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Copyrights and Creativity: the Hispanic Perspective

by

Alán V. José

A dissertation submitted in partial satisfaction of the

requirements for the degree of

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Abstract

Copyrights and Creativity: the Hispanic Perspective

by

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Doctor of Philosophy in Hispanic Languages and Literatures

University of California, Berkeley

Professor Francine Masiello, Chair

Does the Hispanic tradition offer an alternative perspective to the problem of copyrights and digital piracy? This dissertation examines the narrative that connects copyrights and creativity. It focuses on how prevailing representations of the practice, circulation, and experience of creativity that link it to copyrights are governed by specific epistemological structures and a rhetoric of fear. The dissertation focuses on three competing and overlapping traditions of conceiving and codifying property and national identity: first, the personal, natural and deontological tradition of continental Europe which comes to be crystallized in *droits d'auteur*; then the commercial and utilitarian Anglo-American tradition represented by copyright; and finally the public domain-centered Hispanic tradition represented by its preprinting license and *tasa*.

My investigation traces the genealogy of each tradition and registers the increasing tension in the Hispanic world between notions of possessive individualism, *droit moral* and reason of state while documenting the relentless dominance of copyrights in postnational times. I argue that different codifications of individual property lead to opposing views of the public domain, which in turn relate to competing exemplars of sociopolitical organization. I show that the codification of intellectual property in the Hispanic transatlantic is peculiar in that it was aristocracy which defeated

liberal bourgeois revolutions in the early modern and enlightenment eras. The debate seen as a hallmark of European modernity opposing, on the one hand, classic participative republicanism and *droits d'auteur*, and, on the other hand, liberal contractual republicanism and copyrights, is often superseded in the Hispanic tradition by a discourse stressing the importance of the public domain and the rights of «well-crafted works.» I argue that while copyrights and author laws are the response of corporate England and revolutionary France to the increasing power of printing guilds and corporations, the Spanish enlightened state of Carlos III addressed the similar problem of the power of religious corporations by protecting readers, through the empowerment of a secular *sui generis* printing tribunal, and through the legislation of the public domain. I put forward the idea that the codification of intellectual ownership as copyright is one of the key mechanisms by which literature becomes commodified. As such, copyright is one of the engines of a historical process of reification that asserts the materiality of culture over its «spiritual» content. In this regard, copyright replaces literal canonicity and becomes a technology of Schumpeterian creative destruction that ensures the affirmation of the new or emergent over the established: Enlightenment over Renaissance modernity; Liberal over Classic republics; and the global and hybrid postnational over an older universalizing humanism.

Within this framework, I develop a new genealogy of the legal codification of intellectual property starting with common property of the public domain in Spain in the sixteenth and seventeenth centuries, and continuing with northern Europe's codification of individual intellectual property in the seventeenth and nineteenth. My dissertation registers the implications of the the different conceptions of intellectual property and the public domain in the seventeenth and eighteenth century in Spain, as the Spanish imperial project failed in the nineteenth century, and then in contemporary times when the internationalization of copyrights through multinational treaties and the struggles to codify first cinema and then the Internet, reproduced a context similar to the one in which copyrights were first crystallized: a context of imperial justification and expansion.

My dissertation, then, engages in a double movement. On the one hand, it shows how recent controversies opposing Spain and the United States in regard to peer-to-peer file exchange are part of a long struggle over the codification of international law, and the construction of an international community to enforce it that evolves from the European struggle to legitimate its overseas empires in the early-modern era. On the other hand, it examines how these controversies are presented through rhetorical strategies that pose romantic creative expression and intellectual property legal protection as two universal human rights. This artifice ties an ethical-legal conceptualization of creativity to a neorepublican form of sociopolitical association, both of European origin, to the European imperial legacy.

The systematic analysis of the correlation between copyrights and creativity leads me to conclude that the volatility of copyrights does not put creativity at risk, but rather shows itself linked to imperial projects and institutions associated to copyrights. Conversely, the Hispanic intellectual property tradition provides a new framework to think new media differently, and a more nuanced alternative to the idea of the death of creativity that the imperial narrative of copyrights presents. Of particular interest to me are the implications of such debates for Modern and Postmodern Spanish American transatlantic and transcontinental cultural production, with Spain and Mexico as my primary case-studies.

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Acronyms

AGS	Archivo General de Simancas
AHDE	Anuario de Historia del Derecho Español
AHN	Archivo Histórico Nacional
BN	Biblioteca Nacional de España
BPR	Biblioteca del Palacio Real
BRAE	Boletín de la Real Academia Española
BRAH	Boletín de la Real Academia de Historia
BUS	Biblioteca de la Universidad de Salamanca
Cod.	Código de Justiniano
D.	Digesto
MPAA	Motion Picture Association of America
NAFTA	North America Free Trade Agreement including Mexico, United States, and Canada.
NCT	New Communication Technologies
NIE	New Information Economy
Nov. R.	Novísima Recopilación
P.	Partidas
PROMUSICAE	Asociación de Productores de Música de España
RIAA	Recording Industry Association of America
R.I.	Recopilación de Indias
R.O.	Real Orden
R.	Recopilación Castellana de 1567
SGAE	Sociedad General de Autores y Editores (de España)
SOGEM	Sociedad General de Escritores de México
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights administered by the WTO
WTO	World Trade Organization

Introduction

In the last two decades of the twentieth century profound political, economic and technological transformations have altered in fundamental ways how people communicate and learn. These transformations reconfigured the international balance of powers, and extended the globalization of neoliberal policies in areas of everyday life never before commoditized. These significant changes have provoked antithetical reactions, and have been represented through opposed narratives of hope and fear. The technological transformation brought about by new communication technologies,¹ for example, has been fearfully described as «a safe haven for anarchists or new communists,»² but has also been hopefully depicted as «the epicenter of contemporary creativity and of the new information economy.»³ Hope has sometimes turned into disillusionment and then into fear. In the Spanish-speaking world, for example, the political transformations marked by the end of fascism in Spain, of military regimes in the Southern Cone, and of seventy years of a single-party governance in Mexico led first to a general sentiment of accomplishment and hope, but soon turned into disillusionment as promises of social justice and equality once again came to be perceived as illusory. Disillusionment has led to anxiety and fear, as failure is perceived as endemic and intrinsic to the notion of progress associated with neoliberalism. Discourses denouncing pervasive violations of the rule of law, blatant disregards for human rights, and the everlasting Latin American economic «crisis» while the gap between rich and poor deepens, often present these problems as connected with the expansion of neoliberal markets. This narrative resonates with the anxiety over the pollution and over-exploitation of the planet, which continue at alarming rates, and which are also perceived as associated with the neoliberal model of progress.

However, while in these narratives the notion of «neoliberal progress» is presented as a threat, in other equally globalized discourses, progress, this time termed «western civilization» is presented as being under attack. The destruction of the Twin Towers in New York on September 11th, 2001 marks the moment that triggers those reinvigorated narratives of danger, warning against new «others» and their threats to western civilization and progress.⁴

Narratives of hope and fear are particular strategies through which history is perceived and articulated. Paul Ricœur, Michel de Certeau and Hayden White have famously observed⁵ that narrating history emplots time into archetypical narrative structures. As with tragic or comic emplacement, narratives of hope and fear can be reconstructed from traces left in a wide range of cultural productions and historical documents by social unconscious⁶ or authorial practice.⁷ Narratives of fear are disproportionate accounts of perceived rather than actual threats, that are used in warfare, propaganda,⁸ or as a colonization⁹ practice. They demonize adversaries, manufacture consent and coalesce national identities behind constructed imaginaries.

Following Lakoff's notion of metaphorical thinking,¹⁰ Robert Reich¹¹ has theorized that successful political actors in modern democracies are sensitive to «social sentiments of confidence or anxiety,» and that they accordingly frame their progressive or regressive ideology in four archetypical social narratives that Reich has identified within the political discourse in the United States. Two are about hope and two about fear. Reich's principle is that when politicians recognize these narratives and speak to these hopes and fears, their discourse resonates with their audience; hence they gain trust and votes.

In addition to political analysis, other disciplines such as criticism or the social sciences also discuss narratives of fear. Critics of relativism and postmodern skepticism in the philosophy of science,¹² for example, have argued that they are «narratives of fear to commit.» Within economic theory, Deirdre McCloskey¹³ has argued similarly that the postmodern «fear to commit to reality» in contemporary econometrics and the general unawareness of the consequences of rhetorics in economic discourse has led to costly vacillations or misjudgments that have impacted not only the

economic discipline but also the world economy. Both of these narratives speak about the future, and call for a change in a particular institution. Barthes' «death of the author» is also in that sense a narrative of fear since the French thinker frames his argument as a concern about the future of *écriture* (Literature). The future of creativity in general is also commonly presented today through narratives of hope and fear. As one organizing principle of the new information economy and its associated world order, creativity is indeed at the center of a high-stake political and economic struggle. It should come as no surprise that the discourses on its practice, conception and circulation are cloaked by the shadow of three ominous narratives prophesying (1) «the end of creativity;» (2) the dusk of literature as a privileged cultural exemplar; and (3) the increasing futility of the liberal arts or «crisis of the humanities.» These three narratives are told from complementary perspectives focusing respectively on (1) the volatility of the institutions of authorship in the light of new communication technologies and the Internet; (2) the cooptation of literature by the postnational market-state; and (3) the increasing loss of prestige of a humanistic education in a fast-changing world evermore specialized and technologized.

Of course, I acknowledge that poetry written on the walls, independent video art and small press publishing will always exist regardless of the economy and sometimes in spite of it. However, my focus here is the market for creative works and the industry associated with it through contracts governing the reproduction and derivatives of those works. In this dissertation, I examine the logic and rhetoric of the contemporary narrative of «endangered creativity» from a Hispano-transatlantic perspective. I explore it from historic, political, economic, and critical perspectives and analyze whether this narrative foretelling a tempestuous future corresponds to actual threats or, alternatively, to a moment of Schumpeterian «creative destruction,» as a reform of traditional cultural institutions within the context of the new information economy. My central case studies are Mexico and Spain.

Contracts that regulate reproduction, marketing, use, and possible modifications of an artistic work are based on a particular conceptualization of the practice which is codified through intellectual property law. Within

this legal body, copyrights and author laws are directly concerned with literary and artistic artifacts, while other laws such as patent and trademarks refer to scientific and technological inventions or branding. The study of copyrights and author laws is the focal point of specific subfields within legal studies, political economy, history, and criticism. These subfields seek to understand the legal codification of authorship and intellectual property from their particular disciplinary perspective: legal studies are concerned with fairness and justice; political economy with economic value and power structures; and history and criticism with the development and interconnection of notions of romantic authorship and modern intellectual property rights.

The narrative of endangered creativity tells a story in which the Internet has made the notions of copyrights and romantic authorship volatile, two structures assumed to be at the source of creativity. As copyrights and romantic authorship become volatile, creativity is presented as being in increased jeopardy. There is, however, disagreement on the solutions presented to dodge the danger: large copyright holders champion strengthening copyrights and romantic authorship in digital spaces; librarians, universities and consumer ombudsmen warn against the loss of freedoms and rights obtained through valiant efforts of several generations, and advocate for a better balance between private property and the public good; finally, a group of artists, programmers, scholars and social advocates suggests that intellectual property rights do not reflect the reality of the practice or the experience of creativity in digital spaces, and urges to think radically different models for digital spaces.

The narrative of endangered creativity suggests that creativity is correlated to copyrights, and that one can predict the former by observing the latter. Scholars agree that although perceived as natural, and inseparable from our modern conception of society, copyrights are in fact recent cultural formations dating from the eighteenth and nineteenth centuries. There is also considerable agreement in considering that copyrights are the combined product of six factors: enlightened ideas, possessive individualism, valorization of original genius, professionalization of the author, technological innovation and a mass-market for books and

newspapers, all galvanized by commercial struggle and the requirements of legal argumentation. Multinational treaties are seen as having synchronized national differences and made heterogenous forms of authorship merge into one global model represented by copyrights. However, new communication technologies are perceived as having brought about a technological paradigm shift that renders copyrights volatile and endangers creativity as a consequence.

This narrative of copyrights and of the Scylla and Charybdis stalking the future of creativity has a double foundation: one of its pillars is a particular logical structure, and another is a set of specific rhetorical devices. This particular logical structure is used in epistemology to generalize causal inference. In this case the model is used to argue that copyrights and romantic authorship are the source or *cause* of certain types of creativity, and that this fact can be generalized to most creative artifacts. This structure is a particular logical iteration that is composed of two elements: a particular event that clearly divides time in two (before and after copyrights), and a series in time in which the two elements of the correlation can be established and studied (the author-copyright-work relation for every work). This particular logical iteration is commonly referred to in epistemology as an «interrupted time series.»¹⁴

Logical iterations construct «logical classes» by establishing an origin and theorizing an operation or progression from it. In this instance, the logical class is the set of copyrighted works; the origin is the first copyright legislation; and the operation is the assignment of each and every work to an author, a relationship that is sanctioned by the law. From an epistemic perspective, a logical iteration is sound when two conditions are met: first that the original observation is rooted in reality; and second, that the operation is logically correct (to the soundness of the iteration, it is *irrelevant* whether the operation is real or fictional). When theoretically extended, iterative thinking allows claims to be made about future elements of the series. The original point grounds the process in reality, the trend portion of the iteration validates the correlation. In this instance, documenting the boom in creativity parallel to the codification of copyrights gives reality to the argument, and the legal certainty of the author-work relation permits to

generalize it. By framing the narrative of copyrights as an iteration, the relationship between copyrights and creativity has to be instantiated only once and can then be generalized. As a result, three central claims are presented as self-evident or axiomatic when in fact they are not.

First, in order to establish the origin of the iteration, the narrative needs to emphasize a discontinuity in time before which there is little of something, and after which there is a significantly more (in this case modern creativity). Establishing copyrights as that path-breaking event disconnects Renaissance from Enlightenment and necessarily leads to a double effect of downplaying Renaissance modernity and over emphasizing Enlightenment.¹⁵

The second claim presented as axiomatic and self-evident is that creativity is «caused» by copyrights, a proxy which subsumes romantic authorship, the technology of serial reproduction, a mass market for books and the legal codification of the practice in intellectual property laws. This logical model assumes that copyrights provide authors with sufficient incentives to foster creativity. This assumption has two major problems: causality and precedence. The former is problematic because it reduces the motivations of artistic creation to economic incentives. The latter is problematic because this particular epistemological model does not specify if a boom in creativity is «caused» by copyrights or if, alternatively copyrights are «caused» by a boom in creativity. Under this alternative perspective, the narrative becomes a story of privatization, and copyrights the law that enables the appropriation of profit and wealth that creativity was generating in the first place. This is exactly what happened in the early times of the Internet where major advancements were made under «open source» principles, and not through individual intellectual property rights. In either case, creativity «caused» by copyrights or copyrights «caused» by creativity, the relationship copyrights-creativity is expressed in terms of causality, when in fact the epistemic structure used to construct it allows only for claims of *correlation*, but not *causality*.¹⁶ This fact does not preclude claims about the future of creativity, but specifies which ones are *valid* within the epistemological framework.

The third assumption –after a path-breaking event, and a relation of causality– is representativity, or that the premise that texts are clearly

delimited and that univocal authorship can be established over each one of them are principles that can be extended to all literary and artistic works.

A significant structuring principle of this narrative comes from the framing of the issue as a problem of intellectual property. Intellectual property is a large legal body including principally copyrights, author laws, patent, and trademarks laws. Copyright law is concerned with the part of intellectual property that refers to literary and artistic works as opposed to inventions, trademarks, or original denominations, which are considered under different sub-branches of intellectual property law. The combined codification of literary and artistic creativity with knowledge and information –i.e. copyrights together with patent law– has important consequences as it obviates characteristics of the lesser mechanized artifacts, and instead brings to center stage the forms of cultural production that rely more on technological mass-reproduction. This taxonomy has enabled uncanny associations between literature and technology. For example, in Renaissance Italy the reproducing rights of a book were sometimes granted not to the writer of the work, or the editor, but to the inventor of the typeface in which the book was printed.¹⁷ As a second contemporary example, copyright law considers software code to be of the exact same genus as poetry and fiction, and to be practiced and experienced in an exact same way, standing both as equals before the law.

The literary and artistic artifact may be considered from alternative perspectives, emphasizing its materiality rather than its intellectual form, or is rather privileging the unique personality connection of an author and a work, an identitarian relation that cannot be sold or bought. These two perspectives situate intellectual property laws under even more general categories of either «patrimonial» or «personal» law. If seen as a branch of patrimonial or property law, intellectual property represent a particular case of tradable items, an approach that is reflected in the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). If seen instead as part of personal law, they may be theorized as related to human, natural, universal, or citizenship rights and responsibilities.¹⁸ Different forms of authorship have been normally associated with particular national traditions. The story of copyrights normally begins on April 10th, 1710 in England with the

enactment of the Statute of Queen Anne,¹⁹ and continental author laws in eighteenth-century Austria, Germany and revolutionary France. These national traditions are seen to continue until present times, when they have been synchronized into copyrights through multinational treaties.

The global harmonization of intellectual property law referring to arts and literature first through the Berne Convention for the Protection of Literary and Artistic Works (1886), but mostly through TRIPS (1995) could potentially be read, in combination with new communication technologies and the Internet, as a second path-breaking event dividing time into before there was a unique global form of authorship, and after. If indeed the Internet and global copyrights are a paradigm-shift comparable to the printing press and the first copyright legislation, they may represent an ending point to the time series. By extension, the correlation copyrights-creativity may also be bound to a particular time frame ranging from the seventeenth century to the turn of the twenty-first century. From an epistemological perspective, it is thus crucial that this second moment in time be seen as a relatively minor occurrence of the series and not as a major path-breaking event, for the narrative that links creativity to copyrights to continue to have bearing.

The history of copyrights and author laws spans over three centuries, but the regulation of the reproduction and derivatives of literary and artistic works has a much longer history. Considering the latter instead of the former, one can suddenly articulate a longer genealogy that joins Renaissance and Enlightenment, previously seen as separate, and identify important precedents in Classic Rome, and in the Scholastic revolution of the twelfth-to-fourteenth centuries. In this longer periodization, copyright and author rights become a phase in a tradition concerned with the dominion and property of writing and painting, a tradition that does not always run parallel to the development of patent law. Instead, the fact that in the seventeenth and eighteenth centuries copyrights and author laws were first thought of as a state strategy seeking to curb the power of printers and stationers through the empowerment of authors, has fundamental implications. Facing the exact same problem, the enlightened monarch Carlos III decided to empower a *sui generis* secular tribunal, the *Juzgado de Imprentas* (1715-1830) continuing a sixteenth and seventeenth century

Hispanic tradition of partially legislating individual property rights, and focusing instead on regulating the public domain. This wider periodization can be schematized in three stages: (1) pre-modern, from Roman Hispania to the end of the Middle Ages; (2) modern, from sixteenth-century Spain to the last quarter of the twentieth century; and (3) late-modern or postmodern, from the Uruguay Round Negotiations and the fall of the Berlin Wall to contemporary times. This wider narrative does not necessarily forebode the end of creativity, but suggests instead an imminent reform of cultural institutions.

In the pre-modern period, the narrative unfolds through six important key points: In Classic Rome an incipient market for books and the invention of a novel technique of law creation allows people to construct new laws from «useful and fair fictions.» Legal fictions are still in use today in a wide range of cases. A few examples of these «legal fictions» include the imagination of corporate juridical personality, the expedition of new birth certificates for adopted children, or the presumed death of a person absent for a period of time. Using this technique, the Hispano Roman epigrammatist Martial argued for a legal certification that «good books» were in a way equivalent to children, and therefore their authors should be granted the same status and privileges of citizens who were «fathers of three,» a status which include tax exemptions and privilege access to several public fora. The concept can be traced all the way up to Juan Manuel's prologue to his literary œuvre. In this text Manuel stages a trial in which the king recognizes the «right of the well-done works» to be preserved and protected by the state. Don Juan Manuel's prologue is also relevant because it instantiates the tendency started only in the twelfth to fourteenth century of binding together in a single volume the «complete works» of one single author.²⁰ The book in volume form breaks with the previous model of the miscellany,²¹ predominant since the eight-century, and which gathered texts of different genres and authorships in the same codex. The organizing principle of the grouped texts was not the writer, but rather the reader who had dissimilar texts bound according to his preferences and stamped with the *ex libris* of his personal library. The scholastic revolution that established the body of works of the classic Greco-Roman authors and of the fathers of the Church,

progressively granted more agency to the medieval *auctor* of the works whom medieval scholars increasingly saw as responsible for the *strictu sensu* of texts, as opposed to the *spiritual sense*, which was of God's authorship. The Roman legal tradition was also widely commented and discussed at the time, thanks to the compilations of Roman law by Justinian (6c),²² and to the crystallization of Roman and Germanic Canon law reflected in the *Forum Iudicum* (7c).²³ Among the laws that were commented upon and examined, the tradition of the *tabula picta*²⁴ focused on discussing books six and forty-one of Justinian *Digeste*, concerned with how to establish the just property of the literary and artistic text from the ontology and experience of the work of art. In addition to the *fictio legis* and the *tabula picta*, the fourteenth-century Franciscan controversy on the right to poverty also helped construct the modern notion of property. One of the subjects discussed at the time, for example, was the idea that one could use and benefit from something without necessarily possessing it, especially if the use did not «consume» the item. This distinction between usufruct or dominion and property can be exemplified with books that are not exhausted by reading, but rather gain in value as they are more widely read and commented. Finally, Francisco de Vitoria and the School of Salamanca in the sixteenth century thoroughly discussed the notion of universal human rights and the idea of an international community responsible for enforcing them concertedly. Both ideas, universal values and harmonized international law, will become once again relevant in the narrative of endangered creativity after 1995 as copyrights and authorship laws are inscribed in multinational treaties, and the responsibilities regarding creativity of the nation-state are also globalized.

The narrative continues into modernity, from the assignment of texts to their authors in order to censor and prohibit –which Foucault calls «the penal appropriation of discourse»²⁵– to the birth²⁶ of the concepts of copyright and literary property in the eighteenth century under corporative English regulations and royal privilege in France respectively. As mentioned earlier, the increasing power of printers and stationers was faced with a reaction from Reformation and Counterreformation who sought to empower competing sectors of society in order to counterbalance the increasing

influence of corporations. While in France and England authors were empowered, Enlightened Spain granted extensive powers to protect the public domain to a secular printing tribunal 1715-1830. The nineteenth century Hispanic transatlantic was marked by unrest and instability. Spanish American states were rushed into independence some argue before they were ready, and both in America and in the peninsula a quest to reinvent communities through non-imperial identities took successive forms. A significant portion of the century is marked by philosophies of identity, especially Krausismo,²⁷ a German romantic idealist model embracing spiritual interpretations in general and Catholic notions of divinity in particular. Identity searching among Hispanic nations is often framed as an opposition between perceived materialistic values embodied by a stereotypical view of the United States and the spiritual values of the Spanish tradition; a confrontation between mercantilism and the dehumanization arguably associated with materialism and technology, and traditional codes of honor, goodness and courage. The opposition knows a peak after the Spanish defeat of 1898 when a wave of transatlantic Hispanism rallies in opposition to the United States imperial expansion, and another peak occurs during the interbellum of 1918-1939, when the idea of technological progress towards a period of generalized wellbeing and happiness is shattered by the war of 1914-1918. The controversy between Miguel de Unamuno and José Ortega y Gasset is exemplary of the times. Unamuno, conflicted between spiritualism and modernity, imagines a literary and artistic Spain, opposed to a scientific and technological «rest of Europe» and a heavily industrialized and materialistic United States. On the other side of the spectrum, Ortega is a self-defined «liberal humanist» fascinated by both German idealism and the liberal philosophical tradition of Locke and Hume. Ortega is a firm defender of self-determination and individual liberties, but also of the idea of a meritocracy led by «excelling minorities.» While Unamuno argues for an international division of tasks, «¡Que inventen ellos!» [Let others invent!], Ortega champions the idea of a supranational international intellectual community and a unified European State. Ortega's works on the dehumanization of the arts and on the formation of masses, together with his aesthetic theory present a fascinating counterpoint to

Walter Benjamin's «Work of Art in an Age of Mechanical Reproduction.» In the context of the narrative of endangered creativity, this counterpoint identifies two groups of art forms in relation to the intensity with which they rely on technology. While the most heavily technologized artforms follow the principles sketched by Benjamin, those in the visual and live arts do not. In terms of copyrights, the arts that can be serially produced and mass-distributed, which follow Benjamin's observations, are also the ones for which copyrights are «useful.» Paintings, poetry, or theater, for which technology cannot produce identical and ubiquitous copies follow different principles sketched by Ortega and find little use for copyrights. The distinction between technological and lesser-technologized art forms, closely matches a division of relevance of copyrights, and also a dichotomy between two forms of aesthetics, one governed by the market, and another aligned with more identitarian concerns. As with the aesthetic of the literature and the arts produced under the auspices of the identity-building nation-state, a particular «aesthetic of copyrights» can also be defined from this debate. These two institutional supports for literary and artistic creation can be exemplified in 1939-1975 by the comparison and contrast of the two alternative models in Latin America represented on the one hand by the Mexican School and its peculiar notion of a «right to a national identity,» and, on another hand, by the Latin American Boom, chiefly orchestrated from Spain under commercial premises often opposed to the fascist ideology of the Francoist state.

In the late-modern era, copyrights become partially harmonized worldwide through the ratification of multinational treaties. However, the inception of the Internet brings back important contradictions inherent to different national conceptualizations of the role of the state in regards to creativity and cultural heritage. The changes brought about by new technologies and the importance of an international copyright treaty with fangs, represent major historical changes both in terms of technology and the intellectual property law.

First, the perception of the magnitude of the technological change is a central concern. If this is a true paradigm shift, the epistemological connection between copyrights and creativity based on an interrupted time

series would cease to have bearing once the original paradigm is «switched off» and replaced. As Kuhn describes for the sciences, the narratives based on a previous paradigm will appear to be wrong and insufficient to seize the *opportunities* brought about by the new paradigm. If alternatively the technological change is presented as significant, but not a true paradigm shift, then a readjustment of old institutions will suffice to encompass the *challenges* and *risks* of the new conditions.

While a relatively solid global understanding exists on the trade related aspects of individual intellectual property rights, there is a significant disparity in the conceptualization of the non-commercial aspects of the relation author-text, and in national understandings of the public domain. The public domain in the Anglo-Saxon world is a sum of individualities, readily available for appropriation. The Anglo-Saxon state has limited responsibilities over the preservation of heritage or the canon as compared to other models. In the continental tradition, after the legal copyright protection expires, the state continues to be responsible for the non-commercial or moral rights of authors, namely integrity and attribution of the works. Those rights are non-transferable and as such cannot be legally sold or bought. In the Spanish tradition, the national identity contribution of the canonized work is especially recognized. Parallel to the market, a «cultural complex» similar to the military or academic complexes, exists and sponsors significant amounts of creativity, offering an alternative to authors and artists to contribute to the public domain through the patronage of the state and through a system of over seven thousand pre-publication awards. Whether this specificity is to survive the expansion of the markets and contribute to the redefinition of copyrights in the twenty-first century is uncertain. The undergoing struggle, however, can be exemplified in Mexico by the legal debates surrounding global copyright integration in 1995-2000, and in Spain by the ongoing controversy about peer-to-peer file sharing.

This manuscript is divided, accordingly, in one theoretical and three period-chapters covering the prehistory, history and recent controversies surrounding intellectual property rights: chapter one focuses on the epistemology of the narrative; and chapters two through four on pre-modern (5c bC-14c), modern (15c-20c) and late-modern times (21c).

Chapter one examines the logic, assumptions and relevant tropes of the narrative of copyrights and «endangered creativity.» The investigation can be summarized as the discussion of the validity of the claims about the future of creativity in relation to the epistemological model on which they are based. Three of those claims are: first, that creativity is either correlated or inversely correlated to copyrights and to free-market circulation; second, that creativity is a public good; and third, that through multinational treaties copyrights have effectively become universal rights, codified through one single universal legislation, and enforced comparably across national borders. As mentioned earlier, efforts to harmonize copyrights have been circumscribed to the individual legal protection occurring during the «copyright term.» They have left out the non-commercial aspects related to intellectual property, and especially the different conceptions of the public domain and of the responsibility the nation-state and the international community have to protect it.

Chapter two focuses on the pre-modern era. It examines the origin of the term «plagiarism» applied to a creative work in fourth-century Roman Hispania when the poet Martial first used it to describe the wrongdoing of a bard who deceptively included verses of his own making amongst the ones of Martial without making it known to his audience. This type of offense is not what we, in modern times, would call plagiarism, and which in Martial's time was referred to as the offense of the «stealer of words» or *logoklopeus*.²⁸ To plagiarize was to kidnap or mansteal, a meaning that is still current in Romance languages. Martial's choice to frame his complaint as a metaphorical narrative of enslavement is not coincidental. I argue that it is rooted instead on a newly invented technique of law creation: the *fictio legis*, and that Martial, who had studied law, used this technique with the idea of offering a «useful and fair» legal imagination of the relation between authors and texts. The chapter then briefly addresses the concept of dominion and usufruct pertaining to text and painting as discussed in the scholastic glosses of the *Tabula Picta*. It questions whether those discussions transcended the realm of byzantine lucubration and reached legal codification, or if instead, other legal principles such as the *fictio legis* were used in printing and editorial contracts of the book. The idea is discussed through the

examination of the general prologue to the complete works of don Juan Manuel. Manuel's choice of staging a fictional trial to defend the rights of «the well-done work» is shown not to be an isolated occurrence, but rather a build-up in the fictional experiment started by Martial. The notion of composing a «general prologue» as a paratext that would organize a complete body of works according to their authorship is a novel idea associated with the invention of the modern book. The way in which Manuel composed it, heavily borrowing from other sources, but still claiming authorship over it based on the quality of his assemblage, is important to mark the changes in the conception of the author's agency at the time. Finally, the extension of Martial's prosopopeia to the point of arguing for the «rights of the well-done work» places the prologue alongside Manuel's *Libro de Los Estados* as a tool to reclaim the rights of his heirs. Manuel's argumentation is not based on individual property rights, but rather on the the notion that it is the state's responsibility to protect cultural heritage and the public domain.

The story continues in chapter three with modernity: first, early Renaissance Spanish modernity and industrial northern European Enlightenment modernity; and then nineteenth-century romanticism and twentieth-century nationalistic and ideological modernity. In the context of discoveries, a growing market for books, reform and counterreformation, the growing power of printers and stationers is faced in corporate England and revolutionary France with copyright and literary property laws respectively. These laws were first conceived as an empowerment of authors to help rebalance the threatening power of the printing industry and its guilds. In enlightened Spain, Carlos III opted for a different solution, and decided to empower a secular printing tribunal with vast powers to keep not only the industry in check, but also the Church, whose censorship function was drastically diminished. Monasteries and churches were not permitted to have printing workshops inside their walls, but because people commonly bequeathed belongings to the Church, the inclusion of books in these bequests risked losing control to a portion of the nation's literary pantheon, and of some technical and scientific works to the church. The laws of Carlos III reaffirmed the responsibility of the state in those cases, and the state faculty

to help put back into circulation works that would otherwise fall into the «dead hands» of the church («manos muertas»). The authorship laws of the Bourbon reforms keep a tight control over all sectors of society including authors, in spite of the recognition of their right to commercialize their works and leave to their heirs their printing privileges.

With the final dissolution of the *Juzgado de Imprentas* in 1830, starts a new period in which three models coexist and compete: Franco-German deontological and personality author laws; corporate Anglo-Saxon copyrights; and the Spanish tradition of laws regulating the public domain. Six years after the dissolution of the tribunal, a law on literary property law was presented to the Spanish legislature using the technique of *fictio legis*. During a debate in the Cortes on April 17, 1847, the Spanish senator García Goyena presented the initiative in the following terms: «The law of literary property is a fiction, but a fiction that is just to authors, and useful to the people.»

A «useful and just» fiction, the law of literary property is passed by a Spanish legislature mostly composed of literati. The law emphasizes the moral rights of authors, the difference between literary creation and scientific invention, and the responsibility of the state for the protection of «literature» and «cultural heritage.» It goes great lengths in distancing literary creation from scientific invention, and reaffirms the importance of authors in society and their relevance in the conception and administration of the modern nation-state. Seven years later, a new legislature, this time composed mostly of engineers, was more attuned to with science and technology and did not deem it necessary to establish a major distinction between artistic creativity, scientific discovery and technological invention. This new legislature decides to modify the literary property law to encompass more creative activities, transforming it into the first Hispanic law of intellectual property in 1854, a law which remained in force almost unchanged until the post-Franco reforms of the 1980s.

Placing the *Juzgado de Imprentas* (1715-1830) back in the context of the laws on reproduction and derivatives of literary and artistic works that European enlightened states implemented to counterbalance the growing power of printers and stationers, brings to center stage the importance of

printing in the formation of modern nation-states and helps bridge the two main theorizations of the formation of modern nations in the nineteenth and twentieth centuries. Benedict Anderson in *Imagined Communities* identifies the importance of the modern novel and of newspapers in the imagination of the modern nation-state. Anderson's theoretical framework is based on historic materialism, which together with Althusser's theory of interpellation, and Gramsci's theory of the function of the intellectual in the bourgeois state, conforms the core marxist framework to understand the construction of national identities and imagined communities. Anderson's brilliant exegesis has become one of the pillars of the humanities for understanding the formation of the nation-state. However, Anderson has to go great lengths to make his brilliant insights fit into the erroneous notion that the modern novel originated in eighteenth-century England. Instead of setting the beginning of the Hispanic modern novel with Lizardi's *Periquillo Sarniento* [The Mangy Parrot] (1816-1831) as Anderson does, in this chapter, I offer the case of the most striking best-seller of the seventeenth century: Mateo Aleman's *Guzmán de Alfarache* (1599) which circulated broadly in Europe and in the Americas. In his reading of *Guzmán*, Lázaro Carreter confirms Bakhtin's theory of a dialogical imagination in the Renaissance, the centrality of the «I-narrative,» and the irruption of every-day life that characterizes the modern novel. However, Lázaro Carreter is puzzled by the «strange relation of property» that links Aleman to his character. The strangeness that Lázaro senses and that he cannot fully explain is related, I argue, to the fact that property in the eyes of the Renaissance writer appears as «a liberation» from the identitarian relationship presupposed by the legal appropriation of discourse. Property entails not only rights, but also responsibilities, which are *less* than the responsibilities implied by identity. The distance between text and author that property brings about, allows the modern author to express ideas with which he might not necessarily agree, or for a character to disagree with his author altogether. The conceptual shift between identity and property and the metaphors of authorship used by Alemán and by Cervantes –paternity, personality, the idea of the text as a cultivated field, and the metaphor of a general conquering new territories for the nation– are

logical extensions of the personification of the text and the metaphors constructed by Martial and don Juan Manuel.

The opposition property/identity bridges the two main theorizations of the formation of nineteenth century Hispanic nation-states: the marxist view represented by Anderson, and the liberal perspective articulated by the Cambridge school of neorepublican thought and exemplified by Pagden and Castro Leiva's «The Fate of the Modern Republics of Latin America,» 2001. While the former stresses literary identity formation and the creation of national-subjects, the latter focuses on the opposition between liberal contractual and classic participative republics as exemplars of political association in Latin America. Nineteenth-century romanticism and twentieth-century nationalistic and ideological modernities become a space where discourses of national identity and property rights including intellectual property rights coexist and compete. In Spain, the property/identity binomial was at the center of the Unamuno/Ortega controversy on the possible specialization of creativity and on the aesthetics of technologically mass-reproduced literary and artistic works. The property/identity dichotomy also frames the interrelation of two different models of literary and artistic production and circulation in Mexico: on the one hand, the «revolutionary cultural complex» 1929-2000 whose objective was to guarantee what Moises Sainz' termed the «citizen's right to a national identity,» and, on another hand, the largely commercial Latin American Boom of the 1960s and 70s.

Chapter four discusses late-modernity, the ratification of both TRIPS and NAFTA in 1995, and the advent of the Internet. It examines how the function and responsibility of the state in regards to creativity becomes partially harmonized through multinational treaties, and briefly recounts the legislative debates in Mexico and Spain surrounding the unforeseen effects of multinational treaties and copyrights on the state handling of cultural heritage and the conceptualization of the public domain. To track down the sources of the contemporary narrative of endangered creativity and the Internet, I examine four apparently disconnected discursive spaces where the contemporary narrative of endangered creativity was first constructed: the Nixon-Rockefeller fight for the Republican party nomination in the

1960s; *la politique des auteurs* that helped establish the figure of romantic authorship in cinema; the structuralist and post-structuralist discourses of the death and function of the author, and the semantic shifts in the changing conceptualization of the Internet in the 1980s and 1990s. The latter ceased to consider media-specificity, demonized certain common practices, and positioned intellectual property in digital environments as axiomatic. The chapter then addresses the question of whether new communication technologies constitute a paradigm-shift; it examines the validity of the narratives of fear through which possible institutional changes are posed; and presents two case studies: (1) the legislative debates in Mexico surrounding the changes in ownership of Mexican cultural heritage after the signature of multinational treaties in 1995 and Mexican president Vicente Fox' neorepublican cultural plan termed «ciudadanización de la cultura 2000-2006.» The Fox' plan consisted on the restructuring of the national cultural institutions based on notions of neoliberal citizenship practice and on Anglo-Saxon forms of civil society organization; and (2) the controversy that opposes the United States copyright industries and Spain on the interpretation of the law regarding digital file-sharing.

The perspective discussed in this manuscript seeks to move the discussion on «copyrights and creativity» from fine-tuning the balance between private and public interests within a static model of copyrights, towards a public conversation where different conceptualizations of the public domain are taken into account; where the specificity of aesthetic creativity is recognized as distinct from discovery and invention; and where both stake and stockholders can have an informed participation in a debate on the cultural-institutions reform that has already started.

Chapter I: Epistemology

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What are Copyrights?

In order to speak about copyrights it might be advisable to explicit a general working definition of the term.

Copyrights are today part of a larger legal body, termed intellectual property law, which in addition to copyrights includes patent law, trademarks, designs, and region denominations. The word «copy» rightly suggests they are concerned with the act of copying. In the early modern a «copy» was also understood as the original manuscript a stationer or printer would use as the basis for a printed edition of a work. Copyrights are the legal structure that commoditizes a work by assigning to a «copyright-holder» property over the «first copy» and monopoly for a period of time over its reproduction and marketing.

Material Property

Laws asserting material property over paintings, sculptures, and books as physical movable items or «bienes muebles» have existed since classical times. In the fifth century A.D., Justinian had classic Roman laws gathered under one volume,²⁹ and a few years later, in the Spanish peninsula, Recesivinto had the first legal code merging Roman and Canon law compiled.³⁰ These works circulated widely in the twelfth and thirteenth century. In Toledo Alfonso IX «El Sabio,» had both codes translated and glossed, while he was composing his seven *Partidas*,³¹ which together with the Justinian *Digesta*, and Recesivinto's *Fuero Juzgo*, constitute the three pillars of Spanish law. The gloss and commentaries of Justinian's *Digesta* referring to the property of the artistic and literary work fascinated medieval

scholars in the twelfth and fourteenth centuries and constituted a subject of discussion that has come to be known as *Tabula Picta*.

Establishing clear ownership and rights is important to determine usufruct, enable commerce, and regulate inheritance. Laws on material property of books and paintings establish ownership considering general simple cases, and also very special circumstances such as ownership when a writer would write on someone else's parchment; where different contributions were made to a work; where those contributions could be subtracted from it leaving the work unaltered; or where particular contributions significantly changed the commercial or artistic value of the work making those additions of the essence. As a general basic rule one could say that classic and medieval laws placed the ownership of the artistic artifact on its material owner, except when a modification made a significant contribution to the practice, or to the fundamental value of the work.³² Statues or paintings would come often from workshops where a number of hands intervened in their making. Artists owned an artistic work if they used their own materials and had not been paid to make that work by someone else.

For books, rarely the owner was the writer, as works were often made for hire, and the composer of a work rarely wrote the copy himself. Manuscript hand-copying was regulated under the premise that the decision to allow copiers to reproduce a work, lay on the person who had the physical «copy» to be reproduced. The text as idea and expression was thought to be under the dominion, not property, of the writer or artist until the moment it left his or her portfolio, at which moment it became the property of readers and scholars who glossed it and carried it further. The text was considered freed from the jurisdiction of the composer at the moment of publication, when it was considered that the work entered the «public domain.»³³ From the eight to the twelfth centuries, booksellers would bind together various works or fragments by several authors in a «miscellany.» Book collectors would acquire scrolls and works that they would then have bound in volumes according to their preferences and criteria. Those volumes would all bear the initials of their owner, the collector, or the institution gathering the works. In the twelfth and thirteenth centuries, scholastic scholars worked

on assembling authoritative editions of classic authors, under the premise that «authorship» was a better principle to organize and understand texts. As the medieval individual *auctor* gained recognition and agency, the notion of «complete works» and an «œuvre» became common currency, and the book in its modern form was created.³⁴

Privileges and Monopolies

With the popularization of the printing press a significant change occurs.³⁵ The book goes from being a significantly expensive luxury item to a relatively accessible one, and the practice of reading from an oral communal activity to a private and silent one. Reproduction rights become valuable assets with the existence of technology to serial-reproduce, and mass-distribute. The first legal attempts to establish a judicial framework for the use and commoditization of these assets is thus governed by the association of reproduction rights and technology, not authorship. Legislators are not concerned with the origin of the work as text which would have led them to authorship, but rather with the origin of the material copies of the book forming a printed edition. This approach led them to conceive the inventor of the technology of print-reproduction as the originator of the edition, and thus as the just owner of this new kind of commodity, *el libro de caja*, or *libro de molde* [the printed book]. This explains why, for example, in Renaissance Italy reproduction rights were sometimes granted not to authors, but to the inventors of specific mobile types. For instance in 1495-1496, Aldus Manutius received a twenty-year monopoly of all works printed by him in Greek, combined with a patent for two of his printing developments, one of them a Greek type. Five years later Manutius received a similar concession: a ten-year monopoly of all works printed in his italic type.³⁶

As the commerce of books and newspapers becomes increasingly profitable, permission to join the trade is more valuable and desired. In the Spanish world, books are accompanied with a paratext that included a printing license, a privilege or a pre-publication censorship authorization

also called *imprimatur*, and a «tasa» or capped price at which the book could be sold. The printing license was the proof that the workshop was registered, recognized, and that it followed the legal regulations of the trade. The license is a state prerogative which at times is controlled by increasingly powerful guilds. The privilege or *imprimatur* in Spain is a «pre-publication» censorship that pretends to guarantee that what is printed is also sound. Similar to the contemporary process of «peer-review,» texts are examined by different academies, schools, or institutions, according to their subject, and then granted permission to be published either by authorized members of those institutions, or most commonly, by monarchs themselves. This unrealistic goal is satirized by Cervantes as Don Quijote argues to Sancho that «what is said in books must be true because it bears the signature of the kings.» Finally, the «tasa» is set in recognition that monopolies, such as a printing privilege, include incentives to increase prices and limit circulation in order to maximize profit, a practice harmful to readers and to society in general. The «tasa» is particularly strict in books that are considered of «primera necesidad» [first-need books], mostly books used to alphabetize or to distribute critical information, such as how to prevent and cure a potentially epidemic disease.

The idea of state-sanctioned commercial private monopolies poses a series of questions starting with the legitimacy of the state prerogative to grant such monopolies. Under one perspective, those monopolies could be thought of as concessions to private parties over the public domain for a limited period of time. Today, a similar notion is applied to broadcasting concessions for radio and television companies which arguably result in public utility –dissemination of information, and creation of jobs–, and also in revenue for the state. Under another perspective those monopolies are seen as citizen rights, which deflects the legitimacy issue away from the state. The problem is a particularization of the origin of rights, and of whether those rights are natural, pre-existing the state, and surrendered to it in order to live in society, or, alternatively, if they are granted to citizens by the state without which those rights could not exist. The two conceptions imply different notions of citizenship practice, ideas of civil society and theorizations of the relation of the private and public spheres with the sphere

of state authority.³⁷ Common-pool resources are appropriated and commoditized as individual property rights are defined and enforced. The problem fascinated thinkers in the Renaissance and Enlightenment from Francisco Vitoria to Hugo Grotius and Samuel Pufendorf as Spanish, Dutch, English, German and French imperial expansion required moral justification for military action, but also international laws, a world balance of power, and the constitution of an international community agreeing to enforce those laws.³⁸ To enforce those state-sanctioned property rights relies on the coercive forces of the state, but also on forging the perception that those rights are legitimate. Not coincidentally the philosophical justification of copyrights and author laws and its «naturalization» as axiomatic can be read as extending the discussion on the appropriation of the newly discovered territories (Vitoria's *De Indis*, 1599); the usufruct of a common pool of resources (Grotius's *Mare Liberum* 1609); the universal rights and responsibilities of citizens (*De officio hominis et civis* 1675); and the construction of international law and of an international imagined community to enforce it (Vitoria, Grotius, Pufendorf). In recent times, Roland Barthes argued that the «very principle of myth» is that «it transforms history into nature.»³⁹ This naturalizing of history occurs with copyrights to the extent that natural rights theory has been used at times to argue for uncapped copyright legal protections.⁴⁰

In either case, whether privileges or rights, these monopolies commit the coercive forces of the state for a period of time at the expense of the public domain. This situation poses a classic problem of impartiality, and of checks and balances. Reproduction and distribution control through the regulation of «copying rights» fulfills multiple functions: it creates a framework for the commoditization of works, but also concentrates resources in a group of editors sanctioned by the state.

Mark Rose has argued along these same lines that English printing monopolies are closely related to economic activity, state control and censorship.⁴¹ Copyright laws brought a significant change to the legal tradition of material ownership and to the notion of printing privileges, by placing the reproduction and derivative rights in the hand of authors, instead of investors. While printing privileges were of common use since the

fifteenth and sixteenth centuries, the power and influence of printers and stationers grew significantly in England since the Statute of Monopolies (1624). By placing the reproduction rights in the hands of authors, the crown intended to limit the power of corporations, which it partially succeeded to do. Corporations still had a much larger bargaining power to acquire and profit from those copyrights, but a negotiation process started between authors and corporations that continued for centuries.⁴²

In France, a similar problem was dealt with through author laws or *droit d'auteur* that were first established during the reign of Louis XVI and further expanded during the revolution.⁴³ French author laws are part of the Franco-Germanic continental tradition. They are similar to copyrights in that they establish reproduction and derivative rights in the author of a work, which can then commercialize them. However, they differ from Anglo-Saxon copyrights in that in addition to commercial or patrimonial rights they also recognize deontological or personality rights which cannot be sold or bought. The most commonly cited of those moral rights are attribution and integrity, that is the right of an author to always be recognized as author of a particular work, and the right that such work always be presented in its integral form and not misquoted or arbitrarily summarized.

In Spain, the problem was handled differently, and that did not directly empower authors, but rather gave extraordinary faculties to a *sui generis* printing tribunal 1715-1830, which in a way sought to empower the public domain through a relatively strict official interpretation of what constituted the common good.

Whether copyrights are conceptualized as a relentless march from the dark ages of privileges to the enlightened realization of individual property rights; or critically described as an ever increasing encroachment onto the public domain, as with all monopolies, copyrights entail a cost to society, which economists have termed «deadweight loss.» Industry's interests are concentrated while society's are dispersed, which results in asymmetric bargaining powers. What is the right amount of copyright legal protection and how can a balance between private and public interest be determined under such negotiation disparities? The nation-state has conflicting interests. On the one hand it is supposed to represent the people and the *res publica*.

On the other hand, intellectual property rights signify jobs, taxes, and a form of information oversight that contributes to guaranteeing the wellbeing of the state itself.

International Copyrights

Another way to think of copyrights, in addition to privilege, concession or monopoly, is as a delegated tax collection associated with a direct targeted subsidy. Delegated tax collection has been a common practice in the Spanish world for a long time. Jews in Spain, for example, grew to be specialized public administrators, and often managed tax collection until their expulsion from the Peninsula in 1492. Subsidies, on the other hand, are a form of public investment or state sponsorship aimed at providing economic resources to sectors that would fail to be self sustainable through the market.

In contemporary times viewing copyrights as a combination of a tax on consumption and a targeted subsidy to production can be exemplified by imagining a person buying a book or DVD. The person is charged a surplus amount or tax on consumption in addition to the costs of production, commercialization and of the general rate of return of the economy. This tax is twofold. It includes a general tax to consumption, in California it varies from eight to ten percent, and the «copyright tax» usually ranging from five to twenty percent. The general tax is collected by the IRS, and the «copyright tax» is redirected as a subsidy to the agent responsible for the coming about of the book or the DVD. This subsidy is not, as it is commonly perceived, aimed at recouping his or her investment, which is already included in the costs of production, distribution and market profit margin. It is an incentive aimed at *future works*. Another way of stating the same fact is to think of copyrights as an incentive for authors to publish their works. Once a work is published there is no economic reason to allocate any subsidy to its author anymore.⁴⁴ The «copyright tax» is particularly efficient because it bypasses state bureaucracy, and targets the subsidy very

precisely to creators with a provable track to make works that appeal to the public.

However, the plot thickens as we think of international copyrights because, through a notion of international community, global copyrights commit coercive forces of one state to benefit another.⁴⁵ More industrialized countries are interested in stronger and deeper copyrights, while lesser industrialized nations would benefit more from the wider circulation of information. International copyright is a strategic objective that goes beyond notions of corporate lobbying and corruption. For example, during the Cold War, film studios in the United States were permitted to coordinate their activities through an association technically functioning as a cartel. The MPAA incurred in a series of violations to market concentration limits and other monopolistic practices deemed illegal by the antitrust laws of the United States. However, perceived as a strategic sector, the MPAA also had representatives in all major US embassies around the world, sharing the cost of these offices with the United States Information Agency. During the Cold War, a series of barriers limited ownership of Film studios to American citizens. However, the fact that foreign representations in embassies, and ownership barriers were dramatically reduced after the fall of the Berlin Wall –French, Japanese and Australian firms each bought a major studio at that time– suggests that the deferential treatment to the sector was not a mere problem of corporate lobbying or the result of a shared bed between government officials and the industry. Rather, the policy was truly perceived as strategic and benefiting the interests of the United States as a whole.

Copyright and the Internet

The copyright paradigm has been seriously challenged in recent times,⁴⁶ in particular from the perspective that the exchange of works in digital environments takes the practice away from centralized printing and distribution, and closer to language communication. The act of copying is exceptional and costly in material print-form, while in digital environments it is the rule and costs practically nothing. Copyrighting digital exchange has

been compared to copyrighting linguistic utterances, and the change brought about by the Internet to a paradigm-shift from print to digital culture, and from author to reader-centrality.⁴⁷ However, although new communication technologies constitute an unprecedented support for the exchange of ideas and the advancement of creativity, they also have stark implications for the actual business model of commercialization of creative works. As a consequence, the industry has closed ranks to support a plan to limit the flow of communication in the cyberspace; to educate society in what they have termed «digital citizenship»; and to promote the perception that «digital copyrights⁴⁸» are axiomatic. By the same token, the problem of finding a balance between private commercial interests and accessibility of information, for creativity to thrive, has been replaced by a discussion on how to keep creativity-related jobs,⁴⁹ disregarding whether the copyright paradigm adequately reflects the practice and experience of literature and the arts in digital environments. The case for the public domain lags behind.

Copyrights and Literature

Privileges and printing monopolies provided legal certainty to the printing trade in the Renaissance, but, as guilds grew increasingly powerful, English and French copyrights and author laws respectively, tried to counterbalance this corporate influence by empowering authors. This was achieved by placing reproductions rights in authors' hands, a decision that established a fundamental link between copyrights and authorship.

Cultural historians following the penetrating works of Bakhtin, Barthes and Foucault have demonstrated that modern and romantic authorship are relatively recent European inventions, and that the conceptualization and function of the author is time and geography dependent. Copyrights have been associated with a particular form of romantic authorship which poses the author as a self-expressive genius who creates *ex nihilo*. Conceptualizing authorship in this way, defines by extension a particular form of hermeneutic readership practice which emphasizes a quest for authorial intention, and for

discovering the order he or she has inscribed upon the work. Mark Rose is an authoritative copyright historian, and a perfect example of the contradictions between copyright theory and criticism analysis. Rose is a Shakespeare scholar who has frequently served as an expert witness in litigations of alleged copyright infringement, an unusual combination in the profession.⁵⁰ His testimony consists primarily in contrasting and comparing two texts to determine to which extent one is a copy of the other. The issues usually discussed in copyright controversies are access, similarity, and motivation as means to establish originality. Establishing originality is relevant because it sets the base for the court's determination on who bears the legal right to control a text and its circulation, and on who is thus entitled to the profits resulting from its marketing and distribution. As a cultural historian, Rose's work draws from the foundational works of Barthes and Foucault on the historicization of authorship. In «What is an author?» Michel Foucault argued that «principles of order like genealogies, genres, or schools of thought are weaker scissions in the discourse of the history of ideas, in which the leading voice is carried by the solid and fundamental unit of the author and the work.»⁵¹ This «fundamental unit» is embedded in library catalogues, in the index of standard literary histories, and in Internet archives. It is enmeshed in the promotion, dissemination, and circulation of creative works and determines when and what we can see, hear, or read. It is pervasive in our education system where students are taught from a corpus of canonical texts and raised in the fear of plagiarism.

In *Authors and Owners*, Mark Rose argued in turn that

No institutional embodiment of the author-work relation (...) is more fundamental than copyright, which not only makes possible the profitable manufacture and distribution of books, films and other commodities but also, by endowing it with legal reality, helps to produce and affirm the very identity of the author as author. (...) The distinguishing characteristic of the modern author (...) is proprietorship; the author is conceived as the originator and therefore the owner of a special kind of commodity, the work.⁵²

Rose's choice of the word «reality» is noteworthy for the analysis proposed in this dissertation. In Rose's view, copyrights endows the subject with «legal reality,» which implies first that authorship is a subject-creation mechanism, and also that other forms of authorship are illegal or unreal; they have been outcasted to the realm of the imagination and have no bearing in the «real» world whose materiality is perceived exclusively through «property.» Law *produces* authors by making legal subjects. «I am an author» is an utterance requiring legal certification as in «I am an attorney at law», «I am the ambassador to the European Union», or «I am a member of a guild.» The relationship author-text in this discourse is not about the practice, but about property and legal certification. The notion that law creates authorship implicitly establishes the origin of rights in the state and not in the individual. The precedence of state or individual marks key differences in republican philosophical traditions. Liberal contractual republicanism, as opposed to participative classic republicanism, conceives citizens' rights as stemming from the national state that confers and guarantees those rights.⁵³ Alternatively, as noted by Lacan⁵⁴ and Althusser,⁵⁵ another perspective argues that ideology pre-exists the individual, and that the state apparatuses construct national-subjects through ideological narratives and interpellation. Lastly, humanism, suggests that society precedes association and that universal rights and responsibilities pre-exist states.⁵⁶

However, Mark Rose is also a Shakespearean scholar who notes that «...the concept of a unique individual who creates something original, and is thus entitled to reap a pecuniary profit from those labors, obscures relevant processes of how creative works come into being.» Rose critical perspective is shared by other Renaissance scholars. Northrop Frye, one of Rose's sources, argues that:

...a significant portion of all literature is mimetic, a fact that in our day is elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented.⁵⁷ (...) This state of things makes it difficult to appraise a literature which includes Chaucer, much of whose poetry is translated or paraphrased

from others; Shakespeare, whose plays sometimes follow their sources almost verbatim; and Milton, who asked for nothing better than to steal as much as possible out of the Bible. It is not only the inexperienced reader who looks for a residual originality in such works. Most of us tend to think of a poet's real achievement as distinct from, or even contrasted with the achievement present in what he stole, and we are thus apt to concentrate on peripheral rather than on central or critical facts. For instance, the central greatness of *Paradise Regained*, as a poem, is not the greatness of the rhetorical decorations that Milton added to his source, but the greatness of the theme itself, which Milton passes to the reader from his source. (...) Poetry can only be made out of other poems, novels of other novels. All this was much clearer before the assimilation of literature to private enterprise concealed so many of the facts of criticism.⁵⁸

A similar idea was elegantly put by Foucault in the *Order of Discourse* when he says «Le nouveau n'est pas dans ce qui est dit, mais dans l'événement de son retour» [novelty is not in what is being said, but in the stunner of its comeback].⁵⁹ Both Rose and Frye are aware of the contradictions that result from trying to read and understand texts that were produced before copyrights, with anachronistic notions of romantic authorship. Moreover, Rose argues that «...intellectual property theory is poorly-suited to explain the merit of the works of Shakespeare, Chaucer, or Milton, and also to accurately account for the products of the entertainment industry which are collective, and for the most part, formulaic.» On the one hand the expert witness says that copyright endows authors with legal reality, and that there is no more fundamental embodiment of the author-text relation than copyright. On the other hand, the critic states that although copyright determines the circulation and dissemination of works, it is of no utility to understand how a vast majority of these texts, pre or post romantic, are produced in reality. The ubiquitous framework of copyrights may result in an anachronistic and thus poor explanation of how literature was produced before them, and may also generate a biased misperception of the

literary value of a work. The crucial term here is value, and how different disciplines conceive it and structure narratives around it.⁶⁰

Narratives justifying the necessity of regulating reproduction rights pre-existed copyrights and author laws. They were formulated by stationers and guilds seeking to legitimize commercial monopolies. When copyright and author laws placed those rights in the hands of authors, these narratives were recasted through a rationale that identified copyrights as incentives for creativity and innovation, and author as professional workers. As the practice and conception of authorship started changing first through the insightful perceptions of authorship theorists, and then by the popularization of Internet and new communication technologies, those narratives have shifted away from authorship and creativity, and have focused once again on jobs and the industry. The narratives of endangered creativity, exaggerated threats to the institution regulating reproducing rights, have passed from referring to a monopolistic industry to expressing concerns about authors and innovations, and back again to frame the importance of copyrights in terms of the importance of the industry for the economy. As noted by Frye and Rose, these narratives pose copyrights as axiomatic, and go great lengths in trying to prevent discussions of alternative undomesticated forms of authorship.

The criticism presented by Rose and Frey can be understood as directed to an indiscriminate application of copyright-related concepts to all forms of literature or creative activity. Copyrights are normally presented as an institution which offers legal protection to literature, and which is thus beneficial to the practice. The conceptual link that connects copyrights and literature is authorship. However, both recent copyright and literary criticism have questioned the fact that both institutions assume particular notions of authorship to be universal. While traditional copyright theory emphasizes a relatively universal concept of literature referring to a precise series of textual practices, clear limits between texts and the positive attribution of each text to one author, Internet studies find that the basis on which copyrights are based may simply no longer exist in new creative digital practices where authorship and text are impossible to segment and define.⁶¹ Similarly, what most literary criticism emphasizes today is that the concept of literature is

difficult to extrapolate outside specific times and geographies, and that literary works are hard to delimit as they permeate one another. Different readings may stress authors, while others may focus on texts, books, circulation, readers, national language or particular relations such as the author-text unity in Foucault, or the writer-reader joint authorship in Barthes, Sartre, Isser or Jauss. A number of critical views defend «literature,» stressing its aesthetic and communicative aspects, while detractors of the term note its disciplinarian features, and its relation to ideologies of world dominance.⁶² The notion of literature is also associated with a dialectic conception of public/private spheres where views and perspectives of diverse constituencies are expressed, speech acts formed, communicative actions agreed, narratives negotiated, and imagined communities cemented.⁶³ Modern literature is presented in contemporary historiography as a disciplinary institution which contributed to the formation and interpellation of national subjects in a process of prolonged displacement of the authority of religion and of oral narrative by print culture, a displacement that copyright historians associate with possessive individualism, a mass-market for books and enlightened ideas such as copyrights and author laws. Today, as the firm assumption of author-centrality is put to the test, the link copyrights-authorship evidences its fragilities. Instead of complementary, copyrights and literature start appearing as coexisting but also as conflicting institutions, which interpellate individual to produce national.subjects, but that do not entirely share the same system of values. In consequence, the copyright and literary interpellations produce different forms of national subjects or «digital citizens,» each of which is associated with a particular form of sociopolitical association. Under this view, it becomes clearer why in the postnational market-state, the globalization of copyrights coincides with generalized sentiments of loss of literature centrality.

Oracles

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The Industry and its «pirates»

Voices are grim and loud in their effort to convey urgency and danger: «In five years this disappears. There will be no songs and no music» warn the artist Eduardo Aute and Antonio Guisasola, president of Promusicae, the Spanish Association of Music Producers.⁶⁴ The message is echoed consistently in a joint public relation effort of Promusicae and SGAE, the Spanish Society of Authors and Editors, together with their American counterparts, the Recording Industry of America RIAA, and the Motion Picture Association of America MPAA. «If the law is not toughened to protect the industry against piracy,» the industry's augury foretells a tragedy of biblical proportions: «soon... no more music, films, books, texts, arts, or literature.» This perspective criminalizes what «pirates» do and suggests that the law should punish them because they are «stealing.»

What is being stolen is unclear. A series of practices, normal with physical editions such as lending a book, quoting from it or even sometimes reading from it, are being claimed by copyright holders to be detrimental to what they perceive as their property in digital environments. One person seeing a film by Almodovar in a living room, does not take anything away from the experience of another person watching the same movie on a plane over the Atlantic. A theatrical presentation of the movie will occur when a person buys a ticket for it. If a second, third, or fourth enter the same theater without paying, they will still enjoy the show in no notably different manner, and these additional readers or spectators will not take anything away from the first person's experience until the comfortable physical capacity of the venue is reached. In fact, the opposite to consumption occurs for creative texts and artworks: a book is not exhausted and unusable after it is read, the

more people read a book, listen to a song, or watch a movie the more their economic, symbolic and social value increases. A number of studies have shown that the more a song is heard, a book read, or a movie seen, the more copies of it are sold. «Pirates» are often consumers who have bought a song and use it as musical background for a home movie, or that make copies to listen to that song across the panoply of platforms people normally have nowadays: computer, television, smart phone, tablet, etcetera. Pirates often join clubs to share their property with others who own different works. A similar principle, only this time applied to books in paper, was applied in Mexico to create a network of neighborhood-book clubs called «living room libraries.» A widely successful state-sponsored civil society practice, it counts today thousands of nodes nationwide, with hundreds of thousands of members.

Rick Falkvinge, founding president of the Pirate party,⁶⁵ a political organization which holds two seats in the European parliament and has a growing constituency of registered voters in the millions, makes also an urgent case but this time not for respecting the property of the industry, but of buyers who have acquired works and whom, he claims, «are entitled legally to use, share and dispose of their property as they see fit.» From that perspective, Falkvinge makes the case that when one buys an apple or a pair of jeans, one can eat the apple and use the pair of jeans whenever one wants, lend them to a friend, or even give them entirely to someone else. Firms that want to sell something but keep the right to decide when and how to use it are committing an old form of fraud. Falkvinge also makes the case of creativity as part of society's «creative commons» or heritage. In Spanish law, for example, an art collector can buy a famous Picasso, but is not allowed to distort it, cut it in pieces or add mustaches to it, because Picasso's works are considered heritage. A private party can hang it on a wall, and enjoy it, but has only partial dominion over it because it belongs to the public domain. Falkvinge argues that large copyright owners follow a double standard when they claim that the property rights of artists are fully «exhausted» when they sell their works to them, but that those same rights ought to never be exhausted when they sell copies to readers, audiences

and consumers. They are playing on two mutually exclusive principles, saying one thing to artists and the opposite to readers.

Good Citizens

Copyrights are an institution that needs to be reconsidered, argues Lawrence Lessig,⁶⁶ «because it was made in a time when making copies was an exceptional process, and in the digital age it is a rule.» The term of copyright legal protection has also been overextended. «If in the 1930s and 1940s, we had been using the same laws Walt Disney lobbied for in the 1980s and 1990s, he wouldn't have been able to make any of the works he did.» Copyright today protects «old creativity in detriment to new one» that in the present conditions of the law «may never exist,» Lessig concludes. Referring to the United States, continues Lessig, the central problem «is that the debate about copyrights does not reach the legislature.» What gets to senators and house representatives is only one side of the story because «large corporations are holding the conversation hostage» through lobbyists and multimillion-dollar marketing campaigns. «The balance between private and public interest, a fundamental principle of intellectual property law, is broken» he concludes. «On a global scale —adds Peter Drahos⁶⁷— less industrialized countries are coerced into signing intellectual property treaties that are clearly against the best interest of their nations. Unrelated industries, such as construction or financial products, will face tariffs and taxes in the US market if a country does not comply with what the US stipulates in excess of what multinational treaties stipulate,» he explains. In a similar line of thought, Carla Hesse⁶⁸ and other cultural analysts, legal practitioners and political economists stress the importance of leveling the playing-field to guarantee the necessary balance between individual interest and the public-good benefits associated with the circulation of knowledge and information. But, if new communication technologies indeed represent a paradigm shift, fine tuning the institution of copyright to achieve that balance will prove impossible, because, as Kuhn theory suggests, the

rationale on which the whole institution is based will appear invalid under the new paradigm.

The Authors

A «cantautor» or modern bard, a genre very popular in Latin countries, Luis Eduardo Aute writes narrative poems that he accompanies with the music of his guitar. He sings for audiences of various sizes, in bars and concert halls, and his works also circulate broadly as digital recordings online or on DVDs. In the opening of this section, an article in *El País* placed Aute next to Antonio Guisasola of Promusicae as the latter presented to the press the case for toughening copyright legal protection. However, on the Xornal de Galicia, a Spanish provincial newspaper, Aute makes headlines again by declaring «Estou a favor do «gratis total» no mundo da culture»⁶⁹ [I am in favor of «totally free» in the world of culture]. Aute's apparent double standard is representative of the Spanish and Latin American author in several ways. First when speaking with or for by the industry, Latin American authors become professional workers and adamant champions of copyrights and intellectual property laws. When speaking with or to their audiences, authors become intellectual voices that are part of wider flow of cultural expression interested in the wider possible circulation of their voice and ideas, which they recognize at odds with copyrights. In Spain, where authors, editors and producers are represented by one guild, SGAE, their voices tend to be in favor of unlimited copyrights. In Mexico, on the other hand, where authors and writers are represented by one guild, and producers and distributors by another, authors tend to side with audiences and oppose Anglo-Saxon copyrights in favor of Continental author rights.

Different from the perspective of the good citizen who sees in copyrights an opposition between private and public interest, in the Spanish tradition the author is seen as divided between two interests: on the one hand, the compensation for his or her work and the possibility of making a living out of his or her profession; and, on the other hand, the larger possible circulation of the oeuvre in the public sphere regardless of whether it is paid

for or not. What makes the position of the Latin author different from his or her Anglo-Saxon counterpart is not how intellectual property is legally codified in their respective countries, which is very similar, but rather how Anglo-Saxon copyrights and continental author-laws imply drastically different forms of public domain and author's participation in it.

New communication technologies are bringing to center stage those differences. Analyzing the problem from the perspective of desire, value and sovereign appropriation, Debora Haynes notes that the Internet is producing resistance to an unquestioned version of copyright and authorial integrity because, as Shapiro has noted, «polities whose sovereign surfaces appear smooth and untroubled contain dormant resistances below the surface, which can be awakened when various unleashed forces disturb the inscription process that is responsible for smoothing the surface.»⁷⁰

Ominous Narratives

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Origin and Historic Landmarks

There is significant agreement today in that copyrights are the product of the syzygy, in eighteenth and nineteenth century Europe, of Gutenberg's printing press, a mass-market for books, Lockean possessive individualism and the valorization of individual genius, all coalesced through commercial struggle, and the requirements of adversarial legal argumentation. There is considerable consensus as of their historical landmarks⁷¹ as well: Gutenberg's mobile type and printing press (c. 1450); printing privileges (Subiaco 1464, Venice 1469-1517, imperial fairs c16-c17); stationers' companies (Basel 1531; London 1557; Paris 1618); Corporate monopolies

(UK Statute on Monopolies 1624); first author's contracts (Milton's *Paradise Lost*⁷² 1667); first statutes (England 1710; US 1790); the Enlightenment reprinting debate («battle of the booksellers»; Diderot⁷³; Condorcet⁷⁴, Kant⁷⁵; Fichte⁷⁶); *droits d'auteur* (France 1777-1793; Prussia 1837; UK 1842); Berne Convention (1886); Uruguay Round negotiations and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS 1986-1995); and other regional ententes (North American Free Trade Agreement NAFTA, 1995; Digital Millennium Copyright Act, US 1998); and the Copyright Directive EU, 2001).

The history of the Hispanic tradition could be presented similarly: dissemination of the printing press (Toledo 1472, Mexico 1581, Lima 1581); first printing privileges (Toledo 1473); first author's contracts (Boscán⁷⁷ 1533); printers Companies (Spain/Caracas/Havana 1763); first literary property laws 1714, 1762-1836; Berne Convention, TRIPS, and regional ententes such as NAFTA, or the European Directives.

A longer non-canonical genealogy could be drawn if instead of a narrow definition of «copyrights» one used a more encompassing notion of modern authorship, rights (property, reproduction and derivative rights), and the mechanisms through which the conception of the practice and experience of literature and the arts has been codified into law. This expanded genealogy would include, in addition to the aforementioned key moments, the invention of the legal mechanism known as *fictio legis* in classic Rome; the discussion of the *tabula picta* and the legal distinctions of use, dominion and ownership in the Franciscan controversy, both in the middle ages (12c-14c); the articulation of the notion of universal rights and an international community in the judicial humanism of the Renaissance; and the legislation of the public domain as a matter of national interest (15c-19c).

The Hispanic tradition is continental, and its civil code considers both author's personal and patrimonial rights. Spain is one of the original signatories of the Berne Convention in 1887, and other Spanish-speaking countries have joined it in three waves: first during the late sixties (Mexico, Argentina, Uruguay 1967, Chile 1970); then as a result of the Uruguay Round Negotiations⁷⁸ 1986-1994 (Peru, Colombia 1988); and finally after

the realignment that followed the fall of the Berlin Wall (Cuba, Guatemala 1997, Belize, Nicaragua 2000).

National Laws

Particular national laws have come to be associated with distinct philosophical traditions: the U.S. and U.K. copyright laws are said to be property-centered, utilitarian and «public-good» oriented; whereas continental author laws are regarded as author-centric, reflecting deontological philosophical ideas like personality or natural rights. The former embrace Lockean⁷⁹ possessive individualism, while the latter build on the Hegelian⁸⁰ notion of personality extension and deontology. The Hispanic tradition is based on a civil code and today considers both copyrights and author laws with a noteworthy specificity in the emphasis on state protection of the «common good.» The specific notion and importance of the «common good» in the Hispanic tradition has been studied usually alongside its Catholic background⁸¹. The history of the Spanish book has been registered in legal documents ranging from the Visigothic Code or *Liber Iudicorum*⁸² to the *Siete Partidas de Alfonso el sabio*⁸³, and to the edicts of the Catholic Kings (15c-16c) to the «enlightened censorship» of the otherwise secular *Juzgado de Imprentas* (1715-1830)⁸⁴. The «communal» component of the Hispanic tradition also found fertile grounds in the Original-Americans' legal tradition codified in the *derecho indiano*⁸⁵. This indigenous tradition places a number of items beyond the market and prohibits its commodification, while defining for the items that can be bought and sold three forms of property rights: individual, group and community property.⁸⁶

Multinational Treaties

However, there is a generalized perception that multinational treaties, starting with the Berne Convention and culminating with TRIPS, have put an

end to national differences and made particular traditions converge into one single harmonized form of global legal authorship protection. Hence the question of *specificity* in contemporary legal debates is being increasingly replaced by the one of *compliance*, which is whether a country falls in, out or short of the model determined by the consensus of the united league of nations.⁸⁷

New Communication Technologies

Finally, there is considerable consensus regarding the volatility of the institutions of authorship in the light of new communication technologies and the Internet, and a generalized disquiet caused by speculations on possible threats to the future of creativity. However, assessments of the problem fall into opposing camps. On the one side, a teleological story is told that unfolds from the dark ages of privileges to the full recognition of rights. From this progressivist perspective, works are said to be endangered because new communication technologies increasingly weaken copyright protection, allowing profiteers to benefit or «free-ride» without contributing «a fair share to production and distribution costs.» Alternatively, another free-market perspective claims that creativity is at risk because intellectual-property-based industries use monopolies and market barriers to protect old forms of creativity to the detriment to that of new ones. Under this perspective, copyrights are an extension of unfair privileges that hamper free competition, limit circulation and increase prices to benefit a handful of large conglomerates in detriment of young artists, small cultural industries and consumers whose property rights are hampered. A third perspective, critical of the way neoliberalism has expanded the market, argues that there is an ever-increasing appropriation of the public domain through commercial interests and that large economic interests are holding the conversation hostage. Excessive copyrights, they argue, limit circulation and access, criminalize audiences and young artists, threaten basic human rights, and sabotage access and dissemination infrastructures. The first perspective sees copyright as a tool to promote industry and the dissemination of knowledge;

the second places copyrights next to government censorship, as a tool to limit freedom of speech, control corporations, and encroach on private property; the third view sees copyrights as a primary tool of reification of culture and regressive⁸⁸ market expansion. Champions of all perspectives agree on the necessity to rethink intellectual property, but disagree on the course of action: intellectual property defenders call for toughening copyright legal protections; advocates of «creative commons» argue in favor of limiting the extension of authorship and copyright monopolies; and conciliatory cultural analysts, legal practitioners and political economists stress the importance of leveling the playing-field to guarantee the necessary balance between individual interest and public-good benefits associated with the circulation of knowledge and information. In their view, seeking for this private/public interest balance, has been wrongfully replaced by the idea of protecting jobs and the industry.

The stakes to copyright holders are very high and their strategies to rally public opinion support for their views includes an ample array of elements which include bringing to trial people they perceive as infringers in exemplary cases, lobbying legislatures, financing large marketing campaigns and education materials starting from kindergarten all the way through college. Large copyright holders have also coalesced in associations and obtained government support to apply aggressive coercion to governments with weak rule of law, or to countries they perceive as insufficiently compliant. From all those tactics and strategies, this dissertation analyses one: the narrative of fear that associates copyright volatility to the end of creativity, which I circumscribe to conventional forms of arts and literature in the Hispano transatlantic represented by Mexico and the United States.

Emplotment and Fear

As Paul Ricœur⁸⁹, Michel de Certeau⁹⁰ and Haydn White⁹¹ have famously observed, narrating history emplots time into archetypical narrative structures. Tragic or comedic, these structures can be reconstructed from traces left in cultural productions and historical documents by the social

unconscious⁹² or by authorial practice.⁹³ Modern historical analysis can recount wars, inhuman abuse, or deeds of apocalyptic regimes through narratives that provoke sadness or outrage, but not fear. They do not elicit fear because there is no risk of them happening over and over again because the modern conception of time is not cyclical. Historical analysis can discuss past narratives of fear, but does not produce them. Fear of the past, as Auerbach and Foucault observed, inhabits ritual time or the modern notion of insanity.

Narratives of fear are disproportionate accounts of perceived rather than actual threats. They are used in warfare, propaganda⁹⁴, or as a colonization⁹⁵ practice. They demonize adversaries, manufacture consent and coalesce national identities behind constructed imaginaries of common enemies. As a rhetoric device, they appeal to an audience's emotions in search of particular behaviors, rather than rational commitments. Following Lakoff's notions of metaphorical epistemology,⁹⁶ Robert Reich⁹⁷ has theorized that successful political actors in modern democracies are sensitive to «social sentiments» of confidence or anxiety, and that they frame accordingly their progressive or regressive ideology in four archetypical social narratives that Reich has identified within the political discourse in the United States. Two are about hope and two about fear. Reich's principle is that when politicians recognize these narratives and speak to these hopes and fears, their discourse resonates with their audience, hence they gain trust and votes. Reich's termed the narratives of hope «the successful individual» and «the benevolent community;» and termed the narratives of fear «the rot at the top» and «the mob at our gates.»

«The mob at our gates» is the story where «...the United States is a beacon light of virtue in a world of darkness, uniquely blessed but continuously endangered by foreign menaces;» and «the rot at the top» is the story of «...the malevolence of powerful elites. It's a tale of corruption, decadence, and irresponsibility in high places, and of conspiracy against the common citizen.» Reich's theory derives from the practical contemporary exercise of politics. It is both a look at politics and advice to politicians. It continues a longstanding tradition of historic tropes where «the mob at our gates» echoes nineteenth-century discourses about «America's manifest

destiny,» with the fear of atavistic forces attempting to draw back civilization into barbarism, and fears over military attacks or immigration. It sets an «*us*, Americans» versus «*them*, the rest of the world.» In Latin America, the narrative itself is feared, as it has served to justify past neocolonial interventions, and supported authoritarian and military regimes. In this narrative Latin American people are the «other» both facing the colonial powers internationally, and the ethnic differences domestically. «The rot at the top» that in Reich's context chastises the decadence of the wealthy and powerful, echoes a tradition of puritan austerity and protestant ethics in the United States. In Latin America, in addition to the corruption of wealth, this narrative also connects with the imaginary of colonialist exploitation. The narrative of copyrights and endangered creativity can be told to reflect these archetypes of fear and hope: fear that a mob of barbaric pirates at the gates of the market economy threaten to return civilization to a pre-commoditized communist chaos; fear that the rotten corporations at the top are plotting against the common citizen for selfish interest and unethical profit; and hope that the benevolent community will find a way to negotiate a balance between possessive individualism and the public good.

Other Discourses of Fear

In addition to politics, other disciplines such as criticism or the social sciences speak of narratives of fear. For example, critics of relativism and postmodern skepticism in the philosophy of science⁹⁸ have argued contemporary thought is indecisive and suffers from «fear to commit.» Within economic theory, Deirdre McCloskey⁹⁹ has argued similarly, that the postmodern «fear to commit to reality» in contemporary econometrics and the general unawareness of the consequences of rhetorics in economic discourse has led to costly vacillations or misjudgments that have impacted not only the economic discipline but also world economy. Roland Barthes frames the death of the Author as a narrative of fear also, in which the death of author-centrism is necessary «to give writing [écriture/literature] its future.» What all these narratives of fear have in common is that their

ominous prophecies are connected to an agenda of institutional reform whether it be copyrights, criticism, economic theory, or the humanities.

Fear for Creativity

As a pivotal organizing principle of the new information economy and its associated world order, creativity is at the center of a high-stakes political and economic struggle. It should come as no surprise that the discourses on its practice, conception and circulation be cloaked by the shadow of three ominous narratives prophesying «the end of creativity;» the dusk of literature as a privileged cultural exemplar; and the increasing futility of the liberal arts or «crisis of the humanities.» These three narratives are told from complementary perspectives focusing respectively on the volatility of the institutions of authorship in the light of new communication technologies and the Internet; the cooptation of literature by a postnational market-state, and the increasing loss of prestige of a humanistic education in a fast-changing world ever-more specialized and technologized. All three are based on a double structure of representation combining epistemological models seeking to understand «truth and reality,» and rhetorical strategies designed to convince audiences to support or resist political action and change.

The narrative of the end of creativity as a result of volatile or weak property rights is not specific to contemporary times. It was voiced in Germany by Kant and Fichte during the nineteenth-century controversy on the illegality of reprinting.¹⁰⁰ It has been used by stationers in eighteenth-century corporate England, and by Diderot commissioned by printers, in revolutionary France.¹⁰¹ It was voiced by printers in relation to privileges in sixteenth-century France and Spain also,¹⁰² and before, anytime there were unauthorized editions being sold, there were also warnings about serious risks of allowing unauthorized editions to circulate. The narrative that creativity is endangered by overzealous individual property rights is not characteristic of this era either. It was a central motivation in eighteenth-century England for the Statute of Anne¹⁰³, and in France the case for wide

free circulation of scientific information and knowledge was made by Condorcet¹⁰⁴. In Spain, protecting the people from the excessive greed of individual commercial interests was the rationale for the fifteenth and sixteenth-century royal edicts of the Catholic Kings establishing free circulation of books, for the incentives to the edition of medical, and technical treatises, and it was also a rationale used for legally establishing minimum quality standards for book paper and binding¹⁰⁵.

It was also the motivation for the «task» or cap price for «first necessity books» or «libros de primera necesidad» which were used to teach reading, arithmetic, and to catechize.¹⁰⁶ Finally, the balance between private economic interest and public benefit has a history as well. Framed from a slightly different perspective, it was present in the legislative debates in the Spanish Cortes surrounding the Law of Literary Property. The problem was not posed as an opposition between the individual interest of authors and the public interest of readers, but rather as a combined double interest of authors: to be read widely and to be compensated from the hard effort. The value of the work was considered a «value in use» rather than as a «value in existence.»¹⁰⁷ As senator García Goyena explains on April 17, 1847, a legislation pretending to balance those two private and public author interests, «is a fiction, but a useful fiction» since it is also the most «convenient solution» for people to access the works they want or needed.

Although fearful narratives of endangered creativity and the hope that a balance between private and public interests can be reached are not time or geography-specific¹⁰⁸, it is a hallmark of modernity to associate creativity with romantic authorship and possessive individualism and to link the volatility of authorship to copyright.¹⁰⁹ Increasingly in the contemporary versions of those narratives the terms copyrights and creativity play as synonyms. The end of creativity today is a narrative that associates creativity to copyrights under the premise that legal protection of property compels professionalized writers to produce more and better works. As copyrights become vulnerable, the incentive for authors to make or at least share their works with others withers, hence creativity becomes endangered.

How did this happen?

Gradually: first, sixteenth to eighteenth-century printers rhetorically suggest that privileges, monopolies, or other forms of concessions and subsidies *will* result in «artes y letras que darán más lustre al reyno»¹¹⁰ [more arts and letters to the prestige of the kingdom]; second, the notion of competition stating that with them (Condorcet's argument and the case of nineteenth-century US for example) or without them (the opposing case of Defoe¹¹¹ and corporate UK) the comparative advancement of the nation would be hampered; and lastly, the future tense «will result,» that conveys both publisher's promise and their hope that they will find and publish worthy works, becomes «results» in today's discourse which implies a causal relation: «without copyrights there is no creativity whatsoever.»¹¹²

Copyfights: Negotiation or Aporia

The different narratives describing copyrights reflect the vested interests of the different stockholders. Debora Khane¹¹³ explained the reluctance of liberal republicans to negotiate globalization «Liberal republicans resist international negotiation because even if outsiders were, strictly speaking rational, nothing guarantees that the reasons that motivate them would be the same that motivate insiders.» Similarly, in the copy-fights, copyright defenders would resist negotiation because from their view either the others are factually or morally wrong, or the vested interests that motivate them, are not the same as those that motivate a large copyright-holder. This view of the public domain as the set of individual egoisms has an alternative which not only takes into account stake and stakeholders' views, but also believes there is a truthful solution to the problem within the cosmogonic paradigm. Kuhn,¹¹⁴ suggests that all models are bound to imprecisions and that absolute generalized causal inference is an illusion; instead, one has to take into account the epistemic paradigm within which the arguments are being made. The correlation copyrights-creativity is constructed through and epistemological paradigm of an iteration and a time series. That epistemological framework considers an error of validity of the model or false aporia, when two sound readings of the same series of observations

lead to conflicting conclusions. To remedy that type of «poor validity,» epistemological methodology suggests three actions: first, review the assumptions of the four assumptions of model: reality of the origin, and theoretical causality, universality, and representativity of the series; then extension of the series both in time and/or to a wider or more nuanced corpus; and, finally, examination of a counterfactual scenario of what would have happened to comparable works or individuals in the absence of the alleged source of change. In the case of copyrights, reality of origin refers to how real or imagined is the schism before and after copyrights in terms of creativity. Theoretical causality is associated with the notion that creativity is a public good and that it will be unavailable at the level society needs or wants it, if collective action is not taken to remedy its propensity to be prey of opportunistic behavior. Universality is twofold: it is associated with the notion of universal rights, and also with the idea that intellectual property law is universal after the signature of widely encompassing and fanged multinational treaties. Representativity in the case of copyrights refers to whether all practices legally protected under copyright law are not only equal under the law but comparable in reality.

The Correlation Copyrights-Creativity

The narrative of endangered creativity is governed by the assumption that creativity is correlated to copyrights to the extent that one can predict the former by observing the latter.¹¹⁵ If copyrights are perceived to be at risk, then creativity is also perceived to be endangered. The epistemological model that substantiates the correlation creativity-copyrights is a particular iterative logical structure.¹¹⁶ Logical iterations construct logical classes by establishing an origin and theorizing an operation or progression from it. In this instance the logical class is the set of copyrighted works; the origin is copyright legislation; and the operation is the assignment of each and every work to an author, a relationship sanctioned by the law. From an epistemic perspective, a logical iteration is sound when two conditions are met: first that the original observation is rooted in reality; and second, that the

operation is logically correct. To the soundness of the iteration, it is *irrelevant* whether the operation is real or fictive,¹¹⁷ since, by theory, logical operations applied to sound premises produce sound conclusions. In consequence, when theoretically extended, iterative thinking allows claims to be made about future elements of the series based on valid extrapolation. The original point grounds the process in reality, while the trend portion of the iteration validates the correlation. The iteration is particularized in this case into an «interrupted time series» by establishing the origin as a paradigm shift in time, and the trend as a series of historical events through which the relation is documented. By framing the narrative of copyrights as an iteration, the relationship between copyrights and creativity has to be instantiated only once and can then be generalized.

In this case, the original element of the iteration is the first group of creative works affected by copyright legal protection. Scholars agree that although perceived as natural, with no beginning and inseparable from our modern conception of society, copyrights are recent cultural formations dating from the eighteenth and nineteenth centuries, and the combined product of six factors: (1) enlightened ideas, (2) possessive individualism, (3) valorization of original genius, and professionalization of the author, (4) technological innovation and (5) a mass-market, all coalesced by (6) commercial struggle and the requirements of legal argumentation. In the narrative that correlates copyrights and creativity, the flow of historic time is interrupted by a paradigm shift that changes cosmovision and the nomos that codifies it. It is what Marshall McLuhan termed Gutenberg Galaxy,¹¹⁸ the passage from oral, aural, and religious traditions to a written, technologized, and legal nomos. Documenting a surge in creativity parallel to the codification of copyright laws gives reality to the argument by creating a before-and-after stark contrast, and the legal certainty that sanctions all author-work relation recognizing it as a universal «right» gives certainty to the relation and permits to generalize it to all creative works. What Foucault termed «the fundamental unit of the author and the oeuvre»¹¹⁹ extends, Mark Rose argues, to the law that sanctions it becoming an equally fundamental unit «author-copyright-work.»¹²⁰

The logical series is defined by the history of this relation author-copyright-work, which is told as a progression either from feudal privileges to modern property rights; or, alternatively, as an ever-increasing appropriation of the public domain by private interest and throughout different cultures. Multinational treaties are seen as having synchronized national differences and made heterogenous forms of authorship coalesce into one global model represented by copyrights. As of works, while some critics have argued a progression from tradition to more technologized forms of expression (Walter Benjamin), or to fundamentally commercial and industrial forms (Tyler Cowen), most prefer to explain creative expression without recurring to positivist notions of progress and see only one major paradigm shift in modernity that transformed a mostly oral culture into a written or printed one.

New communication technologies are perceived as having brought about a significant change that has rendered copyrights volatile and endangered creativity. Two opposing readings see either that copyrights need to be further strengthened across those new technologies; or alternatively, that the level of legal protection of copyright law needs to be revised down because it has already gone too far in the direction of protecting individual gain. A third group suggests negotiation is the path to maintain the necessary balance between private interest and the public good benefits of creativity, and sides with copyright skeptics in warning that the discussion has been recently held hostage by large corporations and short-sighted private commercial interests.

The epistemological validity of the model determines under which circumstances and to which extent claims on the correlation creativity-copyright can be generalized. A strong validity depends on origination, correlation/causality, universality and representativity. First, the origin of the iteration has to establish an unambiguous before-and-after stark contrast which in this case implies emphasizing a conceptual disconnect between an intentionally toned-down Renaissance and a deliberately spotlighted Enlightenment. The strength of the effect of the variable scrutinized has to also be distinguished from other possible elements affecting creativity, by consolidating through rhetorical strategies all those elements under a

broadly encompassing «copyright-effect.» Second, it is important to distinguishing correlation from causality, which the narrative of copyrights and creativity does not accomplish. Under one perspective copyrights are seen as providing incentives to authors to create. As with other public goods, opportunistic behavior is perceived as a threat to their existence. Under an alternative view copyrights are seen as *the consequence* of a boom in creativity and a mass market for creative works. Under this perspective copyrights enable the appropriation and control of the public domain as a means to also appropriate the potential wealth the creative practice could generate. In either case the relationship copyrights-creativity is expressed in terms of causality when in fact the epistemic structure used to construct it allows only for claims of correlation, but not causality. Correlation does not preclude claims about the future to be made, but determines which ones are valid within the chosen epistemological framework. The third condition is universality. The universality of copyrights is triply-rooted on the global extension of the free-market, the universality of the rights that copyrights and author law recognize, and on the existence of a multinational body through which the international community can settle disputes and enforce the rule of law. The two latter pose problems because rights which are presented as universal are the creation of a specific legal European tradition within which different perspectives coexist and compete regarding some fundamental aspects. The assumption of a global harmonization of copyrights implies a partial consensus of those opposing value-systems and on a global exemplar of sociopolitical organization. (4) The fourth condition is representativity, or that the observation of what is called creativity is similar to the ensemble, and hence its properties are generalizable to describe the whole, in particular the validity of a single designation of creativity encompassing as equal under the law arts, literature, information, and scientific knowledge.

Finally, new communication technologies render copyright and authorship institutions volatile and are described either as a significant technological change within the same paradigm, or, alternatively, as a fundamental paradigm shift in the sense given to the term by Kuhn, *The Structure of Scientific Revolutions*.1962. The magnitude of their impact is

conceptually problematic. Under the first view, while significant they do not threaten the fundamental notions on which the institution of copyrights is based. The problem associated with them are solvable through regulation of the new technologies, and fine-tuning of the copyright balance between private and public interest as was the case before with cinema, radio and television. However, under the second perspective, new communication technologies entail a completely different paradigm which renders invalid the context in which copyrights were conceived, and by extension all negotiations within the previous paradigm devoid of significance. Under this perspective it just makes no sense to talk about copyrights in digital environments because the elements and conditions on which copyrights rely are not present.

The Partial Autonomy of the Literary and Artistic

Field

As mentioned earlier, the assumption of a causal relation copyrights-creativity ignores the fundamental autonomy of the literary and artistic practice, and also contradicts the romantic notion, on which copyright law is based, of the artist's self-expressive creative originality. On the one hand, copyright law assumes that the author is the source of the work, and that, for this very reason, he or she is entitled to control the reproduction and derivatives of his or her work. On the other, it presents copyrights as the *reason* for this creativity to occur. When seen under the light of competing imperial models, it becomes apparent that this paradox is in fact a double standard. Pierre Bourdieu has argued that the term «original creation» is a metaphor to refer to the partial autonomy of the literary and artistic field,¹²¹ and that this autonomy stems mostly from art's history. The field is partially autonomous because as, Malraux put it, «art engenders art.» An artist, school, or movement occupies a position that breaks with a previous one, and forces all others in the field to take a stand —reposition themselves—

vis-à-vis the new position or discourse.¹²² Pierre Bourdieu notes that the autonomy of the field is constructed through a double movement that both establishes the new, and perpetuates the past: «*La distinction, qui renvoie le passé au passé, le suppose et le perpétue, dans l'écart même par rapport à lui.*»¹²³ [The distinction, that sends the past back to the past, assumes and perpetuates the past, in the distance it puts between the new and the old.] Copyright law acknowledges the field's autonomy in what makes a work new, but rejects the implicit reference to tradition which, following the imperial reading suggested here, symbolizes an aristocratic value of a competing imperial model. However, the autonomy of the field requires both, and ignoring one would lead to error. That the Spanish model valorizes tradition is not to say that it leaves no room for the new—the author-knight or author-general wins *new* territories for the nation—, but rather that the canonization process of the work is different. To understand this difference, one has to remember that the autonomy of the field is partial. For example, one author requires external support to break with tradition, and validate his or her new dominant position. The support he or she needs comes from critics, cultural institutions or readers. With copyrights, where the literary canonization is always post-printing, this support manifests mostly through market channels. In the Hispanic world, a number of prizes, state patronage, and other preprinting forms of literary canonization constitute a true cultural apparatus or «cultural complex» alternative to the market, and comparable in their importance for literature and the arts, to the military or educational complexes, for invention, innovation, and discovery.

It is also important to recognize that it is not the aristocratic vein that leads to the fact that writers can «represent» the people, but the identification of the state and the public domain. As Bourdieu, explains, the adjustment of the literary and artistic field to society's reality is automatic, because the author is part of society and the subject of literature and the arts is society's common problematic.¹²⁴ It is not a common zeitgeist that defines a national cultural identity, but the history of *common problematics* that can be traced by literary or art history because, Bourdieu argues, a problematic is not other thing but the network formed by all positions in the literary and artistic field and its history.¹²⁵ This distinction explains why in the Anglo-American world

literary writers are seldom considered public intellectuals, while in the French and especially the Hispanic tradition, they are first and foremost seen as speaking for, and to the people, in a representation that parallels the one of the government, because their works are also constitutive of the public domain.

I have presented so far the Spanish tradition as opposed to a solid block in which copyrights and the market were treated together. However, market and copyrights do not necessarily constitute an inseparable unit. Within the Anglo-American, and French traditions different conceptualizations of the cultural market, and of the applicability of copyrights emerged after the 1898 collapse of the Spanish imperial project, which it is important to acknowledge. These conflicting views were importantly defined by parallel discussions that peeked in three apparently disconnected discursive spaces which originated in Europe and the United States in the 1950s and 1960s: the Nixon/Rockefeller fight for the republican nomination in the U.S.; *la politique des auteurs*; and the death and function of the Author in literature and criticism.

The Correlation Copyrights-Modernity

First, the correlation copyrights-creativity and its specificity to modernity depends on the clear establishment of a time break, a before-and-after copyrights laws that would show that copyrights and the practices, conceptions and circulation of creativity characteristic of modernity originated concomitantly.

As we have mentioned earlier, there is significant consensus today in the notion that copyrights originated in the Enlightenment. Notwithstanding printer privileges and «copyrights» were granted earlier in the sixteenth century in France, Spain and other European countries, the assignment of copyrights to original authors under the premise that this would help the advancement of knowledge and the arts was only argued as of the eighteenth century.

Copyright historian Bruce Bugbee argues that the date should be revised:

The Statute of Anne passed in 1710 has been generally regarded as the earliest copyright legislation. Traditional beliefs in this respect, however, are in need of drastic revision in the light of evidence placing the origin of state protection of intellectual property in Renaissance Italy. Bugbee, «Genesis of American Patent and Copyright Law,» c.1967. p. 269

In his analysis, Bugbee refers to intellectual property as the combined body of patent and copyright laws whose origins he places in the Roman privilege of Subiaco (1464) to German clergymen Arnold Pannartz and Conrad Schweinheim and in the Venetian privileges issued between 1469 and 1517 which included «importation franchises, monopolies, exclusion of foreign competition, patents and copyrights.» The first known copyright awarded to an author, according to Bugbee, is the one granted by the Cabinet on September 1, 1486, to Marc-Antonio Sabellico. Similarly to Bugbee, García Oro¹²⁶ documents, in Spain, the letters to the Crown and the privileges granted to Maestre Miguel de Chanty and Teodorico Alemán in 1477, and Norton¹²⁷ explains how even before the Pragmática of 1502, printers, stationers and booksellers solicited from the kings and secured exclusive privileges for printing and selling books.

These rights were established on a case by case basis. Norton explains that they were conceived as «ley particular,»¹²⁸ an exceptional «individual law.» Hence importation franchises, monopolies, exclusion of foreign competition, patents or copyrights—even when assigned or granted to an author— do not invalidate the notion that copyrights and natural author rights are an invention of Northern European Enlightenment, because the examples found in Spain are laws made for one particular person at the time, and not general national or provincial laws applicable to all.

Mark Rose has argued that, generally, «the figure of the proprietary author depends on a conception of the individual as essentially independent and creative, a notion incompatible with the ideology of the absolutist state.»¹²⁹ Under that perspective the fact that intellectual property laws were set in place in the Hispanic transatlantic in the nineteenth century, could be

read as atavism or lagging behind the push of northern Europe. However, under an alternative perspective, Carla Hesse has argued that the first legal recognition of the modern author in France occurred in the eighteenth century, but that «in France the author was a creation of the absolutist police state, not the liberal bourgeois revolution.» The monarchy set in place author laws to limit the power of corporations, and imagined authors as small kings sovereign over their conquered fictive states:

The author was conceived as a little mirror of the king, the regulator of his fictions: they only fell back into the king's domain if and when they were willfully alienated (like any other feudal tenure). The creation of the author by the absolutist state was the product of a political initiative within the royal administration rather than a result of commercial protest, and it had the explicit purpose of consolidating state control over the form, content, and means of disseminating knowledge by removing the publisher as intermediary between the state and the author.¹³⁰

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For Spain, it has been argued that the recognition of author rights dates in fact to the Royal Ordinance of Carlos III of October 20, 1764.¹³¹ This ordinance established the right of authors to leave to their heirs their privileges to print their works. Like the Statute of Anne and the author laws of France, the objective of these laws was to limit the power of other corporations, in the case of Spain the «dead hands» of religious communities, «manos muertas.»¹³² The precept remains however, that the manuscript is private property and the published work enters the public domain solely by the fact of being «published.» Even Jovellanos, who Álvarez Alonso¹³³ argues is the most liberal and Lockean of his contemporaries writes in his «Advertencia» to *El Delinvente Honrado*:

...si es cierto que hay una especie de propiedad en los escritos y en las ideas que cada uno ordena para su uso privado, y que es injusto violador de ese derecho quien los publica a hurtadillas de su autor, también lo es que cuando los escritos se han hecho comunes por

medio de la prensa, a nadie se ofende en reproducirlos y multiplicarlos; y que quien lo hace para mejorarlos, más que reprensión, es digno de agradecimiento¹³⁴.

[...If it is true that there is a kind of property in the texts and ideas that each person orders for his personal use, and that it is unjust infringement of that right to publish them in hiding, without telling their author, it is also true that when those texts have been made common through the press, nobody is offended when they are reproduced and multiplied, and that when this is done to better them, rather than punishment, the one who does it should be thanked.]

The principle that defines the logic of the Spanish Ancien Régime is «previous censorship», as opposed to copyright laws that consider administrative measures post-printing. Gómez Reino has argued that the fundamental principle in the Spanish ancient régime was negation to print, publish, sell or import books without the crown's *authorization*, which constitutes an exception to prohibition based on public utility, whose burden of proof falls on the editor requesting the license or privilege. This principle results in three particularities: first, that central to the Spanish printing system is the judge and the Juzgado de Imprentas 1715-1830¹³⁵ charged by royal delegation to administer the review of manuscript by university scholars, literati, civil authorities or priests; second, the fact that the role of the Tribunal of the Inquisition was very small, circumscribed to post-printing censorship and to books referring to the Tribunal itself as of the prohibition of Carlos I in 1550 against the inquisition to issue printing privileges in the Spains;¹³⁶ and, lastly, that instead of legislating the balance between private and public interest from possessive individualism, the Spanish standpoint is the public domain. The crown is bound by arguments of public interest which on the one hand upholds all prerequisites for publication of useful works during emergencies,¹³⁷ and, on the other, structures printing prerogatives as a system of state propaganda.¹³⁸

The general concept of literary property based on natural individual rights was only argued and legislated in Spain by the parliament of the Cadiz

Regency that ruled in King Fernando's name during the Napoleonic occupation. The Regency declared a free press on November 10, 1810 allowing anyone to write, print and publish his or her ideas; and on June 10, 1813, it established author rights declaring authors the owners of their works. However, upon his return on May 1814, Fernando VII annulled the laws passed by the Regency. The first Spanish Law of Intellectual Property was passed by the Cortes on August 5, 1823 during the Liberal Triennium 1820-1823, but was again annulled by Fernando VII through the *Decreto Manifiesto en el Puerto de Santa María*, which marked his return to monarchical authoritarianism. The law was again established, this time for good, by Alfonso XII in 1879 during the Bourbon Restoration 1874-1931, an epoch characterized by a liberal model of state associated with the industrial revolution. In Mexico, limited laws of intellectual property were passed by the liberal state of Benito Juárez, and extended during the Porfiriato a regime characterized by its positivist ideology.

To use copyrights as proxy for modernity is complex. As Carla Hesse showed, copyrights are not necessarily associated with modern bourgeois states but rather with the notion of Enlightenment. Copyrights are not the result of a search to establish a balance between private and public interest, but rather a multidimensional equilibrium between three interests: the private corporate; the private individual; and the public. Still privileging efficiency over equality, recognizing the problem as a three-point equilibrium does not necessarily imply an exact equal benefit or cost for all three parties, but rather the overall lesser cost and higher benefit for society.¹³⁹ The Spanish system also follows that logic, only first stressing the common good. In that sense all three systems reflect a modern concern and share a common universalizing notion of nature or humanity. Copyrights conceived as natural universal rights of individuals were perceived as contrary to the notions of Spanish universalizing humanism, but the two represented models of European universal values based on universal rights. The concept of universal, natural or human rights was not a product of the modern bourgeois state either, but as Anthony Padgen¹⁴⁰ has argued, it was the invention of monarchies and empire. Stemming from the Greek concept of *koinos nomos* and sixth-century Roman *Corpus Iuris Civilis*. Universal,

natural or human rights were the product of the attempt to regulate imperial expansion both in Roman times, and in Renaissance Europe through the creation of international regulations and the invention of an «international community,»¹⁴¹ which Padgen argues «undeniably derives its values from a version of a liberal consensus which is, in essence, a secularized transvaluation of the Christian ethic, at least as it applies to the concept of rights¹⁴².» Universal natural or human rights were presented by Thomas Aquinas in the thirteenth century as a body of universal principles that bridged the human and the divine, and by Francisco Vitoria and the theologians of the School of Salamanca in the sixteenth century, to justify Spanish military intervention in the Americas.¹⁴³

Following similar lines of argumentation, to the prevalent concept of Enlightened modernity, recent postcolonial historians argue alternatively that such periodization constitutes an oversimplification related to the transfer of international hegemony from the Italian states and the Spanish and Portuguese empires which dominated most of the fifteenth, sixteenth and seventeenth centuries to Holland, France, England, Germany and then the United States, which dominated most of the eighteenth, nineteenth and twentieth centuries. Modernity under this perspective starts with the Italian and Spanish Renaissance¹⁴⁴. Under this view an artificial divide is set between Renaissance concepts and their Enlightenment transvaluation. Could copyright and author laws be one of those concepts extending and refunding universal natural rights, artistic and literary property laws or publishing regulations aimed at striking a balance between private interest and public domain?

At this point, and if that arguably artificial divide is to be considered, it would seem advisable to provide general elements of its theorization.

Interrupted Modernity

In his Nobel discourse Octavio Paz¹⁴⁵ points out that «modernity is a slippery term that changes with geography and time,» but that all its definitions share the central role of the subject or «I,» in the constant quest of

the present, and the existence of modernity in stark contrast to the Middle Ages. Paz argues that modernity is basically a question of time: first the time of men in a unified history; then lineal time that runs towards progress; and finally the reduction of cyclical time to the instant, «the fleeing present always renewed,» but tinted by the ephemeral of the fashion and the «new.» Modern men are historical men, advancing through linear progressive time, but living in a fleeing present charged with magical mythical cosmogonies of cyclical time concentrated into the instant. What this means is dependent again on time, but also on geography. Paz' Nobel address has become a paradigmatic text to understand the Hispanic transatlantic perspective of modernity, and its periodization. He writes:

La idea de modernidad es un sub-producto de la concepción de la historia como un proceso sucesivo, lineal e irrepitible. Aunque sus orígenes están en el judeocristianismo, es una ruptura con la doctrina cristiana. El cristianismo desplazó al tiempo cíclico de los paganos: la historia no se repite, tuvo un principio y tendrá un fin; el tiempo sucesivo fue el tiempo profano de la historia, teatro de las acciones de los hombres caídos, pero sometido al tiempo sagrado, sin principio ni fin. Después del Juicio Final, lo mismo en el cielo que en el infierno, no habrá futuro. En la Eternidad no sucede nada porque todo es. Triunfo del ser sobre el devenir. El tiempo nuevo, el nuestro, es lineal como el cristiano pero abierto al infinito y sin referencia a la Eternidad. Nuestro tiempo es el de la historia profana. Tiempo irreversible y perpetuamente inacabado, en marcha no hacia su fin sino hacia el porvenir. El sol de la historia se llama futuro y el nombre del movimiento hacia el futuro es Progreso.¹⁴⁶

[The idea of modernity is a by-product of our conception of history as a unique and linear process of succession. Although its origins are in Judaeo-Christianity, it breaks with Christian doctrine. In Christianity, the cyclical time of pagan cultures is supplanted by unrepeatable history, something that has a beginning and will have an end. Sequential time was the profane time of history, an arena for the

actions of fallen men, yet still governed by a sacred time which had neither beginning nor end. After Judgement Day there will be no future either in heaven or in hell. In the realm of eternity there is no succession because everything is. Being triumphs over becoming. The now time, our concept of time, is linear like that of Christianity but open to infinity with no reference to Eternity. Ours is the time of profane history, an irreversible and perpetually unfinished time that marches towards the future and not towards its end.]

The philosophical conception of modernity that Paz lyes out, was ushered, by the realization of the significance in history of Renaissance discoveries. After what Paz calls «the irruption of America in history,» time can no longer be perceived as cyclical, and in lieu of pagan cyclical time and Christian eternity, modern times are lineal and infinite. Building on Paz' observation that modernity's dawn is middle ages' dusk, Michael Iarocci elaborates on the second property of modernity, geography:

Why did modernity happen? Three reasons: discoveries, Renaissance, Reform. Modernity is a distinctive period because for the first time Europe is clearly superior to Muslim, India, and China, hence modernity as an imaginary of eurocentered history. (...) However, Europe today is a synecdoche referring only to Northern Europe: France, England, Germany and the Low Countries. (...) How did this happen? In four four stages: (1) First, as the Holy Roman Empire of Charles V is divided in two, the Dutch face a possible empire to battle for and administer, but only if simplified (Grotius); (2) Then [Northern Europe] operates a series of demonizations. In the 1500s and the 1600s Northern Europe invents the concept of Enlightenment to focus on Reformation as the center of Modernity and to portray Spain as exceptionally barbaric (e.g. The Inquisition and the «Black Legend»); (3) In the 1700s Northern Europe was portrayed as Modern through Industrial Revolution and Spain as part of the South, uncivilized and indolent; and (4) finally, in the 1800s Romantic Historicism celebrated Spain as «exotic» in the same terms

it generated the «Orient» and in a structural homology to the exclusion of the 1600s.

Iarocci tells a story of a systematic displacement of the events that led to modernity, from Renaissance to Enlightenment. Would it be possible that a similar displacement has occurred also in the prevalent story of copyrights and author laws? Iarocci is not alone in advancing this hypothesis. His view is representative of recent scholarly work informed by three different perspectives: sociohistorical theories of modernity;¹⁴⁷ philosophy of world history;¹⁴⁸ world-system analysis;¹⁴⁹ and postcolonial historiography.¹⁵⁰ Enrique Dussel is another scholar, working on a similar line of investigation, who also speaks of two modernities:

The first is Hispanic, humanist, Renaissance modernity, still linked to the old interregional system of Mediterranean, Muslim and Christian. (...) The mechanisms through which Spain «manages» centrality and domination are through the hegemony of an integral culture, a language, a religion, (...) military occupation, (...) bureaucratic-political organization, (...) economic expropriation, (...) demographic presence, (...) [and] ecological transformation. This is the substance of the world empire project which [...] failed with Charles V. (...) On the other hand there is the modernity of Anglo-Germanic Europe, which begins with the Amsterdam of Flanders and which frequently passes as the only modernity.¹⁵¹

Dussel argues that confounding modernity with Enlightenment is a necessary «reductionist fallacy» because: «[to] be able to manage the immense world-system opening itself to tiny Holland [...] she must accomplish, and increase its efficacy through simplification.» This reduction produces a series of entymemes such as, for example, that «since before modernity come the middle ages, and modernity starts with eighteenth-century Enlightenment, then Renaissance must be medieval.» In the chronotope of Enlightened modernity the center is occupied by Northern Europe. The rest of the world is depicted either as a periphery (Russia, Spain,

Greece, Italy, Eastern Europe and the Scandinavian countries), or as a potential colony (the Americas, Africa, the Orient, Antarctica). Historicizing the Romantic reaction under this focalization produces distorted perspectives: «Romanticism is produced exclusively in Germany, France, and the United Kingdom. Spain does not produce Romanticism because it *is* Romantic.»¹⁵² The semantic shift is of relevance because it evidences the linguistic struggle that accompanies colonial advancement, and which can be somehow distanced from the realm of the factual, a characteristic that Voloshinov referred to as «the inner dialectic quality of the sign,»¹⁵³ and Baudrillard as the simulacra of reality.¹⁵⁴ Recalling Herder, Fichte and Hegel, Iarocci notes three important characteristics of the Romantic historicism paradigm : (1) «[it] posits in place of an ever-ascendant common civilization like in the Middle Ages, irreducible differences of each nation Volkgeist (Herder); (2) «In place of the promises of the future, [Romantic Historicism] seeks the commune with its fantasies of the past; and (3) in place of celebratory pursuit of material process it aims to dwell in the world of spirit.» If the dark legend dismissed Spanish Renaissance as medieval, the romantic metaphor outcasted Spain from progress and modernity. While England's insularity remained central, Spanish peninsularity became a periphery. «Why did Spain accept that? Because of internal divisions, and a self-deception that lasted until the loss of Cuba and Puerto Rico to the United States.»¹⁵⁵ Contemporary historicization of the Spanish transatlantic recognizes that both the black and the pink legends are exaggerated narratives that do not reflect the steady albeit sometimes slow modernization processes of both Spain and Spanish America in the nineteenth and part of the twentieth centuries. Iarocci distinguishes two contemporary historicization claims: «postmodernity claims in a way that the project of modernity was never valid and suggests that the game is over; neocolonial studies argue differently, that there was ‹foul play› and that a number of elements key to the construction of Europe and Modernity originated in Italy and Spain.»¹⁵⁶ For the latter, European Modernity starts with the Renaissance and Spain ought to be recognized as the «first modern European state.»¹⁵⁷

I will refer to the argument summarized here as «interrupted modernity» because it reasons that Enlightened modernity poses itself as the only

modernity and in so doing, it «interrupts» the continuity of Renaissance, Enlightened, Romantic and Contemporary modernities. «Interrupted modernity» is relevant to copyrights history because it deconstructs and relativizes the notion of a hard temporal divide marked by the Enlightenment, and questions its substitution to and oversimplification of modernity. The notion of Enlightened modernity is crucial to the epistemological model correlating copyrights and creativity because it validates the imagination of a clear distinction in the conception, practice and circulation of creativity before and after copyrights.

The argument of interrupted modernity shifts the focus from documenting when and how copyright law was first set, to a broader investigation of ownership and dominion rights over textual and artistic artifacts as well as over their reproduction and derivatives. As mentioned earlier, the prevalent historic narrative conceives copyrights as the children of Enlightenment and the product of six factors: (1) Lockean possessive individualism; (2) technological change allowing for serial reproduction of books and newspapers; (3) a mass-market for printed texts; and (4) valorization of original genius all coalesced by (5) commercial struggle and (6) the requirements of legal adversarial argumentation.¹⁵⁸ Under the light of a four-fold conception of Renaissance, Enlightened, Romantic and Contemporary modernity the narrative of copyrights becomes part of a longer more encompassing process concerning use and reproduction rights (dominion, property, citizenship, or universal rights); authorship practice; and the law-construction mechanisms that codify those rights and practices.

The historicization of modern authorship from book-history and author criticism –albeit still governed by elements of «interrupted modernity»– already uses a broader arc to tell the story of modern authorship, a historic arc that includes copyrights, literary and author laws as a third stage in the construction of modern authorship. In *L'ordre des livres*,¹⁵⁹ Roger Chartier distinguishes: first, the coming about in the last two centuries of the Middle Ages of the book in its modern form, which included for the first time as a single object the oeuvre of a single author, breaking with the previous model of the miscellany,¹⁶⁰ predominant since the eighth-century, which gathered in the same codex texts of different genres and authorships; then,

the assignment of texts to their authors in order to censor and prohibit, which Michel Foucault calls «the penal appropriation of discourse;»¹⁶¹ and finally, the birth, in the eighteenth century, within corporative English regulations and royal privilege in France, of the concepts of copyright and literary property respectively.¹⁶² A similar story, this time about rights, property, dominion and universal rights, is told by contemporary cultural historians from greek and roman notions of appropriation, blood and land rights, *ius sanguine* and *ius soli* to the twelfth-century Franciscan debate on dominion and property, and from Vitoria and Grotius notions of universal human rights and international law to Lockean possessive individualism and the liberal contractual tradition. Ownership and dominion of the literary and artistic artifact, and of its reproduction and derivatives is a particular instance of this narrative. The evolutionary or revolutionary transformations of use and reproduction rights, authorship practices and law-construction mechanisms could be traced accordingly through four temporal stages: Classic and medieval times; Renaissance modernity; the competing and coexisting Enlightened and Romantic modernities; and finally postnational and contemporary times.

So copyrights would be a third stage in long-standing tradition one can trace back at least to twelfth-century Europe. The same could be said about the relation of copyrights to the notion of universal rights, or to the search for a balance between private and public interest in the regulation of the circulation of messages and texts. Copyrights are a step in a tradition towards modernity that can be traced far back to scholastic or Classic antecedents. As the exemplar of modernity, the prevalent notion of copyrights also confounds at least three forms of authorship: the modern Renaissance authorship, different from the legal appropriation of discourse that produced such dialogical imaginations as the *Guzmán de Alfarache* and *Don Quijote*; the professional author-worker and author-owner associated with the industry and to copyrights; and the notion of romantic authorship which particularly in Spain, but also in France and Germany often positioned ideas of nature, sentiment and self-expression as opposite and against the world view associated with the industrial revolution and its technological reductionism.

The now classic work by Benedict Anderson of *Imagined Communities*¹⁶³ offers an example in point. As Paz in «La búsqueda del presente,» Anderson starts his argument by focusing on the shift in conceptions of time. He begins his famous argumentation on the central importance of modern novels and newspapers to the imagination of the modern nation-state with Erich Auerbach's¹⁶⁴ distinction between pre-modern conception of time based on prefiguration and fulfillment and modern notions of linear empty time where community is not imagined through shared fate, but rather as coincidence in instant and space.¹⁶⁵ Anderson then considers the same distinction, this time from Walter Benjamin's perspective and notion of common «homogenous empty time» and of how modern individuals perceive commonality not as fate or destiny, but rather as coincidence by clock and calendar.¹⁶⁶ At the same time Anderson was writing *Imagined Communities*, in Mexico, Roger Bartra was following a quasi-identical argument, using exactly the same Auerbach quotes in *La jaula de la melancholia*.¹⁶⁷ Like Anderson, Auerbach's argument led Bartra to identify in that shift in time one of the origins of the modern nation-state in general, and of the Mexican revolutionary state in particular. Like Anderson, Bartra discusses how modern communities are constructed through literature and other cultural artifacts, and staying with Auerbach distinctions alongside his argument, he identifies how the modern nation state transvalued legitimacy structures from the Ancien Régime to modernity. Interested in the nation, Anderson introduces Benjamin's instead. The difference is apparent in the imagery of «clock and calendar,» and is that while Auerbach places the shift in the Renaissance, Benjamin places it in the industrial revolution of which the time-machine is a proxy. Both Anderson and Bartra continue by arguing that modern genres such as the novel were key to the construction of that perception and the acceptance of the narrative of sovereignty, and they both focus on the birth of the modern American states and on Fernández de Lizardi's *Periquillo Sarmiento*.¹⁶⁸ However, for the theory of the birth of the modern novel and its associated modern author, Bartra relies on Bakhtin's *Ideological Imagination* and notion of chronotope, while Anderson chooses Febvre & Martin, *The Coming of the Book*¹⁶⁹ from which he understands that the novel and the newspaper are Enlightened inventions. As a result of this

difference Anderson sees in Lizardi's *Periquillo* a «solitary hero through a sociological landscape of fixity that fuses the world of the novel with the world outside» while Bartra sees in him a variation of the Spanish pícaro, a character reflecting the socioeconomic condition of a class of individuals, and whose adventures stress the necessity of enforcing common universal values and practices. Strikingly, as Anderson's perspective logically results in associating modernity with possessive individualism and individual rights, Bartra's argument in turn concludes with the proposal of Moises Sanz «right to a national identity.» Reading with the same critical tools (Auerbach and Bakhtin) another classic text of the Picaresca, Lázaro Carreter notes in Mateo Aleman's *Guzmán de Alfarache* the surprising coexistence of novel sentiments of «freedom» and «property» in the relation author-character thought the text.¹⁷⁰ While under Anderson's perspective and the narrative of Enlightened modernity, property is a reaffirmation of possessive individualism, under the alternative perspective of Renaissance modernity the author feels that property is a liberation from the legal appropriation of discourse that forces him (Alemán in this case) to have an identitarian relation to his characters. By *owning* them instead of *being* them the author can now tell the stories of all types of characters that live in the same space-time and make heroes of them without having to necessarily agree with their views or with what they represent. In a step away from identity, individual property for the modern Renaissance author comes as a liberation from the individual and a reaffirmation of community. Community is at first Catholic and associated with the notion of a common good, and is then transvalued into universalizing notions of humanism that become, in the secular state, a right to identity. Rose is right then when he argues that individual property is a characteristic of modernity, but only as a balance between the individual and public interest, a balance that from possessive individualism results in copyright, from participative public intellectuals in author rights and literary property, and from Spanish humanism into fundamentally cultural rights to identity.

Chapter II: Author Property from Roman Hispania to the Middle Ages

Martial and the «Fictio Legis»

Intellectual property historians¹⁷¹ credit Martial as the first writer to have used the term «plagiarism» in the sense we give it today of «usurpation of authorship.» The fact is mentioned as a historical curiosity with no further consequences since there were no copyright or intellectual property laws in Classic Rome. However, if one sets aside the narrow focalization on copyrights and considers instead authorship conception, reproduction rights, and the evolution of mechanisms of law-creation, Martial's choice is far from inconsequential. It marks a necessary step towards the modern conceptualization of the author-work relation and is necessary to understand the mechanisms through which those concepts could have been codified into law.

Marcus Valerius Martialis (40-104 A.D.) was a Hispano-Roman writer who was protected in his life by two other Hispano-Romans writers: Lucius Annæus Seneca (4 b.C.–65 A.D.), and Marcus Fabius Quintilianus (c.39-95 A.D.). Martial wrote close to fifteen-hundred poems in fifteen books that have survived practically whole. All of his verses are short concise epigrams, mostly satirical, and his style is usually praised for its specificity and precision which is said to be the poetic counterpart of Seneca's short prose aphorisms, and which have made him being considered as the first Spanish conceptist poet. Under the help and patronage of Seneca, Martial started to study law, which he had to interrupt as a result of Seneca's suicide. Martial was daunted by poverty nil the end of his life, but was also helped by Juvenal, Quintilian, by the emperor Domitian and also by his writers, one of which gave him a house in the country to where he retired.

In a letter to Quintilian, Seneca quotes Cicero referring the book-trade at the time «We copy badly, we nonetheless sell well.»¹⁷² In Roman times a significant market for books existed. Manuscripts were copied by specialized slaves that Cicero calls *librarii*, and that he distinguishes from the writers who can transcribe oral testimonies and use shorthand, the *notarii*. In Seneca's quote, Cicero was speaking of Atticus, his publisher, who created a relatively important industry that Cesar decided to encourage by establishing public

state libraries in every province based on the concept of the one in Alexandria. He called these libraries *bibliopoles* from the greek *polein* «to sell» and «*biblios*» books for they were the place where booksellers ought to go to sell their books. Cesar's policy had a significant impact in the market for books and the workshops of copiers multiplied. It was Tryphon's which copied and commercialized Martial's *Epigrams* and Quintilian's *Institutio oratoria* (a.D. 95). The book at the time was a luxury item which could be sold for a considerable price for the profit of the bookseller rather than the author. In *De Beneficiis*, referring to Dorus, the copier and seller of the works of Cicero, Seneca writes: «We say that the books belong to Cicero; the bookseller Dorus calls the same books his and the truth is in both sides. One claims it as author, the other as buyer; and it is just to say that they belong to both because in fact they do belong to both but not in the same way.»¹⁷³ To whom an artistic or literary artifact belonged was a problem that received attention at the time and which consisted of two aspects: understanding the nature of things and what in them was valuable; and constructing techniques to establish and codify the juridical relations between humans and things. For people to buy, sell, use and leave property to their heirs it is necessary that things are thought thoroughly, movable things, and real estate but especially things that are not easily divisible in parts such as the stream of a river, the fruits of a tree, the womb of a pregnant woman, or the text or image from its material support. A commonly used principle in Roman law was the *solo credit superficies* which states that every addition contributes to the base property on which it is superimposed¹⁷⁴. However, as Seneca's commentary suggests, an incipient distinction between material and intellectual property exists which explains that when in conflict, the material property of a book is assigned to the owner of the tablet or paper on which the copy is made, rather than to the copyist, but the attribution of the text remains linked to its author. It also explains that the ownership over ideas and characters end with publication, as the work becomes the property of readers and commentators who elaborate on it. The two types of property are different and entail different value-systems and judicial rights. As for the text itself, the value associated with its originality is also a subject of a debate which opposed anomalists, followers of Cicero and Seneca, and

analogists, represented by Quintilian and Cesar. While the former more traditional view placed the value of discourse in relative originality (anomalists); the later newer imperial view considered that its value was in accordance to its articulation into a genealogy of canonical texts (analogists). This debate resulted in three important reflections on the nature of texts and the relation men has with them, which pertained to the value inscribed in a text by authorship or canonical integration; the importance of notions of style in establishing and advancing that canon; and the universality of that canon as texts transited through national languages. In his *Institutio Oratoria*¹⁷⁵ Quintilian translates the greek *gramatike* by *litteratura* which he defines as «the science of correct language and poetry interpretation.» The value of a text for Quintilian is in how much it illustrates the norm. But the norm is not given solely by tradition, as one can see in the fact that Quintilian was opposing the views of Cicero and Seneca, but it is a product of a conscious effort to construct that norm. Martial epigram to Quintilian in 86, illustrates the ambition of power of Quintilian, «a man who longs to surpass his father's census rating.» The project of placing value in canon rather than in individual originality coincides also with the passage of the Roman republic of Cicero, to the Roman Empire of Quintilian and Cesar. The views of imperial Rome are present in the appropriation of other works and traditions that Roman authors would have no qualm in appropriating, translating, sometimes modifying and marking with a Roman authorial signature¹⁷⁶. Quintilian is thinking of a start when world knowledge is appropriated, translated and fixed into latin, the lingua franca, not only for philosophical reasons, but also to satisfy the business opportunity created by Cesar's bibliopoles. The anomalist view recognizes instead, that there is value in the linguistic deviation from the norm, because it marks the marginal evolution of language and thus of the norm itself. Benison Gray has argued that the valorization of those marginal changes over tradition are at the core of stylistics, and that the study of style makes sense mostly when if there is a significant distance between literary and colloquial language, and if the literary works to establish the norm and educate the ruling classes on how to use it: Homer wrote in Ionic greek while his readers in Athens spoke Attic, and scholastic readership focused on classic languages while

colloquial language was Romance, etc.¹⁷⁷ Literary style is a deviation from colloquial registers, but not just any deviation, one that is recognized as canonical and thus as a marker of a new norm.¹⁷⁸ Gray argues that as the expression of the educated writer and the colloquial speaker narrows, the canon-formation capacity of literature withers and the pedagogical need for stylistics as hermeneutic readings becomes less and less relevant.

When copyright historians mention Martial's use of the term «plagiarism,» it is often in contrast with Diogenes Laertius¹⁷⁹ use of the term *logoklopeus*. Diogenes tells us that the appropriation of the literary or philosophical work of someone else in Classic Greece and Rome was referred to as a stealing offense, and the thief was called a *logoklopeus* literally a «stealer of words.» Jacques Boncompain in his history of the birth of intellectual property writes «le poète latin Martial personalize l'infraction ainsi commise et qualifie (...) de «plagiat» le détournement de ses vers, le *plagium* désignant à l'époque le délit de rapt d'enfant et d'esclave, en vue de les revendre.»¹⁸⁰ The interpretation is straight forward: Martial is the first to use prosopopeia to «personify the infraction;» the text is metaphorically associated to a kid or a slave stolen to be sold. In that narrative Martial trope is a dramatic exaggeration, a rhetorical tactic to move the audience in his favor. Martial is after all a satirical poet. No wonder that the fact is seen as of little consequence for copyright history.

In reality Martial offered much more than a simple rhetorical exaggeration and the fault attribution he was referring to—contrary to what Boncompain who was good-willingly passing onto his readers an idea he read in Olagner's history of *droit d'auteur*¹⁸¹—the fault Martial was referring to was not the appropriation by someone else of one of his texts, but rather the inclusion among his verses of some he did not write as if they were his. Martial's claim is thus more complex than a simple case of *logoklopeus*. Martial was using some of the conceptualizations recently made by his contemporaries in the analogist/anomalist controversy, but most importantly, he is articulating an author rights claim through a rather novel technique recently introduced to Roman law by the *Lex Cornelia Captivis*, an important law which was very likely studied in law schools which Martial attended. This mechanism is nowadays referred to as the principle of *fictio legis*.

Martial accuses Fidentius of introducing verses of his own making among his epigrams which he considers literary theft:

Una est in nostris tua, Fidentine, libellis
pagina, sed certa domini signata figura,
quae tua traducit manifesto carmina furto. (...)
Indice non opus est nostris nec iudice libris,
stat contra dicitque tibi tua pagina «Fur es.»¹⁸²

[One page only in my books belongs to you, Fidentinus, but it bears the sure stamp of its master, and accuses your verses of glaring theft... My books need no one to accuse or judge you: the page which is yours stands up against you and says, «You are a thief»]

Literary theft in modern terms refers to the act of taking the writings of another person and passing them off as one's own. It receives the name «plagiarism» and denotes the appropriation of a literary work. Martial accuses Fidentius of a very peculiar theft: the offense of including apocryphal verses among his epigrams and clamming they are Martial's. It is not the text that Fidentius steals but the name of the author. So far the offense could be typified as forgery, but it is not that avenue Martial's decides to pursue. As he sings to Quintianus, the patron of the faulty bard, the Martial uses the term «plagiarism» in a very astute move:

Commendo tibi, Quintiane, nostros
—nostros dicere si tamen libellos
possum, quos recitat tuus poeta—:
si de seruitio graui queruntur,
adsertor uenias satisque praestes,
et, cum se dominum uocabit ille,
dicas esse meos manumque missos.
Hoc si terque quaterque clamitaris,
inpones plagiaro pudorem.¹⁸³

[To you, Quintianus, do I commend my books, if indeed I can call books mine, which your poet recites: If they complain of a grievous yoke, do come forward as their advocate, and defend them efficiently; and when he calls himself their master, say that they were mine, but have been given by me to the public. If you will proclaim this three or four times, you will bring shame on the plagiarist.]

The common interpretation of Martial's trope is a simple prosopopeia. However, his figuration involves several metaphoric layers and enthymemes. First Fidentius' offense is wrongful reading or interpretation. Fidentius is a bard who sings Martial poems and intermingles with them his own. Fidentius is guilty of forgery or falsification of a person's signature or authorship as he pretends the whole work belongs to Martial. Martial's claim is contrary to the positive principle of *solo credit superficies* according to which additions to property add to the ownership of the original proprietor, because in this case those additions are not betterments but harms to the original property. Finally, yes, Martial operates the prosopopeia of the text as it makes it speak and complain of the *seruitiu* or yoke, a very fortunate metaphor describing both the joining of two disconnected elements, the personification of the text, and the purpose of joining for the purpose of making them work on the behalf of the person tinging them with the yoke. Martial refers to his verses as being «*manu missos,*» manumitted from under his artistic hand, and then sequestered by a plagiarist. The metaphor conveys the idea of a personified text, son or slave to the author until freed by publication. Note that in Lebrija the second meaning of «*crear,*» to create, is precisely the ability of a pope or a king to confer a new status to a person, i.e a cardinalship, a ducat, or the manumission from slavery.

The problem arises when those sons or slaves manumitted are put back into slavery (the yoke) by someone claiming «dominium» over them. What Martial is claiming is that the dominion of the author over the text is different than the one of the interpreter, and also that while the author's dominion extinguishes through publication there are some deontological rights that persist even when the text is «freed» into the public domain, a clear claim of

droit moral. According to Cicero,¹⁸⁴ *plagium*¹⁸⁵ is the offense subject to punishment as typified in the *lex Fabia Plagiarii*:¹⁸⁶

The chief provisions of the Lex [Fabia] are collected from the Digest (48. tit. 15 s6): «if a freeman concealed, kept confined, or knowingly with *dolus malus* purchased an *ingenuus* or *libertinus* against his will, or participated in any such acts; or if he persuaded another person's male or female slave to run away from a master or mistress, or without the consent or knowledge of the master or mistress concealed, kept confined, or purchased knowingly with *dolus malus* such male or female slave, or participated in such acts, he was liable to the penalties of the Lex Fabia.»

In Martial's time, the penalty established by the Lex Fabia was banishment for non-citizens, while citizens had to pay a fine and were subjected to *infamia*, a condemnation for ignominious behavior implying the loss of certain public rights such as *suffragium* and *honores*, but not of any private rights. Under the empire, *infamia* lost its effect as to reducing political rights for such rights became irrelevant, and «persons who offended against the Lex Fabia were punished, either by being sent to work in the mines or by crucifixion, if they were *humiliores*, or by confiscation of half their property or perpetual relegation, if they were *honestiores*.»¹⁸⁷ Martial's mention of *pudorem*, shame, as a just outcome of Fidentius' inappropriate behavior is in accord to the metaphor as shame is the proper punishment for the infraction.

The *Lex Fabia* helps contextualize Martial's personification of the text, but does not contribute to our understanding of why Martial used «plagiarism» to figuratively refer to the manstealing of the author, and to the forgery of an author's signature. It does not explain either why an interpreter could incur in such offense by misrepresenting the attribution of the verses sung. In order to understand how the plagiarist metaphor works on this level, we need more information about Martial's conceptualization of the author-text relationship, and about the mechanisms used at the time to transform philosophical ideas into juridical relations.

Martial thinks of his texts through figures of property, identity, and paternity: (1) he says «Fidentius, the book you recite is mine, but when you recite it badly it starts being yours.» (I. XXXVII), and also «the one who gets a book and recites the poems in it as if they were his, should not have bought the book but the author's silence» (I. LXVI); (2) in terms of identity he tells Luperco to stop asking him if he can borrow a copy of his epigrams, and instead go to a library on Argiletto street and ask for him there to the owner Atrecto, «De primo dabit alterove nido / Rasum pumice purpuraque cultum / Denaris tibi quinque Martialem.» [«...and from the first or second shelf, for five dinars, he will give you a Martial well smoothed with pumice-stone, and adorned with purple.» (I. CXVII); and finally (3) Martial also refers to his texts as his offspring in rhetorical but also in judicial terms. He writes to Domitian:

Caesar...,
 Si festinatis totiens tibi lecta libellis
 Detinuere oculos carmina nostra tuos,
 Quod fortuna vetat fieri, permitte videri,
 Natorum genitor credar ut esse trim.(II.XCI)

[Caesar... if my hastily composed books, so often read by you, have succeeded in making your eyes notice my verses, allow what fortune has precluded, that I be seen as the father of three.]

Martial here is asking Domitian to legislate on a fiction, to make the laws of Rome see children in Martial's books so that he be exempted of taxes applied to the unmarried, and to be vested with the benefits of this new condition. Again in the second old meaning of the verb to create, he asks Cesar to use his power to create Martial's legal persona based on a convened imagination. The notion of creating laws based on useful and convenient imaginations was a recent mechanism devised to solve a combined problem of inheritance difficulties and war. The problem was this: if a man was captured by a foreign army and enslaved, something common at the time, inheritance became problematic because slaves had no rights to

pass along property to their heirs, nor even in some cases to own property. While the captured Roman was a slave under the jurisdiction of a foreign country, the property he owned remained on Roman soil, likely under the dominion of his family, which faced the legal conundrum of illegitimate possession or dominium. The *Lex Cornelia de captivis*¹⁸⁸ (81 BC) and more generally the body which includes it, the *Lex Cornelia testamentary nummaria* also known as *Lex Cornelia de falsis*¹⁸⁹ (81-79 BC) solves the problem by suggesting a useful and convenient fiction imagining that the Roman citizen died right before he was made prisoner, or «plagiarized» by foreign troupes. Even in the presence of evidence suggesting that the person was still alive, the *fictio legis* established the judicial relation of heirs and property under the convened fiction that the plagiarized parent was dead. It is with these laws and through the principle of the *fictio legis* that the notion of plagiarism in Martial can be fully understood and its importance revealed in the genealogy of authorship, reproduction and derivative rights, and mechanisms of legal codification of otherwise philosophical conception of the relation author-text.

Martial made caricatures of a number of Rome's personages, and in particular of two: «text robbers» (e.g. I. XXIX, XXXVIII, LIII, LXVI, LXXII, LXIII, LXIV, XCI; X. C, CII; XI. XCIV); and «testament hunters» (e.g. I. X, II, 26; VI. LXIII; VIII. XXVII). The term plagiarist is in relationship to both. In the sense of a personification of the textual artifact to whom human conditions such as a voice are attributed, the metaphor functions similarly to how it is interpreted today. Someone appropriates the personified text with the intention of profiting from them. The text which had been freed by publication is then enslaved again for the benefit of the crook. In Roman times a *paterfamilias* had dominium over the unemancipated members of his household, children, women and slaves. Until the Roman civil code and the Visigothic canon tradition intermingled in the *Liber Iudicorum* (7c) a *paterfamilias* had the *potestas* of selling those household-members in particular circumstances, for which the metaphor of texts as offspring was not fundamentally contrary to the notion of a commerce of those children. The personified text is a «free-man» when it is published, which entitles «him» to claim *iura*, justice, under the law, and the justice Martial claims for his texts is

to be rightfully interpreted, integrally circulated, and correctly attributed. These rights are not fundamental reproduction or derivatives rights, but rather refer to correct literary analysis and moral deontological rights of authors.

The plot thickens as one throws into the mix Fidentius' offenses. By mixing verses of his own making with the ones of Martial, Fidentius is transgressing the fundamental assumption of romantic authorship and copyright theory which states that texts have clear limits and can be attributed clearly to one definite author. Fidentius is treating those texts if they were still subject to change and had not been fixed and published. He is manstealing those texts and keeping them captive, under the control of a private hand. As in the *Lex Cornelia* the texts are fictionally dead. This put the father in a terrible position because the loss of his only-child would cancel his condition of «father of three,» and also because it would expose him to another plagiarizing this time of himself by the hunters of heritages. Martial is very aware that the term «heir» has different meanings in law and in literature, in voice and in writing. In LXXIII he says to Catullus «I will believe it when I read it, your heir Catullus. I won't believe it until I see it in writing.» And as for the vulture-like attack of heritage-hunters once sons are held captive or dead, Martial writes «Salanus has lost his only-child (...) To which vulture [Salanus'] corpse will belong now?» (LXII) If authorship of his verses is disputed, «which vulture would appropriate it?»

The mechanism of juridical fiction became common in Rome and is in use still today. Common legal fictions in contemporary law establish for example that corporations are persons under the law, that embassies are extraterritorialities within a country, that every person that participated in a murder killed the victim, or in the case of adoptions, new birth certificates are produced in which biological parents are substituted by the adopting ones as a useful and just legal fiction. In the continental civil code tradition the mechanism of *fictio legis* or «useful and convenient fictions» is used and valued more, than in Anglo-Saxon traditions where jurisprudence and common law are emphasized more. Literary property and author laws are an unambiguous example of the mechanism of *fictio legis* too. The first time the idea of literary property was introduced to the Spanish Cortes on April 17,

1847, the Spanish senator Florencio García Goyena presented it as «a useful and just fiction» created by the legislator whose work García Goyena equated to that of a fiction writer:

La propiedad literaria, señores, es una ficción, una creación del legislador fundada en motivos de justicia respecto del autor y en motivos de conveniencia respecto del público.¹⁹⁰

[Literary property, gentlemen, is a fiction, a creation of the legislator based on justice in respect to the author, and in convenience in respect to the public.]

Florencio García Goyena was the lead legislator in the draft of the Spanish Civil code of 1851. It should come as no surprise that he was an expert on the Roman civil code, that he published in 1841 a treaty on the mechanisms of judicial codification in Roman law,¹⁹¹ and on 1852 an encyclopedic compendium of the concordances of the civil code.¹⁹²

Coming back to Martial, there are two important aspects still to discuss. The first is to reiterate that the Hispano-Roman epigrammatist was concerned not only with the recognition of his literary authorship, but also with the consequences for him of the sale of his books, their circulation and derivatives. Contrary to the interpretation of Boncompain, Guillén¹⁹³ and others, who state that authors in classic Rome had no economic interest in the sale of his books because there were no copyrights, Martial constantly calls for readers to go to booksellers and buy a copy of his epigrams, which suggests that the Hispano-Roman author had vested economic interests in those sales. An example of those calls opens his first book:

Qui tecum cupis esse meos ubicumque libellos
et comites longae quaeris habere viae,
hos eme, quos artat breuibus membrana tabellis:
scrinia da magnis, me manus una capit.
Ne tamen ignores ubi sim uenalis et erres
urbe uagus tota, me duce certus eris:

libertum docti Lucensis quaere Secundum
 limina post Pacis Palladiumque forum. (l, 2)

[You who are anxious that my books should be with you everywhere, and desire to have them as companions on a long journey, buy a copy of which the parchment leaves are compressed into a small package. Bestow book-cases upon large volumes; one hand will hold me. But that you may not be ignorant where I am to be bought, and wander in uncertainty over the whole town, you shall, under my guidance, be sure of obtaining me. Seek Secundus, the freedman of the learned Lucensis, behind the Temple of Peace and the Forum of Pallas.]

Martial was in a «joint-venture» with his publisher, a venture that was not exclusively based on the commercialization of his works. Martial recognized and valued the editorial contribution of Severus who revised his «manuscripts» and of Secundus who puts them in stone. In the epigram LXXX, for example, he request time from Severus to review and correct his manuscript and says: «this little book will owe a lot more to you than to his author, because it will be fixed; when the text is worked into stone by the skillful Secundus and my dear Severus it does not have to fear marble anymore as the fugitive stones pointlessly exhausting Sisyphus.» The work of the editor and the copyist help the writer's task be a concrete one, as opposed to Sisyphus work which is pointless. So, although the final product is still Martial's, the author recognizes a collective effort in its making. Who owns a literary or artistic artifact when different persons are involved in its making, and several different materials with specific ownerships are involved was a problem that drew significant attention of the Roman jurists in the second to fourth century and, after the *Digesta*¹⁹⁴ ordered by Justinian in the fifth-century and the *Liber Iudicorum*¹⁹⁵ ordered by Recesvinto in the seventh century, the problem was also a matter of significant interest for the scholastic jurists of the twelfth-fourteenth centuries under the name of the problem of the *tabula picta*.

Who owns the literary and artistic artifact when different persons and owners are involved is an important judicial problem that is reflected in contracts, adversarial legalism, and in the conceptualization of the practice and experience of writing and painting codified in civil code law through mechanisms such as the *fictio legis*. The work for hire that is made under contract distinguishes the figures of *locator* and *conductor*, the one who hires and the one who executes, and establishes ownership in the financier who hires, unless he defaults, in which case the *conductor* can keep the work which was not paid in full. Adversarial legalism, the trials leading to jurisprudence are first and foremost based on precedent and as such give a significant emphasis to common law. The conceptualization of the experience and practice of texts and paintings, how they were acquired and in what consisted their usufruct has been a subject of study of romanists and medievalists.

The problem of the *tabula picta* is to conceptualize the different experiences and practices that result in and concern literary and artistic artifacts, in order to establish legal basis for *dominium*, usufruct and ownership of those artifacts. Hence the *tabula picta* involves both a philosophical problem of how to conceptualize the relation of people and things, and also a legal problem pertaining the codification of property rights. This conceptualization and legal codification becomes problematic in artifacts in which production several persons were involved, and in which materials of diverse ownership were used. Marta Madero, examining the gloss of the jurist Paul, summarizes the problem of the *tabula picta* as a problem of combination or adjunction of parts and lists the different criteria used in the series of arguments expressed by Roman jurists and medieval glossarists and commentators:

Si nous tenons compte de l'ensemble où apparaît la question de la *tabula picta*, le premier texte que nous venons de voir appartient à un commentaire du juriste Paul dans lequel, après avoir exclu de la revendication les choses qui ne peuvent être dans le patrimoine de personne —choses sacrées et religieuses—, il énumère l'adjonction d'une chose à une autre de façon à ce que la chose ajoutée en

devienne une partie— c'est le cas quand on ajoute un bras à une statue, une anse à une coupe ou un pied à une table; l'écriture et la peinture; le bois de construction et les *cementa* qui entrent dans le corps d'un bâtiment. Il s'agit en effet des choses jointes ou ajoutées régies par trois logiques. Une logique de la *prevalentia* qui permet de *déterminer* laquelle des deux choses devra accroître à l'autre —critère fondé, pour la glose, sur les rapports entre la partie et le tout, ou sur le prix. Une logique qui préside aux formes de l'union (l'opposition entre *ferruminatio* et *adplumbatio*). Et, finalement, une logique qui classe les choses suivant la physique stoïcienne, en choses simples, composées ou collectives. La glose ajoute deux autres critères qui existent néanmoins déjà dans la compilation Justinienne mais dont le fragment de Paul ne parle pas: celui des choses *factae* et *infactae*, et celui de l'ornement.¹⁹⁶

While a number of Roman legal historians have devoted attention to the problem in classic Rome,¹⁹⁷ only two studies have tackled recently the intense scholastic debate on the *tabula picta*. This debate occurred between the judicial revolution of the twelfth century, which defined a common legal *nomos* for the European space combining Roman, Canon, and common law, and the birth of judicial humanism in the fifteenth century which coincides with the diffusion of the printing press,¹⁹⁸ has only been systematically studied in two books by Paola Maffei¹⁹⁹ and Marta Madero²⁰⁰ respectively. Roman law historians have pointed general characteristics of the logical arguments of the *tabula picta*, for example (1) that they do not necessarily are based in the production technique, (2) that the argument or story referred in the text is relevant, but that (3) the general subject (religion, medicine, science) is considered an important criteria. In the summary established by Marta Madero three logical principles govern how Roman and Medieval authors thought of the result of the combination of things and their dominium: *prevalentia*, continuity of the union, and the individual or collective nature of the experience and practice. The notion of *prevalentia* seeks to understand if one is a part and another the whole, if one could exist without the other, if the combination produces something of equal or

different nature than the parts, and if those parts can be returned to their original state prior of their combination. The notion of *accessio* refers to the dominium that is acquired over one thing because it is perceived as an addition or betterment of something the owner previously has, and also occurs through *specificatio* when the addition produces a new «species» of thing. A distinction is made between materials that are *factae* and *infectae*, this is manufactures and raw materials, understanding however as raw materials the onus that, even if submitted to industrial transformation, can be returned to their raw material form by for example melting as in the case of coins or utensils made out of gold or silver. When objects from different ownerships are combined the principle of addition or *superficies solo credit* is sometimes overturned by considerations of attraction or *preualentia*. This notion establishes for example that the dominium over a *charta* corresponds to the owner of the parchment and not to the writer because of the price and rarity of parchment as compared to ink. The object which is deemed the more valuable, however, is not only determined as a function of its market price but as the preciousness of the materials and non commercial values of the artifact. The opposition is established between *pretium* and *presiositas* where the former refers to economic value, and the later to a «creative hierarchy.»²⁰¹ Contardo Ferrini has argued that Romans thought of two ways in which dominium could be acquired: by appropriation/occupation, and by attraction.²⁰² Attraction of the most valuable element over the least valuable defines the ownership of the *tabula picta* or the *charta*, and «value» is not only defined by price, but by a series of creative hierarchies, notions of whole and parts, of what is essential and what is an ornament to the object, or what is substantive versus what is accessory (*substantial v. qualities*)²⁰³.

While in classic Rome it has been argued that the governing principles of the *tabula picta* are the *superficies solo credit* and the notion of price, medieval jurists starting with Bartolo give significant attention to the distinction of things that are added to others, and things that are born forming a new species distinct from its combining parts. While Roman jurists were concerned with price, medieval jurists were also concerned with materiality, and with the specification of the experience and practice of literature and the arts. A classic problem of the *tabula picta* is how much in

medieval times it became a Byzantine scholar discussion, and how much of it was practical and affected the law. While Maffei assumes it must have been a practical debate, Madero notes that the arguments of the gloss and commentaries are not set in motion in contracts or in common law, which makes her conclude that the exercise was indeed circumscribed to academic arenas. It still bears a remarkable importance, she argues, because it helps structure the archeology of the notion of immaterial or intellectual property that was never addressed by the jurist of classical times: «Le problème de l'écriture comme contenu, comme création, comme chose immatérielle, n'est absolument pas posé par les juristes du *ius commune* dans la période classique.»²⁰⁴

While Madero is aware that the philosophical conceptualization of the practice and experience of artistic and literary artifacts is not a central principle of adversarial legalism, she stills looks for evidence in common law, where not surprisingly she cannot find any. Continental civic codes use, in addition to jurisprudence and common law, legal fictions as a mechanism to construct laws. Martial's plagiarism metaphor and his claim that the state see children in lieu of books and legislate accordingly is an example of how novel conceptualizations of the author-text relation are transformed into law. The case of Martial is not unique, and the notions in stoic physics of different forms of property —material and authorial— and of different types of physicality —simple, complex and collective— are also linked to law through legal fictions. The conceptualization of material and authorial (immaterial) property is a discussion that exists at least since the stoics as we have seen in the distinctions made by the Hispano Roman thinkers Seneca, Martial and Quintilian. The problem was discussed in great detail during the Franciscan controversy on poverty where significant points were made for example identifying that *usus* and *dominium* are partially confounded for possessions that are consumed. In items such as a text that a person can read (*usus*) without consuming it, usufruct does not necessarily require possession. William of Ockham makes the case that even when items are consumed, the illegality of poverty argued by Pope John XXII's bull *Ad conditorem canonum* wrongfully conflates moral justice with legal right: «if

enjoyment without having acquired dominium may be deemed morally unjust under certain circumstances, it is not necessarily illegal.»²⁰⁵

In contrast to copyright history and the prevalent view that copyrights were consolidated through adversarial legal argumentation, the recognition of the judicial mechanism of the *fictio legis* allows to register a long history of non-adversarial legal imaginations of the relation author-work. Martial metaphor of plagiarism in classic Rome constitutes a key moment in that history. As the scholastic jurists of the twelfth to fourteenth century engage in a revision of Roman law through the gloss and commentaries of Justinian sixth-century *Digesta*, and of the merge of the Roman legal tradition with canon law through the seventh-century *liber iudicorum*, these judicial reflections are accompanied by the philosophical conceptualization of *dominium* of the *tabula picta*; the theorization of *ius*, *usus* and *dominium* (right, usufruct, and property) in the Franciscan controversy; and through a series of legal fictions imagining the proper codification of the practice and experience of literature and art in the law. During this scholastic revolution of the twelfth-fourteenth century the scroll is abandoned in favor of the modern book; the *miscellany*, common since the eight century is replaced by single-author volumes based on the novel idea of strictly delimited works that put together form an *œuvre*. This increased recognition of author's agency is recognized first in religious and secular texts. Don Juan Manuel's fourteenth-century extension of Martial metaphor into the notion of the right of the «well-done *œuvre*» constitutes a key moment in the history of the *fictio legis* concerned with the legal codification of the relation author-text.

Don Juan Manuel and the Well-Crafted Work

Martial's plagiarism metaphor as both the appropriation of a text, and of an author's signature continues through the Middle Ages and into the Renaissance. The practice is wide-spread and not necessarily perceived as problematic, unless the alterations result in a work of lesser quality than the original one. This was the case for Martial argument against Fidentius, and it will be the case for Cervantes' argument against the apocryphal Quijote. However, when the modifications are for the better, the plagiarist becomes a proud new author. To exemplify how the practice was perceived positively, one can think of Garci Rodríguez de Montalvo's widely popular interpretation of Amadis de Gaula (1508). Montalvo added to the chivalric romance, written in three books in the fourteenth century, a fourth book of his own and a sequel, *Las sergas de Esplandián* [The Exploits of Esplandian] in which Montalvo describes the mythical «island of California,» an imagination that motivated the first Spanish conquerors to explore and name after it California and Baja California. The quality of the modified text was articulated as key for the establishment of authorship and text in the fourteenth century by don Juan Manuel. Manuel extends the prosopopeia of the work, and decides to use a *fictio legis* to argue for the recognition of the «rights of the well-crafted work,» and for state responsibility to protect it.

Don Juan Manuel writes at a time when the conception of the book, and of the author's agency in its making are changing. His most famous work, *El conde Lucanor*, follows a narrative structure common in Indian, Arabic and Romance literature at the time, which consists of a narrative framework inside which a varying number of stories can be included. Different from a novel's fixed number of chapters and narrative line, the *cuento de cajas* is flexible and fluid, varying from version to version. However, like Montalvo will be, Manuel is proud of his achievement, and decides to imitate the

scholastic masters who have recently established the «complete works» of classical authors such as Aristotle. Manuel's decision to gather all of his works into one single volume corresponds to a triple movement. First, to establish a reference for copyists to consult without having to go through the permission of manuscript owners, Manuel decides to place the copy in the monastery of Peñafiel. The idea is part of a general movement to standardize canonical units including weights and measures, and has in that sense a symbolic value in the imagination of foundational texts of the nation. In that respect, it is the state responsibility to protect it, together with all «well-crafted works,» as they are part of the nation's heritage. Finally, Manuel decides to make this move, in the context of his ongoing fight to have the right of his heirs to the crown of Castilla recognized, for his daughter he will arrange a marriage, for his son he will write the *Book of Estates*, and for his works, also metaphorically his offspring, he will argue rights through a legal fiction. It seems advisable to quickly review the legal, scholastic, and personal context in which Manuel made these decisions.

The Legal Definition of the Book

The legal definition of the book before the invention of the printing press was mostly material. In the *Partidas* of 1252-1284 the book is defined as a «bien mueble,» a movable asset (3.29.4) appropriable by any means of property acquisition or through bona fide possession for three years through prescription of rights. Books that belong to the Church are considered *rei sacrae* and thus could not be sold or acquired unless in the case of the prescription of rights. The book is a luxury item, expensive because of the cost of its material support, the difficulty in reproducing it, and the scarcity of copyists. Books were commonly used as collateral in financial transactions, or rented by their legal owners who argued usufruct of property similar to that of land²⁰⁶. Books that included family history, or descriptions of the discipline of a particular craft like the *ars mercatoria* were considered transmitters of lineage in the same form of a building or a feudal state, and in certain cases could only be subject to patrilineal inheritance. Daughters,

when heirs, were thereby only the vehicles through which the book was transmitted or passed on to the husband²⁰⁷. There was no legal notion equivalent to the nineteenth-century «derecho de autor,» rather authors were defined as glossers or commentators and the ownership of the book was placed on the reader. In the thirteenth century, for example, the Franciscan monk Buenaventura classifies the different forms of making books as:

...sin añadir ni cambiar nada de las obras de otro (el amanuense o *scriptor*); con adiciones a la obra que son del que la escribe (*compiler*); con añadidos del que escribe que tienen la intención de aclarar (*commentator*); o con añadidos ajenos a la obra que uno escribe con la intención de confirmar (*auctor*).²⁰⁸

[...Without adding or changing anything of the works of another (copyist or *scriptor*); with additions to the works from who writes them (*compiler*); with addition of the writer with the intention of clarifying (*commentator*); with additions foreign to the œuvre being written with the intention of confirming (*auctor*).

Here, there is no mention of «original creation» or authorial property a notion that the scholarship on the *tabula picta* suggests evolved slowly since the twelfth-century and often seemed contrary to Catholic doctrine. From the thirteenth to the fifteenth century, the book was an object, a commodity, «a writer was a man who made books with a pen, like a cobbler made shoes with a needle and string» notes Elizabeth Einsenstein.²⁰⁹ The *Partidas* considered that «a writer owns a book if he also owns the scroll or paper on which it is written.» The perception of the author as originator, and therefore as owner of a work, was in principle contrary to Catholic dogma, and only started to be recognized through the scholastic debates over *literalis* and *strictu sensu*.

Literalis and strictu sensu

Starting perhaps with the thirteenth-century understanding of Aristotle's theory of causality and instrumentality, and to late medieval exegesis, human authors of Holy Scriptures were granted more agency than before as «instrumental efficient causes» working with a degree of autonomy under the primary «efficient cause,» God. The distinction between literal and spiritual sense carved out a space for the recognition of the author's work without contradicting theological hermeneutics. The fifteenth century Spanish polymath Alfonso de Madrigal (d. 1455) writes, for example, a complex disquisition distinguishing the «literal sense» from the «spiritual sense» and argues that only about the literal sense one can debate:

The literal sense is the tangible embodiment of a message in parables, proverbs, tropes, metaphors, and similes. The spiritual sense cannot prove anything because we cannot say that a given passage or parabola is true or false in its spiritual sense, only in its literal sense.
(X)

Madrigal presents us with a series of dichotomies literal/spiritual, tangible/intangible, debatable/dogmatic and with an important corporal metaphor of the creation of a text. It is the human auctor who gives body to the spiritual message, a body made not of pages and ink, but of tropes and figures. The increasing agency of the medieval auctor runs parallel to a progressive conception of the work of the writer as tangible and material. The rule «Render unto Caesar the things which are Caesar's, and unto God the things that are God's» (Matthew 22:21) is still valid, but the discussion now centers on what is literal and tangible, hence both debatable and potentially Cesar's, while at the same time avoiding to argue about the dogma that could risk brushing feathers with the inquisition. Agency recognition increases with an expanded notion of materiality, but property remains spiritual²¹⁰.

In an exegesis of Madrigal, Alastair Minnis clarifies that while the literal sense establishes the realm of the personal meaning of the human auctor, it does not imply that the literal is the exclusive personal property of the human author: «On the contrary, the human author depended on God, as primary efficient cause, for inspiration and authority.» (13) and «God was the ultimate auctor of holy Writ, responsible for all the meaning that could be extracted from it (within the boundaries of reverent interpretation' to be sure), including the literal sense and all it could comprise.» (xiii)

As Minnis points out, increasing agency is recognized to the auctor but not property rights. From the Middle Ages to the Ancien Régime texts were thought to be the product of inspiration, evocation or invocation. They were dictated by muses, angels or by God himself to writers in trance or through their dreams. Sacred texts in particular, and all texts in general were thought to be co-authored by a medieval auctor, but remained the property of God, whose affairs on earth were entrusted in turn to his representatives: kings, popes, the Crown, the Church. Selling the word of God was referred to as the sinful crime of «simony,» for Simon Magus attempt at trafficking for money in spiritual things. Thus every literary or artistic work was seen as a collaborative work whose uses and dominium was subject to the disquisitions of the *tabula picta*.

In all Abrahamic religions, Jewish, Christian, and Muslim, the traditional notion of authorship is identitarian. The words of the Holy Scriptures are consubstantial with God himself. A letter is an extension of the person who writes it. A public speech is the act of the person who utters it. There is no distinction between what a writer believes, what the character expresses, and the reader thinks. In pre-modern Europe the interpretation of texts belonged to the group, not to the individual, and the reading and interpretation of some texts was proprietary to certain institutions as was the Bible to the Church. Dissent for the inquisition was first and foremost an act of «illegal reading,» or «illegal interpretation,» sometimes aggravated by the existence of «written proof.» Dissent as a form of reading was particularly important because it threatened allegiance, and the recognition of property through privilege. It was perceived and treated in legal documents as a violation of the rights of the Church, or the Crown, a specially grave violation because it

threatened the genealogy on which heritage and property was constructed, and that could thus be typified as sedition in that it could serve as justification for the alternative claims of different heirs.

After its publishing the text belonged to its readers, not its author, and it was the reader who often had it bound with his initials on the cover and his *ex libris* sealed on its pages. Don Juan Manuel's decision to establish a *príncipe* [original copy] of his «complete works,» and have them guarded by the state and available to all regardless of the material ownership of the copies of the work is revolutionary in that it claims for the author the «branding» of the well-crafted work under his authority.

Manuel's General Prologue

Medievalists agree today that sometime during the first half of the fourteenth-century don Juan Manuel compiled all the works he authored into a single volume, had three copies made, and wrote a prologue to the *œuvre*.²¹¹

Alberto Blecua²¹² and José Manuel Blecua²¹³ document how Manuel used to publish his works as he finished writing them. Of the three complete collections of his works, one was bound in individual volumes, and Manuel used it as the basis for his compilation; another was the compilation itself; and a third one, a copy of the one Manuel gave to the monastery of Peñafiel for safekeeping. By doing so, don Juan Manuel was imitating the practice common at the time of placing a valuable object in a Church, but he was also making sure that the copies made were accurate, and would not progressively depart from his version.

The volume as Manuel conceived it, compiles eleven works including *El conde Lucanor* (1335). As Roger Chartier²¹⁴ and others after him have noted, the concept of «complete works» was something new at the time, and presupposes the idea of an author as an organizing principle. Previously, different texts were bound together as a matter of convenience, and usually by the owner of the library where those books would be placed. Binding responded to an organization principle that sometimes reflected genre, but

was more often external to the text. Oftentimes all books in a library were similarly bound and bore the initials of their owner on the front or back cover, as well as an *ex libris* in the first pages, or on the side of the volume to guarantee that it was not separated from the book.

This initiative is relevant in several ways. First, it exemplifies the shift away from the concept of the *miscellany* that had been the preferred editorial principle since the eighth-century, and towards the modern conception of the book which includes complete works by a single author. It also exemplifies the shift away from the scroll and towards the bound volume. The notion of leaving two master copies in monasteries is also relevant. Manuel imitated the scholastic practice of compiling the works of master classic authors in whole volumes. He also did this in the context of the juridical merging of Roman and canon law which established a common *nomos* for the European space. Within that context, an effort to establish common units was necessary, and examples of accurate weights and meters were kept also in safe places so that merchants and artisans could calibrate their measuring tools against them. Finally, during the Middle Ages, it was common practice that feudal lords acquired and collected relics to be placed in the custody of churches and monasteries as a symbolic source of spiritual power. As Kate Harris explains,²¹⁵ relics were bought by noblemen and kings, and placed in the vaults of churches to keep them from being vandalized or stolen. They were put in churches or monasteries because they were a sanctuary, but also because their symbolic powers were then sanctioned by the Church. Relics were fetishistically associated with magical powers, and to possess the relic transferred that power to its owner. The relic did not have to be in physical contact with its owner. It could be owned and used without being possessed, or ever seen either. Relics were rarely exhibited. Oftentimes they were kept inside a reliquary made of precious metals, and adorned with valuable jewels. Relics were valuable because they existed, not because they were seen, and because people talked about them. In that sense, churches functioned as «banks of spiritual value.»

In a largely illiterate society, the aural power of books and paintings was also significant. Manuel's work represents the peak of the medieval tradition of didacticism, a tradition based on the notion of learning through *parabolae*

and imitation, a process comparable to the establishment of paragons for measuring the wisdom and pertinence of people's solutions to everyday problems, and their adequacy to a Catholic code of ethics. The last practice that is important to contextualizing Manuel's cultural framework of compiling his works in volume form and placing reference copies in monasteries, is money. It was common practice that people would place their gold or money under the custody of religious or private changers that would function as proto-banks. In the Middle Ages, the Catholic Church prohibition of usury, forbade the charging of interest on loans. The papacy distinguished, however, the role of financiers who *risqué* their money in projects that were uncertain, and who were hence perceived as entitled to a reasonable share of the profits of the project they helped finance. Money lenders could charge fees for the risk of keeping deposits safe, or for the services of changing money. Jacob Fugger, Carlos V's money lender, is credited to have discovered in 1519 the financial principle of «money creation» or «money multiplier,» consisting of lending several times the amount of reserves he had, through banking notes, which at the end of the day was beneficial for the economy because he helped increase the money in circulation, and allowed him to appropriate part of the wealth created by nations, a role normally played today by central banks. This last contextual reference is relevant not only because of the notion of value or *preciositas*, not necessarily related to *pretium*, the price or monetary value. It is also relevant when put in context with the other strategic actions Manuel was trying to accomplish parallel to his writing. Manuel was very concerned with his family's rights of succession to the Castilian crown, succession rights that he argued in his *Book of Estates* and in his *Book of Arms*. Within the scholastic glosses and commentaries related to the *tabula picta*, significant attention was drawn to the metaphors conceptualizing the relation of people (authors and readers) to the artistic artifact in order to determine *dominium*. As the author is recognized as having more agency, the land metaphor withers. The trope presenting the scriptor as a field-worker, adding superficial or marginal value onto land owned by an aristocrat does not adequately represent the new reality. The land metaphor, established a frame of mind propitious for considering the literary practice under the Roman

legal principle of the *solo credit superficies* which states that every addition contributes to the base property on which it is superimposed²¹⁶. The work of the writer, according to this idea, is proportionally insignificant compared to the literary tradition in which it is inserted. The land metaphor is increasingly replaced with a metaphor of the Roman auctor, or general who wins a new territory for the empire, and the right for himself to claim for a province, from the latin expression *pro-vincere*, the award the conqueror deserves. The metaphor of the writer as a military hero persists until the present day and is directly referred to by José Ortega y Gasset in *La deshumanización del arte*,²¹⁷ and by Octavio Paz in his *Quest for the Present*, where the Nobel laureate describes the work of the author as a conquest that earns him a place in the linguistic tradition, and the recognition that through his works the author defines the future of language, and of everything that can be named.²¹⁸ However, the most common rhetorical imagination of the author-work relation is of a parent and his offspring. The text is bound by tutelary rights to its author, until it is freed by publication. Within this frame of mind, Manuel's decisions regarding the edition of his complete literary works can be read as a double movement: on the one hand, an attempt to establish not only a blood lineage, but also an intellectual lineage to the house of Alfonso IX; and, on the other hand, a claiming of rights for his metaphorical offspring, that they be protected by the nation because of their literary and educational merits.

The Problem of Disputed Authorship

As a final contextual note on authority conferred by authorship, it is important to note that Manuel had the right to mint his own money following the *fuero juzgo*. Minting coins using a suboptimal alloy was an inflationary practice that was not uncommon during the Middle Ages. Some feudal princes would use instead of their own effigies, the king's which would constituted an act of forgery. The signature of the king in the form of his effigy was an assurance to people who could not easily «read» the contents of the coin to determine its true value. The transfer from the notion

of value in the alloy to value in the signature was only understood in the fourteenth and fifteenth century leading to the understanding of the «creation of money» and of the practice of «printed money.» I do not claim that Manuel committed forgery, my point here is that the conceptualization of the symbolic value of money and of the idea that value and hence money could be created solely by circulation was also developed during the fourteenth and fifteenth century.

To introduce his *Obras completas*,²¹⁹ don Juan Manuel wrote the «Prólogo general» in which he argued in defense of the rights of the «*obra bien hecha*» or «well-crafted work.» Francisco Rico²²⁰ has shown that part of the text of the prologue follows almost literatim the *Postilla litteralis* by Nicolás de Lira. Rico argues that Manuel's claim of textual authorship is not based on originality. Rather, according to Rico, Manuel's authorial claim lies on two scholastic notions, which are treated also in the *tabula picta*: first, Manuel brings to the narrative the value of nuance, which makes it a superior example for imitation, and thus he «attracts authorship» through the test of *preciositas* by the principle of *subtilitas*; second, Manuel also «attracts authorship» through *preciosities* by the test of *utilitas*, because his work is also an exemplar of the foible *magister* which not only teaches, but also entertains in order to reach the highest possible number of auditors. As Rico explains, Manuel is the author of the prologue, not because it is his original idea, but because he constructed it better than his predecessors, hence one of the «rights» of the well-crafted work is for it to be fixed in its optimal form, and marked for future reference with the name of the author of this stage, rather than with the marks of ownership of its reader.

The prologue is structured as a traditional *enxiemplo*. It is divided into three sections reflecting its narrative, didactic and practical content. The text begins with an exposition of the problem whose solution is going to be exemplified by the parabola or *enxiemplo* presented next, and in narrative form. A *moraleja* will follow, in which sometimes an antithesis would sometimes be included to address possible criticism or inapplicability, by specifying clearly to which cases and circumstances the parabola can be extended and to which they cannot. A clear summary of the teaching will then be included, often in verse form for easy recollection. Lastly, a *captatio*

benevolentiae in which the author calls for benevolence on the part of the reader, would serve as conclusion. In this section the author would reaffirm his humility and cast away pretensions of centrality in the form of arrogance.

María Rosa Lida²²¹ relates the *enxiemplo* in the prologue to the known story that Plinius refers to in his *Naturalis historia* (XXXV, 85) in which he relates that a shoemaker had approached the painter Apelles of Kos to point out a defect in the artist's rendition of a sandal, which Apelles duly corrected. Encouraged by this, the shoemaker then began to elaborate on other defects he considered present in the painting, at which point Apelles silenced him with the famous «*Ne sutor supra crepidam,*»²²² or «cobbler don't pretend to be a judge of paintings beyond the ones that represent shoes.» According to Guillermo Serés, the anecdote that Manuel situates under the reign of Jaime I de Aragón is similar in its plot to a well known story at the time of «The Troubadour of Perpignan.»

To the three references pointed out by Rico, Lida and Serés, I will include Martial's metaphor of plagiarism, which has escaped other critics likely because the modern use of the term is too narrow and cannot reflect Martial's more encompassing trope which evokes notions of forgery, slander, manstealing, and authorial claims to certain rights over the circulation and derivatives of a work.

In the narrative, a noble composer of a song or *cantina* hears a cobbler singing what he has composed in a dreadful ungracious manner. Without a word the nobleman enters the cobbler's shop and destroys all the shoes the cobbler had made. The cobbler of course reacts vigorously but agrees to go before the king to resolve the matter. Once in front of the king, the cobbler explains «*cómmo le tajara todos suss çapatos et le fizzier grant daño,*» how the nobleman ripped all his shoes and how much that represented a harm to him. The nobleman responded to the king that «*él fizzier tall cantina que era muy buena et aver buen son, et que aqua çapatero gel aver confondida et que gel mandasse dextr,*» that he had composed the well-known song named such-and-such, which the cobbler had completely butchered, and then asked him to sing it before the king. When the king hears the cobbler he agrees with the nobleman and therefore:

...El rey mandó al zapatero que nunca dixiesse aquella cantiga nin confundiesse la buena obra del cavallero, et pécho el rey el daño al zapatero et mandó al cavallero que non fiziesse más enojo al çapatero. (5)

[...And the king ordered the cobbler to never sing that song again, and to never cause harm to the oeuvre of the gentleman, and then he paid to the cobbler for the harm that was caused to him, and ordered the gentleman not to make the cobbler suffer any more.

Manuel's parabola differs from the story of Apelles and of the troubadour of Perpignan in several important aspects. The cobbler in Apelles's tale was not modifying the painting and claiming it was still Apelles's work, but was rather giving advice to the painter on how he should paint. There are no claims of misrepresentation or forgery, which are central in Martial, the troubadour and Manuel. The characters are also not the same. In Apelles and the troubadour stories the problem arises between two artisans, while in Juan Manuel's version the artist is a noble and the story resolved in a trial in front of the king. It is a useful and fair imagination of a trial pretending to establish the exemplar of the judicial author-work relation that is a legal fiction presented for consideration to the king. The nobility of the author is a very significant element in the narrative. From don Juan Manuel the story is taken and retold by Franco Sachetti in his *Trecentonovelle* (1399, CXIV) but this time Sachetti names the troubadour and identifies him with Dante, who is then treated by Sachetti as a «hero» in the classical sense, and in his traveling he manages to accomplish a series of good deeds and to redress a series of injustices. The nobility of the composer in the prologue reflects on Manuel himself, nobleman and author; on his intention to assert his lineage to another intellectual king Alfonso X, «The Wise» but also on the establishment of the heroic figure of the author, not because of his fighting, but because he can help codify justice and usefulness into law. Manuel's use of the legal fiction in constructing didactic exemplars, or parabolae people ought to follow, has a place in the history Foucault makes note of

when and how «we stopped telling stories about heroes and we started telling stories about authors.»²²³ As for the king who sanctioned the author's argument, he is presented as fair, and as such gives equal treatment to both parties, with no direct reference to the nobility of the composer affecting the ruling. He asks both parties to cease the causes of their grievances, but it is he, the king, who pays the cobbler for the lost shoes. It is important to note that he does not order the composer who destroyed them to pay for damages, but that the crown assumes it is fair to pay for them from the monies of the kingdom itself. In this distribution the property, the shoes are the property of the cobbler; authorship and literary property are the composer's; and, since the *cantina* is both a public and a well-crafted work, it is the responsibility of the state to safeguard it.

The Models of Martial and Manuel

The legal fiction Manuel set forward, arguing state's responsibility for protecting canonical texts was reproduced almost *literatim* by printers seeking tax exemptions in the fifteenth century. Manuel rationale argued that well-crafted works «bring honor to the state and help educate its subjects.» Between 1470 and 1480 recently authorized printers addressed a series of letters to the Chancellorship of Castilla arguing for the necessity of tax exemptions as incentives to «a nascent industry» that would result in «honor and utility for the kingdoms.» One of those letters, signed by two of the earliest printers known, Maestre Miguel de Chanty and Teodorico Alemán (1477), is mentioned in a 1480 law of the Cortes of Toledo, a law granting tax exemptions to workshops «printing well-crafted works (...) that will educate and form men of letters [letrados] who will [in turn] result in universal benefit and the ennobling of the kingdom.» The 1480 Toledo law, passed to the code [*Recopilación*] of Castile in 1567.

As did Martial, Manuel conceives poor or incorrect readings and interpretations offensive, and potentially harmful to the reputation of the author. However, while Martial's use of a *fictio legis* imagines the offense as enslavement of a manumitted slave or freeman, and therefore punishable by

the *Lex Fabia*, Manuel argues instead for the responsibility of the state to protect heritage, and for the rights of the well-crafted text to be fixed under the author's name in a double movement of canonization of the text and the author. Martial's freedom model and Manuel's centralized state-centric conceptualization prefigure the two alternative approaches in tension in Spain during the Renaissance, counterreformation and Enlightenment, which range from totally free circulation in the 1480 *Pragmática* of the Catholic King to no publication at all unless a text had passed a pre-print state-censorship process, carried out largely by the powerful Printing Tribunal [*Juzgado de Imprentas*] 1714-1830. Manuel's placement of the state as central agent for the construction of authorship and of literary canon prefigures both the mirroring problem of literature as constructor of national communities, and the issue of canon universality once it is claimed as heritage and safeguarded by a particular nation.

The «scripturization» of society

The popularization of the printing press put pressure on the crown to legislate the printed book as of the late fifteenth century. It has been commonly accepted that this pressure started a distinctive path towards copyright and author laws in eighteenth-century England and France, respectively. The difference between the two models has also been summarized as the inclusion in the latter of two «moral rights» recognizing the perennial rights of authors to attribution of authorship, and the integrity of their work, even after their death and after the term of the legal protection of their individual property rights has expired. The former right guarantees that an author's work will always be attributed to him or her, and the latter that the work will remain fixed, with no additions or emendations. Intellectual property scholars have not, to my knowledge, pursued the implications these different approaches have for the public domain, once the legal protection of individual property expires. While Anglo-American copyright law does not include any provision concerning it, French author laws define a sphere of common property that implicitly falls under the

protection of the state as the only legal representative of all the people is the state. As such, the French tradition falls between the Anglo-American and the Spanish.

The Spanish tradition has its roots in the seventh-century integration of two legal traditions, one communal and the other individualistic, through the *Fuero Juzgo* (654). These two traditions combine, on the one hand, Germanic canon law and the communal Roman laws of Justinian (485-565), with, on the other hand, the more individualistic Roman laws of Diocletian (283-476) during the late Roman Empire. In the Justinian code the term used to describe the public good is *utilitas ominus*, while the Roman civil code before him used the term *utilitas publica*. The difference is significant as the first stresses what all individuals constituting the Republic have in common, while the second designates the combined interest of fundamentally different individuals.²²⁴ Both traditions get finally integrated into general common law through Recesvinto's code, the *Fuero Juzgo*,²²⁵ circa 654, which frames the particular *libri*, which means both *book* and *law*, of the different feudal kingdoms of the peninsula. The book in this fundamentally oral culture is a symbolic object representing the origin of power. However, while a family book establishes lineage, and justifies the claims to power of a particular clan, the fifth century transformation brought by Germanic canon law transformed the notion of law from individual authority into an objective order associated with a larger, albeit divine, organizing principle.²²⁶ The double symbolism source of power/customary law can be exemplified by the burning of the *liber* in Castile, in the tenth century, as to signify their independence from León.²²⁷

A series of fundamental changes occur in the twelfth to fourteenth century, that will further establish the communal component of the Spanish tradition. First, with Thomas Aquinas the notion of universal natural rights as evidence of the existence of a higher divine law begins to take shape. As such, the law is seen increasingly seen as a means to achieve *bono* [good] in the twelfth century, and *bono publico* [public good] in the thirteenth century, concepts that will replace the medieval idea of *aequitas* [fairness]. This shift is crucial, because it will help establish that the authority of the monarch is not a personal attribution, but rather a function which originates

in the pursuit of the public good, and in the natural rights of the kingdom subjects. For example, the scholastic scholar Baldo argues, against Bartolo, in favor of the conceptual superiority of the notion of *bono publico* over *aequitas*, going to the extreme of justifying the «*transgressio statuti*,» [transgression of the law or reason of state] when it is used in the public's interest.²²⁸ Those fundamental changes that, in a sense, empowered the people, would have been useless if those people had no access to the written documents where their rights and obligations were established and discussed. This fact contributed to a relentless march away from orality and towards the progressive transformation of society into a written culture. Roger Chartier has termed this process «*la scripturisation de la société*,»²²⁹ and argued that it constituted a fundamental revolution far more relevant than the invention of the printing press in the fifteenth century, which only accelerated the process. Chartier bases his argument on two facts: first, that the modern book, which includes the works of a single author bound in one single volume, occurred in the twelfth to fourteenth century, and, second, that in the sixteenth and seventeenth centuries the printed book was subordinated to the manuscript book.²³⁰ The existence of two parallel book practices, one manuscript, and another one printed, has also been documented for Spain in the sixteenth to eighteenth centuries by Maxime Chevalier.²³¹ My research pertaining the development of book and intellectual property laws, also supports that idea.

As mentioned earlier, Juan Manuel's compilation, and placement of one copy his works in the Cathedral of Peñafiel for reference, is indicative of a changing practice, and experience of the book characteristic of the twelfth to fourteenth century. This practice is reflected in the work of the scholastic commentators who sought to establish and fix the works of the classic authors, and of the masters of the church during those times, as Foucault has observed.²³² I argue that this practice was not disconnected from the *scripturisation de la société*, and from the change in the conceptualization of the law from *aequitas* to *bono publico*, that made necessary for a larger part of society to read, write, and have access to books. This fact is evidenced, for example, by the appearance of the figure of the stationer in thirteenth century Spain. The first documented evidence of a stationer in Spain, that I

am aware of, is in 1254, and refers to the one stationer associated with the University of Salamanca.²³³ Chosen amongst the city's booksellers, the stationer function was defined by the *Partidas* in 1265, and under the umbrella of the common good, as an agent guaranteeing access, and administering the practice of book copying.

Estacionarios ha menester que aya, en todo estudio general, para ser cumplido, e que tengan sus estaciones buenos libros, e legibles, e verdaderos de testo, e de glosa que los logue a los escolares para fazer por ellos libros de nuevo, o para enmendar los que tosieren escritos (2.31.11)²³⁴

[It is necessary to have stationers for all areas of general study, and that their stations have good books, readable, and with a true text, and gloss, to be rented to students so that they can make a new copy of them, or correct the one they may have written.]

The increasing demand of books for copying before the printing press, and their associated circulation made it necessary to start registering their property,²³⁵ and placing an original copy for reference either in a monastery or university to be administered and commercialized by a stationer. The practice is twofold. On the one side, the law acknowledges its public utility as an educational tool, and builder of common values. On the other, the motivation is individual commercial interest because both the stationer, and the material owner of the book will receive dividends from the renting of the original copy. While the latter is easily understood as a predecessor of the modern conception of intellectual property rights, the former has to be placed within the context of the increased mobility of people, and transit of commodities which led to the establishment of common weights and measures to ensure the applicability of a common law, and provide certainties for a fair trade. Together with the iron «meter,» and other physical references, legal, sacred and other important texts were placed for reference where people could access them. This fact also serves to support the claim of the greater importance of the progressive transformation of society into a

written culture, over the invention of the printing press. For example, in the 1265 Ordinance of Alcalá (Ll. Tit. 28), Alfonso XI establishes that two copies of the *Partidas* be made and placed for reference in the Chamber, for general reference.

Porque sean ciertas, è non aya raçon de tirar, e enmendar, e mudar en ellas cada uno lo que quisiere, mandamos façer dellas dos Libros, uno sellado con nuestro seello de oro, é otro sellado con nuestro seello de plomo, para tener en nuestra Cámara, porque en lo que dubda oviere, que lo concierten con ellos:

[For them to be true, and to prevent that anyone discards, corrects, or changes in them what he sees fit, we have two books made out of them, one sealed with our golden seal, and the other with our lead seal, to be put in our Chamber, so that if there were any doubts, they could be referred to them.]²³⁶

Alfonso XI ordinance of 1265, sees having those copies made, and placed for safeguard and access in a public place, as a mean to fix the text, and stop changes or free interpretations of it. The exact same argument is voiced by don Juan Manuel. The paragraph in which he explains his reasoning is the following:

...que por razón que non podrá excusar que los libros que yo he fecho non se hayan de trasladar muchas veces, et porque yo he visto que en los traslados acaece muchas veces lo uno por desentendimiento del escribano, o porque las letras semejan unas a otras, que en trasladando el libro ponen una razón por otra en guisa que muda toda la entención e toda la suma, et sea traído el que la izo, non habiendo y culpa et por guardar esto cuando yo pudiere, ice hacer este volumen en que están escritos todos los libros que yo fasta aquí he fechos...²³⁷

[...Because this will not prevent copying/translating the text many times, and because I have seen that when this is done, whether it be because of a mistake of the copier, or because one letter resembles another, in the copy made one thing is written for another, changing all the intention and all the content, the person who made the text is blamed, when he is not guilty; and because I want to prevent this from happening, I have had this volume made in which are compiled all the books I have made until now...]

Both Alfonso's *Partidas* and Juan Manuel's works are manuscripts, not printed copies. An important subtlety, while the manuscript fixes the text, the printing press fixes the copies that circulate of the text. While the printing press is a qualitative empowerment of authors and printers, this empowerment comes at the expense of the authority of the church, but not only because of the control of the text, as it is commonly assumed, but on the administration of its copies. No longer is it necessary to place an original for reference in a monastery or church, the serially reproduced book is affordable, increasing the likelihood that a reader will have a copy that has not undergone successive iterations. The centrality of the church that cumulates, and protects, is replaced by the centrality of the industry from which all copies emanate. The industry's centrality is not guaranteed by dogma and tradition, but rather by money, because while a single copy is less and less expensive, printing a book is significantly expensive. Modifications to a printed work are as costly as having a new complete edition made.

As mentioned earlier, the laws promoting books, were accompanied by others limiting the distribution or use of certain ones. For instance, Juan II of Portugal's *pragmática* of February 8th, 1427, established measures both to promote access to law books for their study in universities, «que los libros de los derechos que los sabios antiguos fizieron, que se lean en los estudios generales de nuestro señorío,» [that the legal books by the ancient masters be read in the general studies across the kingdom]; and, at the same time, limited the use in legal allegations in court to books «que han sido hasta aquí después de Juan Andrés e Bartulo» [made after Juan Andrés and

Bartulo].²³⁸ While Juan II prohibition did not take effect, García y García has argued that these types of laws had a significant impact which he documents in the increase of legal books registered in the Portuguese and Castilian cathedrals²³⁹ in the second half of the fifteenth century.

The printing press appeared in Spain in the late fifteenth century, Toledo's printing press was established in 1472, and was granted printing privileges as early as 1473. As the practice became more popular, it put increasing pressure on the state regulate it.²⁴⁰ The first known Spanish printing law is the 1480 royal edict of Fernando and Isabel establishing the freedom of the press, and the exemption from tariffs for all books imported into the kingdoms (Law I, title 15, book 8, of the Novísima Recopilación)²⁴¹ Spanish historians of the history and proto-history of intellectual property rights in the peninsula take this edict as the beginning of their story,²⁴² when it is fact an extension of a tradition of legal promotion of the book that had existed at least since the *Partidas*. The true change that this law establishes, is the Spanish codification of the public domain, forced by the increasing popularization of the printing-press.²⁴³ This notion needs perhaps to be unpacked a little more. As Chartier and Chevalier have documented, a parallel practice of manuscript and printed editions coexisted from the fifteenth to the eighteen century, and as Chartier notes the boom of the book predates the invention of the printing press by two centuries. As my example of the stationer notes, this twelfth-century boom is accompanied by a series of laws concerning the promotion of the book on the grounds of the *bono publico*. With the popularization of the printing press what we see is the continuation of a legal tradition stemming from the twelfth and thirteenth centuries codifying the manuscript, and a new series of legislations aimed at codifying the printed book. However, during the sixteenth to eighteenth century both traditions coexist conceptualizing the manuscript and printed book in very different manners. While the manuscript is juridically still a movable item, property of its material owner, the book enters the public domain the moment it is printed, which means that in Spain all laws concerning the printing press are codifying first and foremost the public domain, and not individual property rights.

The Spanish *sui generis* codification of the printed book, and hence the public domain, occurred in five stages in 1480, 1502, 1558, 1610, and 1714. How this affected the practice of literature can be exemplified by three contracts for the edition of works by Boscán (1533-1543); the publication and circulation of Mateo Aleman's *Guzmán de Alfarache*²⁴⁴ (1599); the negative opinions about the printing press that Lope de Vega puts in the voice of Leonelo in *Fuente Ovejuna*²⁴⁵ (1619); the way Cervantes' addresses the edition of an apocryphal don Quijote²⁴⁶ through the «true» don Quijote himself (1615); and the controversy over the unauthorized publication, in 1691, of the *Carta Atenagórica* by Sor Juana that marks the end of the Spanish Golden Age in the New Spain, and the beginning of the Enlightened counterreformation of Carlos III.

Chapter III: Modernity: From Public Domain to Copyrights

The previous chapter presented two complementary views of the author-work-relation through works of the Roman epigrammatist Martial (c1) and the Medieval writer don Juan Manuel (c14). Martial used the double understanding of the Latin word *liber*, which refers both to freedom and a type of book, to suggest that published works were akin to freeman, and should not be enslaved or plagiarized. He then argued, successfully, that his books ought to be legally equated to children, and that he, as their father, should receive the prestigious distinctions awarded in Rome to the «father of three.»

Building on Martial's ideas, in fourteenth-century Castile, don Juan Manuel argued that it was the state's responsibility to protect «well-crafted works,» and presented a thought-provoking notion of authorship attribution, not to the *first* original writer, but to the one who had made the *best* work. Manuel's idea that a legitimate right to property may originate in the work invested in it, prefigures the very similar notion attributed to John Locke in the seventeenth-century. However, while Locke cites the work of a farmer to improve bare land that he renders productive as an argument for individual property rights, Manuel is concerned with the attribution of a work which still remains in the public domain to a noble. Locke's claim is patrimonial, while Manuel's is deontological. The difference reflects two opposing conceptions of the use, attribution and appropriation of the «common-pool resources» or public domain.

Finally, after Manuel compiled his writings, and wrote the «Prólogo General,» he had two copies made, and placed one in the monastery of

Peñafiel for reference, which is indicative of a changing practice and experience of the book in the twelfth to fourteenth centuries that Roger Chartier termed the «scripturization of society.»

The popularization of the printing press in the Renaissance, Enlightenment and Romanticism continued and deepened this process. While the printed book did not replace the manuscript, and both practices complemented each other for over two centuries, the printing press did force the Spanish Empire to regulate the public domain in the sixteenth and seventeenth centuries. With the death of Carlos II in 1700, the Spanish Empire entered a period of slow decline that lasted two centuries. The British and French colonial empires on the rise sought to appropriate positions the ailing Spanish one could no longer maintain. It is in this context that copyrights and author laws were crystalized in England and France respectively. In Spain, a *sui-generis* supreme Printing Tribuna,l in place from 1714 to 1830, sought to protect and continue the Spanish tradition that had been itself crystalized between 1480 and 1610.

This chapter will tell this story. It is divided in two subsections covering each roughly two centuries: the Spanish Golden Age 1492-1691, and the Ailing Empire 1700-1898.²⁴⁷ The period covered in this section ends with the rise, in the nineteenth and twentieth century, of yet another Empire: the United States.

The Spanish Golden Age 1492-1691

The title of this chapter is modernity. The modern era spans from the fall of Constantinople in 1453 to contemporary times. The siege and victory over the stronghold door to the Dardanelles symbolizes the moment in which Christian Europe asserted her definitive victory over the Muslim Ottoman empire. It is also when Spain began to emerge, victorious from this battle and other military struggles, as the first modern European empire. Spanish Golden Age is usually periodized as spanning from the 1492 publication of Antonio de Nebrija's *Gramática Castellana* to the death of Pedro Calderón de la Barca in 1681. In the New Spain, one may argue that it ended a few years later, with the 1690-1691 controversy over Sor Juana's *Carta Atenagórica*, whose publication she did not authorize, but that had a significant impact in her decision to practically stop writing, until her death in 1695.

1492 is a year charged with symbolism. On March 31st, Fernando I de Aragón and Isabel I de Castilla signed the Alhambra Decree also known as Edict of Granada which established the religious unity of the nation, and forced all Jews and Muslims in the peninsula to convert to the Catholic faith or leave. On October 12th, Christopher Columbus arrived to Guanahani (today's Bahamas), connecting Europe to America for the first time. On August 12th, two weeks after the departure of Columbus from the port of Palos, the printing of the first Romance-language grammar was finalized in Salamanca. Antonio de Lebrija's *Gramática Castellana* and the dictionary he published three years later, would prove instrumental in forging the linguistic commonality of the modern Spanish nation. Finally, on August 11th, 1492, one day before Lebrija's *Grammar* was put into circulation, Valencia-born Rodrigo Borgia became the first Spanish pope under the name of Alexandro VI. A few months later, in 1493, the newly elected

papacy published a series of bulls sanctioning the right of Castile and Portugal to conquer the New World, and setting geographic boundaries for the newfound lands dividing them between Portugal and Spain at the meridian one hundred miles west of the Azores and Cabo Verde. In these bulls, the pope recognized for the first time Fernando and Isabel as kings of a territorial unity, and gave them the official title of «Catholic Kings of the Spains.» As such, 1492 marks the beginning of the modern transatlantic Spanish empire constructed through a double helix, on the one hand, innovation and discoveries; and, on the other, cultural tradition, religion and linguistic commonality. The tension between the new and the established is not exclusive to the Hispanic tradition. However, the prominent position of the Spanish Empire for over two centuries, and its slow decline for over two more, made Spanish Renaissance, Enlightenment and Romanticism different from the other modern European empires, which, during the same period of time, saw their colonial power rise in similar but inverse proportion.

Alexandro VI and the «Lineage book»

Alexandro VI's 1493 bulls were an answer to the request for arbitration presented to the papacy by «the two powerful and modern nations that [had,] at the time, the proven capabilities of conquering new territories.» The pope acknowledged the military and technological development of the two nations, and mentioned «the cartographic knowledge, constantly enriched, and passed from one generation of [Spanish and Portuguese] sailors to the next.» Alexandro's observation is not inconsequential, as he was acknowledging a secular form of «non-aristocratic lineage» rooted on the controlled transmission of knowledge and information through family books.

I mentioned in the previous chapter, that the book was defined in the *Partidas* as a movable item (3.29.4) that could be traded similar to any other commodity except when it had been consecrated as *rei sacrae* (*Partidas*, 1.14.1). In that case the book could not be sold or bought under the penalties considered for the sin of simony. In the early modern, books were

still rare valuable luxury goods, carefully accounted for in wills and heritage procedures. In 1519, for example, Gonzalo García de Santamaría devotes most of his long will to explain how he wants his books handled after his death. He writes «...no se maraville alguno que tanta diligence ponga en mis libros, porque según mi affection, más valen que todo el resto de mi mueble.»²⁴⁸ [...no one should be surprised if I devote such care to my books, because, according to my estimates, they are worth more than the rest of my movable state.] Valuable items indeed, books served as collateral to guarantee debt payment, and it was common — amongst struggling Spanish *bachilleres* to bring their books to a pawnshop.²⁴⁹ Similar to land or real-estate, a book owner was seen as entitled to compensation when his books were used by someone else. Gil Fernández references and compares the income for book rental of the Cathedral of Toledo, in the fourteenth-century, to the one of the Cathedral of Palencia in the early fifteenth century.²⁵⁰ The acceptance of the book-rental practice leads him to suggest that book ownership had been assimilated to land ownership. Further proof of this association comes from the fact that in those times the transmission of books from one generation to the next started receiving similar juridical consideration to that of the transmission of land associated with nobility. The practice amongst the aristocracy of keeping family books to document the family's lineage (i.e. Manuel's *Book of Estates*) extends to other sectors of society, especially traders. While at first these books are considered «chronicles of domestic matters, or commercial book-keeping,»²⁵¹ they soon became recognized as a core asset for a family of traders.²⁵² It was to these type of intellectual know-how that Alexandro VI refers to in his bull. These family and trade books, which I call «lineage-books,» are the more valuable the less they circulate. Their value comes from the secrets they contain, but also from their uniqueness. Lineage-books are a powerful tool for the transfer of production factors from one generation to the next. In this line of thought, Christiane Klapish-Zuber has observed that daughters in the Middle Ages are often only a medium of transmission of lineage-related possessions to their husbands,²⁵³ and Pérez Prendes that in fourteenth-century Castile and León women were not allowed to inherit significant real-state or «books containing trade secrets.»²⁵⁴ However, these books were not only the

guarantors of the secret know-how of a family, they also constituted a comparative advantage for Spain and Portugal over other European nations, as the bull of Alexandro VI illustrates. Hence, it was on Spain and Portugal's strategic interest to keep them out of the reach of other nations, and, it was, conversely, in their potential competitor's best interest to break this practice and disseminate the secrets.

The concern of being dispossessed of something valuable was not exclusive to knowledge and information. The Spanish state was worried that money and other types of valuable resources may be taken away from the kingdom and make it poorer. The Spanish legislators sought to address this problem with a series of laws forbidding that those resources leave the country, the *leyes de sacas*. Jaime Vicens Vives has argued²⁵⁵ that the Spanish notion of wealth at the time was cumulation as opposed to capitalization. Circulation of money was not understood as a source of wealth creation. The principle known today as «money multiplier» or «creation of money» through circulation and lending at interest, was applied intuitively by Fugger and other money-lenders in the sixteenth and seventeenth centuries. These proto-bankers observed that at any given time they could lend more than once the money deposited with them for safeguard, and that at the end of the day this «magical multiplication of the monies» was a form of reifying and appropriating part of the wealth the overall economy was generating. Werner Sombart argued that some principles of modern capitalism such as these, were rejected by the Spanish catholic elites, but partially understood by a class of administrators who were mostly Jewish. As mentioned earlier, for example, charging interest on loans was seen by the Catholic Church as usury, and forbidden. Sombart believes that the Edict of Granada expelling Jews and Muslims in 1492, was a contributing factor both to the inability of Spain to capture and keep the wealth the empire was generating, and also of the shifting of the center of economic life from Southern to Northern Europe in the sixteenth century.²⁵⁶ As we will see again further, these different economic notions mirror a tension between coexisting and competing conceptualizations of the book and of knowledge: on the one hand a tradition that sees the book as a physical object and values the communal cumulation of knowledge, and,

on the other hand, the possessive individualism of intellectual property, and the replacement of the role of the Church by the economy as producers of symbolic capital. This opposition subsumes the contrast between Anglo-Saxon copyrights and Franco-German author laws, placing the latter as a mid-point between Anglo-Saxon individualistic capitalism and Spanish communal traditionalism.

The books I have called lineage-books are mentioned in a number of wills since the middle ages, recognized as a juridical tool for the transmission of social position and of its associated wealth. However, it is not until the fifteenth century that I found evidence such as Alexandro VI's bulls, that knowledge and the know how contained in those books began to be perceived as intrinsic to the transmission of the means of production and power of the nation as a whole. However, that intellectual knowledge was valued «in existence» and not «in use/circulation.» As such, Spain perceived that it was strategic to keep it within national borders through the *leyes de sacas*. These laws are a crucial counterpart of the ones seeking to limit the import of heretic, libelous or false information, with which they constitute a whole policy of Felipe II, that Dámaso de Lario has termed *impermeabilización del reyno*²⁵⁷ [the impermeability of the kingdom]. Hence, the Spanish policy of *control de aduanas* [custom control] cannot be understood from a capitalist perspective, because the only category in this framework through which one can think it is control of imports, which is different. The policy of custom control was complemented by a series of *leyes de fomento* [laws for promotion], which sought to incentivate the production, circulation, and availability of books within the kingdom. While across borders circulation viewed with suspicion, within national borders, the wide distribution of useful knowledge and information was considered strategic: The law, for example, had to be known and readily available to guaranty a common justice. Books used for learning how to read, write, count and pray were considered a «first necessity.» Practical information on how to prevent epidemics, or face health threats were exempt from the need of a privilege. Books used in universities to learn all subjects had to be readily available for students to copy, or contrast with their own copies. Finally, certain literary works, perceived as useful to the education of morals,

and to the construction of national subjects managed to overcome the platonic prejudice, and were also considered worthy of being widely distributed.

The dilemma of imperial control over strategic traditional know-how, and wide circulation of certain works that would strengthen the nation, is not to be confused with the tension between the different ideas of Martial and Manuel on the author-book-state relation, which are literary-specific, and do not bear any relation to the problem of divulging trade or military secrets contained in family books. A common misinterpretation of the two emerges from the erroneous assumption that the printed book replaced the manuscript, while in fact both practices coexisted and complemented each other from the fifteenth to the eighteenth century.

Boscán's Contracts

A common perception in copyright history is that privileges were only granted to authors when they invested in the edition of their books. Konrad Haebler, for example, unambiguously maintains that «cuando se dio un privilegio a un autor para la impresión de sus libros, se concedió, no para proteger su producción intelectual, sino el gasto material hecho para imprimir su obra.» [when a privilege was granted to an author, it was issued not to protect his or her intellectual property, but rather the material cost of the printing of the work.]²⁵⁸ While the notion that individual intellectual property rights were not considered in the process of granting a printing privilege, what this perception may seem to imply is that privileges were granted to an author when he or she was investing on the material costs of the edition, and that no recognition to the author-text relation was implied in those privileges. The examination of three concordats or contracts related to the printing of works by Boscán in 1533, and 1543²⁵⁹ cast some doubts to the universality of that claim.

The first contract (1533) is to print *Il Cortegiano* (1534) by Baltazar di Castiglione that Boscán had translated and prologued. The work was

published in Barcelona by Pedro Monpezat in 1534, under a privilege by the Cesar, signed in Monzón, on December 20, 1533. Like the other two contracts, the signed copy is in the *Archivo de Protocolos* of Barcelona, and a facsimile was printed in 1945 by Martín de Riquer. The first contract was subscribed, on the one side, by Juan Almugáver and Juan Boscán, and on the other, by Juan Bages and Francisco Labia. Juan Almugáver was Boscán cousin, and Jerónima de Palou, to whom Boscán dedicates the edition, is his wife.

The second concordat subscribed on March 23, 1542 by, on the one side Joan Amugáver olio de Bosha (Boscán) and his wife Ana Girón de Rebolledo y de Boschá, and, on the other, by Juan and Francina Bages. The contract considers the printing of Boscán *Cancionero* (1543) and leaves the equivalent to five or six lines to be later filled-out presumably by a description of the works by Garcilaso which accompany the 1543 edition. A privilege granted in Madrid on February 18, 1543 by Carlos I, is kept at the *Archivo de Protocolos*, and Martín de Riquer mentions that Carreral Vals published a facsimile of it in *El libber a Catalunya* (138). The third contract also referred Boscán's works, and was signed four days later, between the bookseller Juan Bages, and the printers Carlos and Juan Amorós, father and son. Boscán died six months later, and did not see his works printed.

The terms of the two contracts Boscán subscribed are similar. Boscán would bring to the deal the original manuscript, all reviews necessary, and obtain the royal privilege to print the work. All expenses would be covered by the bookseller. Boscán would sign all copies (six hundred for the *// Courtesano*, and one thousand for his *Cancionero*), after which the bookseller would take responsibility for the distribution, and selling of the works. In the first case, half of the proceeds from sales would go to each party, and in the second, after discounting printing costs, half of the sale would also go to each party. In the second contract mention is made to foreign distribution of the book that Juan Bages would also coordinate through other librarians. Finally, both parties agreed that all reruns would be made by the same bookseller, for as long as the privilege lasted. In the contract Bages subscribes with Amorós, explicit mention is made that all

paper would be supplied by the former, and of how many ducats every quart printed, and book finished Bages will pay Amorós.

While «in spirit» the claim that the privilege might have protected a material investment might be true, because there is no reference to any sort of intellectual property, the person to whom it was granted was the author, who did not assume any financial responsibility over printing. While the edition represented a potential economic benefit to him, it did not entail any direct material investment. Furthermore, the privilege strengthened Boscán's negotiating leverage to the extent that it seemed fair to put, on the one side, the work, the edition and the privilege, and, on the other, all financial, and administrative costs of the «business.» The signature of Boscán on every copy, was not aimed at increasing the value, or to guarantee their authorship, as the fact that his wife's mark replaced his signature. It was rather a form of author's control seeking to guarantee that all copies printed and sold, were accounted for.

Certain elements in these contracts are exemplary of the printing practice before royal regulation. While both works have royal privileges, those documents are not included in the printed editions of either work. They are kept under notary custody, and are not considered a paratext that needs to accompany the printed work yet. In the printed edition there is no mention of the cap price at which they were to be sold, a customary practice in Castile since the *Fuero Juzgo*, but not in Catalonia. A series of questions arise also: What justified Boscán's initiative to have those works printed? Why would an author be more likely to obtain the privilege from the king, than a bookseller? On which grounds did the king grant those privileges?

The first question might appear evident to a person living in the twenty-first century, and taking for granted the romantic valorization of self-expressive authorship, but his was not the case in fifteenth-century Europe. In the first contract, Boscán feels compelled to justify that he is printing a book that he translated and prologued. In the second, he argues that he wants to print it because there are many manuscript copies in circulation with many mistakes in them –so far the same reason for having a *principe* made like Alfonso IX, Alfonso XI, or Juan Manuel– but also, because he has been «compelled by a number of principal gentlemen to print his

Cancionero.» It is important for Boscán to establish that he is not initiating the printing out of pride, or pure self-interest, but rather as a service to the people: first as a translator of someone else's work, and then to satisfy the demands of a number of gentlemen who have asked him to do it. Again, these documents are legal «private» documents—to the extent that «privacy» is also a novelty at the time—which are not meant to be published. The reason for Boscán's claims is different. It reflects the central importance of the public domain, and the chivalric conception of authorship as a knight of the crown, servicing the community. It is precisely on the grounds of serving the «common good» that the kings would ground Boscán's privilege. Lastly, why would it be easier for an author to obtain a privilege than for a printer? Because the author, like the king, is part of the aristocracy, an additional peculiarity of the Spanish tradition.

Regulating the Printing Press 1480, 1502, 1558,

1610

As mentioned earlier, the first known Spanish printing law is the 1480 royal edict of Fernando and Isabel establishing the freedom of the press, and the exemption from tariffs of all books imported into the kingdoms (Law I, title 15, book 8, of the *Novísima Recopilación*)²⁶⁰ This law extends the common practice of promotion of the manuscript book, and the scripturization of society started in the twelfth-century. The price at which a book is to be sold is included in the text of the book already in the *Fuero Juzgo*, and Fermín de los Reyes has argued²⁶¹ that the *tasa* exists in Spain as a generalized practice at least since 1503. He also has notes that it is characteristic of Castile, although some sporadic examples of its use have been documented in Portugal, Valencia, Italy, and Catalonia. While in 1534, England adopted a series of protectionist measures excluding foreigners from participating in the book trade, Spain was a net importer of books, spending according to sources quoted by Clive Griffen²⁶², over two hundred

thousand ducats every year in book imports. The edict of 1480 emphasized the educational and community building aspect of the book trade, but left hanging the quality control over form and content of those books. These aspects were considered soon thereafter.

The royal edict of the Catholic Kings of June 8, 1502 (Nov. R. 8.16.1) defines the practice of printing as part of the public domain, and the king's faculty to regulate it as a *regalia demanial*. The term is key, because it means that the king's faculty or *regalia*, is not a prerogative of his persona, but rather comes as a responsibility vis-à-vis the public domain whose adjectival form in Spanish is *demanial* [related to or issued from the public domain.] The royal edict suggests that the books «be well-made, with good paper that would not curl» and introduces the notion of *licencia* [license], a Spanish-specific form of pre-printing censorship, as opposed to the post-printing control of Anglo-American copyrights, and French *droits d'auteur*. The 1502 royal edict is directed to printers, and booksellers, and requires from them to refrain from printing without previously obtaining a license from a civil minister (chancellor) or religious authority (bishop). The penalty for non-compliance is, however, small: loss of the books and a fine equivalent to the value of those books.

Felipe II royal edict of September 7, 1558 confirms and extends its 1502 predecessor and further defines the public domain in relation to the printed book, the authorities in charge of protecting it, and on which the king's *regalia demanial* would be delegated. It makes the inclusion of the license and the *tasa* compulsory. A Castilian-specific price cap to books, the *tasa* is a practice made in direct recognition of the monopolist incentive to limit circulation, and to increase prices to maximize benefits, in contraposition to the interest of the people of wide distribution, and low prices. The 1558 edict is not addressed only to printers and booksellers, but also to authors, in compliance with the directives of Trento bulls of 1546, and increases the penalties to loss of all possessions, banishment, or death.

As an example of these paratexts, Juan Gallo de Andrada fixed the *tasa* of the first volume of Don Quijote at two hundred ninety *maravedies* and fifty cents. The license and privilege, signed by Juan de Amezqueta in the name of the king, in Valladolid, on September 26, 1604, were granted considering

(1) that «os había costado mucho trabajo» [Cervantes had put in it a significant amount of work]; (2) «era muy útil y provechoso» [that it was very useful and beneficial]; and (3) «por os hacer bien y merced» [because the king wanted to do good to Cervantes and grant him his request]. The idea that the preprinting review of the text would guarantee its veracity was ironized in Chapter L, of the same book by the «crazy» Quijote:

¡Bueno está eso! —respondió don Quijote—. Los libros que están impresos con licencia de los reyes y con aprobación de aquellos a quien se remitieron, y que con gusto general son leídos y celebrados de los grandes y de los chicos, de los pobres y de los ricos, de los letrados e ignorantes, de los plebeyos y caballeros, finalmente, de todo género de personas, de cualquier estado y condición que sean, ¿habían de ser mentira?

[[Well now, said don Quijote, the books that are printed with the license of the kings, printed with their approval, liked by readers, and praised by old and young, poor and rich, literati and illiterate, gentile and noblemen, in sum, by all sorts of people, regardless of their condition, would they be lies?]

The passage's location in the book is important. Continuing the previous chapter, Don Quijote is arguing, non-coincidentally, with an unconvinced priest. But while chapter IL is centered on the veracity of the deeds of «los caballeros andantes» [the wandering knights], in chapter L, don Quijote shifts his argumentation to the system regulating book-printing. This move places the skeptical priest in disbelief, not of the fantastic exploits of knighthood as before, but rather, I argue, in the position of disbelief towards secular forms of censorship. The nuance is relevant, because contrary to what it is normally assumed, it reflects the fact that the 1502, and 1558 Spanish system of privilege, license and *tasa* weakened the control the Church had had over the printed book since the royal edict of 1480, as it limited religious preprint censorship to theological works.

Fifteen years later, in 1619, Lope de Vega publishes *Fuente Ovejuna*. The story is well known. The people of Fuente Ovejuna rise and kill the abusive local authority. When asked to name who did it, the townspeople shout «Fuente Ovejuna señor.» Leonelo, a *licenciado* [bachelor] recently returned from the University of Salamanca, appears briefly at the beginning of the second act, having a conversation with Barrildo. Their dramatic function is simple. As Americo Castro notes in his prologue,²⁶³ «Fuente Ovejuna... tiene como héroe a toda una villa» [the hero of the play is the whole town]. Barrildo and Leonelo represent the voice of the *letrados* [literati] in the town. What Lope has them say is indicative of the mixed feelings the learned class had regarding the printing press at the time. While they acknowledge its importance, they also note the increased number of books of questionable value, and that the number of self-proclaimed authoritative views has multiplied. «Después que vemos tanto libro impreso, no hay nadie que de sabio no presuma.» [With the number of printed books today, everyone can claim to be sage.] But the books are shallow, and confuse the reader: «...y aquel que de leer tiene más uso, de ver letreros sólo está confuse.[...and the one who has the habit of reading, is confused of seeing only signs posted.] Leonelo, who has just graduated from the University of Salamanca, lets the spectator think that he has witnessed there a number of excesses «¿...Salamanca? Es larga historia.» [...Salamanca? It's a long story.] He then develops:

No niego yo que de imprimir el arte mil ingenios sacó de entre la jerga, y que parece que en sagrada parte sus obras guarda y contra el tiempo alberga; éste las distribuye y las reparte. (...) Mas muchos que opinión tuvieron grave, por imprimir sus obras la perdieron; tras esto, con el nombre del que sabe, muchos sus ignorancias imprimieron. Otros, en quien la baja envidia cabe, sus locos desatinos escribieron, y con nombre de aquel que aborrecían, impresos por el mundo los envían.

[I do not deny that the art of printing has made a thousand intellects known, and that their works are now kept and preserved in sacred

places, protected against the passage of time. The art of printing distributes and shares them. (...) However, there are authors once serious who lost their gravity when they had their works printed. With the authority they had built for themselves, they printed their ignorance. Others, envious of someone else's talent, have written crazy nonsense, and have it printed and sent to the world under the false name of the one they hated.]

Read usually from the perspective of contemporary democratic thought, its historic importance has been downplayed because of its «premodern» ending. In it, the Catholic Kings reestablish what is read as the status quo. They grant pardon to the people, and name a new *Comendador*. The people are happy and applaud, making the play «a comedy.» In the key of the *regalia demanial* explained here, one could argue, differently, that nobody was punished for taking the law in their own hands, and that having been recognized the people's natural rights as the source of power of the monarchy, those same people are now demanding accountability. Furthermore, while the narrative emplotment of a classic and liberal republicanism might be tragedy, a common form of figuring history in the Spanish empire and constitutional monarchy has been comedy.²⁶⁴ Of course I acknowledge that in *Fuente Ovejuna* there is no mention of popular vote, balance of powers, or accountable governance, but, as we will now see, the construction of modern institutions of governance was precisely the core challenge that Felipe II sought to resolve.

As of 1502, and especially as of 1558, while the manuscript book is still considered private individual property, the printed book is defined legally as part of the public domain. In 1675, for example, de legal scholar Melchor Cabrera Nuñez de Guzmán explains the two legal conceptions of the book in the following terms:

Mediante la publicación los libros que hasta reducirlos à la prensa son de los Autores; después de impresos dejan de serlo, se hazen propios del Pueblo, y de los Doctos y Sabios que los tratan.²⁶⁵

[Through publication, the books, which are the property of the Authors before being reduced (sic) to the press; after being printed, they no longer belong to them, and become instead the property of the People, and of the Knowledgeable and Wise men who treat them.]

This double legal consideration of the book will prevail until the eighteenth century, and produce two parallel narratives. The printed book will be tightly regulated, and its production, circulation, and experience always limited by civil law. The manuscript book will live in a more lenient legal environment, with significantly lower barriers to its production, and with no civil censorship.

The last element of this first series of legal definitions of the public domain comes with the royal edict of 1610, (Nov. Rec. 8.16.7) which prohibits printing outside the kingdom without a license, under penalty of «perdimiento de naturaleza, honras, y dignidades que se tuvieran en estos Reynos, y la mitad de sus bienes» [loss of «nationality», honors, and dignities the person may have in these Kingdoms, and half of their belongings.]

A key difference between the edicts of the Catholic Kings (1480, 1502), and Fernando II's edict of 1558, central to the argument I am making here, has been mentioned in passage by three legal theorists scholars and law historians. Dámaso de Lario has argued that the 1558 edict forms part of the larger project of Fernando II started the same year his father Carlos I died, also 1558: the project of «achieving the impermeability of the kingdoms.»²⁶⁶ For de Lario, this notion means shielding the Spanish elites from any religious contamination from abroad, and argues that the series of edicts have to be read together. Of particular note, he quotes the 1559 royal edict (R. 1.7.25) forbidding Spanish nationals to study abroad.²⁶⁷ However, historians of the State-Church relation in Spain such as Pérez Prendez, Álvarez Alonso, Borromeo, or Martínez Millán²⁶⁸ have argued that these set of edicts distanced Madrid and Rome, and that this was a step necessary to guarantee the administration and governance of the empire. Following the same train of thought, only from a legal perspective, Javier García Martín

points out that the shift from the use of the religiously charged *bono publico* [public good] to the secular notion of *utilitas omnium* [public utility], indicative of a partial secularization of the state. García Martín argues that the 1558 royal edict «obedecerá, por tanto, al ambito del *imperium*, no al de la *auctoritas*.» which one could translate into plain English as [will obey, hence, to principles of *nation-building*, not of *medieval governance*.] The technical difference deserves attention. As mentioned earlier, while the 1480 royal edict extends a practice already extant for manuscript books, a fundamental aspect of the 1502 and 1558 edicts is the definition of the king's faculty as a *regalia demanial*, a royal attribute that originates in the public domain. This fact brings a whole new rationale to the source of the kings power. As conveyed by these edicts, the king's power is no longer coming directly from God, but as a delegation of the natural rights of his subjects, with the implied obligation that he protect them. These natural rights, Thomas Aquinas famously argued, were still related to God, and proof of his existence. The chain of power is no longer God-king-subject, but God-subject-king. This fundamental change, started in the twelfth and thirteenth centuries is a basic stepping-stone in the construction of the modern nation-state. However, one element is still missing.

So far, the source of the justification for the authority of the monarchy has shifted the king's persona (*auctoritas*) to the people, whose public good (*bono publico*) the monarch has the obligation to protect. As the world expands with Renaissance discoveries, the state is faced with the necessity to construct a solid bureaucracy to administer and govern the old and new territories. This process cannot be achieved without the modernization, and the partial dismantling of the theocratic structures that had previously served as the state's backbone. What the historians, and legal analysts mentioned earlier emphasize is, on the one hand, the important distancing from Rome that these measures achieve, and, on the other, that the motivation behind those laws is the construction of a bureaucracy capable of administering the modern empire.

The pious Felipe II is, of course, torn between his religious faith, and the necessity of distancing the empire from Rome to guarantee its survival, and will take a series of measures to appease the Vatican.²⁶⁹ One could argue

that under his rule, Spain goes from a vicarious theocracy to a confessional state. Not coincidentally, a second similar distancing from the church, and the establishment of measures to maintain a good relationship with Rome will occur in the eighteenth-century, with the Bourbon reforms. Before addressing them, let's examine first the different motivations, and philosophical paths that led Spain to opt, until the ultimate fall of her empire in the nineteenth century, for an approach fundamentally different from Anglo-American copyrights, and Franco-German author laws.

Authorship and Empire

The author-work relation has often been presented through metaphors. The most common ones include paternity, land, and body. Cervantes, for instance, refers to don Quijote in terms of fatherhood:

...quisiera que este libro, como hijo del entendimiento, fuera el más hermoso, el más gallardo y más discreto que pudiera imaginarse. Pero no he podido yo contravenir al orden de naturaleza; que en ella cada cosa engendra su semejante. Y así, ¿qué podrá engendrar el estéril y mal cultivado ingenio mío, sino la historia de un hijo seco, avellanado, antojadizo y lleno de pensamientos varios y nunca imaginados de otro alguno...

[... I wish that his book, as son of the intellect, be the most beautiful, fine-looking, and discreet one could imagine. But I have not been able to contravene the natural order that like engenders like. As such, what else could my barren, and uncultivated intellect bring to light, other than the history of dry son, countersunk, capricious and filled with various thoughts never imagined by someone else...]

Cervantes plays with the ambiguity of the fact that «don Quijote» is both the name of his character, and the title of his novel to graciously construct an allegory of the father-son relation and to intermingle the characteristics of the

one with the other. The book Cervantes talks about is not the the material object, but rather the abstract narrative it contains. A significant step away from the chains of identity, the father-son metaphor still implies a vested interested in the offspring and a biased assessment of his qualities. Cervantes invents from the start a fictive source for his text, the Arab historian, Cide Hamete Berengali, who allows him an additional distance from the text. «Pero yo, (...) aunque parezco padre, soy padrastro de Don Quijote...» [But although I seem the father, I am the step-father of Don Quijote...] He does not have to praise him, and beg the reader to like him either. Both Cervantes and the reader of don Quijote are free to think whatever they want of don Quijote, the character, and the text itself. Don Quijote, the character this time, also gains the freedom of his own opinions dictated only by the requirements of his fictive persona. Cervantes is no longer a father with full tutelary rights and responsibilities over a child that has become an adult.

In the eighteenth and nineteenth centuries, notions related to the author's original creation began to appear. As Paul Bénichou has explained for France, these metaphors are not gratuitous, but rather associated with the author's attempt to occupy the central position in society that religion was no longer fulfilling. Bénichou dates this period as spanning from 1750 to 1830. A new attempt at achieving's author centrality, this time from a secular perspective, was Victor Hugo's foundation of the *Association Littéraire et Artistique Internationale* (ALAI), which led to the Berne Convention for the Protection of Literary and Artistic Works in 1886. In both cases the author was presented as the original creator of the work.

Thee notion of the author as original creator also existed in the Hispano transatlantic —albeit with a time difference— as the next section will document. Its use, however, was less prevalent, and coexists with other authorship metaphors more attuned to the *tradición hispanista*: the author-hunter, and the author-knight.

This difference between Spain and northern Europe is not coincidental. It reflects the difference valorization of the bourgeoisie in the latter, and of the aristocracy in the former. Is is important to note that this is a difference in degree, and that both economic bourgeois ideas were valorized in the Hispanic transatlantic, and also, as Arno Mayer has famously argued, the

aristocracy kept much of its leading role across Europe after the French Revolution, and at least until the 1914-1918 Great War.²⁷⁰

Of this two lesser explored metaphors, Federico García Lorca's aesthetic theory of *el duende* is a perfect example, of the author-hunter metaphor. Drawing on the popular usage of the expression «tener duende,» [untranslatable], Lorca gave a lecture on his «*Juego y teoría del duende*» [Game and Theory of the *Duende*] in Buenos Aires in 1933. In it he describes the creative process as a hunt in the forests of the imagination, to bring back as a hunter's trophy, a form, a figure, a metaphor.²⁷¹

I evoked the author-knight metaphor before, referring to Boscán's motivations to have his works printed. In this figuration the author is a *noble* knight protecting the public good, and aggrandizing the empire. The metaphor accompanied *la tradition hispanista* in Latin America, at least until Octavio Paz' death in 1998. Paz, for example, speaks of «conquering tradition,» while José Ortega y Gasset compares authors to generals of the Roman empire:

El poeta aumenta al mundo añadiendo a lo real, que ya está ahí por sí mismo, un irreal continente. Autor viene de auctor, el que aumenta. Los latinos llamaban así al general que ganaba para la patria un nuevo territorio.²⁷²

[The poet aggrandizes the world adding to the real, which is there by itself, an unreal continent. Author comes from *auctor*, the one who augments. Romans used the term to refer to the general who conquered a new territory for the nation.]

The victorious general would be granted a province to govern in recognition to the services given to the empire (from the latin *pro* [for] and *vincere* [to triumph or conquer]). As seen with Boscán and Cervantes, the printing privilege granted to an author is not aimed at protecting their material investment, but rather at recognizing useful services to the common

good. In that sense, no *œuvre* was more worthy of publication because of the services rendered to the construction of the linguistic unity of the Spanish empire than Antonio de Lebrija's *Grammar* (1492) and *Dictionary* (1495).

Lebrija's Dictionary

As mentioned earlier, the Catholic Kings's project was rooted in religious and linguistic unity, and in imperial expansion. Felipe II's handled instrumentation, and focused on the construction of solid institutions that would guarantee the governance and administration of the empire. To the construction of the Spanish notion of linguistic community, Lebrija's works were instrumental. The semantic shifts in the concept of authorship documented in the successive editions of the dictionary, from 1495 to 1983, are indicative of the evolution in the conception of the author-work relation in the past five hundred years.

In his 1495 edition, Lebrija defined the terms «*creador o criador*,» «*creacion o criacion*,» and «*crear o criar*,» as used in three different contexts: as a faculty of God; as the nurturing of animals and infants; and as the «creation» of a new post, job, title or condition by a king or the pope. This latter use, lost today, was employed to describe the pope's investiture of a cardinal, «*el Papa crea un cardinal [the pope creates a cardinal]*,» or the kings making of a new nobility title, «*el Rey crea un ducado [the king creates a duchy]*.» In this latter sense, create also was used to describe the manumission of a slave, «*el Rey ha creado un hombre libber del esclavo [the king has created a freeman out of a slave]*.» The successive editions of the dictionary, now the dictionary of the union of Spanish academies, tell the story of how the concept evolved from these three definitions to describe the author making of an artistic or literary work. In the fifteenth and sixteenth centuries, «creation» was God's attribute, extended to monarchs and popes as they «created» additional centers of power, privilege or rights, mirroring their own. The term also was used to describe the person who nurtured or raised. Children, animals, slaves and servants were «*criados o creados*»

[both created and raised]. In the seventeenth-century edition of the dictionary, the meaning of the verb expanded to include «to cause something to be, that did not exist before.» Parents «create» their offspring both by childbirth, and by upbringing; and the author «da a luz sus obras» [gives birth to his works, literally «gives his works to light»], but does not «create» them yet.

In the eighteenth century, a phonetic distinction is made between «crear» [to create], and «criar» [to raise], although entries still cross-reference each other. Entries in the dictionary are separate, and do not cross-reference as of the 1869 edition. In it, the idea of creating a new social identity or position disappears, and is replaced by the metaphor of an author as creator of an artistic or literary work. As Paul Bénichou has shown for France between 1750 and 1830, in Spain also, romantic writers ceased to speak as representatives of some religious or political power and assumed the mantle of what Benichou calls «spiritual authority» in their own right, speaking directly to and in the name of all humanity.²⁷³ The idea of a new spiritual elite negotiating a religiously grounded traditional order with a decline in the credibility of its institutional foundations, was perceived as a convergence of Renaissance Humanism and Enlightenment faith in humanity. The 1869 edition of the dictionary acknowledges the common use of the metaphor artist-creator, but notes that when used to describe «original work, artistic or literary, of relevant merit,» it is an «hyperbole.» The definition implicitly acknowledges that «artistic or literary creation» refers only to the literary and artistic canon. The 1884 edition of the dictionary responds to a different conception of the proper education of governing elites, which no longer sees in literati the best or only possible formation for the ruling class, but includes also engineers who are more attuned with scientific discovery and technological invention. The description of the use of the metaphor now includes the clever and original arrangement of elements in a work that is not necessarily artistic or literary. Creation is described as «a metaphor or a figure of speech when referring to the poet, artist and ingenious mind [*ingenio*].» Another significant change in this edition, «*crear*» [to create] is for the first time defined as a «faculty» describing not a specified agent, and not an explicit characteristic of God. In other words, as of 1884, to create is

no longer an attribute that defines divinity, but rather a common trait shared by God, artists and geniuses. In its substantive form, «creativity,» the term will have to wait a century to be included in the dictionary. Its use both in Spanish and French is documented²⁷⁴ under quotation marks in the 1950s and 1960s, in the *Diccionario de Autoridades* [dictionary of authorities], as a translation to the corresponding term used in German term during World War II, and retaken by the Anglo-Saxon school of social psychology at the end of the war. Quotation marks were suppressed only in the 1980s, after its adoption by generative linguistics (Noam Chomsky), in reference to the grammatical and syntactical skill of a speaker to create original communicative expressions based on a learned vocabulary and a set of rules. The term «*creatividad*» was included as an independent entry in the 1983 edition of the Spanish Academy dictionary.²⁷⁵

Two additional semantic shifts in the term have occurred since, in English primarily, that are not reflected in the Spanish dictionary. First, in the United States, a semantic recalibration of terms used to describe intellectual property changed in the 1980s and 1990s to include new forms of production and experience of the work in digital environments. Creativity became increasingly used as a synecdoche of all practices legally protected by intellectual property law: literary and artistic, scientific, technological, or commercial.²⁷⁶ Second, the notion of creativity as a faculty, also has increasingly expanded to include not only God and the genius, but every person. Creative expression is increasingly positioned in multinational documents, such as UNESCO reports, next to freedom of speech, amongst universal human rights. The move is twofold. On the one hand it «democratizes» creativity from the hands of an elite, and presents intellectual property law as a quest for people's rights and not as a state of exception granted to a privileged group. On the other hand, the creative faculty also has been identified as the necessary skill a successful worker of the emerging information economy needs to have. Pierre Menger has argued that this move helps commoditize and appropriate valuable ideas. For example, a corporation or university now legally owns all intellectual production conceived or developed by the people working for her. Menger

argues that the nineteenth-century battles over the control of the body, are now being reenacted, this time over the control of the mind.²⁷⁷

Practical contemporary implications of these asymmetric semantic shifts, include the fact that although having ratified the same multinational treaty, a Spanish and an English-speaking country will have disagreements over its proper interpretation, which cannot be bridged by translation alone. Also, the notion of international law, and of a concerted international community to enforce it, are tied to the conceptualization of natural or universal human rights, which Anthony Pagden has argued convincingly, evolved from the European struggle to legitimate its overseas empires in the early-modern era.²⁷⁸ Pagden shows that the French revolution linked human rights to the idea of citizenship, tying them not only to a specific ethical-legal code, but also implicitly to a particular kind of political system, both of which are of clear European origin. In both cases, the use of natural or human rights serves the purpose of presenting those models as universal, and connects them to an imperial tradition whose origins are to be found in the Classic Greek and Roman idea of common law for all humanity, and in Renaissance notion of universalizing humanism.

Natural or human rights also are at the center of the debates that led, on the one hand, to copyrights and author laws, and, on the other, to the Spanish codification of the public domain. Posing creativity as a «human right to artistic expression and intellectual property legal protection,» ties the ethical-legal conceptualization of the practice and experience of literature and the arts to a neorepublican form of sociopolitical association, and connect copyrights to the European imperial legacy.

The European Imperial Legacy

Chapter one examined the epistemological structure of the narrative of fear that associates copyrights to creativity, and poses that the volatility of the former implies the end of the former. The dark omens casted upon creativity that this narrative suggests, are governed by a series of assumptions among which the artificial disconnect of Renaissance and Enlightenment

modernities, and the universality of copyrights, which the narrative presents as desirable and axiomatic. I will argue in this section that this idea originated in the notion of universal natural rights, and that, in the Hispanic tradition, it evolved towards universal human rights and the also universal notion of a «right to a national identity.»

In chapter two, I noted that don Juan Manuel's notion of authorship grounded on the production of a well-crafted work, is similar to the concept attributed to Locke that a legitimate origin of property is work. However, while Locke uses the metaphor of the work of a farmer on the bare land that he renders productive, and argues for individual property rights, Manuel claims the attribution of a work that still remains in the public domain. While Locke's claim is patrimonial, Manuel's is moral, and reflect a different conception of the accepted use of the public domain.

The different solutions to the same challenge of regulating the printing press that the English, Franco-German and Spanish traditions came up with in the eighteenth and nineteenth centuries, extends a controversy among the same actors on universal natural rights, the use of common-pool resources, and the legitimacy of European imperial expansion, in the sixteenth and seventeenth centuries. Most noteworthy in this debate are Francisco de Vitoria's *De Indis* (1532), Hugo Grotius' *Mare Liberum* (1609), Samuel von Puffendorf's *De jure naturae et gentium* (1672), and John Locke's *Two Treatises of Government* (1689). This discussion opposed, on the one side, the Spanish perspective of universal humanism and natural rights, which the empire had the moral obligation to see enforced, and, on the other side, Northern European ideas of non-intervention, self-determination, and possessive individualism. While the latter view privileged the *common values* shared in the public domain, the former stressed the *differences of opinions* in it, and the individual rights to use and appropriate its resources. In order to understand how and why the actors of this debate offered so different solutions, to the common challenge of legislating the printing press, it seems advisable to offer a brief recollection of the structuring aspects of the sixteenth and century discussions that frame those decisions.

Cultural historian Anthony Pagden has argued that rights «are cultural artifacts masquerading as universal, immutable values...[while they] are the

creation of a specific legal tradition —that of ancient Rome, and in particular that of the great Roman jurists from the second to the sixth centuries—.»²⁷⁹ Modern rights are the result of a social contract, whether they are conceived as citizenship and rooted in the state; as pre-existing natural rights that individuals transfer to the state for guardianship and protection and which legitimize state authority; or as a constant negotiation and renegotiation of the *res publica* in opposition to or in extension of the nation-state.²⁸⁰

The English word «right» is Germanic in origin, but it translates the Latin term *ius* which includes both notions of rights and responsibilities. Roman right is mostly based on land or lineage: *ius soli* and *ius sanguini*. It becomes associated with citizenship practice after the edict of Caracalla of A.D. 212, but makes no claim on the existence of a natural or universal order. The idea that some legal regulation had to be universal was introduced by Justinian in the sixth century as an extension of the Stoic notion of *koinos nomos* to codify the proper behavior at the frontiers of the empire and especially in times of war.²⁸¹ This universal world order that Cicero termed *republic totius orbis* «A republic of all the world.» Thomas Aquinas and other Christian thinkers transformed that universal *ordo* into a body of universal, and innate, principles which would act as a bridge between the human and the divine. Since it preceded the formation of nation-states, it was governed by a body of customary laws or «*ius gentium*» named after the term *gens* which in Latin designated the foreigners, and which led in the fourteenth century to «*gentilis*» or «gentiles» to refer to non-Jewish, in particular Christians. Since it preceded nations, it also was to take precedent over local legislative practices of local nations. In the words of the sixteenth-century Spanish theologian Francisco de Vitoria (c.1485-1546), no «kingdom may chose to ignore this law of nations.»²⁸² The argument was being made in the context of the justification for the Spanish colonization of the Americas, on the grounds of coming to the rescue of fellow humans (the natural order applies both to Catholics and non-Catholics) that were being subject to the inhuman treatments of cannibalism and sacrificial immolation.²⁸³ Hugo Grotius used those principles in *De Indis* (1605) and *Mare Liberum* (1609) to argue for international laws of war and the recognition of international waters. The term «natural rights» was replaced by «men» or «human rights» in the

French 1789 declaration of the *Droits de l'homme et du citoyen*, which rescued Vitoria's breath of rights which included not only property but other forms of dignified living conditions. «The shift from ‹natural› to ‹human› reflects a modern unease with the conception of an essentialised ‹nature› and, in particular since the death of the natural-law tradition in Kant, with the idea of the existence of guiding natural principles.» explains Pagden. The concept of human rights is a development of the older notion of natural rights, which evolved in the context of the European struggle to legitimate its overseas empires. The French Revolution linked human rights to the idea of citizenship. Human rights are thus tied not only to a European ethical-legal code but also to a particular kind of European political system: the republic. Both the ethical framework of the humane and the sociopolitical exemplar of the republic employ an underlying idea of universality rooted in the Greek and Roman idea of a common law for all humanity. As Pagden points out, defending human rights implies endorsing «an essentially Western European understanding of the human.»²⁸⁴

Political historian John Pocock²⁸⁵ notes that people found modern republics when they lost faith in Providence, replacing religious association with notions of social contract. Intellectual historians distinguish two forms of contractarianism: a classic, participative and cosmopolitan Rousseauian republic; and a liberal, representative and hegemonic Lockean and Hobbesian republic.²⁸⁶ Pagden argues that the concept of «international community» derives its values from a version of a liberal consensus which is, in essence, a secularized transvaluation of the Christian ethic, at least as it applies to the concept of rights.²⁸⁷ The analysis of the extension of national rights to global universal rights evidences two opposing views also, which extend the principles of contractarianism and the opposition between liberal and participative republics. For liberal republicans the international sphere is the sum of all individual national interests; while for cosmopolitans it is the leaded consensus of all nations. In order to accomplish globalization, liberal republicans value individual action, self-motivation and see the use of coercion as a pragmatic strategy; while cosmopolitan republicans value large scale debates and consensus building. «Liberal republicans resist international negotiation because even if outsiders were, strictly speaking

rational, nothing guarantees that the reasons that motivate them would be the same that motivate insiders.» explains Debora Khane.²⁸⁸ These different conceptualizations of the international community translate into an opposition of republicanism versus cosmopolitanism²⁸⁹ or also of the global versus the universal.²⁹⁰

The Individual and the Community: Two

Competing Universals

In the opening of this chapter I briefly mentioned that the French tradition was midway between Anglo-American liberalism and copyrights, and the Spanish *regalia demanial* and preprint censorship. All three traditions are imperial, and seek, under the premise of irradiating universal human rights, the legitimation of their expansion, and the acquiescence and support of the international community also constructed on a transvaluation of Catholic notions of universalizing humanism. The international expansion and affirmation of *droits d'auteur* and copyrights occurred precisely as a counter-reflexion of the slow decay of the Spanish empire. In the sixteenth and seventeenth centuries both the Dutch, English, French and Spanish empires competed in trying to establish and extend their monopolies over the new richness that accompanied the discovery of new territories, and the intellectual and spiritual advancements associated to them.

As mentioned before, from the fifteenth to the eighteenth century, the two practices of the manuscript and printed book coexisted in the Hispanic transatlantic. Together with them, two parallel conceptions of the book also coexisted. One of these perspectives considered the [manuscript] book as a movable item subject to the laws of private individual property. The other considered the printed book part of the public domain. The privilege in the case of the printing press, and the «letter patent» in the case of technical inventions granted an exception to these laws, and allowed that public property claims be postponed for a limited period of time after publication.

As we mentioned earlier, the juridical conception of the privilege was that of a «personal law,» one that only applies to one person, for a limited period of time, instead of the general common law. Partially because of their different position in the Reformation and Counterreformation, while Spain made a *de jure* monopoly of the public domain through the royal edicts of 1480, 1502, 1558, and 1621, England also made a *de jure* monopoly out of the «exception» through the Statute of Monopolies of May 26, 1624. The comparatively lesser English legislations regarding the public domain in this time, and the few Spanish laws regulating copyrights, in the same period, should not come as a surprise. While the goal of Spain since Felipe II was to generate structures to keep and administer the Empire's privileged position, the goal of Holland and England was to validate the appropriation of part of that wealth, whether it be land, commercial routes, or spiritual/intellectual legitimacy stemming from posing as champions of the universal rights. In validating those monopolies, monarchies were committing the coercive forces of their respective states to guarantee their enforcement, and privileging with it a small number of their subjects. The power of printers and stationers grew so much as to represent in England and France a risk to the authority of the monarchy. The solution these monarchs found, was to empower another class of subjects participating in the publication process. Examples in Rome and Florence of printing privileges granted to the inventor of the technology (for Aldus Manutius a mobile type, for example) had proved impractical. The Statute of Anne of April 10, 1710, on copyrights, and the French laws of 1777-1793, on *droits d'auteur* were designed to empower authors as a mean to counterbalance the power of printers and stationers. These laws created a type of market known today as «monopolistic competition,» in which different *de jure* monopolies were set to compete against each other, a middle ground between aristocratic privilege and common law. Spain also faced the problem of increasingly powerful corporations, but because her monopoly was over the spiritual common good, the corporation she faced was the Church. The double problem Felipe II faced was the construction of accountable institutions to administer and govern the empire, and then the protection and promotion of the public good.²⁹¹ With the royal edicts of 1502 and 1558, Spain limited the

power of the Church and of religious corporations over the public domain to works of theology, and claimed for the crown the *regalia demanial* to administer the defense of the public good exclusively across all territories. Initially, however, the public domain was not defined identically in the Peninsula and in the New Spain.

The Public Domain in the New Spain

The legal definition of the public domain was different in the Peninsula and in the Viceroyalties of the New Spain. The Royal Ordinance of April 4, 1531²⁹² prohibits the introduction in the Americas of works in «...romance, de historias vanas y de profanidad, como son las de Amadís y otras de esta calidad (...) mal ejercicio para los indios é cosa en que no es bien que se ocupen ni lean.» (R.I. 1.24.4) [[works] in Romance, of vane and non-religious stories, such as the one of Amadís and others that are of similar quality (...) a bad practice for Indians, and something on which it is not good that they occupy their time or read.] The distinction between fictional and non-fictional genres is, at the time, still fluid. On the one hand, *El Dorado* or the «magic island of California,» drive conquistadors such as Cortés to organize discovery expeditions and motivate their soldiers. On the other, the *Crónica de Indias* [Chronicle of the Indies] mixes historical facts with fabulous accounts in the narratives that discover the New World to Europe. The ordinance commands «...[que sólo fueran introducidos libros] tocantes á la religión cristiana é la virtud en que se ejerciten y ocupen los dichos indios é los otros pobaldores de las dichas Indias, porque á otra cosa no se ha de dar lugar.» [...[that the only books to be introduced should be] about the christian religion, and the virtues the said Indians, and the other inhabitants of the Indies, should practice, and on which they should occupy their time, because nothing else will be allowed.] In the New Spain there are thus no privileges, licenses or *tasa*. Rather than regulate, delimit and protect the public domain as in the peninsula, the Royal Ordinance of 1531 rules the public domain does not exist in the Americas.

Toribio Medina notes that the measure could not be enforced.²⁹³ An observation one can confirm by the numerous rulings in the seventeenth and eighteenth centuries that mention books in circulation, either imported to or printed in the Americas. For instance, Fernando VI's Real Cédula of April 4, 1741 (RI 1.24.15) mentions that all books published are required to include a *tasa*.²⁹⁴

In the shipments to the Indies, the number of books by Antonio de Lebrija, Mateo Alemán, and Miguel de Cervantes is telling of the importance and magnitude of the book trade at the time, and also of the wide circulation of these books in the American viceroyalties.²⁹⁵ The whole first edition of *Don Quijote* of 1605 was shipped to the New Spain, and most of the copies of the subsequent re-editions were destined to Mexico or Lima.²⁹⁶ Irving Leonard has noted that the first edition of *El Guzmán* of 1599 came off the presses too late to catch the annual fleets to the Americas which usually began their long voyages late in the spring, but «Scarcely a manifest of 1600 covering consignments of books fails to include *«Libros del Pícaro»* in lots of a dozen, a score or a hundred and more, the majority of which went to Mexico City.»²⁹⁷

The books were not only in the holds of transatlantic galleons, they were in the deck-cabins as well. In the archives of the Inquisition in Mexico, where records are kept of the customary questioning of Inquisition officials who boarded each incoming ship before passengers landed or was discharged, the works by Alemán, Cervantes and Lope are constantly mentioned.²⁹⁸

It is important to note that by 1603 mentions to «*Libros del Pícaro, Parte Segunda*» began to appear on the registers, referring to the apocryphal continuation which is now believed to have been made by Juan Jose Martí, under the pseudonym of Mateo Lujin de Sayavedra.²⁹⁹

The striking parallelism between the lives of Cervantes and Alemán is often noted in books, articles, and classes covering the Spanish Golden Age. Both men struggled against poverty, and lived precariously from poorly compensated government posts; both served terms in debtor's prisons where some think their greatest works may have been written in part; both had unfortunate experiences in domestic life; both derived much fame but

little fortune from the popularity of their literary works; both received the compliment of a spurious sequel of their masterpieces by pseudonymous emulators before they brought forth their own second parts of their respective novels; and both sought opportunities to better their lot in the Americas, though only Alemán actually crossed the ocean to the New Spain where he died.

How Alemán and Cervantes handled the problem of the unauthorized use of their literary work is exemplary of the conception of authorial property in the Spanish Golden Age, and illustrates a range of problems an author could face including plagiarism, piracy, and the unauthorized production of derivatives.

Mateo Alemán: Property as Freedom

While both Cervantes and Alemán saw second parts of their works published without their knowledge, a major difference between the two consists in that Avellaneda's *Quijote* is an unauthorized derivative, while Sayavedra's *Guzmán* is a plagiarized work. As a result, the grounds on which Alemán and Cervantes claim back authorship attribution is different. While Cervantes is adamant in condemning the bad quality of the work by Avellaneda, Alemán says there are parts of Sayavedra's version that he wished were attributed to him. Presumably, those are the parts he also wrote, or at least conceived, which he showed to the «bad friend» who took them from him, and had them published. The issue is even more complex, because it might have originated on a decision, by Mateo Alemán to handle a pirated edition of his *Guzmán*, outside of the legal channels established for it.

The pirated edition in question was published, according to its title page and colophon, in Madrid in 1601 by Iuan Martinez or Francisco de Espino, the first name appears in title page, while the second on the colophon. The attribution to two different printers has aroused suspicion and made scholars conclude that the fact is a strong indication of piracy.³⁰⁰ However, since Alemán was living in Madrid at the time, it would have been very difficult to

Espino and Martinez to print it, without coming to Aleman's attention.³⁰¹ While Raymond Foulché-Delbosc argued that this fact was indicative of the work not being printed in Madrid, but probably in Italy, Donald McGrady used a notarial document discovered in 1953 to argue that Alemán did know about the edition, and that it was indeed printed in Madrid. The notarial document records the sale by Alemán of 1500 copies of the Juan Martinez-Franciso Espino edition to two book dealers, Miguel Martinez and Francisco López. Through the analysis of the unusually long and detailed bill of sale, a sign of distrust, McGrady concludes that Alemán caught up with the book pirates and turned a profit for himself, from their illegitimate edition. McGrady concludes:

Alemán received 106,500 *maravedís*, and the publishers kept 1500 copies of the piracy. Had Alemán denounced Martínez and López, he would have been entitled only to a third of the fine of 50,000 *maravedís* imposed by law on the printers of unauthorized editions. The book pirates, on the other hand, would have lost their entire printing plus the fine. The government of Felipe III would have been the principal beneficiary of the denunciation.³⁰²

McGrady correctly presents this arrangement as beneficial to both parties, and detrimental to the state. However, if one takes Boscán's contracts as exemplars of the common practice at the time, the arrangement was far more beneficial to Alemán, than to the printers. In Boscán's contracts author and printer divided profits equally, after the cost of printing and distribution were deducted. The *tasa* of the *Guzmán* establishes a sale price of 105 *maravedís*, which amounts to 157,500 *maravedís* for the whole edition of 1500 copies. Being conservative to a fault, one can assume that the costs of production and distribution were zero. In such case, both Alemán and the printers would have received each 78,750 *maravedís* from the total sale of the edition. With this arrangement, Alemán received 106,500, while the printers, after all sales were finalized, may hope to recover the surprisingly round number of 51,000 *maravedís*. If Boscán's contracts are indicative of the costs of production incurred by printers, then the fifteen thousand copies

may have costed to the printers at least twenty-five to thirty thousand *maravedís*. Without even considering freight costs, this left the printers with a meager perspective. It is therefore logical to assume that they hold a grouch against Alemán for this transaction, and that they sought revenge in a way Alemán did not have the law to back him up. It is thus not coincidental that in 1603 Francisco López printed an edition of the spurious continuation of *Guzmán de Alfarache*.

How Alemán claims authorship over the sequels of his work is indicative of the conceptualization of authorial property at the time. Like Manuel before him, and Cervantes after him, Alemán would ground his arguments not on having done a work first, but better. While the concept of being the original author is still present, it comes second to the notion of composing a well-crafted work. Alemán cannot completely dismiss the spurious sequel because it is based, on texts he wrote, or ideas he conceived, and that were stolen from him. The publication, he says, made him start anew his own second version, and follow a completely different path.

However, one fundamental thing Alemán criticizes of the work, which makes it a poor-crafted work, is that it missed the essence of the character, and the core problem of the work. Guzmán, he reminds, «escribe su vida desde las galeras donde queda forzado al remo» (I, 113) [writes his life from the galleys, where he remains forced to row]. There is no hope that he will be released because the King has refused to grant him pardon. Since Américo Castro, there is significant consensus in considering that a central problem the *Guzmán* posed to the reader was whether the king was justified in refusing his pardon according to the notions of justice and piety.³⁰³ While I fully agree with the idea that the question posed problem to the contemporary reader, the legal analysis of the *regalía demanial* presented earlier, is indicative that the rationale for the origin of the king's power at the time was changing from the medieval notions of justice and *auctoritas* to the idea that the king's faculty stemmed from the people whose common good he had to protect. The distinction is key. The old model emphasizes a life of deceit for which Guzmán is punished «siempre por lo de atrás mal indiciado no me creyeron jamás» (II, 506) [always marked by what I had done before, I was never believed]. The new approach, on the other hand, would have to

stress the contribution of Guzmán to the public good through the telling of his story, and the education through it of fellow sinners. While under the old model Guzmán ought to stay in the gallows, under the new one he should be let free. Fernando Cabo has pointed out «aceptar el relato de Guzmán es, para el narratario, lo mismo que aceptar su conversión; de ahí la necesidad que tiene de persuadirle de su legitimidad como narrador»³⁰⁴ [to accept the story of Guzmán is, for the narratee, the same thing as accepting his conversion; hence the need he has to persuade him he is a legitimate narrator.] The king has already spoken with a refusal. Now Guzmán presents his case to the narratee,³⁰⁵ who forms a unity with Guzmán and all readers through their common condition of sinners³⁰⁶. He presents the case to the people who «instruido en las veras» (II, 48) can better decide on the morality of the character. Through the innovative use of the «monodialogue,»³⁰⁷ where different forms of tú/vosotros range from Aleman's alter-ego to represent the people,³⁰⁸ Alemán achieves the triple movement of positioning himself at a distance from the character avoiding the biography, giving autonomy to his Guzmán, and, by an interesting loop, claiming back property over the published work as part of the people who own the public domain.

Most literary analysis and criticism of the Renaissance points out the increasing autonomy of the character, and its novel coexistence with the reader in a world formed by an identical chronotope. Bakhtin notes that the modern novel is polyphonic, and that these different voices are not necessarily the ones of kings, mythological heroes or demigods, but rather the ones found among the people on the streets, an observation that corresponds with the shift in focus from *auctoritas* to *regalia demanial* as sources of authority. Building on Bakhtin's dialogical imagination³⁰⁹ Fernando Lázaro Carreter marvels at the freedom of the author-character relation in the *Guzmán*, and wonders what may have prompted «the rough Mateo Alemán to disavow his Guzmán de Alfarache at every other turn of the plot, and to manifest his complete disagreement or interject a harsh judgement on what the character does.» «Se diría que no es suyo» [as if it wasn't his] Carreter says. Framing the author-character relation in terms of property is at the core of the problem faced by both Alemán and Cervantes

with the unauthorized sequels to their works. Carreter's assumption that property is synonymous with control is not uncommon. However, when read in the context of the time I have been presenting here, property appears to be, not restrictive, but libertarian. The reason is twofold.

In chapter two, I mentioned that the concept of authorial property had been considered at least since Seneca who writes that both the author and the bookseller own the book «but in different ways.» With the popularization of the printing press it becomes apparent that the author, the bookseller, and also the people do own the book in different ways. The legal appropriation of discourse, that Foucault describes, is grounded on an identitarian conception of the relation author-text. The author is not only responsible for what is said, there are no authors of unauthorized texts. As Guzmán notes «Sólo los libros heréticos no tienen autor.» [Only the heretic books have no author.] The printing privilege granted to authors, both reified the work and offered the author the possibility of defining his or her relation to the works and to their homonymous characters, in terms of property, rather than identity. Why was this shift accompanied by increase autonomy? Why was property felt as libertarian over identity? The answer, I argue, is in the parallel shift away from the concept of «identitarian property» which occurred at the same time.

Before the Renaissance, an identitarian concept of property prevailed. Since classical times the author owned his works, but was also fully responsible for the words expressed in them, with no distinction over whether they were expressed by a character or not. For example, according to Tacitus, Augustus' *lex maiestatis* of the first century A.D. established hard penalties for works where «their authors or dramatic characters» expressed defamatory information of «illustrious men and women.»³¹⁰ Livy mentions a similar practice in the third century,³¹¹ which apparently continued under other Roman emperors, and was extended by Tiberius who set the death³¹² penalty for offenders. In the late Middle Ages property was still closely tied to identity: a duke was considered one because he owned a duchy, and debt-slavery was a common practice.

The identitarian conception of property was dramatically changed first in the sixteenth century, by the revolutionary concept of bankruptcy and its

associated notion of «honest debtor,» and then, in the eighteenth, by the royal ordinance establishing paid work as an acceptable and encouraged activity for the aristocracy who were no longer deemed to lose their identity by accepting a salary. The invention of bankruptcy and the idea of the honest debtor was a direct result of the Spanish wars of the sixteenth century, civil wars, wars of conquest, wars of religion, wars of expansion, succession wars, all very expensive wars. As a consequence, Felipe II declared bankruptcy four times, in 1557, 1560, 1575, and 1596. The concept was new. Before, failure to comply with a debt was prosecuted solely as a crime. In ancient Greece, bankruptcy did not exist. If a man owed and he could not pay, he and his entire household, wife, children and servants, were forced into «debt slavery,» until the creditor recouped losses via their physical labor. In the early modern, failure to pay was punishable by seizure of property, and jail. In both cases there was no distinction, or distance between the person, the property, and the debt. In England, for example, it was not until 1705 that Queen Anne³¹³ passed the first bankruptcy law (4th Anne, ch. 17) providing for both the benefit of the creditor, and introducing in English law the Spanish concept of «honest debtor». Both Mateo Alemán and Cervantes, spent time in jail as «honest debtors,» deprived of their freedom for a while, but not having to serve under their debtors until the amount due was recovered. So both from the identitarian notion that governs the legal appropriation of discourse, and from the one implicit in debt-slavery, authorial property in the sixteenth century represented a form of emancipation. How these combined forms of emancipation translated into character's increased autonomy is related, I argue, with the *sui generis* form of authorship construction that is specific of the Hispanic tradition, of which the problem surrounding Avellaneda's *Quijote* is exemplar.

Don Quijote Speaks

In chapter two, we examined don Juan Manuel's conception of authorship attribution, which was based not on original creation, but on grounds of having composed a well-crafted work. Manuel claimed that the

state was obliged to take responsibility in the protection of those works, which belonged to the people. At the beginning of this chapter we connected these ideas with the Spanish-specific definition and regulation of the public domain, and to the change in the rationalization of the origin of the power of the king, from being god-sent to the notion that people's natural rights had been delegated to the king. Then a series of metaphors, the author-knight for example, were suggested to be specific of the Hispanic tradition from don Juan Manuel and Boscán to the Hispanists of the twentieth century. All these notions come together in the case of Avellaneda's Quijote.

In 1605 Cervantes published *Don Quijote*, which turned out to be an instant bestseller, and touched at the core the Spanish zeitgeist, which is represented by this novel until today. The fact is acknowledged in the second volume of *Don Quijote's* adventures (1615), by Sancho Panza:

...es tan trillada y tan leída y tan sabida de todo género de gentes, que, apenas han visto algún rocín flaco, cuando dicen: «Allí va Rocinante». Y los que más se han dado a su letura son los pajes: no hay antecámara de señor donde no se halle un Don Quijote... (II.3)

[...It is so popular and read and known by all kinds of people, that , as soon as they see a skinny horse, they say: «There goes Rocinante». And the ones who have read it the most are the court pages: there is no gentleman antechamber without a Don Quijote...] (II.3)

We know that don Quijote finds out about Avellaneda's sequel in chapter II, as he overhears two guests in a hostelry complaining that, in the sequel, don Quijote has fallen out of love. Don Quijote immediately reacts, affirming that is not possible, and challenging whomever may have said it to a duel. The two noblemen, quickly convinced by his words and looks, acknowledge they are in front the *true* don Quijote, and that the other one is fake.

...sin duda, vos, señor, sois el verdadero don Quijote de la Mancha, norte y lucero de la andante caballería a despecho y pesar del que ha querido usurpar vuestro nombre y aniquilar vuestras hazañas, como lo ha hecho el autor deste libro que aquí os entrego. (II.II)

[...There is no doubt that you, sir, are the true don Quijote de la Mancha, north and star of the wandering knighthood, in spite of the one who has attempted to misappropriate your name and annihilate your heroic deeds, as has done the author of this book that we surrender to you.] (II.II)

The tirade exemplifies how the problem is being framed. Avellaneda has allegedly tried to appropriate the name of don Quijote, and destroy his «heroic deeds.» What in twentieth-century copyright law or *droits d'auteur* would be treated as plagiarism and a violation of copyrights, is also treated here as a form of plagiarism if one considers the term as it was understood originally by Martial, the unlawful appropriation of a man's name in a poorly-crafted work. The difference, however, is that the claim is not being made in the name of the author, but of the character himself, and that the sentence is being uttered by a reader of the work.

The conversation becomes even more interesting when don Juan, one of the two readers, expresses his wish for a system that would forbid everyone except for the first author, to write about things that concern the hero of a work:

Yo así lo creo -dijo don Juan-; y si fuera posible, se había de mandar que ninguno fuera osado a tratar de las cosas del gran don Quijote, si no fuese Cide Hamete, su primer autor, bien así como mandó Alejandro que ninguno fuese osado a retratarle sino Apeles.

[I do believe it —said don Juan—; and if it was possible, it should be ordered that no one dared to address the things of the great don Quijote, except for Cide Hamete, his first author, in a similar way

Alexander commanded that no one dared make a portrait of him but Apeles.

Don Juan's wish is not to be confused with a claim for author-centric regulations and a valorization of self-expressive creative originality. As the example of Alexander's portraitist Apeles shows, don Juan is assuming that the work of Cide Hamete is a well-crafted work, and it is on the grounds of the quality of the work, rather on self-expression, that the nobleman expresses his wish. Don Quijote's response clarifies what is considered desirable.

-Retrátame el que quisiere -dijo don Quijote-, pero no me maltrate; que muchas veces suele caerse la paciencia cuando la cargan de injurias.

[–May anyone who so wishes be allowed to make a portrait of me — said don Quijote—, but son't mistreat me, because patience runs out, when it is bothered with insults.]

The claim is clear. Anyone can make a portrait of the character as long as he or she does it well. While don Juan's idea may have been more beneficial for the individual private interest of authors, don Quijote reaffirms the character-centrality or text-centrality uniquely specific of the Spanish system. If don Juan Manuel suggested the idea of «the rights of the well-crafted work,» Cervantes lent his pen to a character to voice them. The picture gets fledged even further in a subsequent note written by the bandit Roque Guinart to a friend in Barcelona, where he lets him know that don Quijote will be arriving to the city in four days, after having avoided Zaragoza. Roque asks him, in the letter, to let their common friends know that don Quijote is coming to town, so that they can also enjoy his presence, and acknowledges that, although he wished his adversaries had no access to that enjoyment ...

...esto era imposible, a causa que las locuras y discreciones de don Quijote y los donaires de su escudero Sancho Panza no podían dejar de dar gusto general a todo el mundo. (II.LI)

[...This was impossible, because the crazy and sensible deeds and words of don Quijote, and the gracious ones of his squire Sancho Panza could not be prevented from bringing joy to everyone. (II.LI)]

It is important to note that the text functions within a certain degree of ambiguity. Don Quijote is both the character and the work, and knows about the books that tell his adventures, for example. A similar ambiguity operates here which makes it difficult to separate the idea of free circulation, and the one of an intrinsic quality that makes the enjoyment of the work universal. However, to seek a definite distinction would be anachronistic, because in the model I am describing, publication, state protection, and free, wide circulation are discussed only for the well-crafted works. The reader's perspective in this model of authorship-attribution is further specified in two additional remarks in the text, which address the texts that do not achieve the rank of well-crafted. Those texts ought to be discarded, and the the reader should have the right of NOT reading them, a notion mentioned by Roger Chartier in his analysis of the book from Renaissance to the digital age.

Bad books ³¹⁴should be discarded, and it may come as no surprise that the preferred form of discarding them at the time was by fire. Burning books in Renaissance Spain and later is not, as in other places or times, a Church's action directed at censoring heresy. Censorship in Spain is fundamentally secular, and occurs before, rather than after the book is printed. In a vision of the doors of hell in Cervantes' novel, two demons juggle with books, and suddenly notice one of them is Avellaneda's which is so bad, they say, that they through it into the flames. But another mention of burning is more telling of the frame of mind I wish to describe. In it don Quijote refers again to the historians (i.e. authors) who do not do justice to their characters: «...y los historiadores que de mentiras se valen habían de ser quemados, como los que hacen moneda falsa.» [...and the historians who use of lies ought to be burned, like the ones who mint false currency] (II. III) Don Quijote plays

with the ambiguity inherent to the prosopopeia of the book, only this time, from a character's perspective. As such, he identifies books to authors, rather than characters, because it is bad authors who can damage a character's reputation. The justification that comes after is telling, because books are not burned by religious tribunals anymore, but by secular order. The judicial order of book burning is considered at the time «a transgression of private property rights, in the name of the public good.» Don Quijot³¹⁵'s remark reminds the reader that not only the authority of the church had been replaced by an increasingly people's-rooted secular authority, but also that the void left by the Church as central producer of symbolic value, was also being increasingly replaced by the economy.

The character's perspective is also expressed in different parts of the book. For instance, Sancho points out that characters do not perceive book-royalties:

Pero digan lo que quisieren; que desnudo nací, desnudo me hallo: ni pierdo ni gano; aunque, por verme puesto en libros y andar por ese mundo de mano en mano, no se me da un higo que digan de mí todo lo que quisieren. (II. LVI)

[Say what they want, I was born naked, and naked I am; I won't win or lose for being put in books, nor for being handed from one person to another, I am not given a fig, so have them say what they wanted.]

From a character's perspective, the apocryphal sequel presents a problem of defamation and impersonation. As such, when don Quijote encounters Álvaro Tarfe, a character who met the «false» Quijote in Avellaneda's text, he has him sign an official affidavit in the presence of local authorities establishing that he has never met until then don Quijote or Sancho. (II. LXXII) A similar legal fiction occurs at Alonso Quijano's deathbed, when the priest asks a notary to assess Don Quijote's death.

Finally, the verses and remarks of Cide Hamete that close the volume voice the perspective of the author in this model. Hamete claims exclusive

authorship attribution on the grounds that he has succeeded in the difficult task of composing a well-crafted work. The word he uses is «*impresa*,» which is the same don Quijote uses to describe the heroic deeds that he claims his own, and constitute his fame as a wandering knight:

¡Tate, tate, folloncicos! De ninguno sea tocada; porque esta *impresa*, buen rey, para mí estaba guardada. (II. LXXIV)

[Stop right there, little troublemakers! No one touch it, because this deed, my good king, is reserved for me.] (II. LXXIV)

As the rest of the text that follows it, this is a claim for authorship attribution. The grounds on which the claim is being made are noteworthy because they are fundamentally different to the ones expected in the context of romantic authorship or copyrights. Although Hamete is the first original writer to have addressed and told the adventures of don Quijote, this consideration comes second to the quality of the work he composed, and which allegedly Cervantes translated. As with don Juan Manuel, authorship ought to be attributed to the best-crafted work, not to the first-crafted one. To the romantic self-expressive author, this alternative view offers the figuration of the author-knight in search of a challenge to overcome. Censorship and authorship in the Anglo-American, Franco-German, and Hispanic traditions, are parallel and mirroring processes. As mentioned before, a characteristic of the Hispanic model is pre-printing censorship, as opposed to post-printing, in the Anglo-American, or Franco German models. Similarly, authorship is axiomatic in the self-expressive system of copyright law, —anyone writing an original text is assumed to be his or her author—, while the Hispanic model privileges the quality of the work over its originality as it considers authorship attribution.

The depiction of the conceptualization of the Hispanic author that I have made, is not circumscribed to fiction. On the contrary, I have found numerous cases where legal rulings, and licenses address the issue of authorship in these terms. For instance, in 1739, Manuel de Herrera, civil censor ascribed at the Ministry of War, is brought a copy of the manuscript

entitled *Historia Civil* [Civil History], by friar Nicolás Jesús Belando. In his examination Herrera notes that the work is basically plagiarizing Marquis de San Felipe's *Comentarios*. However, his refusal to grant Belando a printing license is not based on this fact, but on how «poorly the subject was organized,» as compared to the *Comentarios*. Herrera's critical judgement was challenged, and the book was in the end granted a license to be printed under the name of Belando!

In the His³¹⁶panic model authorship is a recognition for having accomplished a difficult task in benefit of the common good, not a right to which any writer should feel entitled. While copyrights and *droits d'auteur* recognize legal protection to every text, regardless of its quality, the Spanish system recognizes excellence, not self-expression. While intellectual property rights conceive works as being the product of self-examination and original expression, the Spanish model stresses the author's call by a problem. Hispanic authorship is constructed by these callings, and by the success in overcoming them that a well-crafted works proves. Finally, while copyrights and *droits d'auteur* empower and showcase the author's personality, the Hispanic model valorizes the quality of the work and the effacement of the author.

Sor Juana Did not Go to Trial

Printing shops existed in the New Spain since the sixteenth century, notably in the Universities of Mexico (1581), and Lima (1581). As it was the case in fifteenth-century Spain, a number of canonical literary and philosophical works were written in the context of a partially collaborative scholar exercise. The case of *La Celestina* (1499) in the Universidad de

Salamanca, for example, is well known. While it was still forbidden in the New Spain to place a printing press inside a convent or monastery, it is now being increasingly accepted that, together with universities, these religious communities provided an alternative for the development of literary, artistic, and intellectual works in general. This idea was pointed out first, to my knowledge, in the context of the scholarly research undertaken on the occasion of the 1995 three-hundred anniversary of Sor Juana's death. The 1690-1691 controversy over the publication of her only theological work exemplifies the beginning of the two-centuries decline of the Spanish empire, and how, when the secular state was weak, the power of religious corporations grew stronger. The controversy surrounding Sor Juana's first and only theological work is exemplary of this fact.

The controversy is well known. Sor Juana composed a critic to the *Sermão do Mandato* by the portuguese friar António Vieira, which she entitled *Crisis de un Sermón*. The text made it to the hands of the bishop of Puebla, Manuel Fernández de Santa Cruz, who prologued it under the pseudonym of Sor Filotea de la Cruz, and had it published under the title of *Carta Atenagórica* [A letter worth of Athena's wisdom] in 1690. Much has been written about the motivations of Sor Juana for writing, for the first and only time in her life, a work of theology, and of how it ended up in the hands of Fernández de Santa Cruz, a bishop who admired and respected Sor Juana. As Octavio Paz points out in his monumental *Sor Juana Inés de la Cruz o las trampas de la fe* (1983)³¹⁷, whether the letter was originally directed to the bishop, or to the now-infamous confessor of Sor Juana, the Jesuit Antonio Núñez de Miranda, what is certain is that Francisco de Aguiar y Seijas, a follower of Vieira, felt attacked by it. At the time, Fernández de Santa Cruz and Aguiar y Seijas were competing for the nomination to the powerful post of archbishop of Mexico, and Sor Juana's work, placed her in the midst of their political dispute. In 1691, she wrote a response, *Respuesta a Sor Filotea de la Cruz*, in which she addressed the main criticisms made to her in the prologue of the *Carta Atenagórica*, that could have put her at odds with a religious tribunal. Sor Juana famously signed it «Yo, la peor de todas» [I, the worse of all] which is an indication of how much aware Sor Juana was of the importance of these accusations. As I mentioned earlier, the

controversy has been widely studied, especially since the 1995 three-hundred year anniversary of her death, and especially from a gender-studies perspective. My observation here is about her relation to her text, and her perception of the rights she had or did not have over them.

First, Sor Juana did not decide that her work be published, was not in control of the title under which it did, and had no saying on whether it was attributed to her or not. «...n[o] escribí más que para el juicio de quien me lo insinuó (...) Que si creyera se había de publicar, no fuera con tanto desaliño como few.» [I wrote only for the person who asked me to, (...) if I had believed it was going to be published, I would not have written it so carelessly.] Sor Juana gave away her work in manuscript form to the person she wrote it for, who then had copies of it made, and distributed those copies without Sor Juana's permission or consent. The title under which the work was published, *Carta Atenagórica*, explicitly compares the author with the goddess Athena, a very arrogant move for an author who is also a nun with vows of humility and obedience. Sor Juana does not claim defamation, or that she did not authored the work. She does not claim the violation of her property rights either, because the problem is not commercial gains to be attributed. Her mention to innovation is characteristic of the time, and a too contemporary reading of it of purely ironic might be slightly anachronistic:

...porque hay muchos que estudian para ignorar, especialmente los que son de ánimos arrogantes, inquietos y soberbios, amigos de novedades en la Ley (que es quien las rehusa); y así hasta que por decir lo que nadie ha dicho dicen una herejía, no están contentos.

[...because many study to ignore, especially the ones that are arrogant, restless, and haughty, friends of novelties in the Law (which refuses those novelties); these people are not going to be happy until their efforts to say what nobody has said before, make them say an heresy.]

One of the problems Sor Juana faced, was that she had not been formally denounced or accused, but was being publicly criticized by an anonymous

detractor. This anonymous person, which is know commonly believed to be the bishop of Puebla, speaks from a position of authority, whose anonymity does not authorize. Aware that the the person behind the pseudonym was playing with that double standard, she argues in her defense that she cannot accept the authority of Sor Filotea, a nun like her, over the bishop's who protects her. She dares his accuser to denounce her «Si es, como dice el censor, herética, ¿por qué no la delata?» [If it is, as the censor says, heretic, why doesn't he denounce the work?» The sentence she writes immediately after this one is important because it connects her previous dare, with secular censorship. While theology falls under the aegis of the Church, «art heresy» is judged by the public with discrete laughs or criticism: «pues una herejía contra el arte no la castiga el Santo Oficio, sino los discretos con risa y los críticos con censura» [because an heresy against art is not punished by the Inquisition, but by the discreet people with laughter, and by critics with censure.»

Under the law at the time, what would have happened if Sor Juana had been brought to trial? Not much to Sor Juana. While the law authorized the Church to censor theological works, and grant printing privileges to those works, the law is clear in that censorship has to occur *before* the book was printed, not after. The license that accompanies the *Carta Atenagórica* is an official document establishing that the work has been *officially censored and authorized* by the Church. Furthermore, the law is unambiguous in that there is no post-printing censorship in the Spains. Trials related to the printed book had to be exclusively argued in secular tribunals. If Sor Juana's case had been brought to court, the case would have been swiftly dismissed, in spite of her affiliation to a religious order.

Unfortunately, the Golden Age of the Spanish Empire was reaching its end, and the house of Habsburg was at its weakest. Carlos II «The Bewitched» would leave no heirs, and his death would lead to the War of the Spanish Succession 1701-1714. From then and until the 1898 war, the Spanish empire lived a slow decline, inversely proportional to the rise of the Dutch, English, French and American empires. It was during those two centuries that copyrights and intellectual property laws were crystalized. The fact that these laws were championed by the powers on the rise, and resisted

by the dawning Portuguese and Spanish empires is not coincidental, as those laws were part of mechanisms instrumental to the slow but steady transfer of power and knowledge from one empire to the others.

The Ailing Empire 1700-1898

In his deathbed, Charles II, bequeathed his possessions to Philippe, grandson of his half-sister and of King Louis XIV of France. Philippe thereby became Felipe V of Spain and, since he was also the younger son of the Dauphin of France, Philip was in the line of succession of the French throne. The idea of a multi-continental empire of Spain passing under the control of Louis XIV provoked a massive coalition of powers to oppose Philip's succession. The war was concluded fourteenth years later, by the treaties of Utrecht (1713) and Rastatt (1714). As a result, Felipe V remained King of Spain but was removed from the French line of succession, averting a union of the two kingdoms.

As with Felipe II, one of the central challenges Felipe V faced was redressing the public finances, and the construction of institutions that would guarantee the governance and the administration of the empire. The measures Felipe V, and his heirs undertook to achieve these goals have been termed the Bourbon Reforms. As with the changes undergone under Felipe II, the Bourbon Reforms also reduced the power of the Church, and were concerned with the regulation of the printing-press. While the French influence of the Bourbon led to the recognition of some rights to authors, these rights were second to the fundamentally different Spanish tradition which became crystalized in a *sui generis* Printing Tribunal 1714-1830.

1714-1830 The Printing Tribunal

The roots to this secular tribunal are to be found in the legal definition and regulation of the public domain, and in the notion of *regalia demanial*, the king's prerogative to legislate the public domain on behalf of the people, whose natural rights had been delegated to him. Javier García Martín has argued that Spain was founded in the *Partidas*, with the objective of achieving the greater common good. To this end, Spain's relation to the Church, definition of the public domain, and Printing Tribunal constitute the three pillars on which the Spanish monarchy founded its governance in the eighteenth and nineteenth centuries.³¹⁸ García Martín argues that the root of the figure of the *Juez the Imprentas* [Supreme Justice for Printing] can be traced back to 1570, in Flanders.³¹⁹

As seen earlier, the Royal edicts of 1502 and 1558, establish that in the case of books, the collective interest will supersede the one of the individual. The Royal Ordinance of 1570, further extends this view paying special attention to books for primary education and other «first-necessity books.» This same ordinance also creates the figure of *prototipógrafo* or *protoimpresor*, a royal representative with a series of faculties that García Martín studies in that they constitute a delegation of the royal prerogative to regulate the public domain.³²⁰ The ordinance established that this royal representative could not be under the line of command of anyone at a printshop (art. 1); that he could grant printing licenses (Art. IX); examine and approve artisans who wished to be certified as printers, or in any other capacity the governor of Flanders, (art. XXII); and, finally, following the indicatives of Trento, to visit all printing shops at least once a year (art. V). Non coincidentally, the system was first established at the epicenter of the wars of religion.³²¹ In the Disposition of the June 13, 1627 (R. 8.16.9), Felipe II creates the function of «*Comisario de Imprentas*,» extending it to Castile, and the system gets finally centralized under a Supreme Court Justice in 1714, giving birth to the Printing Tribunal.

It is important to recall that this system only applies to the printed book, and not to the manuscript which circulated under significantly less restrictions. For example, in 1621 Felipe II created a commission to explore the changes that the administration needed [La Junta de Reformatión]. The commission suggested, among other things, that for ten years no printing license be granted to novels or comedies because, from the perspective of the commission, they were not beneficial to the education of the youth, and they could still exist in manuscript form.³²²

The appointment of a *Juez de Imprentas* [Printing Justice], comparable in its ranking to a Supreme Court Justice, is indicative of the proclivity of Castilians to go to trial. Stationers, printers and booksellers presented their arguments in a significant number of cases. As with England, France, or the United States, they did it to defend their private commercial interest, but the arguments they presented in court are also indicative of the peculiarity of the Spanish system. For example, in 1710, the booksellers of Barcelona challenged the privilege granted by Carlos III (Habsburg) to the family Figerò, to print exclusively all gazettes, orders of appointment, and official and political documents of the state. The king's response to the claim justifies the ruling first because it was a royal responsibility to regulate the public domain, and then, because in those troubled times a stringent control would help censor and control the distribution of unwanted information. The king compares the public domain to the public sources of water: «...pues no es punto dudable, que se pueden ocasionar graves daños con la impresión de algunos escritos, no menos que si se emponçoñaran las fuentes públicas, de donde breven todos...» [...there is no doubt that the printing of certain documents can cause significant harm, no less than the act of poisoning the public sources of water...]³²³ The second aspect of this response, which mixes considerations of the censorship and the public good, is also important.

As mentioned earlier, the printing monopolies granted in England and France in the sixteenth century empowered corporations that threaten *de facto* de authority of the state. The solution that both England and France came up with to face this problem, was the empowerment of another class of

people to create a balance between the two. Both English copyrights and French author laws empowered authors.

In Spain, the regulation of the public domain created an intellectual monopoly over the notion of the common good, which also contributed to increase the power of corporations to the point of threatening the governance of the state. However, as we mentioned with Felipe II, and then again with the Bourbon Reforms of the eighteenth century, the corporations the Spanish system risked to over-empower were religious corporations, and the aristocracy. For example, the increasing secularization of the censorship, and the creation of the secular Printing Tribunal were measures directed at keeping under control the power of the Church. For instance, the powerful Printing Justice Juan Antonio Curiel de Tejada fiercely opposed granting extensions to privileges given to religious organizations, and pushed for laws prohibiting that printing privileges could be left to religious organizations after an author's death. In 1756 Curiel writes:

Nunca he concedido privilegio para reimpressiones á otras comunidades que á las madres de los autores, ni á otros particulares que á los herederos ó que traen causa de ellos, lo hé negado á cuantas obras pías o comunidades los pretenden por vía de limosna. Y cuando ay interesado de Justicia le doy con mucho gusto y aun provoco á que le pidan á los impresores porque importa fomentar estos oficios con el interés. (AHN, Consejos , leg. 50693, ff 5.5v).

[I have never granted a privilege to reprint a work to any community except for the mothers of authors, nor to any private party other than to the rightful heirs who bring proof of it. I have denied it to every pious community that came begging for it. [But] when there is someone rightfully interested, I grant it happily, and encourage printers to ask for privileges, because it is important to promote these industries with financial incentives.] (AHN, Consejos , leg. 50693, ff 5.5v).

Both «comunidades o personas privilegiadas » [religious corporations and the aristocracy] were forbidden since 1766 (Nov. R. 8.15.5) to have printing presses «por su propia autoridad» [based on their own authority] which they placed «dentro de a Clausura y en parajes inmunes,» [in privileged locals that could not be inspected by civil representatives].

1767-1847: The Republic of Letters

The legal recognition of self-expressive authorship and individual author rights in Spain occurred under the Bourbon Reforms of Carlos III (1758-1788). It was further extended under the Liberal Resistance of Cadiz against José Bonaparte (1808-1813), and under the Liberal Triennium (1820-1823). Carlos III's Royal Edict of November 14, 1762, abolished all taxes on books, and set price limits to books of «first necessity» (i.e. the ones needed for alphabetization). The Royal Edict of March 22, 1753, placed reproduction rights on the original author, which the Royal order of October 20th, 1764 specified, establishing that the privilege granted to authors would be perennial, as long as the rightful heirs applied for it again. Following the old Spanish tradition that those institutional and personal rights were contingent on publication, the edict establishes that the privilege would be invalid if it fell on *manos muertas* [mortmain] that would it keep the works from the public. The Royal Edict of June 14th 1778, further specified the one of 1764, declaring the privilege of Libraries, Academies, and Royal Societies to print the works by their members. Carlos III delegated extensive powers to the Printing Tribunal through the Royal Orders of May 1, June 28, and November 29, 1785. The Tribunal could examine printing disputes, but also cases of defamation for which the author would have had to pay trial costs, reparations and go through public retraction, if he or she was not able to explain his opinions to a group of experts specially convened to examine his or her arguments.

The most important law for the purpose we are considering was the Royal Edict of March 1783 recognizing «the nobility of work.» The law in Spain up to then, considered all forms of craftsmanship, industry and

commerce to be shameful and degrading. The privileges of «hidalguía» were to be lost if one was proven to have accepted payment for one's work, other than royalties for public office or rents on one's state. Over one million individuals were registered in Spain as nobles at the time, more than twice the number in France, with half the population, and accounting for over four percent of the population. The law of 1783 was twofold. On the one hand, it opened the industries of silk, cloth and paper to the working classes and the bourgeoisie. On the other, it also opened the possibility that anyone could own a printing press, a newspaper, or a publishing house. The law also took the first steps toward the recognition of authorship as a socially accepted and noble profession.

The laws of Carlos III remained in effect during the turbulent times of the French Revolution in which the Spanish branch of the Bourbon dynasty tried, unsuccessfully, to prevent the beheading of Louis XVI. With the abdication of Carlos IV on behalf of the Bonaparte family, Spanish-America proclaimed the breach of the social contract established with Carlos I, and declared independence.

1803-1823: Freedom of the Press and Literary

Property

The Republicans of Cadiz, all of them writers or closely connected to the practice of writing, passed a series of laws stressing freedom of the press, inspired by French legislation. In their deliberations, they discussed explicitly «authorial property,» and the laws they passed in 1803 ended printing privileges, and established the Printing Tribunal as an independent and autonomous body. The Tribunal's attributions to protect the «public interest» and «freedom of speech» were further expanded in the Spanish

Constitution of March 19, 1812 («La Pepa»), and when José Bonaparte left Spain definitively in 1813.

On August 5, 1823, The Spanish Cortes passed a law recognizing for the first time «literary property» of authors. But the law had no effect once the French army of the One Hundred Thousand Children of Saint Louis re-established the absolutist regime of Fernando VII, during The Ominous Decade 1823-1833. After 1833, the law on literary property was reinstated. The laws of January 4, 1834 and May 5, 1837 limited literary property to life of the author plus ten years, regulating the extent of the legal protection to author's individual property rights.

1847- : Intellectual Property

Seven years of debates on the laws of 1837, led to the extensive law of June 10, 1847 that declared obsolete all printing privileges.

Mariano Roca de Togores argued for the necessity of the law for the progress of the Nation on the basis of education, and fully recognizing the contradiction between «las más altas producciones del espíritu y su casi nulo rendimiento economic» [the highest productions of the spirit and their almost null economic performance]. Togores and the rest of the Spanish legislature, understood that literature and therefore literary property was created at the moment of publication and distribution of a work, and thus the original owner of the literary to be society in much the same way an individual belonged to a nation. The author was recognized as having tutelary rights of guardianship over the work, that were in turn to be protected by the State as a constitutive part of it, a national:

Más en este punto se tropieza con una dificultad gravísima, la mayor quizá que se ofrece en esta materia. Desde el momento en que se publica una obra, ya sale hasta cierto punto de su jurisdicción privativa del autor y se hace patrimonio de la sociedad respecto de su

uso y aprovechamiento. Un libro por ejemplo no puede equipararse con una alhaja que se deja a los herederos y a quienes es lícito sepultar o destruir a su antojo, cual pudo hacerlo su primitivo dueño; el Estado mismo tiene un derecho a que no se le prive de los beneficios de una obra por incuria, por capricho, o tal vez por dañada voluntad de aquellos en quienes haya recaído la facultad de disponer de ella. Razón por la cual los legisladores de otros países, y a su vez el gobierno en el proyecto que presenta, se han visto precisados a templar la rigidez del principio de la propiedad literaria, no igualándola cumplidamente con la demás, en cuyo caso hubiera bastado comprenderla en las reglas comunes del derecho civil, sino antes bien sujetándola a una legislación particular como lo es su índole y naturaleza. [Diario de Sesiones de las Cortes, Senado, «Proyecto de ley sobre la propiedad literaria,» palabras preliminares del Ministro de Instrucción Pública (legislatura de 1847, sesión del 20 de febrero de 1847)]

[However, in this point we encounter a serious difficulty, perhaps the greatest there is in this matter. Since a work is published, it abandons the private jurisdiction of its author and becomes the patrimony of society in what concerns its use and utility. A book, for example, cannot be equated to a jewel that is left to some heirs who then have the right to hide it or destroy it at will, as the original owner also could; the State has the right to not be deprived of the benefits of a work for negligence, caprice, or for damaged will of the persons on whom the faculty of using of it had fallen. This is the reason why legislators in other countries have also decided to temperate the rigidity of the principle of literary property, not equating it with fully to other forms of property, in which case it would have sufficed to place it under civil right, but placing it instead under particular legislation according to its character and nature]

During a debate in the Cortes on April 17, 1847, the Spanish senator García Goyena presented the idea of literary property as part of literature itself and equated the work of the legislator to that of a fiction writer:

La propiedad literaria, señores, es una ficción, una creación del legislador fundada en motivos de justicia respecto del autor y en motivos de conveniencia respecto del público.

[Literary property, gentlemen, is a fiction, a creation of the legislator based on justice in respect to the author, and in convenience in respect to the public.]

Literary property was defined in article one of law of February 7, 1848 as a «reproduction right:»

Se entiende por propiedad literaria para los efectos de esta ley el derecho exclusivo que compete a los autores de escritos originales para reproducirlos o autorizar su reproducción por medio de copias manuscritas, impresas, litografiadas, o por cualquier otro semejante.

[Literary property is understood to the effects of this law as the exclusive right that is competence of the author of written originals to reproduce them or authorize their reproduction through hand writing, printing, lithographing, or through other similar method.]

Goyena makes the case for «Literary property» arguing it is deontological and pragmatic, a fair reward for authors, and a convenient option for the public, but also a social contract requiring a public agreement similar to the suspension of disbelief a reader accords to a work of fiction. Goyena was an astute man of letters, and the first of his claims is addressed to writers and editors, to whom he refers as «creators,» while the second and third resonate with the concerns of distributors, readers, and the «tax-payer» at large. Debates on the costs of a law for the protection of authors and inventors were held across Europe, in Latin America and in the United States. The

arguments made by proponents of author rights in Europe used natural rights, and deontology, while in the Anglo-Saxon tradition where natural rights were distrusted, the case for intellectual property was made on the basis of the «unpleasant hard work» involved in the making of a work, and on the necessity of giving an incentive for authors to make, and give to the public good works. The arguments made by detractors of the idea were based on the fact that all works and inventions are interconnected and that individual claims of full responsibility in the creation of a particular work are in consequence not sustainable. Authors could thus not to be deemed proprietors of such works on the basis of origination. Granting monopolies to publishers was also criticized on the grounds that it affected fundamental principles of the «free market» and constituted the ultimate loss of society in as much as monopolies tend to increase prices and limit circulation of the products over which they exert their monopoly. A work once published was made freely available and there should be no limitations on republication because they benefitted society, an argument Kant fiercely rejected.

Although it is very difficult to compete against «free» there is something that beats it, and that is what Goyena found in «convenient». Convenient is a mix of simple, and orderly. It addresses the claims made by readers since the invention of the press of the hectic environment created by disorderly publication in which the burden of discerning the needle in the haystack fell completely on the reader (a criticism voiced in Lope's *Fuente Ovejuna*, for example.) In the argument presented by Goyena, the amount to be paid is insignificant, in comparison to the convenience it brings to the public .

Article 2 of the law of February 7, 1848, extends author rights from the 1834 limitation of life-plus-10 to life-plus-25 years. And article 3 specifies that both literary and scientific authors, translators, composers, calligraphers, graphic artists, painters and sculptors should benefit from its provisions. The law also specifies that the basis of this protection is publication and distribution, and that no author could benefit from its protection if he or she could not prove that a copy of the work had been sent to the National Library and another to the Ministry of Public Instruction before having been commercially marketed. (Art. 13)

The laws of January 10, 1879, and September 3, 1880 replaced the one of 1847, which remained in effect for over a century, until 1987. It was those laws that first introduced the concept of «Intellectual Property» into Spanish law. The path towards the new laws began in 1876 when Gaspar Núñez de Arce and Emilio Castelar —both congressmen and members of the Honor Committee of the Artistic and Literary Association founded by Victor Hugo— commissioned the lawyer Manuel Danvila Collado to draft legislative language that would serve to re-establish the perennial rights of authors over their works. The resulting «Project for a Law on Literary, Artistic and Scientific Property» (Biblioteca del Archivo de la Presidencia de Gobierno, 3478/9, 3483/9 & 3484/9) was not well received by the Liberals of the Restoration, most of whom were professional technicians and engineers who were more empathetic with Anglo-Saxon Liberalism than French notions of author rights. In response, the wording was changed from «Literary, Artistic and Scientific» to «Intellectual» property on the grounds that:

...la comisión juzga muy preferible emplear en el título de la ley la palabra intelectual, que comprende las producciones literarias, artísticas y científicas, pues a consecuencia de llamar siempre de propiedad literaria a las leyes y a los convenios internacionales sobre esa material se ha descuidado, fijando especialmente la atención en las letras, el atender cual se debía en las unas y en los otros a las ciencias y a las artes. [Diario de Sesiones de las Cortes, Senado Legislatura de 1878, Sesión del 16 de diciembre.]

This commission judges most preferable to use the term intellectual in the title of the law, which includes literary, artistic and scientific productions, because as a consequence of always naming literary property our laws and international agreements, we have focused on the letters, and not given the attention they deserved to the sciences and the arts.

The debate that followed is relevant in that it exemplifies the tone of the discussions in transatlantic Spanish-America, a tone that is contrary to the commonly accepted perspective suggesting that continental author-centric deontological arguments oppose Anglo-Saxon public-interest rationales. In the case of the Spanish world the opposite occurs: the protection of the public interest is undertaken from an author-rights perspective, while the liberal-mercantile rationale of Anglo-Saxon descent advocates for individualistic rights, including freedom of contract. The Count of Casa Valencia presented this latter perspective and argued in favor of ascribing intellectual property under common property, because any other treatment would «limit the freedom of the author to freely negotiate with his work.» His intervention was answered by the Marquis of Valmar who stated that:

Desde luego la propiedad intelectual tiene dos aspectos diferentes que no pueden desconocerse: el aspecto del lucro y de la gloria; cuando la propiedad común u ordinaria no tiene más que uno. Se trata de dos propiedades diferentes (...) Ya creo haber dicho que el monopolio de la propiedad intelectual es contrario a la civilización universal, y por eso se establece esta diferencia. La falta de propagación dañaría a la gloria misma del autor y sería ciertamente contraria a los nobles fines de su voluntad y de su entendimiento.

[It is clear intellectual property includes two different aspects that we cannot overlook: the aspect of profit and the one of glory; while ordinary and common property includes but one. These are two different properties. (...) I recall mentioning that the monopoly of intellectual property is contrary to universal civilization, and that is why we establish this distinction. A lack of propagation would hurt the author glory itself and would be certainly contrary to the noble goals of his/her will and understanding.]

Valmar's discourse, like that of Togoires before him, resonates deeply in the Spanish context where until 1783 writing for a profit was considered degrading. Profit, mercantilism and intellectual property monopoly are

resented as contrary to the universal good and inconsistent with the noble intentions of the author. However, the argument continues, intellectual property monopoly is also contrary to the personal interest of the author whose glory would suffer by limiting the circulation of his or her works.

Emilio Castelar, first advocate of author rights in Spain at the time, did not participate in the debate as a congressman rather through his writings and publications in Spain and Mexico that appeared most notably in his column in *El Liberal*. After his short term as president of the Spanish First Republic (1873-1874), and the Restoration of the Monarchy in 1874, Castelar decided to undertake a very long journey, having Paris as his home base. In his column, he reported on the case of *Cinquin c. Lecocq* before the Cour de Cassation in France in 1878, where the jurist André Marillot argued in favor of a dual system of economic and personal author rights using the term «moral rights» for the first time. The French jurists argued over whether author rights were non-specific personality rights as the Kantian Monist system sustained; or whether they were two distinct rights: the right to economically exploit one's creative property and the acknowledgement that the author's work is a direct manifestation of his or her personality as Hegel's Dualist system proposed. In *Was ist ein Buch* (1797) Kant had argued that creation is a manifestation of the individual will of an author, an action rather than an external object, and thus that author rights are personality rather than property rights. Within Kant's theory rests the notion that personality rights are a derivative of the inalienable right of every man to communicate and express his ideas, and thus an issue fundamentally rooted in freedom of speech. Hegel, on the other hand, argued that a work is an «externalization of the will of personality» and can thus be owned. As Castelar notes, it was Karl Gareis and Friedrich von Gierke who, elaborating on the Kantian Monist philosophy developed the idea that personality rights are superior rights that protect the person and all concrete manifestations of his or her will, while author rights concern only the economic exploitation the artistic property, a system from which stems the German tradition of intellectual property. André Marillot in France and John Kohler in Germany argued in favor of a dualist theory, that asserts that authors have both personality and economic rights over their works, emphasizing with Gareis and Gierke that personality rights

should take precedent over economic rights, and, when in conflict, circulation and freedom of speech were to predominate over economic and patrimonial concerns. It is this dual system that is at the root of the French *droit d'auteur*, (See for example Art. 2, of the Law of March 11, 1957).

Arguably, Spain adopted a dual model, but remained intentionally opaque on the essence of intellectual property that, together with the property of water and other goods that today are classified as «public,» was characterized as «special property» in the Spanish law of 1879 :

La propiedad intelectual para los efectos de esta ley comprende, para los efectos de esta ley, las obras científicas, literarias o artísticas que pueden darse a la luz por cualquier medio (art. 1)

[Intellectual property, for the effects of this law, is comprised of scientific, literary or artistic works that can be published in any form.]
(art. 1)

While the manuscript is still legally regulated by notions of material property, intellectual property is defined as a form of property that occurs solely after publication. However, the the Law of 1879 is based on an honor system, because no proof of publication needs to be submitted. This was changed with the creation of the Intellectual Property Registry under the Ministry of Promotion (Fomento). (Art. 33 to 42), and with the definition of «works» in the regulation of the law, published on September 3, 1880:

Se entenderá por obras, para los efectos de la Ley de Propiedad Intelectual, todas las que se producen y puedan publicarse por los procedimientos de la escritura, el dibujo, la imprenta, la pintura, el grabado, la litografía, la estampación, la autografía, la fotografía, o cualquier otro de los sistemas impresores o reproductores conocidos o que se inventen en lo sucesivo .

[It will be understood as works, to the effects of this Law of Intellectual Property, all the ones that are produced and can be published

through the means of writing, drawing, printing, painting, engraving, lithographing, stamping, autographing, photographing, or any other printing or reproductive method known or to be invented. (Art. 1)]

The rights of heirs were also extended in a controversial manner that infuriated publishers and editors. Article 6 established intellectual property protection for the life of the author plus eighty years. Those rights were commoditized and could be acquired by an editor or publisher for the whole period only if there were no direct heirs of the author. Publisher's rights, however, would expire twenty-five years after the death of the author and pass onto the author's heir for the remaining period of fifty-five years, at which point they could again be acquired by the publisher for those remaining fifty years. The definition of «author» was also important:

Se considerará autor, para los efectos de esta Ley de Propiedad Intelectual, al que concibe y realiza alguna obra científica y literaria, o crea y ejecuta alguna artística, siempre que cumpla las prescripciones legales.

[It will be understood as author, to the effects of this Law of Intellectual Property, the one who conceives and brings about a scientific or literary work, or the one who creates and executes an artistic work, as long as the legal prescriptions are followed. (Article 2)]

The definition of an author for the regulation of 1880 establishes property in the author, and authorship in the maker of the work. It excludes pre-existing ideas of work for hire, or royalties as pensions for one's work. And it recognizes the author as a professional. It also recognizes the «small intellectual property» of interpreters, in line with the central importance of the spectacle in Spain. The long protection running the life of the author plus 80 years was later reduced when Spain joined the 1880 Berne Convention.

Up to that time, the author in Spain was not unionized nor did she/he belong to associations as was increasingly the case in the rest of Europe. An author had an individual relationship with one editor, marked with uncertainty, especially for the writer. Authors would normally sell their works and transfer their whole property to their editor. If the text was successful, the economic benefits would be cashed by the editor alone. This was the case of José Zorrilla and his editor Sinesio Delgado, a case studied by Jesús Martínez Marín (2002). Zorrilla recounts in *Recuerdos* how the law of 1847 was inconsequential, as he tried to convince his editor to share some of the benefits of the immense success of his play *Don Juan Tenorio* (1844). Zorrilla was reduced to poverty and had to plead his case to the government. As a result, the most famous dramaturges of the time such as Duque de Rivas, Leopoldo Augusto de Cueto, Patricio de la Escosura and Juan Eugenio Hatzenbush decided to join with José Zorrilla to establish the Sociedad de Autores Dramáticos in 1844. Theater and music were by far the most profitable writing activities of the time. A series of associations charged with collecting author royalties were founded in the following years: the Asociación de Autores, Compositores y Propietarios Dramáticos (1879); the Sociedad Lírica Española (1881); the Sociedad de Autores, Compositores y Editores (1892); the Asociación Lírico Dramática (1898); and finally the Sociedad de Autores de España (1899), that regrouped them under one aegis.

Spanish editors were fighting on several fronts with sometimes contradictory positions: to battle against author heirs, they argued for full recognition of intellectual property under common civil law; to guarantee the monopoly of intellectual property they would argue the status of «protected industry» to be homologated with paper, or news; to increase their competitive position in the Americas they would argue for lifting the protection on paper and raw printing materials. In 1922 they constituted the Chamber of the Book and in 1923 they established the Official Commission for the Book, that was in charge of providing information and technical advice to the Ministry of the Interior that was conducive to the establishment of bilateral treaties on Intellectual Property Rights. By 1928, Spain had treaties with Colombia, Costa Rica, Ecuador, El Salvador Guatemala, Mexico,

Panamá and Paraguay; but not with the main producers of illegal copies of Spanish editions: Argentina, Cuba and Brazil.

During the two centuries covered in this section, from 1700 to 1898, the Spanish model of authorship as recognition for having accomplished a difficult task in benefit of the common good, coexisted and competed with notions of rights to which writers should feel entitled. Copyrights and *droits d'auteur* recognizing legal protection to every text, regardless of its quality, asserted progressively their supremacy over the Spanish system. However, as we will examine in the next section, the underlying Hispanic specificity was not completely effaced.

Chapter IV: Contemporary Times

Dusk of the Spanish Imperial Project

Chapter one brought to the test today's prevalent narrative tying creativity to copyrights and claiming that the volatility of the latter would necessarily result in a crisis for the former. An epistemological analysis showed that the inference was based on a particular structure, governed by the assumption of a stark discontinuity between Renaissance and Enlightenment, and by a reductionist notion posing copyrights as creativity's efficient (functional) or final (teleological) cause. The assumption of a causal relation copyrights-creativity was found to ignore the fundamental autonomy of the literary and artistic practice, and to contradict the very notion on which copyright law is based: the artist's self-expressive creative originality. A cautionary note was raised concerning the use of the term «creativity» because it confounds under one semantic category the different practices of literature and the arts, scientific discovery, and technological innovation. This reductionist view is reflected in the legal structuring of copyright and patent law under the umbrella of intellectual property rights, and has produced uncanny juridical conceptions in history, such as the attribution of authorship and copyrights to the inventor of the typeset in which the works were printed in Renaissance Italy, or the fact that today's laws consider software and poetry as identical practices.

An examination of the claimed discontinuity between Renaissance and Enlightenment led to the realization that, while copyright and author laws did not exist as such in the Renaissance, other types of conceptualizations of authorial property and different regulations of reproductions and derivatives did exist long before the eighteenth and nineteenth century when copyrights and author laws were crystalized.

Discussions on authorial property were traced back to first-century Roman Hispania, when Seneca distinguished how «both the author and the bookseller own the [literary] work, but in different ways.» Two complementary views of the author-text relation were exemplified through the Roman epigrammatist Martial (c1) and the Medieval writer don Juan Manuel (c14). Martial used the double understanding of the Latin word *liber*,

which refers both to freedom and a type of book, to suggest that published works were akin to freemen, and should therefore not be enslaved or plagiarized. He then argued, successfully, that his books ought to be legally equated to children, and that he, as their father, should receive the prestigious distinctions awarded in Rome to the «father of three.»

Building on Martial's ideas, in fourteenth-century Castile, don Juan Manuel argued that it was the state's responsibility to protect «well-crafted works,» and brought to light a thought-provoking notion of authorship attribution, not to the *first* writer, but to the one who had made the *best* work. Manuel's idea that a legitimate right to property may originate in the work invested in it, prefigures the very similar notion attributed to John Locke in the seventeenth-century. However, while Locke cites the work of a farmer to improve bare land that he renders productive as an argument for individual property rights, Manuel is concerned both with the attribution to a noble of a well-crafted work which is to remain in the public domain, and with the state responsibility to protect this type of works. The different perspectives were found to be indicative of two opposing conceptions of the use, attribution and appropriation of «common-pool resources» or «public domain.» Locke's claim entails a patrimonial take over, while Manuel's is a deontological «act of *imperium*» [nation building]. Don Juan Manuel's attitude towards his œuvre—which he compiled, prologued, had copied, and placed for reference in the monastery of Peñafiel—was found to be indicative of the changing practice and experience of the book in the twelfth century that Roger Chartier termed «scripturization of society.» The evolution of the concept of common-pool resources to «public domain» was also found to have occurred progressively, from the twelfth to the fifteenth century, and in consonance with the development of the notion of universal natural rights, and «judicial humanism.» This process was accompanied by a shift in the rationalization of the source of the power of the king, from the notion of *auctoritas* derived directly from God to the idea of a *regalia demanial*, a royal attribution stemming from the delegation to the king's persona of the natural rights of people, for the protection of the *demanio* [public domain].

The popularization of the printing press during the Renaissance, Enlightenment and Romanticism continued and deepened these combined processes. While the printed book did not replace the manuscript —both practices complemented each other for over two centuries and were regulated through separate laws—, the printing press did force the Spanish Empire to regulate the public domain in the sixteenth and seventeenth centuries. The foundational royal edicts of 1502, 1558, and 1610 were found to be of particular importance because they formed part of a series of laws explicitly termed «acts of *imperium*» meant «to build the national institutions that would guarantee the governance and administration of the [colonial] empire.»

The specificity of the Hispanic model was investigated through a series of exemplary cases. Manuscript-books containing trade secrets were found to convey lineage, a fact that evinces the importance attributed to information and knowledge in Renaissance Spain. The value of these books was considered «value in existence» rather than «value in circulation» which is inherent to copyrights. Then, the relation author-industry was explored through three contracts referring to the works of Boscán. Contrary to the common perception that privileges were granted to authors only to protect their financial investments, this examination showed that the financial burden fell usually on booksellers, and that the privilege granted to authors empowered them in their negotiations with them. Furthermore, these contracts showed that the author felt strongly compelled to define his position as an author-knight whose works were akin to heroic deeds serving the public good. The figure of the author-knight was found to be pervasive in the Hispano-transatlantic at least until the death of Alfonso Reyes, and sporadic at least until Octavio Paz. The evolution of the term «creativity» and its eventual association with literary and art practice, and intellectual production in general was documented in the successive editions of Lebrija's dictionary, from 1492 to 1983 (by then the Dictionary of the Union of Royal Academies of the Spanish Language).

The double case of Mateo Alemán and Miguel de Cervantes showed that Renaissance authors saw the conception of the author-work-character relation as libertarian from previous identitarian conceptualizations

characteristic of what Foucault termed «the legal appropriation of discourse.» This perception was made possible first by the shift in the conception of property from identitarian to functional with the invention of the concept of bankruptcy, and the idea of the «honorable debtor», and then by the progressive valorization of work as a means to attain recognition and respect. How Alemán and Cervantes addressed the publication of unauthorized sequels to their works, confirmed the prevalence of the notion of the author-knight, and the idea that authorship attribution ought to correspond to the *best*, and not necessarily to the *first* author. Finally, the 1691-1694 controversy surrounding the publication of Sor Juana's *Carta Atenagórica* without her consent evidenced how religious corporations were both tied by secular regulations, and defy them at the turn of the eighteenth century.

With the death of Carlos II in 1700, the Spanish Empire entered a period of slow decline that lasted two centuries. The British and French colonial empires on the rise sought to appropriate positions that the ailing Spanish one could no longer maintain. It is in this context that, in England and France, copyrights and author laws were crystalized. In Spain, a *sui-generis* supreme Printing Tribunal, in place from 1714 to 1830, sought to protect and continue the Spanish tradition that had been itself crystalized between 1480 and 1610.

As with the copyrights and author laws, the Tribunal set limits to the increasing power of corporations that could represent a threat to the state. However, while copyrights and author laws sought to limit the power of guilds and booksellers, the Printing Tribunal kept in check the constant claims of religious corporations. Bourbon Reforms aimed at redressing the finances of the state, and the Tribunal's mission included providing incentives to the printing industry, which it did.

The judicial archives of the Tribunal evidence a continuation of the Spanish project centered on the regulation and protection of the public domain. Spanish-specific practices such as the license [preprint censorship] were compulsory, and the use of the criteria of quality rather than originality for authorship attribution was often used. The opposition between the Spanish and Anglo-French models was evidenced through the strong

correlation between the affirmation of the later, and the parallel receding of the former. For example, on the one hand, Carlos III Royal Edicts of 1753, and 1754 recognized *droits d'auteur* and placed reproduction rights on the original author, and, on the other, the one of 1763 suppressed the Spanish-specific *tasa* [price cap to printed books] that had been compulsory since 1558. The double movement empowered both authors and printers at the expense of the public domain.

With the dissolution of the supreme Printing Tribunal, a cornerstone of the Spanish national and imperial project disappeared. From 1830 and until the Spanish-American war of 1898, Hispanic authors sought to fill the gap left by that loss and to speak directly for and to the people, in the name of a Hispanic spiritual and universalizing Humanism which posed itself as an alternative to the materialism of the new emerging empire: the United States. As such, Hispanic authors posed as ambassadors of modernity and progress, indispensable for the construction of a new humane national project. In order to achieve that goal, they had to find a model that combined the philosophical ideas of Enlightenment and Romanticism with a spiritual component akin to the «essence» of Hispanism. They found what they were looking for in the works of the German philosopher Karl Christian Friedrich Krause (1781-1832). «Krausismo» was rife amongst the conservative Spanish and Criollo elites in the Peninsula and the Americas from 1830 to 1898.³²⁴ It was during this time of imperial debacle and self-proclaimed heroic authors in power, that literary and intellectual property laws were passed. The successive iterations of the Literary Property Law in 1834, 1847 and 1878 progressively extended the term of the copyrights granted to authors and reduced the public domain. In 1879 and 1880, a new congress, formed mostly by engineers this time, passed in the Peninsula the first Hispanic Intellectual Property laws, which remained in effect practically unchanged until the reforms of 1987. In 1886 Spain ratified the Berne Convention for the Protection of Literary and Artistic Works, while three years later, in 1898, the «catastrophic defeat to the United States» put a hard term to the illusion of an overseas Spanish empire. The idea of a Mexican Empire (1831-1846) ended a few years earlier, also through American Intervention, in 1846-1849.

Cinema and the New Empire

The turn of the twentieth century was marked both by the combined emergence of the United States as the new world power, and the invention of the cinematographer. As with Spain and the printing press in the Renaissance, the regulation of cinema was inscribed in the context of imperial expansion. This time, however, the relative position of copyrights and public-domain laws was inverted. The trace of the Spanish tradition was not to be found in dominant discourses, but rather in marginal claims for access (both to works and power) made by (mostly privileged) minorities in the United States and France. These claims were recognized, partially legitimated, and coopted through the establishment of funds such as the national endowments for the arts and humanities in the United States, and through the foundation of academic disciplines such as cultural economics or author-criticism.

The strategic potential of cinema as a tool for the «construction of consensus» was discovered in the first quarter of the twentieth century,³²⁵ and the monopoly of its military use claimed by the state in England, Germany, Russia and the United States through the establishment of ministries of propaganda, and information agencies. During the Cold War, the United States backed the global expansion of its cinema under the umbrella of a wide-ranging military strategy.³²⁶ To justify this position, cinema was casted as entertainment within «information industries,» a classification that falls inline with the juridical taxonomy which places creativity, innovation, invention and knowledge under one centralized body of laws. The combined reading of José Ortega y Gasset and Walter Benjamin showed that cinema-entertainment represented one particular form of cinema characterized by the «distracted experience» and «unchallenged reception» described by Benjamin's *Work of Art in an Era of Technical Reproduction*³²⁷ (1936), but that another form existed, characterized in turn by a «focused experience» and «critical reception»

described in Ortega's aesthetics,³²⁸ and represented by *cinema d'auteur*. An examination of *la politique des auteurs* confirms that it is the setting up of romantic authorship in cinema, that transforms the reading practice into an hermeneutical quest to discover the traces of the author's creative persona.³²⁹

La politique des auteurs was a political movement involving filmmakers, intellectuals, and other representatives of the cultural and entertainment industries over the regulation of the international film market, and the trade-related aspects of intellectual property rights. Filmmakers claimed that film as an art form was put in jeopardy by the predatory practices of the American entertainment cartel, and that copyrights were oblivious of non-economic aspects of creativity, that French *droits d'auteur* considered. In other words, while cinema-entertainment was found to be closely associated with copyrights, *cinema d'auteur* was in turn shown to be attuned with *droits d'auteur*.³³⁰

As with copyrights and author laws in the eighteenth century, *la politique des auteurs* found in the empowerment of authors a means to resist the increasing power of corporations.³³¹ However, the resulting *auteurisme* or cult of the author's personality, backfired in France, and led to author-criticism which claimed the death of author-centrality in the double name of the reader and the work. Read under the light of the Hispanic authorship tradition, the largely influential death (Barthes³³²) and function (Foucault³³³) of the author shows traces of the imperial narrative discussed here. Ideas such as author's self-effacement in literary masterpieces, and correct conceptualization of the relation author-work-reader for a «good and desirable society» reflect how different authorship models are entwined with particular sociopolitical associations: the public domain associated with copyrights is also associated to liberal republicanism, while the one inherent to *droits d'auteur* presumes participative republicanism. These organizing principles of author-criticism are in consonance with the Spanish notion of a self-effacing author-knight whose well-crafted works are aimed at contributing to the public good. A brief review of these connections is shown in the next subsection.

Death and Function of the Author

The rebirth of author-centrality in cinema in the 1950s and 1960s became a lighthouse against which all other positions in the creative field were defined in the 1970s and 1980s. Roland Barthes and Michel Foucault were criticized, within that context, for paying too little attention to authors in their analyses. These criticisms prompted them to position themselves against author-centrality, and voice the reader's perspective that the blunt author-centric view of *la politique* had set aside.³³⁴ In the years to come their views would also become a point of reference for all studies on authorship, including its connections to copyrights.³³⁵

Roland Barthes «Mort de l'auteur» (1968), Michel Foucault «Qu'est-ce qu'un auteur?» (1969) and *L'ordre du discours* (1970) were originally motivated by criticisms to readings they made: Barthes reading of Balzac's *Sarrazine*,³³⁶ and Foucault's *Les mots et les choses* (1966). Barthes emphasized how certain parts of the text were not clearly attributable to Balzac, but were rather part of a cultural flow that defines a time, a place, a society. Foucault challenged the normal division of texts as independent units hold coherently together by an authorship-function, and focused on discourses or «*napes textuelles*» rather than on particular works or authors.

Barthes «Death of the Author»³³⁷ evolves, not coincidentally, around a short excerpt from *Sarrazine*, which he uses to exemplify the difficulty to attribute to certain text a clear authorial voice, in contrast with the ease with which the reader makes sense out of it. «The unity of a text is not in its origin, it is in its destination» he infers, before famously suggesting that «...to give writing its future back, it is necessary to overthrow the myth: the birth of the reader must be paid with the death of the Author.»³³⁸

Barthes identifies the future of «writing» or literature with freedom of interpretation, and suggests that its future is at risk because academy has ideologically appropriated the text in the name of «a good society,» which is exactly what a unique imposed interpretation prevents. Barthes connects here a particular notion of writing with a specific notion of «good society.»

He conceives writing not as an act of self-expression, but as a practice of cultural social expression where different interpretations and voices negotiate their place through a text, and where no part is «original.»³³⁹ «Good society» is in Barthes' system a form of participation in a public sphere all different views are present directly, a *participative* citizenship as opposed to a representative citizenship practice. This view is in line with the struggles over different models of authorship battling in *La politique des auteurs*, but to the two other loci where the narrative of endangered creativity is at play, Barthes perspective brings the suggestion of enthroning an «aural reader,» self-motivated constructor of meanings, whose impersonal³⁴⁰ voice, a class in an epistemological sense or a person in the etymological sense of the *dramatis personae* through which resonate the sentiments of humankind, rather than an individual, this person's utterance will participate in the public sphere constituted in part by writing, a sphere in which, in a «good society,» the *res publica* is debated. From this perspective, Barthes *auteur*-structuralism does not oppose *La politique* but extends its battle against corporations and institutions one step forward suggesting that author-centrality be replaced by reader-centrality. Barthes notion of the death of the author is a metaphor that he interprets clearly as the the effacement of the writer one can observe in the master piece. Barthes is not referring to just any group of written words, but to the apex of the scale where a work becomes universal and in so doing indistinguishable from the flow of cultural discourse. His argument implies a value scale is correlated to the effacement of the author, but Barthes is careful not to imply that the effacement or death of the author is the cause of a work to become a masterpiece. Instead he just points out what other famous writers before and after him have observed which is that a quantum leap in the quality of their writing occurred when the text was freed from their control and self-expression.

Foucault brings another turn of the screw as he addresses the problem first in a conference to the College de France in 1969, and then in his inaugural speech as a member of the same institution one year later.³⁴¹ In the first conference, Foucault points out first that the notion of the simultaneous death of God, man, and the Author (sic) was part of nineteenth-century

philosophical debate, and suggest to consider instead the «function» played by the author. With Barthes, whom he never mentions explicitly, he considers the person of the writer as an echoer of a social, cultural, and historic discourse that he or she does not fully masters or understands, as opposed to an authoritative self-expressive individual.³⁴² The *scriptor* is a privileged reader and observer rather than a god-like originator of realities *ex-nihilo*.

His argument is divided in steps: First, Foucault considers the name of the author and observes that it follows different grammatical rules than common or proper names, representing thus a *sui generis* syntactical and epistemic category; then, he considers appropriation and control. The author is not the owner nor the one responsible for the work; he is not its producer nor its inventor; with Barthes, Foucault points out that writing is a particular *speech act*³⁴³ (sic) that enables a group of texts to form an oeuvre. Foucault's system gives back agency to authors, albeit literary canonized authors, not as originators of texts, but as producers of schisms in the cultural flow of cultural discourse,³⁴⁴ and hence as privileged contributors to a public cultural sphere.³⁴⁵ Finally, Foucault discusses the establishment of the fundamental attribution of a work to an author, and addresses the position of the author, this time not as the bridge between text and reality, but within the text itself.

Similar to Barthes, Foucault is an author who chooses to position himself alongside readers, not editors, printers or producers, in the conceptualization of the practice. With Barthes, Foucault also implies a ranking. In Foucault's system, author's agency is re-established from his or her capacity to redirect the flow of cultural discourse through speech acts, and not from the addition to a chaotic mayhem of self-expressions. In both systems, the literary canonized author has no inherent property and only partial responsibility over the texts that are attributed to him or her during a process of appropriation of an otherwise public discourse.

For Foucault, the possessive characteristic of the writer-work relation is merely conventional, fictional³⁴⁶, and with no right or wrong value. Both Barthes and Foucault consider masters and masterworks, not a general form of self-expressive creativity common to all humankind. It is in these

canonical works that they note the mirroring effect of author-disappearance and universal appeal. Copyright is blind to literary canonicity, which it replaces with market success. The market for masterpieces, superstar³⁴⁷ artists, and superstar cultural institutions is a two-level market.³⁴⁸ The first level is characterized by excess. The second whose entrance is guarded by institutional gatekeepers³⁴⁹ is characterized by canon and an artificial scarcity. The market cannot predict which work, author or institution will be canonized, and it does not recognize any external predictor either.³⁵⁰ Both Barthes and Foucault clearly refer to this second upper level, while copyright theory is blind to this distinction. Lastly, both Barthes and Foucault observe that property assignment, and textual significance constitutes an act of appropriation of the public domain in the name of a «good society» which they both identify as a space where different interpretations and claims fight for acceptance, agency, and ultimately configuration of a public sphere or *res publica*, that is they both refer to a sociopolitical model of participative citizenship where representativity exists only through the merit of ideas.

The relation of the death of the author with copyrights is problematic, and reflects the double standard implicit in the association of copyrights and creativity through causality. On the one hand, copyright theory is based on the notion of a self-expressive author and creative originality. On the other, it refuses the traditional and communal component inherent to the history of literature and the arts, which reaffirms the past every time the new is asserted. The increasing extension of the copyright term, the time a work's is legally protected by copyrights, has complicated the problem even more, as the longer the term, the more copyrights become an agent of protection of the established, in detriment of new creativity.³⁵¹

The Imperial Legacy: Mexico

As the Cold War ebbed, the Anglo-American and European clashing economic interests resolved through the Uruguay Round Negotiations 1986-1994, which led to the World Trade Organization and the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1995. The

history of the construction of the Euro-American accord is told by Ronald Bittig's *Copyrighting Culture* (1996)³⁵²; and the way in which TRIPS was forced to other countries, through coercion and in the context of an American imperial project, is told by Peter Drahos in *The Story of TRIPS at the GATT* (1995).³⁵³ For Mexico, the negotiation took place in the context of Carlos Salinas de Gortari's project of positioning the country as a periphery, and not a potential colony of the industrialized nations. With strong presidential leadership, Mexico's subscription to the WTO, and fast-track negotiation of the North American Free-Trade Agreement (NAFTA) went parallel, in a speedy process that left little time for pondering details. As Drahos explains, TRIPS was an element of the agreement whose importance was not fully understood by third-world countries at the time. It was a no opt-out element of the WTO, that was clearly opposed to those countries' national interests, but that was perceived to be counterbalanced by other concessions made to their potential exports. These concessions appeared to those countries, and to the political economists negotiating the treaty, as more important than the potential losses TRIPS might entail.

The legislative debates over international copyright in Mexico were prompted by an American children movie seeking circulation in Mexico. The film had used as part of its musical score, the Mexican national anthem. Such a use in Mexico is illegal, but under international copyright law it is permitted. The legislative debate raised questions about the validity and use of national symbols such as the anthem, flag, and seal, but also about the state responsibility for the protection of its national heritage, and the limits national states have, in the practice, to enforce the use of their cultural heritage or national symbols outside of national borders, in spite of multinational treaties. The Mexican legislative debates recognized that international copyright treaties, left unprotected heritage and the public domain, the way it was nationally, and provided a framework for the private appropriation of that heritage outside national borders.

The case of the national anthem is extreme, and not completely generalizable to other works in the public domain. However, the legislative debates the issue prompted are indicative of the clash of the Hispanic and

Anglo-American models, once the latter breaks into the former's national borders.

The first time such a problem happened in Mexico, resulted in the *sui generis* 1943 nationalization of the «moral rights» of the anthem which made the Mexican state the legal «author» of the national anthem. When a similar problem happened in Spain in 1997, the Spanish state decided to buy back the national anthem's copyrights.³⁵⁴ The 1995 legislative debates on international copyright in Mexico were not conclusive. They were interrupted by the assassination of the PRI presidential candidate, Chiapas war, and the financial crisis of 1995, and have not continued since.

The film that prompted the debates in Mexico was *Jumanji* (1995). The children «horror» movie had been adapted from the homonym short story by Chris Van Allsburg (1981). Forty nine minutes into the film a hunter enters a gun store. His name is Hunter Van Pelt, and he is the villain. The music playing in the background while Van Pelt bribes the clerk with what a closeup shows are Spanish gold doubloons coined in 1798, is «Dios y Libertad.»

«Dios y Libertad» is a musical march composed by Jaime Nunó to accompany the poem written by Francisco González Bocanegra in 1853, and that, together with the «Marcha Dragona» composed by Isaac Calderón in 1909, constitute the official national anthem of Mexico. Using it for non-official business is illegal in Mexico, and especially in the context in which the film used it.

Jumanji is a children film. The story is modeled from James Mathew Barry's *Peter Pan* (1904) while keeping the darker notes of the *Little White Bird* (1902) where Pan first appears. The central characters, Peter Pan (book and play) and Alan Parrish (film) are boys who wouldn't grow up, and escape into a fantastic world. However, while Neverland is a mostly playful fairyland, *Jumanji* is a frightening jungle. Peter Pan keeps his youth by playing and listening to stories, while Alan is trapped into a game where he is in constant danger. Alan's body ages, but he still «feels as a child.» Sarah Whittle (film) is a combination of Maimie Mannering of *Little White Bird*, and Wendy Darling, from *Peter Pan*. Both in the English dramatic version of Pan, and in *Jumanji* the same actor plays the father and the villain, the pirate

Capitan Crook in *Peter Pan*, and Hunter Van Pelt in the film. Van Pelt does not exist in the book by Van Allsburg. He was added in the script. The name of the character is functional: he is a «hunter» seeking to «pelt» Alan out of childhood like an animal is herded, and under the threat of becoming a «human pelt» in the hunter's living room.

Hunter Van Pelt can be read as Hispanic because of the music in the background, and of the currency he uses to bribe the store owner. This is certainly not the first time the villain is casted as Mexican in a Hollywood film, and not the first time either that the Mexican government presents a formal complaint through its diplomatic representation. However, it is the first time that such a protest is not backed by the power to refuse circulation to the film or by the threat of not granting «visas of exploitation,» but is presented, instead, in terms of intellectual property rights. The studio claimed that it had purchased the rights to utilize the score from its «legal owner,» Sony Music corporation, while in the eyes of the Mexican government the national anthem was not covered by copyright laws, but by the Law of the Flag, Anthem, and Seal.³⁵⁵ The Mexican law establishes, within national borders, the exceptionality of those three national symbols, but cannot be enforced beyond those borders. Seeking to extend that protection internationally, the Mexican state subscribed the Berne convention and nationalized, in 1943 the moral rights of the national anthem. The story is worth-telling.

Prior to having a national anthem, between 1821 and 1854, bands would play a fragment of an opera in official acts where the head of the state was present. Similar to the dramatic entrance of a character in an opera, different presidents were introduced with specific musical themes that people could recognize and associate with them. Santa Anna, for example, was introduced by the overture of «Semiramis» by Rossini, and José Joaquín Herrera by the one of «Poet and Peasant» by Von Suppe. It was not until the United States Intervention of 1846-1848 that calls to create a national anthem began. In 1849 president Santa Ana instructed, not his minister of education, but rather the one of Incentives, Colonization, Industry and Commerce to organize a public contest for a national anthem. The call was published in 1854, and the poem by Francisco González Bocanegra

declared the winner. The composition «Dios y Libertad» by Jaime Nunó won the ensuing contest for putting it into music, and in 1909 the «Marcha Dragona,» composed by Isaac Calderón for the Mexican cavalry, was incorporated to the score.

In its original form, the poem consisted of ten quartets of ten-syllable verses and a chorus. The chorus follows a rhyme *abab*, common in Italian opera, while the corpus follows an *abbc deec* structure that proves very effective in placing an accent at the end of the second quartet to emphasize rhythm and melody. The tropes and metaphors of the text are characteristic of nineteenth-century romanticism, in that they constitute an emotional and martial call for arms, which makes the Mexican anthem similar to the French Marseillaise, and different from the British' or United States' national anthems which are prayers, and refer to war from a distance, abstracting violence and placing it in the background. The language of the Mexican national anthem utilizes expressions that are not common anymore like «arrostrar,» to face problems or fears; or «horizonos» that provoke horror, that frighten. The vengeful attitude it evokes, and its language reflect the time in which it was composed, and not necessarily the contemporary views of the Mexican nation.

Before it became official, the text was twice reduced: First strophes IV and VII were suppressed, and then strophes II, II, VIII and IX were kept in writing but never sung. The suppression is interesting, because it not only erases the names of Santa Ana and Iturbide, the verses suppressed from the national anthem, contained mentions to a physical geography that the Spanish intervention also suppressed from the Mexican nation. It is not coincidental that the same person, Bernardo Couto, who signed the political treaty of Guadalupe Hidalgo on February 2, 1848, presided the literary jury that awarded the prize to González Bocanegra on February 5, 1853, and was a member of the commission suggesting that the first suppression be made, a few years later.

In 1891 the ministry of War and Marine made the first step towards rendering official the national anthem, by instructing that it only be played in official events.³⁵⁶ The law was written in the same operatic vein mentioned earlier, and includes the popular metaphor of a fantom or ghost representing

history (Hegel), and the nation (Marx, Herder). The law says that «every time the Mexican national anthem is played, the ghost of the nation enters the room,» hence it is only permitted in official events where the nation is convoked and invoked.

In 1909 the British government decided to put together a compendium of the old and new nations of the world, by anthologizing their national anthems. Prompted by the British ambassador, Mexico sent the González Bocanegra/Nunó/Calderón as its own. The British decision was interestingly governed by the assumption that a nation existed, if it had a national anthem, or that a nation was its national anthem.³⁵⁷ That assumption, Roger Bartra has argued is essential to the Mexican National Project,³⁵⁸ and extends the premodern notion that what happens to certain texts or people, prefigures what will happen to the nation as a whole.

In 1922, the soprano Fanny Anitua made the first known recording of the Mexican national anthem, but, to better show her virtuosity, Anitua changed its key from «b bemol agudo» to the more operatic «do de pecho.»³⁵⁹ Anitua's creative license prompted a number of criticisms, because, as Benito Juárez put it in 1864: «Al himno no se le cambiará ni una palabra, ni una nota.»³⁶⁰ [Not a word or note will be changed to the national anthem.]

Prompted by the recording of Fanny Anitua, the president Álvaro Obregón instructed that certified copies of the original scores by Nunó were made and archived in different places to serve as reference. But to the surprise of many, there were no «originals» of Nunó's scores; nobody had kept them. The president named a commission³⁶¹ charged to establish an original on which to base an official version of the work. The commission located a version of the anthem published in 1854 by Murgia, and the heirs of Nunó provided partial notes and versions. Twenty years later an archive was finalized, and an «official prince edition» made.

In 1943, President Ávila Camacho made three historic declarations: through the first, he re-founded the state-party, self-proclaiming it the «holder of the tutelary rights of Mexicans;» through the second, he declared war to the axis, entering World War II; and through the third, he joined the Berne convention and *nationalized the moral rights of the Mexican National Anthem*, establishing the nation as its author. Never a state had nationalized

«moral rights,» to extend its control over a work outside its national borders before, and no state has done it ever since.

In 1959 another incident drew attention to the ownership of the Mexican Anthem. The publishing house Repertorio Wagner S.A. that specialized in the printing of scores for concert music for orchestras, published an edition of the Mexican Anthem. On the first page, under the names of González Bocanegra, Nunó and Calderón, there was a mention of copyright for all countries belonging to Repertorio Wagner. Every time an orchestra would play the anthem, royalties would be owed to the editor. A similar problem occurred with Wagner and Levien, its headquarters, and with Ralph S. Perr & Co. Based on Ávila Camacho's nationalization of the moral rights of the anthem, Repertorio Wagner was fined, and had to make a public declaration that the legend was a mistake.³⁶² The fact that the Mexican government used author rights, to justify that a work in the public domain could not be appropriated by a private party is telling of the Mexican conceptualization of the public domain.

In 2002, in a soccer game in Guadalajara, a mariachi singer who attended the game was pushed to sing it, but was unprepared to do it properly. She made a mistake on one of the strophes, and two days later, was fined with the equivalent to five thousand dollars.³⁶³ The fine, however, was not justified anymore on the Ávila Camacho's nationalization, but on the 1984 law that made the flag, the anthem, and the national seal, exceptional cases, falling outside of intellectual property considerations.³⁶⁴

In the case of Jumanji in 1995 producers claimed they had purchased from Sony the right to use the recorded version in their film, and Sony claimed that the work had fallen out of copyright protection and into the public domain, which made it perfectly legal to record and copyright a version of it. Based on the law of the anthem, flag, and seal, the ministry of interior ruled that the film could not circulate in Mexico as it was. The studio produced a version of the film in which the background music of that scene was replaced, which was put in circulation in Mexico, and distributed the unchanged version abroad.

Confronted with its limitations to control the studio outside Mexican borders, the legislature convoked intellectuals and legislators to present

opinions on the implications of international copyrights, and on the legislation covering national symbols and cultural heritage. The process was interrupted as we mentioned earlier by the turmoil that marked the end of the Salinato in 1995. The argument between Roger Bartra and Guadalupe Jiménez Codinach on the subject is, nonetheless, worth citing.

Using a body metaphor, Bartra suggested that the nations' symbols were dated, and should be buried and replaced:

A 149 años del estreno del Himno Nacional, éste ya se encuentra en avanzado estado de putrefacción y es urgente, por tanto, enterrarlo.

[149 years after the Mexican national anthem was first introduced, it is now in an advanced state of putrefaction, and it is, hence, urgent to bury it]

The idea of a decaying body that one needs to bury, horrified Guadalupe Jiménez Codinach who presented the problem through a more amicable fatherhood metaphor:

...crear un nuevo himno sería tan absurdo como pretender cambiar de padre, madre, o de abuelos, porque ya no son modernos.

[...To create a new national anthem would be as absurd as pretending to change one's father, mother, or grandparents, because they are no longer modern.]

The debates in congress about the National anthem and international copyrights in 1995, were part of a larger movement started in 1990, a movement that was primarily cultural and aimed not at opposing, but at making its voice heard in the negotiations that led to the WTO and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). In 1992, filmmakers and cultural activists succeeded in lobbying the legislature to pass a law to help counterbalance Hollywood's practices in Mexico, practices they had experienced in the form of blocked access to the United

States market, and to major circuits of international circulation of cinema also controlled by Hollywood. The Mexican law considered a series of measures including the establishment of two federally-endowed funds to help co-finance independent movies. It also included a provision on the *derecho de estreno*, the right of movies (sic) to have a first run. In the words of Alfredo Joscovicz, director of the state-run Churubusco studios at the time, and future director of IMCINE:

There is a perception that Mexican films are not quality films. Some of them are not, but others are valuable art-films or well-crafted commercial motion pictures that deserve a chance to be seen.

The framing of the law as a means to protect film-rights has been read as a double metaphor of the right of audiences to access existing works, and of the right of filmmakers to a fair competition in news and articles considering it. But it is in its literal form that it might be the most thought-provoking as the codification of «film rights» directly connects with the medieval idea of the «right of the well-crafted work» and the responsibility of the state to protect it. There are of course no direct institutional channels through which the rights of cultural artifacts can be claimed, an idea that may sound superfluous compared to the urgent needs of real people, filmmakers and audiences included. But that fact does not cancel the wording of the law which considers them explicitly. The law is not inconsequential and the fact that it took seven years after it was passed to be in effect is telling of the difficulty cultural claims have to reach the fora where laws and policies are made.

The Mexican Law of Cinematography³⁶⁵ was passed by the legislature on December 29, 1992. In order to be in effect, the law needed to be accompanied by a regulation drafted by the executive branch, which took seven years in the making. The remarkably long delay between the law and its regulation can be partially explained by the continuous lobbying of the MPAA in Mexico, and also by the multifaceted crisis Mexico went through from 1995 to 2000. However, it also does have an institutional explanation evidenced by the stark disparity between the map of executive institutions

affected by, and the ones responsible of the negotiations of multinational treaties and copyrights in Mexico.

On the one hand, the National Institute for Author Rights (INDAUTOR), under the Ministry of Education, is the agency in charge for the administration of all laws and regulations. The National Council for Culture and the Arts, Conaculta, also under the Ministry of Education, acts as a *de facto* ministry of culture that receives and disperses most of the federal cultural budget (a little less than one percent of the GDP). Conaculta controls the National Institute of Cinematography (IMCINE), which focuses on independent «quality» productions. On the other hand, entertainment industries including radio, TV, and commercial cinematography, fall under the aegis of *Gobernación* [The Ministry of the Interior], and all international negotiations, including that of copyrights, are carried by *Hacienda y Crédito Público* [Treasury], which also controls federal budget.

The implications of this double structure are twofold. First, while the agencies in charge of culture and *droits d'auteur* are undersecretaries, the ones in charge of entertainment, national budgets, and international treaties are secretaries. As part of the cabinet, secretaries meet together and with the president, while undersecretaries have to compete amongst themselves to carve a point in the agenda of their minister. While the claims of cinema-entertainment, copyrights, and treasury are at the same level, cultural institutions are at a lower hierarchical level and have no direct horizontal communication with them. In other words, there are no direct institutional channels of communication that the cultural sector can use to make their voice heard to the highest levels of the executive branch. For example, when the Treasury decided to cut privatize IMCINE and other cultural institutes in 2002, authors, filmmakers, and other cultural practitioners took the streets in coordination with the director of Conaculta to stop it.

The Mexican Laws of Cinematography were massively important to the sector, whose federal subsidies had been cut by Salinas de Gortari in 1990. For example,³⁶⁶ between the passing of the law (1992) and the regulation (2000) less than a dozen Mexican Films were internationally distributed: *Like Water for Chocolate* (1992), *Cronos* (1993), *A Little Princess* (1995), *Midaq Alley* (1995), *Cilantro y Perejil* (1997), and a few others. However, as of 2001,

Mexican directors, scriptwriters, and actors have participated increasingly in internationally distributed film productions whose international awards and nominations in festivals like the Academy Awards, Cannes, San Sebastian, Huelva, Sundance, and Florida. In the history of the Academy Awards, Alejandro González Iñárritu, Alfonso Cuarón and Guillermo del Toro are in fact the first Mexican directors to be nominated for «best director» and their movies *Babel* (2006), *Children of Men* (2006) and *Pan's Labyrinth* (2006) for «best motion pictures». In 2000 Mexico produced ten commercial and nine art-films. Less than twenty five hundred people bought a ticket to watch them on their theatrical release, and those movies were not awarded or nominated to any international award. One year later, in 2001, Mexico produced one hundred and sixty commercial and thirty art-films. Almost thirty million people bought tickets to watch them, and thirty received an international award out of one hundred nominations. Some of the movies that the Mexican Law of Cinematography and its associated endowments helped directly include *Y tu mamá también* (2001), *The Crime of Father Amaro* (2002), *21 grams* (2003), *Quinceañera* (2006), *Pan's Labyrinth* (2006), *Babel* (2006), *Children of Men* (2006), *Padre Nuestro* (2007), *The Violin* (2007) and *Stellet Licht* (2007).

If cinema and its regulation were the principal motors driving the international regulation of copyrights in 1950-1995, implementing traditional copyrights in the Internet has taken their place at the turn of the twenty-first century. The volatility of copyrights and authorship institutions in digital spaces provides an invaluable counterfactual to the association copyrights-creativity, and to the argument made in this dissertation.

«Art's Disease» in Industrial Societies

Besides *La politique* and the death of the author, other elements important to the Spanish tradition were claimed during the 1960s. The aristocratic component of the Hispanic model, and its structuring principle of a dual body of laws regulating respectively the highly technologized forms of arts (printing) and the lesser technologized forms (manuscripts), was found to be the major claim of the discipline of cultural economics, founded in 1965. The major studies aimed at documenting the public good characteristics of the arts in the 1960s, led to the conclusion that while copyrights might be an adequate structure to channel funds for highly technologized art forms, the ones that were not serial produced or mass distributed suffered from «arts disease» in industrialized societies. Hence, a parallel legal and economic conceptualization of creativity was recommended, focusing on the one hand on technology and copyright theory, and, on the other, on fine arts and cultural economics.

Nelson Rockefeller and Richard Nixon contended twice for the republican nomination for the United States presidency, first in 1960, and then in 1968. In 1960, Nixon won the nomination swiftly but was defeated in the presidential election by John F. Kennedy after a debate, televised for the first time, where his democratic opponent appeared younger, handsomer, more refined and charismatic. In 1968, a similar setting was sought by liberal, cosmopolitan and aristocratic governor of New York Nelson Rockefeller who subtly emphasized the parallel between Rockefellers and Kennedys in the American imaginary, and sought to cast Nixon as a rough, unsophisticated Quaker.³⁶⁷ The political race set a cultural competition which led, on the one side, to Nixon's public support for the establishment and funding of the National Endowments for the Arts and Humanities in 1965; and, on another side, for foundational studies³⁶⁸ on the economics of the performing arts supported by the Rockefeller Brothers Fund³⁶⁹ and the Twentieth Century Fund.³⁷⁰

The mission of these studies was to prove that arts and culture were «public goods,» and that they required in consequence public action and

state support, or they would be in jeopardy. Researchers had for the very first time access to the largest database on performing arts in history, and gathered other sources of information such as a large historical archive of art sales covering almost four centuries. Economists from Europe, Canada the United States and Australia participated in the project making it transcend country borders. Their result were conclusive: literature and the arts do not behave in the market as public goods do, which meant a blow to Rockefeller's plan to justify public spending for the arts. Another rationale was found by Baumol and Bowen, who proved that the lesser-technologized forms of artistic production were increasingly endangered in industrialized societies, an effect they termed the «art's disease.»³⁷¹

The counter-intuitive conclusion that literature and the arts do not behave as «public goods» in the market implies a different understanding of the public good and the public domain in the Anglo-American and Spanish traditions. While the former sees the public good as common property to whose protection the state is committed by definition, the former identifies the public domain as absence of private individual property available for the taking. The contrast with cinema-entertainment is striking because this cultural art form both benefits directly from the market and copyright laws, and also from the backing of the state as strategic tool for propaganda and the building of consent. Copyrights in this sense, represents an Anglo-American form of canonization alternative to the literary and artistic. Copyrights valorizes commodification and consensus-building over aesthetics, and the Spanish tradition valorizes inalienable common resources and well-done works. One relies on reification and space-time fragmentation, while the other is founded on spirituality and space-time continuity. As such, copyright and literature represent two coexisting and competing paradigms, one numerical and discontinuous, the other literary and continuous. Pierre Bourdieu has also noted the different world-views offered by statistics (copyrights) and the arts (literature):

...l'analyse statistique [ne représente pas adéquatement le champ] puisque, en regroupant les auteurs par grandes classes préconstruites (écoles, générations, genres, etc.), elle détruit toutes les différences

pertinentes faute d'une analyse préalable de la structure du champ qui lui ferait apercevoir que certaines positions (en particuliers les positions dominantes comme celle qu'a occupée Sartre dans le champ intellectuel français entre 1945 et 1960) peuvent être à une seule place et que les classes correspondantes peuvent ne contenir qu'une seule personne, défiant ainsi la statistique.³⁷²

[...the statistic analysis [does not adequately represent the field] because, by regrouping authors in large preconceived classes (schools, generations, genres, etc.), it destroys all pertinent differences, lacking a previous analysis of the structure of the field that would make it perceive that certain positions (in particular the dominant positions such as the one Sartre occupied in the French intellectual field from 1945 to 1960) can refer to one individual and that the corresponding categories can contain only one person, which defies statistics.

In addition to the different conceptualizations of the common good, and the competing forms of canonization of copyrights and literature, the final recommendation of the group of researchers is also attuned with claims dear to the Spanish model. What the commission finally recommended was that two parallel bodies of laws were set that recognize the very different practices, circulation and experience of the highly technologized forms of art (cinema, printing) and the lesser technologized ones (literature, fine-arts). Their proposal mirrors the double juridical conceptualization of the manuscript and the print-book from 1480 to 1830.

These facts are not evident to cultural economists. In their fifty years of formal academic inquiry, cultural economists have explored a vast array of subjects related to the economic behavior of the live and visual arts, superstar artists and museums, labor economics of artists as workers, and contracts between arts and commerce. The research of the subdiscipline has focused on concert music, theater, the book industry, or high-brow plastic and visual arts, and has treated aspects related to economic and symbolic

capital.³⁷³ However, a conspicuous drought on research on copyrights has recently puzzled cultural economists who have called for academic explanations of the fact from their specialized journals.³⁷⁴

If not from cultural economics, these matters have been discussed from four different economic and multidisciplinary perspectives: (1) the rhetoric of economic discourse has been recently the focus of attention of a number of scholarly works stemming from the insights of Mauss³⁷⁵, Bataille³⁷⁶, and McCloskey³⁷⁷ and generally termed «new economic criticism;» (2) the arts that are industrial, produced serially and mass-distributed are the focus of media studies³⁷⁸ and of (3) copyright theory; and (4) contracts economics addresses the ones between complex multi-authored works³⁷⁹ and the market under the special rubrics of «information-intensive products» or of «creative industries³⁸⁰.» The divide is not coincidental, I argue, because a central pillar of cultural economics is based precisely on the distinction and opposition of arts and technology. Technological arts are immune to «arts disease,» as they represent a highly profitable niche and a powerful mass-communication tool in rich industrialized societies.

Internet

The volatility of authorship and copyrights in digital spaces provided this epistemological analysis with an invaluable counterfactual. A review of the scholarly work on the effects of the Internet on creativity showed consensus on the fact that in the absence of strong copyright legal protection, creativity in general thrives, but both some forms of creativity suffer, and the market structure changes. As a result, more works circulate amongst a lesser number of people each (the «long-tail effect»). This recomposition directly affects the dominant position of large copyright holders and the flux of capital flowing away from the public domain and into Europe and the United States. These facts provide an invaluable framework to understand the key role copyrights and author laws played in the transfer of power from the Spanish to the English and French empires.

The Excitement

How Internet has changed the practice, circulation and experience of the work, can be exemplified by a short story by an author (or authors?) whose pen-name is «Anónimo.» In its opening paragraph the story depicts the modern circulation of music in the case of Anna, a music student in her late teens, in «an undefined cosmopolitan Spanish or Spanish-American city, at the turn of the twenty-first century:»

Las intensas percusiones de los Trionfi de Orff, bajo la interpretación de Welser-Mös, apenas lograron despertar a Anna de su pesado sueño. Un día de estos tendría que tomar en serio eso de hacer algo con la radio basura que había encontrado en la acera. El tiempo que tarda en hacerse un pan tostado, hojea el periódico del día, descarga los Trionfi, les añade una línea de percusiones, y los vuelve a subir a la red. Hay tantas versiones de los Carmina para elegir y tan pocas de los Trionfi. Pan en mano, Ana le da una última hojeada a la partitura en la que está trabajando con otros compañeros de clase, antes de presionar el botón «enviar» y someterla a comentarios de toda la escuela. Un último bocado, mientras da instrucciones a su TiVo para que le grave un documental de Flaubert, sale, corriendo como siempre para no perder el autobús de las ocho treinta.

[The intense percussions of Orff's Trionfi, under the interpretation of Welser-Mös, managed to wake up Anna from a heavy sleep. Seriously, one day soon she would have to upgrade the trashy radio-clock she found on the sidewalk. The time a bagel toasts, she skims through the morning paper, downloads the Trionfi, adds in a line of percussions and uploads the modified version again into the network. There are so many version of the Carmina to choose from and so few of the Trionfi. Bagel in hand, Anna gives a last inspection to a score she is working on with other classmates before hitting

“send” and distributing it to her schoolmates. One last bite, while instructing her “TiVo” to record a documentary about Flaubert, and there she goes, running as always to catch the eight-thirty bus.]

As the story unfolds, Anna meets with a series of characters that «absorb and contribute to the surrounding flows of information, knowledge and emotions» and which use different media to express ideas and emotions with peculiar intensities, in dissimilar quantities and qualities; until the concert for which they have all been preparing takes place. A big success, the school is invited to perform in the world presentation of... the «Eiffel Tower.» The sponsoring company, we are explained, is a Japanese firm that has been in charge of keeping and repairing the French Eiffel Tower in Paris for over fifty years. During that time it has replaced, as part of his contract and one section at the time, all the original pieces of the monument, and brought them to Japan, where the unveiling of the «original Eiffel Tower» will take place. The question of where the real tower is confronts a character who argues it is in Paris «with all its symbolism» to another who maintains that it is in Japan «where its original pieces are.» This leads to a series of comical protests and *quid pro quos*, and to a discussion of whether a three-thousand year old Indian wooden temple, which has not one single piece of wood older than 100 years, can be publicized as «authentic» in a tourism brochure.

Characters go great lengths, even to the point of absurdity, to argue their vested interests. The opposition young/old turns slightly poignant when Ana realizes, at the end of the story, that the discussion on ownership which she had been arguing was not hers, will nonetheless affect her life. On the last section of the text, Anna receives an offer to sell for a profit the score to a pop group, whose name gives title to the short story: «Los Autores.» The last conversation of Anna and the group’s agent serves as a pretext to make the reader wonder with Anna why is she offered the deal, when there were so many people who contributed to the work, dead and alive. Anna is particularly anxious when the agent tells her that the work has reached a level of completeness that does not need additional changes, and that «she has to let it go.» Her answer is both naive and in point: «Free the work so

that you can establish when and how people can use it? Somehow that doesn't sound *freedom* to me.» By the end of the story the reader is left to decide if after hearing the large amount she is being offered Anna will sign a paper and become an «author of the stable.»

The author of the text is «anonymous.» The term is intentionally used as a pseudonym with a lower-case «a.» No trace of copyright claim. Instead a colophon stating that the run was printed on «Aurora,» presumably a physical printing-press that had been given that name. A line is left blank to write the name of owner of the physical copy of the book on it. This wink of the maker or makers of the work, reminds us that before authorship, it was the reader who owned the text and inscribed his name or *ex-libris* on the bound volumes of his or her library.

The cultural thrive depicted in this short story is intensely intriguing because it corresponds to the almost utopian excitement of the early days of the Internet where cyberspace was seen as a place alternative to the real world, and new media as an epistemological revolution full of challenges and opportunities.

New Media

Different media scholars use different definitions of «new media.» One common periodization distinguishes four stages associated with particular technologies: (1) the printing press, (2) photography and film, (2) new (broadcasting) media, and (3) new (decentralized) communication technologies.³⁸¹

Marshall McLuhan³⁸² argued that the printing press and the mobile type are hallmarks of modernity, and the basis of a «Gutenberg galaxy» which consolidates the passage from oral to written culture by enabling mass-reproduction of books and of daily-changing newspapers. The circulation of printed text replaces oral tradition, and the conception of text as aural and requiring an hermeneutic reading, concept essential to the religious and dynastic modes of socio-cultural organization, is replaced by the legal appropriation of discourse (Foucault³⁸³), and by mass-media broadcasting of

information (Herman & Chomsky³⁸⁴ 1988), both of which constitute key aspects in the imagination of the modern nation-state (Anderson³⁸⁵).

The coming about of photography and film during the second industrial revolution of the late 1800s and early 1900s marks a consolidation of the passage from aural to mechanical art, which further blurs the difference between fictional representation and reality. The practice, conception and circulation of culture and the arts is radically changed. The public sphere where ideas are debated in a community-building conversation passes first from the Republic of Letters to the Gutenberg Galaxy, and now to a phase of mass diffusion from centralized agencies and corporations to distracted audiences and numbed masses.³⁸⁶ English, German, Russian and American propaganda machines assume gargantuan proportions. The aesthetics of arts change and the social function of literature and the humanities becomes increasingly peripheral for the construction of republics and democracies, and ever-more ingrained with authoritarian-regimes propaganda. The auratic value of arts and culture withers as the economic and political value of mass-reproduced arts increases.³⁸⁷

Similarly to the ways in which newspapers complemented books in the eighteenth and nineteenth century, in the 1920s, 30s, and 40s radio and television complemented film, allowing for mass-circulation of everyday-changing information. Printing, film and new media are until now broadcasted, this is that their production is costly, their reproduction imperfect and their distribution centralized: a motion picture can only be produced by the state apparatus, studios or large corporations; vinyls, audiotapes and videotapes reproduce originals with significant losses in quality over time and over reproduction, and have also a short life-span; finally, large capital is necessary to mount industries for mass-reproduction and large-scale distribution. Pirates are easily identified. They are few, they mass-reproduce. The state has some control over their business permits and their use of the public domain for the distribution of their products, whether these are printed material such as books, newspapers and films, or broadcasted streams that use public air waves in the case of radio and television. These three aspects constitute the core of what makes monopolies

and copyrights viable as O'Hare³⁸⁸ (1985) observed, and what enables the control and profitability of the industry even under weak property laws.

New Communication Technologies change that. The cost of producing a new book, photograph, song or film is drastically reduced with digital technologies with a quality that increasingly approaches traditional prints. The reproduction of a work, once a first copy is obtained, has virtually no cost, and there is no difference aside from cost between the first and all subsequent copies. Furthermore, it is increasingly facile to acquire a work, modify it and put it back in circulation. Which brings us to distribution. Digital distribution, particularly through the Internet has virtually no cost, and does not necessitate centralized broadcasting. New Communication Technologies make production significantly less expensive, reproduction cheap and quality-perfect, and distribution rhizomatic which weakens every aspect of monopoly power in the production, distribution and reception of artistic and literary works. The industry has sought to battle the thrusts against its niche with money: increasing the budget for marketing, for buying independent productions, for developing digital locks to prevent reproduction and by engaging in a mass campaign that tries to convince people that it is morally wrong to use the works they acquire in this fashion. Marketing budgets have uncertain effects and compete against costless word-to-mouth in social media such as youtube, Facebook or twitter. Buying independent productions is also uncertain, and mostly weakens the perceived necessity of large studios with important operating costs. Animation constitutes a niche for traditional business, in particular because of all the non-digital merchandizing associated with it (the Walt Disney model). Embedding locks in cultural products is always inefficient because the key to those locks needs to be included in the products to allow the works to be read or viewed by their audience, at which point they always become «unlocked.» The industry uses the core advantage of its concentration versus the scattered nature of its competition, and the fundamental principle of «illegal copying» codified in the law of copyrights, but the technology race continues and people «stream» content without copying it, making the wording of law partially ineffective to describe the phenomena.

Internet changes the experience and practice of communication and the fixity of literary and artistic artifacts. The digital is a space between publishing and speaking. If thought closer to the later it constitutes an extension of the public sphere, while if thought closer to the former it becomes a marketplace. In either case it constitutes to a certain extent *terra nullius* or *mare nostrum* as it transcends national boundaries and requires for a «global legislation» applied by the «international community.» The change is so profound that it is comparable to the fifteenth and sixteenth century discoveries that led to modernity. To transform this space into common nomos a series of processes are necessary that would fix and codify the experience and practice of it into enforceable law. Observation and careful description of that experience and practice is, as we saw with the study of the *tabula picta* a necessary but insufficient step that requires the imagination of «useful and just» legal fictions. These legal fictions can stem from the careful observation of the relation of people and digital artifacts as we saw with the *tabula picta*, or from universalizing and colonial claims that would seek to extend the existing status quo to the newly discovered territories, as we saw in the case of the Franciscan debate on the right to poverty. The colonial claim seeking expansion of the status quo, if similar to its Renaissance and Romantic antecedents, will not only use of the mechanism of law construction of the *fictio legis*, it will be accompanied by a form of military coercion, and by the «demonizations» or semantic shifts required to construct the idea of moral justice. The series of narratives instrumenting those semantic shifts have started non surprisingly in the United States who carries the leading voice in this neocolonial struggle, between 1980 and 1995. As the new terra ignota is being claimed, neocolonial struggles ignite again, and as we will see in the analysis of the controversy controversy over the definition of file sharing that is opposing Spain and the United States, and Internet users t the copyright industries, this neocolonial struggle is based on a combination of legal fictions and the disparity of acceptance of those demonizations and semantic shifts in Spain and the United States.

In order to understand those debates it is advisable to quickly examine the narratives and semantic shifts over the Internet that occurred in the United States between 1980 and 1995.

Semantic Shifts

A common understanding of words is crucial for communication to be possible, and law to be understood, interpreted and applied. Institutional reform often starts as a semantic shift in a term commonly used, and in its legal interpretation. Debora Halbert³⁸⁹ has traced how, in the last two decades of the twentieth century, the legal interpretation of terms like «communication,» «distribution,» «fair use,» «lucre,» «public,» «author» and «work» has significantly changed partly as a result of corporate pressure. However, the new legal interpretation of those words does not reflect its common use. Halbert registers the anxiety of the industry and their strategy to educate people in these new semantics through exemplar legal action, media campaigns and especially through education reform targeting books and materials used from preschool to K12³⁹⁰. On March 1995, the *Intellectual Property and the National Information Infrastructure* task force in the United States suggested that making those new semantic understandings «household words» was decisive to the construction of «electronic citizenship.»³⁹¹ In multinational treaties where several national languages are involved, an additional layer of difficulty ensues as these semantic shifts do not necessarily occur simultaneously in different languages, and even when some shift occurs, the model of citizenship ideal to one country might not be ideal for another. Both the construction of the modern notion of «fact,»³⁹² and language are sites of struggle, a characteristic Voloshinov termed the «the inner dialectic quality of the sign,»³⁹³ that are linked to competing forms of sociopolitical organization.

Debora Halbert argues that the narratives referring to new communication technologies and the Internet in the United States are progressively establishing sovereign claims over the cyberspace in order to pave the road for the establishment of intellectual property laws on the digital space. Along the lines of Michel de Certeau's observations on the structuring power of storytelling,³⁹⁴ and Louis Althusser's notion of interpellation, Halbert observes that these narratives extend the existing

nomos into the digital world, and interpellate individuals through storytelling in the hope of constructing particular forms of «digital citizenship,» and argues that copyright is becoming a commonly accepted myth naturalized through hegemonic narratives and legitimized through the legal system.³⁹⁵

Habert notes:

The narratives that have been created to entrench private property in the information age present multinational corporations as victims, teenage hackers and developing countries as villains, and involve the government as both a peacekeeper and enforcer. This narrative process serves to establish property lines in new technology and socializes the average citizen to an understanding of what is and is not acceptable. If the copyright message can be uncritically passed on through narratives to the general population, then the property rights of current owners will be reinforced. If copyright cannot be embraced, then more individuals will find themselves facing criminal charges until a new concept of private property is accepted.³⁹⁶

The identification that narratives are not neutral, but rather reflect vested interests producing them, empowers readers to relativize the authority of dominant narratives and produce alternative stories and possible identities. The temporal and causal sequencing of the narrative depend on notions of logical validity and verisimilitude, but it is in semantic shifts that narratives become irreflexive and naturalized. Stanley Fish noted, «Change is produced when a vocabulary takes hold to the extent that its ways of elaborating the world become normative and are unreflectively asserted in everyday practices . . . change just creeps up on a community as a vocabulary makes its unsystematic way into its every corner.»³⁹⁷ Halbert argues that this process of naturalization for digital intellectual property started in the United States during the 1980s and 1990s. The key points of this process may be summarized as follows: In 1976, the National Commission on New Technological Uses (CONTU) recommended that computer programs be included as «literary» works under the Copyright

Act, making them subject to copyright law. With no legislative debate, Congress amended Section 102 of the Copyright Act to include computer programs as «literary» works.³⁹⁸ In 1985, the Intellectual property in an age of electronics, report presents the digital age as a complete paradigm change that requires a total overhaul and questioning of all previous notions of intellectual property:

At a basic level, the very definitions on which intellectual property rights are based take on new meanings, or become strained and even irrelevant, when applied to the context created by new technologies. They raise questions, for example, about what constitutes a «derivative work» when works are made available through intangible electronic waves or digital bits; about what constitutes a «work;» and about who owns the rights to it when it is interactive, and when creators have combined their efforts to produce it.³⁹⁹

The OTA report examines how new technologies contribute to produce new forms of authorship, and how the traditional distinction author-reader becomes blurry in digital spaces:

In many cases, as with word processing programs, the machine contributes little to the creation of a work; it is «transparent» to the writers creativity. But with some programs, such as those that summarize (abstract) written articles, the processing done by the computer could constitute «an original work of authorship» if it were done by a human being. Indeed, the machine itself is at once a series of processes, concepts and syntheses of human intelligence so mixed that it is difficult, if not impossible, to separate its parts from the whole.⁴⁰⁰

In 1985 the discussion brought to the U.S. Congress emphasized the fluidity between reader's and author's ideas into an expression produced through interactive technology. The tone of the report was hopeful of the creative potential of a new paradigm but, consistent with its claims, it tried

not to offer a single unified view under one central authorship, and allowed therefore for expressions of dissent even within the report itself. Paul Goldstein manifested his dissent to the general conclusion of the report stating that he believed that

the challenges presented differ little, certainly not in kind, and only slightly in degree, from the challenges that such technologies as radio, television, motion pictures, semiconductor chips, and, indeed, the printing press have posed in the past.⁴⁰¹

Goldstein argued that old law was adequate to new technology and that the inability to assign clearly delimited works to an individual author was not problematic but undesired. Instead of exploring radical potentials, Goldstein suggested sticking first to «more mundane uses» and domesticating this new technology to old systems by creating programs to «trace sources and allocate royalties.»⁴⁰²

Nine years later, the OTA 1994 report appeared to be more in line with Goldstein observation and framed new dimensions of authorship not as challenges of opportunities, but as «threats to property and ownership.»⁴⁰³ In the 1995 Report of the Working Group on Intellectual Property Rights despite evidence presented to the contrary, the Internet is conceptualized in Congress as a place without «content» that will only become a meaningful aspect of economic and educational life if property rights are strictly enforced.⁴⁰⁴ The report argues a series of crucial semantic shifts that redefine distribution, readership, public, fair-use, first-sale principle, and public domain: «Digital transmission» is deemed distribution,⁴⁰⁵ an important shift because distribution rights belong to the copyright owner and if transmission is a form of distribution then electronic exchange is subject to copyright owner approval. Reading is redefined as an act of «public viewing»⁴⁰⁶ because computers automatically save webpages in their cache, thus constituting an act of transmission. The first-sale doctrine traditionally gave the buyer of a product control over its use and destiny. The copyright owner, unless the rights were specifically retained, lost rights to what happens to the product after the first sale, but according to the report, the

first sale right would not apply to electronic transmissions because a copy remained with the original owner.⁴⁰⁷ Fair-use is interpreted in such a narrow manner that it becomes impracticable in digital environments.⁴⁰⁸ Finally, the conceptualization of the Internet as a public sphere where communication occurs was replaced by the idea that the Internet is a marketplace, and that a marketplace could only occur if traditional copyright owners would be in control. It is at this point Habert argues that «the applicability of copyright was assumed and its extension to the new digital age was also assumed.»⁴⁰⁹ The focus changed in the 1995 task force report from the communication and creative potential of the new technologies to the protection of an industry and the jobs it represented. What was of national relevance was not innovation and creativity per se, but rather that «intellectual property industries» provided Americans with jobs:

...people of all ages should recognize that millions of U.S. workers are employed by industries that rely heavily on intellectual property protection, and that intellectual property rights are truly a matter of national interest.⁴¹⁰

The distance between the proposed conceptual framework and the general perception of people and new media scholars was noted by the task force and a massive campaign of education to build consensus around the idea of intellectual property in digital spaces. In order «to better educate the public,» the task force initiated a Copyright Awareness Campaign in March 1995. Participants in this campaign developed guidelines for educating the public about intellectual property. With the goal of making intellectual property a «household word.»⁴¹¹ The task force recommended that this education begin at the elementary school level where «certain core concepts should be introduced» related to the «underlying notions of property: what is «mine» versus what is «not mine»⁴¹² then these concepts of property could be extended to the Internet and copyright. The task force notes:

Therefore, they should learn what one participant refers to as «electronic citizenship,» including how to determine the owner of a

work, and how to go about asking for permission to use it. Similarly, they should learn that the taking of someone else's property, including copyrighted works, without their permission is not right. Additionally, as noted previously, users will also be creators of copyrighted works, and therefore should know what their rights are and that they may expect those rights to be respected by others.»⁴¹³

From paradigm shift to domestication of new technologies, and from commodification of the public sphere to indoctrination of a particular form of sociopolitical organization, the semantic shift, and the narratives set in place in the 1980s and 1990s in the United States have unassumingly established a plan to model global citizenship as an extended marketplace under the surveillance and control of copyright-holders.

The Empire Speaks Back

The idea of a global citizenship resonates with the Spanish tradition and its imperial component. However, how this global citizenship is being defined, shocks Spanish people whose communal tradition is stronger and feel entitled to share digital material in a way that would seem unlawful to Anglo-Americans. The issue is further complicated by the fact that Spanish legislators do not understand the words forming multinational treaties in the exact same manner their American counterparts do, because of the semantic shifts operating in the English language described before, which have not occurred in the Spanish language. The conflict opposing those two traditions, this time from within Spanish borders, will be exemplified by the ongoing Spanish-American controversy on peer-to-peer file sharing. The United States has put significant pressure on Spain to adopt its standards of interpretation, but Spain has refused this «foreign intervention» and opted instead for a reading of Internet and peer-to-peer exchange more consistent with the Spanish tradition, which has infuriated the American entertainment industry.

The examination of the controversies surrounding peer-to-peer file sharing in Spain showed that, contrary to the common perception of a single multinational law of copyrights, different traditions still exist and compete. How these different perceptions collide was exemplified in the particular case of the Mexican legislative debates of 1995 on copyrights and cultural heritage.

Exemplar trials

On October 4, 2007, Jamie Thomas,⁴¹⁴ a 30-year old and single mother of two was sentenced to pay \$220,000 dollars, or roughly a quarter of her expected lifetime earnings, to Capitol Records. Jamie had made 24 songs available through Kazaa, a web-based, peer-to-peer sharing system. These expensive songs —\$9,250 dollars each— were only a few that the Record Industry Association of America (RIAA) decided to focus on, amongst a broader list she had made available for download from her hard disk drive.

Spanish diaries quoted legal experts and justices who argued why *Capitol v. Jamie Thomas* ruling could have never happened in Spain where peer-to-peer exchange is wide spread and «thought of as legal.» The case of *Capitol v. Jamie Thomas* has been widely covered by the press in the United States and abroad. In Spain it was followed by the press in the context of a larger debate that includes the law *Sinde* [ley *Sinde*], the «digital canon» and the interpretation of the multinational treaties Spain has signed which include provisions pertaining to intellectual property. The last episode of what is perceived as a saga confronting Quijote-like values to the economic interests of multinational corporations was the law *Sinde*, a controversial anti-peer-to-peer bill that would have made it easier to shut down websites that link to infringing content. The law was killed before it even entered the Spanish legislature in a blow to the ruling Socialist government, but in an even greaterer blow to the US, which pushed, threatened, and cajoled Spain to crack down on downloading. This fact was revealed by *El País* through the publication of an extensive series of cables provided to the newspaper by Wikileaks and which exposed the pressure the US put on the Spanish

government to pass this law. Known as ley Sinde after Spain's culture minister, the bill was actually an amendment to a much broader economic rescue package known as the Sustainable Economy Bill. The Sinde law would have set up a new government committee that could draw up lists of sites which largely link to infringing content. These sites would then go to a Madrid court, which would have four days to rule on whether they should be fully or partially blocked. Spain has become notorious to large copyright-holders for its levels of peer-to-peer file sharing. Thanks to Wikileaks, it is possible to access some of the cables sent from the US Embassy in Spain. In those cables, the US demanded that Spain take government action to curb file-sharing, or else the US would put Spain on its annual «Special 301» intellectual property watch-list. In 2008, the US Embassy in Spain sent this cable back to Washington:

We propose to tell the new government that Spain will appear on the Watch List if it does not do three things by October 2008. First, issue a [Government of Spain] announcement stating that internet piracy is illegal, and that the copyright levy system does not compensate creators for copyrighted material acquired through peer-to-peer file sharing. Second, amend the 2006 «circular» that is widely interpreted in Spain as saying that peer-to-peer file sharing is legal. Third, announce that the GoS will adopt measures along the lines of the French and/or UK proposals aimed at curbing Internet piracy by the summer of 2009.

Spain's *canon digital* [levy system] on blank media is widely perceived to be a payment to artists that substitutes copyrights in digital environments and allows for unlimited downloading. The amount paid through the levy is seen by the industry as too low, and no replacement for adopting copyright law in new media even at the cost of redefining terms such as communication, distribution, lucre, fair-share, author, pirate and work. Debora Halbert argues that the semantic shift in those terms occurred within the US government between 1986⁴¹⁵ and 1991⁴¹⁶. In 1986 the congressional report on Intellectual property in an age of electronics

perceived Internet and new communication technologies as a game-changing paradigm shift:

At a basic level, the very definitions on which intellectual property rights are based take on new meanings, or become strained and even irrelevant, when applied to the context created by new technologies. They raise questions, for example, about what constitutes a «derivative work» when works are made available through intangible electronic waves or digital bits; about what constitutes a «work» ; and about who owns the rights to it when it is interactive, and when creators have combined their efforts to produce it.⁴¹⁷

The distinction between authors and readers in that report was also deemed problematic because computers blended the practice in ways that made almost indiscernible the difference between authors and readers:

In many cases, as with word processing programs, the machine contributes little to the creation of a work; it is "transparent" to the writers creativity. But with some programs, such as those that summarize (abstract) written articles, the processing done by the computer could constitute "an original work of authorship" if it were done by a human being. Indeed, the machine itself is at once a series of processes, concepts and syntheses of human intelligence -- so mixed that it is difficult, if not impossible, to separate its parts from the whole.⁴¹⁸

The conversation changed after this report, as it stopped focusing on the characteristics specific to the media and on the practice of creativity, and directed its attention instead at protecting the industry that was employing millions of US workers. The moment the point was shifted from works to jobs, copyright became axiomatic. Halbert argues that as of 1991 the applicability of copyright law to the cyberspace stopped being challenged and its extension assumed. The 1991 task force specifically linked intellectual property rights with the national interest because of the

employment it provided U.S. citizens: «In addition, people of all ages should recognize that millions of U.S. workers are employed by industries that rely heavily on intellectual property protection, and that intellectual property rights are truly a matter of national interest.»⁴¹⁹ The cyberspace was assumed to be a marketplace as opposed to a public sphere, and the narrative of professional authors solely motivated by possible economic gains was reiterated for the Internet. With the Digital Millennium Copyright Act of 1998, peer-to-peer and piracy was made into a crime.⁴²⁰ In Spain, sharing content might in some cases be illegal, but it is essentially decriminalized.

While in UK and France new proposed laws involve graduated response mechanisms that in the case of France could even result in disconnection, Spain's 2006 Prosecutor General Circular is interpreted as having recognized peer-to-peer file sharing as a widely accepted social practice. The US placed Spain on its Section 301 Watchlist⁴²¹ which explains that:

The United States remains concerned about particularly significant Internet piracy in Spain, and strongly urges prompt and effective action to address the issue. The Spanish government has not amended portions of a 2006 Prosecutor General Circular that appears to decriminalize illegal peer-to-peer file sharing of infringing materials, contributing to a public misperception in Spain that such activity is lawful. Spain's existing legal and regulatory framework has not led to cooperation between Internet service providers (ISPs) and rights holders to reduce online piracy. On the contrary, rights holders in Spain report an inability to obtain information necessary to prosecute online IPR infringers, further reducing their ability to seek appropriate remedies. Spain's legal system also generally does not result in criminal penalties for intellectual property infringement.⁴²²

The US was hopeful of the Sinde law, which the report notes «would allow a committee based in the Ministry of Culture to request that an ISP block access to infringing materials hosted online.» However, the Sinde law had trouble in Parliament where public representatives saw it as contrary to

the will of their constituencies, and momentarily sunk altogether after the 115 Embassy cables on the Sinde law were made public.⁴²³ A massive reaction of Spanish people rallied online in a virtual demonstration which threatened to take the streets one day before the law was presented to the legislature.⁴²⁴ Impressed by the magnitude of the reaction, one lawmaker told *El País* for example, that the Sinde law was a not in the interest of the Spanish people but «a response to pressure from the US film industry lobby, as Wikileaks has revealed.» However, with an accord of the two mayor parties the conservative PP and the social democrat PSOE, the law was partially modified and passed on 15 February 2011, and incorporated to the Sustainable Economy Bill, on March 2011.

The fact that both the United States and Spain are signatories of the same binding multinational treaties does not seem to have put an end at controversial interpretations of international law. Within and across national borders there are different views of what a chiefly economic form of globalization has brought about. Under one perspective globalization is seen as an ever-increasing dissolution of barriers to international trade and towards the free circulation of products, services and information; Under another, it is perceived as a process of increasing appropriation of local markets by large commercial interests to the detriment of diversity and traditional communities. While today there is considerable consensus in that some form of global sharing of information, and universal rights is beneficial. However, the intellectual property discussion is not exclusively based on facts, but involves also emotions such as fear, apprehension, or indignation. Total harmonization of national laws is not received with unanimous joy because Intellectual Property Rights are unambiguously recognized as barriers or tolls that limit free-circulation of information, knowledge, and cultural and artistic artifacts, characteristic of authoritarian control which resonate with unpleasant memories of censorship, coercion and propaganda of both authoritarian regimes, and colonial expansion.

Peer-to-Peer Music Exchange

The statistics around peer-to peer exchange have not favored the industry's claim that the practice unambiguously hurts artists. Music downloading has been the source of an intense debate as from 1998 to 2003 intellectual property revenue internationally tripled, but around the same dates, recorded music sales backslide triggering a *qui vive*. According to Pew Internet Project⁴²⁵, between 2000 and 2003 the number of people who downloaded music in the world doubled and according to Ipsos-Reid⁴²⁶ over 60 million Americans above twelve participated. During a similar period of time, between 2000 and 2002, according to the RIAA (2002), the number of CD's shipped in the United States fell from 940 million to 800 million –i.e. 15 percent–. The association downloads/drop-in-sales was immediate, but all research including the pew report, Ipsos-Reid and a number of independent scholarly works suggested that Internet had three effects: increasing the circulation of music, empowering audiences and opening the door to free-riding. The combination of these effects resulted in an overall *increase* of the global size of the markets for music and cultural goods, with, however, a lesser concentration of superstars and of large companies concentrating revenue. Oberholzer and Strumpf proved that downloads had an effect on the number of records sold indistinguishable from zero.⁴²⁷ and Chris Anderson coined the term «long-tail» to describe the new forms of circulation consisting of more creative works to smaller audiences for each work, and fewer concentration of revenue.⁴²⁸

These results were puzzling to economists, and inconvenient to large publishing houses, music conglomerates and motion pictures studios with vested interests in global standards of intellectual property.

However, they were in line with what much literary theory emphasizing today that the notion of literature is context-dependent and becomes difficult to extrapolate outside the culture that produced or appropriated it. They are also consistent with Bourdieu's notion that statistical models that do not previously consider a structure of the field will fail in representing the reality they seek to explain.⁴²⁹

Digital File Exchange in Spain

This section opened with Judge Davis' ruling on *Capitol v. Jamie Thomas*, sentencing her to pay a quarter of her salary for life to Capitol Records; the declaration that such ruling could not happen in Spain where digital file exchange was «though of as legal;» and with the puzzling observation that such different perspectives come from two signatories of all global treaties on intellectual property and especially the TRIPS agreement and the Berne convention.

Capitol v. Jamie Thomas is an important case for the Record Industry Association of America. The American music industry has filled over 26,000 similar lawsuits in the past four years including *Capitol v. Foster* –aimed also at a single mother and her daughter– which, in June 2006, Judge Lee West decided to dismiss with prejudice and force Capitol to pay \$68,685.23 to cover for Ms. Foster's attorney fees. On May 14th, 2008, Magistrate John Acosta also awarded \$103,175.00 for attorney fees in *Atlantic v. Andersen* to Tanya Andersen, a disabled single mother of a nine year old. While the vast majority of these lawsuits have been settled or dismissed at the time I write this, some are still open. The RIAA has actively publicized Judge Davis' ruling on *Capitol v. Jamie Thomas* as a precedent. According to the RIAA, the ruling would have reversed previous binding jurisprudence in the United States and established a new limitation for «fair use» as the making available copyrighted material would constitute «distribution» even if no actual dissemination was proved. For that same reason, however, Judge Davis acknowledged on May 15, 2008 that he would consider a retrial on the grounds that «the Court committed a manifest error of law» by instructing the juries that:

The act of making copyrighted sound recordings available for electronic distribution on a pee-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right

of distribution, regardless of whether actual distribution has been shown.⁴³⁰

According to Michael Hegg, a juror, it would have been a lot harder to make the decision if the plaintiffs had been required to establish that Kazaa users actually downloaded the music, but «[y]es, we would have reached the same result.» Jamie Thomas' defense argued some improbable possibilities that offended the jurors: she turned in a different hard drive for examination, and she argued that a hacker intercepted her wireless connection when she does not have one. Jurors found Jamie Thomas first and furthestmost guilty of lying and thinking she was above the law: «She's a liar» Hegg said, «I think she thought a jury from Duluth would be naïve. We're not that stupid up here [...] I don't know what the fuck she was thinking, to tell you the truth.»

Under the governing assumption of a unique international system of intellectual property rights, comparative analyses loose bearing and the relevant questions become first whether a country is within the system or falls outside of it; and second if once in the system the country fully complies with the international model or falls short of it, in which case its non compliance can only be attributed to a weakness in its rule of law. Following this rationale on April 4th, 2008 the Office of the United States Trade Representative put Spain on the 301 watch list, together with ten other Spanish-American countries: Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico and Peru. The text referring Spain reads:

Spain will be added to the Watch List in 2008. The United States is concerned by the Spanish government's inadequate efforts to address the growing problem of Internet piracy, described by U.S. copyright industries as one of the worst in Europe. There is also a widespread misperception in Spain that peer-to-peer file sharing is legal.⁴³¹

The text does not hide the source of information is the «U.S. copyright industries,» and that it is the state as a whole that is then concerned by the

«Spanish government's inadequate efforts.» The agreement between copyright industries and the State is, as we mentioned before, a double entente in which the coercive power of the state can be called upon to enforce intellectual property protection, but also in which copyright industries committed to distribute the benefits they would perceive to all sectors of American society. The use of the term «misperception» suggests that peer-to-peer exchange is «illegal» and the intentional vagueness on who misperceives its legality aims at Spanish society at large, and at the Spanish legislator and the judicial in particular.

However, The Spanish legislator seems to be very aware of the binding international treaties Spain has signed, when considering peer-to peer technologies. The unnamed legal experts quoted in the Spanish press coverage⁴³² of *Capitol v. Jamie Thomas* emphasize that the key element to be established in a peer-to peer trial is the «intention to profit.» If it does not exist or cannot be proved, then the Spanish and European courts would tend to dismiss the case without prejudice. Jamie Thomas had no intention to profit from sharing those songs. Intention to achieve economic profit is a prerequisite for penal/criminal actions on copyright crimes in Spain and the European Union, but its presence is not indispensable for claiming civil action against transgressors. The Attorney General Office of Spain circulated a regulation on May 5th, 2006 based on the November 25, 2003, modification of the Organic Law 15-2003 on «Offenses against Intellectual Property,» in which he states:

...hay que entender que las conductas relacionadas con la utilización de nuevas tecnologías, para la comunicación u obtención de obras protegidas, tales como las de «colocar en la Red o bajar de Internet» o las de intercambio de archivos a través del sistema «P2P» , sin perjuicio de poder constituir un ilícito civil, frente al que los titulares podrán ejercitar las correspondientes acciones en dicha vía, no reúnen, en principio, los requisitos para su incriminación penal si no concurre en ellas un ánimo de lucro comercial.

[...we have to understand that conducts associated with new technologies with the purpose of communicating or obtaining protected works, such as «uploading into the Net or downloading from Internet,» or sharing files through the p2p system, with no prejudice of possibly constitute an illegal civil activity, against which [copyright] holders can take the corresponding steps through that [civil] path, do not fulfill, in principle, the requirements for penal incrimination if they do not concur with the intention of commercial profit]

The Spanish justice makes a series of fundamental distinctions on the nature of the fault, and on the conception of what is right and thus legal for the circulation of digital files. First, if let's say Ana buys a record and gives its songs away without perceiving a «commercial gain» then she will not be committing a criminal offense. Ana can still be charged of infringing civil, «patrimonial rights» of the copyright holder, in which case the burden of the proof would fall on the claimant. He would have to establish the amount of the loss that Ana's action caused to his business and if Ana has bought a CD from which she has copied the files the difficulty becomes even greater as he would have to argue that his rights were not «exhausted» through the first-sale principle when he sold the individual CD to Ana, and that he can still control the use Ana does of his property afterwards. As texts become less-dependent on a material support, understanding what is Ana buying when she pays for a song becomes increasingly complex to determine.

Debora Halbert argues that information sharing over the Internet was deemed «distribution» and thus under the control of copyright holder, only after 1995⁴³³, when a vast number of terms present in the copyright law suffered semantic shifts to try to accommodate the changes brought by Internet and new digital media. Another of the words which received a much narrower interpretation at the time was «profit.» Sharing for reasons different than seeking economic profit was not considered a crime before, but the interpretation of the term expanded to include enjoyment of a work, which in the practice criminalizes a series of activities widely perceived as normal

with printed paper books for example, such as sharing them. The term was also controversial in the Spanish and American interpretation of the law.

While Spanish identifies «lucro» [lucre] with usury, the English legislator reads it as «benefit» which has a large positive connotation associated with the public good. The semantic shift that transforms communication into distribution, and criminalizes it, even in the absence of profit has not happened in Spain. The Spanish legislator is very clear on the distinction as he writes that «profit/lucro» should not be understood as «benefiting in general» or «enjoying» copyrighted material but rather in the narrow sense of «economic profit:»

...el elemento subjetivo del ánimo de lucro exigido por el tipo penal no puede tener una interpretación amplia o extensiva, sino que debe ser interpretado en el sentido estricto de lucro comercial...

[... the subjective element of intention of commercial profit that the penal [transgression] typifies cannot have an ample or expanded interpretation, but has to be interpreted in the narrow sense of commercial profit...]

However, this is not a mere problem of translation, and the Spanish legislator is concerned with harmonizing national laws with European directives and with the articles of the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of which Spain is an affiliate. He thus proceeds to justify his interpretation by quoting the passages of the international laws on which he is supporting his analysis:

En apoyo de la anterior interpretación, debe señalarse que en la Propuesta de Directiva y Decisión Marco del Parlamento y del Consejo presentada por la Comisión el 12-7-2005, sobre medidas penales para asegurar el respeto de los derechos de propiedad intelectual, se contempla en su artículo 3. la consideración por los Estados Miembros como delito de «todas las infracciones intencionales de los derechos de propiedad intelectual a escala

comercial...» Este criterio a su vez es tomado del art. 61 del Acuerdo sobre aspectos relacionados con el Comercio de los Derechos de Propiedad Intelectual, firmado el 15 de abril de 1994, por todos los miembros de la Organización Mundial del Comercio.

[In support to this interpretation, it should be noted that in the Proposal for a Directive and on the Decision Framework of the Parliament and the Council presented by the Commission on 7/12/2005, pertaining criminal actions to secure the respect to intellectual property rights, article 3 contemplates member states' consideration of offense «all intentional infractions to intellectual property rights at a commercial scale...» This criterion is in turn taken from Art. 61 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), signed on April 15, 1994, by all member states of the World Trade Organization.]

Coming back to the syllogism on which this problem originates –that under the assumption of a unique model of authorship, none-compliance equates to a weak rule of law– and having discarded the possibility of misinterpretations due to the use of different languages, it would be logical to think that the disagreeing countries would make use of the series of avenues that TRIPS has under the World Trade Organization, and that the Berne convention administered by WIPO under United Nations' supervision, offers to their signatories to solve their quarrels. However, the United States has opted for continuing to use of the 301 process, as if a unified agreement had not been reached and signed already.

There is significant consensus in the perception that a global order of intellectual property was achieved with the signing of the Trade Related Aspects of Intellectual Property Agreement (TRIPS) within the World Trade Organizations in 1994 as it encompassed all international agreements on authorship and intellectual property. However, on the first section of its article 9 «Relation to the Berne Convention» it reads:

Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

The second part of Article 9, that exempts the United States to comply with Article 6bis of the Berne convention is far-reaching as it is in this article that deontological author-rights are defined: the right to claim authorship and prevent work distortion, mutilation, or derogatory actions in prejudice of honor or reputation. The article in its two subsections reads:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.

The use of the terms «honor» and «reputation» establish a code of conduct that is incompatible with the idea of economic-property. Regardless of who owns the economic rights of a work, the article says, the author can «claim authorship» at any moment to object distortion, modification or derogatory action. This moral right runs parallel to property rights. Under this provision, the buyer of a Sorolla in Spain becomes its legal custodian, but he is not permitted to paint a mustache on a character, or destroy it, while in the United States the economic owner of a painter can cut it in pieces to fit the size of his living room, or destroy it as it happened with Richard Serra's sculpture *Tilted Arc* in 1989. Both examples refer to public

art and stress public interest to counterbalance on the one hand the individual whim of the owner, and another hand the private pretensions of an author contrary to people's will (Serra's public sculpture brought about individual protests in large numbers).

Under United States legislation author-rights are circumscribed to copyrights, which can pass through sale or transfer to a new owner, and die with the expiration of the copyright term:

(a) Relationship With Domestic Law. - The provisions of the Berne Convention - (1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and (2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) Certain Rights Not Affected. - The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law - (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.⁴³⁴

In consequence, as copyrights expire and the work enters public domain so do author-rights:

Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.⁴³⁵

In the practice, this implies Walt Disney can adapt Don Quijote into a film without mentioning the name of Cervantes or of the book he wrote; and that the studio can appear as the «author» of the work without mentioning

the name of the writers who did the adaptation on the basis of work-for-hire.⁴³⁶ It also implies a different structuring of the public domain that I will analyze in greater detail in the next section.

Finally, the late date of 1971 for the Berne Convention in TRIPS Art. 9, instead of the original 1886, means to include the modifications made in Paris on that date that includes two far-reaching changes: first any country member is now allowed to opt-out of any individual article of the treaty, and second, it is permitted to pursue parallel bilateral pre-emptive actions (namely the 301 process). Since any member joining the Berne Convention after 1971 can pick which articles to abide by, the document has ceased to matter as a tool to promote a global understanding of authorship. Article 28-1(b) of the new 1971 version of the Berne Convention now reads:

(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply to Articles 1 to 21 and the Appendix, provided that, if such country has previously made a declaration under Article VI(1) of the Appendix, then it may declare in the said instrument only that its ratification or accession shall not apply to Articles 1 to 20.

Article 6 of this Act, «Preemption with Respect to Other Laws Not Affected,» reaffirms the 301 process:

Section 301 is amended by adding at the end thereof the following:
«(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.»

Under the powers of Congress enumerated in Article 1, section 8 of the United States Constitution is to «promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.» Congress exercised this faculty with successive Acts (1790, 1909, 1976, 1994, 1998 and 2005) that have

ever-increased the term of protection from an initial 14 years with a limit to one renewal in 190, to 95/120 years or life plus 70 years, with unlimited renewals in 1998. With the Digital Millennium Copyright Act of 1998 and further more with the Family Entertainment and Copyright Act of 2005, U.S. Congress criminalized copyright infringement. While some binational agreements were signed at the turn of the century, the United States signed multinational agreements relatively recently, the most relevant being a modified version of the Berne Convention in 1988, and TRIPS in 1995. Statutory provisions related to copyright law are codified in Title 17 of the United States code. The Anglo-Saxon tradition places a significant stress in case or common law, and thus for digital file exchange a series of cases set precedent and are part of the legal framework of copyright in the United States. Some examples of those cases are: RIAA v. Napster that established that peer-to-peer exchanges are commercial in nature; MGM v. Grokster that set that peer-to-peer technology qualifies for the «Sony safe-harbor doctrine» that is that if significant legal use of a technology is established, even if part of that technology is used for illegal activities, the law cannot condemn the technology itself; and Worldwide Church of God v. Philadelphia Church of God that established property rights are to supersede author rights when conflicting.

Spanish author law on the other hand comes from a long tradition of Roman and Canon law, it was explicitly codified during the first Spanish Republics, and in the law of January 10, 1879, modified and confounded with intellectual property law in cinema, on November 11, 1987, and with multinational treaties on April 12, 1996 (Law 1/1996). The Spanish Constitution of 1978 in its Article 10, establishes «individual dignity» and the «development of one's own personhood» as the founding principles of peace and political order, and Article 20.1 reads:

Se reconocen y protegen los derechos: (a) A expresar y difundir libremente los pensamientos, ideas y opiniones mediante la palabra, el escrito o cualquier otro medio de reproducción; (b) A la producción y creación literaria, artística, científica y técnica; (c) A la libertad de cátedra.; (d) A comunicar o recibir libremente información

veraz por cualquier medio de difusión. La ley regulará el derecho a la cláusula de conciencia y al secreto profesional en el ejercicio de estas libertades.

[The following rights are recognized and protected: (a) [right] to express and freely distribute thoughts, ideas, and opinions, through oral or written works, or any other mean of reproduction; (b) [right] to artistic, scientific and technical production and creation; (c) [right] to Academic freedom; (d) [right] to communicate or freely receive truthful information through every media. The law will regulate the right to the clause on conscience and professional secrecy in the exercise of these freedoms.]

In Spain, freedom of speech and author rights are constitutional rights established in Article 20.1b) of the Spanish Constitution (CE). Spanish law decides to use the term «recognizes» implying the existence of rights before the Constitution of the Spanish State in 1978 that need thereafter to be effectively protected (Art. 9.2.c CE). This has been interpreted both as a recognition of a long tradition of Spanish law, and also of the natural origin of author rights. Subsection 1b, on another hand, was the object of a heated debate and voted to stay by the majority of Congress on the basis that «author rights [were] in more need of protection than property.» In an essential departure from Anglo-Saxon tradition, Spanish law recognizes first and foremost the right to «production and creation,» before the right to property. Also, Article 10.2 of the Spanish Constitution (CE) instructs the interpretation of these articles «in accordance with the Universal Declaration of Human Rights, and to the related treaties and international agreements subscribed by Spain:» Article 27.2 of the Universal Declaration, and Article 15.1.c) of the International Covenant on Economic, Social and Cultural Rights state that «Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.»

However, there is some controversy about the constitutional ground up on which intellectual property should be based. Under one interpretation

intellectual property base is authorship and is covered under Article 20.1.b), it is second to author rights and freedom of speech. Under another interpretation economic and patrimonial rights should stand on equal grounds to personal rights and the base of intellectual property should be sought in Article 33, establishing private property rights. Both views agree different interpretations of Article 149.9, «De las Comunidades Autónomas» of the Constitution that specifies the exclusive Federal State competence to legislate on industrial and intellectual property. Under one interpretation this is an indication that intellectual property should be subject of general laws (not organic), while under another it indicates that it was not covered on Article 20.1.b). For the purpose of this essay, it is relevant to note also that intellectual property is again mentioned in the list of faculties that are constitutive monopolies of the Spanish State including administration of nationality, foreign relations, defense and army, tariffs, minting, units of measure and time, currency and exchange, and treasury. Finally, Title 1 Article 14 of the Spanish Law of Intellectual Property establishes that moral rights are inalienable, and cannot be renounced. It will always correspond to the author thus, to decide if and how a work should be divulged or retired from circulation, and under what name, pseudonym or if under a state of anonymity. The author always retains rights to access his original work, can always demand its integrity be respected, although he or she can modify it if it hasn't been declared of national cultural interest or affects other's people rights.

Spanish intellectual property law is composed of a bundle of rights that include economic patrimonial rights and also deontological personal and natural rights rooted on honor codes of classical citizenship, while the United States' seems to recognize mostly, if not only, economic and patrimonial rights. Of the 153 countries that have signed the TRIPS agreement a significant majority – close to 152 – have agreed to follow a mix of both a property-based copyright model of intellectual property, and an author-based deontological honor-based system of author-rights (Berne has been signed by 165 countries including all 153 that have signed TRIPS). However, one country, the most important in terms of breath, scope and coercive power, has opted-out the articles pertaining author-rights,

effectively establishing two models for global authorship and intellectual property. Under this interpretation by putting a significant number of countries on the 301 watch list, the United States is trying to coerce those countries outside of multinational fora to abide by ever-increasing private protection national laws in this case the Digital Millennium Copyright Act of 1998 and the Family Entertainment and Copyright Act of 2005 that criminalize digital file sharing.

Similarly to the nineteenth century debate between free-trade supporters and monopoly-proponents sheltered unresolved under TRIPS, the unresolved antagonism between, on the one side, proprietary rights associated with freedom of contract, and, on another side, personal rights associated with classical citizenship and inalienable human rights, is kept dormant and unsolved inside the treaty.

For transatlantic Spanish-America this has far reaching consequences. Aside from important economic sanctions in unrelated products such as financial services, or construction, the Spanish Legislator is very concerned that the pressures from the 301 process want to criminalize the Spanish society at large:

En todo este marco de nuevas tecnologías de la sociedad de la información, debe partirse de la necesidad de coordinar la protección de los derechos de los titulares frente a las conductas vulneradoras, con los derechos de los usuarios de los servicios de la sociedad de la información, sin que resulte posible, ni efectiva, una criminalización generalizada de la sociedad.

[In this framework of new technologies and the information society, we should always start by harmonizing the needs for protection of copyright holders against harmful practices, with the rights of users of the services provided in the information society, without ever trying to incur in an impossible and ineffective criminalization of society at large.]

The 301 discourse justifies an aggressive and confrontational economic intervention that has been suggested to be directly recasted from 1950s anticommunist McCarthyism⁴³⁷ (see for example Lowenfels 1955, Peterson 1962, Ewald 1986, Schrecker 1994, or Doherty 2003), and to follow traditional techniques of war censorship and propaganda identified in the nineteenth century early works of Tarde, and Lippman, and later on formalized in Herman and Chomsky's linguistic model. At a textual level these techniques function as the iteration of a series of tropes mass distributed and endlessly repeated starting from the metaphor of new communism and Marxism, to appeals to fear and disinformation by evoking the possible extinction of creativity, to the appeal to authority by pretending to be siding with authors, to the appeal to prejudice by identifying file exchangers with profiteers, to labeling, stereotyping and demonizing the other as hackers, communists, terrorists and pirates, to flag-waving copyright protection as patriotic, to cutting truths in half like attacking European Exceptionalism and omitting to mention American Uniqueness, to glittering generalities and oversimplification of issues, to finally offering a simple decision or leadership venue that would swiftly simplify the process of reacting against the alleged threat. In an address to the American Senate in 2002, for example, former head of the Motion Picture Association of America, Jack Valenti, stated that :

Everyone sharing a copyrighted file on the Internet is a hacker and all hackers have a strange ideology. Subsidies, quotas, the French so called Cultural Exception... they are reminiscences of a Marxist idealism to protect the inefficiency of local industries. Hollywood is defending authors against sites of piracy like Morpheus and Kazaa. Those sites are the new form of communism and a potential nest of terrorists.

However, the cold war conditions supporting Valenti's discourse don't hold any more, and the argument for state support to American corporations with large vested interests in intellectual property included the promise of sharing the benefits received to society at large, precisely what the Spanish

juror decided to emphasize in the fragment quoted earlier. An American monolithic position on intellectual property depends on reciprocity, but recently, parallel to the well-publicized debate on drug patents, a significant number of American and European institutions have grown increasingly worried about the steep costs of academic journal subscriptions. UC Berkeley, Harvard, Stanford, Duke, and the École Normale Supérieure have taken steps to denounce monopolistic practices of large publishers, naming in particular the Dutch conglomerate Elsevier who controls a significant number of academic publications and especially the ones of medical content. The argument made by academic associations and institutions is twofold: on the one hand they argue that copyrights were never bought (since academic publishing is not remunerated); that most research is produced with public funds, and that the peer review process that gives the added value to those journals, is also being done by academics working for those same universities; they argue on another hand, that the high cost of scientific information could seriously hamper the conduction of academic research. As a result, on January 11, 2008, the US Senate passed the Consolidated Appropriations Act, 2008 requiring that:

all investigators funded by the National Institute of Health submit or have submitted for them to the National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law. [(Division G, Title II, Section 218 of PL 110-161)]

Based on a similar rationale, all doctoral students in all disciplines of credited universities are today required to sign an agreement under which they grant rights to preserve, archive and publish their dissertations. For the University of California, for example, it is ProQuest/UMI Dissertation Publishing Business. The first article of this 2008-2009 version of this agreements reads:

Grant of Rights. Author hereby grants to ProQuest/UMI the non-exclusive, worldwide right to reproduce, distribute, display and transmit the Work (in whole or in part) in such tangible and electronic formats as may be in existence now or developed in the future. Author further grants to ProQuest/UMI the right to include the abstract, bibliography and other metadata in the ProQuest Dissertations and Theses database (PQDT) and in ProQuest/UMI's Dissertation Abstracts International and any successor or related index and/or finding products or services.

Lastly, in music, private business is learning from the Spanish model and implementing it in other markets around the world. It has been increasingly reported in the media and by scholars that digital file exchange is not only wide spread but it is also regarded as normal in most industrialized societies by a generation of young people who expect music to be free. A series of electronic manufacturers has thus decided to copy and extend the Spanish model of the «digital canon» into their business model. The Spanish «Remuneración compensatoria por copia privada» or «Canon digital por copia privada» or «Canon» mandates a fee from 60 cents to 12 € be charged on recording equipment and support to be distributed to authors, producers and editors through author guilds. It was first considered in the Spanish laws of intellectual property of 1987 and 1996, and first applied in 2003. Today it distributes through author guilds close to 300 million euros per year. Starting in 2008, a series of manufacturers and internet service providers has decided to offer to its clients free music when they buy a handset or MP3 recorder starting with Microsoft's Zune in the U.S., to Nokia's CWM-system (Comes With Music) in Britain and India, to Orange's Music Max in France and the E.U., to TDC's CWM in Danemark, to Sony's Play-Now-Plus in Sweden. Music studios receive a fixed fee per handset sale, are guaranteed a number of sales, and the promise of «free-use» is actually subject to «fair-use» limitations, beyond which access is cut-off. A popular magazine reads «Record companies are realizing that their efforts to get young music fans to pay up are not working. Many are unwilling, or unable, to pay for

downloads, and legal action results in bad publicity» and «[However] subsidized subscriptions will only strengthen the widely held belief that music should be free... That said unlimited music services could help reduce piracy by making it unnecessary.»⁴³⁸

While the Spanish intellectual property tradition did not fully die with the collapse of the empire —some of its ideas have been rediscovered in sociopolitical and academic discourses opposing the totalizing universality of copyrights—, its institutional basis ceased to exist with the disappearance of the supreme Printing Tribunal in 1830. With multinational treaties in the twentieth century global copyrights clashed with national models of *droits d'auteur*, and with notions inherent to the Hispanic tradition in both Mexico and Spain. The clash between copyrights and *droits d'auteur* led to a Euro-American truce crystallized in TRIPS, that did not reduce their different conceptions of the public domain, but established grounds for the globalization of the individual property rights of authors. The Hispanic and Anglo-American views on the public domain clashed in Mexico in the last decennia of the twentieth century, and led amongst other things, to the Mexican Laws of Cinematography. In Spain, the general perception that society is entitled to freely share Internet content has led to a yet unresolved controversy that risks to escalate and spill over other sectors of the United States-Spain bilateral relation through the pressures of the 301 process. Finally, a profound disconnect between society and the politico-cultural institutions that are supposed to represent it, leave no formal channels to efficiently direct cultural claims, and leaves culture in both Mexico and Spain in the volatile position of being taxed by international copyrights, without being represented in their implementation.

Conclusion

The systematic analysis of the correlation between copyrights and creativity has led us through a journey across the Atlantic. The perils that we were told would accompany us were real. They were not, however, risks to creativity. They were part of the European struggles to extend and justify its overseas empires, and it was those imperial projects and institutions that we found were at stake. During that journey, we discovered that the different forms of conceptualizing intellectual property were directly connected to particular sociopolitical forms of organization: Anglo-American copyrights were found to be entwined with liberal republicanism, and *droits d'auteur* with Franco-German participative republicanism. But these two were not the only forms of conceptualizing intellectual property and European imperial models at odds. The systematic examination of the epistemology on which the association of creativity and copyrights was based led us to discover a third paradigm ground in the Spanish imperial project and the Hispanic tradition of the *license*, alive from the fifteenth to the nineteenth centuries.

Unveiling the Spanish tradition brought back to the surface a number of treasures whose implications this dissertation has only begun to explore. Among them, we discovered a revolutionary shift in the conceptualization of the source of power of the monarch, in the twelfth to fourteenth centuries, from the medieval *auctoritas* to the *regalía demanial*. While the former was based on the direct association of the monarch to God, which is now thought to be characteristic of the *ancien régime*, the latter was based on a delegation of powers from the natural rights of the people to the monarch, with the associated condition that he or she protects the *demanio* or public domain. The Spanish juridical conceptualization of intellectual property reflected that idea, and laws were established to codify the communal property of the works published and in the public domain. Printing

privileges were exceptions to that rule that were considered «individual laws.» Those privileges granted to authors, were not, as it has been assumed, a means to protect their financial investment when publishing their works, but rather a recognition to the value their works contributed to the public domain, and hence the empire. The financial burden of printing fell on booksellers, and printing privileges granted to authors empowered them in their negotiations with booksellers. The idea that privileges were granted to author-entrepreneurs to protect their investments, was in fact incompatible with the Hispanic world view where authors often were nobles as well. The Hispanic model of authorship was based instead on an author-knight whose works were seen as heroic deeds intended to protect the public good and expand the public domain. While the romantic author creates mostly driven by a need of self-expression in a participative republic, and the copyright-owner moved by personal gain in contractual republics, the author-knight main motivation is solidarity and glory in a system of «regalia demanial» or constitutional monarchy. In the Hispanic tradition books became part of the public domain the moment they were printed, but manuscript books were still considered movable items subject to general commoditization.

Another treasure discovered was the existence of two complementary and parallel bodies of laws that referred on the one hand to the lesser technologized arts, such as the manuscript and the *tabula picta*, and another which codified in a very different manner the higher technologized forms of art, such as the print book, the gazette, and the newspaper. Placing the public domain before the author allowed the Hispanic tradition to explore different forms of authorship attribution that may lead to better works for the public. One such Spanish-specific conceptions of authorship that, found both in literature and in jurisprudence, assigned authorship not to the *first*, but to the *best* author. Conscious of the competing interests of authors, booksellers and readers, the Hispanic model made compulsory a *tasa* or price cap to limit monopolistic practices, which was in effect from 1558 until 1761.

Our journey took us to the midst of the battle where colliding empires fought for dominance in the seventeenth and eighteenth centuries, only to discover that copyrights played a key role in the transfer of wealth and

power from the ailing Spanish Empire to the northern European ones. Spain of course tried to resist that transfer with a number of laws directed at preventing the export of valuable resources out of the kingdom, the *leyes de sacas*, and also by setting a supreme Print Tribunal 1714-1830 to defend the Spanish Imperial conceptualization of intellectual property and the public domain. The Tribunal died with the Empire during the Napoleonic invasion, and the independence of Spanish America. From 1836 to 1886, in the disarray of the falling empire, self-proclaimed author-heroes in positions of power set and extended author and copyrights laws. The ultimate collapse of the Spanish Imperial project with the military war of 1898 followed, three years later.

Bringing back to the surface the imperial narrative of intellectual property and the Spanish tradition within shows a different face of copyrights. If the copyright legal timeframe poses a limit to the private control of a work, it is also one of the engines of a historical process of reification that asserts the materiality of culture over its «spiritual» and intangible content. In this regard, copyrights replace literal canonicity, concentrate and appropriate wealth, and become a technology of creative destruction that ensures the affirmation of the new or emergent over the established: Enlightenment over Renaissance modernity; Liberal over Classic republics; and, the global and hybrid postnational over an older Hispanic universalizing humanism.

Then our journey took us to contemporary times, to the internationalization of copyrights through multinational treaties and the struggles to codify first cinema and then the Internet, in a context similar to the one in which copyrights were first crystallized, a context of imperial justification and expansion. After the fall of the Spanish Empire and the rise of the United States as a world superpower, the Spanish intellectual property tradition did not fully die. Some aspects dear to the Hispanic tradition were rediscovered from oblivion through political, economic and critical discourses opposing a unique and totalizing view of intellectual property and market globalization. For instance, the necessity of two legal parallel conceptualization of creativity in the law, one regulating the highly technologized work, and the other focusing on the practice and experience

of the lesser technologized ones that both the Spanish tradition, and cultural economics advocate for.

In the volatility of copyrights in digital spaces we found a valuable counterfactual to assess the relationship copyrights-creativity, and confirmation of the imperial narrative seeking to legitimize and expand the control of copyrights over the Internet. Conversely, the Hispanic intellectual property tradition provides a new framework to think new media differently, and a more nuanced alternative to the idea of the death of creativity that the imperial narrative of copyrights presents.

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¹ For different definitions of new communication technologies and new media, see for example Scolari, «Mapping conversations about new media: the theoretical field of digital communication,» 2009.

² Jack Valenti director of the Motion Picture Association of America considers that subsidies, quotas, «Cultural Exceptions» are reminiscences of a «Marxist idealism to protect the inefficiency of local industries;» and that Hollywood is defending authors against «sites of piracy like Morpheus and Kazaa, [that] are the new form of communism and terrorism [because] everyone sharing a copyrighted file on the Internet is a hacker and all hackers have a strange ideology.» (Valenti 2002)

³ *OTA report on intellectual property rights in an age of electronics and information: joint hearing of the subcommittee on patents, copyrights, and trademarks of the senate committee on the judiciary and the subcommittee on courts, civil liberties, and the administration of justice of the house committee on the judiciary.c.1986.*

⁴ On Latin American sentiments of hope and despair see example Sarlo, «Cultural Studies and Literary Criticism at the Crossroads of Values,» 1999., or Masiello, *The Art of Transition: Latin American Culture and Neoliberal Crisis*2002.; on the narratives of danger associated with 9/11 and their relation to criticism see Baudrillard, «L' esprit du terrorisme,» *The spirit of Terrorism* Dr. Rachel Bloul trad.2001. or Eagleton, *After theory*2003..

⁵ See Certeau, *L' écriture de l' histoire*1975.; Certeau, *L' invention du quotidien*1990.; Certeau, *Histoire et psychanalyse, entre science et fiction / précédé de «Un chemin non tracé,» par Luce Giard.*2002.; Ricœur, *Histoire et vérité*1955.; Ricœur, *La mémoire, l' histoire, l' oubli*2000.; White, *Metahistory*1973.

⁶ I refer here to the concept first developed by Fromm, *Beyond the Chains of illusion: My Encounter with Marx and Freud*1962. and developed as political unconscious by Jameson, *The political unconscious : narrative as a socially symbolic act*1981.

⁷ On the authorial intention of historical documents see the works that Pagden, Pockok, and Skineer at the Cambridge School of Historical Thought propose, applying Foucault's penetrating insights on power and authorship to historical analysis.

⁸ See for example Herman, Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* 1988. or Ross, «Understanding Propaganda: The Epistemic Merit Model and Its Application to Art,» 2002.

⁹ Narratives of fear are amply studied by postcolonial theory. See for example Said, *Orientalism* 1978..

¹⁰ Lakoff, Johnson, *Metaphors we live by* 1980. see also Ricœur, *La métaphore vive* 1975.

¹¹ Reich, «The Lost Art of Democratic Narrative: Story Time,» 2005.

¹² The «fear to commit to reality» has been lamented by Bruno Latour for example in reference to the appropriation of critical relativism by certain interest groups to question findings of earth's global warming, Latour, «Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern,» 2004.. «The mathematical principle that one plus one is two should not be relinquished by the fact that one can go through excruciating efforts to find exceptions to it. The mixing of two drops of water which produces not two, but one drop that is not twice as big or has twice the mass does not preclude the existence of arithmetics.»

¹³ See for example McCloskey, *If you' re so smart : the narrative of economic expertise* 1990.; McCloskey, *Knowledge and persuasion in economics* 1994.; McCloskey, *The rhetoric of economics* 1998.; McCloskey, *The secret sins of economics* 2002., and the works the school of New Economic Criticism has undertaken after her.

¹⁴ See Shadish, Cook, Campbell, «Experimental and quasi-experimental designs for generalized causal inference,» 2002.

¹⁵ There are in fact two path-breaking events in the narrative: first author laws and copyrights in the eighteenth and twentieth century, and also first multinational harmonization of intellectual property laws through the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property of 1995.

¹⁶ See Shadish, Cook, Campbell, «Experimental and quasi-experimental designs for generalized causal inference,» 2002.

¹⁷ The famous scholar-printer Aldus Manutius, for example, received in 1495-96 a twenty-year monopoly of all works printed by him in Greek, combined with a patent for two of thi printing developments—one of them a form of Greek type. Five years later (1500-1501) Manutius received similar award: a ten year monopoly of all works printed in his italic type. Cf. Bruce Bugbee «Genesis of American Patent and Copyright Law,» 12-13, 43-48 (1967) in Merges, Ginsburg, *Foundations of Intellectual Property* 2004. p.

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- ¹⁸ For an analysis of these distinctions in legal theory see Bercovitz Rodríguez-Cano, *Manual de Propiedad Intelectual* 2002.
- ¹⁹ Statute of Anne (1710). Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19 *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org
- ²⁰ See for example Chartier, *L'ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XVe et XVIIIe siècle* 1992.
- ²¹ See for example Armando Petrucci, «Dal libro unitario al libro miscellaneo,» in Andrea Giardina ed. *Società e impero tardoantico*, vol 4, *Tradizioni dei classici, trasformazioni della cultura*, Bari, 1986, 173-187.
- ²² Sandars, *The Institutes of Justinian: with English introduction, translation and notes* 1910.
- ²³ *Fuero Juzgo en Latin y Castellano, cotejado con los mas antiguos y preciosos códices por la Real Academia Española. (Glossarium vocum barbararum et exoticarum quæ in libro iudicum continentur.-Glosario de voces antiqüadas y raras que se hallan en el texto castellano.)* The Visigothic code, Liber Iudicorum or Forum iudicum trans S.P. Scott. 654.
- ²⁴ Medieval jurists commented and glossed the dossier compiled by order of Justinian in the sixth-century, and in particular of the books 6 and 41 of the *Digeste* and the book 2 of the *Institute*. See Madero, *Tabula Picta* 2004.
- ²⁵ See Foucault, *L'ordre du discours: leçon inaugurale au Collège de France prononcée le 2 décembre 1970*. 1971.; Foucault, «Qu'est-ce qu'un auteur?,» c.1969.
- ²⁶ See Chartier, *L'ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XVe et XVIIIe siècle* 1992.; Chartier, «Figures de l'auteur,» 1996.
- ²⁷ Karl Christian Friedrich Krause (1781–1832)
- ²⁸ Diogenes Laertius refers to this offense in the third century for example. See Georges Steiner *Grammaire de la création*, p. 344, or Boncompain, *La Révolution des auteurs* 2001. p. 23
- ²⁹ Hulot, Berthelot, *Corps de droit civil romain* 1804.
- ³⁰ *Fuero Juzgo en Latin y Castellano, cotejado con los mas antiguos y preciosos códices por la Real Academia Española. (Glossarium vocum barbararum et exoticarum quæ in libro iudicum continentur.-Glosario de voces antiqüadas y raras que se hallan en el texto castellano.)* The Visigothic code, Liber Iudicorum or Forum iudicum trans S.P. Scott. 654.
- ³¹ Alfonso IX «el Sabio», *Partidas*. 1265.
- ³² See Madero, *Tabula Picta* 2004.

³³ See Chartier, *The Order of Books* 1994.

³⁴ Chartier, *L'ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XIVe et XVIIIe siècle* 1992.; and Minnis, *Medieval theory of authorship: scholastic literary attitudes in the later Middle Ages* 1988.

³⁵ McLuhan, *The Gutenberg galaxy: the making of typographic man*. 1962. has argued that the printing press had existed in China for over two thousand years, and that Gutenberg's innovation was really the incorporation of the mobile type. However, a similar case could be made to question the novelty of the mobile type too, since we know today that mobile wooden types were in use in China and other parts of Asia for almost a thousand years. What seems to be new about Gutenberg's press is the material he used to make his mobile type. Before establishing his own workshop, Gutenberg worked as an apprentice at a mint. For his mobile type, he modified an alloy that was used to mint money. The connections between printing money and printing books has not to my knowledge been explored, for example the use of an effigy to guaranty the true value of money, and the use of a signature to guaranty the true value of a work; or the fact that for the first time at Gutenberg's time paper money was printed, making its value depend on aspects external to the physical object etc. Alternatively, one can argue that a change in ideas made possible that printing technology be developed and used widely. Whatever the change, Gutenberg's printing press and mobile type contributed to enable serial-reproduction of books and prints, and a mass-market of readers.

³⁶ Merges, Ginsburg, *Foundations of Intellectual Property* 2004. p. 271

³⁷ See Ku, «Beyond the Paradoxical Conception of Civil Society without Citizenship,» 2002. and Habermas, *The structural transformation of the public sphere: an inquiry into a category of bourgeois society* 1962.; Habermas, «Citizenship and National Identity,» 1994.

³⁸ See Pagden, «Human Rights, Natural Rights, and Europe's Imperial Legacy,» 2003.; Pagden, «Imperialism, Liberalism & the Quest for Perpetual Peace,» 2005.

³⁹ Barthes, *Mythologies* 1957. p. 123

⁴⁰ Along those lines Halbert, *Intellectual property in the information age: the politics of expanding ownership rights* 1999. p. 70 argues that «Copyright has become a commonly accepted myth legitimized through the legal system.»

⁴¹ See Rose, *Authors and owners* 1993. and Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain, 1695-1775* 2004.

⁴² Rose, *Authors and owners*1993.

⁴³ See Hesse, «Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,» 1990..

⁴⁴ Hurt, Schuchman, «The Economic Rationale of Copyright,» 1966.; Drahos, «The Universality of Intellectual Property Rights: Origins and Development,» and Boldrin, Levine, «The Case against Intellectual Property,» 2002.

⁴⁵ See Drahos, Mayne, *Global Intellectual Property Rights: Knowledge, Access and Development*2002.; Drahos, «The Universality of Intellectual Property Rights: Origins and Development,» and also

⁴⁶ Boldrin, Levine, «The Case against Intellectual Property,» 2002.

⁴⁷ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999.

⁴⁸ As Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999. p. 70 has argued referring to copyrights in digital environments: «Copyright has become a commonly accepted myth legitimized through the legal system. (...) Barthes argued the «very principle of myth» is that it «transforms history into nature.» See: R. Barthes, *Mythologies*, trans. A. Lavers (New York: Hill and Wang, 1972). 129. This naturalizing of history is exactly what has occurred with copyright law to the extent that natural rights theory is often times used to justify the copyright system.

⁴⁹ The final «Report [to U.S. Congress] of the Working Group on Intellectual Property Rights» of 1995 for example, specifically links intellectual property rights with the national interest because of the employment it provides U.S. citizens: «In addition, people of all ages should recognize that millions of U.S. workers are employed by industries that rely heavily on intellectual property protection, and that intellectual property rights are truly a matter of national interest.» (*Intellectual property and the National Information Infrastructure*, 206.)

⁵⁰ The combination is unusual in the profession in part because in both anglo-saxon and continental legal traditions the figure of a «certification» to litigate alongside with lawyers in copyright cases is open to professionals of the hard and social sciences, but it is closed to the humanities. Rose expertise in Renaissance literature is not valued much either in as much as all early modernity is in the public domain. Rose is credited thus as an expert in science fiction, a genre he also knows well.

⁵¹ Foucault, «Qu'est-ce qu'un auteur?,» c.1969.

⁵² Rose, *Authors and owners*1993.

⁵³ See for example Ku, «Beyond the Paradoxical Conception of Civil Society without Citizenship,» 2002.

⁵⁴ Lacan, «Le stade du miroir comme formateur de la fonction du je, telle qu'elle nous est révélée, dans l'expérience psychanalytique,» 1949.

⁵⁵ Althusser, «Idéologie et appareils idéologiques d'État (notes pour une recherche),» 1970.

⁵⁶ Ortega y Gasset, *La rebelión de las masas* 1929.

⁵⁷ QTD in Rose, *Authors and owners* 1993. p. 2

⁵⁸ Frye, *Anatomy of criticism; four essays*. 1957. pp. 96-97

⁵⁹ Foucault, *L'ordre du discours: leçon inaugurale au Collège de France prononcée le 2 décembre 1970*. 1971. p. 28

⁶⁰ On the theoretical distinctions of aesthetic and economic value see from an economic perspective Mossetto, *Aesthetics and economics* 1993. and from a critical perspective Poovey, *A history of the modern fact : problems of knowledge in the sciences of wealth and society* 1998.; Poovey, *Genres of the Credit Economy* 2008..

⁶¹ See for example Scolari, «Mapping conversations about new media: the theoretical field of digital communication,» 2009. and Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999.

⁶² See for example Beverley, *Against literature* 1993. In the early modern literature is immanent to the humanities, it stems from universities in general and from the humanistic disciplines in particular, as it is evidenced in the first classic of modern Spanish literature, *la Celestina*, which had its origins in a classroom exercise called the *comedia humanística*. The early modern humanistic model of education is well aware that it is forming elites to be potential rulers, or administrators, and that literature, especially with the reintroduction of classical rhetorics forms an integral part of that pedagogy. With peculiar styles in the continental tradition, in the insularity of the Anglo-saxon or the peninsularity of the Hispanic specificity, literature and the humanities continue to be a discipline both descriptive and prescriptive through the enlightenment and romanticism. A postmodern and postcolonial tendency to relinquish both the descriptive and prescriptive disciplinary functions of the literary canon in contemporary times seeks, however, to breakdown or renegotiate the distinctions on which the status and prestige of the discipline have rested.

⁶³ See Sartre, «Qu'est-ce que la littérature?,» *What is Literature?* c.1947. and Habermas, *The structural transformation of the public sphere : an inquiry into a category of bourgeois society*. 1962.

⁶⁴ Portela, Lino, Madrid. " 'En cinco años esto desaparece. No habrá ni canciones ni música' Músicos, productores y otros profesionales del sector exigen ante Industria una ley que les proteja de la piratería." *El País* 1 Dec. 2009, Digital ed. Web

⁶⁵ Precisely with the slogan of bringing the conversation on copyrights to the European parliament Rick Falkving president of the Pirate party has recently managed to obtain millions of votes across Europe, to gain two seats in parliament and to fire the founding of dozens of national Pirate parties across Europe and Latin America. «En Suecia, [el partido Pirata] ha conseguido 215.000 votos en los comicios europeos (un 7,1% de los sufragios) y así ha arribado al corazón de Europa: ya tiene dos escaños en el Parlamento Europeo. (...) Partidos hermanos han surgido en decenas de países, entre ellos España. El mayor triunfo ha ocurrido en Alemania. Allí han sumado más de 845.000 (un 2% del voto) en las pasadas elecciones federales...» Grau, Abel. "Y por bandera, la ideología pirata: El Partido Pirata, opuesto al 'copyright', llega a la Eurocámara y desafía a las grandes formaciones." *El País* 18 Oct. 2009, digital ed. Web.

⁶⁶ Lessig, *Free culture : how big media uses technology and the law to lock down culture and control creativity*2004.

⁶⁷ Drahos, «Global Propert Rights in Information,» 1995.

⁶⁸ Hesse, «The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance,» 2002.

⁶⁹ «Aute: «Estou a favor do ' gratis total' no mundo da cultura». O cantante presenta esta noite no Teatro Colón da Coruña o seu disco ' Intemperie' ,»

⁷⁰ M. J. Shapiro, Reading "Adam Smith": Desire, history and value, Newbury Park, CA, London, & New Delhi: Sage (1993), 37. In Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999.

⁷¹ See for example *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org; Merges, Ginsburg, *Foundations of Intellectual Property*2004.; and Hesse, d' Iribarne, «La logique culturelle de la loi révolutionnaire,» 2002.

⁷² «John Milton' s contract with Samuel Simmons for the publication of Paradise Lost,» c.1667.

⁷³ *Lettre sur le commerce de la librairie*c.1763.

⁷⁴ Condorcet, «Fragments sur la liberté de la presse (1776),» 1847.

⁷⁵ Kant, «Von der Unrechtmäßigkeit des Büchernachdrucks,» On the Unlawfulness of Reprinting1785.

⁷⁶ Fichte, «Beweis der Unrechtmäßigkeit des Büchernachdrucks. Ein Raisonement und eine Parabel,» *Proof of the Unlawfulness of Reprinting: A Rationale and a Parable* 1793.

⁷⁷ Boscán Almogaver, *Juan Boscán y su cancionero barcelonés*. 1543.

⁷⁸ The United States joined the Berne treaty as part of the Uruguay Round Negotiations in 1989. This will be relevant to our argument further along. On how global intellectual property was negotiated see: Drahos, «Global Property Rights in Information,» 1995. and Bettig, *Copyrighting Culture* 1996.

⁷⁹ Locke, *Second Treatise on Government* c. 1690.

⁸⁰ Hegel, *Grundlinien der Philosophie des Rechts* Remarks on Intellectual Property (1821) c. 1821.

⁸¹ Spain was a «confessional state» until the death of Franco and the democratic constitution of 1978, on whose art. 16.3. one reads: «Ninguna confesión tendrá carácter estatal.» However, in spite of the constitution the Concordat of 1953 and the agreements with the Vatican of 1979 still guarantee considerable privileges to the Catholic Church. This fact should not be blown out of proportion either since a significant number of modern states are still today confessional e.g. in Europe, the U.K. is confessional Anglican, Norway, Sweden, Denmark, Iceland, and Finland are confessional Lutheran; Greece is confessional Orthodox, and Liechtenstein and Monaco are confessional Catholic. On this see for example Carlos Corral Salvador *Concordatos Vigentes*, Madrid, Universidad Pontificia Comillas 2003.

⁸² Chindasuinth, *Liber Judicorum* [642-3] Libro de los Juicios / Forum Iudicum c. 643.

⁸³ Alfonso IX «el Sabio», *Partidas* c. 1265.

⁸⁴ Cf. Einsenstein, *La revolución de la imprenta en la edad moderna europea* c. 1983. and García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003.

⁸⁵ On the contemporary impact of the notion of the «common good» in Hispanic conservatism in Latin America see for example Rock, «Intellectual Precursors of Conservative Nationalism in Argentina, 1900-1927,» 1987. and on the historical legal codification of the common good from the philosophy of natural and human rights see Pagden, «Human Rights, Natural Rights, and Europe's Imperial Legacy,» 2003.

⁸⁶ Advocates of «creative commons» have argued that aspects of this tradition may better represent the use and development of open source software than copyrights. Karl Fogel from questioncopyright.org, for example, elaborates on the resemblance of open source development with traditional hunting practices of native Americans which allowed tribes to

hunt buffalos as the herd crossed their territory, but explicitly prohibited fencing or impeding the free transit of animals across their lands, a common practice for other non-commodified goods such as water, or sunlight.

⁸⁷ See for example Hesse, d' Iribarne, «La logique culturelle de la loi révolutionnaire,» 2002.

⁸⁸ I am using the terms progressive and regressive in this section in their economic sense, as related to whether they result in more (regressive) or less (progressive) social injustice and inequality.

⁸⁹ Ricœur, *Histoire et vérité* 1955.; Ricœur, *La métaphore vive* 1975.

⁹⁰ Certeau, *L'écriture de l'histoire* 1975.; Certeau, *L'invention du quotidien* 1990.; Certeau, *Histoire et psychanalyse, entre science et fiction / précédé de «Un chemin non tracé,» par Luce Giard.* 2002.

⁹¹ White, *Metahistory* 1973.

⁹² I refer here to the concept first developed by Fromm, *Beyond the Chains of illusion: My Encounter with Marx and Freud* 1962. and developed as political unconscious by Jameson, *The political unconscious : narrative as a socially symbolic act* 1981.

⁹³ On the authorial intention of historical documents see the works that Pagden, Pockok, and Skineer at the Cambridge School of Historical Thought propose, applying Foucault's penetrating insights on power and authorship to historical analysis.

⁹⁴ See for example Herman, Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* 1988. or Ross, «Understanding Propaganda: The Epistemic Merit Model and Its Application to Art,» 2002.

⁹⁵ Narratives of fear are amply studied by postcolonial theory. See for example Said, *Orientalism* 1978..

⁹⁶ Lakoff, Johnson, *Metaphors we live by* 1980. see also Ricœur, *La métaphore vive* 1975.

⁹⁷ Reich, «The Lost Art of Democratic Narrative: Story Time,» 2005.

⁹⁸ The «fear to commit to reality» has been lamented by Bruno Latour for example in reference to the appropriation of critical relativism by certain interest groups to question findings of earth's global warming, Latour, «Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern,» 2004.. «The mathematical principle that one plus one is two should not be relinquished by the fact that one can go through excruciating efforts to find exceptions to it. The mixing of two drops of water which produces not two, but one drop that is not twice as big or has twice the mass does not preclude the existence of arithmetics.»

⁹⁹ See for example McCloskey, *If you' re so smart : the narrative of economic expertise*1990.; McCloskey, *Knowledge and persuasion in economics*1994.; McCloskey, *The rhetoric of economics*1998.; McCloskey, *The secret sins of economics*2002., and the works the school of New Economic Criticism has undertaken after her.

¹⁰⁰ Woodmansee, Jaszi, *The Construction of authorship : textual appropriation in law and literature*1994.

¹⁰¹ See for example respectively Rose, «The Author in Court: Pope v. Curll (1741),» 1992. and Hesse, *Publishing and cultural politics in revolutionary Paris, 1789-1810*1991.

¹⁰² See for example, for Spain and France respectively: García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003. and Armstrong, *Before copyright: The French Book-Privilege System 1498-1526c.*1990.

¹⁰³ Rose, «The Author in Court: Pope v. Curll (1741),» 1992.; Armstrong, «Review: Authors and Owners: The Invention of Copyright by Mark Rose,» 1994.

¹⁰⁴ Condorcet, «Fragments sur la liberté de la presse (1776),» 1847.. See also Hesse, «Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,» 1990.

¹⁰⁵ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003.

¹⁰⁶ REF

¹⁰⁷ The distinction between value in use and value in existence is relevant. Relics in the middle ages for example had a value in existence. They were kept inside a chest and might not ever be seen. They had a spiritual value that did not require them to be used. Similarly diamonds have a high value in existence and a very low value in use, while water has a high use-value and a relatively low value in existence.

¹⁰⁸ Hesse, «The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance,» 2002.

¹⁰⁹ Woodmansee, «The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ' Author' ,» 1984.; Woodmansee, Jaszi, *The Construction of authorship : textual appropriation in law and literature*1994.

¹¹⁰ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003.

¹¹¹ Defoe, *An Essay on the Regulation of the Press*.1704.

¹¹² *El País* 1 Dec. 2009, Digital ed. Web

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- ¹¹³ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999.
- ¹¹⁴ Kuhn, *The Structure of Scientific Revolutions* c.1962.
- ¹¹⁵ The notion that copyrights foster innovation is ubiquitous. See for example Hurt, Schuchman, «The Economic Rationale of Copyright,» 1966.
- ¹¹⁶ On the concept of epistemological validity for generalized causal inference see Shadish, Cook, Campbell, «Experimental and quasi-experimental designs for generalized causal inference,» 2002.; and in regards to its relation to behavior theory and legal practices see MacCoun, University of California, Berkeley. Graduate School of Public Policy., *Biases in the interpretation and use of research results* 1997.; MacCoun, «Epistemological dilemmas in the assessment of legal decision making,» 1999..
- ¹¹⁷ This notion will prove useful to explain and compare how laws are created using different traditions through documenting a common law precedent or by imagining deontological fictions (*fictio legis*).
- ¹¹⁸ McLuhan, *The Gutenberg galaxy: the making of typographic man*.1962.
- ¹¹⁹ Foucault, «Qu'est-ce qu'un auteur?,» c.1969.
- ¹²⁰ Rose, *Authors and owners* 1993.
- ¹²¹ Bourdieu, «Mais qui a créé les «créateurs»?,» c.1980. pp. 208-209
- ¹²² Bourdieu, «Mais qui a créé les «créateurs»?,» c.1980. p. 217
- ¹²³ Bourdieu, «Mais qui a créé les «créateurs»?,» c.1980. p. 218
- ¹²⁴ Bourdieu, «La production de la croyance,» 1977.; Bourdieu, *La distinction : critique sociale du jugement* 1979.; Bourdieu, «Mais qui a créé les «créateurs»?,» c.1980.
- ¹²⁵ Bourdieu, «Mais qui a créé les «créateurs»?,» c.1980. pp. 214-215
- ¹²⁶ García Oro, *Los reyes y los libros. La política libraria de la Corona en el Siglo de Oro (1475-1598)* c.1995. p. 22
- ¹²⁷ Norton, *La imprenta en España 1501-1520* 1997. pp. 188-189
- ¹²⁸ Sebastian de Covarrubias in the seventeenth century, defines privilege as a law designed for a small group, a «private law» according to the latin «quasi privata lex» (Covarrubias, *Tesoro de la lengua castellana o española según la impresion de 1611, con la adiciones de Benitio Remigio Nogales publicans en 1674. (Facsimil)* c.1611. p. 882)
- ¹²⁹ Rose, *Authors and owners* 1993. p. 28
- ¹³⁰ Hesse, «Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,» 1990. pp. 114-5
- ¹³¹ *Novísima recopilación de las leyes de España*

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- ¹³² «De la apropiación penal a la propiedad literaria. Sobre los orígenes del derecho de propiedad intelectual en España,»
- ¹³³ Álvarez Alonso, «Las dos caras de Jano. Propiedad y Constitución en el primer liberalismo español,» 1999. pp. 305-306
- ¹³⁴ Jovellanos, *Obras completas* 2010. p. 351
- ¹³⁵ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 188
- ¹³⁶ See for example González Novalín, *El Inquisidor general Fernando Valdés 1483-1568* 1971. pp. 212,268 and Lea, *Historia de la Inquisición Española* 1983. p. 294
- ¹³⁷ Bouza Álvarez refers for example the case of the work by the doctor Luis Mercado in 1599 about the treatment of the plague that was hitting Castilla during that time, and how all prerequisites for printing were lifted and one copy of the book was sent to each corridor with orders to «circulate widely.» in García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 220
- ¹³⁸ See for example García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. pp. 220-1 and Bouza Álvarez, «Escritura, propaganda y despacho de gobierno,» 1999. pp. 111-137
- ¹³⁹ A similar concept in geometry is the Fermat point of a triangle, also called Torricelli point, which is the solution to the problem of finding a point such that the total distance from the three vertices of the triangle to the point is the minimum possible.
- ¹⁴⁰ Pagden, *Lords of All World: Ideologies of Empire in Spain, Britain, and France, 1500-1800* 1995.; Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003.
- ¹⁴¹ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003.
- ¹⁴² Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003. pp. 173 & n.6
- ¹⁴³ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003.
- ¹⁴⁴ With the European Union, Spain should not reclaim the non-existence of modernity, but its inheritance rights as its first modern European State. Iarocci, *Properties of Modernity* 2006. p. 22
- ¹⁴⁵ Paz, «La búsqueda del presente,» c.1990.
- ¹⁴⁶ Paz, «La búsqueda del presente,» c.1990.

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- ¹⁴⁷ Weber, *The Protestant ethic and the spirit of capitalism* c.1905.; Durkheim, *Le suicide. Étude sociologique* c.1897.
- ¹⁴⁸ Hegel, *Lectures on the philosophy of world history* c.1830.
- ¹⁴⁹ Wallerstein, *The Modern World System: Capitalist agriculture and the European World economy in the sixteenth century* 1974.; Wallerstein, *Modern world system II: mercantilism and the consolidation of the European world-economy, 1600-1750* 1980. and Dussel, «Beyond Eurocentrism: The world-system and the limits of modernity,» 1998.
- ¹⁵⁰ Mignolo, *Local histories/global designs : coloniality, subaltern knowledges, and border thinking* 2000.; Mignolo, *The darker side of the Renaissance : literacy, territoriality, and colonization* 2003., Jameson, Miyoshi, *The cultures of globalization* 1998.); or Quijano, *Colonialidad y modernidad-racionalidad* 1992.; Quijano, «Colonialidad del poder, eurocentrismo y América Latina,» 2001.
- ¹⁵¹ Dussel, «Beyond Eurocentrism: The world-system and the limits of modernity,» 1998. p. 32
- ¹⁵² Iarocci, *Properties of Modernity* 2006. p. 21
- ¹⁵³ p 24, quoted in Iarocci, *Properties of Modernity* 2006. p. xiv
- ¹⁵⁴ Baudrillard, *Simulacre et simulation* 1985.
- ¹⁵⁵ Iarocci, *Properties of Modernity* 2006. p. 23
- ¹⁵⁶ Iarocci, *Properties of Modernity* 2006. p. 25
- ¹⁵⁷ Iarocci, *Properties of Modernity* 2006. p. 25
- ¹⁵⁸ I am using here Rose, *Authors and owners* 1993. but I could have equally taken similar definitions from Kaplan, Benjamin, *An unhurried view of copyright* c.1967.; Hesse, «Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,» 1990.; Saunders, *Authorship and Copyright* 1992.; or Woodmansee, Jaszi, *The Construction of authorship : textual appropriation in law and literature* 1994.,
- ¹⁵⁹ Chartier, *L' ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XVe et XVIIIe siècle* 1992.
- ¹⁶⁰ See for example Armando Petrucci, «Dal libro unitary al libro miscellaneo,» in Andrea Giardina ed. *Società e impero tardoantico*, vol 4, *Tradizioni dei classici, trasformazioni della cultura*, Bari, 1986, 173-187.
- ¹⁶¹ See Foucault, *L' ordre du discours: leçon inaugurale au Collège de France prononcée le 2 décembre 1970*. 1971.; Foucault, «Qu'est-ce qu'un auteur?,» c.1969.
- ¹⁶² See Chartier, *L' ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XVe et XVIIIe siècle* 1992.; Chartier, «Figures de l' auteur,» 1996.

¹⁶³ Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*.1983.

¹⁶⁴ Auerbach, *Mimesis: la representación de la realidad en la literatura occidental*1a ed. en español 1950c.1946.

¹⁶⁵ Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*.1983. pp. 23-4

¹⁶⁶ Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*.1983. pp. 24-26

¹⁶⁷ Bartra, *La jaula de la melancolía*1987.

¹⁶⁸ Fernández de Lizardi, *El Periquillo Sarnientoc*.1816.

¹⁶⁹ «While the *Princesse de Clèves* had already appeared in 1678, the era of Richardson, Defoe and Fielding is the early eighteenth century.» in Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*.1983. pp. 25, n. 35

¹⁷⁰ REF

¹⁷¹ See for example Bugbee, «Genesis of American Patent and Copyright Law,» c.1967. or

¹⁷² *Epistulae ad Quintilius VI, III*, in Seneca et al., *Oeuvres complètes de Sénèque le philosophe*1842.

¹⁷³ in Seneca et al., *Oeuvres complètes de Sénèque le philosophe*1842.

¹⁷⁴ Paul Clement, *Étude sur les droits d'auteurs, précédé d'une dissertation sur la propriété littéraire chez les Grecs et les Romains*, 11, 28 QTD in Boncompain, *La Révolution des auteurs*2001. pp. 27-28

¹⁷⁵ Quintilian, *The Institutio oratorio of Quintilian*.95.

¹⁷⁶ See on this Venuti, *The Translation studies reader*2000. pp. 2-8

¹⁷⁷ Gray, «Stylistics: the end of a tradition,» 1973.

¹⁷⁸ Definitions of style may vary, and what I use here is a general view. For specific definitions a common genealogy would include the classic views of Aristotle, *Rhetoric*1926.; Aristote, *Poetics*1927.; and Boileau Despréaux, Horace, *L' Art poétique, suivi de Epitre aux Pisons*.1674.; the analogist/anomalist controversy mentioned here; the expressive school of Bally, *Traité de stylistique française*1909., one of the students who published Saussure, *Cours de linguistique générale*1922.; the individualist view of Croce, *Estética como ciencia de la expresión y lingüística general : teoría e historia de la estética*Aestheticc.1902.; the views of Russian formalists (1910-16); the circle of Prague (1926-36) (Jakobson, Trubeckoj, Mathesius), the schools of Copenhagen (Hjelmslev); Frankfurt (1950-60, (Todorov, Clejov); the strualism; and the American school (Sapir, Bloomfield).

¹⁷⁹ Diogenes, *Lives of Eminent Philosophers*.c.240.

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- ¹⁸⁰ Boncompain, *La Révolution des auteurs*2001. p. 23
- ¹⁸¹ Paul Olagner, *Le droit d'auteur*, t.1, p17. QTD in Boncompain, *La Révolution des auteurs*2001. pp. n.4
- ¹⁸² Martial, *Epigrams*1897. pp. I. LIII
- ¹⁸³ Martial, *Epigrams*1897. pp. I. LIII
- ¹⁸⁴ (Pro Rabirio c3), quoted in John Murray's Dictionary of Greek and Roman Antiquities, London (1882)
- ¹⁸⁵ While in English this sense of the term is now lost, in Spanish «plague» is used commonly in both senses. French, although using more readily its literary connotation, keeps the two meanings in the dictionary. Anatole France in his *Vie litteraire* of 1892, for example, explains that in Rome «le plagiaire» was a child robber: «celui qui était accusé de détourner pour les vendre des esclaves appartenant à autrui, ou de vendre comme esclaves des personnes libres. En droit romain, au sens propre du mot, le plagiaire, c'était l'homme oblique qui détournait les enfants d'autrui.»
- ¹⁸⁶ Digeste, XLVIII, 15 Hulot, Berthelot, *Corps de droit civil romain*1804. see also Sandars, *The Institutes of Justinian: with English introduction, translation and notes*1910. pp. 507-508
- ¹⁸⁷ Smith, *A dictionary of Greek and Roman antiquities*1875.
- ¹⁸⁸ Digesta, XXVIII,3 Krueger, Mommsen, Studemund, *Collectio librorum iuris antejustiniani in usum scholarum*.c.1890.
- ¹⁸⁹ Digesta, XLVIII, 10 Krueger, Mommsen, Studemund, *Collectio librorum iuris antejustiniani in usum scholarum*.c.1890.
- ¹⁹⁰ Fondo del Archivo Histórico Nacional (España) (1834-1923)
- ¹⁹¹ García Goyena, *Reglas del derecho romano*1841.
- ¹⁹² García Goyena, *Concordancias, motivos y comentarios del Código Civil Español*1852.
- ¹⁹³ The notion is for example in Boncompain, *La Révolution des auteurs*2001.; in the Introduction and notes to the Spanish edition of the Epigrams by José Guillén (2003).
- ¹⁹⁴ Sandars, *The Institutes of Justinian: with English introduction, translation and notes*1910.
- ¹⁹⁵ *Fuero Juzgo en Latin y Castellano, cotejado con los mas antiguos y preciosos códices por la Real Academia Española. (Glossarium vocum barbararum et exoticarum quæ in libro iudicum continentur.-Glosario de voces antiqüadas y raras que se hallan en el texto castellano.)*The Visigothic code, Liber Iudicorum or Forum iudicum trans S.P. Scott.c.654.
- ¹⁹⁶ Madero, *Tabula Picta*2004. pp. 32-33

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- ¹⁹⁷ See for example Arangio-Ruiz, *Istituzioni di diritto romano* 1927.; Arangio-Ruiz, *La compravendita in diritto romano* 1956.; Lucrezi, *La «tabula picta» tra creatore e fruitore* 1984.
- ¹⁹⁸ On the notion of juridical humanism see Maffei, *Gli inizi dell' umanesimo giuridico*. 1956.; Caprioli, *Indagine sul bolognini. Giurisprudenza e filologia nel Quattrocento italiano* 1969.; Troje, *Graeca Leguntur: Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus juris civilis in der Jurisprudenz des 16. Jahrhunderts* 1971. and Madero, *Tabula Picta* 2004. pp. n.33, p.26
- ¹⁹⁹ Maffei, *Gli inizi dell' umanesimo giuridico*. 1956.
- ²⁰⁰ Madero, *Tabula Picta* 2004. Madero, *Tabula Picta* 2004. pp. 105-107
- ²⁰¹ See Madero, *Tabula Picta* 2004. pp. 109-118
- ²⁰² Ferrini 69-70] in Madero, *Tabula Picta* 2004. pp. 105-107
- ²⁰³ See Madero, *Tabula Picta* 2004. pp. 131-134
- ²⁰⁴ See Madero, *Tabula Picta* 2004. pp. 109-118
- ²⁰⁵ in Lee, «Roman Law and Human Liberty: Marsilius of Padua on Property Rights,» 2009. pp. 28-30 On the Franciscan debate see M. D. Lambert, *Franciscan Poverty. The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order 1210–1323* (London: SPCK, 1961); V. Mäkinen, *Property Rights Rights in the Late Medieval Discussion on Franciscan Poverty*, *Recherches de Théologie et Philosophie médiévales*, Bibliotheca, 3, (Leuven: E. J. Brill, 2001); R. Lambertini, *La poverty pensata. Evoluzione storica della definizione dell'identità minoritica da Bonaventura a Ockham* (Modena: Mucchi, 2000); D. Burr, *The Spiritual Franciscans: From Protest to Persecution in the Century After Saint Francis* (University Park: Pennsylvania State University Press, 2001).
- ²⁰⁶ See for example Gil Fernández, L on the practices of the Cathedral of Toledo and Palencia in *Panorama social del Humanismo español (1500-1800)* p. 666
- ²⁰⁷ See for example P´erez-Prendes, J.M. « La mujer ante el Dercho p´ublico medieval castellano-leonés » in Rodriguez Gll, M. Pareceres (1956-1998). *Interpretatio. Revista de Historia del Derecho* (1999), VII, I, p. 653
- ²⁰⁸ Einsestein, *La revoluci3n de la imprenta en la edad moderna europeac*. 1983. pp. 88-89
- ²⁰⁹ Einsestein, *La revoluci3n de la imprenta en la edad moderna europeac*. 1983.
- ²¹⁰ The commodification of the intangible was the subject of heated debates in pre-modern Europe, whether it referred to granting indulgences, privileges, monopolies, or in the distinction between property and dominion

made by Franciscan friars. Not coincidentally, books, paper money and relics codified their respective circulation simultaneously, coming to terms with their dual form, material and spiritual, and with the leap of faith required to acknowledge their aura, ubiquity, and virtual multiplication.

²¹¹ Ver Orduña y Serrés en Manuel, *El conde Lucanorc*.1335.

²¹² Blecua, *La transmisión textual de El conde Lucanor*1980. pp. 101-111

²¹³ Manuel, *El Conde Lucanor o libro de los enxiemplos del Conde Lucanor et de Patronio*1971. pp. 13-14

²¹⁴ See Chartier, *L'ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XIVe et XVIIIe siècle*1992.; Chartier, «Figures de l'auteur,» 1996.; Chartier, «The order of books revisited,» 2007.

²¹⁵ Harris, *From Muslim to Christian Granada: inventing a city's past in early modern Spain*2007.

²¹⁶ Paul Clement, *Étude sur les droits d'auteurs, précédé d'une dissertation sur la propriété littéraire chez les Grecs et les Romains*, 11, 28 QTD in Boncompain, *La Révolution des auteurs*2001. pp. 27-28

²¹⁷ Ortega y Gasset, *La deshumanización del arte*c.1925.

²¹⁸ Paz, «La búsqueda del presente,» c.1990.

²¹⁹ All quotes are taken from Manuel, *El conde Lucanorc*.1335.

²²⁰ Rico, «Crítica del texto y modelos de cultura en el *Prólogo general* de don Juan Manuel,» 1986. p. 414

²²¹ Lida de Malkiel, «Tres notas sobre don Juan Manuel,» 1951. p. 188

²²² Specific studies on the the concept of authorship of don Juan Manuel see Gaibrois de Ballesteros, «Los testamentos inéditos de don Juan Manuel,» 1931.; Scholberg, «A Half-friend and a Friend and a Half,» 1958.; Sturm, «The Conde Lucanor: The First Ejemplo,» 1969.; Menéndez Pidal, «De Alfonso a los dos Juanes. Auge y culminación del didactismo (1252-1370),» 1972.; Taylor, «Don Jaime de Jérica y el público de El Conde de Lucanor,» 1986.; Manuel, *El conde Lucanorc*.1335.

²²³ Foucault, «Qu'est-ce qu'un auteur?,» c.1969.

²²⁴ The difference is studied at length by García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003.

²²⁵ *Fuero Juzgo en Latin y Castellano, cotejado con los mas antiguos y preciosos códices por la Real Academia Española. (Glossarium vocum barbararum et exoticarum quæ in libro iudicum continentur.-Glosario de voces antiqüadas y raras que se hallan en el texto castellano.)*The Visigothic code, Liber Iudicorum or Forum iudicum trans S.P. Scott.c.654.

²²⁶ Petit & Vallejo explain this shift in the understanding of the law in the fifth century as: «la categoria giuridica giunse a convertirsi in un ordine oggettivo piuttosto che in una postestà individuale, come natura anzichè artificio umano, come manifestazione della volontà di Dio e non contenuto di libertà.» Petit & Vallejo «La categoria...» 734

²²⁷ See Sánchez G. «Para la historia de la redacción del antiguo Derecho territorial castellano,» AHDE 6 (1929) 312-314.

²²⁸ «*aut nulla prorsus causa subest in remouendo ita quod nec utilitas publica suadet...*» quoted in Pennington, K. *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Western Legal Tradition*. California, University of California Press, 1993. 234.

²²⁹ R. Chartier «La representación regia: entre mostrar y mediar» Prologue to Bouza F. *Imagen y propaganda: capítulos de Historia cultural del reinado de Felipe II*. Madrid Akal, 1998. 8.

²³⁰ Chartier, *Libros, lecturas y lectores en la Edad Moderna* 1993. p. 25

²³¹ Chevalier, *Lectura y lectores en la España de los siglos XVI y XVII* 1976.

²³² Foucault, «Qu'est-ce qu'un auteur?,» c.1969.

²³³ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 92

²³⁴ Alfonso IX «el Sabio», *Partidas* c.1265.

²³⁵ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 93

²³⁶ Ordinance through which Alfonso XI ratifies Alfonso IX «el Sabio», *Partidas* c.1265. QTD in García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 87

²³⁷ Manuel, *El Conde Lucanor o libro de los enxiemplos del Conde Lucanor et de Patronio* 1971.

²³⁸ Published by Pérez de la Canal, J. «La pragmática de Juan II, de 8 de febrero de 1427» in AHDE (1956) 667

²³⁹ García y García «Bartolo de Saxoferrato y España» en *Derecho común...* 99-128

²⁴⁰ Eisenstein, *The Printing Press as an Agent of Change: Communications & Cultural Transformation in Early-Modern Europe* 1979.

²⁴¹ *Novísima recopilación de las leyes de España*

²⁴² See for example Ansorena, *Tratado de la Propiedad Intelectual en España* 1894.

²⁴³ The idea that the printing press forced Spain to define what was part of the public domain has been expressed by Eisenstein, *La revolución de la imprenta en la edad moderna europea* c.1983. p. 88

²⁴⁴ Alemán, Micó, *Guzmán de Alfarachec*.1599.

²⁴⁵ Vega, *Fuente Ovejuna*.1619.

²⁴⁶ Avellaneda, *El Quijotec*.1614.; Cervantes Saavedra et al., *Don Quijote de la Mancha : edición del Instituto Cervantes, 1605-2005c*.1605.

²⁴⁷ Primary sources consulted for this chapter also include manuscripts of the Spanish National Library; the dossier «Estado, Gracia y Justicia» at the Simancas Archive, and, in the Spanish National History Archive, the files «Juzgados y Comisión de Imprentas» (legs. 50683-50695); «Pleitos de la comisión de imprentas» (Castilla 1731- ,legs. 51629-51634; Aragón 1735-, legs. 51638-51642), «Originales de Impresión» (legs. 5770-5797 & 50751-50838), as well as the dossier pertaining to the Inquisition (leg. 4470). In the section on Councils of the Archivo Histórico de Protocolos de Madrid, a series of lawsuits were also consulted; for example Blas de Robles v. Domingo de Portonariis (1584, prot. 1279, fol. 298), and the seizing of books of French merchants in 1625 that assigned the works of Jérôme de Courbes to the Spanish bookseller Luis Sanchez as a «matter of state» and for the «common good.» (AHPM, prot. 2862, fols. 646-648). Finally, the last part of this chapter that concerns Mexico also includes primary sources from the office of the elected president Vicente Fox, and the Mexican cultural agency, Conaculta to which I had direct access from 2000 to 2004.

A number of printed sources were also very valuable in helping me put together the puzzle of a thousand pieces. The recently booming field of study of the history of the Hispanic book, provided valuable clues for understanding the book trade in the Spanish transatlantic, and its related laws.

²⁴⁸ Serrano y Saenz, «Testamento del doctor micer Gonçalo García de Sancta María, ciudadano de Çaragoça,» 1914.

²⁴⁹ García y García, «Escolares Ibéricos en Bolonia, 1300-1330,» 1991.

²⁵⁰ Gil Fernández, *Panorama social del Humanismo español*1997.

²⁵¹ Petit, *Del Ius Mercatorum al Derecho Mercantil*1997.

²⁵² Petit, *Del Ius Mercatorum al Derecho Mercantil*1997.

²⁵³ Klapish-Zuber, «Comptes et mémoire: l' écriture des livres de famille florentins,» 1991.

²⁵⁴ Pérez-Prendes y Muñoz de Arracó, «La mujer ante el derecho público medieval castellano-leonés,» 1999.

²⁵⁵ Vicens Vives, *Manual de historia económica de España*1982.

²⁵⁶ Sombart, *The Jews and modern capitalism*.1911.

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- ²⁵⁷ Lario Ramírez, *Sobre los orígenes del burócrata moderno : el Colegio de San Clemente de Bolonia durante la impermeabilización habsburguesa (1568-1659)*1980.
- ²⁵⁸ Haebler, Martín Abad, *Introducción al estudio de los incunables*1995. p. 37
- ²⁵⁹ Boscán Almogaver, *Juan Boscán y su cancionero barcelonés*c.1543.
- ²⁶⁰ *Novísima recopilación de las leyes de España*
- ²⁶¹ Reyes Gómez, «La tasa en el libro español antiguo,» 1998.
- ²⁶² Griffin, *The Crombergers of Seville : the history of a printing and merchant dynasty*1988. p. 145
- ²⁶³ Vega, *Fuente Ovejuna*c.1619.
- ²⁶⁴ See for example Iarocci, «Virile Nations,» 2003.
- ²⁶⁵ Cabrera Nuñez de Guzmán, M. *Discurso legal, histórico y político en prueba del origen, progressos, utilidad, nobleza y excelencia del Arte de la Imprenta*. Madrid, Oficina de Lucas Antonio de Bedmar, 1675. QTD in García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003. p. 106
- ²⁶⁶ Lario Ramírez, *Sobre los orígenes del burócrata moderno : el Colegio de San Clemente de Bolonia durante la impermeabilización habsburguesa (1568-1659)*1980.
- ²⁶⁷ Lario Ramírez, *Sobre los orígenes del burócrata moderno : el Colegio de San Clemente de Bolonia durante la impermeabilización habsburguesa (1568-1659)*1980. p. 52
- ²⁶⁸ See García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003. pp. 130, n.5,6,7
- ²⁶⁹ See García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003. pp. 130, n.5
- ²⁷⁰ Mayer, *The persistence of the Old Regime : Europe to the Great War*1981.
- ²⁷¹ García Lorca, *Obras Completas: Prosa*c.1898.
- ²⁷² Ortega y Gasset, *La deshumanización del arte*c.1925. p. 67
- ²⁷³ Bénichou, *Le sacre de l' écrivain, 1750-1830*.1973.
- ²⁷⁴ Trésor de la Langue Française Inforamtisé <http://atilf.atilf.fr>
- ²⁷⁵ The Diccionario de la real Academia de la Lengua is made by the Association of academies of all Spanish-speaking countries. Although the United States has a Spanish Academy it is not part of the joint association of academies because Spanish is not recognized as a national language on the United States. Of the dictionary see its editions of 1729, 1780, 1852, 1869, 1884, 1983 and 1992.

²⁷⁶ See Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999.

²⁷⁷ See Menger, *Portrait de l' artiste en travailleur : métamorphoses du capitalisme*2002.

²⁷⁸ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003.

²⁷⁹ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003. p. 172

²⁸⁰ Ku, «Beyond the Paradoxical Conception of Civil Society without Citizenship,» 2002.

²⁸¹ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003. p. 174

²⁸² De potestate civili 4.3 in Vitoria, Pagden, Lawrance, *Political writings*sc.1528. p. 40

²⁸³ «Weapons of Mass Destruction» of Renaissance Spain, the extension of those practices is now been contested, since there is no testimonial account other than «having heard that..» they existed.

²⁸⁴ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003. p. 171

²⁸⁵ Pocock, *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition*1975.

²⁸⁶ cf. Skinner, *The foundations of modern political thought*1978., Pocock, *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition*1975., Pagden, *Lords of All World: Ideologies of Empire in Spain, Britain, and France, 1500-1800*1995., Gelderen, Skinner, *Republicanism : a shared European heritage*2002. et al.

²⁸⁷ Pagden, «Human Rights, Natural Rights, and Europe' s Imperial Legacy,» 2003. pp. 174, n.35 It is not coincidental that within he last thirty years the Catholic Church has taken up this historical account of the origin of «human rights» in an attempt to ward of some of the more damaging implications of most human rights claims. See, in particular Leonard S. Widler, «Diritti umani: una panoramica storica,» *Concilium, Rivista internazionale di teologia* 26 (1990): 27-42.

²⁸⁸ Kane, *Emerging conflicts of principle : international relations and the clash between cosmopolitanism and republicanism*2008. p. 192

²⁸⁹ Kane, *Emerging conflicts of principle : international relations and the clash between cosmopolitanism and republicanism*2008.

²⁹⁰ Baudrillard, *Simulacre et simulation*1985.

²⁹¹ A hierarchy of priorities that was repeated in Spain and Mexico at least until the death of Franco in 1974, and the loss of the presidency by the Party of the Institutionalized Revolution in 2000.

²⁹² Reproduced in Medina, *Historia de la imprenta en los antiguos dominios españoles de América y Oceanía* 1958. pp. vol. 1, 22-23

²⁹³ Reproduced in Medina, *Historia de la imprenta en los antiguos dominios españoles de América y Oceanía* 1958. pp. vol. 1, 23

²⁹⁴ Reproduced in Medina, *Historia de la imprenta en los antiguos dominios españoles de América y Oceanía* 1958. pp. vol. 1, 11

²⁹⁵ Leonard, «Guzmán de Alfarache in the Lima Book Trade, 1613,» 1943.

²⁹⁶ Francisco Rodriguez Marin, *El «Quijote» y Don Quijote en America*, Madrid, 1911, passim; in A. Leonard, «Don Quixote and the Book Trade in Lima, 1606,» *Hispanic Review*, 1940, VIII, 285-304.

²⁹⁷ Leonard, «Guzmán de Alfarache in the Lima Book Trade, 1613,» 1943.

²⁹⁸ Archivo General de la Nación, Mexico. Inquisición, 257, visita de naos 1600, fol. 14. qtd in Leonard, «Guzmán de Alfarache in the Lima Book Trade, 1613,» 1943.

²⁹⁹ Leonard, «Guzmán de Alfarache in the Lima Book Trade, 1613,» 1943.

³⁰⁰ Foulche-Delbosc describes this edition on pp. 503-504 and 551-552; he concludes that it was unquestionably printed without Aleman's permission. in McGrady, «A Pirated Edition of Guzmán de Alfarache: More Light on Mateo Alemán's Life,» 1966. pp. n.3

³⁰¹ Foulché-Delbosc argues this.

³⁰² McGrady, «A Pirated Edition of Guzmán de Alfarache: More Light on Mateo Alemán's Life,» 1966. p. 328

³⁰³ See for example Cavillac, «El diálogo del narrador con el narratario en el Guzmán de Alfarache de Mateo Alemán,» 2001.

³⁰⁴ Fernando Cabo Aseguinolaza, *El concepto de género y la literatura picaresca*, Universidad de Santiago de Compostela, 1992. 122.

³⁰⁵ Cavillac, «El diálogo del narrador con el narratario en el Guzmán de Alfarache de Mateo Alemán,» 2001.

³⁰⁶ See for example IFE, Barry William, *Lectura y ficción en el Siglo de Oro: Las razones de la picaresca*, trad.J. Ainaud, Barcelona, Crítica, 1992. 93.

³⁰⁷ Cavillac, «El diálogo del narrador con el narratario en el Guzmán de Alfarache de Mateo Alemán,» 2001.

³⁰⁸ Cavillac, «El diálogo del narrador con el narratario en el Guzmán de Alfarache de Mateo Alemán,» 2001.

³⁰⁹ Bakhtin, *The dialogic imagination : four essays* c.1930.; Bakhtin, *L' oeuvre de François Rabelais et la culture populaire au Moyen Age et sous la Renaissance* c.1945.

³¹⁰ Tacitus *Annales* 1.72. QTD in Cramer, «Bookburning and Censorship in Ancient Rome: A Chapter from the History of Freedom of Speech,» 1945.

³¹¹ Livy (Tito Livio) *Ab urbe condita* 25.1.12 QTD in García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 43

³¹² Cramer, «Bookburning and Censorship in Ancient Rome: A Chapter from the History of Freedom of Speech,» 1945.

³¹³ As we will see later on, the same Queen Ann signed, five years later, the first law granting copyrights of their works to authors.

³¹⁴ Chartier, Fagan, «Languages, Books, and Reading from the Printed Word to the Digital Text,» 2004.

³¹⁵ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003.

³¹⁶ The story is referred in Zavala IM, *Clandestinidad y libertinaje erudito en los albores del s XIII*, Barcelona, Ariel, 1978, 371-373

³¹⁷ Paz, *Sor Juana Inés de la Cruz o Las trampas de la fe* 1983.

³¹⁸ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003.

³¹⁹ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. pp. 120,122

³²⁰ García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial* 2003. p. 121

³²¹ It is also where the first printed money was also made, printed on the covers of unbound books!

³²² Moll J «Diez años sin licencias para imprimir comedias y novelas en los reinos de Castilla 1625-1634» en BRAE, 101 (enero-abril 1974) 97-103.

³²³ «...pues no es punto dudable, que se pueden ocasionar graves daños con la impresión de algunos escritos, no menos que si se emponçoñaran las fuentes públicas, de donde breven todos (...) el Rey nuestro señor está obligado à precaver los peligros que llevan semejantes escritos (...) Y esto es lo que ha executado, mediante el Real Privilegio que se intenta opugnar. Tan lexosestá la Real gracia de los inconvenientes que el Gremio de Libreros alegan, que por ella su Magestad prudentísima pretende ocurrir à los que amenaçaren à la Religión, lusticia y bein común, dificultando que se comuniquen al vulgo falsas y nocivas noticias, que especialmente en las Gazetas se difunden más libremente.»

BN. VE/1399-1: Utilidad pública, atendida en el Real Privilegio que al S.C.R. Magestad del Rey Nuestro Señor Carlos III, Monarca de las Españas y Emperador de las Indias otorgó a Rafael Figueró, padre, e hijo, impresores y ciudadanos de la Excelentísima Ciudad de Barcelona. Defendida de las quejas, que el gremio de los libreros de la misma ciudad de Barcelona, ha dado en el Pleyto, à su instancia movido en la Real Audiencia del Principado de Cathaluña a relación del noble D. Plácido de Copons y de Esquerrer, dignissimo senador de aquella. Impresa con licencia de los Superiores. Año 1710, ff. 9v-10.

Commented in García Martín, *El juzgado de imprentas y la utilidad pública: cuerpo y alma de una monarquía vicarial*2003. p. 23

³²⁴ Evidence of its currency in Mexico exists at least until 1929, and its use to frame claims of popular and populists movements reclaiming the state responsibility to limit private appropriation of common resources and the public domain was documented in Argentina in 1983-1989.

³²⁵ See for example Herman, Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*1988..

³²⁶ Shulberg, «Selling Democracy Worldwide,»

³²⁷ Benjamin, «The Work of art in the Age of Mechanical Reproduction,» c.1936.

³²⁸ Ortega y Gasset, *La rebelión de las masas*1929.; Ortega y Gasset, *Obras completas. Tomo 9, 1960-1962*1965.; Ortega y Gasset, *La deshumanización del arte*c.1925.

³²⁹ Caughie, *Theories of authorship: a reader*1981.

³³⁰ See for example Toscan du Plantier, *L'émotion culturelle*1995.

³³¹ See Truffaut, «Une certaine tendance du cinéma français,» 1954. and Sarris, «Notes on the *auteur* theory in 1962,» 1962.

³³² Barthes, «La mort de l' auteur,» 1968.

³³³ Foucault, «Qu'est-ce qu'un auteur?,» c.1969.; Foucault, Michel, *L'ordre du discours: Leçon inaugurale au Collège de France prononcée le 2 décembre 1970*c.1970.

³³⁴ The works of Barthes and Foucault are the reference to which practically all scholarly works seeking to understand the interconnections of copyrights and romantic authorship have defined their positions so far. The intrinsic connection between the invention of the author as original genius and copyrights was first suggested by Kaplan, Benjamin, *An unhurried view of copyright*c.1967., practically at the same time Roland Barthes and Michel Foucault were presenting their penetrating works on the death and function of the Author. Following on their footsteps, the first systematic articulation of

the connections between legal, economic, and aesthetic notions of authorship and text were made in Woodmansee, «The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author',» 1984.. Woodmansee's work focused in German philosophical thought and legal tradition, and was followed by two conferences organized at Case Western Reserve University by the Society for Critical exchange in 1991 on Intellectual Property and the Construction of Authorship; and with Deirdre McCloskey and Mark Osteen in 1991 and 1994 on New Economic Criticism: Woodmansee, Jaszi, *The Construction of authorship : textual appropriation in law and literature* 1994.; Woodmansee, Osteen, *The New Economic Criticism: Studies at the intersection of literature and economics* 1999.. The works presented at these conferences established copyrights as the combined product of Gutenberg's printing press, a mass-market for books, Lockean possessive individualism, the valorization of individual genius and the professionalization of the author, all these elements coalesced through commercial struggle, and the requirements of adversarial legal argumentation. Contrary to the rapid dismissal of the idea by Barthes and Foucault, studying the English tradition, Rose, *Authors and owners* 1993. argued that «the solid and fundamental unit of the modern author and the work is property» and that, generally, «the figure of the proprietary author depends on a conception of the individual as essentially independent and creative, a notion incompatible with the ideology of the absolutist state.» However, under an alternative perspective, Carla Hesse has argued that the first legal recognition of the modern author in France occurred in the eighteenth century but that «in France the author was a creation of the absolutist police state, not the liberal bourgeois revolution.» Hesse, «Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,» 1990. Saunders, *Authorship and Copyright* 1992. suggested that the death of the author in literature and criticism was destined to provoke the death of copyrights in law. His prophecy was disputed by Bently, «Copyright and the Death of the Author in Literature and Law,» 1994., a review of the books by Woodmansee, Saunders and Rose. In it, Bently minimized the relation between copyrights and authorship, arguing that they represented two very different traditions with only tenuous connections. See Barthes, «The death of the author,» 1967.; Foucault, «Qu'est-ce qu'un auteur?,» c.1969.; Foucault, Michel, *L'ordre du discours: Leçon inaugurale au Collège de France prononcée le 2 décembre 1970* c.1970.. A recent literature review of the discipline is offered by Haynes, «Reassessing "Genius" in Studies of Authorship,» 2005..

Woodmansee's Author Theory proceedings are published in the special issue of the *Cardozo Arts & Entertainment Law Journal* v.10, No. 2, 1992 and in book form in 1994. Her Arts and Economy proceedings were published in book format in 1999.

For the Anglo-American history of copyrights see Rose, *Authors and owners* 1993. p. 28; for France, Hesse, «Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793,» 1990., and for a comparative view Saunders, *Authorship and Copyright* 1992.

A recent review of the field can be found in Haynes, «Reassessing "Genius" in Studies of Authorship,» 2005.

³³⁵ See Caughie, *Theories of authorship: a reader* 1981.

³³⁶ The text was later published as Barthes, *S/Z* 1970.

³³⁷ Barthes, «The death of the author,» 1967.; Barthes, «La mort de l'auteur,» 1968.

³³⁸ «Nous savons que, pour rendre à l'écriture son avenir, il faut en renverser le mythe : la naissance du lecteur doit se payer de la mort de l'Auteur.» Barthes, «La mort de l'auteur,» 1968.

³³⁹ «We know that a text does not consist of a line of words, releasing a single <theological> meaning (the <message of the Author-God>), but is a space of many dimensions, in which are wedded and contested various kinds of writing, no one of which is original: the text is a tissue of citations, resulting from the thousand sources of culture.» Barthes, «La mort de l'auteur,» 1968.

³⁴⁰ Barthes distinguishes the impersonal self from the «person» or performative self defined by society.

³⁴¹ The session of questions and answers that followed his first communication are an integral part of his argument and are often published together which is consistent with the argument made by Foucault. The structure of «Qu'est-ce qu'un auteur?» also forms part of the overall text, as it was distributed to the audience prior to the conference.

³⁴² Foucault, *L'ordre du discours: leçon inaugurale au Collège de France prononcée le 2 décembre 1970*. 1971. p. 3

³⁴³ See Austin, *How to do Things with Words: The William James Lectures delivered at Harvard University in 1955*. 1962.

³⁴⁴ Thomas Kuhn is presenting almost simultaneously a similar perspective on the history of science in Kuhn, *The Structure of Scientific Revolutions*. 1962..

³⁴⁵ I use the term as theorized by Habermas, *The structural transformation of the public sphere : an inquiry into a category of bourgeois society*. 1962.

³⁴⁶ This observation complements from a different perspective what on another field of discourse cultural economists have suggested, i.e. that the attribution of original property rights is arbitrary, and has in time no social impact in a free-market. the point famously made by nobel prize laureate Ronald Coase Coase, «The problem of social cost,» 1960.

³⁴⁷ Rosen, «The economics of superstars,» 1981.

³⁴⁸ Throsby, «The production and consumption of the arts: a view of cultural economics,» 1994.

³⁴⁹ See for example Throsby, «The production and consumption of the arts: a view of cultural economics,» 1994.

³⁵⁰ This principle is known in cultural and media economics as the «nobody knows» principle. See for example Caves, *Creative Industries: Contracts between Art and Commerce*2000. and Vany, Walls, «Uncertainty in the Movie Industry: Does Star Power Reduce the Terror of the Box Office?,» 1999.; Vany, Walls, «Motion picture profit, the stable Paretian hypothesis, and the curse of the superstar,» 2004.

³⁵¹ For further reference, see for example Chartier, *L'ordre des livres: lecteurs, auteurs, bibliothèques en Europe entre XIVE et XVIIIe siècle*1992. and the book history offered by the School des Annales in France or in Spain García Oro, *Los reyes y los libros. La política libraria de la Corona en el Siglo de Oro (1475-1598)*c.1995.; Saunders, *Authorship and Copyright*1992.; Bently, «Copyright and the Death of the Author in Literature and Law,» 1994.; and Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999.

On the one hand the investigation of the interconnections of modern notions of authorship and copyrights is today an active field of study that has brought to light key elements in the history of copyrights, and has contributed to understanding the two competing and coexisting traditions of Anglo-Saxon copyrights and continental literary property and author laws. On another hand, while copyrights and author laws are clearly inventions of the Enlightenment closely linked to the world-order of the industrial revolution, the construction of modern authorship is historicized by Foucault and other historians from previous events starting in twelfth and thirteenth-century Europe. Also, copyrights author and intellectual property laws are fundamentally author-centric, a stage that author-criticism declares extinct either by enthroning the reader as the most important generator of meaning of texts (Barthes); or by questioning text and author segmentation, when in fact texts permeate each other and it is very difficult to objectively determine where one ends, and another begins (Foucault). David Saunders

argues that since copyrights is based on the notion of romantic authorship, and the privileged position of the romantic author is no more, then copyrights are doomed. Alternatively, Lionel Bently's argues that the relationship authorship-copyrights has been blown out of proportion; that copyrights are fundamentally corporate, and have only tenuous connections to author rights. From his perspective, the legal tradition of copyrights will be mostly unaffected by the death of the author in literature and criticism. However, by saving copyrights from authorship, Bently exposes a double standard in the corporate discourse of endangered creativity: on the one hand, the death of the author does not affect copyrights, but, on another hand, threats to copyrights will result in the end of authorship practice. A third perspective on the issue is set forward by Debora Halbert who states that the Internet is bringing to the surface these naturalized contradictions of copyright and that the end of the print paradigm is seriously questioning the existence and applicability of copyrights in cybercommunities.

³⁵² Betteg, *Copyrighting Culture* 1996.

³⁵³ Drahos, «Global Propert Rights in Information,» 1995.

³⁵⁴ España, *Himno Español y Marcha Real* 1997.

³⁵⁵ México, «Ley sobre el escudo, la bandera y el himno nacionales,» 1984.

³⁵⁶ For a detailed history of the Mexican national anthem see México, «Ley sobre el escudo, la bandera y el himno nacionales,» 1984.; González Stephan, «A propósito de la "Tapada" de Antonio Cornejo Polar,» 1999.; Estado de Guanajuato, *Piensa ¡oh Patria!: 150 años del himno nacional* 2005.; Otero Muñoz, *Análisis histórico jurídico del Himno Nacional Mexicano* 2008.

³⁵⁷ In a similar vein, the poet Andrés Henestrosa described the Mexican flag as being the nation itself: «La bandera es la patria toda, en sus sueños, en sus realizaciones. En su origen y concepción se mezclan el mito, la leyenda, la fábula, que sumadas dan el concepto de patria, de nacionalidad, de identidad colectiva.» [The flag is the nation as a whole, in her dreams, in her achievements. In her origin and conception it mixes myth, legend, fable, that, together, make the notion of a fatherland, nationhood, collective identity.]

³⁵⁸ Bartra, *La jaula de la melancolía* 1987.; Bartra, *The imaginary networks of political power* 1992. The trope is the figuram implere, described by Auerbach, *Mimesis: The Representation of Reality in Western Literature* 1946., and used as the theoretical background of Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism* 1983.

³⁵⁹ Estado de Guanajuato, *Piensa ¡oh Patria!: 150 años del himno nacional*2005.

³⁶⁰ See Estado de Guanajuato, *Piensa ¡oh Patria!: 150 años del himno nacional*2005.

³⁶¹ José López Portillo y Rojas, Manuel Barajas, and Julián Carrillo were its members.

³⁶² «...lo único que [Repertorio Wagner] quería anunciar en la portada del Himno, incluido en el repertorio, es que la casa editora cuenta con la partitura correspondiente, pero en ningún acto jurídico ha adquirido la titularidad del mismo.» qtd in Estado de Guanajuato, *Piensa ¡oh Patria!: 150 años del himno nacional*2005.; Otero Muñoz, *Análisis histórico jurídico del Himno Nacional Mexicano*2008.

³⁶³ Apparently she was caught on TV playfully singing «Ciña ¡Oh Patria querida! tu aceite de oliva;» instead of «Ciña ¡Oh Patria querida! tus sienas de oliva,»

³⁶⁴ México, «Ley sobre el escudo, la bandera y el himno nacionales,» 1984.

³⁶⁵ «Ley Federal de Cinematografía.» [Mexican Law of Cinematography]. 29 Dec. 1992.

³⁶⁶ With official data from IMCINE.

³⁶⁷ On this episode of history see for example: Bradford, Gary, Wallach, *The politics of culture: Policy perspectives for individuals, institutions, and communities*2000. or Hutter, Throsby, *Beyond price: value in culture, economics, and the arts*2008.

³⁶⁸ See also Baumol, Bowen, «On the Performing Arts: The Anatomy of Their Economic Problems,» 1965. and *The Performing Arts in a New Erac*.1999.

³⁶⁹ *The Performing Arts*

³⁷⁰ Baumol, Bowen, *Performing Arts—The Economic Dilemma*.1966.

³⁷¹ Baumol, Bowen, «On the Performing Arts: The Anatomy of Their Economic Problems,» 1965.; Baumol, Bowen, *Performing Arts—The Economic Dilemma*.1966.

³⁷² Bourdieu, «Mais qui a créé les «créateurs»?», c.1980. p. 212

³⁷³ On this see for example Throsby, *Economics and culture*2001.; Throsby, «Cultural Capital,» 2003.

³⁷⁴ Ruth Towse notes that there are sparing but noteworthy exceptions and poses the question of why the subject seems to have been avoided by cultural economists in Towse, *Creativity, incentive, and reward : an economic analysis of copyright and culture in the information age*2001.

³⁷⁵ Mauss, «Essai sur le don,» 1923.

³⁷⁶ Bataille, *La part maudite*The Accursed Share (1991)1949.

³⁷⁷ McCloskey, *The rhetoric of economics*1998.

³⁷⁸ On the scope and disciplinary focus the term covers see for example Scolari, «Mapping conversations about new media: the theoretical field of digital communication,» 2009.

³⁷⁹ Robert Caves distinguishes between simple and complex works placing under the former the ones that are mostly dependent on individual genius, and under the later the expensive multi-authored and collective works which require significant investment and are produced, distributed, and exhibited in industrial scale. Caves, *Creative Industries: Contracts between Art and Commerce*2000.

³⁸⁰ Copyright-based industries are usually termed «creative industries.» Cultural economists often prefer to use «cultural industries» to mark a distinction with patents and invention.

³⁸¹ See for example Scolari, «Mapping conversations about new media: the theoretical field of digital communication,» 2009.

³⁸² McLuhan, *The Gutenberg galaxy: the making of typographic man.*1962.

³⁸³ Foucault, «Qu'est-ce qu'un auteur?,» c.1969. and Foucault, *L'ordre du discours: leçon inaugurale au Collège de France prononcée le 2 décembre 1970.*1971.

³⁸⁴ Herman, Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*1988.

³⁸⁵ Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*c.1983.

³⁸⁶ See Ortega y Gasset, *La rebelión de las masas*1929. & Ortega y Gasset, *La deshumanización del arte*c.1925.

³⁸⁷ Benjamin, «The Work of art in the Age of Mechanical Reproduction,» c.1936.

³⁸⁸ O' Hare, «Copyright: When is monopoly efficient?,» 1985.

³⁸⁹ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999.

³⁹⁰ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999. pp. 41-42

³⁹¹ Intellectual property and the National Information Infrastructure, 205-6

³⁹² Poovey, *A history of the modern fact : problems of knowledge in the sciences of wealth and society*1998.

³⁹³ Voloshinov, *Marxism and the philosophy of language*c.1986. p. 24

³⁹⁴ Certeau, *The practice of everyday life*1984. pp. 123-125

³⁹⁵ Roland Barthes argued the «very principle of myth» is that it «transforms history into nature.» See: R. Barthes, *Mythologies*, trans. A. Lavers (New

York: Hill and Wang, 1972). 129. QTD in Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999. p. 70

³⁹⁶ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999. p. xiii

³⁹⁷ Fish, *Doing what comes naturally change, rhetoric, and the practice of theory in literary and legal studies* 1989. p. 24

³⁹⁸ Office of Technology Assessment, *Intellectual property rights in an age of electronics and information, summary (OTA-CIT-303)* (Washington, DC: U.S. Government Printing Office, April 1986), 78.

³⁹⁹ OTA, *Intellectual property in an age of electronics*, 23.

⁴⁰⁰ OTA, *Intellectual property in an age of electronics*, 12.

⁴⁰¹ Statement of Paul Goldstein, OTA Report, 38.

⁴⁰² Statement of Paul Goldstein, OTA Report, 38-9.

⁴⁰³ OTA report on intellectual property rights in an age of electronics and information: Joint hearing of the subcommittee on patents, copyrights, and trademarks of the senate committee on the judiciary and the subcommittee on courts, civil liberties, and the administration of justice of the house committee on the judiciary. 99th Cong., 2nd Session (16 April 1986). QTD in Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999. p. 31

⁴⁰⁴ See the statements of Representative Burman in No Electronic Theft (NET) Act, (1997, November 4), Congressional Record, Vol. 143, 152, p. H9887.

⁴⁰⁵ Information Infrastructure Task Force, *Intellectual property and the National Information Infrastructure: The report of the working group on intellectual property rights* (September 1995), 213-218.

⁴⁰⁶ *Intellectual property and the national information infrastructure*, 72.

⁴⁰⁷ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999. pp. 34-35

⁴⁰⁸ «It would be inaccurate to say that the NII Report recommends abolishing fair use law. And yet, it takes such a narrow view of existing fair use law and predicts such a dim future for fair use law when works are distributed via the NII that the Report might as well recommend its abolition. Since the fair use doctrine has been one of the historically important ways in which the law has promoted public access to copyrighted works, the virtual abolition of fair use law for which the Report argues would represent another vast expansion of copyright law in favor of publishers.» See: Samuelson, «NII intellectual property report.»

⁴⁰⁹ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights* 1999. pp. 37-8

⁴¹⁰ Intellectual property and the National Information Infrastructure, 206. discussed in Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999. p. 38

⁴¹¹ *Intellectual property and the National Information Infrastructure*, 204.

⁴¹² *Intellectual property and the National Information Infrastructure*, 205.

⁴¹³ *Intellectual property and the National Information Infrastructure*, 205-6

⁴¹⁴ *Virgin v. Thomas (renamed Capitol v. Thomas)*(Duluth, MN) documents can be seen at

http://beckermanlegal.com/Documents.htm#Virgin_v_Thomas

⁴¹⁵ *OTA report on intellectual property rights in an age of electronics and information: Joint hearing of the subcommittee on patents, copyrights, and trademarks of the senate committee on the judiciary and the subcommittee on courts, civil liberties, and the administration of justice of the house committee on the judiciary.*c.1986.

⁴¹⁶ *Intellectual property and international issues. Subcommittee on intellectual property and judicial administration of the House Judiciary Committee. (May 15 and 16).*c.1991.

⁴¹⁷ *OTA report on intellectual property rights in an age of electronics and information: Joint hearing of the subcommittee on patents, copyrights, and trademarks of the senate committee on the judiciary and the subcommittee on courts, civil liberties, and the administration of justice of the house committee on the judiciary.*c.1986.

⁴¹⁸ *OTA report on intellectual property rights in an age of electronics and information: Joint hearing of the subcommittee on patents, copyrights, and trademarks of the senate committee on the judiciary and the subcommittee on courts, civil liberties, and the administration of justice of the house committee on the judiciary.*c.1986.

⁴¹⁹ *Intellectual property and international issues. Subcommittee on intellectual property and judicial administration of the House Judiciary Committee. (May 15 and 16).*c.1991. qtd in Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999. pp. 37-8

⁴²⁰ *DMCA*

⁴²¹ 2011 Special 301 Report http://www.ustr.gov/webfm_send/1906

⁴²² 2008 special 301 Report, Office of the United States Trade Representative (Susan Schwab) p. 44

⁴²³ http://www.elpais.com/documentossecretos/tema/pirateria_en_espana/

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http://www.elpais.com/articulo/cultura/Pacto/in/extremis/ley/Sinde/elpepicul/20101220elpepicul_1/Tes

⁴²⁵ Lenhart, Simon, Graziano, «The Internet and Education: Findings of the Pew Internet & American Life Project,» 2001.; Jones, «The Internet Goes to College: How Students Are Living in the Future with Today,» 2002.; Jones, Fox, *Pew Internet Project: Generations online in 2009*2009.

⁴²⁶ Peitz, Waelbroeck, «The effect of internet piracy on music sales: Cross-section evidence,» 2004.

⁴²⁷ Oberholzer, Strumpf, *The Effect of File Sharing on Record Sales An Empirical Analysis. 2004*2004.; Oberholzer-Gee, Strumpf, «The effect of file sharing on record sales: An empirical analysis,» 2007.; Oberholzer-Gee, Strumpf, «File-sharing and copyright,» 2009.

⁴²⁸ Anderson, «The Long Tail, Wired,» 2004.; Anderson, *The long tail: Why the future of business is selling less of more*2008.

⁴²⁹ Bourdieu, «Mais qui a créé les «créateurs»?», c.1980.

⁴³⁰ Order: Civil File No. 06"1497 (MJD/RLE)

⁴³¹ 2008 special 301 Report, Office of the United States Trade Representative (Susan Schwab) p. 44

⁴³² see for example El País of June 10th 2007

⁴³³ Halbert, *Intellectual property in the information age : the politics of expanding ownership rights*1999.

⁴³⁴ Appendix II, Berne Convention Implementation Act of 19881, of Title 17 of the United States Code, subsection 3

⁴³⁵ Berne Convention Implementation Act of 1988, Appendix II of Title 17 of the United States Code, subsection 12

⁴³⁶ All these details are imprinted in the contracts between the industry and the author which have been studied by a small number of scholars like Caves, *Creative Industries: Contracts between Art and Commerce*2000.

⁴³⁷ See for example Lowenfels, «But the most important question that still faces the court and the nation, is: shall freedom of speech apply to all Americans? Or shall the Communists continue to be sacrificed on the altar of McCarthyism?,» 1955.; Peterson, *McCarthyism: its ideology and foundations*1962.; Ewald, White, *McCarthyism and consensus*1986.; Schrecker, *The Age of McCarthyism: A Brief History with Documents.*1994.; Doherty, *Cold War, cool medium: television, McCarthyism, and American culture*2003.

⁴³⁸ *The Economist* [1843-] 11/4/08, 67-68