

« Rightholders » as Human Beings : Does It Make a Difference ?

Valérie Laure Benabou
Aix Marseille University

Backgrounds Assumptions

- Artificial Intelligence : if a machine can create a work / a performance is it relevant to vest it in copyright ?
- Distinction between natural persons /legal persons is essential
- Is it clear within the European Law that « authors » and « performers » are human beings ? Assessment in the directive
- Exemple of the « collective work » in France (legal person genuine owner/author...)

- I. It did not make much of a difference for European law at the beginning and it still does....
- II. Sometimes, still references are being made “natural persons”...
 - III. Towards a common status of “artistic workers” ?
 - IV. Distinction between natural persons and legal persons

- I. It did not make much of a difference for European law at the beginning and it still does....

Specific Subject Matter of « Copyright »

ECJ 20 October 1993 Phil Collins, joined cases C-92/92 and C-326/92.

- 19 As Community law now stands, and in the absence of Community provisions harmonizing national laws, it is for the Member States to establish the conditions and detailed rules for the protection of literary and artistic property, subject to observance of the applicable international conventions (see the judgment in Case 341/87 EMI Electrola v Patricia Im- und Export and Others [1989] ECR 79, paragraph 11).
- 20 The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation, or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties (see the judgment in Joined Cases 55/80 and 57/80 Musik-Vertrieb membran v GEMA [1981] ECR 147, paragraph 12).
- 21 As the Court pointed out in the last-mentioned judgment (paragraph 13), whilst the commercial exploitation of copyright is a source of remuneration for the owner, it also constitutes a form of control of marketing, exercisable by the owner, the copyright management societies and the grantees of licences. From this point of view, the commercial exploitation of copyright raises the same problems as does the commercial exploitation of any other industrial and commercial property right.

Specific Subject Matter of « Copyright »

ECJ 20 October 1993 Phil Collins, joined cases C-92/92 and C-326/92

- The protection of **moral rights enables authors and performers, in particular, to object to any distortion, mutilation, or other modification of a work which would be prejudicial to their honour or reputation.**
- Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties
- The commercial exploitation of copyright raises the same problems as does the commercial exploitation of any other industrial and commercial property right.

Non-discrimination Principle

ECJ 20 October 1993 Phil Collins, joined cases C-92/92 and C-326/92

- 2. The first paragraph of Article 7 of the Treaty must be interpreted as precluding the legislation of a Member State **from denying to authors and performers from other Member States, and those claiming under them**, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory.
- 3. The first paragraph of Article 7 of the Treaty must be interpreted as meaning that the principle of non-discrimination which it lays down may be directly relied upon before a national court by an author or performer from another Member State, **or by those claiming under them**, in order to claim the benefits of protection reserved to national authors and performer

« Those claiming under them » ? Ayants droit ?
Derechohabientes ? Aventi causa ?
Hierarchy ? Primacy ? Succession in time ?

Specific Subject Matter of « Copyright »

Judgment of the Court of 6 April 1995 Magill, Joined cases C-241/91 P and C-242/91

- 27 The Court of First Instance then observed that in principle the protection of the specific subject-matter of a copyright entitled the **copyright-holder** to reserve the exclusive right to reproduce the protected work (ITP judgment, paragraph 55).
- 28 (...) the Court of First Instance continued, the copyright was no longer being exercised in a manner which corresponded to its **essential function, within the meaning of Article 36 of the Treaty, which was to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86.**

Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance

Article 3

- (c) 'rightholder' **means any person or entity**, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue;
- (d) 'member ' means a **rightholder or an entity representing rightholders**, including other collective management organisations and associations of rightholders, fulfilling the membership requirements of the collective management organisation and admitted by it;

The member of the CMO is not necessarily a natural person....

II. Sometimes, still, references are being made to
“natural persons”...

Distinction between natural persons and legal persons ?

Directive 2009/24 of 23 April 2009 on the legal protection of computer programs / codified by

Article 2 Authorship of computer programs

1. The author of a computer program shall be the **natural person** or group of natural persons who has created the program **or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation**. Where collective works are recognized by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.
2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.
3. Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all **economic rights** in the program so created, unless otherwise provided by contract.

Article 3 Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works

+ duration ! (grounded on BC)

Distinction between natural persons and legal persons ?

Directive 96/9/EC of 11 March 1996 on the legal protection of databases

Article 4 Database authorship

1. The author of a database shall be **the natural person** or group of natural persons who created the base **or, where the legislation of the Member States so permits, the legal person** designated as the rightholder by that legislation.
2. Where **collective works** are recognized by the legislation of a Member State, **the economic rights shall be owned by the person holding the copyright.**
3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Implied reference to the natural person by.... her death

Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

Article 1 Duration of authors' rights

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall **run for the life** of the author and for 70 years **after his death**, irrespective of the date when the work is lawfully made available to the public.
2. In the case of a work of joint authorship the term referred to in paragraph 1 shall be calculated from the death of the last **surviving** author.
4. **Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work as such are identified as such in the versions of the work which are made available to the public.** This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply.
6. In the case of works for which the term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within seventy years from their creation, the protection shall terminate.

Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art

Article 6 Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the **author of the work** and, subject to Article 8(2), **after his death** to those entitled under him/her.
2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

Is the performance necessarily made by a natural person ?

Article 3 **Duration of related rights**

1. The rights of performers shall expire 50 years after the date of the **performance**.

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)

DIRECTIVE 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights

(5) Performers generally **start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime**. Therefore, some performers face an income gap at the end of their lifetime. In addition, performers are often unable to rely on their rights to prevent or restrict an objectionable use of their performances that may occur during their lifetime.

(6) The revenue derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of 4 copyright and related rights in the information society (), as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property(5), **should be available to performers for at least their lifetime**.

Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC)

(72) Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law. That need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts

Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.)

(74) Authors and performers need information **to assess the economic value of rights of** theirs that are harmonised under Union law. **This is especially the case where natural persons** grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration. That need does not arise where the exploitation has ceased, or where the author or performer has granted a licence to the general public without remuneration.

III. Convergence between authors and performers ?
Towards a status of « artistic » workers ?

[Parcourir](#)[Appli de bureau](#)[Essayer Prime](#)[Boutique](#)

10

[Acheter des bits](#)[Se connecter](#)[S'inscrire](#)

Rejoignez la communauté

Twitch !

Découvrez les meilleurs
streams où que vous soyez.

[S'inscrire](#)

Chaînes populaires

**Solary**

League of Legends

**Sardoche**

League of Legends

**Kamet0**

League of Legends

**OgamingLoL**

League of Legends

**LeStream**

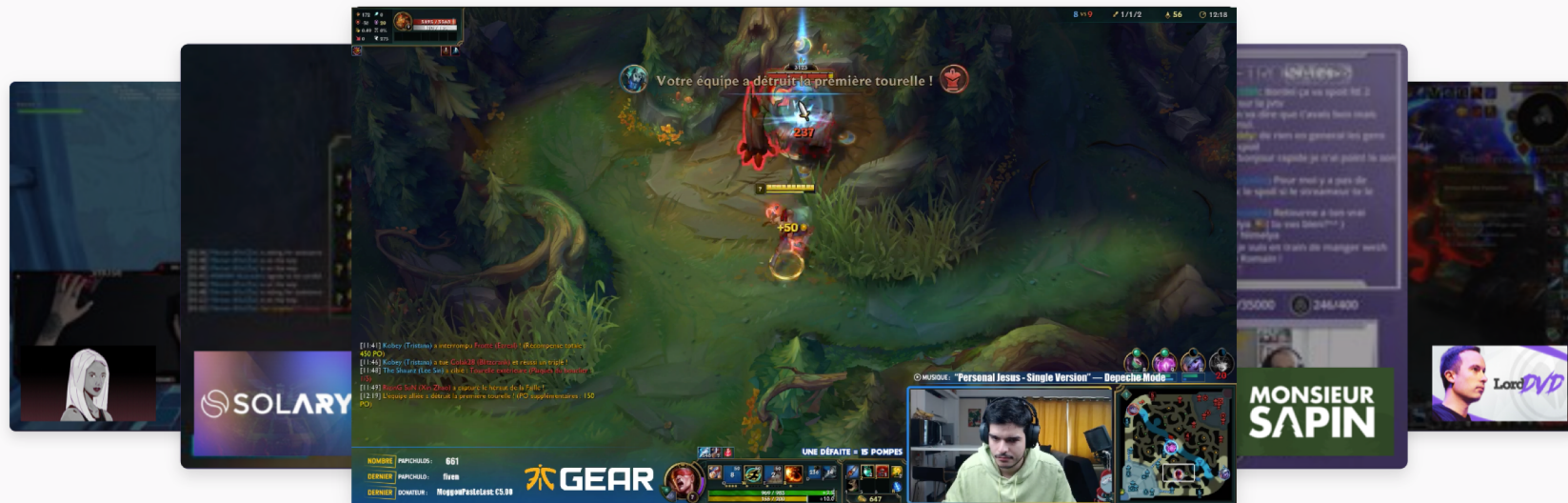
Just Dance 2019

**SolaryFortnite**

Fortnite

**Twitch Prime**

Des jeux et cadeaux en jeu chaque mois, des exclusivités et un accès à des centaines de films et séries TV avec Prime Video.

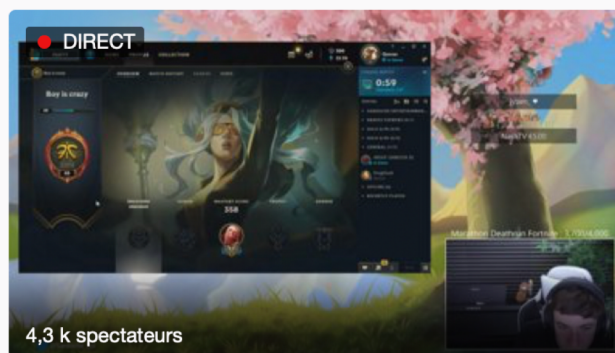
[Démarez votre essai gratuit](#)

Chaînes en direct populaires

**RUSH SAISON 9 - MULTIPOV - 24/24**

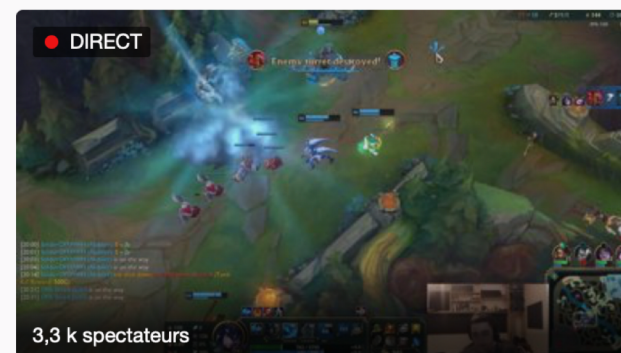
Solary

League of Legends

**SARDOCHE - RUSH SAISON 9 - 3/2 - On doit...**

Sardoche

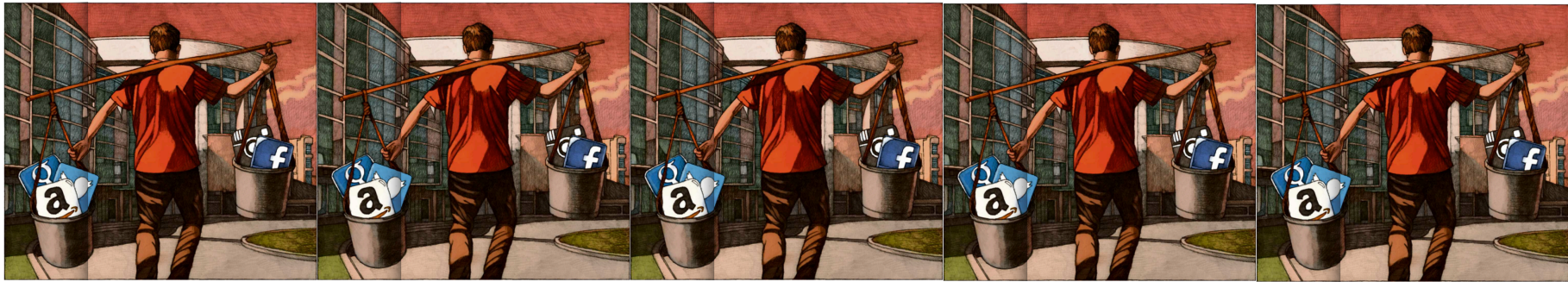
League of Legends

**ON RUSH SOLO EN ATTENDANT SARDOCHE...**

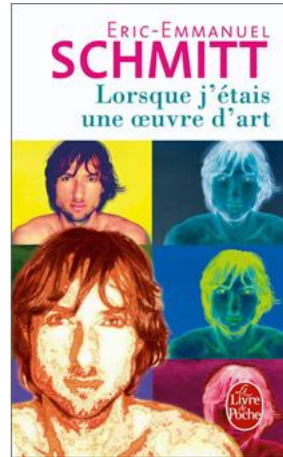
Kamet0

League of Legends

- Clic workers ?



Performance of Myself as a Work ?



Michael Jackson hologram kind of scared me...it was cool. But it was weird.”



IV. Distinction between natural persons and legal persons

Isn't it time to abandon the distinction between authors and « neighbours » as it is drawn ?

Status of the creators / artists as human beings versus legal persons

- Distinct functions leading to separate regimes
 - Recognition ab initio : abolishing the myth of the « original » beneficiary – two separate regimes : avoid the confusion of the interests
 - Hierarchy (model Article 12 D. 1992 ; article 5 D. 1993 « shall leave intact and shall in no way affect the protection ») ?

Isn't it time to abandon the distinction between authors and « neighbours » as it is drawn ?

Status of the creators / artists as human beings versus legal persons

- Distinct functions leading to separate regimes
 - Duration : longer for natural persons and /or guaranteed during the lifetime / Subject to exploitation for legal persons (see the extension of duration for phonograms)
 - Unwaivable right to remuneration (D. 1992/2006 + Martin Luksan) / exclusive right as a bargaining power
 - Remuneration « proportionate » as a principle / Lump sum as an exception (recital 73 DSM) ? % is not necessarily the best solution (depending the scope)

Isn't it time to abandon the distinction between authors and « neighbours » as it is drawn ?

Status of the creators / artists as human beings versus legal persons

- Distinct functions leading to separate regimes
 - Contractual protection for natural persons in a weaker position (DSM) : transparency, termination, revocation....
 - Collective management for natural persons only or clear distinction between CMO for human creators and other organizations ?

Unwaivable/ Unassignable Right

- Lending right directive 1992/ 2006
- Resale right D. 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art

ECJ 9 February 2012 (*) In Case C-277/10, **Martin Luksan**

Articles 1 and 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, and Articles 2 and 3 of Directive 2001/29/EC of 22 May 2001 in conjunction with Articles 2 and 3 of Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and with Article 2 of Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) **vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question.**

European Union law must be interpreted as meaning that, in his capacity as author of a cinematographic work, **the principal director thereof must be entitled, by operation of law, directly and originally,** to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the ‘private copying’ exception.

DSM

(81) The provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive should be of a mandatory nature, and parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements. As a consequence, Article 3(4) of Regulation (EC) No 593/2008 of the European Parliament and of the Council should apply to the effect that, where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States, the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum

DSM

Article 18

Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where **authors and performers** license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive **appropriate and proportionate remuneration**.

DSM

Article 19

Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.

2. Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1.

Where that additional information is requested, the first contractual counterpart of authors and performers shall provide information on the identity of those sub-licensees.

Member States may provide that any request to sub-licensees pursuant to the first subparagraph is made directly or indirectly through the contractual counterpart of the author or the performer.

DSM

Article 20

Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, **authors and performers or their representatives** are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

Who are the representatives ????

DSM

Article 21

Alternative dispute resolution procedure

Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure **that representative organisations of authors and performers** may initiate such procedures at the specific request of one or more authors or performers.

DSM

Article 22

Right of revocation

1. Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter.

DSM

Article 23

1. Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.
2. Member States shall provide that Articles 18 to 22 of this Directive **do not apply to authors of a computer program** within the meaning of Article 2 of Directive 2009/24/EC.

- (73) The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. **A lump sum payment can also constitute proportionate remuneration but it should not be the rule.** Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector. Member States should be free to implement **the principle of appropriate and proportionate remuneration** through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.