 2015

⁴ ECJ UsedSoft GmbH / Oracle International Corp., aff C-128/11.

Hyperlinks: defining what constitutes a “new audience”

The viral diffusion of works on the Internet also crops up over the use of hyperlinks and so-called framing.

In its Svensson ruling of 13 February 2014⁵, the European Court of Justice ruled that inserting a hypertext link on a website to direct site visitors to a work lawfully posted online on another website does not constitute an act of communication to the public, because it does not target a new audience.

Later, in its BestWater ruling of 21 October 2014⁶, the Court extended its reasoning to the inclusion by a third party on its website, using framing (embedded video) of a video originally posted online by the copyright holders.

Framing involves creating a window on a website that allows to view content hosted on another site, such as YouTube or Instagram. Most websites offer this function via the </> icons



or via a URL link which can be integrated on a website or social network page. The original video content is neither copied, nor reproduced, nor moved. Yet it is accessible from a new page.

Framing therefore involves only the right to communicate to the public, and not the right to reproduce works.

According to the European Court of Justice, once a copyright holder has posted a work online, without restrictions, he cannot object if a third party uses framing to communicate it to the public via a different site.

The Court's position has been strongly criticized by many copyright specialists for two reasons. First, it would be incompatible with the definition of public communication enshrined in the Berne Convention, the World Intellectual Property Organization (WIPO) treaties, and Directive 2001/29, which make no reference to this notion. Second, it may extend the principle of exhaustion to the right of communication to the public.

In view of the above, the scope of the “new audience” criteria needs urgent clarification. The European Court of Justice has recently been called upon to examine other related issues by the Netherlands high court, in the case of GS Media.

In this new case, the Court will have to decide whether the new audience criteria can be applied to hyperlinks which directs users to works posted without prior authorization of rights owners⁷.

Subsequent to the Svensson and BestWater judgements, France's Council for Literary and Artistic Property on 5 February 2016 set up a commission to redefine France's law on public communication to adapt it to new activities that have come into being since the adoption of Directive 2001/29.

⁷ Request for a judicial opinion filed by the Hoge Raad der Nederlanden (Netherlands) 7 April 2015 - GS Media BV / Sanoma Media Netherlands BV e.a. (Affaire C-160/15) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164772&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=447587>

⁵ ECJ 13 February 2014 C-466/12 Svensson e.a. c/ Retriever Sverige AB, Comm. Com. Electr. 2014, comm. 34, C. Caron., Propr. Intell. 2014, p. 165, obs. A. Lucas

⁶ ECJ 21 October 2014, C-348-13 BestWater International GmbH v Michael Mebes and Stefan Potsch.



The commons and the public domain

Commons and intellectual property

During consultations over France's proposed Digital Republic law, several organizations proposed an amendment designed to provide a positive definition for "common knowledge" (the commons).

Would fall within the scope of commons works in the public domain, works information lawfully made public, or administrative documents made publicly available. These organizations proposed expressly defining this "public knowledge" as "public goods" (res communes) in the sense of Article 714 of the French Civil Code, which therefore cannot be appropriated - in the same category, then, as the air and seawater.

Though this amendment was finally considered too imprecise, unnecessary and potentially hazardous to be adopted, it nonetheless demonstrates awareness that the public domain can also be a source of creativity and innovation.



The three sources of the flow of commons

Nature: air, water, photosynthesis, mother earth, electromagnetic waves, DNA, minerals, animals, plants, antibiotics, oceans, fisheries, aquifers, silence, tropical zones, forests, rivers, seas, solar energy, seeds

Culture: language, philosophy, physique, musical instruments, classical music, jazz, dance, hip-hop, astronomy, electronics, the Internet, radio frequencies, medicine, biology, religion, mathematics, chemistry, open-source software

Community: streets, playgrounds, calendars, universities, libraries, social security, laws accountancy rules, capital markets, museums, institutions, politics, money, commodity markets, flea markets, Craigslist, public holidays

Commons

Source: Apitux, d'après Peter Barnes



Open Data

Several initiatives had already been launched to facilitate access to public data, notably with the EU's PSI Directive of 17 November 2003¹ on the re-use of public data and the INSPIRE Directive of 2007².

To assist this opening-up of public data, France's proposed Digital Republic law aims to introduce an exception to the sui generis rights of database producers when they are public.

But this opening-up cannot happen regardless of existing ecosystems. This initiative, which extends the nature of the public domain and public service, must be accompanied by support for economic players who earned a living from these data before they were liberalized.

The proposed Digital Republic law also intends to ensure that research publications that are largely financed by public funds be made available free online by their authors, with a 6 month delay for scientific publications and a 12 month delay for social and human sciences.

The battle against private appropriation of the public domain

During the debate on the proposed Digital Republic law an amendment has been discussed to fight against the expropriation of the public domain by certain economic actors. Such expropriation is sometimes described as copyfraud by public domain supporters.

Individuals or institutions sometimes block the free reuse of certain works although said works are in the public domain

Though an amendment targeting copyfraud was ultimately rejected, it seems important to highlight the fact that copyfraud creates a legal uncertainty for users and is thus harmful to intellectual property. Several measures could channel copyright holder claims and prevent abuses. For example, the creation of a "meta" search engine of all works within the public domain would ensure legal certainty for all users.

Duration of copyright protection

Designing a system of intellectual property appropriate to the digital era offers a chance to clarify and harmonize the duration of protection.

Today, calculating the duration of protection for content is a real challenge for users. The rules differ by territory, the nature of the rights, the nature of the content, and their publication date. It is extremely difficult for those involved to know the duration of rights relating to a creative work, a recording or a performance. In France, these difficulties are compounded by an obscure system of extensions under which, for example, the works of the author Antoine de Saint Exupéry are in the public domain everywhere except in France, where copyright will remain in force until 2033.

One very recent example of the difficulties of knowing the duration of rights against an international backdrop would be Wikimedia Foundation's decision to withdraw the Dutch version of the *Journal of Anne Frank* from the online library Wikisource because this version will not enter the public domain in the United States until 2042, some 95 years after its first publication in 1947.

There is widespread criticism that copyright protection lasts too long, and is too fragmented and ill-adapted to new uses. Yet paradoxically, it seems that legislators are tending to extend the duration of copyright protection, witness the EU's Directive 2011/77/UE dated 27 September 2011³. This directive extended copyright protection for musical artists and record producers from 50 years to 70 years from the first phonogram communication to the public.

There are several arguments in favor of reducing the duration of literary and artistic copyright in Europe. Since the French Revolution, the duration of copyright has increased from 5 to 70 years after the death of the author. Yet meantime, copyright has progressively been extended to utilitarian works, such as software and marketing tools, whose exploitation cycles are becoming ever-shorter.

This repeated extension of post mortem copyright duration, in line with the interests of a handful of copyright holders, does not encourage creativity and contributes to civil society skepticism

¹ Directive 2003/98/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 November 2003 on the re-use of public sector information

² Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)

³ Directive 2011/77/EU on the term of protection of copyright and certain related rights amended Directive 2006/116/EC and extended copyright terms of recordings from 50 to 70 years

about intellectual property. Copyright confers a monopoly which must be balanced by the freedom of trade and expression. If copyright is to preserve its legitimacy, and not be considered as a privilege of inheritance, it seems imperative that it should not simply be a form of annuity.

Europe could take the lead by markedly reducing the duration of copyright, in contrast to the United States, without harming the economic viability of copyright holders. This reduction in copyright duration would be confined to inherited rights and would not affect creators' moral rights which remain irrevocable.

The progressive harmonization of jurisdictions

Creating a Digital Single Market also implies to harmonize jurisdictions within the European Union.

This challenge is of utmost importance with respect to copyright infringement on the Internet.

In that regard, two approaches are competing. Those in favor of the destination criterion argue that it must be shown that the website accused is designed to serve Internet users in the country concerned, that is, that there exists a "sufficient, substantial and significant" link between the facts alleged and the territory of the Member State. Meantime those favoring the accessibility criterion believe that it is sufficient to establish that the site is accessible by Internet users from the Member State for the Member State to be a competent jurisdiction.

At the EU level, the European Court of Justice in its Pinckney ruling⁴ of 3 October 2013 and later in its Hejduk ruling⁵ of 22 January 2015, enshrined the accessibility criteria. In essence, the Member State jurisdiction is competent to rule on the damage caused – on its own territory only – by the distribution of counterfeit content whenever the site is accessible from its territory. The site does not need to have sought an audience in the territory concerned. This case law makes it easier for copyright holders to respond if rights are breached online whilst simultaneously limiting the scope of jurisdictions (except those where the offence occurred) to considering the damage caused within their jurisdiction.

This case law also shows the progressive, limited but real harmonization of jurisdictions within the European Union.

Reminder - Duration of copyright protection : some international comparisons

In European Union countries copyright normally lasts for 70 years from the death of the author. In the United States, protection doesn't expire until 120 years after the work was created, or 95 years after publication, resulting in protection normally lasting much longer in the US.

Source: «La propriété intellectuelle à l'ère du numérique», EY, 2012

⁴ Source: CJUE 3 octobre 2013 Pinckney c. KDG Mediatech (Aff. C-170/12)

⁵ Source: CJUE, 22 janvier 2015, aff. C-441/13

Preserving our heritage: making the new economic actors responsible

The hyper-concentration of information in the hands of a few private companies must trigger careful consideration of how best to preserve our cultural heritage.

As Internet users substitute cloud storage for capacity in personal devices, the big Internet platforms are becoming the de facto repositories of the world's digital heritage. Yet their activities are governed only by the laws of the market: they have no obligation to conserve or protect the integrity of the documents they host.

We need to consider what must be done to conserve this heritage. Such a policy could, for example, involve placing obligations on hosting and storage companies, requiring them to keep the world's digital heritage intact, so that it can benefit future generations. But we would have to find a balance between financing such a policy and ensuring access to public domain works.

Though intellectual property has proved agile in the face of digital development, some major challenges have still to be overcome. We cannot leave all the reforms to the European Commission. Economic players and civil society alike must understand the real issues confronting the Digital Single Market and be involved in the legislative process which will shape what happens for years to come.

The online public consultations on the Digital Single Market recently launched by the Commission is a significant step forward in that regard.







Culture's place at the heart of the collaborative economy

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The world of culture has shown impressive agility in the face of digital disruption, both in its business models and in the development of legal protection. Changing consumer behavior and new distribution models for artistic production have together driven the various cultural sectors at the heart of the new, so-called sharing economy. Sharing and distribution have become so easy as to become a cultural trend.

This multi-strand development raises three questions:

- ▶ Is culture threatened by Uberization, as the transport and hotel sectors are?
- ▶ How should we adapt economic and legal models to the using and sharing economy?
- ▶ In this new economy, what happens to culture when it loses intellectual protection and becomes a heritage asset?

Creativity can't be Uberized, but its revenues can

A creative work is intimately linked to its creator and remains their creation so it is difficult to talk about Uberizing culture itself. Yet revenues from creativity can be captured by digital platforms, which skim off the value added and short-circuit traditional intermediaries such as publishers, producers and distribution networks.

In the short term, the Uberization of some traditional intermediaries can add value for the user (speeding access to cultural content, providing personal recommendations, or reducing its cost). Yet their disappearance and questions over the traditional financing chain for cultural players risks causing a remuneration crisis for the act of creation.

But this trend is not inevitable. The evolution of cultural industry services and operating models brought about by the arrival of new players such as Google, Apple, Facebook and Amazon (GAFA) can provide opportunities for cultural industry and consumers alike.

Opportunity knocks: six challenges and proposals from EY:

1 Bring together intermediaries to develop a novel combined offer that competes with the innovations of GAFA

Bookshops have been hard hit by the emergence of Amazon, the global online retailer. Their customers have moved to online platforms that offer a massive catalogue and almost-free delivery. In response to this threat, French booksellers got together to collectively buy and develop the Electre software, creating a common catalogue that can be searched according to very wide criteria. Responding instantly to customer requests, it combines the stocks of bookstores within a region (which used to be fierce competitors) and enables them to compete with Amazon on speed of delivery. An organizational and distribution transformation can be more effective in combating Uberization than regulation or government restrictions.

What is Uberization?

Uberization was one of the most striking neologisms of 2015, but its ultimate meaning has yet to be defined. The concept can include the convergence of several factors:

- ▶ The capture of traditional revenue streams by new entrants from the sharing economy
- ▶ The use of digital platforms connecting user communities
- ▶ The development of new user-centric economic models designed to improve supply or service, taking advantage of regulatory failings
- ▶ But Uberization does not create new demand





2 Encourage the development of hybrid economic models

Another appropriate response to Uberization is to develop hybrid economic models that combine elements of traditional models with the opportunities digital brings. As the music industry's experience with streaming shows, regaining pre-digital financial stability is possible provided the solution meets two criteria. First, the new offer has to deliver strong added value for the consumer - in this case the playlist management, personalized radio stations and personalized recommendation tools. Second, it must include the development of a subscription service, rather than successive card payments. The development of hybrid models within the cultural economy is not only necessary for its survival but also a promising path to growth. Natural selection will ensure that the most flexible and appropriate economic models, best-adapted to their environment, are the ones that will thrive.

A new, innovative, efficient, low-cost service can transform markets. It is even possible that low-cost music streaming services from mobile phone operators will Uberize music piracy on the African continent.

Trialing hybrid economic models should happen within a digital ecosystem built upon three pillars: the user, the producer and the intermediary platform between them. This subtle and complex ecosystem requires a fair balance between the role of the platform - a digital business in search of profitability - and the sometimes ill-perceived distinction between producer and consumer.

Digital: a chance to rebalance economic models?

In February 2016 the Cour des Comptes, a French government financial watchdog, published a report on four national theatres: the Comédie Française, Théâtre National de Chaillot, Théâtre National de Strasbourg and the Théâtre National de la Colline. The report highlighted weaknesses in their economic models. The Court identified one of the factors in the fragility of the economic models of these national establishments: a grave ignorance of their audience, which made it impossible for them to develop an appropriate pricing policy.

Our experience with other similar operators - of concert halls and museums - suggests that digital technologies could help them to learn about, monitor and understand user behavior. Digital technologies offer the foundation for a more flexible pricing policy that could help them tackle their budgetary issues.



The sharing economy, usage and culture

The foundations of today's all-powerful ownership culture are being called into question by the emergence of economic models based upon usage, sharing and the experience of collaboration.

The sharing economy is built upon four fundamentals:

- ▶ User communities, who are at the heart of the system
- ▶ The development of horizontal ways of organizing and working, favoring direct interaction between users
- ▶ The use of web platforms which both support these communities and act as intermediaries
- ▶ The desire to maximize the use of shared equipment and goods.

In his book *The Zero Marginal Cost Society*, Jeremy Rifkin forecast a society shaped by the collaborative economy, where each consumer was also a producer – a “prosumer”. This, he said, would drive down the marginal cost of production. Each object could be made and reproduced on a small scale via 3D printing from a design produced collaboratively.

Traditional production methods, based upon series production and scale economies, would be swept aside by the development of a society with models based upon collaboration and distributed production closer to the consumer.

Consumption, production, financing and collaborative lifestyles: the drivers of the sharing economy raise many vital questions for the cultural economy.

EY has drawn up two proposals to help cultural industry players find their way within the sharing, collaborative economy.

The sharing economy: a vector of transformation for the cultural sphere

Global economic players consulted by the World Economic Forum ahead of its January 2016 meeting in Davos highlighted the importance of the sharing economy for the media, leisure and information sectors. Overall, 21% of leaders questioned identified the sharing economy as having great potential to transform jobs and practices in these sectors, along with mobile internet access (57%), big data (56%) and flexible working (36%). The study concluded that the media industry would be hard-hit by these revolutions, with only business services harder hit.

The four pillars of the sharing economy



Collaborative consumption

Optimization of use by lending or exchange



Collaborative production

A more horizontal mode of production, based upon cooperation, sharing tasks and enriching of the production experience



Collaborative finance

Developing alternative financing solutions, based upon crowdfunding by users



The myth of free services

The collaborative economy provides effective services and sooner or later will be fairly taxed

Implications for the cultural economy

- What legal and economic conditions will be required for legal peer-to-peer sharing of cultural content?

- What new economic models will be required to produce cultural content?
- What will be the impact on rewarding cultural creation?
- What will be the roles of users and intermediaries in these new production models?

- How can crowdfunding tools be integrated within traditional financing systems for creative works?
- How will existing financing mechanisms need to change?

- Can the three pillars of culture - creation, distribution and protection - survive in a free-to-user ecosystem?

3 Support the development of digital tools that facilitate the flow of content

The development of the collaborative and sharing economy in the cultural sphere depends upon users. They want easy access, to be able to save their preferences, software that provides recommendations, content sharing (including collaborative curating and playlist sharing) and exchanges. We need to help those in the cultural and creative industries innovate and continue to respond to changing user expectations, and support the development of new digital applications and new cultural entrepreneurs. This aid should occur in tandem with the emergence of a new ecosystem that aids the development of digital projects and makes use of new possibilities like those offered by big data. Consumers' desire to share legally-acquired e-books and video content exemplify the issues arising.

We also need to ensure that virtual culture can be passed-on to future generations.

The development of digital tools must take place within a cross-border framework with Europe-wide rules, if the continent wants to be able to withstand the standardization of tools that will otherwise be imposed by intermediaries from the United States or Asia.

4 Securing the legal framework for exchanging virtual cultural goods

But sharing cultural content isn't just a question of spotting opportunities and developing digital solutions: it also raises questions of legality.

What opportunities are available within the existing legal framework for sharing virtual content, such as e-books? What changes are necessary to fulfill this need?



Digital: when culture becomes heritage

Digital is an opportunity for heritage, a chance to preserve it and regenerate it. We can digitize old and rare books, rebuild temples in 3D and digitize archives to better conserve them. But these opportunities contain a paradox: large-scale digitization requires technical knowledge and scale economies (in terms of digital infrastructure) that are possessed by only a few players, among them Google, Apple, Facebook and Amazon. How can we reconcile this effective oligopoly with the fact that our digital heritage is a shared public property, of which we are all the owners?

5 Ensuring open access to our digital cultural heritage

Though a technological necessity, today's "natural oligopoly" must not finish by excluding part of the population, either for financial or technical reasons, from access to our digital cultural heritage. Open access must be written into the Declaration of human digital rights. It should form part of a review of citizen access to our cultural heritage when that heritage has been digitized by an international company and could be stored anywhere.

6 Define the countervailing conditions to be required of the "natural monopoly" held by Google, Apple, Facebook and Amazon, that will enable all citizens to have free access to our digital heritage at marginal cost

The natural oligopoly described earlier implies a need to redefine the framework within which the enterprises involved – especially Google, Apple, Facebook and Amazon, safeguard our digital heritage. The right of access in our fifth proposal does not mean free access: we need to define what is provided or allowed in return, and to put in place a pricing system that rewards the digitization and storage effort, without creating entry barriers – hence the need for pricing at marginal cost. A system balanced in this way between the interest of the companies and citizens must answer three important questions:

- ▶ Who should digitize the content?
- ▶ Who should manage access to data?
- ▶ What should be the role of national bodies, such as France's Institut National de l'Audiovisuel (INA), which archives the nation's TV and radio programs?

A key issue underlying the sharing economy: jobs

The issues examined here are also connected with the question of employment: during 2013, the creative industries were reckoned to provide 1.3 m jobs in France, according to an EY/France Créative study (*Création sous tension*). These jobs are particularly vulnerable, since they are in sectors undergoing sweeping change and characterized by insecure contracts and job definitions.

In the widest sense (including mobile internet, the cloud and big data) digital technologies certainly pose a threat. But in the medium term they offer a vital chance to create jobs. In the arts, design and leisure sphere, mobile Internet and the cloud are set to generate 1% more jobs within the sector by 2020m while employment in media and information will grow 3.57%, according to a study by the World Economic Forum. Big data alone is likely to boost media sector employment by 8%.

Notes

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Studio EY France - 1602SG576
SCORE France N° 2016-017
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This EY report was realized under the supervision of Bruno Perrin and Fabrice Naftalski with the contribution of France de Roquemaurel, Colin Garnier, Christophe Ménard and Sandrine da Cunha.