6 From idea to fixation: a view of protected works

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The protected work needs at first to be expressed. An expression is the only way for the work to be accessible to the public and then to start potentially an exploitation life. This requirement means that a form or a mode is needed. This question is more complicated than it appears. A work could be definite at many stages. Of course these different stages are not at the same level before the originality requirement, but a special analysis could be done. From conception to delivery, literary and artistic works show us many faces and could be split in many subjects of rights.

Under the terms of the Berne Convention, expression is needed all over the European Community. Regarding fixation, each State has the choice to consider it as a requirement or not. Continental countries dealing with author’s rights laws mostly ignore fixation. But under copyright law, especially in Great Britain, fixation is still required. Whereas every subject of intellectual property has been explored by the European Community, no European Directive helps us to understand how these different criteria should be applied. Nevertheless, this silence certainly means there is no necessity for common rules because, after all, each state reaches exactly the same solution and a sort of harmonization in practice is obtained.

The scale from conception to exploitation starts with ideas that, after many stages, are communicated to the public, for example by means of fixation. First, we have to analyse the concept of expression and compare it to ideas. Then, it is necessary to understand the difference between expression and fixation.

1. From ideas to expression

First of all, we have to explain why and how ideas are not protected works and what the required expression consists in. Secondly, we will explain how jurisprudential cases apply the rules. Thirdly, we will search for alternative solutions enabling a certain control over ideas.

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1.1 Principles

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement, coming into force all over the European Community, clarifies certain specific points. Concerning the scope of the protected works, article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Few statutes expressly exclude ideas as non-protected works.¹

In France, we used to define ideas as ‘de libre parcours’, that means ‘free career’. No one is able to own them because they have a mental form exclusively produced by the mind.² And these mental forms exclusively describe useful characteristics of objective reality. Consequently, they are entirely functional. Protected works are entirely different: they are the product of an author’s imagination. They are arbitrary. That is why they convey the author’s personality and that is why originality is required.

Literary and artistic works are not directly described in the Berne Convention. Indeed, its article 2(1) only gives examples. It is written as follows: ‘The expression literary and artistic works shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.’ Nevertheless, a large consensus considers protected works as an original form that an author has adopted to express an idea.

This definition does not mean that the idea shall be protected through its expression. The form is by itself protected. However, this misunderstanding can generate the protection of a commercial service. Indeed, a Canadian company tried to sell an ‘Intellectual Passport’.³ This is shown to be a cheap way for the author of a new commercial idea, or of an innovative service

¹ US Copyright Act, s. 102(b).
concept, or for an inventor to get international protection. The ‘Intellectual Passport’ is a book that describes the creator and his concept or invention.\(^4\) This book may or may not be published, depending on the desire of the creator to keep the ideas secret. The argument is totally wrong and different national industrial property agencies warn against this process.

The expression requirement is understood as an intelligible form. It is the only way for the work to become real. The conception as an abstract intellectual operation is not sufficient. The form requires the organization of a substance.\(^5\) The expression is the guarantee that the work is aimed at human intelligence. It does not matter if the media itself uses a code which is not understandable. In this way, software protection under copyright law looks like a huge exception. Computer programs are a human creation designed for a machine. Its expression only makes sense for a computer.

Moreover, only a developed and original form is protected. Otherwise, nothing shall be protected.\(^6\) But the notion of form covers both external and internal expression. That means that the structure of a work which is no more than a series of ideas is protected in its entirety.

This solution causes many difficulties and generates a lot of case law. How can a distinction be made between the internal form and the background? What allowance should be made as regards what is coming from a sort of common fund and what is the creation of the author? Under copyright or author law, clever plagiarism is allowed. That means that many works could be based on the same ideas, as long as they are different enough. In general, the difference is estimated on a purely objective analysis. Under copyright law, a more subjective criterion is added: the work should not to be substitutable. Keeping the same ‘look and feel’ and then general appearance is not itself an infringement. Moreover, functionalities and results can also be considered as an idea: an external idea. A literary or artistic work might be useful but its use should not be protected under copyright or author’s rights law.

\(^4\) The argumentation is especially based on a French case concerning design protection. Lyon Court of Appeal, 1 April 2004 and Cour de cassation, Commercial chamber, 4 July 2006 (Bulletin 2006 IV no. 160, p. 174). But the meaning of this decision is rather different: judgments just recognize, using the European Community Directive of 13 October 1998 on the legal protection of designs, that in an infringement situation, an industrial design could not achieve protection because of its previous publication in a book.


Actually, protecting ideas is mostly a question of scope rather than a question of requirement. Indeed, isolated ideas never reach copyright or author’s rights law protection. Nevertheless, through an expression, owners or creators often try to secure legal protection for an idea. Chronologically, it would then also be possible to reverse the relationship by speaking first about fixation, which is presented as a real protection requirement. By the way, as we shall see, the exclusion of ideas is no easier when the law requires fixation. The idea could be hiding behind a fixated work.

1.2 Practical instances
As previously said, in many cases, jurisdictions have to decide on infringement when a work seems to meet the structure of another work. Different types of works usually change their expression when they are translated or adapted, especially in the case of audiovisual works. Judges have to compare works in order to decide whether the very frame is the same or whether the similarity does not exceed general ideas. Generally, cases concern fiction works such as novels or movies (novel against novel, movie against movie or novel against movie). For example, a long French trial ruled on the link between the novels *Gone with the Wind* by Margaret Mitchell and *La bicyclette bleue* by Régine Desforges. On four different occasions, courts decided alternatively that there was copyright infringement and that there was not. This case was unusual because the two stories were quite similar, but the period and the place were totally different. Concerning movies, the French Supreme Court is strict, which reminds us that ideas are free. There is no infringement until it is proved that there are, in a concrete way, similar form characteristics regarding conception, characters and scenes.

In Great Britain, in similar cases, judges often recall the principle of the non-protection of ideas. This is based on the fact that ideas ‘have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an

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8 La Totale case, Cour de cassation, 1st Civil Chamber, 5 July 2006, no. 04-16.68, unpublished.
9 It is mandatory ‘de préciser, de façon concrète, quelles caractéristiques de forme originales dans la conception des deux œuvres et de leurs personnages ainsi que dans le développement de l’action, étaient semblables’.
artistic work’. But it seems to be clear that ‘Copyright Acts are not concerned with the originality of ideas, but with the expression of thought’. But it is not a whole exclusion, because in certain cases, the idea may have ‘represented sufficient of the author’s skill and labour as to attract copyright protection’. Then the idea shall become a substantial part of the work. At this level of precision, we think that it is no longer an idea that is protected but an internal expression. This opinion is translated by Lord Hoffman in the Designers Guild case as follows: ‘Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author’s skill and labour, tends to lie in the detail with which the basic idea is presented. Copyright law protects better foxes than hedgehogs.’ More interesting are cases where ideas protection is more isolated. For example in France, courts refused to protect the rules of a beauty competition. In another case, they had to decide if Christo’s packagings were protected. First, in the case of a picture that showed a Paris bridge, the ‘Pont Neuf’, packaged by Christo, the court condemned an unauthorized photographer for fixing a real production. Secondly, the following year, another court decided that the principle of packaging in an artistic way different constructions was not the property of Christo. The judges decided that this was free even in advertising. These two cases are helpful in understanding where copyright protection begins and where it stops. TV formats generate much litigation. If they can be covered by a non-disclosure agreement, copyright is not involved in itself, even if the ideas are put into words. The French Cour de cassation had to deal with a very special case: the protection of footpaths’ itineraries. The court decided that the itinerary, independently of its drawing.

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15 Paris Court of Appeal, 13 March 1986: Dalloz, somm. 150, note Colombet Claude.
17 Paris Court of Appeal, 31 January, Propriétés Intellectuelles, no. 7 p. 158, note Lucas André.
and of its potential publication, should be protected under author’s right law. Its argument does not mean that ideas are protected. It consecrated a wide conception of expression: the form can be expressed in choosing geographic characteristics, natural or human specifications. This example shows us how fixation through a guide book could generate an extensive protection of the content: the itinerary itself.

1.3 Alternative solutions

We can conclude that there is no property in ideas that can be provided in copyright or author’s right law. Nevertheless, is there an alternative solution? This chapter is about copyright analysis, so it is not the place to develop other types of legal protection. Still, we can conjure up three ways of bringing some sort of judicial security to the creator of an idea.

First of all, the idea may be patentable. Actually, patent is awarded to an invention that is a solution to a problem. In this way, patent law protects finalized ideas but never a result. This argument could be valid in several countries where an invention is protected as long at it is new and useful. For example, the United States Patent and Trade Office allows the registration of business or gaming methods. But in European countries, patent law requires technical effect. Indeed, the European Patent Convention (EPC) reads as follows:

Article 52. Patenable inventions

(1) European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.

(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

(a) discoveries, scientific theories and mathematical methods;
(b) aesthetic creations;
(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
(d) presentations of information.

All Member States of the European Community are part of this Convention. So an idea underlying a literary and artistic work is not patentable at all. General ideas coming from imagination in the artistic or literary field remain free. Anyway, it has been quite impossible to prove the novelty of an abstract idea. On the other hand, as we have already said, describing a technical invention in a literary way offers no protection to the product or method involved. For instance, this solution explains why most companies involved in developing software wish their product were patentable in the EC. They explain that

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Secondly, an idea can legally be the object of a contract. The creditor is the creator: he explains his/her ideas. The debtor is the potential user: he promises to keep the idea for himself. Actually, as with other information, artistic ideas can be covered by non-disclosure agreements. This kind of protection is especially frequent for TV programmes or movies. But it is a relative protection. It is no more efficient when the public in general knows the idea through the exploitation of the work . . . except if each user agrees with the contract!

Moreover, without a convention, in certain cases, the responsibility of the idea’s user can be involved. Different from property law, this mechanism allows the creator to prosecute unauthorized users. This kind of procedure, frequently known as unfair competition, varies in content according to states. This protection is recognized at a general and worldwide level under article 1(2) of the Paris Convention for the Protection of Industrial Property of 20 March 1883. This article provides: ‘The protection of industrial property has as its object [. . .] the repression of unfair competition.’ Especially in the European Community, this right is mostly considered as a part of competition law. In most cases, the difficulty for the creator is to prove the fault of the user. The most important question is: how can the use of an idea be unfair even if this object is protected under intellectual property law? In France, much litigation is based on this mechanism because courts admit cases where the defendant usurps a part of another’s labour or reputation. This tort is called ‘parasitism’.  

2. From expression to fixation

For most judicial systems in the European Community, fixation is not required for copyright or author’s right protection. The expression means an external form that can be sensed in one way or another. Some expressions are directly perceptible (drawing), others use a conventional signal (literature, music). In most cases, it is easy to get from one form to another (music, architecture . . .). In any case, this classification is not always linked to a fixation. Moreover, the question of the fixation requirement is independent of the necessity of formalities or registering, which is positively forbidden under the Berne Convention. Its article 5(2) clearly explains that ‘The enjoyment and the exercise of these rights shall not be subject to any formality.’ The European Community directives never mention fixation as a requirement. In fact, protected works are

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20 See the practice of clean room that allows preserving the software material without copying the code.
never expressly defined, except for photographs and computer programs. The only requirement in European law is for a work to be ‘the author’s own intellectual creation’. Nevertheless, fixation is often mentioned as a right for the author. Fixation or copying is the main method of reproduction. Prescribing a general requirement of fixation means that every creator has to be his/her own publisher! Fixation is ambiguous. It mostly belongs to the scope of the right rather than to its access.

We will begin by explaining that indifference towards fixation is the principle in European Community law. Then, fixation can be required in certain countries and/or in certain circumstances. Finally, as a conclusion, we will see that fixation is a way of proving the creation. Fixation as a form of evidence can guarantee that copyright is effective.

2.1 Indifference towards fixation

Generally speaking, neither statutory law nor case law requires a translation of the work in a conventional form, which is more convenient for its conservation and distribution. For instance, Spanish law chooses to specify that the work shall be expressed in ‘any manner, whether tangible or intangible’. Nor does Swiss law provide that a creation should be fixed in a material form in order to be protected. Moreover, a traditional and permanent fixation is less and less a necessity in order to access the work (except if fixation on the eye’s retina is considered as such as regards a visible work!). Historically, copyright but also author’s right are obviously linked to the paper edition, even in France. Printing had been for a while the principal way to transmit works. But copyright and author’s right are more than economic rights. Author’s right is part of the human rights recognized under the Universal Declaration of Human Rights of 10 December 1948. Article 27(2) says: ‘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.’ This means

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23 Spanish Copyright Law 1987, article 10.

24 Article 29, §1, of the Federal Law on copyright and neighbouring rights of 9 October 1992: ‘the work, whether fixed on a physical medium or otherwise, shall be protected by copyright from its creation’.

25 This idea has been expressed to minimize the French dichotomy between reproduction right and representation right.

26 Law of 19–24 July 1793. But the first French law protecting authors was concerned with theatre performances (13–19 January 1791).
that authorship is the main requirement. The author’s will to be published and exploitation by fixation or any other form is not required.

Moreover, the fixation requirement would be totally incompatible with moral rights according to French law. Indeed, authors own the right of divulgation, which means that they are able to decide upon the access of the public to their work,\(^\text{27}\) whatever the conditions of this access might be. Indeed, an original work can objectively exist without fixation. On the one hand, self-generated works are created, as for instance talk or musical improvisation. On the other hand, some works are fixated but not permanently (air cutting, ice statue . . .) or not in their final form (rough draft . . .).

In France, two decisions of the Paris Court of First Instance have confirmed the principle according to which a work shall be protected in itself, even if it has not been fixated in a material form. The \textit{Lacan} case\(^\text{28}\) concerned the publication of a conference speech given by a famous French psychoanalyst, Jacques Lacan. The Court confirmed that an oral presentation was protected in itself without needing to be fixated in any material form. Thus, the author or his/her successor can oppose publication. The \textit{Barthes} case\(^\text{29}\) concerned similar facts. The entitled beneficiary of Professor Roland Barthes opposed the publication of one of the oral presentations given by his brother. The Court ruled that the publication in a book of an oral presentation by a professor constituted a copyright infringement, if this publication was made without the agreement of the rights owner, confirming therefore that an oral presentation is protected in itself. The solution would certainly have been the same in other laws that provide authorship rights protection without any formal requirement.

The opinion of each piece of legislation towards the fixation requirement is particularly involved in cases regarding fragrances or perfumes. Most European countries do not protect fragrances as copyright works. Except in France and in the Netherlands, no litigation about the protection of fragrances is known anywhere else, which does not necessarily mean that perfumes would not be protected if the case happened to be judged. In France, despite the fact that the Supreme Court\(^\text{30}\) rejected the protection of a fragrance as a work of art, on the basis that a fragrance was nothing more than the result of

\(^{27}\) Article L. 121-2, French Intellectual Property Code.


particular know-how, first instance courts and appeal courts are still admitting the protection of a fragrance as a work. Indeed, French copyright law protects original creations resulting from an intellectual activity, expressed within a form. Consequently, a fragrance which is the result of a creative activity, having an olfactory form that would be original, can be protected by French copyright law. In the Netherlands, the Supreme Court decided that a fragrance could be protected by Dutch copyright law, as the law gives a non-exhaustive list of works (as in France) and the protection criteria are similar to those of France. British copyright law gives an exhaustive list of protected works. Because fragrances are not listed among them, this would probably exclude the protection of fragrances under British copyright law.

However, the protection of fragrances causes a problem of fixation and of evidence. But somehow, the fragrance can be considered as fixated in the perfume’s juice, fragrance and juice being consubstantial. The fixation of the fragrance should not be an obstacle to its protection by copyright, as, in civil law countries, no fixation is required to obtain copyright protection, and as it can be said that a fragrance is fixed in its juice. Therefore, opponents of the protection of fragrances by copyright, and even the French Supreme Court, do not put forward the absence of its fixation. However, the fact that the fragrance is no longer fixated at the time it is smelled could be an obstacle to the appreciation of its originality and to proving a copyright infringement, the protection in that case being then inefficient. However, decisions which recognize a fragrance as a work overcome those obstacles, even if this was not the case in the initial litigation.

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The case of fiction characters is also very interesting. First, fiction works are very popular and their commercial exploitation is more and more developed. Secondly, fiction characters are protean. One kind of fixation cannot usually manage to describe the entire creation. Actually, this work includes a physical appearance (drawing, acting or writing) but also a psychological aspect. It is quite impossible to embody the entire creation in a single fixation. This kind of work cannot be efficiently protected according to one of its fixations.

Generally speaking, we observe that more and more works can be communicated without a traditional fixation. Because of dematerialization, most forms of exploitation do not need supporting devices any more. The issue of fixation has no sense in the Internet world. Digital forms and broadcasting become the rule. The concept of ‘single source’ is real with mobiles and multimedia. If copies remain, they are just technical or temporary. That is why the European Community Copyright Directive of 22 May 2001 created a mandatory exception for temporary acts of reproduction on the Internet. But when we look at the creator’s side, we also observe that digital devices and the Internet offer more and more tools to create and/or to copy works. The fixation becomes a kind of reflex and does not deal with traditional publishing any more. All around the world, rights content has been developed to follow technical changes. Even copyright is no longer a right over copies but a possibility of controlling most of the uses of works. This development could come about because of the Berne Convention describing exclusive rights in general terms. This change means that the scope of rights and especially the requirement rules have been adjusted. Because publishing is no longer a necessity, fixation is more than ever an unjustified criterion.

If the principle of protection can exist without any fixation requirement, most cases of exploitation need a fixation in reality, wherever the fixation might intervene in the process. The main issue will be knowing when fixation is required, whether the fixation can be a former one or if the unauthorized fixation that raised the litigation can be deemed sufficient.


38 Article 9(1) of Berne Convention: ‘Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form’.
2.2 Fixation as a requirement

Under the terms of the Berne Convention, linking copyright to fixation is acceptable. Its article 2(2) states: ‘It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.’ As we have already mentioned, European Community directives do not express anything about this requirement. At first, copyright countries and especially Great Britain could demand fixation because of the traditional proof of the protection. Copyright is more a power on diffusion than one based on the process of creation. In this context, there can be a natural link between protection and fixation, especially when publishing was the main method of diffusion for works. As the content of copyright changes, the attachment to the fixation is less strong. Anyway, computer science is nowadays omnipresent during the creation process or the transmission. Many works could be elaborated and published without any traditional fixation. This is especially the case for digital photographs, computer graphics or cartoons.

Under United Kingdom copyright, a protected work still needs to be fixed in some material form. But the practical differences are less than the theory might lead us to believe. As Professor Ysolde Gendreau pointed out, there are not many divergences between the two systems for classical works but divergence is real in special cases. The reason is the implementation of a very accessible definition of fixation. It could be any tangible medium of expression. All forms are accepted even if they are directly perceptible or if a machine or device is needed. Nothing more is required than that the fixation has to be directly intelligible. Much more, tangible form does not mean mandatory permanent materialization. Therefore a fixation is considered even if the support device or the signal is ephemeral. The fixation should be stable enough so that the work is accessible to the senses. The tangible embodiment is then very easy to verify and drifts away from a criterion which was, not so long ago, a publishing requirement. Even if the United Kingdom copyright keeps the principle of fixation, nevertheless we can quote the Hyperion case: ‘[...] the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person’s spontaneous singing, whistling or humming of improvisations of sounds by a group of people with or without musical instruments should not

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be regarded as “music” for copyright purposes.\textsuperscript{42} In conclusion, all European States, whether they require fixation or not, seem to reach the same result: copyright work means a work capable of reproduction in a tangible form. It should be susceptible to being reproduced or published in one way or another. Therefore, as a French court explains, the requirement is mostly an ability to get form.\textsuperscript{43}

Another problem can be underlined. It is the question of the person responsible for the fixation. Let us come back to the French conferences’ cases. Should we conclude that an oral presentation cannot be allowed copyright protection, if it does not comply with the requirement of fixation in a material form? The second paragraph of Section 3 of the United Kingdom Copyright, Designs and Patents Act of 1988 states that in order to benefit from copyright protection a work must be ‘recorded, in writing or otherwise . . .’. Thus, an oral presentation would be protected by copyright law only following fixation by different means (stenography, recording . . .). However, ‘the fixation requirement will be satisfied even if the recording is carried out by someone other than the creator (with or without their permission)’.\textsuperscript{44} From this, we conclude that an oral course given by a professor is protected in Great Britain, as soon as it has been fixed, with or without an author’s permission. But, in practice, in which case will the author have to defend his monopoly? When an unauthorized reproduction is done in order to be directly communicated to the public or to be used as a specimen for a representation? Because the United Kingdom copyright law does not specify who has to decide the fixation, the counterfeiter can both cause the protection and apply it. This interpretation could not be made under United States copyright law because it requires an authorized (or self-executed) fixation to obtain protection.\textsuperscript{45} But most States accept the principle of protecting performances even if the work is not fixed.

Moreover, attaching great significance to the fixation criterion could also generate two kinds of trouble. First, ownership could be given to the person who recorded the work and incidentally caused the property. Furthermore, it could be tempting to consider the owner of the copy as the owner of the work. Last, this situation could generate a conflict between the author and the owner. \textit{Accessorium sequitur principale} is not verified according to copyright. Whatever his power, the owner of a copy has no right in the protected

\textsuperscript{45} US Copyright Act §101.
work. Second, it could become hard to distinguish between the protected work and the performance that is fixed in tangible form, and then to appreciate who is the owner. For instance, the Paris Court of Appeal had to deal with this case in 2004 in relation to a conjuring trick. Even if the performance and the work are protected in the same way, the owners could be different.

2.3 Fixation as evidence

_Non jus deficit sed probatio_. Whatever the requirements for obtaining copyright protection, in case of infringement, the right holder must prove the reality of his work and often his precedence. As a judicial fact, evidence is free. All means of proof should be available. In this way, fixation is interesting, particularly if the copy is made with durable material. It is the most important reason why fixation is sometimes required. The fixation requirement was intended to secure the identification of works in which copyright was exercised. But fixation will never be as strong as an official deposit which is a formality forbidden according to article 5(2) of the Berne Convention. The judge is still free to trust the fixation which is brought or not brought and consequently to estimate the work’s date of birth. In most cases, the fixation date will be regarded as the date of the creation and therefore as the beginning of the protection.

Without any material that could be considered _lato sensu_ as a fixation, jurisdictions are not able to make comparisons between the two litigated works. Testimonies do not suffice to prove a counterfeit. The total lack of fixation controlled by the right holder or an illegal fixation merely committed by the defendant would create many difficulties in enforcing copyright. Copyright exists in theory but right holders are unable to make it respected. This solution is also implemented in countries such as France which traditionally attach great value to the act of creation because of a high level of moral right protection. For instance, the Paris Court of Appeal rejected a teacher’s claim. His psychotherapy course was copied and published by one of his students. Because of the lack of fixation, the court was not able to compare the oral course with the book. Judges remark that the work has no ‘tangible’

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46 For instance, Vaux le Vicomte gardens are not an accessory property of the company to whom the castle belongs. Paris Court of Appeal, 11 February 2004, PI, July 2004, no. 12, obs. Lucas André, p. 773.
form. Consequently, even in countries which do not require fixation as a general principle, it is needed as evidence in special cases. For instance, this is the case for audiovisual works in Germany or choreographies, circus shows and pantomimes in France.\(^5^0\) Because these States belong to the author’s right tradition, the requirement is mostly understood as a criterion *ad probationem* and not *ad validitatem*.\(^5^1\)

As we have already said, information technologies are affected by the question of fixation considered as a requirement or simple evidence. Indeed, computers and networks in general (local or Internet) offer many ways to record or to keep marks of a work. In our digital world where more and more works are created or disseminated using a computer, it becomes easier and easier for a right holder to prove the reality of the creation. Much more, many tools are available to supervise the network and could mark out unauthorized uses.

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\(^{50}\) Article L. 112-2, 4, French Intellectual Property Code.