

Rewarding Creativity in Law, Economics and Literature

Maurizio Borghi

Summary¹

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) 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.

Article 27 of the Universal Declaration of Human Rights (1948) states two principles that today seem to be universally accepted. Civil society brings them up on every occasion. All governments broadly support them. The legislation of all countries upholds them, for example, in the form of free compulsory education and copyright protection. Nobody would hesitate to consider unfair a state that did not incorporate such principles in its legislation and practices.

Scientific, literary and artistic products are the outcome of what in the Western world has been called, at least since the 18th century, creative human labour, or simply, creativity. Since creativity is one of the foremost faculties of the human being, it is in the common interest to protect and encourage it. The problem seems only to be how to do it. How is it possible to make laws consonant with this sound and universal tenet? What measures should be taken? But even prior to that: how can one orient himself securely in these questions?

In a sense, since the dawn of Western culture, these questions have raised serious discussions. However, the shape these questions have taken today is something new; it is the eventual result of a "revolution" begun two and a half centuries ago that upset the way our humankind relates to works of art and thought². In this paper I will deal with this topic only in a limited and apparently marginal way. My question is: what does "rewarding creativity" mean today? And what did it mean before the rise of the modern world?

Questioning the principles and institutions that regulate and have regulated the rewarding of creativity in Western culture, might allow us to become better aware of our present situation as regards to art, knowledge and learning – knowing full well that this situation is so puzzling that no historical analysis as such can pretend to shed a complete light on it.

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Modern practices and institutions for rewarding creativity are the utmost transformation of principles rooted in Roman law and that continued to be essentially in force until the beginning of the 19th century. To understand these principles, we must refer to the original political dimension in which they originate, that is to say the Roman *civitas*.

The *civitas* is the community of the *cives*, that is, free human beings³. One of the highest manifestations of human freedom is the exercise of the *artes liberales*. In them, a human being cultivates himself, and such *cultura* is actually its *virtus*, its excellence: what differentiates it from (other) animals, but also from humans who are not free. The expression *artes liberales* basically means two things: on the one hand, the fact that it is a matter of *ars*, the exercise of which requires above all – even before any other requisite such as skilfulness and talent – freedom; but, on the other hand, this freedom – that is therefore a prerequisite – can be fully attained only by exercising the *artes liberales* themselves. Therefore, an *ars* can be called *liberalis* precisely because it is the means through which one attains consent to become free (*liber*). In the early Middle Ages the *artes liberales*, codified into *trivium* (grammar, rhetoric, dialectics) and *quadrivium* (arithmetic, geometry, astronomy, music), represent the foundations of education⁴. The *artes liberales* are in contrast with the *artes mechanicae*, namely, the

1 Maurizio Borghi is a Research Fellow at the Bocconi University of Milan and Visiting Scholar at the Center for the Study of Law and Society, University of California, Berkeley. I wish to thank Andreas Abegg, Ivo De Gennaro, and Joe Rollins for their helpful and enlightening comments on preliminary versions of this paper.

2 For a discussion of this topic cf. F. Vézin, La question de l'oeuvre d'art, in F. Midal and H. France-Lanord (eds.), La fête de la pensée. Hommage à François Fédier, Lettrage: Paris, 2001. See also Paul O. Kristeller, "The Modern System of Arts: A Study on the History of Aesthetics", Journal of the History of Ideas, 12-13, 1951.

3 Cf. Ernout-Meillet, Dictionnaire étymologique de la langue latine, Klincksieck: Paris, 4th ed., 2001. *Civis* originally meant the free member of a city, in contrast to other forms that were not free, like *hostis*, *pergrinus* e *socius*. As the latter, namely *socius*, we shall later see more clearly how *civitas* differs from *societas*.

4 The enumeration of the *artes liberales* traditionally goes back to Varro (first century B.C.) at the time of the Latinization of the Hellenistic educational institutions. The core of the seven *artes* was supplemented in various ways by medicine, architecture, law and history. Later, starting from the Carolingian era (8th cent.), medicine, philosophy and theology were formally added to the seven *artes*.

knowledge that is used to do or carry out something (*mēchanē*), and that, being subordinate to a purpose or result, is not intrinsically free.

Thus *ars* means knowledge, both in the sense of "knowing" and of "knowing how". It is a very broad meaning that coincides only in part with what today is meant by "art".

In 18th century economic thought, the difference between *artes liberales* and *artes mechanicae* will subsequently be translated into the distinction between "intellectual work" and "manual work". In this modern distinction, what comes to the fore is the *means* by which the work is carried out (the hand *vs.* the mind), while what becomes implicit and almost disappears, is the reference to what the work aims to achieve (freedom *vs.* tangible results).

Returning to the Roman notion of the *artes liberales*, we see that, as an exercise in freedom, they are to be considered perfect in themselves: the fact of exercising them is already an end in itself, and they do not have to refer to anything else in order to consider themselves wholly accomplished. Therefore what happens when an *ars* of this kind is exercised in the interest of others or when its fruits are exchanged for other fruits? For example, what kind of relation shall be established between the sculptor that shapes a statue and the person who commissions it, or between the scholar who expresses an opinion on a legal matter and the merchant that asks him to do so in order to manage a business?

Rewarding free work is codified in Roman law with the institution of the *honorarium*. Even today we speak of the doctor's or lawyer's "honorarium" as a form of remuneration distinguished from "wage", "salary", "price" and so on. However, in Roman law it is not simply a matter of lexical differences. The characteristics of the *honorarium* are essentially incomparable to other forms of monetary transactions such as those implied by – for instance – *salarium* or *pretium*. The *pretium* is an equivalent in money used to finalize the purchase of something that necessarily implies a *negotium*, namely a contract of sale (*emptio-venditio*). Outside a contract of sale, no price is possible. But contract of sale concerns exclusively *merces*, that is commodities, and human labour is (still) not considered a commodity. The reason is simple: once it is "lent", namely, exchanged, labour no longer belongs to the labourer, in the sense that it can never "come back" to him – instead, a *merx* exchanged for a quantity of money can always be returned to the seller in exchange for the same amount of money. In other words, the contract that provides for work done is irreversible, and it is for this reason that Roman law refuses to analogize it to a contract of sale and devises the special figure of the *locatio*

operarum, leasing work⁵. Moreover, in every kind of work or labour, even the most menial, it is always a question of human freedom, and this makes it impossible to consider a human work as perfect substitutable with another human work.

Unlike commodities, work has no perfect equivalent – although it is always possible to find an equivalence between work done and its remuneration, and, accordingly, it does not seem completely incongruous to establish, for example, the equivalent in money for the working day of a farm labourer or a scribe⁶. However, when every equivalence is, in principle, excluded, it is just in the exchange of the fruits of *free* work. The *artes liberales* not only produce goods that cannot be exchanged, but they are not even in themselves the object of being leased. If they were, they would become *ipso facto* servile arts: that is to say, they would be work done, subordinate work, work carried out for a purpose extrinsic to the exercise of the *ars* itself. The fruits of such work of *artes liberales* have the characteristic of always being original and unique: each time they are "one of a kind" – a speech, a play, a medical prescription, a legal advice, and so on – and therefore have no equivalent and cannot *stricto sensu* have a price.

The fact that fruits of *artes liberales* do not have a price does not mean, however, that a remuneration is not paid or cannot be paid for them. A form of remuneration does exist, and it is defined as *honorarium*. We find a definition of *honorarium* in an 18th century German lexicon:

*Honorarium means acknowledgement or reward, recognition, favor, stipend; it is not in proportion to or equivalent to the services performed; differs from pay or wages, which are specifically determined by contracting parties and which express a relationship of equivalence between work and payment.*⁷

The author of this entry points out the characteristics of the *honorarium* that distinguishes it from other forms of compensation for the work: it is not obligatory and, above all, there is no equivalent ratio between the compensation and the work done. The *honorarium* is the only form of

5 The fact that Roman law considers the worker a lessor of his *operae*, instead a seller of labour, has some important consequences. One of these consequences is that the *periculum*, namely, the risk of not fulfilling the contract for reasons not attributable to the lessor (i.e. the worker), is wholly charged to the conductor (i.e. the employer). (Cf. *F. De Robertis*, *I rapporti di lavoro nel diritto romano*, Giuffrè: Milano, 1946).

6 In these kinds of contracts, the amount of money is established *ex ante*, that is before the work is done. This is possible because the fruits of the labour (the *operae*) can somehow be evaluated. As we shall see, this precisely does not occur in the case of *artes liberales*.

payment that can fit an equal relationship between free men exchanging invaluable things. As a matter of fact, this kind of relationship is not based on the valuable equivalence between work done and payment obtained by means of a contract, but on the harmonious balance between the gratuitous acts of the offer and the compensation.

Since it is a non-obligatory act, this form of remuneration can be employed in so-called "imperfect contracts", namely, those that are binding for only one party. A typical imperfect contract is the mandate (*mandatum*), namely, the contract in which one party entrusts another party with a task that he promises to carry out unconditionally. It is a contract based on the trust (*fides*) between the two contracting parties, and that commits only one of the two without the other being bound by any financial or whatsoever obligation⁸. The mandate thus becomes the usual type of contract for deals covering acts or performances that are essentially invaluable and for which the compensation cannot therefore be fixed *ex ante*. In these cases, only *ex post* discretionary payment can be freely made, namely, in the form of an *honorarium*.

Up to the beginning of the modern age, dealings for commissioned artistic works have been regulated by mandate-like contracts and only in special cases did one resort to leasing work⁹. In the *Metaphysik der Sitten* (1797) Immanuel Kant identifies in the mandate the judicial rationale of the relation that binds the author of a book to the publisher:

A book is a writing, which represents a discourse addressed by some one to the public, through visible signs of speech. [...] He who speaks to the public in his own name is called the author (auctor); he who addresses the writing to the public in the name of the author is the publisher. [...] The publisher, again, speaks, by the aid of the printer as his workman (operarius), yet not in his own name, for otherwise he would be himself the author, but in the name of the author; and he is only entitled

*to do so in virtue of a mandate (mandatum) given him to that effect by the author*¹⁰.

The *mandatum* is the only form of contract that the *honorarium* allows. These two institutions – *mandatum* and *honorarium* – define the boundaries of the relations between those who exercise an *ars* and those who exploit the fruits of it in order to fulfill a purpose or to obtain a tangible result. Excluding, in principle, every *ex ante* determination, and relinquishing the search for an equivalence in the exchange – that is, for an evaluating relation – the legal institutions of *mandatum* and *honorarium* ensure that a distance is maintained between the two contracting parties, thereby making it possible to formally preserve the necessary sphere of freedom for the exercise of the *ars*. Based on the *fides* and gratuitousness, these institutions shape an extra-economic space that is not, however, *extra legem*, but that, on the contrary, represents the height of legality¹¹.

Around this "legal space" created by the figures of *mandatum* and *honorarium*, early copyright institutions such as the book-privilege took shape around the end of 15th century¹². Unlike the *honorarium*, the *privilegio* is not – at least not directly – a way of remunerating creative work. It is only a means of regulating the commerce of mass produced goods involving a creative work. Such are books, engravings, maps and charts. Granting to the publishers a fair return for their investments, the privilege allows publishers to regulate their relationship with authors in a free way, and does not

7 Honorarium, heisset Erkenntlichkeit, oder Vergeltung, Verehrung, Discretion, Besoldung, bestehet in einer freien Willkühr und hat keine Proportion oder Gleichheit gegen die geleisteten Dienste, different von Mercede oder Lohne, so von denen Contrahenten ausdrücklich bedungen, und zwischen solchen und der Arbeit eine Gleichheit beobachtet wird" (J.H. Zedler, Grosses vollständiges Universal-Lexikon aller Wissenschaften und Künste, Leipzig und Halle, 1732-50, vol. 13, p. 382). This entry is quoted and commented in M. Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics*, Columbia University Press: New York, 1994, at 42.

8 In this sense it can be said "unconditional", and thus "imperfect" contract.

9 Cf. F. Haskell, *Patrons and Painters: A Study in the Relations between Italian Art and Society in the Age of the Baroque*, Yale University Press: New Haven and London, 21980.

10 I. Kant, *Metaphysische Anfangsgründe der Rechtslehre*, in *Metaphysik der Sitten*, Kants gesammelte Schriften, ed. Königl. Preuss. Akademie der Wissenschaft, De Gruyter, Berlin-Leipzig, 1907, vol 6, p. 404. In the case of the publishing mandate, the honorarium functions in the reverse way with respect to the artistic commission: it is the mandatee (the publisher) who pays the mandator (the author). In the current copyright laws, both in civil law and common law countries, publishing contract is subject to specific restrictions in terms of alienability and duration, and it differs essentially from a contract of sale (see N. Netanel, "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law", *Cardozo Arts and Entertainment Law Journal*, 12, 1994).

11 Pianigiani, in his *Vocabolario etimologico* (Firenze: 1907), traces lex back to ligare and to the Greek legein "akin it says, as Cicero teaches, 'elected or chosen rule and norm of life'". In this sense, one can say that the exercise of the artes liberales is the most binding law, and therefore also capable of radiate a sphere of legality around it.

12 The juridical rationales of book-privileges of 15th and 16th centuries, and the essential differences with the "intellectual property system", are discussed in M. Borghi, "Un tacito contratto: scrittori e collettività dai privilegi di stampa alla proprietà intellettuale", *Rara Volumina*, 1/2, 2005; and Id. "Writing Practices in Privilege and Copyright-System (On Authorship, Ownership and Freedom)", paper delivered at the 2003 workshop of the Society for Critical Exchange and available at <http://www.cwru.edu/affil/sce/Texts_2003/Borghi.htm>.

interfere with the traditional way of dealing with it by means of the non-compulsory and gracious act such as the *honorarium*. In other words, privilege does not supplant the *honorarium*, but complements it, and so doing it permits maintaining a clear distinction between the remuneration of creative work on one side and the earnings depending on the commercial exploitation of the work itself on the other. Artistic creation and commercial exploitation remain two distinct spheres of human activity, even when they merge into a unique enterprise¹³.

This well-balanced play between authors and dealers, i.e. between creators and commercial exploiters of works, is clearly expressed by Goethe in an enlightening page of his autobiographical work *Dichtung und Wahrheit* (1811). Referring to the situation of the book marketplace in the generation just preceding his, he says:

The production of poetical works was regarded as something sacred, and it was considered close to simony to accept or bargain for a reward. Authors and publishers enjoyed a most amazing reciprocity. [...] The authors, who in addition to their talent were usually considered by the public to be highly moral people and were honored accordingly, possessed intellectual status and felt themselves rewarded by the joy of their work. The book dealers contented themselves with the second rank and enjoyed a considerable advantage: affluence placed the rich book dealer above the poor poet, so everything remained in the most beautiful equilibrium¹⁴.

13 From economic point of view, the privilege-system is a method for ensuring the commercial exploitation of creative works as a function of the market in which these commodities are exchanged. In this sense, the privilegio, as legal institution, can be interpreted as an act of defining limits and boundaries of an economic space. Accordingly, in the privilege-system "[a work] is not purely and simply a 'commodity' [as it is fundamentally assumed in the current intellectual-property-system]: it is a commodity only so far as it serves the needs of a buying-selling exchange. [...] Where there is no economic interest, or where economic interest has already been met, no exchange value needs to be ascribed to the [work]" (M. Borghi, "Writing Practices in Privilege- and Copyright-System", supra note 12).

14 Die Produktion von poetischen Schriften aber wurde als etwas Heiliges angesehen, und man hielt es beinahe für Simonie, ein Honorar zu nehmen oder zu steigern. Autoren und Verleger standen in dem wunderlichsten Wechselverhältnis. [...] Jene, die neben ihrem Talent gewöhnlich als höchst sittliche Menschen vom Publikum betrachtet und verehrt wurden, hatten einen geistigen Rang und fühlten sich durch das Glück der Arbeit belohnt; diese begnügten sich gern mit der zweiten Stelle und genossen eines ansehnlichen Vorteils: Nun aber setzte die Wohlhabenheit den reichen Buchhändler wieder über den armen Poeten, und so stand alles in dem schönsten Gleichgewicht." (Goethe, *Dichtung und Wahrheit*, Dritter Teil, Buch 12). This excerpt is cited and commented in M. Woodmansee, *The Author, Art and the Market*, supra note 7, at 43.

Privilegio and *honorarium* are the two juridical pillars of what Goethe terms "the most beautiful equilibrium" (*das schönste Gleichgewicht*). According to him, such equilibrium was the fact of an "amazing reciprocity" that, in its turn, was grounded on an essential inequality or disparity between authors and dealers.

But Goethe is at the same time witness of the *collapse* of that equilibrium he depicts so enthusiastically, and which he describes intentionally speaking in the past. In the space of one generation, an entire world of practices and institutions ruling the relationship between authors and dealers, as well as the juridical structure that govern it and that rooted back to Roman law principles, falls down or radically changes its meaning. As I have initially pointed out, these legal principles unfold perfectly and gain their force in a specific political dimension which is the *civitas*, namely, a community based on the common search for *virtus*. However, modern times have been characterized by the emergence and the increasing dominance of a new and unprecedented way of being together, namely, the "society". The expression "modern society" is in truth a tautology since an "ancient society" does not exist, nor could it exist at all. Only in the modern world does "society" become the general and universal form of the human community. Society supplants any other form of togetherness, to such an extent that it appears to be the only possible way humans relate to each other¹⁵.

The collapse of the "beautiful equilibrium" in which authors and dealers enjoyed an "amazing reciprocity" occurs when the author becomes fundamentally a *member* of the *society*. In the following, I shall try to point out some of the consequences of this considerable – although outwardly unproblematic – event.

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The emergence of the society as unique and universal way of relating to one other did not occur over night. Actually, this emergence was an event prepared by the Romans. As Hannah Arendt points out, "the word 'social' is Roman in origin and has no equivalent in Greek language and thought"¹⁶. However, the Latin word *societas* did not originally mean a fundamental human condition: it indicated an alliance or an agreement stipulated for a specific purpose, like the government (*societas regni*), crime (*societas sceleris*)

15 From now on, polis and civitas appears to be institutional superstructures of – respectively – the Greek and the Roman "societies". We can see easily to what extent "society" becomes nowadays the all-embracing concept covering every possible human relation.

16 H. Arendt, *The Human Condition*, Chicago University Press: Chicago, 1958 at 23.

or trade (simply *societas*). In this sense, the ancient distinction between the *civis Romanus* and the *socius Latinus* is wholly clear: the first is an integral part of a community of equals; the second is simply a partner, an ally with whom one has made an agreement in order to govern the *res publica*¹⁷.

Only with the late concept of a *societas generis humanis*¹⁸, and especially with the Thomistic translation of the Aristotelian definition of man *zoon politikon* as *animal socialis*, do "society" and "sociality" come to define the human condition as such. In this way, notes Hannah Arendt, it becomes evident "the extent to which the original Greek understanding of politics had been lost"¹⁹. Certainly, continues Arendt, neither Plato nor Aristotle ignores the fact that human beings cannot live without the company of others; but this condition is not specifically human. In fact, life shared in common, namely, the fact of having to come together in order to stay alive, is a characteristic that human beings shares with other forms of animal life²⁰. The Latin translation of *zoon politikon* as *animal socialis* is thus a "fundamental misunderstanding"²¹ that paves the way and allows the *public sphere*, i.e. the public place of the common search for *virtus* (freedom), to coincide with the *social sphere*, namely, those activities that manage the preservation of life (necessity).

As we have previously seen, the Roman concept of *civitas* implies the common search for *virtus*. This never-ending search, which defines the *humanitas* of human beings as such, is also called by the Romans *cultura*. Now, *cultura* means to cultivate oneself in a whole sense, and this self-cultivation can be fruitfully carried out only in a community sharing the same purpose²². Since the very reason of being together is to foster the *cultura*, and since *cultura* is not a tangible goal but rather a never-ending struggle in which consists the humanity as such, the human community is rooted in an element which is far deeper than the mere *societas*, which is fundamentally an agreement for tangible purpose. To be sure, human beings must associate each other in order to make their living; but such a necessary social aggregation doesn't define at all the very sense of being together between human beings. In this sense, we might understand why Hannah Arendt calls "fundamental mis-

understanding" the Roman translation of the Aristotelian definition of man as *zoon politikon*: it is a misunderstanding, we might add, with respect to the Roman understanding of humanity itself.

This *fundamental* misunderstanding, originating in Christian-Roman thought, becomes even deeper with the advent of the modern understanding of society. According to this latter, as Hannah Arendt points out, all the faculties of man are absorbed by what in ancient times used to be the "private sphere", namely, the domestic and family sphere where the activities necessary for the maintenance of life were relegated – in other words, the activities in which man is *not* considered to be fully human. The distinction between "public" and "private" radically changes meaning. The private sphere now becomes the "inner life," the intimate, that is the humanity par excellence; on the other side, the public domain becomes the "social order", that uniformly dictates its own law transforming the "one-man, monarchical rule [...] into a kind of no-man rule"²³.

*With the emergence of mass society, the realm of the social has finally, after several centuries of development, reached the point where it embraces and controls all members of a given community equally and with equal strength*²⁴.

The central point of Hannah Arendt's historical analysis is the following: the advent of modern society and the ultimate dissolution of previous understandings of human community, like the Greek *polis* and the Roman *civitas*, implies the emergence of a new definition of the human being as such – a definition that secretly guides all knowledge and every human action in our times. Man is no longer *zoon politikon*, nor *animal socialis*, but becomes essentially an "active social animal". This means: an "animal" whose be-

17 Cf. *Ernout-Meillet*, Dictionnaire étymologique de la langue latine, supra note 3, entry "Civis".

18 This wording is probably employed for the first time by *Cicero* in *Tusculanae disputationes*, XXVI, 64.

19 *H. Arendt*, *The Human Condition*, supra note 16, at 23.

20 From this viewpoint, the way modern zoology uses expressions like "social insects", "sociability of penguins", "society of bees", is perfectly (although unknowingly) Greek.

21 *H. Arendt*, *The Human Condition*, supra note 16, at 27.

22 To point out this meaning of culture – which is totally different from our current idea of "culture" as a sum of usages, customs, and beliefs – it might be useful to read the passage where *Cicero* defines philosophy as *cultura animi*: "As all the fields which are cultivated are not fruitful [...] it is not every mind which has been properly cultivated that produces fruit. And, to go on with the comparison, as a field, although it may be naturally fruitful, cannot produce a crop without tilling (*sine cultura*), so neither can the mind without learning (*sine doctrina*); such is the weakness of either without the other. Whereas philosophy is the culture of the mind (*cultura animi*): this it is which plucks up vices by the roots; prepares the mind for the receiving of seeds; commits them to it, or, as I may say, sows them, in the hope that, when come to maturity, they may produce a plentiful harvest." (*Cicero*, *Tusculanae Disputationes*, II, 5, 13).

23 *Ibidem*, at 40. "[T]he rule by nobody is not necessarily no-rule; it may indeed, under certain circumstances, even turn out to be one of its cruelest tyrannical versions" (*ibidem*). This "nobody" can assume each time the form of "general interest of society", "public opinion", "social welfare", "international community", and so on.

24 *Ibidem*, at 32.

ing is essentially determined by the fact of "acting", i.e. to produce observable effects on other human beings and on the surrounding environment²⁵. This guiding concept is now implicitly assumed in all knowing and knowing-how, that is in all modern sciences and practices, but it can never explicitly come to light as such in them.

Human knowledge and the sphere of references that emanate from it are therefore radically transformed in their meaning. The behavioural sciences – namely, that body of knowledge that assumes man as being essentially an *animal* that *behaves*, and whose behaviour can be predicted – take on a central role and, in a sense, replace the *artes liberales*: statistics replaces mathematics (arithmetic and geometry), economics replaces law. Statistics and economics become the "queens" of the sciences – the very *artes* of the modern society. But in conformity with the definition of man as an active social animal, *all* the sciences become, in a sense, behavioural sciences²⁶. In particular, economics focuses on man only from the perspective of his being a "labour animal" and it can do so insofar as "the new social realm transformed all modern communities into societies of labourers and jobholders; in other words, they became at once centered around the one activity necessary to sustain life"²⁷.

Society becomes now essentially a society of labourers. This does not mean that "every member actually [is] a labourer or worker", but that "all members consider whatever they do primarily as a way to sustain their own lives"²⁸. This, in turn, is possible because "[s]ociety is the form in which the fact of mutual dependence for the sake of life and nothing else assumes public significance"²⁹. Since this interdependence is a function of the necessities of life, *every* human activity becomes a process that can be divided into two phases: labor and consumption.

In the society of labourers and consumers, all human activities can be ascribed "to the common denominator of securing the necessities of life and providing for their abundance"³⁰. The only exception to this iron rule is represented by "the artist, who, strictly speaking, is the only 'worker' left in a labouring society"³¹. However, this exception is

maintained at the expense of a radical change in the meaning of artistic creation that now will only appear to be a behavioural variant of the active social animal, like an activity in which one of his vital functions is expressed.

The playfulness [i.e. the freedom to configure (a world)] of the artist is felt to fulfill the same function in the laboring life process of society as the playing of tennis or the pursuit of a hobby fulfils in the life of the individual. [...] From the standpoint of 'making a living', every activity unconnected with labor becomes a 'hobby'³².

In this context, what happens to the legal institutions that govern the remuneration of creative work? As said before, they simply *collapse*. They disappear or change radically their meaning. From this perspective, it is particularly instructive to observe how, since its origins, political economy has tackled the question posed by this particular category of "social animals" that do not act in terms of the work/consumption process – that is to say, artists, writers, philosophers, and the like. In this connection, Adam Smith speaks of "that unprosperous race of men commonly called men of letters":

In every part of Europe the greater part of them have been educated for the church, but have been hindered by different reasons from entering into holy orders. They have generally, therefore, been educated at the public expence, and their numbers are every-where so great as commonly to reduce the price of their labour to a very paultry recompence³³

From the standpoint of labouring in order to work for a living, the man of letters devotes himself to an *unprosperous* occupation. Educated, at the public's expense, to practice a profession, for various reasons he has chosen to do something else. His labour, just like any other one, has a price that depends on the laws of supply and demand. The fact that this price is generally low is due to the abundance of supply compared to the demand. So claims Adam Smith.

However, the meager remuneration is partly offset by another element, without which the existence of such kind of men would be simply inexplicable for economic theory:

The public admiration which attends upon such distinguished abilities, makes always a part of their reward; greater or smaller in proportion as it is higher or lower in degree. It makes a considerable part of that reward in the profession of

25 As we shall see in a while, this is a particularly narrow and restricted sense of "acting" which coincide with "behaving".

26 In fact, for the active social animal, "acting" means nothing more than "behave" in a certain way. This striking restraint of the sense of human action leads the current comprehension of creativity as a modality of human behaviour (see *infra*).

27 *H. Arendt*, *The Human Condition*, *supra* note 16, at 46.

28 *Ibidem*.

29 *Ibidem*.

30 *Ibidem*, at 126.

31 *Ibidem*, at 127.

32 *Ibidem*, at 128. The playful character of artistic creation consists in configuring a world, i.e. a sense to be shared in commons. The transformation of the artist into an animal (non) laborans occurs into the "worldlessness", that is, into the actual disappearance of the world. This phenomenon leads to what nowadays we call "globalization".

33 *A. Smith*, *Wealth of Nations* (1776) I.10.93.

*physics; still greater perhaps in that of law; in poetry and philosophy it makes almost the whole.*³⁴

Public admiration is thus the *condition* (today one would say the "incentive"³⁵) without which the "active (i.e. *conditioned*) social animal" would not have enough stimuli to adopt a social behaviour that is so poorly compensated.

During the same years, an Italian economist, Gianmaria Ortes, tackled the question of "occupations necessary for the national economy"³⁶. After having classified all the labourers in four productive classes, Ortes finds that there are still some employed

*in other occupations, which, although not related with the acquisition or consumption of goods, nonetheless keep minds and persons into some office, without acquisition of goods, either for the whole of their time either only for a part of it. These occupations can therefore be called non-economic*³⁷

These occupations are, for example, "forms of entertainment and games", but also activities "that comprise the application of natural truths, the so-called fine arts and the like" provided they are "pursued for one's own entertainment and pleasure and not professionally"³⁸ since in that case they would be *ipso facto* economic, and included in one of the productive classes.

The "non-economic occupations" constitute the remaining or residual class that comprises the activities that do not participate in the nation's economy and that, from the perspective of labour in order to making a living, have no other justification than being entertainment and pleasure. This class therefore includes "charlatans, mediocre actors, buffoons" as well as "the most reasonable philosophers", who cannot be distinguished from the first "just like a valet [who carries a ware] is different from a tradesman [who sells the same ware]"³⁹. These occupations do not serve to production, since they are carried out "without barter or the pur-

chase of goods". However, since nobody "does anything without sufficient reason", Ortes finds their rationale in the need to employ that great number of "fit people" that are unemployed because of the "overwhelming abundance of goods" and that "possessing many goods, do not need to work to obtain them"⁴⁰. Pursuing the arts and science is thus a way of keeping occupied the mind of all those people who do not have to labor in order to live.

On the one hand, public admiration (Smith), on the other, the need to fill in free time (Ortes): these two "conditions" without which no one would spend his existence in exercising science, letters or arts, are at the same time part of their remuneration, perhaps even the main one.

From this time onwards, economic theory will never change this approach, except to rectify some detail. The economists of the 19th century had only to replace the incentive represented by "public admiration" with that of monetary remuneration – by all means interchangeable with the first⁴¹ – in order to absorb the so-called "non-economic occupations" into the sphere of the economics and integrate them into the domain of production. As Melchiorre Gioia writes:

*If we exclude from the republic of letters the real remuneration proportional to the production costs, the field would only be left to the rich, who, on the one hand, are not prompted by necessity and, on the other, are more eager to acquire social status than literary honors, entitle us to believe that they would leave this field deserted*⁴².

The conclusion is that "whoever spends his time enlightening the public has the right to obtain from this effort an honest living", as occurs "in any other labours or professions"⁴³. The problem is how to determine the "real payment" for the activities that occur in the so-called "republic of letters", and, in order to do so, it is necessary to define their "production costs". This is nothing but basic economics. But this reasoning announces also the complete assimilation of creative work into the production of goods and services. Such assimilation requires however taking a further step with respect to the 18th century economists. If the man of letters, the artist and the scientist are, in their own way, producers, what kinds of goods do they put on the market? Jean Baptiste Say⁴⁴ states they are "intangible

34 Ibidem, I.10.27 (emphasis added).

35 Providing "incentives for creation" is commonly mentioned as being the essential rationale of copyright laws, mainly in the Anglo-American tradition. See for instance this statement of *Abraham L. Kaminstein* (American Register of Copyright, 1965): "The basic purpose of copyright protection is the public interest, to make sure that the wellsprings of creation do not dry up for lack of incentive, and to provide an alternative to the evils of an authorship dependent upon private or public patronage." (Quoted in: *J. Garon*, "Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics", Cornell Law Review, July 2003, at 1314).

36 *G. M. Ortes*, *Della economia nazionale* (1760), in *Scrittori classici italiani di economia politica*, edited by P. Custodi, Milano, 1804, vol. XXI.

37 Ibidem, book I, chap. XXII.

38 Ibidem.

39 Ibidem, book I, chap.V.

40 Ibidem, book III, chap. XXI.

41 As Hannah Arendt writes, commenting on the statement by Smith cited earlier: "it is evident that public admiration and monetary remuneration are of the same nature and one can very well replace the other" (*H. Arendt*, *The Human Condition*, supra note 16, at 42).

42 *M. Gioia*, *Nuovo prospetto delle scienze economiche*, Lugano, 1838, vol. III, p. 437 (emphasis added).

43 Ibidem.

goods” – that is to say, not merely invisible or imaginary goods: the fact they are intangible does not prevent them from being evaluated, exchanged on the market and given a price. “Works of the intellect”, as the fruits of artistic and literary work are now called, have, in fact, the “dignity” of being commodity just like any tangible good. The idea that is taking root is that even the “production” of these goods can follow the same laws as all other products so that the creation of a novel or a symphony is ultimately not essentially different from the production of any other commodity.

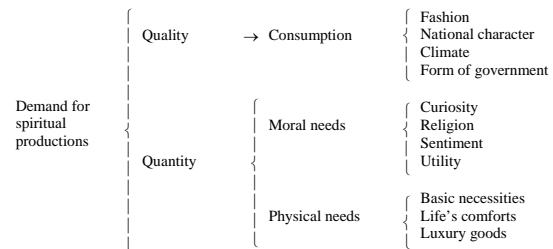
*Might not the production of creative works closely follow the same laws that the public economy has found regarding material productions, if not in the excellence and subliminal nature (which are sometimes independent of any law), always however, in the quantity and quality?*⁴⁵

The question is posed by Giuseppe Pecchio, one of the first Italian liberal economists, in an essay published in 1832 with the meaningful title of *Up to what point do scientific and literary publications follow the economic laws of production generally*. The essay puts such a hypothesis to the test as regards different kinds of so-called “spiritual productions”. G. Pecchio himself presents his own essay as a simple experiment and an exercise in dialectics. The economist, in fact, says that he is attempting something that “as far as I know, has still not been done”⁴⁶, namely, to exhaustively verify if the laws of political economy in force for tangible goods can also explain the causes of intellectual and artistic works.

*The only difference between the authors [of ‘spiritual productions’] and the producers of material things is that the latter receive payment in money or in equivalent barter and the former receive it in terms of fame, applause and honors and rarely in money. However, they are both driven by personal interest, and without any compensation whatever it be, they do not produce*⁴⁷

Here we find a well-know motive: the author is rewarded more by the praise of the public than by money. However, this does not differentiate him from the producer of material things; in fact, he is like him, since both are driven by personal interest. Everybody is driven by an interest and nobody produces without a reward. These two assumptions define the boundaries of every human behaviour, including that non-standard behaviour which is the exer-

cise of non economical occupations. The reward – “whatever it be” – of the creative work is thus the first, indispensable factor – in the creation of “spiritual productions”, whose demand is determined by a combination of the needs these productions meet. The demand for spiritual production can thus be analysed as depending on a range of factors, that Pecchio arranges in the following classification:⁴⁸



In some way, the current “cultural economics” (as is called the branch of economics that deals with the “industry of creativity” in a broad sense) is nothing but the quantitative extension of this pigeonhole. In fact, the relation between the author and the public might by now appear as a pure relation between supply and demand of goods. Certainly, as pointed out, Pecchio regards it merely as a simple experiment, almost a *divertissement*. But at this point, the path is clearly marked. The supply/demand relation becomes the real rationale of the legal institution that, from the early 19th century onward, governs the reward of creativity in the whole western world, namely, intellectual property. In fact, what constitutes this property? As Proudhon writes, it is a “tacit contract” according to which the author will be paid a flat rate by obtaining “a temporary privilege of sale”.⁴⁹ A tacit contract between the author and society at large: one provides his or her work, the other promises to pay remuneration for the work done. In fact, as we read in a *Dictionary of economics* published in the mid-19th century:

*The author is a worker of science, civilization, progress to whom society pays a salary, like the foreman pays a salary to his labourers [...] The so-called “intellectual property” is nothing but the payment for work, the price of leasing work, the payment for conducting business, in the form of a privilege that civil law grants to the author in recognition of the work and services rendered to the social community*⁵⁰.

What is here expressed with disarming frankness sums up very well the meaning that rewarding creativity has tak-

44 Cf. J.B. Say, *Traité d'économie politique* (1803), book I, chap.XIII.

45 G. Pecchio, *Della produzione letteraria* [1832], critical ed. by M. Cossutta, Studio Tesi: Pordenone, 1985, p. 6.

46 *Ibidem*.

47 *Ibidem*, p. 14 (emphasis added).

48 *Ibidem*, p. 94.

49 P.-J. Proudhon, “Les majorats littéraires. Examen d'un projet de loi” [1858], in *Oeuvres complètes*, vol. XVI, Paris, 1868, p. 24.

en on in our times. The economic relation between "society" and "the author" is only a particular case of the relation between an *employer* and a *provider* of labour. The author labours for society; he sells his work just like a labourer sells his labour to his employer. Whether the payment of a "salary", the "payment for a job", the "price of leasing work" or a "remuneration" – by now, the difference between all these forms of economic transactions that Roman law attempted to keep distinct, since they belonged to heterogeneous spheres of human activity, is only lexical. Whether it is called remuneration, salary, or price, it comes down to the same thing: the payment of a sum for a service rendered.

*

The author is a member of society. His membership is justified as far as he provides work for society. His work consists in producing culture, knowledge, and science. Society rewards him accordingly.

This framework – which, as I have tried to point out, overturns and supplants the traditional legal institutions of rewarding creativity that were in force in the Western world until two centuries ago – is wide enough to embrace a large spectrum of "rewarding" modalities, even outwardly differing or clashing. So, for instance, monetary reward, as we have seen implicitly stated by Adam Smith, can be replaced with "honour" and "public admiration" as substitutive goods. More recently, money, as incentive to produce, can and sometimes *must* go along with any sort of "social-psychological motivations", such as "pride in his own work" or "altruistic impulses", as the up to date economic theory points out⁵¹. Pricing, as primary modality to evaluate and exchange creative work, can be efficiently substituted by other systems of value that build up and flourish outside the sphere of the market, such as "social sharing" and the like⁵². Freedom, as a necessary condition

to perform a genuine research in the *artes liberales*, is now supplied to scientists in the form of a curtailed allowance of "curiosity-driven research", according to the wording *à la mode*⁵³.

In all these "substitutions", the misleading understanding of human being as "active social animal", and of human creativity as a behavioural option of this kind of being, are stated more than ever.

However, there is a whole sphere of human activity that is not, and probably will never be, conditioned by this narrow concept of man. It is precisely the sphere of art, literature, and thinking. Although besieged on all sides and nearly overwhelmed by it, "creativity" still takes place beyond any evaluating relationship⁵⁴. Thus, even after the collapse of the traditional institutions for rewarding creativity, the possibility of finding a "beautiful equilibrium" between authors and dealers is still in force. The task of building up the *conditions* for equilibrium can still be afforded more than ever.

Let us conclude by hearing an example of this, from the pen of a great American writer and thinker: Henry Miller. This witness is probably as reliable for today as was Goethe for two centuries ago – considering Miller's long-life experience in struggling with financial problems. In 1959 he addressed a letter to an editor of a small magazine concerning the publication of a short text – a letter of some years before about the Francis Carco's biography of the French painter Maurice Utrillo. In this *Open Letter to Small Magazines*⁵⁵, Miller declares he wants to clear up "the question of remuneration [...] beforehand with you, and all other editors of small magazines"⁵⁶. Reading these pages we are suddenly faced with the old question of rewarding creativity in an unexpected way – at least, in a way that is unpredictable from the standpoint of economic theory. Although it is a matter of money, it is not more question of "values" neither of all its substitutes. The active social animal and all its heavy baggage of "incentives", "motivations", and "interests",

50 G. Boccardo, *Dizionario della economia sociale e del commercio*, vol. IV, Torino, 1861, entry "Literary property". Boccardo endorses openly a "utilitarian" view of intellectual property. However, very similar conclusions can be found in 19th century authors who justify intellectual property in terms of "natural" or "personhood rights" (Persönlichkeitenrechte). See for instance A. Renouard, *Traité des droits d'auteur*, 1834, A. Scialoja, *Relazione alla legge del 25 giugno 1865 sui diritti spettanti agli autori delle opere dell'ingegno*, 1865, and J. Kohler, *Urheberrecht an Schriftwerken und Verlagsrecht*, 1907.

51 See among others B. Frey and W. Pommerehne, *Muses and Markets: Explorations in the Economics of the Arts* Oxford: Blackwell, 1989.

52 See Y. Benkler, "Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production", *The Yale Law Journal*, 114, 2004. This essay and the one cited in the previous note are extremely enlightening as a proof of the impossibility for economic theory to make head out of the core-concept of man as "active social animal".

53 In the current terminology, the average scientist's workday should include both "Mission-Oriented" and "Curiosity-Driven" research: activity controlled from above on one side, and freedom to go along for one's compulsion on the other. In terms of Roman's concept of cultura, this means to move from a slavery to another.

54 In this sense, economic theory of art deals with something which is not art at all. We must therefore distinguish the "creative industry", which is the actual object of economics, to the "creativity" itself, which can no be submitted of any science whatever it be, and which can only become object of thinking.

55 In H. Miller, *Stand Still Like the Hummingbird*, New Directions: New York, 1962.

56 *Ibidem*, at 73.

is temporary put aside. And a most fundamental concern is eventually put before our eyes.

You say: "A five dollar payment is all that we have at present." My dear fellow, have you any idea what an absurd sum five dollars is in a country like ours - even for an old letter? That letter appealed to you because it depicted the tragic plight of a man whose work has brought great joy to millions of art lovers. Today Utrillo is no longer in need. But Francis Carco undoubtedly is, and I, though no longer desperately in want, am still seeking a just reward for my labors.

I don't doubt when you say that five dollars is all you can offer. But have you ever thought that there may be other ways of remunerating a writer than by giving cash? Understand, please, that I am not averse to giving things for nothing; I have contributed to many magazines without asking a penny. In Paris my friend Alfred Perlès and I ran a magazine (The Booster, which later became Delta) and it was the contributors who paid to keep the magazine going. The only American writer who could have paid, the only one of us who earned a living from his work, balked at the idea. I was also one of the contributors to a French revue called Volontés, where again it was we, the writers, who supported the magazine. Is there such a magazine in America, I wonder? If there were, if it were a magazine which, like the ones I mentioned, permitted the contributors to express themselves freely, I would be the first to offer my work, the best I could offer. I mention this because it might give you ideas.

When you think of paying an author for his work you ought to think generously. It is the author who makes your magazine. If you cannot pay in cold cash, why don't you write the author and ask what you could do for him? Offer to do something in the nature of a personal sacrifice, I would say. He may need to have some typing done, or some printing; he may need some research work done for him. There are a thousand and one things he may need and appreciate much more than cold cash, especially when it constitutes a sum which, by American standards of living, means absolutely nothing. It costs me, for example, almost five dollars a week for postage. It costs me much more than that for the gift of books and water colors I am obliged to make to enthusiastic admirers who are too poor to buy my work.

On the other hand, when I myself want something of a fellow artist, let us say a painting, for example, I do not write and say: "My dear Varda, or my dear Rattner, I would love to have that painting I saw at such and such a gallery. I have only five dollars to offer at the moment - will you accept it?" No, I write and say: "I am crazy about your painting. I must have it. What do you want for it? What is the top price? I can't pay for it outright, but I can give you so much a month. Would that be acceptable to you? If, while I am paying you off, someone offers you a good sum outright for it, please don't consider me... sell it." [...]

But this, it seems to me, is the way one good artist should treat another. And you who are editors of small magazines are mostly artists yourselves, I take it. You all expect to become

celebrated writers some day; you identify yourselves with the men whose work you admire and hope to publish. Well, carry out the identification to the nth degree, I say. Think how you would feel if, after years of labor and struggle, you are asked to accept a trivial sum. It is far, far better to say: "We have no money at all. We believe in you and in your work... will you help us? We are willing to make any sacrifice in order to make your name known." Most authors would be touched by such an appeal; they would offer their work gladly; they would probably offer to help in other ways. I am thinking naturally of the kind of writers whom you wish to interest in your project. There can be a magnificent collaboration between author and editor, author and publisher. But you, as editor, must first begin by giving, not demanding. Give the shirt off your back, or offer to give it, and then see what sort of response you will get from the author. I have often noticed with beggars that when they ask for something and you offer them twice or ten times as much, they are so overwhelmed that they often refuse to accept anything, or else they offer to become your slave. Writers, in a way are like beggars. They are continually begging to be heard, to be recognized. Really they are simply begging for a chance to give of their great gifts - which is the most heart-rending begging of all and a disgrace to any civilized community in which it happens. Which is to say, almost the entire civilized world.