

On artefacts and middlemen: a musician's note on the economics of copyright

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In the United States utilitarian theory posits that granting an exclusive right in creative expression will provide a necessary incentive to invest in the creation and distribution of expressive works. It is feared that without this incentive there would be insufficient motivation for creation. (Lydia Pallas Loren).

Is copyright-driven economy of symbolic goods the most efficient?

Georg Philipp Telemann went to law school in Leipzig in 1701 ². The piece of law that could be really important for his life could not be found there. Held as

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² The composers that read law are important as a group. Telemann's contemporary Handel went to Halle Law School in 1702 albeit for a short time; also Johann David Heinichen, a composer of the same period well known to recorder players, was a lawyer. Benedetto Marcello, much appreciated by Bach and, incidentally, by this author, was a lawyer by training and sometimes a judge in Venice. Stravinsky went to St. Petersburg school of jurisprudence, as did Tchaikovsky. Thomas

the most prolific composer in history, he was simultaneously a public servant, a publisher, a concert promoter, a conductor and a performer, rushing all time new works just to stand one step before the competition³. At his time, no copyright was offered in Germany⁴.

Telemann's multiple jobs were not uncommon among his contemporaries. Vivaldi worked in the same fashion all over Europe, as did Handel in London, just to stick to the majors⁵. Creators, performers, publishers and promoters, they strove to control virtually all roles of the economic process of authorship, to maximize return.

Obviously, our intent is not doing small time music history. Picking Telemann and his Baroque peers to discuss copyright economics seems an interesting choice, as they fared quite reasonably in a specific musical ambiance already market-driven – the opera and public concert – and where there was no exclusive rights to reckon⁶. The following generation (The Gallant and Classical composers like J.S. Bach's sons and Mozart) found already in their careers the momentum that would lead to the new copyright protection.

Campion, even though working in England, was not lucky to make the law that was his calling protect his own compositions, as in Elizabethan times the fledging copyright would not extend to music. Cole Porter has also taken his time in law, and JB Thomas, in *Curious Connections: Master Musicians and the Law*, The Supreme Court of Queensland Library, December 2006, 300pp, lists more than 30 lawyers who are better known as composers.

3 Véronique Chossat, *Author's Right and Creativity Incentives: The Case of Gastronomy*, found at <http://www.dimeu.eu/files/active/0/ChossatPAPER.pdf>, visited May 2, 2008, indicates that similar diversification of activities (but geared to maximize the prestige generated by creation of cultural goods) occurs in the non-IP area of gastronomy: "Diversification is polymorphous. Some chefs are consultants for international hotel groups, some work for agro-industrial companies in order to issue ready-to-eat courses for supermarkets, some open souvenirs shops adjoining their restaurants, some invest in the middle-of-the-range segment and even open fast food restaurants. Sometimes these investments can be very numerous. Let just think of Joël Robuchon who opened gastronomic and middle class restaurants in Paris, London, Las Vegas, Macao, Hong Kong and New York. Hence most of the time they publish recipes books, propose cooking courses, propose top class rooms labeled by some prestigious associations (Relais & Châteaux, etc.), they invest in spa, piscine, and so on. These various devices tend to compensate the very low profitability of the gastronomic activity, but tend to divert them from their principle trade".

4 As to the German question, see Johann Gottlieb Fichte, *Proof of the Illegality of Reprinting: A Rationale and a Parable* (1793), trans. Martha Woodmansee, found at http://www.case.edu/affil/sce/authorship/Fichte_Proof.doc, visited 30/4/2008. A history of the economic interests of authors can be found at Cavalli, Jean. *Génesis del Convenio de Berna para la Protección de las Obras Literarias y Artísticas del 9 de Septiembre de 1886*. Colombia: Dirección Nacional de Derecho de Autor, 1986 and Boncompain, Jacques. *La Révolution des Auteurs*. França: Fayard, 2002.

5 The conspicuous lack of mention to J.S. Bach here just stress that the Kantor of St. Thomas of Leipzig was not a market-oriented composer. Some of his tentative push sales (e.g. the *Musical Offering*) are enormous artistic successes but brought meager or no investment return.

6 Would fame drive Baroque pre-IP composers to their massive output? To believe Tyler Cowen, *What Price Fame?* Harvard University Press, 2002, "A fame-intensive society is a society full of illusions, but deception is an important part of creativity, whether the deceptions be in the mind of the creator or in the mind of the audience. In an earlier work, **In Praise of Commercial Culture**, I portrayed the vitality of the market's influence on contemporary music, art, and literature. I presented the capitalist market economy as a vital framework for supporting a plurality of artistic visions, providing new and satisfying creations, helping consumers and artists refine their tastes, and paying homage to the past by reproduction and dissemination". Whereas fame might be an inducement for later creators, the biographies Telemann's contemporaries emphasize the straight economic motive not as reason for choosing their calling, but for the amount of it.

How to cope with this data? Even though not employing the full instruments of the Law & Economics approach, our goals are very much the same: the intent of this short study is to test the exclusive right dedicated to the incentive of expressive production taking *social welfare* as standard ⁷. Therefore, the effective need of exclusive rights for inducing expressive production, their eventual side effects over expressive output, and which historical contexts where exclusive rights are required may be significant.

Music historians note that composers were keen to recover immediately the sheets distributed to the musicians as soon as the rehearsals and concerts were over, and copyists were inspected closely: the corpus mechanicum encompassed all retentive interest on compositions ⁸. Geniuses capable of transcribing entire concerts just by ear, as the legend says that Mozart copied Allegri's Miserere in the Capella Sistina, are happily too few.

In many ways, XVIIIth Century composers were in a better position to do such economic juggling acts than literary authors and even dramatic ones ⁹. The Figaro's creator, Beaumarchais, which successfully lead the copyright movement in late XVIIIth Century France, could not exert the same physical control over copies, and apparently did not produce his own theatre plays, however they were quite successful ¹⁰.

A furious pursuit of lead time

Those Baroque and Gallant composers certainly made good use of their physical control over copies and over most of the distribution process. However, one specific characteristic of their production (not very distinct in this from their minor colleagues ¹¹) seems to indicate that a further action was needed to guarantee

7 Koelman: Copyright Law and Economics in the EU Copyright Directive: Is the Droit d'Auteur Passé? IIC 2004 Heft 6: "In this approach, the desirability of a law is not established by its "justice," but instead by its "efficiency." That is to say, a "good" rule is one that results in "maximum social welfare." Social welfare consists of the sum of the individual welfare of all market participants. Consequently, it is neither the welfare of the individual, nor the distribution of welfare over the various players, but instead the total welfare of society that is the point of reference".

8 Physical control over copies was not relinquished after the copyright came into light. Even today publishers of orchestral and operatic works that do not justify printing rent copies, sometimes manuscript, to specific performances instead of relying solely in royalties.

9 According to Bomcopain op. cit., p. 295, a 1790 dramatic author contract with the Comédie Française, covering 30-shows, would pay the author 2.160 livres, whereas a colonel in the French army would make 6.000 per year. Discounting all historic and national variables, and taking as an example the O7 pay scale of the basic payment of an U.S. Colonel, it would translate into present US\$ 3.623,94.

10 Beaumarchais was a successful entrepreneur (water and firearms) and a big time publisher of Voltaire books, and initially did not pay much attention to his theatrical revenues. From 1775 on, however, the author's changing business interests forced him to press on his dramatic interests.

11 This enormous production of the pre-copyright era was not restricted to the majors. Taking as standard just my personal taste as to their music to pick examples, Graupner composed at least 2000 opi, including 113 symphonies (not alike

sufficient return for expressive production, conducted on a sustainable, professional manner.

The most striking peculiarity of those market-oriented creators was their furious output. Vivaldi composed over 500 concerti, 43 operas, published 100 *op* during his life. Handel staged 50 of his operas, 23 oratorios (which were pious versions of the same thing) and a great number of concerti¹². Telemann sprouted a Guinness record¹³ of more than 8.000 *op*.

Even though other explanations could be drawn as to those quantitative records, it seems reasonable to suggest that the pursuit of lead-time in face of second comers was one of the reasons for it¹⁴.

Cycle-gear and incremental novelty keeps most of the fashion industry out of Intellectual Property, on basis of variety and anchorage¹⁵; similarly, XVIIIth Century public was interested in novel works, and "classic" works of prior times found very limited interest: fashion-like trends drove the music market. Distinct "tastes" provided for variety and contrast; even though success could call for multiple-session performances (in approximately the manner of modern day Broadway shows), the demand for newness was paramount. The renewal of incessant creation created a short obsolescence cycle.

Classical ones), 85 overtures (suites), 44 concerti, 8 operas, 1418 church cantatas and 24 secular, 66 sonatas, and 40 harpsichord partitas; this output reflects the period when the composer was fulfilling the demand of the Hamburg Opera; after the bankruptcy of the theatre, he was transferred to a mecenate model. Albinoni authored 50 operas; Johann Adolph Hasse 120; Johann Joachim Quantz 300 concerti; Alessandro Scarlatti 100 operas; Cimarosa 101, etc

12 Even before an exclusive, therefore *erga omnes* right was established on behalf of musicians and dramatic authors (see Boncompain, *op. cit.*, p. 40), contractual arrangements provided a fixed payment or a variable calculated over ticket revenues for composers and in some case performers: Handel bequeathed to his heirs a right on the Messiahs performances. See, Cavalli, *op. cit.*, p. 40. It worth mentioning that contractual arrangements were also the alternative manner of protection for the period where software was mostly unprotected by copyright: Pamela Samuelson et al.; a Manifesto Concerning the Legal Protection of Computer Programs, 94 COLUM. L. Rev. 2308, 2320 (1994) *supra* note 5, at 2373 ("Initially, software was delivered physically whit a mainframe machine during the installation and acceptance process. Given the high cost and relative infrequency of the transactions involved in buying a mainframe, traditional contract and trade secrecy law provided sufficient protection for innovation".)

13 The actual output winner is an obscure, not exactly market-oriented, XIXth Century composer, Simon Sechter.

14 In systems where there are no artificial barriers to entry (as copyright may be described), lead time is the delay needed by the copyist to start competing with the creator. See the WIPO document Intellectual Property (IP) Rights And Innovation In Small And Medium-Sized Enterprises: "Given some of the barriers faced in using the patent system, SMEs often use alternative means of appropriating their innovations. Some of the alternatives to patenting include secrecy, exploitation of lead-time advantages, moving rapidly down the learning curve, use of complementary sales and service capabilities, technical complexity, on-going innovation, relationships based on trust and use of trademarks to differentiate their products from those of imitators. It is often noted that secrecy and lead-time advantages may be the most common way of appropriating innovations among firms, particularly (though not exclusively) among SMEs", found at http://www.wipo.int/sme/en/documents/pdf/iprs_innovation.pdf, visited in 22/5/2007.

15 Raustiala, Kal and Sprigman, Chris, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design". Virginia Law Review, Vol. 92, p. 1687, 2006 Available at SSRN: <http://ssrn.com/abstract=878401>.

Such consumer-driven considerations certainly contributed for the high quantitative output. The lead-time issue, however, seems to have more import in the way composers worked; after the introduction of exclusive rights, output levels generally decrease¹⁶.

Beethoven 849 opi (8 concerti and 9 symphonies) may not yet reflect the new legal environment, but certainly Gershwin's more relaxed output supposedly does: 19 classical pieces, 35 full Broadway shows and contributions for 22 other plays, 7 films. Leonard Bernstein 3 symphonies, 2 operas and 5 musicals, a ludicrous workload as compared to his Baroque predecessors, were however met with 9 Grammys and 2 tonies and the probably the resulting income¹⁷.

A test group of Bernstein and Gershwin contemporaries, producing roughly to the same public, might indicate that the full effect of exclusive rights in a market economy, whereas certainly provides a less demanding life from creators, at the same time deprive the society from high quality creations at the quantitative level provided by Vivaldi and his colleagues¹⁸.

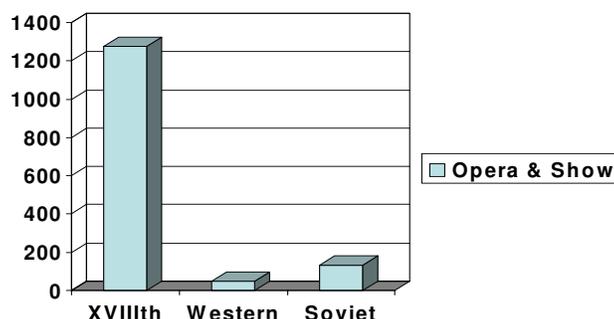
In non-market environments, Aram Khachaturian (a consumer-quality composer utilized on royalty-free basis by Stanley Kubrik in his 2001 film) supplied musical art with 3 ballets, 6 concerti, 3 symphonies, 23 concert and chamber music pieces, 13 films and 15 film score arrangements, in a total of total 108 opi. Sergei Prokofiev output comprises 138 opi, 81 of them under the soviet mode of production, and 7 films, including the masterpieces of Alexander Nevski e Ivan the Terrible. Dmitri Shostakovich counts 147 opi in his output.

16 Answering a comment to Prof. Joshua Sarnoff's peer review of this study: "we have evolved in dysfunctional Larmarkian ways?" Copyright can probably be described as an adaptative motion to fit creativity into a market driven economy, but it is an artificial means to do so. By solving the market shortcomings in assuring the continuity of investment in the creation of symbolic goods through a Government intervention (a statute-structured monopoly) copyright would not cooperate with the natural creative environment, if there is such a thing. As we propose below, its efficiency is circumscribed in a certain kind of production, which allows for maximizing the return of monopoly protection.

17 Gershwin and Bernstein share with the Baroque composers their Classical training and market oriented-output, as distinct from regular Broadway musicians. Other names could be suggested in their ticket, as Kurt Weill, the Austrian Hanns Eisler, and perhaps the Argentinean Astor Piazzola. For the purposes of comparison, however, we restrained our analysis on the two American composers; the other authors here mentioned have not produced in quantitative levels entirely divergent as compared with them.

18 This goes against a canonic argument in favor of copyright: lack of protection should reduce the number of titles available (Plant, "The Economic Aspects of Copyright in Books," pp. 72, 80). Another similar empirical analysis also indicates that market-induced music past the copyright term does not cease to be played nor suffers overexploitation: Heald, Paul J., "Testing the Over- and Under-Exploitation Hypotheses: Bestselling Musical Compositions (1913-32) and Their Use in Cinema (1968-2007)" (April 1, 2008). UGA Legal Studies Research Paper No. 08-006 Available at SSRN: <http://ssrn.com/abstract=1115979>. On a more restrained comment on Law & Economics reasoning, Madison, Michael J., "Intellectual Property and Americana, or Why IP Gets the Blues". Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 18, p. 677, 2008 Available at SSRN: <http://ssrn.com/abstract=1124097>, also notes that the spontaneous blues culture is a cultural output that occurs mainly outside copyright.

Taking the medium total output of all mentioned XVIIIth composers, the two American authors, and their Soviet contemporaries, the graphics would show:



Scarce Scarcity

Taking from Mises¹⁹ the notion that economics is the science of human action carried out under conditions of scarcity, most of the expressive production²⁰ of society is probably of a non-economic nature. There is a whole industry faring upon non-published authors wishing to have their names on typeset. A survey conducted in 2007 by the Arts Council UK among art creators indicated that just over 20% of the players had as a purpose take creation as a moneymaking activity²¹.

That non-economic (or non-market) inducements to creation may be effective is a prosaic notion in law, as noted elsewhere:

Obviously, such market device is not the only way to blossom creativity. Without exclusive rights, the Esterhazy Princes retained the creative flow from Haydn as theirs patrons, entire communities had supported Gothic architecture, the fabliaux literature was born out of the quills of Jean Bodel, of Cortebarbe, Durand, Gautier le Leu, and Henry d' Andeli without the enticement of running royalties. In planned economies, inventors, artists and writers had not ceased to create. Furthermore,

19 Ludwig von Mises, *Human Action*, Laissez Faire Books; 4th Rev Edition, p. 3.

20 For the purposes of this article, "expressive production" is employed to describe the general area covered by the authorship or copyright laws, as opposed to (a) informational production, that related to scientific or news content, (b) technological production, including software and (c) the content of databases.

21 "Almost half of respondents to the survey were primarily motivated by the opportunity to express and communicate ideas. General expressions about the enjoyment of artistic practice were common. Frequent responses were concerned with a sense of calling, passion or a belief in the value of art in society. A smaller yet significant number (22%) wished to earn a living through working as an artist" Found at http://www.artscouncil.org.uk/documents/publications/creyorksvispart2_phpeK4wff.pdf, visited May 1st, 2008.

there are inducements to creation that goes way beyond any economics²².

Lord Canden already put it in 1774, in words somewhat evocative of Shakespeare's Sonnet XVIII²³:

It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press.

When the bookseller offered Milton five pound for his Paradise Lost, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it.

A whole set of rights, said to be "moral", was concocted to serve the non-economic interests related to expressive creation; many practising lawyers in those jurisdictions where moral rights are recognized use such legal protection to convert such nonpecuniary interests in real money for their clients. But such effect is not certainly a motive to start any expressive production²⁴.

On the other hand, indirect economic and even market interests may contribute to make less scarce the expressive production, as Landes and Posner notice in regard to academic and professional articles freely accessible in Internet²⁵.

Could then be argued that economics are peripheral to expressive creations? Certainly not so. Such society output has ever been subject to some societal man-

22 Borges Barbosa, Denis, "Why Intellectual Property May Create Competition Problems" (2007). Available at SSRN: <http://ssrn.com/abstract=1006085>.

23 Donaldson v. Beckett, Proceedings in the Lords on the Question of Literary Property, February 4 through February 22, 1774, found at www.copyright-history.com/donaldson.html, visited May 1st. 2008.

24 Some analysis argue that in fact moral rights may be a disincentive to expressive production: "For example, do such principles as *droit moral*, entitling authors to reclaim copyright from assignees after a fixed period of years or entitling artists to royalties on resale of their art by initial (or subsequent) purchasers, increase or reduce the incentive to create new works? The answer suggested by economic analysis is that, contrary to intuition, such principles reduce the incentive to create by preventing the author or artist from shifting risk to the publisher or dealer. A publisher (say) who must share any future speculative gains with the author will pay the author less for the work, so the risky component of the author's expected remuneration will increase relative to the certain component. If the author is risk averse, he will be worse off as a result". William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Leg. Stud. 325, 325-33, 344-53 (1989)

25 Landes and Posner, *op. cit.*, "Many authors derive substantial benefits from publication that are over and beyond any royalties. This is true not only in terms of prestige and other nonpecuniary income but also pecuniary income in such forms as a higher salary for a professor who publishes than for one who does not, or greater consulting income. Publishing is an effective method of self-advertisement and self-promotion. The norms against plagiarism (that is, against copying without giving the author credit) reinforce the conferral of prestige by publishing; to the extent that those norms are effective, they ensure that the author will obtain recognition, if not always royalties, from the works he publishes."

agement, in the form of censorship, changing tastes ²⁶, etc.; and market considerations is just one of them.

The output is not scarce as a human practice, but scarcity is induced by natural or anthropological filtering and by artificial - political or economic - tools.

A system of expressive production

Copyright appearance has been conventionally explained as a manner of overcoming the natural evanescence of immaterial goods, the content of which tends to disperse as assimilated by the consuming public ²⁷.

Nevertheless, the non-rival and non-exclusive dilemmas of immaterial creations are relevant only to economics under certain specific conditions ²⁸. If society needs sustainable investment flows towards creation (of expressive, technological and firm-image types) and the item created is easily dispersed – if it has a scarcity-inimicous nature – then non-rivality and non-exclusivity are real problems.

Adam Smith apparently only referred to Intellectual Property by noticing that trade secrets are roughly equivalent to monopolies. However technological, those creations are naturally non-rival ²⁹. Other creations may be somewhat un-

26 Taste is a lesser appreciated but very important aspect of the economics of expressive production, see Gerald Reitlinger, *The Economics of Taste*, Hacker Art Books; New Ed edition, 1982, D Throsby, *The Production and Consumption of the Arts: A View of Cultural Economics*, - *Journal of Economic Literature*, 1994.

27 Thomas Jefferson -. "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it (...) Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He, who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature".

28 "Succinctly stated, this body of law grants creators a bundle of exclusive property rights devised to overcome the "public good" problem arising from the intangible, indivisible and inexhaustible nature of intellectual creations, which allows them to be copied by second comers who have not shared in the costs and risks of the creative endeavor", as stated J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a restructured International Intellectual Property System* 13 *Cardozo Arts & Ent. L.J.* 475 (1995). See also Wendy J.Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 *Colum. L. Rev.* 1600 (1982); Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 *Loy. U. Chi. L. J.* 143 (1993). See Wendy J.Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 *U.Dayton L.Rev.* 853, 861-67 (1992); from the same author, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 *Va.L.Rev.* 149, 222-58 (1992) e *Assertive Modesty: An Economy of Intangibles*, 94 *Col.L.Rev.* 8, 2587 (1994). See also Samuelson, Davis, Kapor e Reichmann, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 *Col.L.Rev.* 8, 2308, 2339 (1994). Ejan Machaay, *Legal Hybrids: Beyond Property and Monopoly*, 94 *Col.L.Rev.* 8, 2637 (1994).

29 If any workman were to find a new and quicker way of doing work, or if he were to develop a new method, you can see at once it becomes to his interest to keep that development to himself not to teach the other workman the quicker method. It is to his interest to do what workmen have done in all times, to keep their trade secrets for themselves and their friends.

der control, as the orchestral sheet music of Vivaldi, jealously recouped by the composer at the end of each rehearsal. And other creations, even those filtered through censorship and taste, are simply not produced with views of obtaining market return.

The issue here is source of funding. Expressive production history – not restraining ourselves to a market economy environment – lists basically three sources of funding: the creator himself, the consumer directly, and the market. This may be distilled into a limited number of dramatis personae: the creator, who may or may not supply funding; the purveyor of funding, if not provided by the author; the consumer; and, especially in what could be called “the mediated mode of expressive production”, the publisher.

Those roles are not, as we have seen by looking at the Baroque majors, necessarily exclusive. Those composers tried to overcome the market failure just by encompassing the maximum scope of the distribution phases: they mediated their own crop as farmers selling into the neighbouring town’s street market. Furthermore, as noted Posner recently³⁰, creators are consumers of other creator’s works, and requiring them to fund their predecessors just aggravate their need of funding, perhaps on a non-efficient manner.

The creator who provided funding for his own expression merited from Engels the nickname of “bourgeois author”³¹. My epitome of it, however, is the XVIIIth Century Gesualdo, Prince of Venosa, composer of exquisite madrigals much cherished by Stravinsky and producer of his compositions in public performances, certainly not for the ticketed public, even though the composer’s fame as an unpunished serial killer might attract some paying audience.

Probably Engels would find some terminological impropriety at the present time where the mediate mode went in crisis and creators (not exactly bourgeois), helped by available technologies, may and have assumed his own funding.

Mecenate (the Esterhazy example was already mentioned) is an example of consumer-driven funding. A more sophisticated form of mecenate is the public funding of expressive production intended for the general public, whereby tax money is used directly to overcome the market failure; Government money is used as a surrogate to direct consumer-supported finance. In an example closer to this author, the Brazilian public investment in culture (even if also motivated

That is old idea of trade secrets. The workman kept his knowledge to himself instead of developing a science and teaching it to others and making it public property”. Frederick Taylor’s Testimony before the Special House Committee, 1912.

30 Richard Posner, *The Little Book of Plagiarism*, Pantheon, 2007.

31 As quoted in Alec NOVE (1972) M. i. Tugan-Baranovsky (1865-1919) *Annals of Public and Cooperative Economics* 43 (2) , 113–126 doi:10.1111/j.1467-8292.1972.tb00363.

by cultural preservation motives and infant industry concerns) is present in almost all movie production in the country³².

The third and most important source of funding is the market, mediated by a series of players (publishers, impresarios, producers, agents, marchands de tableaux) some of them taking the risk of the expressive production, others simply marketing their products, many of them holding the technological means necessary to assure an adequate market-sourced return. In the expressive production so mediated, history has shown that overcoming the non-rivalry and non-exclusivity dilemmas may be crucial.

Models of Expressive Production

History has also shown that expressive production has concentrated in three models. Two of them rely on the unicity and uniqueness of the work: the presential one, where creator or his surrogates are in the presence of his consumers to make the work known and felt; and the artefact model (sculpture, painting and original oeuvres d'art), where the corpus mechanicum (the creation is embodied in a single, discrete and self-contained manner) must be brought to the presence of consumers. The third one is the multiple reproduction model, where by technological means many copies of *corpi mechanici* are relied to consumer.

Each of these models provide for very specific economic considerations.

The *presential mode* thrives on the infungible and physical appearance of creators (sometimes extemporizing at the performance, as Baroque soloists and continuo players, repentista poets in Northeastern Brazil, and jazz or Chorinho musicians). Therefore, the creator tells his story directly to the public without any other means of intermediation, but for the eventual *interpreter*. This *person* communicates to the public the work created by others, often adding their own words, which stems from his personality, training or inspiration.

This model was closer to market-driven economics even before dominant market economy has its time³³. As reported, this model was initially stimulated by

32 The public expenditure in culture (what does not fulfill the creativity ticket) in Europe stays significant, at the 1-2.5% of public budget level in various countries. See the Council of Europe study at http://www.coe.int/t/dg4/cultureheritage/Source/Resources/Publications/Culture/InFromTheMargins_EN.pdf, especially p. 299. The Government proxy, consumer-side funding is not peculiar to the economy of symbolic goods. As notes Suzanne Scotchmer, *Innovation and Incentives*, MIT Press, 2004, IP is never a complete substitute for the market failure problems: there is no technological creation system entirely devoid of public funding.

33 "The first point of view is Italian. With the fall of Constantinople in 1543, and the last frantic flight of scholars and their books to the West, the availability of classical knowledge is by and large complete. Gradually the church abandons theatre entirely and, with the dominance of the affluent merchant class in Italy, theatrical professionals have the opportunity to get back to work and move the amateurs off the stage. Between the paying customers and the wealthy patrons,

contractual arrangements, and, in some contexts, resulted in intense product diversification and lead-time considerations. The number of creators and interpreters and their necessary association on collective works (if XVIIIth Century Opera had the technological means, probably would display long credit titles at the finale, like present day movies) created soon pressure groups in face of impresarios and other middlemen.

It is therefore not surprising that the initial demand for exclusive protection on a statutory fashion, (not counting the literary scope of the British Statute of Anne), came exactly from French dramatists, in the late XVIIIth Century³⁴; as the reproductive model (librettos and play text books, printed music sheets³⁵) does not entirely substitute for, or compete directly with the presential model, this collective demand certainly reflects the failing of the private ordering system then in force³⁶.

In law, those peculiarities of the model helped to create the whole area of neighbouring rights, which assure even non-author interpreters a separate flow of income on the basis of their presentation abilities³⁷.

Artefact economics also lure consumers on account of an *aura of uniqueness*. As note Walter Benjamin³⁸,

Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be. This unique existence of the work of art determined the history to which it was subject throughout the time of its existence.

theatre really takes off. The Golden Age of Theatre is here. All sorts of theatre buildings start popping up all over. Architects and designers have a field day. Playwrights and actors take center stage and everything gets published on those new printing presses. From its start in Italy the Renaissance spreads throughout Europe where we will pick up all the other points of view." An History of Theatre, found at <http://emc.elte.hu/~pinter/szoveg/theatre.pdf>, visited at May 2, 2008.

34 The Société des auteurs et compositeurs dramatiques was founded in 1777. « Connaissant un vif succès avec Le Barbier de Séville, Beaumarchais s'interroge sur le montant de la rétribution minimale versée par la Comédie-Française. Le 3 juillet 1777, il propose la fondation de la première société des auteurs dramatiques. Sa lutte aboutit à la reconnaissance légale du droit d'auteur par l'Assemblée constituante le 13 janvier 1791 (loi ratifiée le 19 janvier 1791 par Louis XVI). La première loi édictée dans le monde pour protéger les auteurs et leurs droits », dictionnaire.sensagent.com/Société%20des%20auteurs%20et%20compositeurs%20dramatiques/fr-fr/, visited May 2, 2008.

35 Petrucci obtained from the City of Venice in 1498 a 20-year privilege to print music; this is the start of the music printing industry, even though the Gutenberg shop issued sheets with staves to be filled by hand. See Alec Robertson and Denis Stevens, ed., *The Pelican History of Music*, Penguin Books, 1963, p. 72.

36 As to the application of the notion of private ordering to Intellectual Property issues, see Sag, Matthew J., "Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency". *Tulane Law Review*, Vol. 81 Available at SSRN: <http://ssrn.com/abstract=916603>

37 But those rights are latecomers in the IP field, only emerging as an international treaty obligation in the 60's, after a portion of the presential model was captured by the reproductive one, through movies and television.

38 Walter Benjamin, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit*, as translated in <http://query.nytimes.com/gst/fullpage.html?res=9C04E5DF133BF934A3575BC0A96E958260>, visited May 2, 2008.

The presence of the original is the prerequisite to the concept of authenticity.

Landes and Posner³⁹ have analyzed the Visual Artists Rights Act (VARA), the only U.S. Federal statute to provide moral rights to authors, as a means to protect the economic effects of the *aura* of their artefacts.

The emergence of the technical reproduction of copies did not exclude this specific economy. Much to the contrary, there is a real and substantive market for artefact products even today⁴⁰, and its pricing has been copiously studied by economic authors.

In this model, scarcity is the crucial economic consideration, and taste a major factor, at least up to the moment where the investment value of artefacts becomes independent from the consumption, or art appreciation one⁴¹. Its non-regulated nature may explain the present expansion of the secondary market for artefacts. But there is in such the secondary market, since its inception, an important non-efficiency effect on expressive production, which is long felt, as it is not directly capable of incentivizing creators.

Here also, a body of law was devised to compensate creators for such a loss of efficiency. The *droit de suite*, provided by art. 14 of Berne Convention and incorporated in the national law of some jurisdictions, assures authors of a portion of the subsequent plus-value of their artefact works⁴².

The reproductive model

In a very subtle analysis⁴³, Kant notes that a single artefact is a *werke*, a work of art; but the deliverance of such work to be reproduced on a multicopy fashion

39 William Landes & Richard Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard University Press 2003)

40 Krusin & Company: "The global art economy generated \$23.5 billion (£ 16.6 billion and €26.7 billion) of total sales in 2001. Europe and the United States accounted for about 92% of the value that changed ownership globally during the year. In Europe, the art trade directly generated 73,500 jobs spread across 28,600 businesses. In the United States, 35,300 jobs were directly generated by 8,800 businesses. Ancillary economic activity generated by the art economy in Europe and the United States resulted in nearly \$3 billion (£ 2.1 billion and € 3.4 billion) of further stimulus, including the indirect creation of 80,000 more professional and service sector jobs.", found at <http://dekerckhove.net/pages/arteconomy.html>, visited May 2, 2008.

41 See Reitlinger, *The Economics of Taste*, op. cit.

42 See, as to the peculiar economics of such right, Richard Caves, *Creative Industries: Contracts Between Art & Commerce* (Cambridge: Harvard University Press 2000), John O'Hagan, *The State and the Arts* (Cheltenham: Elgar 1998), Bruno Frey & Werner Pommerehne, *Muses and Markets: Explorations in the Economics of the Arts* (Oxford: Blackwell 1989), and Joseph Sax, *Playing Darts with a Rembrandt: Public & Private Rights in Cultural Treasures* (Ann Arbor: Uni of Michigan Press 1999).

43 Immanuel Kant, 1784, *Von der Unrechtmäßigkeit des Büchernachdrucks*, at <http://www.ikp.uni-bonn.de/kant/aa08/077.html> (on-line version of the Akademie Textausgabe). English translation at <http://www.hkbu.edu.hk/~ppp/fne/essay3.html>. "According to Kant, property applies only to touchable things, among

by a publisher is *an act of communication* (Habermas would say “a speech act”) through a medium. That is the reason by which the reproductive model, therefore, is the mediated mode of production *par excellence* ⁴⁴.

The effect of such technologies is to make conspicuous that *corpus mechanicum* and *corpus mysticum* are not in a body/soul relationship, but rather in what Troeller ⁴⁵ called a *rule of reproduction*. Furthermore, it introduces between the creator and the consumer an act of non-presential communication through a technical device: books and eventually artefacts and performances fixed in wax cylinders or films have turned into multicopy reproductions.

The striking issue here is technology. It must be noted that scribes were also holders of a specific reproducing technology ⁴⁶ and professional mediators between creators and consumers⁴⁷; what Gutenberg’s printing press has done was to free literary expressive production from its prior artefact model. It made possible a multiple copy of the same original at such price and amount that created a new and prevailing model of expressive production ⁴⁸.

But the very reproductive technology, which had the potential to induce its own market demand, also caused a severe risk of oversupply. The non-rival and non-exclusive dilemmas acquire real economic sense, not because consumers might divulge creations out of the investor’s control, as in the Jefferson said in his rather poetic analysis, but because *competing mediators* could eradicate scarcity by oversupplying. Investors coped with the non-exclusivity dilemma through com-

which he includes the works of art. For the very principle of private property, a legitimate purchaser has the right to replicate and to share them without restrictions. Kant recognizes copyright only on written texts, by conceiving them as speeches that exclusively authorized spokespersons - the publishers - may convey to the public in the name of their authors. The rights of the authorized publishers, however, are justified only if they help the public to get the texts”. Pievatolo, Maria Chiara, "The Pirate from Koenigsberg: Why Closed Source Software is Not Worth of Copyright Protection" (March 2007). Available at SSRN: <http://ssrn.com/abstract=1016402>

44 In this model expressive production is mediated both on a technical sense (the copy), and on a market sense (the holder of technical means mediate between creator and consumer).

45 Troller Alois, *Précis du droit de la propriété immatérielle*, Editions Helbing & Lichtenhahn, Bâle et Stuttgart, 1978.

46 According to EPO T 258/03 “[we are] aware that [our] comparatively broad interpretation of the term “invention” in Article 52(1) EPC will include activities which are so familiar that their technical character tends to be overlooked, such as the act of writing using pen and paper”. For a very enticing analysis of the change of this artifact model to the reproductive one, see Peter Yu’s *Of Monks, Medieval Scribes, and Middlemen*, op. cit.

47 “By the late thirteenth century in Paris (a century later in England), ateliers of scribes and illuminators were known by the name of their master artists,” and “[t]he names of scribes, illuminators, parchment-makers and binders . . . [can be found] in tax records, though few names can be linked with surviving books.” (*Of Monks, Medieval Scribes, and Middlemen* PETER K. YU)

48 “The printing press irrevocably altered the balance of moral and economic claims to works of authorship. It also presented copyright law’s central question”, Paul Goldstein, *Copyright’s Highway: From Gutenberg To The Celestial Jukebox* 31 (rev. ed. 2003) “historical emergence [of copyright] is related to printing technology”, Mark Rose, *Authors And Owners: The Invention Of Copyright* 9 (1993)

petitor-target instruments (printer's privilege) and not through social filtering (like censorship).

The reproductive model also

- (a) Separates the funding of creation (*the cost of expression*) from the funding of the medium technology ⁴⁹;
- (b) Characterizes the protection of the investment in the medium technology and risk taking as a separate problem from incentive to creation ⁵⁰;
- (c) Makes it possible that the mediation can work as a professional entrepreneurial activity, not necessarily holding the technological means to reproduce ⁵¹.

Two incidental issues

The printing press revolution occurs in an era also characterized by some instances of a proto-capitalist market economy. Marketing of presential expression models start (as mentioned) not later than the early XVII Century. Therefore, market inducements to at least some expressive production have been in force for three or four centuries.

Does such peculiar kind of economic inducement causes specific expressive endeavours to thrive, whereas other forms are not induced?

The notion of causality here is very important. A very simple mechanical causation model may be found in some mainstream copyright economics, as when Landes and Posner describe the possible *societal* effect of the lack of copyright on expressive production:

Without copyright protection, authors, publishers, and copiers would have inefficient incentives with regard to the timing of various decisions. Publishers, to lengthen their head start, would have a

49 Landes and Posner, *An Economic Analysis of Copyright Law*, op. cit: "The cost of producing a book or other copy-rightable work (we start by talking just about books and later branch out to other forms of expression) has two components. The first is the cost of creating the work. We assume that it does not vary with the number of copies produced or sold, since it consists primarily of the author's time and effort plus the cost to the publisher of soliciting and editing the manuscript and setting it in type. Consistent with copyright usage we call the sum of these costs the "cost of expression."

50 "[f]rom the time of the invention of printing, about 1450, to the end of the fifteenth century, the works of living authors played practically no part in the German book-trade, and the question of commercial results for their writers did not call for consideration"). "there is record . . . of the publication before the close of the fifteenth century and early in the sixteenth, chiefly in Paris, of occasional volumes of original writings"). Peter Yu, *Of monks....* Op. cit.

51 "Moreover, the importance of intermediaries changes over time. For instance, printers, with their unique access to limited technical facilities, were very important in the fifteenth and sixteenth centuries. In the late sixteenth century, however, they "started to lose influence to copy-holding booksellers." By the seventeenth century, they became "merely the agent[s] of the publisher[s]," who had since become "the central figure[s] in the book trade" by virtue of their ability to select, organize, and finance the manufacture of books. As intermediaries continue to emerge, adapt, and disappear in the dynamic business environment, the need to protect a particular group, or groups, of middlemen from obsolescence has become highly suspect". Peter Yu, *Of Monks...*

disincentive to engage in prepublication advertising and even to announce publication dates in advance, and copiers would have an incentive to install excessively speedy production lines. There would be increased incentives to create faddish, ephemeral, and otherwise transitory works because the gains from being first in the market for such works would be likely to exceed the losses from absence of copyright protection. There would be a shift toward the production of works that are difficult to copy; authors would be more likely to circulate their works privately rather than widely, to lessen the risk of copying; and contractual restrictions on copying would multiply.

Therefore, economic decisions would (to such an extent) condition directly and with the highest probability the nature of expressive production. Curiously, classical authors very adverse to Law and Economics could also endorse such mechanical causation⁵². Other economic styles could discern sensible time factors acting between the economic *stimuli* and the expressive production response⁵³.

However (as it was suggested above) only a portion of expressive production is targeted by economic inducements, of which a subgroup is specifically market driven. Personal, political, cultural and other considerations (not excluding the availability of technical means) may induce expressive production; economic determinants certainly act to allow, modify or even stiffen creation in addition to or to the detriment of all other reasons to create.

But this causation is certainly not mechanical; many vectors incide simultaneously and in different degrees to cause authors to express. The relation of economy to expressive creation is systemic, not mechanical⁵⁴.

All this considered, economic considerations might actually influence the content of expressive production. Let us start considering this issue from an organological point of view: taste and convention tended to assign specific instruments to certain expressive roles. From the early XVIIth Century to very late in the following century, recorder sound was associated with the appearance of good spirits (Gluck's Dance of the Blessed Spirits from Orfeo ed Euridice is the very latest use of this convention) as trombones were used to express hellish en-

52 "Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence. They have no history, no development; but men, developing their material production and their material intercourse, alter, along with this their real existence, their thinking and the products of their thinking", Bertell Ollmann, *Alienation: Marx's Conception of Man in Capitalist Society* (Cambridge England, 1971).

53 "The transformation of the superstructure, which takes place far more slowly than that of the substructure, has taken more than half a century to manifest in all areas of culture the change in the conditions of production.", Walter Benjamin, *op. cit.*

54 See Etienne Balibar: *Structural Causality, Overdetermination, and Antagonism*, in *Postmodern Materialism and the Future of Marxist Theory: Essays in the Althusserian Tradition*, 1996.

tities. But this colour-tone induced convention has to be left just because recorders ceased to be available.

Instruments of subtler colouring and dynamics may be quite expressive in small environments: in mecenate funding systems, recorders and organic-stringed gambas, and its specific stylish usage in "affect" contrasts, could thrive, and effectively did so. Those instruments, however, are very inefficient to be heard in larger rooms, and size is a factor when the ticketed public provides funding⁵⁵. Once the paying public, not mecenate funds, provides meat and bread to professional musicians, recorders, harpsichords and gambas leave silently the history of music, to be substituted by stronger, uniform in tone colour and less subtler Boehm flutes, metal stringed cellos and grand pianos.

The same change in music funding has probably influenced (although taste also might have its weight) the expressiveness of orchestral dynamics. Consider the chiaroscuro variations of Corelli music, where the whole orchestra alternates with the *concertino* soloists in scaled timbre and volume contrasts; the attendance of courtly chambers delighted on the solo/*ripieno* alternations and the delicate "bubble" *sforzando* of singular notes. But such delicacies would be tasteless to Rossini opera public of the XIXth century, who preferred endless *crescendos* from their time's 60-member ensemble, and barely noticeable to the audience of rock festivals.

The second issue to be considered in this session is that market economies *may actually justify a mechanical causation analysis*, in connection with a specific type of expressive production.

Once the mediator system is established between creator and consumer, and the reproductive model becomes the dominant method, some market players would target on the maximum return opportunities. Those opportunities tend to be very crafted creators who are able to allow the publisher to sell the largest number of copies of the same work⁵⁶. Curiously, expressive production of such kind is quite scarce, what makes creators like Grisham, Clancy, Steele, Rowling, and Stephen King very valuable. Landes and Posner copyright economics analysis are most precise in such contexts of scarce offer from creators and maximum return considerations from mediators.

55 See Robert Donington The choice of instruments in baroque music, *Early Music*, Vol. I, no. 3, 1973, OUP, p. 131.

56 "The reason publishers want zillion copy sellers from one writer instead of ten writers each selling one-tenth of a zillion is because of unit cost. Unit cost is the cost of each book sold. Add up all the cost for printing, editorial time, design time, and a percentage of the fixed cost like heats light and water and voila and voila: what it costs to make a book happen. That cost is almost same if you sell 3000 books or 30000 books", "Miss Snarky, literary agent", found at <http://misssnark.blogspot.com/2005/11/more-more-more.html>, visited May 3, 2008.

Therefore, maximum return expressive production is subject to a *content filter* quite similar to the Inquisitorial censorship of the XVI to XVIIIth centuries. As censorship tried to keep expression on the most conservative limits, maximum return favors *minimum innovative expression*:

Not only are the hit songs, stars, and soap operas cyclically recurrent and rigidly invariable types, but the specific content of the entertainment itself is derived from them and only appears to change. The details are interchangeable⁵⁷.

For such specific breed of expressive goods, Law & Economics analysis fits to perfection, as the profit motive is the prime mover and the market is their determinant in only and ultimate instance⁵⁸. They are primarily goods in trade, which by chance are minimum-innovation cultural goods.

This specific kind of production brings some special problems to the law. Minimal innovation challenges the scope of protection of copyright, with effects like the doctrine of inadvertent duplication⁵⁹.

On the other hand, a more systemic causation approach might be necessary to provide an economically effective analysis of expressive production destined to diversified or niche markets.

The importance of exclusive rights may have been overstated in connection with such production focused in specialized consumers⁶⁰, and other economic inducements and non-pecuniary incentives are perhaps more significant. By bringing our attention to pre-copyright ambiances and non-IP areas we try to contribute to such studies. It may be reasonably argued that this approach would be il-

57 Theodor Adorno and Max Horkheimer, *Enlightenment as Mass Deception* (1944), *The Culture Industry*, Selected Essays on Mass Culture, 2nd Edition, Rutledge, 2001.

58 In such a restricted context, but probably not elsewhere, it is quite pertinent the observation of *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. The profit motive is the engine that ensures the progress of science.)

59 "Since most popular songs have simple melodies and the number of melodic variations is limited, the possibility of accidental duplication of several bars is significant. Widespread playing of these songs on the radio makes it likely that the second composer will have had access to the original work, which both increases the likelihood of accidental duplication and reduces the cost of avoiding it. If proof of intentional duplication were required for infringement, composers of popular songs would have little copyright protection and social welfare would fall." Landes and Posner, *An Economic Analysis of Copyright Law*, op. cit.

60 "Copyright skeptics point out that authors invest in writing for many reasons beyond the financial rewards that copyright law provides. This is true, but it should not obscure the point that, the author's hope of commercial success is often what keeps them chained to the typewriter and keeps their publisher paying the rent". Sag, Matthew J., "Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency". *Tulane Law Review*, Vol. 81 Available at SSRN: <http://ssrn.com/abstract=916603>

luminating of the more innovative and socially significant expressive production⁶¹.

The demise of gatekeepers

The relative success of copyright to assure return in the reproductive model of incentivizing expressive production resulted in considerable part from the limited number of mediators in each market. Funding requirements tended to be much higher for holding technical means of reproduction than for the cost of expression; the availability of risk-taking agents in a market driven activity is less frequent than prospective authors.

The main issue here, however, is that technological means have been for most of copyright history relatively expensive and subject to political control. Technology was an expensive factor, even for second-comers who did not take the cost of expression and the risks of consumer rejection. The number of possible illegal copyists was quite reduced.

In all that period, the paucity of technology holders allowed for efficient control: as it is inefficient to prevent an huge number of consumers from free-riding, plaintiffs could chose the illegal competitor to strike, and close therefore with one finger only the dyke spillage.

The strategy that makes Intellectual Property effective is exactly that: shoot at the gatekeepers⁶². The multitude of farmers create sometimes an impossible enforcing situation of plant variety holders, the lack of assets make street peddlers unviable defendants in infringement actions, and the expenditure of scarce taxpayer money is required to call criminal enforcement. Those are known Intellectual Property failures.

Fact is, exclusive rights are monopoly-like tools and just function in a competition environment. For the almost entire copyright history, consumers of expressive production are not able to *copy* works in such a way as to effectively compete

61 The same author, however, seems to believe that the Law and Economic approach is compatible with such innovative production: "As the Supreme Court has commented on a number of occasions, the constitutional authority for copyright is expressly for the purpose of the promotion of science and useful arts, and copyright rewards to authors are means to that end, not an end in themselves. This is consistent with a law and economics theory of copyright". As to the Supreme Courts cases indicated, there are however very contrasting rationales. Whereas the innovative and social significance values are the main rationale of *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.), a stricter Law and Economics vision seems to appear in *Eldred v. Ashcroft*, as quoted.

62 Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-party Enforcement Strategy*, 2 J. L. Econ. & Org. 53, 53–54 (1986).

with the mediator's in its market ⁶³. They were not actually capable of violating exclusive *copy* statutes.

As Peter Yu stresses, a Medieval scribe (or, at least, a scribe organization of the late Middle Age) is not ontologically diverse from Gutenberg; they are all mediators between creators and consumers of expressive goods, but Gutenberg and his followers had the means of doing the scribe work on a faster, comparatively cheaper and more efficient way even lacking the *aura* of their predecessors' copies. The amount of copies per time allowed by the new technology, however, resulted in a *qualitative* change in the economics of expressive production.

Those later few decades have enabled consumers with technical means of reproduction (and the Internet is one of such technical means) much cheaper and more efficient than the high-investment tools of the former time publishers. Anyone is a publisher if it chooses to be ⁶⁴, and copies may be technically made in an unlimited amount ⁶⁵. Shooting the gatekeeper now requires weapons of mass destruction.

Here also, it may be argued that a Hegelian transformation of quantity for quality applies ⁶⁶. The prior instruments for directing investments to social purposes are not efficient anymore.

On the other hand, the same technological transformation allowed those creators who thus chose to take over reproduction *and* distribution of his expressive production. The incorporation of the technical means as non-specialized tools, even as life-style implements, help to overcome the advantages of job specialization: I may at the end of this article post it at my Internet page and reach in one week more readers than the printed version of it would ever attain.

Obviously, there are economic and other advantages in securing a traditional print edition. Expressive production may be quite ductile; new media sometimes

63 Jane C. Ginsburg, Putting Cars On The "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace, 95 Colum. L. Rev. 1466, 1488 (1995).

64 "In the age of Xerox, every man is a publisher." These words by Marshall McLuhan, the Canadian communications researcher, aptly describe the situation which has arisen for publishers and copyright law as a result of the development of modern reprographic technology", Reprography and Copyright Law: A Comparative Law Study Concerning the Role of Copyright Law in the Age of Information IIC 1975 Heft 4, p. 382.

65 The basic premises of the presential model of expression might have some contemporary interesting developments. Presential meant historically that at least some portion of the creation is done by a performer before the public, and therefore an at least partial non-fixed creation, somewhat interacting with the public. Although cooperative authorship, with the public taking some part of the creation, is not a new thing in the history of creative endeavors (open theatre plays where the public interacts with performers were not unheard of in the 60's and 70's), the divide between passive and active behavior is now much more blurred. Open source creations and Wikipedia are in such sense also presential. Once more, Joshua Sarnoff is to be credited for the remark.

66 As stated in the Letter from Marx to Engels, 22 June 1867.

does not affect the demand for older media, even though return of the investment needed to keep the old production may follow below market level.

What seems clearly ineffective, however, is the legal construction contrived to assure the flow of investment to those reproduction mediators, especially those in expressive production economy affected by the emerge of cheap, mass-reproduction technical means. It might and should be argued that in connection with those ravaged areas the technology assumptions that led to the appearance of copyright are not anymore operative⁶⁷.

Cost of enforcement is certainly scaling up, and at least a considerable portion of those costs (criminal enforcement, courts, international action, etc.) is paid by taxpayers, diminishing the social justification for creating monopolies⁶⁸. Even considering that producing symbolic goods is an economic activity of prime importance, there would be a reasonable limit to those public expenditures. Exclusive rights are just a means to reduce tax money spent in stimulating innovation, under closer management by the investing parties⁶⁹.

On the other hand, creators may now engage in Kantian speech acts themselves, if they chose to do so, and social (and constitutional) considerations should take this into account. Some authors suggest that a new creator-targeted legal in-

67 "The concept of copyright is rooted in the technology of print. The recognition of a copyright and the practice of paying royalties emerged with the printing press. . . . Copyright was a specific adaptation to a specific technology, and to the problems and opportunities it created. The law recognized that..." Ithiel de Sola Pool, *Technologies without Boundaries: On Telecommunications in a Global Age* (Cambridge, Mass.: Harvard University Press, 1990), pp. 254–59.

68 The ideal solution for the ailing expressive mediator would then be to make the cost of copying more expensive than the original for third parties, by using taxpayer money to raise such costs. "The "cost of copying" is partially under the control of the seller, who could use a "digital rights management system," some anticopying technology, or threats of legal action which would increase the cost of copying and, therefore, increase the price that it could charge for its product" Hal Varian, *Copying and Copyright*, found at <http://people.ischool.berkeley.edu/~hal/people/hal/papers.html>, visited May 2, 2008. But there is a maximum social efficiency level over which is more reasonable to heighten Government-sponsored production than to create new police precincts to arrest counterfeiters. To evaluate the level beyond which Government sponsoring makes more sense than paying cops, the raising costs of public enforcement of copyright must be summed to the other social costs resulting from IP rights. As noted by Pallas Loren, Lydia, "The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection". *Louisiana Law Review*, Forthcoming Available at SSRN: <http://ssrn.com/abstract=1134035>: "Despite its extremely low threshold, copyright protection is not cost-free: granting exclusive rights in expression makes subsequent expression more costly, imposes wealth distribution costs, and creates distributive consequences affecting opportunities for expression. Society should avoid shouldering these costs when they are unnecessary".

69 "In view of such developments, now is a good time for a radical rethinking of traditional intellectual property concepts. Instead of considering reforms to strengthen patents and copyrights, perhaps we should be moving in the opposite direction. To be sure, given current trends, copyright might well die out on its own, whether we like it or not. If so, discussions of the merits of copyright will become essentially moot", Julio H. Cole, *Patents and Copyrights: Do the Benefits Exceed the Costs?*, 15 *J. LIBERTARIAN. STUD.* 79, 83 (2001).

ducement should replace copyright ⁷⁰. Such incentive could be not at all similar to an exclusive right.

Alternatively, the creators may assume the juggling methods of Baroque composers, if they like, and strive in a non-IP environment regulated by lead time, contractual relationships, some private ordering and high output, with much less physical exertion than those horse driven, dirt plodding musicians of the XVIIIth Century. There is for them a life after copyright ⁷¹.

Even the publisher has probably a fair opportunity of survival. As always note Peter Yu:

(...) scribes did not go out of extinction quickly. Indeed, the sale of manuscripts continued to flourish for at least a generation or two, and scribal publications continued to exist until at least the seventeenth century. The pace of change, therefore, was much slower, and the transitional period was far longer than what the entertainment industry is currently experiencing.

New marketing methods, private ordering systems and product diversification may help the mediators to cope. Market reward seems to persist as relevant. Perhaps the most affected economic practice would be the minimum innovation, mass-market line of production.

Even if it were so, the demise of the investors on low-content goods would be far from certain. As notes Joshua Sarnoff ⁷²:

(...) what is threatening about new models (until the means of their production gets consolidated) - they offer the creator the opportunity to dispense with the middlemen and thus to distribute without the content filter and (more importantly) based on different economic returns that would justify the production of very different kinds of works and their dissemination. Hence, they threaten not the market, but by creating new decentralized markets.

On the other hand, the eventual failure of the maximum return, copyright based, and mediation system would not affect the bulk of the expressive production activity. The market-capable creators are, as mentioned, quite a scarce species. Two thousand scriptwriters, who may stop the visual entertainment industry for

70 Ku, Raymond Shih Ray, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology". University of Chicago Law Review, Available at SSRN: <http://ssrn.com/abstract=266964> or DOI: 10.2139/ssrn.266964

71 Leo Galdelmann, a former student of mine of recorder and viols, now a very famous Brazilian jazz musician, is a prime example of creator turned into producer of his own records: further than distributing his production, he states that self-production enhances freedom of choice and control of proceeds. There is no missing of the big time labels.

72 Correspondence to the author of this study dated of May 28, 2008.

months, would find good employment even if copyright would join *prima nocte* rights into the legal history's oblivion.

Conclusion

The example of the XVIIIth Century composers who thrived both in cultural and market terms sheds some doubt on the dogma that without effective copyright the output of symbolic goods would diminish on a significant level. Some non-IP productive systems may be equally satisfactory to induce high quantitative levels of creativity.

Some harder critics could note that also the output of market-oriented Baroque composers is not really first class. The market adverse Johann Sebastian Bach would be deeper and more culturally satisfying than the superficial Telemann or the illusionist Vivaldi. Any market solution would then seem ludicrous under such strenuous standards.

Our theme, however, was not the substantive level of the expressive production, but the changing role of mediators in such production. For the time being, they seem almost as dispensable to digital economy as the sad and comic Woody Allen's Broadway Danny Rose was to their clients once a new, successful achievement came by.