Chapter [•]

France

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1. Introduction

The French copyright regime has always been deeply rooted in natural law principles and has always been favourable to the rights of authors over those of users.

As Mr. Desbois underlines, "in accordance with the French tradition [imbued with individualism], the French lawmaker rejected the view that works of the mind should be timely protected to stimulate literary and artistic activity",[1] and as expressed in a study of 2003, "a single country appeared to be an exception to the recognition of the balance of interests [between authors' rights of those of users] which is paramount to copyright legislation: France. French Copyright Law, which is based on the respect of authors' works of the mind is focused on the latter".[2]

Indeed, if it has always been accepted that the law shall preserve a balance between the interests of authors and those of users, French Legislation never provided for a "catch-all" exception – *i.e.* a general exception which can be applied in various cases significantly different from each other – but set an exhaustive list of exclusions or limitations to authors' rights.

Moreover, until 1994, the only provision dealing with the exceptions to copyright was Article 41 of the Law on Copyright of 1957[3] that recognized only four limitations to authors' rights, based on the safeguard of fundamental rights and freedoms of users (users' freedom of expression and right to privacy and the need to promote the dissemination of knowledge and culture).[4]

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[1] H. Desbois, Le droit d'auteur en France, Dalloz, 3rd ed, 1978, No. 449-450, p. 538.
[2] A. Lepage, Overview of exceptions and limitations to copyright in the digital environment, e-Copyright Bulletin, January - March 2003 UNESCO.
[3] Law No. 57-298 of 11 March 1957 "*sur la propriété littéraire et artistique*".
[4] Article 41 of the Law on Copyright of 1957 used to provide that:

> " Once a work has been disclosed, the author may not prohibit:
>
> 1°. Private and gratuitous performances carried out exclusively within the family circle;
>
> 2°. Copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created;
>
> 3°. On condition that the name of the author and the source are clearly stated:
>
> Analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated;
>
> Press reviews;

This Article was codified under Article L. 112-5 of the French Intellectual Property Code (hereinafter "the IPC") by the Law No. 92-597 of 1st July 1992.[5]

With the transposition into French Law of the provisions of the Directive 2001/29 of 22 May 2001[6] by the Law No. 2006-961 of 1st August 2006[7] (hereinafter "the Law of 2006"), the economic based approach of copyright was incorporated under French Law and the number of the exceptions to copyright substantially increased. These exceptions are currently listed under Article L. 122-5 of the IPC.[8]

Dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies;

4°. Parody, pastiche and caricature, observing the rules of the genre."

[5] Law No. 92-597 of 1 July 1992 "*relative au code de la propriété intellectuelle*".

[6] Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167, p. 10.

[7] Law No. 2006-961 of 1 August 2006 "*relative au droit d'auteur et aux droits voisins dans la société de l'information*".

[8] According to Article L. 122-5 of the IPC:

" Once a work has been disclosed, the author may not prohibit:

1°. Private and gratuitous performances carried out exclusively within the family circle;

2°. Copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1, as well as copies or reproductions of an electronic database;

3°. On condition that the name of the author and the source are clearly stated:

a) Analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated;

b) Press reviews;

c) Dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies;

d) Complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale.

e) The representation or the reproduction of excerpts of works, subject that the works are designed for educational purposes and partitions of music, for the exclusive purposes of illustration in the framework of teaching and research, including for the development and dissemination of examination subjects or of competitions organized in the extension of the lessons to the exclusion of any activity playful or recreational, when this representation or this reproduction is intended, in particular by means of a digital work space, to a public composed predominantly of pupils, students, teachers or researchers directly concerned by teaching, training or research activity requiring this representation or reproduction, that it is not the subject of any publication or dissemination to a third party to the public thus constituted, that the use of this representation or this reproduction does not give rise to any commercial exploitation and that it is offset by a negotiated remuneration on a lump sum basis without prejudice of the assignment of the right of reprographic reproduction referred to in Article L. 122-10;

4°. Parody, pastiche and caricature, observing the rules of the genre.

5°. Acts necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract.

6° The temporary reproduction presenting a transitional or accessory character, when it is an integral and essential part of a technical process and that it is for the sole purpose of enabling the lawful use of the work or its transmission between third parties by way of a network involving an intermediary; however, this temporary reproduction that can only bear on works other than software and databases must not have economic value of own;

7°The reproduction and the representation by legal persons and by the establishments open to the public, such as libraries, archives, documentation centers and cultural spaces multimedia, with a view to a strictly personal consultation of the work by persons with one or more impairments of motor functions, physical, sensory, mental, cognitive or psychic and prevented, the fact of these deficiencies, access to the work in the form in which the author makes it available to the public;

8° The reproduction of a work and its representation made for conservation purposes or intended to preserve the conditions

Besides, French Law does not "officially recognize that copyright entails a *quid pro quo* in favour of society",[9] and excludes that the above-mentioned exceptions can grant rights to their beneficiaries.[10]

Software exceptions set forth in the Directive 91/250 of 14 May 1991[11] were transposed into Articles L. 122-6 and

of its consultation for the purposes of research or private study by individuals, in the premises of the establishment and on dedicated terminals by libraries accessible to the public by museums, or by archive services, subject that they seek no economic or commercial benefit;

9° The reproduction or representation, complete or partial, of a graphic, plastic or architectural art work, by way of written, audio-visual or online press, in an exclusive purpose of immediate information and in direct relationship with the latter, subject to indicate clearly the name of the author.

The first paragraph of this 9° does not apply to works, including photographic or illustration, which aim themselves to account for the information;

10° The copies or digital reproductions made from a lawful source, in view of the exploration of texts and data included in or associated with the scientific literature to the needs of the public research, to the exclusion of any commercial purpose. A decree lays down the conditions in which the exploration of texts and data is implemented, as well as the modalities of conservation and of communication of the files products in term of research activities for which they have been produced; these files are data from the research;

11° The reproductions and representations of architectural works and sculptures, placed permanently on the public road, carried out by natural persons, to the exclusion of any use of a commercial nature

The reproductions or representations which, inter alia by their number or their format, would not be in strict proportion with the exclusive purpose of immediate information or who would not be in direct relationship with the latter give rise to remuneration of authors based on the agreements or the tariffs in force in the professional sectors concerned.

The exceptions listed in this Article shall not affect the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author.

The modalities for the application of this Article, in particular the characteristics and conditions of the distribution of the documents referred to in d) of 3°, are specified by a decree of the Council of State."

[9] A. Lepage, Overview of exceptions and limitations to copyright in the digital environment, e-Copyright Bulletin, January - March 2003 UNESCO.
[10] A. Lucas, Fasc. 1248, Droits des auteurs. Exceptions au droit exclusif, 14 April 2010.
[11] Council Directive 91/250 of 14 May 1991 on the legal protection of computer programs, OJ 1991 L 122, p. 42 - 46.

L. 122-6-1 of the IPC[12] by the Law No. 94-361 of 10 May 1994.[13]

2. The Protection Granted by Copyright to the Authors of Works of the Mind

2.1. Works of the Mind Protected

Pursuing to Article L. 112-1 of the IPC, "rights of authors in all works of the mind [shall be protected], whatever their kind, form of expression, merit or purpose."

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[12] According to Article L. 122-6 of the IPC:

> " Subject to the provisions of Article L122-6-1, the exploitation right belonging to the author of the software shall include the right to do or to authorize:
>
> 1°. The permanent or temporary reproduction of software by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the software necessitate such reproduction, such acts shall be possible only with the authorization of the author;
>
> 2°. The translation, adaptation, arrangement or any other alteration of software and the reproduction of the results thereof;
>
> 3°. The placing on the market for consideration or gratuitously, including rental, of the software or of copies thereof by any process. However, the first sale of a copy of software on the territory of a Member State of the European Community or of a State party to the agreement on the European Economic Area by the author or with his consent shall exhaust the right of placing on the market of that copy in all Member States, with the exception of the right to authorize further rental of a copy."

According to Article L. 122-6-1 of the IPC:

> " I. The acts referred to in items 1 and 2 of Article L122-6 shall not require authorization by the author where they are necessary for the use of the software by the person entitled to use it in accordance with its intended purpose, including for error correction. However, an author may by contract reserve the right to correct errors and stipulate any special conditions to which shall be subject the acts referred to in items 1 and 2 of Article L122-6, necessary to enable the entitled person to use the software in accordance with its intended purpose.
>
> II. A person having the right to use the software may make a backup copy where such is necessary to ensure use of the software.
>
> III. A person having the right to use the software shall be entitled, without the authorization of the author, to observe, study or test the functioning of the software in order to determine the ideas and principles which underlie any element of the software if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the software which he is entitled to do.
>
> IV. Reproduction of the code of the software or translation of the form of that code shall not require the authorization of the author where reproduction or translation within the meaning of item 1 or 2 of Article L. 122-6 is indispensable for obtaining the information necessary to achieve the interoperability of independently created software with other software, providing that the following conditions are met:
>
> 1°. These acts are performed by a person entitled to use a copy of the software or on his behalf by a person
>
> authorized to do so;
>
> 2°. The information necessary to achieve interoperability has not previously been readily available to the persons referred to in item 1, above;
>
> 3°.and these acts are confined to the parts of the original software which are necessary to achieve interoperability.
>
> The information thus obtained may not:
>
> 1°. Be used for goals other than to achieve the interoperability of the independently created software;
>
> 2°. Be given to others, except where necessary for the interoperability of the independently created software;
>
> 3°. Or be used for the development, production or marketing of software substantially similar in its expression, or for any other act which infringes copyright.
>
> V. This Article may not be interpreted in such a way as to prejudice the normal exploitation of the software or to cause unreasonable prejudice to the author's legitimate interests.
>
> Any stipulation contrary to the provisions of paragraphs II, III and IV of this Article shall be null and void.

[13] Law No. 94-361 of 10 May 1994 "*portant mise en oeuvre de la directive (C. E. E.) n° 91-250 du Conseil des communautés européennes en date du 14 mai 1991 concernant la protection juridique des programmes d'ordinateur et modifiant le code de la propriété intellectuelle*".

Articles L. 112-2 ff of the IPC[14] provide a non-limitative list of examples of works of the mind protected by copyright.

Article L. 112-3 of the IPC further provides that "[t]he authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. The same shall apply to the authors of anthologies or collections of miscellaneous works or data, such as databases, which, by reason of the selection or the arrangement of their contents, constitute intellectual creations. Database means a collection of independent works, data or other materials, arranged in a systematic or methodical way, and capable of being individually assessed by electronic or any other means."

Finally, Article L. 112-4 of the IPC states that "[t]he title of a work of the mind shall be protected in the same way as the work itself where it is original in character. Such title may not be used, even if the work is no longer protected under Articles L123-1 to L123-3, to distinguish a work of the same kind if such use is liable to create confusion."

2.2. Rights Conferred to the Authors

According to Article L. 111-1 of the IPC, "[t]he author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons"

This "exclusive incorporeal property right" include both attributes of an intellectual and moral nature, the "moral right", as well as attributes of an economic nature, the "exclusive rights", which benefit and scope depend on the nature of the work of the mind and the number of the authors who participated to its creation.

Articles L. 113-2 of the IPC distinguishes four kinds of works of the mind and two kinds of authors:

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[14] According to Article L. 112-2 of the IPC:

" Shall be considered works of the mind (…):

1° Books, pamphlets and other literary, artistic and scientific writings;

2° Lectures, addresses, sermons, pleadings and other works of such nature;

3° Dramatic or dramatico-musical works;

4° Choreographic works, circus acts and feats and dumb-show works, the acting form of which is set down in writing or in other manner;

5° Musical compositions with or without words;

6° Cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audio-visual works;

7° Works of drawing, painting, architecture, sculpture, engraving and lithography;

8° Graphical and typographical works;

9° Photographic works and works produced by techniques analogous to photography;

10° Works of applied art;

11° Illustrations, geographical maps;

12° Plans, sketches and three-dimensional works relative to geography, topography, architecture and science;

13° Software, including the preparatory design material;

14° Creations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries."

- Individual work, created by a single author;
- Work of collaboration, *i.e.* a "work in the creation of which more than one natural person has participated";
- Composite work, *i.e.* a "new work in which a pre-existing work is incorporated without the collaboration of the author of the latter work";
- Collective work, *i.e.* a "work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production 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".

Concerning individual work, Article L. 113-1 of the IPC states that "[a]uthorship shall belong, unless proved otherwise, to the person or persons under whose name the work has been disclosed".

Pursuing to Article L. 113-3 of the IPC, joint authors of a work of collaboration share identical rights, and can only use them by mutual agreement. When the contribution of the authors is of a different kind, and unless otherwise agreed between parties, each of the author may separately exploit his/her own personal contribution, without prejudice to the exploitation of the collaborative work.

Pursuing to Article L. 113-4 of the IPC, a composite work is the property of its author, subject to the rights of the author of the pre-existing work.

Pursuing to Article L. 113-5 of the IPC, a collective work is the property of the natural or legal person under whose name it has been disclosed and the author's rights shall vest in such person, unless provided otherwise.

2.2.1. Moral Right

Pursuing to Articles L. 121-1 et seq. of the IPC, moral right grants authors the right to the integrity of their name, authorship and work. This right cannot be undermined, whether a user benefits from copyright exception set forth in Article L. 122-5 of the IPC.

Attached to the person of the author, moral right, which is perpetual, inalienable and imprescriptible, can be transmitted to authors' heir(s).

2.2.2. Exclusive Rights

Pursuing to Articles L. 122-1 et seq. of the IPC, exclusive rights confer to authors the rights of reproduction, the right of communication to the public and the right of distribution.

Exclusive rights, which may be transferred or licensed, lasts for the life of authors plus 70 years after their death. Copyrighted works of the mind can be used without authors' authorization or consent only under the limitative list of exceptions set forth in Article L. 122-5 of the IPC.

- **Communication to the Public**

The right of communication to the public, or the right of representation/performance, grants authors the right to communicate their works of the mind to the public by any mean, namely by public recitation, dramatic performance, public representation, public screening and transmission of the broadcast work in a public space and by broadcasting.

- **Reproduction Right**

On the one hand, the right of reproduction grants authors of work of the mind the right to physically fix them by any process enabling their communication to the public, even indirectly.

Indeed, according to Article L. 122-3 of the IPC:

> " Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.
>
> It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording.
>
> In the case of works of architecture, reproduction shall also consist in the repeated execution of a plan or of a standard project."

On the other hand, the right of reproduction grants authors of works of the mind the right to prevent any unauthorized reproduction of their work since, according to Article L. 122-4 of the IPC, "[a]ny complete or partial performance or reproduction made without the consent of the author or of his successors in title or assigns shall be unlawful".

The same solution applies to translation, adaptation or transformation, arrangement or reproduction by any technique or process whatsoever".

Examples of copyright infringements are especially provided for in the IPC, such as reproduction, performance, dissemination, translation, adaptation, transformation or arrangement, by any means whatsoever, of a work of the mind without the consent of its author. Trafficking, exporting, or importing infringing works also constitute copyright infringement.[15]

According to Article L. 335-2 of the IPC, "[a]ny edition of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole or in part regardless of the laws and regulations governing the ownership of authors constitute an infringement or an offence."

Infringement in France of works of the mind published in France or abroad shall be liable to three-year imprisonment and a maximum of EUR 300,000 fine. The sale, exportation and importation of infringing works are subject to the same sentence.

Where offences are committed in organized group, the sentence may be increased to five-year imprisonment and a maximum EUR 500,000 fine.

Article L. 335-2 of the IPC further provides that any reproduction, performance or dissemination of a work of the mind, by any means whatsoever, in violation of the author's rights as defined and regulated by law shall also constitute an infringement.

The violation of any of the rights of an author of software as defined in Article L. 122-6 of the IPC and any total or partial uptake of a cinematographic or audio-visual work in movie-theatres also constitute an infringement.

Article L. 335-2-1 of the IPC provides a three-year imprisonment and a maximum EUR 300.000 fine for editing, making available to the public or communicating to the public, knowingly and in whatever form, a software clearly destined to the public of unauthorized works or of protected objects; encouraging knowingly, including through an advertisement, to the use of such a software.

According to Article L. 335-4 of the IPC, any fixation, reproduction, communication or making available to the public, on payment or free of charge, or any telediffusion of a performance, a phonogram, a videogram or a program made without authorization of the performer, that of the phonogram or videogram producer or that of the audiovisual communication enterprise, where such authorization is required, shall be liable to three-year imprisonment and a maximum EUR 300,000 fine.

[15] See: INTERNET LAW - Basics of Copyrights Laws in France, IBLS Editorial Department.

Importation or exportation of phonograms or videograms made without the authorization of the producer or the performer, where such authorization is required, shall be subject to the same penalties.

Where the offenses provided for under this Article are committed by an organized criminal group, the penalties will be increased to five-year imprisonment and a maximum EUR 500,000 fine.

Failure to respect the author's moral rights can also constitute an infringement or an offense. Civil and criminal actions may be brought before Courts either by the author or its licensee.

- **Distribution**

Under French Law, the situation of the distribution right was complex until the transposition of the provisions of the Directive 2001/29.

Indeed, except for software for which Article L. 122-6 of the IPC expressly recognises a right of distribution, and the correlating principle of exhaustion, there was no express legal basis for the distribution right of other works of the mind.

To compensate for this lack of legal basis, French Courts recognize that the right of reproduction and Article L. 131-3 of the IPC, by extension, grant authors the right of destination over their works of the mind which entitles them to authorize or prohibit any use made of reproductions of the works, and consequently the right to oppose the distribution of tangible copies of copyrighted works of the mind.[16]

Regarding the distribution of copies of works of the mind subject to exhaustion, the provisions of Article 4 of the Directive 2001/29 were transposed under Article L. 122-3-1 of the IPC.

According to this Article, the first sale in a given country of the EU or the European Economic Area of a copy of a work of the mind by the author or the rights holder exhausts the distribution right within the whole EU and EEA. The copyright exhaustion is exclusively applicable to tangible copies of a work and affects only the distribution right.

For the exhaustion of copyright to be recognized, two conditions shall be fulfilled:

- A first marketing of the work of the mind in the territory of the European Economic Area;
- The consent of the author of the work of the mind to this circulation/marketing.[17]

The exhaustion of copyright is limited to the "*material copies*" of the work of the mind and has no effect on authors' moral right.[18]

Likewise, rental and lending of copies of works of the mind are subject to the authorization of authors.[19]

Concerning software, the exhaustion of copyright is sets forth in Article L. 122-6 of the IPC, which imposes the same conditions as Article L. 122-3-1 of the IPC.

Article L. 122-6 of the IPC was applied for the first time by the Creteil Commercial Court[20] on 12 November 1996, which ruled that the author cannot, after the first marketing of the work of the mind, impose conditions for the marketing based on copyright, except for the implementation of contractual agreements.[21]

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[16] Court of Cassation, 1st Civil Chamber, 22 March 1988.
[17] See for further analysis the LIDC French report of 2014 on the exhaustion of rights, Turin Congress. http://www.ligue.org/uploads/documents/2014RapportBfrancais.pdf
[18] See for further analysis the LIDC French report of 2014, Turin Congress. http://www.ligue.org/uploads/documents/2014RapportBfrancais.pdf
[19] Court of Cassation, Commercial Chamber, 27 April 2004, No. 99/18464, *Pen c/ Nintendo*.
[20] Créteil Commercial Court, 12 November 1996.
[21] See for further analysis the LIDC French report of 2014, Turin Congress. http://www.ligue.org/uploads/documents/2014RapportBfrancais.pdf

However, the exhaustion of rights is excluded in respect of a license to use software.[22]

For example, in the case of a sale of a software with a license explaining the terms of use, the principle of exhaustion is applicable, but the resale shall be accompanied by the restrictions resulting from the license of use.[23]

In any case, case law limits the exhaustion of rights to the sale of the "support" of the software, and not the software itself.

In its decision *UsedSoft / Oracle*,[24] the Court of Justice of the European Union extended the exhaustion of rights to software marketed in an "*intangible form*".

This ruling was implicitly applied by the First Civil Chamber of Court of Cassation in a case on musical works. The latter considered that the qualification of the phonogram was independent of whether a tangible support exist, and, based on this fact, ruled that the permissions given to performers included the disposal by downloading.

Hence, the Court of Cassation seems to extend the position adopted by the Court of Justice of the European Union, at least regarding music files distributed online.[25] This solution was confirmed by the decision of the Court of Justice of the European Union of 22 January 2015, according to which:

> " Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the rule of exhaustion of the distribution right set out in Article 4(2) of Directive 2001/29 does not apply in a situation where a reproduction of a protected work, after having been marketed in the European Union with the copyright holder's consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form"[26].

3. Exclusions and Limitations to Copyright under French Law

3.1. Nature and Scope of the Exceptions to Copyright

Since the provisions set forth in the IPC already balance authors' right with users' fundamental rights – such as freedom of expression, privacy, right to education – there is no fundamental rights under French Law allowing the use of works of the mind without authors' consent.[27]

However, author's discretionary use of copyright can be deemed to be abusive, and copyright cannot grant immunity to authors from violations of users' rights.[28] Even economic rights, *i.e.* competition or consumer law – which are not considered in the balance of the exceptions, can under specific circumstances limit the exercise of the rights by authors.[29]

Parties can by mutual agreement modulate the scope of the exceptions or put them aside.[30] However, this solution cannot be applied to software since according to Article L. 122-6-1 of the IPC shall be considered null and void any stipulation contrary to the provisions concerning backup copy, analysis and decompilation.

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[22] Paris Court of Appeal, 23 September 1997, No. 93/491, 93/636, 93/13558, 93/2562; See for further analysis the LIDC French report of 2014 on the exhaustion of rights, Turin Congress. http://www.ligue.org/uploads/documents/2014RapportBfrancais.pdf
[23] Douai Court of Appeal, 26 January 2009, No. 07/02368.
[24] CJEU, 3 July 2012, case C-128/11, *UsedSoft GmbH v Oracle International Corp*, ECLI:EU:C:2012:407.
[25] Court of Cassation, 1st Civil Chamber, 11 September 2013, No. 12/17794; See for further analysis the LIDC French report of 2014, Turin Congress. http://www.ligue.org/uploads/documents/2014RapportBfrancais.pdf.
[26] CJEU, case C-419/13, *Art & Allposters International BV v Stichting Pictoright*, ECLI:EU:C:2015:27.
[27] For an application, the Court of Appeal judged that there is no general enforceability of article 10 of the ECHR to the author, because the right that it recognizes is already taken into account in the limits and exceptions provided by the law, Paris Court of Appeal, 30 May 2001.
[28] C. Caron, Abus de droit et droit d'auteur : Publications de l'IRPI, vol. 17, Litec, 1998, n° 21 to 62.
[29] A. Lucas, Fasc. 1248, Droits des auteurs. Exceptions au droit exclusif, 14 Avril 2010.
[30] See to that effect, P.-Y. Gautier, Propriété littéraire et artistique ; C. Alleaume, La contractualisation des exceptions, in Droit d'auteur et numérique : Propr. intell. 2007, p. 436-442, spéc. p. 438; Paris Court of First instance, 1st Civil Chamber, 30 April 1997.

3.2. General Principles

To be granted, all the exceptions shall meet the following requirements:

- The list of exceptions to copyright set forth in Article L. 122-5 of the IPC is exhaustive;
- All conditions laid down by the IPC shall be met, in an approach in *favorem auctoris*, meaning that those are of strict interpretation;
- The "triple test".

3.2.1. The Exhaustive List of Copyrights Exceptions Sets Forth in Article L. 122-5 of the IPC

Despite the list of the exceptions sets forth in Article L. 122-5 of the IPC was substantially increased with the transposition into French Law of the provisions of the Directive 2001/29, this list remains closed and any unauthorized use of works of the mind falling outside the scope of the exceptions is counterfeiting.

However, French Courts exceptionally circumvent this principle by relying on the "accessory reproductions" theory.[31]

"Accessory reproductions" are works of the mind representing another works of the mind, such as photographs representing an architectural work. Since the subject that confers the work of the mind its principal attractiveness is not an infringement of the copyrighted work, its reproduction and representation is not subject to the exclusive rights of its author, who cannot oppose its copyright.

Moreover, French Courts recognized in 2011 the "accidental inclusion" exception, ruling that the legislator took it into account this exception when transposing the Directive 2001/29, even if it ultimately did not expressly codify it.

The Court of Cassation held that a representation of a work in a documentary was never represented for itself but only in an accessory manner to the main subject, and that it should have been therefore regarded as an "*accidental inclusion*", and underlined that the "accidental inclusion" exception, representing a limitation to the monopoly of the right of the author is foreseen by the Directive 2001/29, and that this provision was considered by the legislator in its preparatory works, even if not literally codified in the IPC.[32]

3.2.2. The Strict Interpretation of the Exceptions

The exceptions shall be strictly interpreted.[33] Consequently, French Courts only grant the exceptions specifically provided by the law, but also assess their conditions of application in an "author favourable manner".[34]

Drawing on the case law of the Court of Justice of the European Union,[35] certain scholars underline that the hypothesis in which the exclusive right of authors is paralyzed shall be strictly interpreted.[36]

However, this principle does not imply that the exceptions shall be confine to their narrowest limits, but that they shall be applied according to their "reason being"[37]. According to the Court of Justice of the European Union, the rule of strict interpretation must not prevent to respect the "useful effect" of the exception and to respect its purpose[38].

3.2.3. The Transposition of the "Triple Test" into French Law

[31] Nanterre Court of First Instance, 12 November 1997; Lyon Court of First Instance, 4 April 2001; Lyon Court of First Instance, 20 March 2003; Court of Cassation, 1st Civil Chamber, 12 June 2001; Paris Court of First Instance, 12 July 1990; Court of Cassation, 1st Civil Chamber, 15 March 2005; Bordeaux Court of First Instance, 13 June 2006.
[32] Court of Cassation, 1st Civil Chamber, 12 May 2011.
[33] Court of Cassation, 1st Civil Chamber, 3 March 1992.
[34] Paris Correctional Court, 24 January 1984; Paris Court of Appeal, 25 March 1982.
[35] CJEU, Case C-5/08, *Infopaq International A/S c/ Danske Dagblades Forening*.
[36] A. Lucas, Fasc. 1248, Droits des auteurs. Exceptions au droit exclusif, 14 April 2010.
[37] *Idem*.
[38] CJEU, Case C-403/08, *Football Association Premier League et a. c/ QC Leisure*.

According to Article 5.5 of the Directive 2001/29, "[t]he exceptions and limitations provided (…) shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudiced the legitimate interests of the right holder".

Hence, to be granted, all the exceptions shall:

- Only be applied in certain special cases and shall not result in a general open-ended exemption from the obligation to protect the right concerned;
- Not conflict with a normal exploitation of the work of other subject-matter;
- Not unreasonably prejudiced the legitimate interests of the right holder. The principle of reasonable proportionality should prevail.[39]

The French Legislator introduced the "triple test" into French Law in a way that this test became a "double test", since according to Article L. 122-5 of the IPC, "[t]he exceptions listed in this Article shall not affect the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author".

Consequently, to be granted, the exceptions shall not conflict with a normal exploitation of the work of the mind and unreasonably prejudice the legitimate interests of the author. French Courts can refuse the user of a work of the mind the benefit of an exception even though the "internal" conditions are met.

The transposition of the "triple test" into French law received a mitigated reception from the doctrine.

Firstly, it was stressed out that the "triple test" was not a substantive rule to be transpose into national law, but rather a methodological indication framing the application of the exceptions which transposition was not imposed by the Directive 2001/29.[40]

For other scholars, unlike international treaties, the Directive 2001/29 does not expressly obliged Member States to transpose the exceptions but merely states that the latter are applicable under national law provided the conditions of the triple test are met[41]. Thus, the question is whether the "triple test" is intended to Member States or national courts. In the first hypothesis, the provisions of the Directive 2001/29 should not be transposed, as it was the case in Germany, Belgium, Denmark, Italy and the Netherlands. In the second hypothesis, the provisions of the Directive 2001/29, harmonising national legislations, shall be transposed and applied by national courts[42].

Secondly, it was highlighted that the "triple test" has become under French Law a "double test", since Article L. 122-5 of the IPC did not transpose the condition according to which the balance between authors' and users' rights shall only be assessed in specific cases, even if it is the first condition to be met under the "triple test" as provided for in international and European texts.

Thirdly, scholars also criticize that the notions of "normal exploitation" and "undue prejudice" are blurry, thus not framing the power of the judge but giving him on the contrary more power on the interpretation of the exceptions.[43]

Fourthly, the practical application of the test remains open. Traditionally, the triple test is considered as a tool against the exceptions to the single service of the right holder, meanwhile a part of the doctrine has proposed intermediate interpretations of the triple test, which lead to a reverse its application in favour of the beneficiaries of exceptions.[44] The criteria of the triple test renew in any case the economic approach of exceptions in French law.

For an example of case law, it has been held that the private copy exception cannot be an obstacle to the insertion, in the support on which is reproduced a protected work, of technical measures intending to protect it from copying when it would have the "effect of impairing the normal exploitation of the work", which must be assessed considering the

[39] For further analysis, see WIPO Guide and Glossary, pp. 59-60; Senftleben, pp. 210-243; Ficsor, pp. 9-10.
[40] P. Gaudrat, « Propriété littéraire et artistique », Dalloz. 3rd Edition, January 2016.
[41] A. Lucas, Fasc. 1248, Droits des auteurs. Exceptions au droit exclusif, 14 April 2010.
[42] T. C. Vinje, Should We Begin Digging Copyright's Grave, p. 553; M. SENFTLEBEN, Copyright, Limitations and the Three-Step Test, p. 280
[43] See among others: Ph. Gaudrat, "Propriété littéraire et artistique", Dalloz; Ph. GAUDRAT, "Le droit d'auteur au lendemain de la transposition: titre 1er de la loi no 2006-691 du 1er août 2006, V. droit commun", RTD com. 2007. 107.
[44] Minutes of the meeting of 15 May 2013 of the Commission on intellectual property of the Bar of Paris, directed by V. Téchené, Editor in Chief of Lexbase Hebdo - private edition.

economic impact that such a copy may have in the context of the digital environment.[45] However, this judgment has been extremely criticized by some scholars as it blurs and does not provide an appropriately framed application of the test.[46]

3.3. The Specific Regime and Logic Behind Each Exception

Since the exceptions to copyright are an "autonomous notion which regime and scope shall be similarly applied in all Member States",[47] national courts shall interpret the regime and the scope of the exceptions provided for in their national law in the light of the provision of the Directive 2001/29 and case law of the Court of Justice of the European Union.

A distinction is drawn between commercial and non-commercial uses of works of the mind. Article L. 122-5 of the IPC indicates for each exception whether the ban of non-commercial purposes is a requirement to benefit from that exception.

French copyright law provides for exceptions relating both to the "reproduction right" and to the "right of communication to the public".[48]

Specific exceptions to reproduction rights are those provided by L. 122-5, 6° IPC, with the exclusion of software and data base:

> " Once a work has been disclosed, the author may not prohibit (…) [t]he temporary reproduction presenting a transitional or accessory character, when it is an integral and essential part of a technical process and that it is for the sole purpose of enabling the lawful use of the work or its transmission between third parties by way of a network involving an intermediary; however, this temporary reproduction that can only bear on works other than software and databases must not have economic value of own."

Specific exceptions to the right of representation are provided for representation in the family circle, for private representation and for private copy, as set forth in articles L. 122-5, 1° and 2° of the IPC:

> " Once a work has been disclosed, the author may not prohibit:
>
> 1°. Private and gratuitous performances carried out exclusively within the family circle;
>
> 2°. Copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1, as well as copies or reproductions of an electronic database."

A set of common exceptions to the rights of reproduction and representation is set forth in Article L. 122-5, 3° of the IPC:

> " Once a work has been disclosed, the author may not prohibit (…) on condition that the name of the author and the source are clearly stated:
>
> a) Analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated;
>
> b) Press reviews;
>
> c) Dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies;
>
> d) Complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale.

[45] Court of Cassation, 1st Civil chamber, 28 February 2006, *Mulholland Drive*.
[46] Ph. Gaudrat, « Propriété littéraire et artistique », Dalloz.
[47] CJEU, case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, ECR 2011 I 12533 and case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena* Vandersteen.
[48] A. Lucas, Fasc. 1248, Droits des auteurs. Exceptions au droit exclusif, 14 April 2010.

e) The representation or the reproduction of excerpts of works, subject that the works are designed for educational purposes and partitions of music, for the exclusive purposes of illustration in the framework of teaching and research, including for the development and dissemination of examination subjects or of competitions organized in the extension of the lessons to the exclusion of any activity playful or recreational, when this representation or this reproduction is intended, in particular by means of a digital work space, to a public composed predominantly of pupils, students, teachers or researchers directly concerned by teaching, training or research activity requiring this representation or reproduction, that it is not the subject of any publication or dissemination to a third party to the public thus constituted, that the use of this representation or this reproduction does not give rise to any commercial exploitation and that it is offset by a negotiated remuneration on a lump sum basis without prejudice of the assignment of the right of reprographic reproduction referred to in article L. 122-10."

Although this exception was initially thought in contemplation of the right of reproduction, it also covers the right of representation, since the Court of Cassation rules that "the integral representation of a work (...) cannot be analysed as a short quotation"[49] and the Paris Court of Appeal that, "it is true that the right of quotation applies both to the right of reproduction and to the right of representation" .[50]

Finally, among the exceptions, some allow full reproduction of the work whereas others only allow partial one. Some allow complete borrowing of the work, while others require an additional personal contribution of the "borrower". Usually the exceptions do not provide for compensation in favour of the copyright owner, except for the exception regarding private copies and for the so-called "pedagogic exception".

3.3.1. Representation within the Family Circle

According to Article L. 122-5, 1° of the IPC, "[o]nce a work has been disclosed, the author may not prohibit (…) private and gratuitous performances carried out exclusively within the family circle."

For this exception to be granted, the representations of the work of the mind shall be:

- Undertaken exclusively within the "family circle", which encompasses only relatives, close friends and intimates;
- Free and without any direct or indirect commercial purpose (no entry fee, entertainment expenses participation, *etc.*).[51]

These two conditions are cumulative.

Consequently, customers of children garden cannot be considered as falling into the scope of the "family circle".[52] Similarly, the projection of cinematographic works without the consent of the author, in a private place, on a periodic basis and with third parties, is deemed to be a counterfeiting even if no financial contribution is sought. [53]

The non-commercial purpose condition is deemed fulfilled when the members of the "family circle" are not called upon to contribute to the representation costs.

Thus, the event-oriented character of an event organized by a famous fashion house for the anniversary of its creation does not fall under the scope of the "family circle", and tending indirectly to profit-making does not respond to the requirement of non-commercial proposes.[54] The free nature of the representation is not sufficient, but is a necessary condition to benefit from the exception.[55]

3.3.2. Private Copying

According to Article L. 122-5, 2° of the IPC:

" Once a work has been disclosed, the author may not prohibit (…) copies or reproductions reserved strictly for

[49] Court of Cassation, 1st Civil Chamber, 4 July 1995.
[50] Paris Court of Appeal, 4th Chamber, 30 May 2001.
[51] Duala Court of First Instance, 3 March 1967; Paris Correctional Court, 24 January 1984.
[52] Grenoble Court of First Instance, 28 February 1968.
[53] Paris Correctional Court, 24 January 1984.
[54] Paris Court of Appeal, Pole 5, 1st Chamber, 8 February 2012, No. 10/13304.
[55] Rennes Court of Appeal, 20 June 1932.

the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1, as well as copies or reproductions of an electronic database."

Except for software or electronic databases, private copies or reproductions of works of the mind shall be made without the consent of authors only for private use.

Thus, a professional use of copies or reproduction of works of the mind is not considered as a private one and requires the consent of the author.[56] Likewise, disclosure and distribution on the Internet of works of the mind without authors' consent is forbidden.[57]

When assessing this exception, the main issue relies in the identification of the copyist.

If French Courts used to base their analysis on an economic-material approach, defining as a copyist any person holding a material copy of the work of the mind,[58] a shift towards an intellectual approach, defining as a copyist the person who chooses the work of the mind to be copied, was made under French Law.

This approach, recognized by the case law of the Court of Justice of the European Union,[59] was indeed enacted into French Law with the Law No. 2011-1898 of 20 December 2011[60] and applied by both the Criminal Chamber of the Court of Cassation[61] and the Council of State.[62]

Concerning copies of works of art, an additional condition is required: a different purpose between the copy and the original work of the mind, assessed according to the use that will be made of the copy, shall be established.

However, to date, French Courts have not had the opportunity to apply this provision and only framed the scope of the exception under the Law No. 57-298 of 11 March 1957,[63] in the hypothesis of the reproduction of the Geode on a postal card.[64]

Concerning software copies, Article L. 122-6-1 in combination with Article L. 122-5, 2° of the IPC only authorize a single backup copy, carried out by the licensee, and made in the event of physical or accidental destruction of the software.

Backup copies is not extended to electronic databases that can only be made with the author's consent.
Articles L. 311-1 of the IPC et seq. of the IPC[65] deal with the regime the remuneration for private copying, implemented to compensate for the losses suffered by authors and based on the medium, the technical devices used to fix the work of the mind.

According to Articles L. 311-3 and -4 and the IPC, the compensation, assessed as a lump sum based on the type of medium and recording time, shall be paid by the manufacturer, the importer or the person making an intra-Community

[56] Court of Cassation, 1st Civil Chamber, 20 January 1969.
[57] Paris Court of First Instance of Paris, 5 May 1997.
[58] Paris Court of First Instance, 8 October 1982; Court of Cassation, 1st Civil Chamber, 7 March1984.
[59] CJEU, case C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, ECLI:EU:C:2015:750.
[60] Law No. 2011-1898 of 20 December 2001 "*relative à la rémunération pour copie privée*".
[61] Despite of the silence of the texts, the case law seems to consider that the benefit of the private copying exception assumes that the matrix from which the copy is made must itself be a copy acquired lawfully, Court of Cassation, Criminal Chamber, 30 May 2006.
[62] Quashing the decision of 20 July 2006 of the "private copy Committee" on the ground that the remuneration for private copying can only take into consideration that the licit copies and including copies made from a source acquired lawfully, Council of State, 11 July 2008.
[63] Law No. 57-298 of 11 March 1957 "*sur la propriété littéraire et artistique*".
[64] Paris Court of First Instance, 23 October 1990.
[65] According to Article L. 311-1 of the IPC:

"The authors and performers of works fixed on phonograms or videograms and the producers of such phonograms or videograms shall be entitled to remuneration for the reproduction of those works made in accordance with item 2 of Article L122-5 and item 2 of Article L211-3.

The authors and publishers of works fixed on any other medium are also entitled to remuneration for the reproduction of those works made in accordance with item 2 of Article L122-5 and item 2 of Article L211-3, on a digital recording medium."

acquisition of recording mediums that may be used for reproduction of works for private use, at the time these mediums came into play in France.

Article L. 311-5 of the IPC provides for an *ad hoc* Committee, chaired by a representative of the Sate and composed by organizations representing the beneficiaries of the right of remuneration, persons designated nu the organizations representing the manufacturers or importers of the media and persons designated by the organizations representing the consumers, in charge with the designation of the media to which compensation is granted and the amount of the sums to collect on the device.

Where Administrative Courts overruled a decision of the Committee, they shall set the amount of the compensation based on the prejudice suffered by the author with the introduction of the private copying exception.[66]

According to Article L. 311-8, I of the IPC

> " The remuneration for private copying shall be refunded when the recording medium is acquired for their own use or production by:
>
> 1°. Audiovisual communication enterprises;
>
> 2°. Phonogram or videogram producers and persons who carry out the reproduction of phonograms or videograms on behalf of the producers;
>
> 2° bis. The publishers of works published on digital mediums;
>
> 3°. Legal persons or bodies, of which the list shall be established by the Minister responsible for culture, that use recording mediums for the purpose of assisting persons with sight or hearing disability."

The Law No. 2011-1898 of 1st March 2012[67] partially amended the French compensation system by codifying into French Law the decisions of the Court of Justice of the European Union[68] and the Council of State of 17 June 2011,[69] which excluded from compensation private copies acquired for professional purposes.

The Law No. 2016-925 of 7 July 2016[70] introduced under the scope of this exception distance digital recording services proposed by publishers and distributors of television service, the network personal video recorder. This Law also modified the regime of compensation for private copying.

According to Article L. 311-8, II bis of the IPC, the remuneration for private copying is not due by the persons carrying out the export or the intra-Community supply of recording media marketed in France.

The Act further specifies that 25% of the sums collected can be assigned for socio-cultural purposes and not for compensation of authors' prejudices.

Technological protection measures, that right holders can establish and which are forbidden to be circumvented, may interfere with certain users who, in order to benefit from this exception, shall find an agreement with the author.
According to Articles L. 331-8 et seq. of the IPC, the "*High Authority for the dissemination of works and the protection of rights on the Internet*" ("the HADOPI") may alternatively be called to seek for conciliation in respecting the rights of authors and considering the interests of users of works.

Hence, the HADOPI balances the rights of authors with the interests of users even if this authority can only intervene on a subsidiary basis if no agreement could be found.

3.3.3. Transient Copies

Article L. 122-5, 6° of the IPC provides for a specific exception allowing temporary reproduction of work without the authorization of its author.

According to this Article, "[o]nce a work has been disclosed, the author may not prohibit (…) the temporary reproduction presenting a transitional or accessory character, when it is an integral and essential part of a technical

[66] Court of Cassation, 1st Civil Chamber, 17 March 2016.
[67] Law No. 2011-1898 of 20 December 2011 "*relative à la rémunération pour copie privée*".
[68] CJEU, case C-462/09, *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and Others*, ECLI:EU:C:2011:397.
[69] Council of State, 17 June 2011, No. 324816.
[70] Law No. 2016-925 of 7 July 2016 "*relative à la liberté de la création, à l'architecture et au patrimoine*".

process and where it is for the sole purpose of enabling the lawful use of the work or its transmission between third parties by way of a network involving an intermediary; however, this temporary reproduction that can only bear on works other than software and databases must not have an own economic value."

This exception is not a general exception dealing with provisional reproductions of works of the mind, but rather a specific limit to authors' right, which could be regarded as an exception for "*technical copies*".
This exception is limited, since the reproduction shall be:

- Temporary;
- Transitional or accessory;
- An integral and essential part of a technical process;
- For the sole purpose of enabling the lawful use of the work or its transmission between third parties by way of a network involving an intermediary.

These principles seem to have been recognized by the Court of Cassation, which ruled that "[t]he reproduction on a hard drive is a technical operation, necessary and accessory to ensure the desired programming and to allow the simultaneous and integral broadcasting of commercial phonograms, since the Multimusic service is lacking interactivity as it does not enable the auditor to precisely select the phonogram he wanted to hear within the program he had chosen (…)".[71]

Are expressively excluded from the scope of this exception software and databases.

Paris Court of First Instance ruled that the transient acts of reproduction exception cannot be invoked in the hypothesis of a "*VCR online*" service, which offers to its subscribers the possibility to record television programs and to access their request of records, after decryption of those, since the copy made by the operator can be once decoded retained in a definitive manner by its user. The Court noted that the copy has its "own economic value", considering the advertising revenues directly related to the number of users of the service and the volume of copies made for the account of these users.[72]

3.3.4. Speeches, Public Lectures, Current Economic, Political or Religious Topics

Article L. 122-5, 3°, c) of the IPC provides for a specific exception allowing the diffusion of works through speeches destined to the public, while Article 122-5, 9° of the same Code provides for a specific exception for the use of graphic, plastic or architectural works for information.

According to Article L. 122-5, 3°, c) of the IPC, "[o]nce a work has been disclosed, the author may not prohibit (…) on condition that the name of the author and the source are clearly stated (…) diffusion, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies." Besides the fact that case law regularly rules that this exception should be strictly interpreted,[73] this exception is particularly limited since:

- Its scope only covers "*speech destined to the public*", that is to say speeches made during political, administrative, judicial or academic gatherings, speeches of a political nature made in public meetings, and speeches made during official ceremonies;
- The diffusion should only be done "for informatory purpose": if it not the case, the speech is protected by copyright and cannot be reproduced without the consent of the author;
- The diffusion of can only be made by "the press or by broadcasting, as current news".

Providing the restrictive approach adopted by French Courts, a company may not publish in a brochure of June 1995 the speeches made by the President of the French Republic from 1991 to 1995 since such speeches cannot be qualified as "news" due to the time elapsed and the diversity of the topics covered.[74]

[71] Court of Cassation, 14 June 2007, No. 02-19833, *Multiradio*.
[72] Paris Court of First Instance, 3rd Chamber, 25 November 2008.
[73] Court of Cassation, 5 May 1959, Ed. *Nuit et Jour/ Cruzeiro*; Paris Court of First Instance, 25 October 1995.
[74] Paris Court of First Instance, 25 October 1995.

Similarly, the publication in a book of the speech of a communist leader, long after its pronunciation and after the death of the author, was not considered as a diffusion of a speech designed to the public since this exception only applied to diffusion by press and broadcasting with information or news purposes. The conditions of the exception being not fulfilled, the author of the speech retains the fullness of its exclusivity rights.[75]

The same solution is applied to pleadings, which can be freely reproduced by the newspapers to account for a trial that has just taken place.[76]

Furthermore, Article L. 122-5, 9° of the IPC provides for an exception specifically relating to the use for information purposes of a work of graphic, plastic or architectural art.

According to this Article, "[o]nce a work has been disclosed, the author may not prohibit (…):

> The reproduction or representation, complete or partial, of a graphic, plastic or architectural art work, by way of written, audio-visual or online press, in an exclusive purpose of immediate information and in direct relationship with the latter, subject to indicate clearly the name of the author.
>
> The first paragraph of this 9° does not apply to works, including photographic or illustration, which aim themselves to account for the information."

Article L. 122-5, 9° of the IPC transposes partially Article 5.3 (c) of the Directive 2001/29, since it does not encompass "works, including photographic or illustration, which aim themselves to account for the information" and requires that reproductions or representations being "by their number or their format (…) in strict proportion with the exclusive purpose of immediate information" or "in direct relationship with this latter".

Hence, a media company which has reproduced on its website a photograph of a public person cannot benefit from the exception since this photograph the latter was dedicated to graphic, plastic or architectural art[77].

The uses not respecting the conditions of application of the exception, would rise the payment of a remuneration based on agreements or tariffs in force in the professional sectors concerned.

3.3.5. Freedom of Expression

Article L. 122-5, 4° of the IPC provides for a specific exception in order to allow freedom of expression of creators. The main category is traditionally the one providing an exception for parody, pastiche and caricature.

According to this provision, "[o]nce a work has been disclosed, the author may not prohibit (…) parody, pastiche and caricature, observing the rules of the genre."

This Article, if it transposes the provisions of Article 5.3 of the Directive 2001/29, adds to the three notions of parody, pastiche and caricature the reference to the "*rules of the genre*", understood as the humorous intention which allows the parody to escape to the monopoly of the author.[78]

This rule allows Courts to sanction the excessive denaturation of the parodied work and, even beyond the moral right, to balance the right to make laugh and the rights of the personality of the author chosen as the target.[79]

Parody, pastiche and caricature refer shall all be for free artistic use. Thus, publicity parodies shall be approved by the copyright owner.

Traditionally, both case law and the doctrine consider that parody, pastiche and caricature in order to be licit shall fulfil the two following conditions:

- They shall be done in a humorous way[80] and not to harm the author of the work by, for example,

[75] Paris Court of First Instance, 28 May 1986.
[76] Paris Court of First Instance, 25 September 1956.
[77] Paris Court of First instance, 6 June 2008.
[78] Seine Commercial Court, 26 June 1934.
[79] A. Lucas, Fasc. 1248, Droits des auteurs. Exceptions au droit exclusif, 14 April 2010.
[80] It is the humorous intention which allows the parody to escape to the monopoly of the author, Court of First Instance of Seine, 26 June 1934. The critical purpose pursued can also make legitimate the caricature or parody, as for example: the desire to raise

transposing it in a different contest from the one of the original work;[81]

- All risk of confusion between the two works shall be excluded, which is the case when the author of the parody obtains a humorous effect absent from the original work.[82]

Although the Court of Cassation makes a distributive application of the three notions, their legal regime is almost identical. Parody, pastiche or caricature are all "transformative" works, and the freedom on which the exemption is based arises also from the fact that the person who "borrow" the protected work brings something personal to the work.

However, since the Court of Justice of the European Union ruled that the notion of "parody" is an "autonomous notion" under European Law, French Courts shall comply with the following principles when applying this exception:

- The parody shall respect a fair balance between, on the one hand, the interests and the rights of persons referred and, on the other hand, the freedom of expression of the user of a protected work relying on the exception for parody;
- The parody cannot be used for discriminatory purposes;
- The parody does not necessarily have to have its own originality;
- It is not necessary to mention the source of the work.[83]

3.3.6. Reproductions in "Another Work"

Article L. 122-5, 3° a) and b) of the IPC provides for a specific exception for press reviews, analysis and short quotations.

- **Press Review**

According to Article L. 122-5, 3°, b) of the IPC "[o]nce a work has been disclosed, the author may not prohibit (…), on condition that the name of the author and the source are clearly stated (…) press reviews."

This exception entails that the reproduction of the work of the mind shall be done to invite readers to take position on a subject matter.

French Law being unclear on what this exception encompasses, case law had to frame its scope. Press reviews shall contain the comparative opinions of different journalists on the same theme or event[84] Thus, are excluded from the scope of this exception the reproduction of works of the mind that cannot be considered as "news".[85]

- **Analyses and Short Quotations**

According to Article L. 122-5, 3°, a) of the IPC, "[o]nce a work has been disclosed, the author may not prohibit (…), on condition that the name of the author and the source are clearly stated (…), analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated."

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the absence of sex and violence in the universe of the characters of the "peanuts", Paris Court of First Instance, 19 January 1977.

[81] The purpose of the parody must not be harmful to others, Court of First Instance of Versailles, 17 March 1994; The caricature must not prejudice to the person of the author, Paris Court of First Instance, 15 October 1985.

[82] Versailles Court of First Instance, 17 March 1994; Paris Court of First Instance, 9 January 1970; Seine Commercial Court, 26 June 1934.

[83] CJEU, case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, ECLI:EU:C:2014:2132.

[84] Court of Cassation, 1st Civil Chamber, 30 January 1978; Paris Court of First Instance, 25 March 1982; Seine Court of First Instance, 17 June 1964.

[85] Seine Court of First Instance, 17 June 1964.

Analyses and short quotations, justified by the critical, polemic, educational, scientific or informatory nature of the work of the mind in which they are incorporated, can be admitted only if they:

- Pursue educational purposes, which implies that they shall be incorporated into other developments that have a critical, controversial, teaching, scientific or information aim;[86]
- Are brief, which is assessed in absolute terms and in relation with the work of the mind quoted.[87] Thus, if the reproduction of a work of the mind in reduced format or during a short period cannot be considered as a quotation[88], the complete representation of a work of the mind, regardless of its format cannot be considered as a short quotation;[89]
- Do not prejudice authors' moral right.[90]

Concerning quotations, it was judged that the recovery in a television work, for a minute, of elements of dialogs contained in a book without reference to the author of the quotation was constitutive of a counterfeit.[91]

The Court of Cassation made an exception to these requirements once, in a case relating to databases.[92]

Analyses shall include a summary, the sources of the author, and its essential elements, generally accompanied by a critical comment, so that the analysis of the work of the mind is not made for the work itself but to serve as a basis for personal assessments of the analyst. Furthermore, freedom of analysis should pass through the requirement of integration in a work with its own identity due to personal developments added.[93]

3.3.7. Teaching and Scientific Research

If lots of the exceptions provided for in Article L. 122-5 of the IPC are relating to teaching and education (such as the above-mentioned exception related to citation), the main provisions dealing with this issue are set forth in Article L. 122-5, 3°, e) and 8° of the IPC.

According to Article L. 122-5, 3° e) of the IPC:

> " Once a work has been disclosed, the author may not prohibit (…), the representation or the reproduction of excerpts of works, subject that the works are designed for educational purposes and partitions of music, for the exclusive purposes of illustration in the framework of teaching and research, including for the development and dissemination of examination subjects or of competitions organized in the extension of the lessons to the exclusion of any activity playful or recreational, when this representation or this reproduction is intended, in particular by means of a digital work space, to a public composed predominantly of pupils, students, teachers or researchers directly concerned by teaching, training or research activity requiring this representation or reproduction, that it is not the subject of any publication or dissemination to a third party to the public thus constituted, that the use of this representation or this reproduction does not give rise to any commercial exploitation and that it is offset by a negotiated remuneration on a lump sum basis without prejudice of the assignment of the right of reprographic reproduction referred to in article L. 122-10".

Even if the scope of this exception was extended by the Law of 8 July 2013[94] to include online representation or reproduction of works of the mind, it remains precisely circumscribed since:

- It only allows the use of "extracts" of works;
- It only applies to a certain type of works;

[86] Quotations are lawful only if they are used to inform or support a discussion, a development or an argument forming the main subject of the book itself, Paris Court of First Instance, 11 February 1988; Marseille Court of First Instance, 26 June 1979.
[87] Seine Court of First Instance, 17 June 1964; Paris Court of First Instance, 22 September 1988; Paris Court of First Instance, 14 September 1994.
[88] Court of Cassation, 1st Chamber, 10 February 1998.
[89] Court of Cassation, 5 November1993; Court of Cassation, 1st Chamber, 4 July 1995.
[90] The quotation can be prejudicial to the moral rights of the author, when it is inaccurate or gives an idea denaturing of the work: Paris Court of First, 6 June 1986. It was judged that there has been a violation of the moral right of the author when, by the withdrawal of multiple quotation of his work, the second work loses its originality: Paris Court of First Instance, 5 December 1997.
[91] Paris Court of First Instance, 5 January 1983.
[92] Court of Cassation, 1st Chamber, 9 November 1983.
[93] Paris Court of First Instance, 25 April 1968.
[94] Law No. 2013-595 of 8 July 2013 "*d'orientation et de programmation pour la refondation de l'école de la République*".

- The representation or the use is lawful only if it intervenes for the "exclusive purposes of illustration in the framework of teaching and research, to the exclusion of any playful or recreational activity";
- The public in question must be composed predominantly of "pupils, students, teachers and researchers directly concerned";
- The legislator requires to consider the economic consequences of the exception. It not only prohibits any "commercial operation", but it imposes a compensation in the form of remuneration.

Article L. 122-5, 3°, e) of the IPC specifies that the remuneration should be negotiated on a flat-rate basis. Two agreements were concluded on 4 December 2009 and published on 4 February 2010. Concluded for a duration of three years, they allow teachers, researchers and students in initial training the use of extracts of audio-visual and musical works.

Also pursuing research and education purposes, Article L. 122-5, 8° of the IPC provides that:

> " Once a work has been disclosed, the author may not prohibit (…) the reproduction of a work and its representation made for conservation purposes or intended to preserve the conditions of its consultation for the purposes of research or private study by individuals, in the premises of the establishment and on dedicated terminals by libraries accessible to the public by museums, or by archive services, subject that they seek no economic or commercial benefit".

This exception, enacted in favour of museums, libraries and archives, is the transposition into French Law of Article 5. 2 (c) of the Directive 2001/29.

However, it remains circumscribed to "the purposes of conservation or intended to preserve the conditions of its consultation on the spot by libraries accessible to the public", and the absence of an "economic or commercial advantage" is required. It does not apply to works "subject to the conditions in the field of purchase and license" under a concluded convention.[95]

Nevertheless, the Court of Justice of the European Union has given a dynamic vision of this exception contained in the Directive 2001/29.

The Law No. 2009-669 of 12 June 2009[96] promoting the dissemination and the protection of creation on the Internet has extended the scope of the exception to include the representation of the work in the premises of the establishment and on dedicated terminals by libraries. It was stated, at the same time, that the exception only covers the consultation for the purposes of research or private study by individuals.

Finally, Article L. 122-5, 7° of the IPC provides an exception for people with disabilities, stating that the author may not prohibit the reproduction and the representation "with a view to a consultation strictly personal of the work by persons with one or more disabilities".

The exception benefits to establishments open to the public whose professional activity may consist in the design, implementation and communication of media for the benefit of persons with disabilities. The regime of this exception is further developed in articles L. 122-5-1 and L. 122-5-2 of the IPC.

3.3.8. "Data Mining" and "Data Bases"

Article L. 122-5, 10° of the IPC, introduced by the Law No. 2016-1321 of 7 October 2016,[97] codifies the "*text and data mining*" exception to the benefice of researchers.

"Text and data mining" *is the process of deriving information from machine-read material.* It consists in using software to analyse a "content", including protected data and work, in order to extract elements of knowledge.

[95] CJEU, case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG*, ECLI:EU:C:2014:2196.
[96] Law No. 2009-669 of 12 June 2009 "*favorisant la diffusion et la protection de la création sur internet*".
[97] Law No. 2016-1321 of 7 October 2016 "*pour une République numérique*".

There are four stages to the TDM process. First, potentially relevant documents are identified. They are then turned into a machine-readable format so that structured data can be extracted. The useful information is extracted (Stage 3) and then mined (Stage 4) to discover new knowledge, test hypotheses, and identify new relationships.

According to Article L. 122-5, 10° of the IPC, "[o]nce a work has been disclosed, the author may not prohibit (…) [t]he copies or digital reproductions made from a lawful source, in view of the exploration of texts and data included in or associated with the scientific literature to the needs of the public research, to the exclusion of any commercial purpose."

This exception is strictly framed to avoid a massive dissemination of copies, since authors scientific works that has been disclosed may not ban:

- Digital copies or reproductions of works (without limitation of volume or format);
- Made from a legal source;
- For the exploration of texts and data included in or associated with scientific literature for public research needs;
- With the exclusion of any commercial purpose.

This exception concerns mainly the upstream work (meeting and search). However, a decree relating to the Terms of use of the activity is foreseen to limit the potential risks associated with these operations of digital search on what concerns particularly the downstream work.

About electronic databases, right holders cannot prohibit copies and reproductions made by licensees.

3.3.9. The "Panorama-Exception"

The "*panorama exception*", dealing with the reproduction and representation of architectural and sculptural works, was codified under Article L. 122-5, 11° of the IPC by the Law No. 2016-1321.

According to this provision, "[o]nce a work has been disclosed, the author may not prohibit (…) [t]he reproductions and representations of architectural works and sculptures, placed permanently on the public road, carried out by natural persons, to the exclusion of any use of a commercial nature."

The exception is framed by strong requirements limiting its scope, since:

- The use of architectural and sculptural works shall be devoid of any commercial nature;
- Only natural persons can benefit from this exception, with the exclusion of corporations and associations;
- The exception only applies to architectural works or sculptures permanently placed on the public road.

3.3.10. Persons With disabilities

Article L. 122-5, 7° of the IPC provides for a specific exception to the benefit of disabled people.

According to this provision, "[o]nce a work has been disclosed, the author may not prohibit (…) [t]he reproduction and the representation by legal persons and by the establishments open to the public, such as libraries, archives, documentation centers and cultural spaces multimedia, with a view to a strictly personal consultation of the work by persons with one or more impairments of motor functions, physical, sensory, mental, cognitive or psychic and prevented, the fact of these deficiencies, access to the work in the form in which the author makes it available to the public."

This exception benefits to establishments open to the public which professional activity consists in the design, implementation and communication of media for the benefit of persons with disabilities.

It does not provide for compensation to authors.

3.3.11. Libraries, Museums and Archives

Article L. 122-5, 8° of the IPC allows "specific acts of reproduction made by publicly accessible libraries, museums or archives, which are not for direct or indirect economic or commercial advantage".

The permitted acts of reproduction should be aimed towards the preservation of works or their onsite consultation. The exception also applies to related rights.

4. Conclusions: France is Favourable to Authors and only Slowly and Progressively Adapt its Legislation to International and EU standards

The French lawmaker, due to the personalist tradition of the French copyright, remains reluctant to balance authors' rights with those of users.

Indeed, the late transposition of the dispositions of the Directive 2001/29 by the Law of 2006 – 4 years and a half after the deadline for transposition of 22 December 2002 – reveals the French Legislator will to favour authors and its reluctance to "balance" authors' rights with those of users.

Furthermore, the current discussion[98] in France about the EU copyright package presented the 14 September 2016 by the European Commission,[99] and the new users' exceptions proposed in this context, proves the reluctance of the French legislator.

However, the current exceptions seem to strike a balance between authors' rights and fair use of their works of the mind by private individuals and others, since the current legislation mainly reproduces the principles set forth in the Directive 2001/29, which is itself the representation of a fair balance, and pursues an alignment with European and international standards.

Nevertheless, if French Courts still adopt an approach in favourable to authors, and interpret the exceptions in a very restrictive manner question of authorship and the original aspect of the works of the mind).

In conclusion, it seems that French current legislation should be amended in order to strike a fairer balance between authors and users. Indeed, some authors propose « a flexibilization of the exceptions », in transposing literally all the exceptions provided by the Directive 2001/29 or inversing the triple test.[100]

[98] National Assembly, 3 May 2016, Information Report on the protection of copyright in the EU, M. Karamanli and H. Gaymard; http://www.senat.fr/ue/pac/EUR000002607.html ; P. Bonnecarrère, Report on the EU copyright reform, 8 February 2017, http://www.senat.fr/espace_presse/actualites/201702/trois_questions_a_philippe_bonnecarrere_sur_son_rapport_sur_la_reforme_du_droit_dauteur.html.

[99] http://europa.eu/rapid/press-release_IP-16-3010_fr.htm.

[100] D. Piatek, « La crise des exceptions en droit d'auteur : étude paradigmatique », 31 May 2017, pp 442 to 447.