Europsko autorsko pravo izvan okvira unutarnjeg tržišta - kritička analiza ograničenja i iznimki u svrhu obrazovanja

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DOCTORAL DISSERTATION

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SUMMARY

The doctoral thesis provides for a critical assessment of the European Union legal framework for resolution of the clash between the copyright protection on the one hand and insurance of social dialogue within the educational environment on the other. The term social dialogue is understood as gaining unprotected ideas through experience of creative works. The research is divided in two main parts. The first one relies on the findings of the social sciences in order to ascertain the importance of such social dialogue as a factor incentivising creativity, on the one hand, and, on the other hand as a factor contributing both to personal and social progress, especially within the educational environment. In approaching the notion of the social dialogue, this part of research has heavily relied on the findings present in the mainstream literature of social sciences. These findings are of importance as to provide us with a view of reality of background of social relations regulated to certain extent by copyright law in order to provide us with knowledge for further critical assessment of the European Union legal framework. The second part deals entirely with the analysis of the European Union legal framework and the crux of this part was precisely the methodological placement of the notion of social dialogue (confined to the educational environment) within the EU copyright legal framework. Due to specific development, the EU copyright legal framework is understood as internal market legislation regulating copyright and related rights' legal matters together with the CJEU jurisprudence on the matter. Hence, essentially, two legal intertwining frameworks were analysed. One is provided by the harmonisation legal basis enshrined in Article 114 TFEU while another legal framework is the one provided by Treaty provisions on fundamental freedoms, fundamental freedom of goods and services. Such frameworks were approached chronologically in order to rightfully understand the underlying ideas and principles permeating the internal market regulation. Through such analysis of the positioning of social dialogue as one of the non-economic objectives of the use of creative works, the doctoral thesis provides us with knowledge of secondary importance of such non-economic objectives. Namely, by proclaiming the high level of copyright protection as a principle objective, all the other objectives which might clash with it are from the start given secondary importance. Provisions on any kind of limitations and exceptions are seen as a derogation to the rule which requires their more or less strict interpretation, depending on the economic impact such provisions might have on the rightholders interest for appropriate reward leaving the question open whether the objective itself will be attained or not.

KEYWORDS

Creativity, copyright, European Union, social dialogue, circulation of ideas, knowledge, educational environment, limitations and exceptions, education, internal market, positive integration, negative integration

EXTENDED SUMMARY IN CROATIAN

PRODUŽENI SAŽETAK

Gotovo svaka ljudska aktivnost obuhvaća određeni stupanj kreativnosti. Kirurg, primjerice, prilikom operacije, ili odvjetnik, prilikom davanja pravnog savjeta, donosi neke više ili manje kreativne odluke. Isto tako, učenici i studenti se kroz proces obrazovanja suočavaju sa određenim zadacima koji od njih zahtijevaju rješavanje određenog problema ili traže izražavanje određenog argumentiranog stava ili mišljenja. U svakom slučaju, obrazovni sustav usmjeren je osposobljavanju učenika i studenata na daljnje poduzimanje brojnih takvih aktivnosti kojima ujedno i izražavaju svoju kreativnost. Pri tome obrazovni sustavi i učitelji/nastavnici kao njegovi nositelji se oslanjaju na radove prijašnjih autora. Ti radovi ne moraju biti samo udžbenici već i drugi oblici kreativnih djela iz područja umjetnosti i znanosti. Naime, takva kreativna djela u obrazovnom sustavu primarno ispunjavaju ulogu medija putem kojih se prenose informacije, odnosno poruke koje mogu potaknuti na daljnju raspravu, a i moguću kreativnost. Štoviše, takav prijenos informacija putem kreativnih djela nije nužno vezan isključivo za obrazovni sustav. Međutim, treba napomenuti da neće svaka osoba primiti poruku jednakog sadržaja već će njen sadržaj ovisiti o prethodnom stupnju znanja i zrelosti primatelja informacija. Naime, osoba koja posjeduje viši stupanj znanja neupitno će lakše pristupiti rješavanju određenog problema te na drugačiji način procesuirati dobivenu informaciju od one osobe koja posjeduje niži stupanj. U tom pogledu, često je u literaturi prisutno isticanje tzv. kumulativne kreativnosti koja podrazumijeva da je za daljnje stvaranje kako u umjetnosti tako i u znanosti potrebno dobro poznavanje ranijih djela koja prethode novom stvaranju. Naime, sami autori vrlo često naglašavaju utjecaj i važnost ranijih autora i njihovih djela na njihovu kreativnost, a potvrđeno je i brojnim istraživanjima da znanstvenici i umjetnici stvaraju kreativnija djela ako su ranije izloženi što većem broju ranijih djela. Kreativnost je, naime, rezultat interakcije između misli pojedinaca i sociokulturološkog konteksta samog pojedinca. Stoga kreativnost nije rezultat samo individualnog već i kolektivnog napora sustava u kojem pojedinac živi.

Pored toga, obrazovanje pojedinaca se smatra korisnim ne samo za pojedinca već posredno i za cjelokupno društvo čiji je pojedinac član. Naime, društvene znanosti pokazuju da obrazovanje ispunjava bitne funkcije u životu pojedinca te se ponekad smatra i bitni preduvjetom njegovog

uspješnog života. Kroz obrazovanje, pojedinac stječe znanja i vještine koje mu omogućuju odgovarajuću kvalifikaciju i obavljanje određenih aktivnosti, npr. da bi mogao obavljati određeno zanimanje. Također, stječe znanja koja mu omogućuju participaciju u društvu i koje ga čine pripadnikom određene političke zajednice, ali također i vještine i sposobnosti koje mu omogućuju pronalazak svog individualnog karaktera u okviru cjelokupnog društva.

Da bi se uspješno ispunile takve funkcije obrazovanja neupitno je da će se obrazovni sustavi oslanjati na kreativna djela koja uživaju zaštitu autorskog prava. U tom pogledu dolazi do sukoba dvaju naizgled suprotstavljenih interesa. S jedne strane, autorskopravna zaštita počiva na ideji omogućavanja ekonomskog poticaja autorima kako bi poduzimali kreativne aktivnosti i pritom stvarali kreativna djela. Međutim, s druge pak strane, ta ista autorskopravna zaštita može otežati prijenos informacija i održavanje društvenog dijaloga, koji je jedan od bitnih stavki modernog demokratskog društva. Zadatak je, stoga, svakog društva uspostaviti okvir i mehanizam rješavanja takvog sukoba te je upravo pitanje rješavanja tog sukoba problem kojim se bavi ovaj doktorski rad. Naime, cilj ovog doktorskog rada jest pružiti kritičku analizu pravnog okvira u okviru kojeg se rješava sukob između autorskog prava, s jedne strane, i osiguranja društvenog dijaloga u okviru obrazovanja, s druge strane. Pravni okvir koji je predmet analize jest pravni okvir Europske unije, a termin društveni dijalog podrazumijeva stjecanje nezaštićenih ideja i znanja kroz kreativna djela zaštićena autorskim pravom. Drugim riječima, istraživačko pitanje kojim se bavi ovaj rad jest kako i pod kojim uvjetima Europska unija osigurava društveni dijalog i protok znanja i ideja u obrazovnom sustavu kada regulira autorsko i srodna prava u okviru zajedničkog unutarnjeg tržišta.

Sam rad je podijeljen u dva dijela i pet poglavlja. Naslov prvog dijela jest „Kreativnost, kreativni proces i autorsko pravo“ i obuhvaća dva poglavlja (drugo i treće poglavlje). U drugom poglavlju ovaj rad pristupa pitanju kreativnosti i kreativnog procesa iz perspektive osobe autora/kreatora dok treće poglavlje analizira svrhu kreativnih djela iz perspektive publike, korisnika tih djela. Naime, i jedno i drugo poglavlje analiziraju pitanje društvenog dijaloga između autora i publike putem kreativnih djela. Razlika je, međutim, u tome što drugo poglavlje razmatra pojavu društvenog dijaloga kao bitan preduvjet daljnje kreativnosti dok treće poglavlje razmatra pojavu društvenog dijaloga kao pokretača društvenog razvoja i osobnog razvoja pojedinca, s naglaskom na obrazovni sustav. Ovaj dio doktorskog rada uvelike se oslanja na već postojeća znanja iz drugih društvenih i humanističkih znanosti te služi radi razumijevanja

društvenih odnosa koje u većoj ili manjoj mjeri uređuju norme autorskog prava, a sve u cilju dobivanja kritičke analize pravnog okvira.

Drugi dio ovog rada, kao i pripadajuće četvrto poglavlje, nosi naziv „Autorsko pravo Europske unije“ i središnji je dio u okviru kojeg se razmatra istraživačko pitanje. Naime, cilj ovog rada jest utvrditi da li i na koji način autorsko pravo Europske unije osigurava društveni dijalog (u okviru obrazovnog sustava). Autorsko pravo Europske unije, pri tome, označava pravna pravila unutarnjeg tržišta kojima se uređuje materija autorskog i srodnih prava, uključujući pored zakonodavnih akata i presude Suda Europske unije kao relevantnih pravnih izvora. S obzirom na takav razvoj u okviru uređenja unutarnjeg tržišta, predmet analize su zapravo dva različita pravna okvira. Zakonodavni akti su većinom doneseni na temelju članka 114. Ugovora o funkcioniranju Europske unije te stoga čine jedan pravni okvir. Međutim, prije njihovog donošenja, pitanja autorsko pravne problematike na europskoj razini rješavale su se presudama Suda Europske unije. Naime, autorskopravna ovlaštenja predstavljala su prepreku temeljnim tržišnim slobodama te je Sud Europske unije kroz interpretaciju odredaba ugovora o temeljnim slobodama ujedno i postavljao pravila i temelje autorskog prava Europske unije. Stoga, pravila ugovora o temeljnim tržišnim slobodama (ponajprije sloboda kretanja roba i usluga) predstavljaju drugi pravni okvir u okviru kojeg se razvijalo autorsko pravo Europske unije te koje je stoga također i predmet analize ovog rada. Ova dva pravna okvira ujedno odgovaraju i dvjema metodama integracije tržišta – pozitivnoj i negativnoj integraciji u kojima dominantnu ulogu preuzima zakonodavstvo (u slučaju pozitivne integracije) odnosno Sud Europske unije (u slučaju negativne integracije).

Analiza tih dvaju pravnih okvira usmjerena je na utvrđivanje položaja društvenog dijaloga. Međutim, društveni dijalog nije pravni pojam koji kao takav postoji u zakonodavstvu niti je istim prepoznat kao cilj koji se harmonizacijom nacionalnih zakonodavstava želi postići. Ipak, zakonodavstvo Europske unije kojim se regulira autorskopravna materija, navodi određene neekonomske ciljeve poput „održavanje i razvoj kreativnosti“ te „promocija učenja i diseminacija kulture“. Sadržaj tih ciljeva sadržajno se preklapa s pojmom društvenog dijaloga te je stoga analiza položaja takvih ciljeva u pravnom okviru autorskog prava Europske unije relevantna za utvrđivanje položaja društvenog dijaloga. Stoga je napravljena analiza takvih ciljeva i načina njihova ostvarivanja radi utvrđivanja kako i na koji način Europska unija osigurava društveni dijalog i protok znanja i ideja prilikom regulacije autorskopravnih pitanja u unutarnjem tržištu.

Nakon analize pravnih okvira u kojima se razvilo autorsko pravo Europske unije, peto poglavlje je potom usmjereno na analizu pravnih odredaba kojima se reguliraju ograničenja i iznimke autorskog prava za svrhu obrazovanja. Naime, ovim se odredbama primarno regulira sukob suprotstavljenih interesa stoga je položaj tih normi od presudne važnosti za utvrđivanje važnosti i položaja koje Europska unija pridaje osiguranju društvenog dijaloga u obrazovnom sustavu.

Konačno u posljednjem poglavlju iznose se zaključci iz kojih je razvidno da u oba pravna okvira prednost ima autorskopravna zaštita dok doseg normi koje osiguravaju ispunjavanje drugih ciljeva, pa tako i osiguranje društvenog dijaloga, ovisi o njihovom ekonomskom utjecaju na način da ako je ekonomski utjecaj jači, traži se stroža i uža interpretacija norme. Time se preostalim ciljevima i interesima koji su u većoj ili manjoj mjeri suprotstavljeni autorskopravnoj zaštiti daje podredna uloga te je njihovo ostvarivanje moguće samo ako ne ugrožavaju primarni cilj osiguranja adekvatne nagrade za autore.

KEYWORDS IN CROATIAN

KLJUČNE RIJEČI

Unutarnje tržište, autorsko pravo, društveni dijalog, ograničenja i iznimke, obrazovanje, integracija tržišta, pozitivna integracija, negativna integracija

DECLARATION OF ORIGINALITY

I, Antonija Ivančan, hereby declare that this doctoral dissertation is an original result of my own work and research activities, and that I have used no other sources except for those listed in the dissertation as indicated by referencing.

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Chapter 1 - Introduction

Every day of human life involves some kind of creativity. A surgeon, when performing a surgery, or a lawyer, when giving a legal advice, is required to make some more or less creative decisions in order to perform tasks. Similarly, when children or young adults go to school they are also entrusted with certain tasks. Those tasks may require them to either solve the problem or express themselves in certain way. In any way, to be able to perform such activities and, hence, to express their own creativity, they are slowly trained to do so. Throughout such process of training, they inevitably rely on the works done by previous authors. Those works can be textbooks or some other pieces of art or even science. For example, in literature class, a pupil is asked to read a novel while in art class to observe the painting or the sculpture. Those works for them represent media through which certain information or message has been transferred and can stir further discussion, conversation or even creation. In fact, such training is not reserved solely for the children or young adults, since throughout the whole human's life one always learns and gains new knowledge. More importantly, each message transferred by such media in the form of creative works is primarily coloured by the level of understanding of the recipient of the message. Namely, a person equipped with more knowledge is better suited "to find valuable problems to solve in a way that a more ignorant person typically will not."[1] In that sense, it is worth pointing out that both in science and art, innovation and creation is a cumulative endeavour and "creativity […] frequently requires significant knowledge of that which came before."[2] Namely, cumulative creation has historically been and continues to be the dominant form of creativity in many cultural settings. Authors throughout history marked the importance of previous authors and previous art for their creation and "various research find that artists and scientists generate more creative outputs when exposed to a greater variety of input references."[3] "Creativity does not happen inside people's heads, but in the interaction between a person's thoughts and a sociocultural context. It is a systemic rather than an individual phenomenon."[4] An author when creating a work sends a particular message, and in order to be

[1] Jeanne C Fromer, 'A Psychology of Intellectual Property' (2010) 104 Northwestern University Law Review 1441, 1464.
[2] Ibid 1456; see also R. J. Sternberg & T. I. Lubart, 'Creating creative minds' (1991) 72 Phi Delta Kappan, 608–614.
[3] Gregory N Mandel, 'To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity' (2011) 86 Notre Dame Law Review 1999, 2000.
[4] Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology and Discovery of Invention*, (Harper Collins 1996), 23 as cited in Erlend Lavik and Stef van Gompel, 'On the Prospects of Raising the Originality Requirement

in a better position to send a new message that is original, breakthrough or thought-provoking, prior to creating a work, an author must start the dialogues with other works of previous authors. Hence, prior to becoming a creator, an author is firstly a listener, member of the audience of works of previous artists.

Furthermore, the education has generally been accepted and recognised as both personal and communal interest. Namely, the findings permeating social sciences allow us to start from the presumption that education can play important functions in one's life. According to an education and philosophy scholar, Gert Biesta, those functions are the following – qualification, socialisation and individuation.[5] By the qualification function he understands education as a tool "providing them [children, young people and adults] with the knowledge, skills and understanding and often also with the dispositions and forms of judgement that allow them to 'do something'". [6] What he includes within this function is not merely providing knowledge for "the world of work", but also knowledge needed for citizenship (i.e., political literacy) and for general functioning within the society (i.e., cultural literacy).[7] The second function of socialisation is, further, perceived as the one through which "education inserts individuals into existing ways of doing and being, and through this, [education] plays an important role in the continuation of culture and tradition." Through this function, a person becomes a "member of and part of particular social, cultural and political 'orders'".[8] Finally, the last function of individuation in a way differs from the previous two because it is not about instilling certain values and certain orders, yet it is "about ways of being that hint at independence from such orders; ways of being in which the individual is not simply a 'specimen' of a more encompassing order."[9] Similarly, in one of the most cited judgments regarding matter of education, the US Supreme Court unanimously pronounced that "education is perhaps the most important function of state and local governments. […] It is the very foundation of good citizenship. […] it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his

in Copyright Law: Perspectives from the Humanities' (2012) 60 Journal of the Copyright Society of the USA 387, 396.

[5] Gert Biesta, 'Good Education in an Age of Measurement: On the Need to Reconnect with the Question of Purpose in Education' (2009) 21 Educational Assessment, Evaluation and Accountability (formerly: Journal of Personnel Evaluation in Education) 33, 39.

[6] Ibid 39-41.

[7] Ibid 39–40.

[8] Ibid 39–41.

[9] Ibid 39–41.

environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[10]

In order to perform those highly important functions, the educational system inevitably relies on the works protected by copyright. However, while copyright can be seen as a tool of commercial policy serving as an incentive for creators to pursue the creative activities, at the same time it can disturb the conversation. Namely, absolute protection of authorial interests may result in disturbance of societal discourse, much needed and appreciated within the modern democratic society. In other words, the two socially accepted and valued interests inevitably clash, and it is upon the society to set up a framework for its resolution.

Interestingly though, throughout the history, the idea of property ownership in the expressions and knowledge was philosophically opposed.[11] In the antic Greece, due to the lack of fixation of poems, poets were in continuous performances adding something novel giving the original work a new expression. In medieval times, the scribe culture enshrined in which texts were circling around open to comments by the scribes. The purpose was to cumulatively participate in creating a base of knowledge and "creativity seemed to entail principally a process of slow augmentation of the 'knowledge and wisdom of humanity.'"[12] At those times the wide dissemination of the work was of utmost importance, rather than being exceptionally preoccupied with the control of its further use. As Plant describes "Erasmus went to Basel in 1522, not apparently to expostulate with Frobenius for daring to print his manuscript writings, but to assist the printer in the good work. The wider the circulation, the more universal the recognition the author would receive."[13] However, following the invention of the printing press, the creation has slowly started gaining the presence and importance in the market context which ultimately resulted in the first copyright act, the UK Statute of Anne. Nevertheless, its proclaimed purpose was still "for the encouragement of learning".[14]

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[10] Brown v. Topeka Board of Education, 347 U.S. 483 (U.S. 1954), 493.

[11] Caterina Sganga, 'The Theoretical Framework of Copyright Propertization', *Propertizing European Copyright* (Edward Elgar Publishing 2018) 18 "Normative theories point to the philosophical or economic reasons that compel legal systems to protect authors, set the objectives of copyright, and provide the rationales to guide legislative drafting and orient the application of existing rules, defining the direction and priorities of a given regime".

[12] John Burrow, *Medieval Writers and Their Works: Middle English Literature and its Background, 1100-1500* (Oxford University Press 1982), 34 as cited in Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity, The Third Paradigm* (Edward Elgar Publishing 2018), 48 - 49.

[13] Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 Economica 167,169.

[14] It was proclaimed as such in Preamble see Gillian Davies, *Copyright and The Public Interest* (2nd edn, Sweet & Maxwell 2002), 11.

Today's copyright regulation has mostly removed its proclaimed purpose from the foundational idea of encouragement of learning. In fact, two groups of normative theories for justification of copyright protection which are usually invoked within legal systems remain silent on the matter of ensuring the circulation of knowledge and ideas among society. One of the invoked arguments is the natural law argument (which can be further divided into two different groups – the Lockean labour argument and the Hegelian personality argument) while the other is commonly known as the utilitarian argument.[15] Both are, unfortunately, solely preoccupied with justifying the moral legitimacy and significance of author's interest to control the use of his work. The difference is that the natural law theories base its arguments on the reasons stemming from the author's side such as labour or personality, while the utilitarian theory justifies moral significance of authorial interest as an interest that promotes "general well-being of society."[16] However, all theories are, unfortunately, one dimensional, and incomplete. The labour argument rightfully reflects creative process as a process requiring time and effort on the author's side, while the personality argument rightfully puts the person of the author as a central figure of creative process. However, they both fail to provide limits and offer substantial justifications for proprietary interests of the author. On the other hand, the utilitarian argument, justifies the interest of the author for the reward relying on the presumption that such reward is deemed to incentivise creativity and will ultimately reach the abundance of the creative works which is seen as a higher social goal.[17] The theory alone, however, remains silent on the definition of the higher social goal leaving it up to the policy makers. However, there are two problems facing this argument. One is that it can be problematic if the designation of a higher goal does not truly start from the position of the general well-being of the society and gives priority to the loudest and politically strongest group. Another is that the ultimate correlation between the higher social goal (e.g. maintenance and development of creativity) and the incentive (e.g. appropriate reward) can hardly be put to test.[18] Due to the above stated reasons, none of the theories can provide a solid "stand-alone justification for the copyright and some

[15] Sganga (n 11) 18 "Normative theories point to the philosophical or economic reasons that compel legal systems to protect authors, set the objectives of copyright, and provide the rationales to guide legislative drafting and orient the application of existing rules, defining the direction and priorities of a given regime".

[16] See also Robert M. Hurt and Robert M. Schuchman, 'The Economic Rationale of Copyright' (1966) 56 The American Economic Review 421 who group the justifications "under two headings: (1) those which are based on the rights of the creator of the protected object or on the obligation of society toward him and (2) those which are based on the promotion of the general well-being of society".

[17] Sganga (n 11) 26.

[18] In that respect, the assumption has been questioned already in the literature by asking whether copyright law incentivising creativity is purely a myth which we tacitly decided to accept see e.g. Diane Lennheer Zimmerman, 'Copyrights as Incentives: Did We Just Imagine That?' (2011) 12 Theoretical Inquiries in Law 29.

of its features."[19] This results in legislation systems combining different theories for different legal institutes,[20] some of which could to more or less extent even lack the needed legitimacy. Caterina Sganga, for instance especially highlights the problem of the legitimacy in the systems of "supranational standardisation, where alien concepts and rationales are often imposed over national models without performing a preventive compatibility check."[21]

However, when it comes to ensuring social dialogue through experience of creative works and gaining ideas and knowledge within the educational environment, the traditional copyright legislation is not utterly blind to it. Namely, it recognises the importance of education within instances regulated by the limitations and exceptions to copyright. However, from the very beginning, that creates a division between the author and the user. Such division is alas removed from the reality, as the author throughout the entire creative process constantly switches between the role of the creator and the role of the user. One is constantly learning and experiencing something new, while at the same time creating. One is constantly upgrading his/her creative capital and at every single moment there is a possibility of inspiration turning him/her to creator. One is not simply born an author; one is predominately a user developing his potential that turns him into the author.

The aim of this research and dissertation is to provide a critical assessment of the framework for resolution of clash between the copyright protection on the one hand and insurance of social dialogue within the educational environment on the other. The framework that will be analysed is the one developed on the European Union level and the term social dialogue shall be understood as gaining unprotected ideas through experience of creative works. Hence, the problem that this research addresses is *how and to what extent the European Union safeguards the social dialogue and circulation of knowledge and ideas in the educational environment when regulating the internal market regarding copyright and related rights?*

In that sense the research is divided in two parts and five chapters. Part one bears the name "Creativity, creative process and copyright" and it is comprised of two chapters (Chapter 2 and Chapter 3). The first one revolves around the creativity and creative process from the

[19] Ana Ramalho *The Competence of the European Union in Copyright Lawmaking A Normative Perspective of EU Powers for Copyright Harmonization* (Edward Elgar 2015), 5.
[20] Sganga (n 11) 19.
[21] Sganga (n 11) 17.

perspective of the author as a creator while the second one then deals with the purpose of copyright protected works from the perspective of the audience. In essence they both address the notion of social dialogue between the author and the audience conducted through creative works (copyright protected works) as mediums of information. The difference is that the Chapter 2 considers the notion as one of the essential prerequisites of ensuring creativity of the creator while the Chapter 3 considers the notion beyond the mere incentive of creativity and as one of the factors contributing both to personal and social progress, especially within the educational environment. This part of the research has heavily relied on the findings present in the mainstream literature of social sciences. Namely, these findings are relevant to the extent to give us a view of reality or background of social relations regulated to certain extent by copyright law in order to provide us with knowledge to possibly assess the legitimacy and adequacy of legal norms. The dissertation however will not delve into the question of legitimacy specifically because it would require a scrutiny and analysis of each norm specifically and that is beyond its scope. The purpose of the comprehension of these findings is to point out the possible overlapping and correlation between interests of the society and interests of the author as an individual. Those findings then can provide us with stance for critical assessment of legal system when determining how and to what extent a legal system safeguards the social dialogue and circulation of knowledge and what are the advantages and disadvantages of the choices made when creating a legal framework.

The second part (together with its starting Chapter 4), then, bears the name "EU Copyright Law" and rightfully reveals the focus of this dissertation and that is the legal framework established on the level of the European Union. Namely, the crux of the research is to determine the methodological placement of the notion of social dialogue (confined to the educational environment) within the EU copyright legal framework. However, due to its development the analysis must be partitioned in two parts reflecting the two different constitutional frameworks in which the EU Copyright law has developed. To be precise, the term EU Copyright law shall be understood as internal market legislation regulating copyright and related rights' legal matters together with the CJEU jurisprudence on the matter. Due to such regulation, essentially two legal intertwining frameworks will be analysed. Namely, within the EU legal framework, regulation of copyright and related rights has not been approached on a special legal basis (which is now enshrined in Article 118 of the Treaty on the Functioning of the European Union), yet it has been approached as a legislation regulating the internal market on the general basis of Article 114 TFEU. Hence the legal framework provided by such internal market

harmonisation legal basis provided in Article 114 TFEU is one framework that will be subject to analysis. Another legal framework is the one provided by Treaty provisions on fundamental freedoms, fundamental freedom of goods and services. Namely, prior to enactment of internal market legislation on the specific legal basis enshrined in the Treaties, the copyright legal matters permeated within the internal market law as one of the national obstacles to the fundamental market freedoms (freedom of movement of goods, services, persons and capital). In that sense it follows that copyright legal matters were prior to harmonisation regulated and analysed as national obstacles, which in order to be deemed compatible with the EU internal market law, had to be deemed legitimate and in accordance with the proportionality test.

Hence, due to such specific development of EU legal framework for copyright legal matters, in order to rightfully understand the underlying ideas and principles permeating the internal market regulation, the chronological method has been chosen. Namely, by analysing chronologically the evolution of copyright law, the placement of ensuring social dialogue through access to creative works could be properly evaluated in two different, yet interrelated, legal frameworks. Moreover, the development of those EU legal frameworks relies on two different but equally important actors. One is the legislative bodies enacting pieces of legislation while the other is the Court of Justice of the European Union (hereinafter: the CJEU) providing legally binding interpretations of the EU legal provisions. Throughout the development within those two legal frameworks, those actors have taken turns in which one has the predominant role and the chronological method is more adept to point out the nuances.

Hence, the first part (of the Chapter 4) corresponds to the first phase of EU Copyright law in which the CJEU played a dominant role and put forward the foundational principles such as the principle of specific subject matter, the principle of exhaustion of distribution right and the principle of the dichotomy of existence and exercise of the copyright or related rights. The principles were created within the internal market framework in which copyright or related rights' exclusive right were seen as obstacles to a fundamental market freedom (goods or services). Such obstacles could, however, be found as justifiable derogation if they pursued the legitimate aim and were considered proportionate and it was upon judiciary to make such evaluation. In this phase, on the European Union level it is, thus, primarily the jurisprudence of the CJEU that is a legal source providing information on the EU Copyright law and creating a legal framework. To be put in another words, this framework is primarily result of the negative market integration in which copyright legal matters were given secondary importance. Namely,

the primary aim was to establish the internal market. Copyright legal matters have not been anything but incidental concerns to be resolved in achieving such aim. In that respect, in order to underline and better understand the position of the CJEU and the effects of its purposive/teleological interpretation when building the legal and normative framework for the internal market and consequently for the copyright legal matters, prior to focus on EU copyright law specifically, there is a part on the CJEU as the common market integrationist and policy maker.

The second chronological part (of the Chapter 4) corresponds to the later phases of EU Copyright law in which the positive market integration ensuring harmonisation of different national copyright legal provisions prevailed over pure negative market integration led by the courts. However, the harmonisation has occurred through phases and was focused on specific issues on the market or exclusive rights rather than approaching the copyright and exclusive rights regulation wholistically. In that respect, so far within the European Union, regarding the copyright legal matters, have been enacted thirteen directives and two regulations. They are the following: (i) The Computer Programs Directive[22] (ii) the Rental and Lending Rights Directive (iii) the Satellite and Cable Directive (iv) Term Directive[23] (v) the Database Directive[24] (vi) the InfoSoc Directive[25] (vii) the Resale Right Directive[26] (viii) the Enforcement Directive[27] (ix) the Orphan Works Directive (x) the Collective Rights Management Directive (xi) The Marrakesh Treaty Directive (xii) The Marrakesh Treaty Regulation (xiii) the DSM directive (xiv) the Netcab Directive and (xv) the Cross-border portability Regulation. Almost all of them have been enacted solely on the basis of Article 114 TFEU which provides the general basis for the harmonisation "of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[28] In other words, the focus is again not on the copyright regulation as such and instead

[22] Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122, p42–46.
[23] Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290, p 9–13.
[24] Directive 96/9/EC of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, p102-110.
[25] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p10-19.
[26] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art OJ L 272, p32–36.
[27] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, p16-25.
[28] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 114 (1) "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the

it is on the establishment and the functioning of the internal market in which goods and/or services slightly touch upon the copyright legal matters.

The research of the latter (harmonisation) phase was, hence, approached by identifying six different levels/parts of the internal market as regulated by directives (ensuring harmonisation) and regulations (ensuring unification): (i) the general internal market of copyright or related rights protected work (ii) the internal market for computer programs (iii) the internal market for databases (iv) the internal market for works of graphic and plastic art (v) the internal market for orphan works and (vi) the internal market for the works for the benefit of persons who are blind, visually impaired or otherwise print disabled. Those six levels of internal market represent six differing "internal markets" as legal and political concepts determined by slightly differing legal and policy choices regarding the specific type of work. The general internal market for the copyright or related rights, however, is a foundation for the rest. Hence, the legal and political values present on that market are applicable to the rest, more specialised ones.

Although, as mentioned above, the Article 114 TFEU provides the same legal framework in which copyright legislation were enacted, the method of analysing specific internal markets, as legal and political concepts, for specific type of works (goods) was chosen due to the following reason. Namely, Article 114 TFEU provides for a very wide array of choices for the legislator. In that respect, Article 114 TFEU is often referred to as the functional provision for internal market regulation providing very little normative value and a high level of discretionary choices of the legislator. In that sense, due to the aforementioned numerous legislative acts regulating certain aspects of copyright legal matters, the position of social dialogue, among other notions, can be given different importance and methodological placement within those legislative acts and, hence, different position for different type of works. Hence, the analysis of different levels of internal market involving copyright protected goods and/or services is more suitable to analyse the position and consideration of the social dialogue (in the educational environment) within the EU Copyright law.

Moreover, the notion of social dialogue as described above, is not a legal notion emanating from the legal texts of the EU copyright legislation. Namely, as already explained above it is a

ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

notion defined as gaining unprotected ideas through experience of creative works and it has not been recognised specifically as such as one of the objectives the harmonisation legislation aims to achieve. However, there have been other non-economic objectives recognised by the legislature such as maintenance and development of creativity or promotion of learning and dissemination of culture. Although there is no clear definition, those objectives overlap with the notion of social dialogue. Thus, the methodological position given to such objectives within the internal market legal frameworks is important for further analysis of the position of social dialogue. Especially in juxtaposition with economic objectives which are concerned more with the control of the use of the creative work such as ensuring appropriate reward. Namely, the latter objectives inherently by closing access to works, contravene the possibility of ensuring social dialogue. Hence, the position of such objectives and the choice of tools that are used for its achievement provide us with a significant overview of the normative and value framework relevant for further assessment of EU's goal to ensure social dialogue and circulation of ideas and knowledge.

After establishing such levels of internal market, research was, thus, focused on placement of such non-economic and economic objectives within. The research material involved all of the legislation acts relevant for specific internal market (the aforementioned acts) and all of the judgments of the CJEU involving interpretation of legal provisions contained in such acts. For the purpose of better understanding the position and the intention of the legislator, explanatory memoranda were also taken into account. The acts were analysed in two-fold way. Firstly by classifying the objectives as economic and non-economic. Namely, economic were considered objectives that have economic efficiency as their primary concern. Economic efficiency is considered as notion in which production of goods and services maximises the total surplus of benefits over costs. Non-economic objectives, on the other hand, do not pursue the economic efficiency as their main concern regardless of whether they produce certain economic effect. Secondly, the position of such objectives and the tools aimed for their achievement was analysed and critically evaluated in order to see their correlation.

Finally, when analysing the CJEU jurisprudence, analysis was conducted in a way to see what are the objectives mostly used when offering interpretation of the provisions and to determine the factual situations in which the CJEU referred to certain objectives. Having conducted all that the research, the results showed the prevailing dominance of the economic objectives over the non-economic both in the legislature and the CJEU jurisprudence, sometimes even in situations where non-economic concern could have rightfully been given the priority. With that

notion in mind the research proceeded to the analysis of the position of social dialogue within the educational environment.

Namely, Chapter 5 revolves around the analysis of the limitations and exceptions to the copyright and related rights protection for the education purposes. Namely, those are primarily instances where in the educational environment the copyright protection confronts certain limitations. In that sense, the choice of which legal norms will be subjected to the analysis were based on their wording. Namely, the relevant words for the determination of relevant provisions to be analysed were words such as “teaching”, “research”, “study” or “education”. The analysis is again conducted through the prism of the internal markets as legal and political concepts. However, this time only three internal markets were identified, since the rest do not ensure any kind of limitation and/or exception for the purpose of education. Hence only three internal markets provide an area in which educational environment is specifically recognised. The following internal markets were, thus, analysed: (i) general internal market for copyright or related rights protected works, (ii) internal market for computer programs, and (iii) internal market for databases.

Finally, the research ends with the concluding chapter in which all the findings were elaborated.

PART I – CREATIVITY, CREATIVE PROCESS AND COPYRIGHT

Chapter 2 – Creativity, the Author and Copyright Law

One can define copyright law as a system of legal rules which regulate "the ownership and exercise of rights in creative works."[29] In other words, it is a law regulating creation, or at least an aspect of it. However, creation was present prior to copyright law, and it would probably be present even if there was no copyright law. So why do we have it? What interests does it serve? What good does it bring? This chapter will, thus, be dealing with the analysis of the emergence of copyright law protection, its justifications, and its repercussions on public interest and domain. However, before analysing the law, this chapter will briefly tackle the process of creation itself, mainly questions on what stimulates creativity, what are the basic contours of creative process and who has historically been considered as an author. Namely, by delving into questions regarding creativity, the creative process and the notion of an author as a starting figure of the creative process and a bearer of creativity, this chapter aims to illustrate the complexity and diversity of the creative process, as well as to enlighten the position of the author, who is both individual and unique, yet inevitably influenced by its predecessors and socio-cultural context in which he creates. It is my view that it is of utmost importance to consider findings of social and humanistic sciences in this respect. Especially since copyright law has traditionally relied to certain extent on the premise that copyright law can serve as a tool to incentivise creativity.[30] Moreover, although legal regulation does not necessarily require a copyright holder to be the person who created the work, the process of creation inevitably starts with a human being, an author.[31] Findings from the area of psychology or anthropology, for instance, could, hence, prove to be of significant value in enlightening the nuances surrounding the creative process and creativity and there should be no reason for legal scholarship to disregard them. In that respect I must point out, that although still very few, there have already been advocates of such approach and Mandel rightfully points out that "psychological and economic analysis of intellectual property law are not contradictory endeavours, but should complement each other to develop as deep and nuanced an

[29] Jane C. Ginsburg, Overview of Copyright Law, Oxford Handbook of Intellectual Property Law, Rochelle Dreyfuss & Justine Pila, Eds., Oxford University Press, 2018; Columbia Public Law Research Paper No. 14-518 (2016). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1990

[30] More thorough discussion later in the Chapter in part 1.3.

[31] For example, it is sometimes assumed that copyright on works created within the scope of employment agreement lies with the employer rather than the employee; In this respect the evolution of Artifical Intelligence could pose even further questions.

understanding as possible of how to optimally promote progress."[32] He further identifies that "psychological research on creativity provides insight into at least three cognitive domains pertinent to the task of intellectual property law: motivation, collaboration, and convergent versus divergent thought processes."[33] Furthermore, by approaching the author as a human being, present in a certain socio-cultural setting, this chapter aims to underscore the importance of the environment and its influence upon the author. Namely, the question of what stimulates creativity and incentivises creation and eventually social progress could not be thoroughly approached and considered without taking it into account. Similarly, any discussion on the justifications of copyright protection disregarding those findings, would thus be incomplete.

Having established findings permeating human and social sciences, this chapter further aims to approach the notion of the author from a legal point of view. Its function is mainly to enlighten the differences between the approaches towards the notion of the author, as well as to demonstrate the broadness and diversity of matter regulated by copyright law. Consequently, it aims to open a discussion on the repercussions of such broad and over encompassing protection. In that respect, it specifically aims to raise concern about the appropriate balance that needs to be ensured by copyright law.

1.1. Creativity – the creative process and the author

1.1.1. Factors stimulating creativity and the purpose of creation

There is no doubt that creation was present well before the existence of copyright law protection. A 40,000-year-old figurine *Venus of Hohle Fels*[34] and 35,000-year-old cave paintings discovered in French village of Vallon-Pont-d' Arc,[35] together with numerous other drawings, poems, plays, books and music, show us that art and creation are an integral part of humanity.[36] In that regard, some art historians emphasize the fact that very first examples of art

[32] Mandel (n 3) 2002. See also Fromer (n 1) 1459 " By examining creativity, the activity that copyright and patent law each seek to stimulate, instead of examining the economic impact of these laws, we can begin to understand better how to structure these laws to induce valuable creativity".
[33] Mandel (n 3) 2000.
[34] Nicholas J Conard, 'A Female Figurine from the Basal Aurignacian of Hole Fels Cave in Southwestern Germany' (2009) 459 Nature 248.
[35] Jean Clottes, *Chauvet Cave: The Art of Earliest Times* (U Utah Press 2003).
[36] See e.g. "Art is thus prefigured in the very processes of living. A bird builds its nest and a beaver its dam when internal organic pressures cooperate with external materials so that the former are fulfilled and the latter are transformed in a satisfying culmination. We may hesitate to apply the word "art," since we doubt the presence of

were made under circumstances where people were struggling with survival in the Glacial Age.[37] Thus, they point out that such creation lacked any kind of functional role and "if non-functional creativity occurred under those circumstances, it is obvious to argue that the human impulse to create is relentless."[38] There are, nevertheless, ongoing discussions on what was/is a purpose or motive underlying creation and there seems to be no straightforward answer. Even when analysing those early forms of art, some commentators connect the cave paintings with their spiritual function, in a sense that they form a part of a ritual or a ceremony.[39] On the other hand, others suggest that such paintings had very educational and communicative role and that "education and transmission of knowledge may have been a pivotal factor in the emergence of creativity."[40] The question on purpose of creation will, hence, remain open, and possibly, it is best answered by the words of cultural anthropologist Claude Lévi Strauss: "Art has had a great number of different functions throughout its history, making its purpose difficult to abstract or quantify to any single concept. This does not imply that the purpose of art is "vague" but that it has had many unique, different reasons for being created."[41]

1.1.1.1. Intrinsic and Extrinsic Motivation

Claude Lévi Strauss further differentiated between non-motivated and motivated functions (purposes) of art. He considered non-motivated purposes those that are inherent to human nature and instinct and independent of external factors, and motivated purposes those that are the result of author's conscious action and choice, e.g., to comment on society, to raise a political issue, to create commercial propaganda, for purpose of psychological healing, etc.[42] To give an example of author's stance towards creation, Albert Einstein, a world famous physicist and, less known, very good amateur pianist and violinist, considered creation as the expression of

directive intent. But all deliberation, all conscious intent, grows out of things once performed organically through the interplay of natural energies." John Dewey, *Art as Experience* (Penguin Group 2005) 52.

[37] James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 Law & Contemp Probs 33, 45–46.

[38] Frosio (n 12) 16.

[39] Henri Breuil, *Four Hundred Centuries of Cave Art* (Hacker Art Books 1979) 23, see also Mario Ruspoli, *The Cave of Lascaux:the Final Photographs* (H N Abrams 1987); Jean Clottes and David Lewis-Williams, *The Shamans of Prehistory: Trance and Magic in the Painted Caves* (Abrams 1999).

[40] Frosio (n 12) 19; see also Gregory Curtis, *The Cave Painters: Probing the Mysteries of the World's First Artists* (Knopf 2006).

[41] 'Reading: Purpose of Art' <https://courses.lumenlearning.com/masteryart1/chapter/oer-1-2/> accessed 13 November 2021; see also Giovanni Schiuma, *The Value of Arts for Business* (Cambridge University Press 2011) 37; Claude Levi-Strauss, *A Savage Mind* (Weidenfeld and Nicolson 1962).

[42] Schiuma, (n 41) 37–38.

the mysterious as it (mysterious) "is the source of true art and science".[43] This chapter will not go further into analysing the purposes of art and creation as they are beyond its scope.[44] The point I'm merely trying to make here is that the process of creation is very subjective and individual. An author is driven by numerous different factors and albeit economical ones can contribute, they might be less common and significant than others. As Arnold Plant rightly recognised "there is […] an important group of authors who desire simply free publication; they may welcome, but they certainly do not live in expectation of, direct monetary reward".[45] Considerable amount of creative works which today are recognised as essential and fundamental pieces of human culture date from the period where economic incentive played secondary, if any role.[46] Even in the contemporary world, it is my experience that scientists and academics do not write articles, musicians do not make music and authors do not write novels primarily for the economic and financial gain.[47] Interestingly though, research on motivation to create has come up with conclusion that external rewards could shift motivation from internal to external,[48] however, another research showed that externally motivated works are generally seen as less creative.[49] This poses an interesting philosophical question whether externally motivated works hide and, possibly, stifle authentic creativity. Similarly, Plant also noted that "more authors write books because copyright exists, and a greater variety of books is published; but there are fewer copies of the books which people want to read."[50] Today, with the rise of digital technology, one might argue that society has been flooded with vast and ever-increasing number of works and it is becoming harder to find a work one deems valuable. But then again, what is valuable?[51] Nevertheless, Mandel, relying on the works of Teresa Amabile, identified

[43] 'Reading: Purpose of Art' <https://courses.lumenlearning.com/masteryart1/chapter/oer-1-2/> accessed 13 November 2021.
[44] For the psychological aspect of creativity see Michael Hanchett Hanson, *Worldmaking: Psychology and the Ideology of Creativity* (1st edn, Palgrave Macmillan 2015); Michael Hanchett Hanson, 'Author, Self, Monster: Using Foucault to Examine Functions of Creativity.' (2012) 33 Journal of Theoretical and Philosophical Psychology 18.
[45] Plant (n 13) 59.
[46] Frosio (n 12) 22, "For the large majority of human cultural history, economic incentive occupied a secondary role in motivating authors to create... Nonetheless, under a regime of limited economic incentive for creation and confined commodification of information, humanity produced the greatest portion of its culture and knowledge. To mention some, the Bible, the Qur'an, the Indian Mahabharata and Ramayana, the Greek Iliad and Odyssey, the Roman Aeneid...all came to life well before strong economic rights were attached to creativity.".
[47] See for similar view Hurt and Schuman (n 16) 425–426.
[48] Beth A Hennessey, 'Is the Social Psychology of Creativity Really Social?: Moving Beyond a Focus on the Individual', *Group Creativity* in Paul B. Paulus, and Bernard A. Nijstad (eds), *Group Creativity: Innovation through Collaboration* (Oxford University Press 2003).
[49] Teresa M Amabile and others, *Creativity in Context Update to The Social Psychology of Creativity* (1st edn, Routledge 1996).
[50] Plant (n 13) 62.
[51] See e.g. Lavik and van Gompel (n 4) for the discussion "whether current originality threshold actually endangers the flourishing of art".

"one significant example for intellectual property law [and that is] that a reward for a creative or novel accomplishment can increase intrinsic motivation and creativity." However, "mere expected rewards […] are extrinsic motivators and have a detrimental effect on creativity. […] The award must be perceived as being not for an output product per se, but only for a particularly creative result."[52]

1.1.1.2. Conclusory remarks

I will not go into this discussion any further because to determine correlation of any kind, in-depth research must be done, which is way beyond the scope of this thesis and will remain within the area of psychology. The role of this brief discussion on stimulation of creativity was, thus, merely to enlighten the flexibility and individuality of the matter. Namely, having in mind that reasons for creation and its stimulus are open ended, allows us one important conclusion. Having established that the question of "What stimulates creativity" cannot be answered with an appropriate degree of certainty, allows us to disregard any theories and arguments suggesting otherwise. For instance, the statement "*Profit incentivises authors to create*" can thus be properly evaluated. What I mean by that is that such statement would inevitably lose its logical strength and would in the end shift to the following statement: "*Profit may incentivise authors to create"*. That way, one does not disregard the potency of profit to have an impact on creativity, yet rightfully evaluates such potency. Profit can incentivise, but it does not necessarily do so in every case of creativity and to the same extent. Thus, legal frameworks relying on any kind of similar statements, are starting from a logically invalid position by unjustifiably giving too much importance and value to one singular and inherently arbitrary factor (among numerous).

1.1.2. The creative process

As it was discussed above, the human impulse to create is potentially relentless and very hard to be specified, since it is ultimately very individual and dependent upon numerous factors. One could, thus, assume that the creative process itself would also be of the same characteristics. He/she would not be wrong. However, in my research I have found that certain contours of the creative process could be discerned. Those contours include the following: firstly, the result of

[52] Amabile (n 49) 117.; Mandel (n 3) 2011.

the creative process is not known in advance; secondly, creative process requires time; thirdly, creative process entails interaction between the author and the environment, and such interaction is under considerable influence of author's prior experience and finally, the creative process entails making choices. In defining these contours, I have predominately relied on the findings of Professor John Dewey, one of the leading psychologists and philosophers of education and epistemology of 20th century who primarily approached the notion of art and creation as experience giving significant amount of importance to person's subconscious mind. In that regard, I would just like to point out that the contours I have identified are nevertheless interrelated and at times overlapping. They should be, hence, understood, merely as guidance to further enlighten the complexity of the process of creativity and preferably clarify the factors influencing author's creativity and creative choices he makes within the creative process.

1.1.2.1. The element of "unknown"

The first contour I would like to start the discussion with is that similarly as it is hard to ascertain creativity stimulus, it is perhaps even harder to ascertain what the result of such creativity will be. Namely, it is generally accepted among creators that "creativity is characterized pervasively by a *not knowing* in advance that encompasses both inspiration and production."[53] The process itself is often described as a process of creative play in which there is no attachment to the specific goal.[54] It starts with the excitement about subject matter[55] and further develops "until the artist is satisfied in perception with what he is doing."[56] Thus, the process of creating a work can involve numerous shaping and reshaping until "its result is experienced as good – and that experience comes not by mere intellectual and outside judgment but in direct perception."[57] The creation, thus, cannot be considered merely as an act, rather as a process. In other words, the expression of the author is not something immediately following the impulse or inspiration to create. "It is the carrying forward to completion of an inspiration[58] by means of the objective

[53] Julie Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 U.C. Davis L. Rev 1151, 1178.
[54] Dewey (n 36) 458.
[55] "Speaking of the production of poetry, Samuel Alexander remarked that "the artist's work proceeds not from a finished imaginative experience to which the work of art corresponds, but from passionate excitement about the subject matter. . .. The poet's poem is wrung from him by the subject which excites him." John Dewey, *Art as Experience* (Penguin Group 2005) .113.
[56] Dewey (n 36) 90.
[57] Ibid.
[58] "Keats speaks poetically of the way in which artistic expression is reached when he tells of the "innumerable compositions and decompositions which take place between the intellect and its thousand materials before it arrives at that trembling, delicate and snail-horn perception of beauty." Dewey (n 36) 132-133.

material of perception and imagery.[59] John Dewey, in that regard, observed how Matisse had described his painting process in which this notion becomes clearly visible:

"*If, on a clean canvas, I put at intervals patches of blue, green and red, with every touch that I put on, each of those previously laid on loses in importance. Say I have to paint an interior; I see before me a wardrobe. It gives me a vivid sensation of red; I put on the canvas the particular red that satisfies me. A relation is now established between this red and the paleness of the canvas. When I put on besides a green, and also a yellow to represent the floor, between this green and the yellow and the color of the canvas there will be still further relations. But these different tones diminish one another. It is necessary that the different tones I use be balanced in such a way that they do not destroy one another. To secure that, I have to put my ideas in order; the relationships between tones must be instituted in such a way that they are built up instead of being knocked down. A new combination of colors will succeed to the first one and will give the wholeness of my conception."* [60]

1.1.2.2. Time

Secondly, since it is a process of creative play, it requires time. "The act of expression that constitutes a work of art is a construction in time, not an instantaneous emission." Dewey further elaborated that this statement does not only entail time creator spent on the actual production of the work yet "it means that the expression of the self in and through a medium, constituting the work of art, is itself a prolonged interaction of something issuing from the self with objective conditions, a process in which both of them acquire a form and order they did not at first possess."[61] Such comprehension of creativity as an ongoing process lasting possibly an entire lifetime of an author already suggests the importance of the dialogue author has with the environment which leads us to the very next, possibly the most important, contour.

1.1.2.3. The author as a central figure of creative process

1.1.2.3.1. The influence of previous experience

[59] Dewey (n 36) 151.
[60] Excerpt from Henri Matisse *Notes d' un Paintre* published in 1908 as cited in Dewey (n 36) 151.
[61] Dewey (n 36) 114–115.

Creative process entails interaction with the environment and such interaction is under significant influence of author's prior experience.[62] Namely, Dewey observes that "when excitement about subject matter goes deep, it stirs up a store of attitudes and meanings derived from prior experience. As they are aroused into activity, they become conscious thoughts and emotions, emotionalized images."[63] He then further goes to underscore the part person's subconscious mind has in the creative process. "Elements that issue from prior experience are stirred into action in fresh desires, impulsions and images […and they…] do not seem to come from the self, because they issue from a self not consciously known. Hence, by a just myth, the inspiration is attributed to god, or to the muse." [64] This notion of divine inspiration that Dewey attached to the subconscious mind of an author is, to my judgment, of utmost importance as the idea of such divine presence has long been present throughout the human history of authorship. More importantly, as it will be further discussed in the part on the evolution of literary authorship, it has in fact been slowly abandoned in the times when printing press became a matter of market and idea of copyright law protection started emerging.

"*The painter did not approach the scene with an empty mind, but with a background of experiences long ago funded into capacities and likes, or with a commotion due to more recent experiences. He comes with a mind waiting, patient, willing to be impressed and yet not without bias and tendency in vision. Hence lines and color crystallize in this harmony rather than in that. This especial mode of harmonization is not the exclusive result of the lines and colors. It is a function of what is in the actual scene in its interaction with what the beholder brings with him. Some subtle affinity with the current of his own experience as a live creature causes lines and colors to arrange themselves in one pattern and rhythm rather than in another. The passionateness that marks observation goes with the development of the new form—it is the distinctly esthetic emotion that has been spoken of.*"[65]

1.1.2.3.2. The sociocultural influence and the cumulative character of creativity

[62] "What is expressed will be neither the past events that have exercised their shaping influence nor yet the literal existing occasion. It will be, in the degree of its spontaneity, an intimate union of the features of present existence with the values that past experience have incorporated in personality. Immediacy and individuality, the traits that mark concrete existence, come from the present occasion; meaning, substance, content, from what is embedded in the self from the past." Dewey (n 36) 133.
[63] Dewey (n 36) 114–115.
[64] Dewey (n 36) 116.
[65] Dewey (n 36) 151.

This notion of environmental influence is significant as it seems to emphasise the role of a human being as a member of social and cultural community. "Each of us assimilates into himself something of the values and meanings contained in past experiences…Some things sink deep, others stay on the surface and are easily displaced"[66], but they nevertheless influence not only one's perception of the surrounding environment, but also the decisions on conducting certain choices and actions. This leads us to an interesting discussion on one's "wit and will". Namely, according to Dewey: *"subconscious maturation precedes creative production in every line of human endeavor. The direct effort of "wit and will" of itself never gave birth to anything that is not mechanical. At different times we brood over different things; we entertain purposes that, as far as consciousness is concerned, are independent, being each appropriate to its own occasion; we perform different acts, each with its own particular result. Yet as they all proceed from one living creature they are somehow bound together below the level of intention. They work together, and finally something is born almost in spite of conscious personality, and certainly not because of its deliberate will. When patience has done its perfect work, the man is taken possession of by the appropriate muse and speaks and sings as some god dictates*."[67]

This line of thinking may prove useful as to contrast it to Hegel's argument which is often invoked when discussing justifications of the copyright protection. Namely, as it will be further discussed, Hegel attached to the notion of will utmost importance when it comes to person's expression. Namely, according to Hegel, one's work is necessary an emanation of his/her personality and personality is nothing but the actualisation of the will. While one can accept that expression does reflect one's personality, it is my view, that one should not disregard findings regarding the subconscious mind and its influence on one's will and personality. In fact, the importance of subconscious in our everyday lives is currently universally accepted in the area of psychology and there is no reason to unjustifiably satisfy ourselves with the possibly outdated philosophical findings of 18th and 19th century.

"*Mind is more than consciousness, because it is the abiding even though changing background of which consciousness is the foreground. Mind changes slowly through the joint tuition of interest and circumstance. Consciousness is always in rapid change, for it marks the place*

[66] Dewey (n 36) 124.
[67] Dewey (n 36) 136.

where the formed disposition and the immediate situation touch and interact. It is the continuous readjustment of self and the world in experience."[68]

Furthermore, relying on the "power" of the subconscious mind, Dewey highlighted the author's dependence on the stream of culture arguing that "*there has been no great literary artist who did not feed upon the works of the masters of drama, poetry, and eloquent prose. In this dependence upon tradition there is nothing peculiar to art. The scientific inquirer, the philosopher, the technologist, also derive their substance from the stream of culture. This dependence is an essential factor in original vision and creative expression.* However, he clearly distinguished dependence on the culture from imitation or copying: *"The trouble with the academic imitator is not that he depends upon traditions, but that the latter have not entered into his mind; into the structure of his own ways of seeing and making. They remain upon the surface as tricks of technique or as extraneous suggestions and conventions as to the proper thing to do."*[69]

He further argues that the "the substance of works of art dealing with the same 'subject' is infinitely varied" due to the differences in cultures, values and personality. For instance, we can all agree that there are infinite number of poems, novels, songs dealing with the subject of 'love', yet each song is nevertheless separate, individual and unique. According to Dewey such "changes in art products are not arbitrary; they do not proceed […] from the unregulated wish of undisciplined men to produce something new and startling. They are inevitable as the common things of the world are experienced in different cultures and different personalities."[70]

In that respect, it must be noted though that such importance of culture in one's expression and hence, creation is not an isolated notion, in fact it has acquired numerous contemporary advocates, one of them being Mihaly Csikszentmihalyi who concluded that "creativity […] could not be understood unless one took into account the impact a person had in his or her community of peers; its causes could not be understood without taking into account the traditions from which the novelty came, and the contribution society made to the individual's ideas."[71]

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[68] Dewey (n 36) 476.
[69] Dewey (n 36) 475.
[70] Dewey (n 36) 188.
[71] Mihaly Csikszentmihalyi, *The Systems Model of Creativity: The Collected Works of Mihaly Csikszentmihalyi* (Springer Dordrecht 2014) xxi.

Finally, Dewey asserts that the subconscious is present not only to the artists, but also to "*persons who are conventionally set off from artists, 'thinkers', scientists[…]They, too, press forward toward some end dimly and imprecisely prefigured, groping their way as they are lured on by the identity of an aura in which their observations and reflections swim. Only the psychology that has separated things which in reality belong together holds that scientists and philosophers think while poets and painters follow their feelings. In both, and to the same extent in the degree in which they are of comparable rank, there is emotionalized thinking, and there are feelings whose substance consists of appreciated meanings or ideas*." [72] To my judgment, this notion is important because it allows us also to perceive science as inherently an area of cumulative creativity. Namely, and not much different from the artistic endeavours, it is usually invoked that all the greatest scientific breakthroughs came out of nothing, or as a mistake in the creative play in which scientists experiment. That leads us to the very last contour of the creative process and that is that creativity inevitably requires making choices[73] and "the directive source of selection is interest; an unconscious but organic bias toward certain aspects and values of the complex and variegated universe in which we live." [74]

1.1.2.4. Conclusory remarks

The discussion on contours of the creative process itself provided us with some valuable understandings that should be born in mind when analysing the legal system regulating it. As shown above, creation should be regarded as a process of continuous interaction between the author and the environment. To my judgment, it would then follow that to have a fruitful interaction, one should be exposed to as many different sources of culture. Namely, in that way a person gains diverse experience that would eventually be internalised in one's subconscious. Such notion has in fact been supported by various research in psychology finding "that artists and scientists generate more creative outputs when exposed to a greater variety of input references."[75] In the words of copyright law, I would argue then that the author should first be analysed as a member of public, or as a user of previous works of art and science, as they are

[72] Dewey (n 36) 127–128.
[73] „Moreover, a respected line of philosophical thought suggests that choosing which scientific theories and approaches to follow is in good measure a subjective enterprise." Fromer (n1) 1454–1455. See also e.g. Thomas S Kuhn, 'Objectivity, Value Judgment, and Theory Choice', *The Essential Tension: Selected Studies in Scientific Tradition and Change* (University of Chicago Press 1977).
[74] Dewey (n 36) 163.
[75] Mandel (n 3) 2000.

significant part of human culture.[76] Namely, prior to creation of the work, one must inevitably start the dialogues through experience of the previous works and such vast collection of experiences has then the potential of stirring an impulse to further create. It is thus arguable, that one of the incentivising factors of creativity, is in fact enabling access to as many works to as many human beings. In other words, copyright law, if its aim is to ensure a greater production of creative works, should start accepting the importance of 'having access' rather than 'controlling access' which in the digital era is slowly becoming quite problematic.

Having the observation of access in mind, this discussion will now continue with the historical analysis of literary authorship in which one important notion emerged and that is that throughout the large part of the cultural history the idea of expressions and knowledge being regarded as ownable commodity was philosophically opposed.[77] Throughout my research I found that to be the case for several reasons. Firstly, due to the differences between available technologies, the scope of transmission and distribution of creative works varied through times. As a result, the scope of economic exploitation equally correlated as the wider the audience is, the higher the possibility of exploitation of the work. Secondly, the position of the author seemed to be affected by socio-economic changes. The social recognition once given to the authors became an insufficient reward. Social status seemed to be more associated with wealth and money. In that regard different conceptions of the author and its rights in relation to his/her work emerged. Finally, the approach taken towards the creative process has also been slightly changing and dependent on the circumstances of the time. Although to my judgment such changes were more theoretical than substantial, it is safe to say that external/divine influences have been replaced by more internal notions and greater importance has been given to creator's own 'genius'.

1.1.3. The literary author – a historical overview

[76] Cohen (n 53) 1179.
[77] Frosio (n 12) 109 "…in ancient Greece, and most premodern civilizations, knowledge and information seem not to have been regarded as an ownable commodity", see also Christopher May and Susan Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers, 2006) 46; Carla Hesse, 'The rise of Intellectual Property, 700 BC - AD 2000: An Idea in the Balance' (2002) 1312 Daedalus 26.

1.1.3.1. The ancient author - Greece

Although copyright, in a sense of property right in one's creation, was far from being imagined in the ancient cultures of Rome and Greece, it was still important for individuals to be recognised as authors, as the ones who have created the work. In ancient Greece, authors, especially poets, were held as "sources of wisdom and authority" and were often quoted as such.[78] A comment by Aristotle "that some people would not take an argument seriously unless a poet was cited as a 'witness'"[79] shows us how important and considerable that influence was. In other words, it shows us how substantial their social recognition was. To be recognised as an author seemed to be one of the highest social achievements one can attain.[80] To that end, competitiveness between the authors seemed to play a part, as polemics with and corrections of earlier authors were very common at the time.[81] The significance given to the authors was equally transferred to their works. "Authors were typically seen as responsible for everything in their work and Greeks did not hesitate to praise or blame poets for sentiments expressed in the speeches of characters."[82] The idea of connection of the author to the work is also visible in the fact that interpretation was always about the intention of the author and although through circulation of the work, some alterations could be made, „the integrity [of the work] was supposed to be maintained in copying."[83]

However, it still seems unknown how did authors attain such high status of being a part of the cultural identity. Namely, another important notion that must be considered when analysing the position of an author is the manner in which author's works were transmitted to the audience. In early Greece, even though a circulation of texts was present, the predominant way of reaching

[78] Ruth Scodel, 'Authorship in Archaic and Classical Greece' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 46–47 „Throughout the history of Greek literature, Greeks were relentless quoters and anthologizers, almost always citing the author as the source of wisdom".
[79] Scodel (n 78) 47.
[80] Scodel (n 78) 49 "[…] famous authors themselves became significant features of Greek cultural identity. By the late fourth century, there were statues of the three canonical fifth-century tragedians in the theater at Athens. From the third century, scholars associated with the Library in Alexandria edited and commented on earlier literature, but also established a canon of nine lyric poets and of ten Attic orators. Epigrammatists composed poems about poets, both contemporaries and earlier. Tourists visited the cave where Euripides was believed to have worked. In the Hellenistic and imperial periods, familiarity with Homer becomes a significant marker of Greek identity, and Alexandria and Smyrna had temples, Homereia, with statues of the poet".
[81] Scodel (n 78) 48 "By the late fifth century, finding and solving "problems" in Homer was a small industry. Zoilus of Amphipolis was nicknamed the "scourge of Homer" for his attacks on the poet, but criticism could only confirm Homer's canonical status. An epigram attributed to the fourth-century tragic poet Astydamas complained that he could compete directly against the canonical tragedians of the previous century, unfairly regarded as unquestionably superior (though Astydamas thereby became proverbial for conceit)".
[82] Scodel (n 78) 47.
[83] Scodel (n 78) 47.

their way to the audience was through performance. Initial performance was usually given by the author himself, but to be further circulated, it had to be "re-performed outside the poet's control."[84] The complexity of authorship in ancient Greece precisely stems from such "tradition of composition-in-performance."[85] "Performers practice and rehearse, but the exact form of a song is not determined until the moment it is performed."[86] Namely, as the work usually lacked fixation and it reached its audience through performance, performers would inevitably add something new. In the end the work was, thus, a product of many individuals and any form of individual authorship logically seemed inconceivable.[87] The example of Homer is usually mentioned in the literature in that regard. Nevertheless, it seems that poets, despite having very little control over their poems, wanted their poems to reach a wide audience, since this would lead them to fame and recognition and, in the end, attract sponsors.[88] The same could be applied to books, even though their circulation was scarce then. Thus, the authors seemed to be unbothered with the fact whether someone can repeat their work. On the contrary, wider transmission of their work was in fact their goal.[89] Comparing this to the contemporary circumstances, it almost inevitably stirs the similarities with the today's, usually local, independent music scene where the musicians gladly share their music online for free (or for very little remuneration) for their music to reach a wider audience and, possibly, a record deal.

Finally, when it comes to the position of authors and approaches towards the creative process, the ancient Greeks' culture close relation to the world of the divine must be taken into account. Greek authors have usually mystified the creative process invoking "divinities who supervise their performance, the Muses."[90] A poem was not considered a pure human creation, it was more of a transmission of words of gods. [91] For example, Plato was one of proponents of such idea of divine creation with his theory of forms or ideas. The theory essentially says that every

[84] Scodel (n 78) 50.
[85] Scodel (n 78) 50.
[86] Scodel (n 78) 51.
[87] Scodel (n 78) 51 "Performers practice and rehearse, but the exact form of a song is not determined until the moment it is performed. In such traditions (the most thoroughly studied is the South Slavic), mediocre performers will repeat songs almost as they first learned them, but the accomplished will adjust them to the audience, and the strongest tradition-bearers will modify what they have inherited. The repertory is at once conservative and constantly developing. Within such traditions, the individual author barely exists.".
[88] Poets, although could not make explicit claim of authorship to unfixed works, usually put their name in the poems, the examples being Hipponax, Sappho etc., see Scodel (n 78) 56.
[89] Scodel (n 78) 53.
[90] Scodel (n 78) 51.
[91] Hesse (n 77) 26.

idea comes from the immaterial world of Ideas (Forms) through a person's (author's) soul.[92] In fact, philosophers, including Plato and Aristotle, never seemed to sign their works.[93]

1.1.3.2. The ancient author - Rome

The culture of ancient Rome does not differ drastically from that of ancient Greece.[94] Authors similarly enjoyed high reputation in the community. Nevertheless, to be able to create and spread their work, they needed financial support either by their master (if they were slaves), or by a wealthy patron from a noble class. There even seems to have existed an authors' guild in 207 BC, which was funded by the nobles.[95] Naturally, around such patrons "literary circles" of authors emerged. They all knew each other and, to gain fame and popularity, they frequently mentioned each other in their texts.[96] Namely, as in Greece, the transmission of works took place predominately through performance, and the wider transmission, the higher the social rank of the author.[97] Books were also present at the time, however, "no one would expect a great wealth from book publication itself."[98] Thus, prose texts were in fact written only by rich politicians, like Cato or Julius Caesar, as they were wealthy enough to have access to private libraries, to have the privilege of such spare time and they could afford the circulation of their works.[99] In fact, it seems that "Roman authors appeared to trust the indirect gain that could be achieved through enhanced reputation more than direct profit from the sale of books."[100] In that respect, considering it was hard to attach the name of the author to the performed work, the Romans, again, relied on the Greek tradition of *sphragis* or author's "marking his or her work at the end with a reference to him or herself."[101] "I am that man who once sang on a slender

[92] Michael Grant, *The Classical Greeks* (Phoenix 2001) noting that "soul is ultimate partner both in the microcosm which is God, the cause and explanation of the universe, and in the microcosm which is the individual human soul".
[93] Scodel (n 78) 58.
[94] That is not surprising since „first authors in Roman literary history, Livius Andronicus, Naevius, and Ennius were native Greeks", see Christian Badura and Melanie Möller, 'Authorship in Classical Rome' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 65.
[95] Ibid.
[96] Frosio (n 12) 117 "Powerful and wealthy men with a large following were uniquely placed to promote the work of an author. The business of promotion and circulation of an author's work was undertaken by the circle of *amici*, instead of booksellers. Through the *amici's* connections, the author found his readership".
[97] Badura and Möller (n 94) 66.
[98] Badura and Möller (n 94) 66.
[99] Badura and Möller (n 94) 66.
[100] Frosio (n 12) 116 "In the Ars Poetica, Horace mentioned that a famous book of his, read accross the Mediterranean, brought him long-lasting fame but gained money for the publisher Sosii".
[101] „The tradition of the sphragis, a "seal" and a kind of copyright statement avant la lettre, is the most prominent phenomenon of authorization in Latin poetry, adopted from Greek literature. The author marks his or her work at the end with a reference to him- or herself, using a personalized, yet formally conventional signature in order to document his or her claim to ownership by that token. […] The device originated in Greek archaic poetry, when

reed and coming out of the woods forced the neighbouring fields to obey their owner, however greedy for gain, a work pleasing to farmers, but now of Mars' bristling arms I sing and the man . . .” is an example how Vergil refers to his previous works and thus connects the work to himself.[102] Such tradition shows us that regardless of having no copyright or any similar right, the claims of authorship were nonetheless present. Plagiarism, although not legally prohibited,[103] was frowned upon.[104] In fact, the term comes from the Latin word *plagium*. It referred to the crime of the abduction of children or slaves of others. It was Martial who used the term in his epigram referring to the literary theft and assigning a literary thief as *plagiarius.*[105] There is, however, no other proof of the term having been used in the meaning of literary theft at that time.[106] Nevertheless, even though appropriation without attribution was not approved, “copying, imitation and emulation in ancient creativity was an art in its own right”[107] The Roman culture, in that respect, seemed to follow the teachings of Plato and Aristotle who considered art an imitation (*mimêsis*) of reality. Romans seemed to further add another level and that it is also an imitation of previous art. Such cumulative creativity was considered to pay respect to earlier authors and their works.[108] It was aimed to create discourse and there was no pejorative element attached to it. “In premodern history, coexistence of cumulative, collaborative and more individualistic creative approaches was commonplace. Appropriation and collaboration have always been widespread parts of creative process, although they have not always been accepted as proper or preferred to individual or ‘original’ creation.”[109]

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there was no book trade yet to securely connect authors to their texts. With the Romans, and especially the Augustan poets, it became an entirely literary form of negotiating authenticity and authorial identity. One of the stock motifs of the sphragis, the appeal to eternal fame, is especially prominent in Ovid's conclusion to his Metamorphoses” Badura and Möller (n 94) 67-68.

[102] Badura and Möller (n 94) 70.

[103] „…no Roman legal source ever mentioned a law or a case where an author summoned a judge to complain about the unlicensed or otherwise illegitimate publication of a work.” Frosio (n 12) 28 see also Scott McGill, 'The Right of Authorship in Symmachus' Epistulae 131' (2009) 104 Class Phil 229.

[104] Badura and Möller (n 94) 71.

[105] Frosio (n 12) 30.

[106] Badura and Möller (n 94) 71; Nick Groom, ‘Unoriginal Genius: Plagiarism and the Construction of “Romantic” Authorship’ in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge University Press 2010) 275 " William Fitzgerald notes that Martial's use is the only instance in Latin literature of plagiarius being deployed to describe literary theft, and that modern usage comes from Lorenzo Valla's imitation of Martial in the preface to Elegantiarum latinae linguae (libri sex, composed 1435–44, pub. 1471)".

[107] Frosio (n 12) 31 - 34 "According to modern studies, ancient Roman literature knew three forms of literary imitation: *interpretatio, imitatio* and *emulatio*. *Interpretatio* was the less original adaptation and coincided with direct translation of one source. *Imitatio* was an adaptation that consisted of borrowing of form, or content, or both from one or more renowned Greek sources. *Aemulatio*, finally was a form of creative rivalry. “

[108] Frosio (n 12) 34.

[109] Frosio (n 12) 23.

Finally, the Romans have also glorified the role of the divine in author's creation, considering an author "a 'seer' who has privileged access to the truth and the gods by way of their and the Muses' inspiration."[110] Precisely for that reason, it seemed inconceivable one could own knowledge. Namely, "a scribe could be paid fees for his labour, an author awarded prizes for his achievement, but the gift of the gods was freely given."[111] Moreover, this line of thinking was not confined only to the ancient cultures, but was very much present in other great premodern civilizations.[112] For example, in faraway China, the land that was no foreigner to book trade since the eleventh century, there was no recognition of any author's claim to his published words. One could only buy "the paper and ink of a manuscript or a printed book."[113]

1.1.3.3. The medieval author

The idea of authors being a mere medium of the divine thought permeated also in medieval times through the canon law doctrine "Scientia Donum Dei Est, Unde Vendi Non Potest" (Knowledge is a gift from God, consequently it cannot be sold). "The divine nature of authorship is reprocessed in mediaeval terms in light of the concept of authority. The author was seen as receiving *auctoritas* (authority) – to make authoritative statements directly from God."[114] And God was considered to be an "ultimate source of all creativity and the highest object of imitation."[115] Similarly as in ancient cultures, the manuscript culture, characteristic of medieval times, was not especially preoccupied with the author's control over the work. Once the text was published and it was already in circulation, the text was open for any further changes, corrections, additions made by their readers, scribes, illuminators etc. The notion of authorship seemed to be irrelevant and this concept of "social textualization" simply reflected the view that "creativity seemed to entail principally a process of slow augmentation of the

[110] Badura and Möller (n 94) 65.
[111] Hesse (n 77) 26.
[112] see Hesse (n 77) 27 "A tour of the other great civilizations of the premodern world - Chinese, Islamic, Jewish and Christian - reveals a striking absence of any notion of human ownership of ideas or their expressions… e.g. Confucius is recorded as saying, "I transmit rather than create; I believe in and love the Ancients"; And the New Testament sanctified the idea of knowledge as a gift from God in the passage of Book of Matthew in which Jesus exhorts his disciples, "Freely ye have received, freely give" (10:8); Medieval theologian interpolated this passage into the canon law doctrine "Scientia Donum Dei Est, Unde Vendi Non Potest" (Knowledge is a gift from God, consequently it cannot be sold)."
[113] Hesse (n 77) 27.
[114] Frosio (n 12) 43 see also Alastair Minnis, *Medieval Theory of Authorship: Scholastic Literary Attitudes in the Later Middle Ages* (U Penn Press 1988) 10.
[115] Jan Ziolkowski, 'The Highest Form of Compliment: Imitatio in the Medieval Latin Culture' in John Marenbon (ed), *Poetry and Philosophy in the Middle Ages: A Festschrift for Peter Dronke* (Brill 2001) 302.

'knowledge and wisdom of humanity.'"[116] Comparing it to the contemporary language of copyright law, one can certainly draw the similarities with copyright's utilitarian function and importance of the public domain. Interestingly enough, in the Renaissance, the author's talent and genius gained insofar unrecognisable importance. However, it was still understood that "their genius was to be divinely inspired rather than a mere product of their mental skills or worldly labours."[117] In that respect, Martha Woodmansee refers to the Renaissance author as "unstable marriage of two distinct concepts" – the craftsman and the inspired.[118] As to the financial and economic status of authors, the system of patronage and sponsorship was still very common both in Medieval times and in the Renaissance[119] in which "the patron offered to the protégé a sealed network of interpersonal relations that has supported creativity."[120]

However, albeit the importance of the divine inspiration was present, it would seem oversimplified and possibly dishonest to disregard the credit given to the authors at the time. Just like claims of authorship were to a certain extent present in the ancient cultures, similarly in the 13th century, monk Saint Bonaventure makes a clear distinction between a scribe, compiler, commentator and an author,[121] the latter being at the top of the hierarchy as the one who "writes the words of other men and also of his own, but with his own forming the principal part and those of others being annexed merely by way of confirmation."[122] It is evident that to be an author, one must produce his own words. Naturally, he will rely on the earlier works, but to become an author his own expression must be the dominant part. Looking at such distinction, it does not seem that far away from the understanding of an author in the contemporary sense.

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[116] John Burrow, *Medieval Writers and Their Works: Middle English Literature and its Background, 1100-1500* (Oxford University Press 1982), 34 as cited in Frosio (n 12) 48 - 49.
[117] Hesse (n 77) 28.
[118] Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 Eighteenth-Century Studies 425, 426–427.
[119] Amy N. Vines 'Patrons and Patronage' in Siân Echard, Robert Rouse (eds)*The Encyclopedia of Medieval Literature in Britain* (John Wiley Publishers 2017) 2, DOI: 10.1002/9781118396957.wbemlb108.
[120] Frosio (n 12) 128.
[121] It must be noted that in practice the roles often overlapped see Frosio (n 12) 47.
[122]AJ (Alastair J) Minnis, A Brian Scott and David Wallace, *Medieval Literary Theory and Criticism c.1100 - c.1375 : The Commentary-Tradition* (Clarendon 1991) 229. as cited in Andrew Kraebel, 'Modes of Authorship and the Making of Medieval English Literature' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 98 "For someone writes out the words of other men without adding or changing anything, and he is called the scribe [scriptor] pure and simple. Someone else writes the words of other men, putting together material, but not his own, and he is called the compiler [compilator]. Someone else writes the words of other men and also his own, but with those of other men comprising the principal part while his own are annexed merely to make clear the argument, and he is called the commentator [commentator], not the author. Someone else writes the words of other men and also of his own, but with his own forming the principal part and those of others being annexed merely by way of confirmation, and such a person should be called the author [auctor]".

1.1.3.4. The printing press

The invention of the printing press occurred in the 15th century and although one could expect a considerable transformation to happen when it comes to the way of work transmission, this did not follow immediately.[123] On the contrary, authors seemed to be hesitant at first to have their works appear in print under their names. A comment by George Puttenham illustrates their reluctance impeccably - "I know very many notable Gentlemen in the Court that haue written commendably, and suppressed it agayne, or els suffred it to be publisht without their owne names to it: as if it were a discredit for a Gentleman, to seeme learned, and to show him selfe amorous of any good Art."[124] Nonetheless, there were authors very much comfortable with having their works printed. Having both possibilities available, the choice was then up to the author. With manuscripts, authors could keep their works within a small circle under their control and some were very fond of such an idea, while with print, their works reached a wider audience, albeit outside of their control.[125] The printing press nevertheless evolved, became more accessible and together with the rise in literacy in the 18th century a market for print was established.[126] The print production thus became a "matter of supply and demand" with the slight exception of monopolistic practices of stationers' companies.[127] Considerable place on the market was taken by reprints without an author, such as religious or classical texts. However, the original content was also present as a need for novelty existed.[128] Booksellers needed authors who could rightfully fulfil the need for specific content. Hence, the most versatile were in fact the most valuable.[129] Such "authors" slowly evolved into an organised class of professional workers. Similarly, the booksellers/publishers as the principal risk-takers

[123] Margaret JM Ezell, 'Manuscript and Print Cultures 1500–1700' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 116–117 "Even as the establishment of printing presses in urban centers across Europe increased the number of texts and quantities of copies available for both readers and booksellers, print was not the standard medium chosen by literary authors to reach their readers during the sixteenth and the majority of the seventeenth centuries. The circulation of literary texts in manuscript form remained throughout this period a vital and vibrant practice for authors and readers".

[124] George Puttenham, *The arte of English poesie Contriued into three bookes: the first of poets and poesie, the second of proportion, the third of ornament* (London, 1589), p. 16 as cited in Ezell (n 127) 119.

[125] Ezell (n 127) 125 "Increasing numbers of writers in the sixteenth and late seventeenth centuries were comfortable placing some of their writings in print, whether as single pieces or as part of printed collections, while restricting the readership of other texts. William Shakespeare published two poems, Venus and Adonis (1593) and The Rape of Lucrece (1594), which went through nine and five editions respectively during his lifetime; his intentions toward the printing of his plays, on the other hand, are less clear.".

[126] Betty A Schellenberg, 'The Eighteenth Century: Print, Professionalization, and Defining the Author' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 134–135.

[127] Schellenberg (n 126) 135.

[128] Schellenberg (n 126) 135.

[129] Schellenberg (n 126) 135–136.

"soon formed themselves into powerful guilds and petitioned authorities for protection against unfair competition from printers who copied their editions. Unfettered competition, with freedom for any printer to copy another's editions, led in all major European countries to a situation in which 'piracy was born, so to speak with the art itself.'"[130]

In answer to the occurring problem, national authorities started granting exclusive privileges to booksellers. A privilege was given in respect of a certain or several works for limited times. The booksellers, thus, secured protection, while the authorities controlled the book trade, "a new method of making information available to people."[131] It seemed, however, that "in all of this, the role and status of the author was minimal."[132] Namely, although booksellers and authors seemed to be interdependent, the balance within their relationship seemed to go in favour of the booksellers. That does not come as surprising considering that a bookseller was primarily an entrepreneur familiar with all the tips and tricks of the trade, while the author, although talented, educated, tasteful or virtuous, seemed not to "acknowledge any interest in pecuniary rewards."[133] Booksellers, thus, led by the idea of making profit, were not much concerned with the position and the reward for the author, and authors merely wanted to publish their works, rather than being preoccupied with the height of the pecuniary reward. Moreover, there were plenty of authors who considered booksellers their patrons,[134] as well as other amateur authors who were merely supplementing their low income with such authorial pursuits.[135]

1.1.3.5. The first copyright act and the romantic "genius"

[130] M.-C. Dock 'Genese et evolution de la notion de propriete litetteraire' (1974) LXXIX R.I.D.A. 165 as cited in Davies (n 14) 20.
[131] Davies (n 14) 20.
[132] Sam Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886 – 1986* (Centre for Commercial Law Studies, Queen Mary College, 1989) as cited in Davies (n 14) 21.
[133] Schellenberg (n 126) 136–137.
[134] See Goethe's view in Martha Woodmansee (n 118) 435 "the book trade was chiefly concerned with important scientific works, stock works which commanded modest honoraria. The production of poetical works, however was regarded as something sacred, and it was considered close to simony to accept or bargain for an honorarium. Authors and publishers enjoyed a most amazing reciprocity. They appeared, as it were, as patron and client. The authors, who in addition to their talent were usually consideredby the public to be highly moral people and were honored accordingly, possessed intellectual status and felt themselves rewarded by thejoy of their work. The book dealers contented themselves with the second rank and enjoyed a considerable advantage:affluence placed the rich bookdealer above the poor poet, so everything remained in the most beautiful equilibrium. Reciprocal magnanimity and gratitude were not uncommon".
[135] Schellenberg (n 126) 137.

The duration of the system of privileges varied between European countries,[136] the first being abolished in the United Kingdom with the Cromwellian Revolution. It was briefly followed by the period of Parliamentary ordinances requiring consent of the owner for printing the book. However, "the system had fallen into disrepute because the power of members of the Stationers' Company to claim copyright in perpetuity had led to high prices and lack of availability of books. The control of the book trade […] was broken with the result that book piracy flourished."[137] Booksellers lobbied again for exclusive rights similar to privileges, however, this time their arguments were more focused on the authors and the benefits to the society. Namely, they were arguing that exclusive rights provide incentive for authors to create, which is ultimately in the public interest. It is at that time that the philosopher John Locke, as a member of Stationers' Company, although "opposed to licensing as leading to unreasonable monopolies injurious to learning, 'demanded a copyright for authors which he justified by the time and effort expended in the writing of the work which should be rewarded like any other work.'"[138]

As a result, in 1709 the Statute of Anne, the first copyright act, was passed "for the encouragement of learning."[139] The Statute conferred the "sole right and liberty of printing books to authors and their assigns; but it stemmed nonetheless from commercial exploitation rather than literary creation pure and simple."[140] Moreover, the Statute of Anne did not resolve the above discussed issues of prices and availability of the books, rather it "had given rise to an impassioned debate about the nature of copyright, often referred to as the "Question of Literary Property",[141] or "The Battle of Booksellers."[142] The question, on the surface, was dealing with term of protection, but it went much further to the point of delving into its rationale. The question arose not only in the UK, but similarly in France and Germany.[143] Although booksellers were the most prominent in the debate, it is in those circumstances that authors were

[136] „The period of privileges lasted longer on the Continent than in England. In Germany, the first privilege was granted in 1501 and the system was not entirely abolished until the first German copyright law was adopted following the creation of the German *Reich* in 1871.[…] In France, privileges dated from the early sixteenth century and the system continued until abolished in the Revolution of 1789." Davies (n 14) 20–21 see also A Kerever 'The Achievements and Future Development of European Legal Culture', (1990) Copyright 131.
[137] Davies (n 14) 11.
[138] John Locke, *Two Treatises of Government* (1690), P Laslett (ed) (Cambridge University Press 1988) para 27 as cited in Davies (n 14) 11.
[139] It was proclaimed as such in Preamble see Davies (n 14) 11.
[140] William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (8th edn, Sweet & Maxwell 2013) 390.
[141] Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press 1967) 12; Mark Rose, 'Author as Proprietor: Donaldson v. Beckett and the Genealogy of Modern Authorship', *Of Authors and Origins, Essays on Copyright Law* (Clarendon Press 1994).
[142] Davies (n 14) 28.
[143] For overview of history in France and Germany see Davies (n 14).

given a voice of their own. It is in those circumstances that a shift from the divine presence occurred, and higher importance started to be given to the notion of the author's own genius[144] and originality. This new notion of genius is seen as "an instinctive and extraordinary capacity for imaginative creation, original thought, invention or discovery."[145] Despite being born in England, it "acquired special prominence in Germany". It has been argued by Martha Woodmansee that precisely the emergence of copyright law provided a fertile ground for such notion. "Writers who sought to earn their livelihood from the sale of their writings to the new and rapidly expanding reading public […] found [themselves] without any of the safeguards for their labors that today are codified in copyright laws. In response to this problem, and in an effort to establish the economic viability of living by the pen, these writers set about redefining the nature of writing."[146]

Starting from Alexander Pope and his Essay on Criticism in 1711, the function of the author was envisioned as not only to "express afresh truths hallowed by tradition", but also to "achieve something that has never been achieved before."[147] Similarly, for Wordsworth in 1815, "the genius is someone who does something utterly new, unprecedented."[148] For Edward Young, as Robert MacFarlane suggests "the original work of literature is unbidden, native to an individual, and comes into being out of nothing."[149] "The pen of an Original Writer, like Armida's wand, out of a barren waste calls a blooming spring…";[150] "An Original may be said to be of a vegetable nature; it rises spontaneously from the vital root of Genius; it grows, it is not made: Imitations are often a sort of Manufacture wrought up by those Mechanics, Art and Labour, out of preexistent materials not their own."[151] Those ideas were very much welcomed and further

[144] Although it must be noted that it was Renaissance who „marked a turning point in Western culture by propelling the emergence of individualism and enhanced human self-consciousness" Jacob Burckhardt, *The Civilization of the Renaissance in Italy* (S G C Middlemore Trans, Harper and Row 1958); also „Michelangelo is 'the first example of the modern, lonely, demonically impelled artist – the first to be completely possessed by his idea and for whom nothing exists but his idea – who feels a deep sense of responsibility towards his gifts and sees a higher and superhuman power in his own artistic genius'" Arnold Hauser, II *The Social History of Art* (Routledge 1999) (1951) 59-61 as cited in Frosio (n 12) 144.
[145] Jonathan Bate, 'Shakespeare and Original Genius' in Penelope Murray (ed) *Genius: The History of an Idea* (Blackwell 1989) 90 as cited in Frosio (n 12) 154.
[146] Woodmansee (n 118) 426.
[147] Woodmansee (n 118) 428.
[148] Woodmansee (n 118) 430.
[149] Robert Macfarlane, *Original Copy: Plagiarism and Originality in Nineteenth-Century Literature* (Oxford University Press 2007) 19.
[150] Edward Young *Conjectures on Original Composition* (A. Miller 1759) 10 as cited in Darren Hudson Hick, *Artistic License, The Philosophical Problems of Copyright and Appropriation* (The University of Chicago Press 2017) 53.
[151] Ibid.

elaborated by German theorists such as Herder, Goethe, Kant, Hegel or Fichte.[152] According to Kant: a "genius is a talent for producing something for which no determinate rule can be given, not a predisposition consisting of a skill for something that can be learned by following some rule or other; hence the foremost property of genius must be originality"[153] In response to Kant, Herder then writes: "At all events, genius works according to rules, arises according to rules, and is a rule unto itself, even granted that not every third person could point it out. The "originality" (a very much abused word) of genius can only mean that the genius produces a work of his own powers, not imitated, nowhere borrowed.[154]

Considering all the statements above, one can defer that originality was understood as a result of the author's own genius. For a work to be considered as original, when creating the work, the author must add something of his own. This could be by breaking the already established rules or adding on to the already established system a new rule. In my view, the work would then be considered as coming out of nothing. That, however, does not entail that author has not been under influence of previous creators. To produce something new, one must be, at least to certain extent, aware of the existing rules of the art. More importantly, neither Young nor Goethe ever undermined the existence of influences. "Knowledge physical, mathematical, moral, and divine, increases; all arts and sciences are making considerable advance; with them, all accommodations, ornaments, delights and glories of human life; and these are new food to the Genius of the polite writer; these are as the root, and the composition, as the flower; and as the root spreads, and thrives, shall the flower fail?"[155]

Similarly, Goethe stated: "People are always talking about originality, but what do they mean? As soon as we are born, the world begins to work upon us, and this goes on to the end. And, after all, what can we call our own except energy, strength and will? If I could give an account of all that I owe to great predecessors and contemporaries, there would be but a small balance in my favour."[156]

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[152] It has been argued that it is so due to the „pressing need of writers in Germany to establish ownership of the products of their labor so as to justify legal recognition of that ownership in the form of a copyright law" see Woodmansee (n 118) 430.
[153] Immanuel Kant, *Critique of Judgment,* translated by Werner S.Pluhar (Hackett 1987) §46 as cited in Hick (n 150) 56.
[154] Johann Gottfried Herder, *Sämmtilche Werke,Vol. 22*. (J.G.Cotta, 1853) 197-198 as cited in Hick (n 122) 56.
[155] Young (n 150) 75 as cited in Hick (n 150) 53.
[156] Johann Wolfgang von Goethe, *Conversations of Goethe with Eckermann and Soret* Vol.1., translated by John Oxenford (Smith, Elder 1850), 263 as cited in Hick (n 150) 57.

It is, hence, my view that this concept of authorship does not significantly differ from the medieval concept described by Bonaventure. In my judgment, it just adds the acknowledgment of internal processes through which the author goes in his or her creative process, the ones rightfully identified by John Dewey, as discussed above. Those processes, although they are individual and unique, at the same time they are universal, as occurring in every creation. I will, in this respect, refer to Fichte, who beautifully described the process of creation and simultaneously started the idea/expression dichotomy present today in copyright:

"*each individual has his own thought processes, his own way of forming concepts and connecting them. ... All that we think we must think according to the analogy of our other habits of thought; and solely through reworking new thoughts after the analogy of our habitual thought processes do, we make them our own. Without this they remain something foreign in our minds, which connects with nothing and affects nothing.... Now, since pure ideas without sensible images cannot be thought, much less are they capable of representation to others. Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property*."[157]

To conclude, I agree with Woodmansee that this concept of authorship, usually referred as "romantic originality" "was shaped by the specific circumstances of writers during that period",[158] as any thought in the end is. However, it should not be a reason to disregard the truths that have been said by those very writers when talking about their creative process. More importantly, the view seems to coincide in great respect with the contemporary's view of authors and their creativity. However, whether those truths present valid and acceptable foundations for a property right is thus a different question. One that will not be answered by the artists, but by legislators or judges. Not having the artists' point of view taken into account would make the law utterly disconnected with the life its rules regulate. Moreover, contrary to Hegel and Fichte, as strong proponents for property right, Kant's view on the matter seems to be far more nuanced. In his view, by publishing a book, an author starts a discourse with the audience. It is thus, his personal right and obligation, to have the control of the discourse and thus it is author's "innate right, invested in his own person, entitling him to prevent anyone else

[157] Johann Fichte, *Proof of the Illegality of Reprinting*, 227-228 as cited in Woodmansee (n 118) 445.
[158] Woodmansee (n 118) 448.

from presenting him as speaking to the public without his consent…"[159] That does not forbid reuse, as long as reuser indicates the original author – "if one modifies a book written by someone else (abridging it, or adding to it, or reworking it) in such a way that it would actually be wrongful to bring it out under the name of the author of the original, then such a modification carried out in the publisher's own name does not constitute reprinting and is therefore not forbidden."[160]

1.1.3.6. The author of the 20th century

Finally, now that copyright protection has been introduced it is important to see how it further affected and influenced the position of the author. The printing press further evolved and by the 20th century there were "cluttered newsstands […] where hundreds of magazines, newspapers, paperbacks, gazettes, pamphlets, and books jostled with one another for attention."[161] Printing became cheaper, education became compulsory, libraries became free and accessible and naturally there was higher demand for different kinds of writings.[162] Magazines often included contests looking for another writer to write a short story, anecdote or any other piece of writing. Everyone could now become a writer. That, however, was followed by several important notions. Firstly, "writing itself was undergoing a radical transformation from a relatively autonomous and self-regulated profession to a fully industrialized activity fueled by corporate capital."[163] The authors, however, could not keep track of the use of such numerous words and writings they have produced. Hence, they required the services of the literary agent who would take a part of author's royalties. The authors were however paid by the word which resulted in being "paid so poorly that writers had to churn out huge quantities of copy to make a living."[164] In the words of Virginia Woolf, writing in such circumstances led to "brain prostitution".[165] Secondly, as a reaction to such industrialization of writing, a countervailing movement, which now goes under the name of modernism, occurred.[166] The prominent figures of such literary scene were James Joyce, Ezra Pound and Franz Kafka, among others, who all depicted the

[159] Immanuel Kant, 'Von der Unrechtmassigkeit des Buchernachdrucks [on the Injustice of Counterfeiting Books]' (1785) 5 Berlinische Monatsschrift 404, 416 as cited in Frosio (n 12) 169.
[160] Kant (n 159) 169-170.
[161] Sean Latham, 'Industrialized Print: Modernism and Authorship' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 165.
[162] Ibid.
[163] Latham (n 161) 168.
[164] Latham (n 161) 172.
[165] Virginia Woolf, *Three Guineas* (New York: Houghton Mifflin, 1966), 94 as cited in Latham (n 133) 172.
[166] Latham (n 161) 170.

notion of this new author as a dreadful bureaucratic figure that had nothing to do with aesthetics and creativity. As an answer to such mass culture, a group of individuals dissatisfied with it gathered and started their own "*little magazines*".[167] It became "an elite culture where, as Pierre Bourdieu famously argues, economic failure became the sign of aesthetic success."[168] For example, James Joyce's work was rejected by all the commercial publishing houses, and were in fact published by small independent publishing houses run by individuals.[169] However, the fact that to be an author does not require certain specific education, did not necessarily entail only troubles. The floor became open for people who previously have not even considered pursuing such profession. Latham gives an example of A.R. Orage (the editor of *The New Age* magazine), a "member of a literate, intellectual class in Britain who made their way through red-brick universities and trade schools rather than through Oxford and Cambridge. While working as a schoolteacher in Leeds, Orage became deeply interested in socialist politics and, with the help of George Bernard Shaw and Holbrook Jackson, he acquired the New Age and transformed it into one of Britain's leading intellectual organs. It succeeded, in part, because he opened the weekly's pages to a new cadre of young and innovative writers."[170]

Following the abovementioned, it seems that although again the positions of the notion of the author remained complex, diverse and individual, one can nevertheless argue that industrialization of the writing process, together with the application of copyright law resulted in the view that "modernist authorship was and remains essentially a legal construct – a way of defining ownership in a global capitalist system where texts no longer circulated under special license from the state but instead became merely one more commodity among others."[171] Such development furthermore created a cultural division, which in my opinion, is still very much present today. Namely, on the one hand, there is the mass, or what we call "mainstream" culture, supported by the industry, while on the other, the independent culture, which consists in small publishing companies supported by the persistent individuals who simply enjoy art, music, and creativity. Copyright law seems to support the former, while the latter in essence requires support, not so much different from the one in the patronage system.[172] Although, it must be

[167] Latham (n 161) 170.
[168] Latham (n 161) 166.
[169] Latham (n 161) 172.
[170] Latham (n 161) 174.
[171] Latham (n 161) 176.
[172] "Amid the tidal waves of print, furthermore, a new emphasis fell on manuscripts, and Joyce's own writing of Ulysses was partially financed by a New York attorney named John Quinn, who quietly purchased the author's pages. In the age of industrial print, such manuscripts became (as they still are) fetish objects, promising authenticity, originality, and genius – the literal mark of the author as an individual rather than a mass- produced

noted that it is not law itself that produces such an effect, and that much of it, similarly as today, is a by-product of informal practices among market players.[173] Nevertheless, being an "industrialised writer" did not provide authors with reward sufficient to make a living, nor did it give them a special position within society. On the contrary, such authors were, as shown above, often ridiculed, and denigrated, as they were perceived as symbols of system which was slowly turning art into a saleable commodity.

1.1.3.6.1. Postmodern criticism

The critical position and stance taken towards such a notion of the author further persisted in the postmodernism, culminating in two of the most widely discussed essays – Roland Barthes' "The Death of the Author" and Michael Foucault's "Who is an Author". I would argue that the critique, however, is not aimed at the notion of an author per se, rather at the system which superficially puts the author in such a high regard, on an imaginary pedestal not supported by the reality. Thus, when Barthes abandons the idea of authors being "unique individuals, graced with a full understanding of themselves and fully conscious of the authorial intentions that give their writings their unique meanings"[174], it is my reading that it is a comment on the copyright law, specifically "capitalist" ideology, which has attached the greatest importance to the 'person' of the author."[175] Similarly, Michael Foucault does not criticise the author himself, but the functions given to the notion of an author raising the questions of control, censorship, publishing and copyright law. Moreover, the fact that those essays touched upon very controversial and important, yet unresolved issues, proves the statement of Andrew Bennet that "almost forty years later we are still caught up in debates about the problem of authorship instigated by Barthes and Foucault in the late 1960s."[176] Today, even sixty years later, although we transferred to the digital world, we are still discussing the very same issues. However, it is

commodity. Nor was Joyce the only one to depend on support from patrons and collectors. The experimental and often obscure writing of H. D. was financed by Bryher (Annie Winifred Ellerman), a wealthy shipping heiress and magazine editor who effectively insulated the poet from the demands of the literary marketplace. Such patronage, in fact, helps defines a modernism where private capital flowed outside of the marketplace to innovative writers from people like Peggy Guggenheim, Nancy Cunard, Lady Ottoline Morrell, and Scofield Thayer." Latham (n 161) 171.

[173] "The mythology of modernism might have been shaped by its often dramatic trials, but authorship in the twentieth century was defined instead by an excess that ran far ahead of the legal structures set in place to regulate it." Latham (n 161) 179.

[174] Hans Bertens, 'Postmodernist Authorship' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 187.

[175] Roland Barthes, 'The Death of the Author' in Stephen Heath (tr), *Image, Music, Text* (Fontana 1977) 143.

[176] Bertens (n 174) 186.

my opinion that we have accepted that the notion of an author, regardless of its humanity, individuality, and uniqueness, has slowly transgressed into being merely a legal concept. Digital culture and democratisation of authorship played a significant role in such transgression. Everyone is an author, and authorship is utterly an unstable concept. The question that we might be dealing with today is, however, what makes the distinction between amateur and professional writers. "Could the level of control over the form and distribution of one's writings be a decisive factor in a definition of authorship in the digital era?"[177]

1.1.3.7. Conclusory remarks

To conclude with this historical overview, I will repeat the question Betty Schellenberg already posed: "Is it possible that "'authorship" is always a various, fragmented, and contested entity that eludes our categories?'"[178] I dare to say it is. The creative process being unique and individual indisputably makes authorial position equally so. Of course, there will be some notions that represented the view of the majority at the time, but the more diverse seems to be the choice of creative and transmission tools, the more diverse are the positions of an author. Any kind of simplification, rising from need to put things in categories, as much as it facilitates comprehension, it eventually disregards the nuances. That is why one could never reach the answer on what exactly stimulates creativity as it will always depend on the personality of the creator, as well as on the time in which creator lives and creates. Antic and medieval poets were perfectly satisfied with social recognition and financial support acquired through the patronage system, while Romantic authors urged for pecuniary reward as they seemed to create in circumstances where they could barely make ends meet. Wider transmission of works, which antic poets perceived as an ultimate goal, eventually resulted in protection of investment. It nonetheless pushed the authors to open the discussion on their connection with the work, something that premodern authors did not have to raise as their social circles were well acquainted with their work and regarded them as valuable. Today we live in the era of internet and digital world where one easily becomes an author by writing a blog, but also where one is prevented from reading if he has not paid potentially very high price for subscription. And if a person is not able to receive certain information, to enjoy certain work, will his/her creativity

[177] Adriaan van der Weel, 'Literary Authorship in the Digital Age' in Gert Buelens, Ingo Berensmeyer and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019) 232 <https://www.cambridge.org/core/books/cambridge-handbook-of-literary-authorship/literary-authorship-in-the-digital-age/B98879ADD7CE9F5C538E3576BA8287B7>.
[178] Schellenberg (n 126) 143–144.

be able to flourish? Authors throughout history marked the importance of previous authors and previous art for their creation and "various research find that artists and scientists generate more creative outputs when exposed to a greater variety of input references". [179] "Cumulative creation has historically been – and continues to be – the dominant form of creativity in many cultural settings. For most human cultural history, openness dominated artistic and literary craftsmanship and promoted derivative creativity."[180] Furthermore, "sociocultural studies typically emphasize that creativity is not simply an attribute of gifted individuals, but something that requires an infrastructure. According to Mihaly Csikszentmihalyi "creativity does not happen inside people's heads, but in the interaction between a person's thoughts and a sociocultural context. It is a systemic rather than an individual phenomenon.""[181] It is, thus, my view that system regulating creativity, including the legal system, must take account of such notion.

1.2. The author and the originality as legal notions

When analysing who is the author in the contemporary copyright law sense, there seems to be no comprehensive definition of personal requirements one must fulfil to be considered an author. Namely, the Berne Convention[182], a leading multilateral copyright treaty, leaves the question upon Member States and yet very few national copyright laws define what authorship means.[183] Instead, the Berne Convention tackles the question indirectly by stipulating that an author shall be deemed the one whose name appears on the work in usual manner.[184] The same approach is visible in national laws. The UK's Copyright, Design and Patent Act provides that "the person whose name appeared on the work shall be presumed to be the author of the work"[185]; the Dutch Copyright Act also provides "that the maker is the person whose name is indicated as maker in or on the work"[186]; the Croatian's Copyright Act similarly does not define

[179] Mandel (n 3) 2000.
[180] Frosio (n 12) 21.
[181] Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology and Discovery of Invention*, (Harper Collins 1996), 23 as cited in Lavik and van Gompel (n 4) 396.
[182] Berne Convention for the Protection of Literary and Artistic Works 1886.
[183] Jane C Ginsburg, 'The Concept of Authorship in Comparative Copyright Law Annual Center for Intellectual Property Law & (and) Information Technology (CIPLIT) Symposium: The Many Faces of Authorship: Legal and Interdisciplinary Perspectives - Featuring Professor Jane C. Ginsburg as the Fifth Annual Niro Distinguished Intellectual Property Lecturer' (2002) 52 DePaul Law Review 1063, 1069.
[184] Berne Convention for the Protection of Literary and Artistic Works 1886, Article 15.1..
[185] Copyright, Design and Patent Act 1988, §104.2.
[186] Copyright Act – Auteurswet, Unofficial translation by Mireille van Echoud, Article 4 https://www.ivir.nl/syscontent/pdfs/119.pdf, accessed November 16th 2021;

authorship, yet stipulates that author's rights subsist in the person (human being) who created the work.[187] As Jane Ginsburg observes "it is easier to assert that authors are the initial beneficiaries of copyright/droit d'auteur than to determine what makes someone an author."[188] In other words, one is an author only when he/she has produced copyrightable work.[189] Hence, the question "who is the author" quickly slips in the background and shifts to the question of "is this person's work deserving of copyright protection?". If it is, a person is an author and if it is not, he is merely a creator. So, what makes a work deserving of copyright protection? The answer leads us to the most important notion of copyright law - originality.[190]

Similarly, as with the notion of authorship, there is no general definition of what makes a work original in a sense of copyright protection. The Berne Convention in its Article 2.1. stipulates that "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"[191] and merely sets out an open list of covered work categories. The term "original" only comes up in paragraph 3, which stipulates that "translations, adaptations […] and other alterations […] shall be protected as *original* works", but there is no mention of the requirement of originality. The same applies to the TRIPS Agreement.[192] Yet, there are "several statements in records of diplomatic conferences and committees of experts meeting under the aegis of WIPO that confirm the requirement that originality be present, and that this is the only applicable criterion, to the exclusion, for example, of artistic merit or purpose."[193] Such line of thinking is now universally accepted.[194]

[187] Zakon o autorskom pravu i srodnim pravima, OJ 111/21, art. 4. 1.
[188] Ginsburg (n 183) 1066.
[189] Russ VerSteeg, 'Defining Author for Purposes of Copyright' (1995) 45 American University Law Review 1323, 1326.
[190] „it [originality] is the most important notion of copyright law because it is the sieve that determines which „productions of the human spirit" are protected by copyright and acquire the status of „work"." Daniel Gervais and Elizabeth Judge, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law' (2009) 27 Cardozo Arts & Entertainment Law Journal 376, 376.
[191] Berne Convention for the Protection of Literary and Artistic Works.
[192] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)
[193] Gervais and Judge (n 190) 400.
[194] Ginsburg (n 183) 1078 "This principle at first seems the most universal and least contested. In fact, however, different countries have developed different concepts of what kind of contribution makes a work "original." Worse, even within a single jurisdiction, the requisite level of originality may vary with the nature of the work..

Nonetheless, even accepting that originality is an integral part of the "work",[195]it still leaves us without the internationally accepted and comprehensive definition of what that notion entails, thus leaving the notion to be specified by national laws.[196] Logically, different standards and different interpretations have aroused. However, for this chapter's purpose, and that is to understand the contemporary legal sense of authorship and originality, I'll mostly rely on the standard set out by the EU law.

1.2.1. The author as a legal notion (EU standard)

Ever since the landmark decision of the Court of Justice of European Union (hereinafter: the CJEU) in *Infopaq*[197], the notion of originality has been recognised as an autonomous European legal concept.[198] Namely, any subject-matter which is an author's own intellectual creation is original and therefore deserving of copyright protection.[199] To be considered author's own intellectual creation "a work must reflect the author's personality"[200] and be the product of "creative and artistic work".[201] "That is the case if the author was able to express his creative

[195] i.g. for the comment on the EU originality test see Justine Pila, 'The Authorial Works Protectable by Copyright' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (1st edn, Routledge 2021) 71 "While often presented by the CJEU as an aspect of the requirement for a work, it is clear that literary and artistic works within the meaning of Berne can either be original or non-original in fact, with the result that the requirements for a work and originality are analytically separate".

[196]„[…] very few national laws contain such a definition. We studied ninety-three national laws and found a specific definition of originality in only three national laws, namely Bulgaria, Burkina Faso, and Malaysia." Gervais and Judge (n 190) 400.

[197] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* Court of Justice of European Union, EU:C:2009:465.

[198] Marianne Levin, 'The Cofemel Revolution - Originality, Equality and Neutrality' in Eleonora Rosati (ed), *Routledge Handbook of EU Copyright Law* (1st edn, Routledge 2021) 91.

[199] "While the Court's holding is roughly in line with the author's right conception of works of authorship that underlies the law of copyright in continental-European Member States, it came as a surprise since no general harmonized standards for works of authorship […] formally exist. The directives have only harmonized[…] computer programs, databases, and photographs – along the common standard of „the author's own intellectual creation", whereas the directives are completely silent on the standard…" in Bernt Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis' in Justine Pila and Ansgar Ohly (eds), *The Europeanization of Intellectual Property Law, Towards a European Legal Methodology* (1st edn, Oxford University Press 2013) 63.

[200] Directive 2006/11/EC on the term of protection of copyright and certain related rights [2006] OJ L 372/12 (Term Dir.) Article 4 and Recital (16) see also Case C – 145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG et al.*), ECLI:EU:C:2011:798, 88.

[201] Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 16/10 (InfoSoc Dir.) Recital (10); Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 (Rental Dir.) Recital (5); Pila (n 195) 65.

abilities […] by making free and creative choices".[202] In other words, "by making those various choices, the author […] can stamp the work created with his 'personal touch.'"[203]

To put it more systematically, through its case law the CJEU[204] created a two-step test[205] for "assessing whether a work is the intellectual creation of an author to be original."[206] As Justine Pila explains - first step requires the CJEU to assess "whether the work is of a type that affords scope for the exercise of free and creative choices (formative freedom) in its production",[207] while the second step then requires the assessment "whether the person claiming authorship of the work has exploited that scope sufficiently to produce a work that is his/her own intellectual creation in the sense of reflecting his/her personality."[208]

1.2.1.1. Work eligible for copyright protection

Applying this legal (often criticised[209]) test, when analysing what has been granted copyright protection, we come to the following results. Regarding the first step, the CJEU, starting from *Infopaq*, supports a very broad, and yet very formal concept of authorship and originality.[210] It is broad in a sense that any combination of expressive elements may be eligible for copyright protection, and it is "through the choice, sequence and combination" of those elements "that

[202] Case C - 145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG et al* Court of Justice of the European Union, ECLI:EU:C:2011:798, 89.
[203] Case C - 145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG et al* Court of Justice of the European Union, ECLI:EU:C:2011:798, 93.
[204] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* CJEU, ECLI:EU:C:2018:899
[205] See also Case C – 469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, p 19 „As is clear from well-established case-law, in order for subject matter to be regarded as a 'work', two conditions must be satisfied cumulatively. First, the subject matter must be original in the sense that it is its author's own intellectual creation. In order for an intellectual creation to be regarded as an author's own it must reflect the author's personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, to that effect, judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraphs 87 to 89)"; Case C-683/17 *Cofemel — Sociedade de Vestuário SA v G-Star Raw CV*, ECLI:EU:C:2019:721, p 29.
[206] Pila (n 195) 71.
[207] Pila (n 195) 71.
[208] Pila (n 195) 71.
[209] For the critical analysis of the test see Johanna Gibson, 'Sine qua Non-Sense: Originality and the End of Copyright' (2020) 10 Queen Mary Journal of Intellectual Property 411, 416 "In Levola, the two limbs of the test have a startling (and oft-criticized) circularity: 'the subject matter concerned must be original in the sense that it is the author's own intellectual creation' and 'only something which is the expression of the author's own intellectual creation may be classified as a "work"'. The test appears at first to be frustratingly tautological; but the aporesis of these paragraphs gives both a functional and a revealing 'infinity', as it were, to the jurisprudence of originality. Copyright imitates art. Originality equals originality. It is both the beginning and the end of the work".
[210] Pila (n 195) 72.

the author may express his creativity in an original manner".[211] In that respect, for example, the CJEU did not *a priori* exclude military reports[212] or a user manual for a computer program[213] from being eligible for copyright protection. However, the CJEU did observe that if "subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom, that subject matter cannot be regarded as possessing originality required for it to constitute a work and, consequently, to be eligible for the protection conferred by copyright."[214] In that regard, the CJEU denied protection to "purely informative documents"[215], folding bicycles if their "shape is [...] solely dictated by technical function",[216] graphic user interfaces "where the expression of [its] components is dictated by their technical function"[217] and sporting events "which are subject to rules of the game."[218] The examples already show us that the threshold applied by the CJEU is quite low. The point was very vividly explained by Advocate General Kokott when comparing individual pixels to individual words and pointing out that bringing those pixels together could form a combination (individual frame) that could represent the author's own intellectual creation.[219]

1.2.1.2. The author's exercise of creative freedom

Nonetheless, having established that a work is of a type capable of affording creative freedom to the author, the second step of the test then puts the emphasis back to the author. Namely, the work will be recognised as original/eligible for copyright protection only if the one claiming authorship has exercised sufficient scope of creative freedom, so that a work reflects his/her

[211] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* Court of Justice of European Union, EU:C:2009:465, p 45.
[212] Case C – 469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, p 23.
[213] Case C – 406/10 *SAS Institute Inc. V World Programming Ltd* ECLI:EU:C: 2012:259, p 65-67.
[214] Case C – 833/18 *SI, Brompton Bicycle Ltd v Chedech/Get2Get* ECLI:EU:C:2020:461 (11 June 2020), p 24.
[215] Case C – 469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, p 24 "If military status reports, such as those at issue in the main proceedings, constitute purely informative documents, the content of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function, precluding all originality, it should be considered, as the Advocate General stated in point 19 of his Opinion, that, in drafting those reports, it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation.
[216] Case C – 833/18 *SI, Brompton Bicycle Ltd v Chedech/Get2Get* ECLI:EU:C:2020:461 (11 June 2020), p 33.
[217] Case C – 393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury,* ECLI:EU:C:2010:816 (22 December 2010), p 49 – 50.
[218] Joined Cases C – 403/08 and 429/08 *Football Association Premier League Ltd v QC and Karen Murphy v Media Protection Services Ltd* ECLI:EU:C: 2011:631 (4 October 2011), p 98.
[219] Opinion of Advocate General Kokott in Joined Cases C – 403/08 and 429/08 *Football Association Premier League Ltd v QC and Karen Murphy v Media Protection Services Ltd* ECLI:EU:C: 2011:43 (3 February 2011), p 79-81.

personality. Basically, we go back to the question of what requirements a person must fulfil to be considered an author. In other words, when has a creator exercised sufficient scope of creative freedom? When does the work reflect his personality? Before analysing the case law, it is important to discuss the difficulties that go along with those questions, if taken in their ordinary day to day meaning.[220] Namely, it is almost undisputable that answers to the abovementioned questions, even though they are, in the legal sense, considered as questions of fact,[221], are not, and probably could never be, straightforward. That is, the answer always lies in the eyes of the beholder, hence making it purely subjective and unpredictable.[222] Moreover, is there anyone who is truly capable and well suited to give an objective answer? Ultimately, it depends on individual's taste and imprint left upon him/her[223] and taste depends upon a vast number of socio-cultural factors such as class, gender, or age.[224] In that regard, one could make an evaluation of certain artistic work, but such evaluation can be considered as valid and legitimate only for the person making it. Similarly, Justice Holmes in 1903 also expressed a concern whether judges are well suited to make such a decision and that it could be possible that some works of genius would be disregarded as "their very novelty would make them repulsive until the public had learned the new language in which their author spoke."[225] Contemporary conceptual art and other types of "non-conventional" art could be most prone to facing such difficulties.[226] However, even the works of so called "conventional" art could easily be overlooked. For example, today we are all aware of works and existence of authors such as

[220] For the notions of creativity and originality in a sense of aesthetics and creativity studies see Stef van Gompel, 'Creativity, Autonomy and Personal Touch. A Critical Appraisal of the CJEU's Originality Test for Copyright' in Mireille van Eechoud (ed), *The Work of Authorship* (Amsterdam University Press 2014) 101-103. „That is, to be creative, a work must exhibit some sort of novel, original or innovative outcome, either in its appearance or in its underlying ideas. In addition, it must also be appropriate (significant, valuable, or useful) within the specific context (Mayer, 1999, pp. 449–450). As Amabile and Tighe describe it, creativity does not merely rest on a work being 'different for the sake of difference' but also requires it to be 'appropriate, correct, useful, valuable, or expressive of meaning' (1993, p. 9) ".

[221] Pila (n 195) 75.

[222] Shane Burke, 'Copyright and Conceptual Art' in Enrico Bonadio and Nicola Lucchi (eds) *Non-Conventional Copyright* (Edward Elgar Publishing 2018) 60 "Yet turning to the requirement of 'personal touch' as enunciated by the CJEU, such a standard arguably reinforces a deeply subjective notion of originality".

[223] See e.g. "Criticism is judgment. The material out of which judgment grows is the work, the object, but it is this object as it enters into the experience of the critic by interaction with his own sensitivity and his knowledge and funded store from past experiences. As to their content, therefore, judgments will vary with the concrete material that evokes them and that must sustain them if criticism is pertinent and valid" Dewey (n 36) 510.

[224] Lavik and van Gompel (n 4) 426.

[225] „It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. "in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[226] See Enrico Bonadio and Nicola Lucchi(eds), *Non-Conventional Copyright* (Edward Elgar Publishing 2018)

Franz Kafka, Søren Kierkegaard, or Emily Dickinson, but all of them have received social and critical recognition and acclaim only after their death.

1.2.1.3. Conclusory remarks

Having all that in mind, and in order to prevent overlooking potential masterpieces when granting copyright protection, it seems that having a low threshold for originality seems like the safest choice and the EU is no stranger to such policy. Although the language of the test described above ("personal touch", "free and creative choices", "reflecting author's personality") could suggest that it requires a very high and specific standard, the CJEU case law[227] demonstrates otherwise.[228] Namely, an author is deemed anyone who merely makes a sequence, combination, or a choice of expressive elements.[229] A perfect example of the low standard seems to be the case of *Painer* where the portrait photograph was considered to be an original work eligible for copyright protection because "in the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software".[230] It follows that the CJEU does not require national courts to go into analysis whether the work truly reflects the author's personality, since it does not give them any guidance in that respect. On the contrary, if it is possible for an author to make any kind of choice regarding expressive elements, it seems to be already presumed that such choice reflects his/her personality, thus making the work eligible for copyright protection and constituting him/her as an "author" in a legal sense. It seems to follow that any kind of scope of creative freedom, no matter how minimal, is already sufficient and "it invites the courts to recognize even trivial works as original."[231] The CJEU did, however, observe that "the freedom available to the author to

[227] See *Case C-5/08 Infopaq International A/S v Danske Dagblades Forening Court of Justice of European Union,* EU:C:2009:465. p 45; *Case C – 393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury,* ECLI:EU:C:2010:816 paras. 48-50; Case C – 145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG et al.*), ECLI:EU:C:2011:798,paras. 88-93; Case C-604/10 *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others* ECLI:EU:C:2012:115 paras. 38-39; *Case C – 406/10 SAS Institute Inc. V World Programming Ltd* ECLI:EU:C: 2012:259, para. 67.
[228] van Gompel (n 220) 95.
[229] See also Hick (n 150) 61 "By suggesting that the free and creative choices were sufficient for such a stamp of personality, the CJEU opinion effectively simplified EU conditions of originality".
[230] Case C - 145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG et al* Court of Justice of the European Union, ECLI:EU:C:2011:798, para 88.
[231] Pila (n 195) 75.

exercise his creative abilities will not necessarily be minor or even non-existent",[232] however, there are no clear lines on what constitutes that minimal freedom and national courts have been granting copyright protection to works with very low level of creativity. For example, in the UK, relying on the decision in *Infopaq*, it was found that headlines are capable of being original works,[233] while in the Netherlands, copyright protection has been granted to "passport photographs, striped wallpaper, the design of simple games like 'four in a row' and designs of basic holiday homes."[234] Besides, it is worth mentioning that the low threshold is not something unique to the EU.[235] The standard set out in the USA, although differently verbalised, is similarly low. According to the US Supreme Court in the *Feist* case "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity…. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works made the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it may be."[236]

Considering all of the above, although the CJEU test appears to rely on the creative freedom and personality of an author, it is evident that the author (in a sense of EU copyright law) is far away from being an inspirational or artistic genius,[237] and there is considerable discrepancy between the legal and aesthetics'/creativity studies' notion of originality and creativity.[238] Thus,

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[232] Case C - 145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG et al* Court of Justice of the European Union, ECLI:EU:C:2011:798, para 93.

[233] *The Newspaper Licensing Agency Ltd v Meltwater Holding Bv* [2011] EWCA Civ 890, [2012] RPC 1 [19]-[22].

[234] P Bernt Hugenholtz, 'Works of Literature, Science and Art' in P Bernt Hugenholtz, A Quaedvlieg and D Visser (eds), *A Century of Dutch Copyright Law: Auteurswet 1912–2012* (Amsterdam:deLex 2012) 44 Cantonal Court Haarlem 7 July 2010, LJN: BN0985 (passport photograph); Court of Appeal The Hague 6 March 2009, KG ZA 08-1667 (striped wall paper); Supreme Court 29 June 2001, NJ 2001, 602 (Impag v. Hasbro); Supreme Court 8 September 2006, NJ 2006, 493 (Timans v. Haarsma en Agricola).

[235] Enrico Bonadio and Nicola Lucchi, 'Introduction: Setting the Scene for Non-Conventional Copyright', *Non-Conventional Copyright* (Edward Elgar Publishing 2018), 6 " Despite such differences, the originality threshold has traditionally been low in many countries".

[236] Feist Publications, Inc. v Rural Telephone Service Co., 499 U.S. 340 (1991), 345.

[237] Romantic originality is a notion invoked in the 18th century literature and copyright law discussions which entails that "the original work […] is unbidden, native to an individual, and comes into being out of nothing. The imitation, by contrast, is laboured over, refashioned from 'pre-existent materials', and therefore does not belong to the individual artist", Robert Macfarlane, *Original Copy: Plagiarism and Originality in Nineteenth-Century Literature* (Oxford University Press 2007) 19.; see also Ginsburg (n 183) 1065 "But we know today, indeed we probably have always known, that this character is neither so virtuosic, nor so individual, as the "Romantic" vision suggests".

[238] "Despite the broad variety of disciplines and perspectives on creativity, however, both aesthetics and creativity studies seem to have in common that they treat creativity and originality as relative or comparative notions (cf. Moran, 2010, p. 75). That is, these notions are used as criteria to determine how one person, product or process stands out creatively against other people, products or processes within the same symbolic domain (Csíkszentmihályi, 1999, p. 316). This is an important observation, because it allows us to understand the

one can rightfully ask questions that Johanna Gibson already proposed – "Are the claims to originality by copyright jurisprudence somewhat disingenuous? Are we seducing ourselves with a concept that is both sublime and ridiculous?"[239] As already mentioned, the test is undeniably subjective. The question whether a work can be recognised as a reflection of a personality of an author, or as a work bearing author's personal stamp, could always be answered in both, equally well argued, ways. Which answer will be given ultimately depends solely on the person making the choice. Thus, Jane Ginsburg's observation that "even within a single jurisdiction, the requisite level of originality may vary with the nature of the work"[240] does not come as surprising.

Moreover, allowing that even the minimal scope of creative freedom can amount to copyright protection, it is safe to say that the threshold is not a very high one. And, having a low threshold naturally results in a very broad and over-encompassing protection. In the words of Sir Hugh Laddie, copyright law seems "to protect nearly every creation of the human mind, be it ever so trivial".[241] Although, as it is already said, such low threshold, due to the inherent subjectivity of the test, seems like the best choice not to wrongfully disregard certain creations from copyright protection, there is a an important issue arising with it. Namely, "when the original threshold is very low,[…], the public domain shrinks."[242]

1.2.2. Copyright and the Public Interest – the fair balance

It has generally been argued that wide and over-encompassing protection can be detrimental to the society. "Fencing off the commons restricts access to the means of expression, thus limiting the scope of debate."[243] "Democracies depend on expressive diversity, and while copyright law does not have the authority to ban expression, it functions as a form of economic subsidy that influences cultural production."[244] Furthermore, restricting access can hinder flourishing and

fundamental difference with the way in which originality and creativity are applied in copyright law. There, these notions are treated not as relative or comparative, but as independent, normative concepts" van Gompel (n 220) 102.

[239] Gibson (n 209) 416.

[240] Ginsburg (n 183) 1076.

[241] Hugh Laddie, 'Copyright: Over-Strength, over-Regulated, over-Rated?' (1996) 18 European Intellectual Property Review 253, 257.

[242] Ryan Littrell, 'Toward a Stricter Originality Standard for Copyright Law', (2002) 43 B.C. L. REV. 193, 217 as cited in Lavik and van Gompel (n 4) 392.

[243] Ryan Littrell, 'Toward a Stricter Originality Standard for Copyright Law', (2002) 43 B.C. L. REV. 193, 216 - 217.

[244] Lavik and van Gompel (n 4) 432.

evolution of individuals, hence society's creative potential. Ironically, it can create the very same circumstances (high prices and lack of availability of works) from which the need for copyright protection emerged. There have been arguments and suggestions to raise the originality standard, "the rationale [being] to cultivate truly valuable expression, and to exclude works that do not really merit copyright protection."[245] However, I would not agree with such a solution because of all the reasons already discussed – ineptitude and subjectivity of a decision maker will remain an issue even when the threshold is higher. In fact, it is arguable that a higher threshold would make those notions even more prominent.[246] Similarly, Khatchadourian argues that it is "the function of society […] to provide the conditions that foster the creation, growth, and conservation of all possible values and since good art is a great positive value, furnishing the artist with optimum conditions for artistic creativity is one of society's basic responsibilities."[247] However, he further notes that "from this it does not follow that society has the responsibility to discourage poor art".[248] Not even going into the discussion of what makes art good or poor, what if such "poor art" influences another to make good art? Finally, higher threshold could prove inadequate for certain works due to the variety of creative works and unstructured characteristic of the creative domain.

Hence, it is my view that the balance between the right holders and the public domain should be approached from a different perspective. To be precise, from the perspective of the public interest. It is my view that if we determine which uses are socially valuable, it would then be easier to put them in balance with the rights of the right holders. In the words of Uma Suthersanen, "the role of legislator is to steer a course between these two extremes of over-protection and under-protection by deftly manipulating the instances in which copyright protection is limited."[249] It thus seems that those creating the rules, be that legislators or judges, must ask themselves what is it that we want to achieve and protect by copyright law. As Jane Ginsburg documented, William Cornish similarly expressed such concern: "We should seek to preserve real benefits from copyright laws for the authors in whose name they are granted. They

[245] Lavik and van Gompel (n 4) 426.
[246] "…the effort to identify higher degrees of originality would inevitably bring copyright into the ambit of aesthetics, which is unable to provide sufficiently well-defined and coherent principles and procedures for decision makers. In addition, were courts authorized to grant protection on the basis of what they find valuable, decisions about copyrightable subject-matter would also serve an unfortunate legitimizing function." Lavik and van Gompel (n 4) 390.
[247] Haig Khatchadourian, 'Artistic Freedom and Social Control' (1978) 12 Journal of Aesthetic Education 23, 23.
[248] Khatchadourian (n 247) 24.
[249] Uma Suthersanen, 'Copyright and Educational Policies: A Stakeholder Analysis' (2003) 23 Oxford Journal of Legal Studies 585, 587.

seek to ensure that copyright laws are not mere pretexts for protecting the investment and entrepreneurial initiative of their exploiting partners. Why after all do we continue to have copyright laws which derive their legal and moral force from the act of creativity? Why do we not just have producers' investment laws?[250]

Similarly, Jane Ginsburg, by advocating the shift of focus to the author, proposes re-establishment of copyright as a "system designed to advance the public goal of expanding knowledge, by means of stimulating the efforts and imaginations of private creative actors".[251] Jessica Litman goes even further stating that "a vigorous public domain is a crucial buttress to the copyright system: without the public domain, it might be impossible to tolerate copyright at all".[252] It seems, thus, that a battle long time ago held in the British Parliament in 1841 between Lord Macaulay and Thomas Talfourd still persists. "The system of copyright has great advantages and great disadvantages; and it is our business to ascertain what these are, and then to make an arrangement under which the advantages may be as far as possible secured, and the disadvantages as far as possible excluded….It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated…"[253] Not having honest and reliable foundations of copyright law provides fertile ground for critics such as Foucault who in his essay "What is an Author?"[254] through analysis of functions of an author proposed a view that designation of an author merely serves as "a means of classifying, limiting and controlling the circulation of ideas."[255] The justifications for copyright law protection thus need to be discussed.

1.2.3. Justifications of Copyright Law Protection

[250] Ginsburg (n 183) 1091.
[251] Ginsburg (n 183) 1068.
[252] Jessica Litman, 'The Public Domain' (1990) 39 Emory Law Journal 965, 977.
[253] Thomas Babington Macaulay, 'The Miscellaneous Writings and Speeches of Lord Macaulay Vol. 4 (of 4)' < https://www.gutenberg.org/files/2170/2170-h/2170-h.htm> accessed on December 15th 2021.
[254] Michel Foucault, 'Authorship: What Is an Author?' (1979) 20 Screen 13, 19. " Consequently, we can say that in our culture, the name of an author is a variable that accompanies only certain texts to the exclusion of others: a private letter may have a signatory, but it does not have an author; a contract can have an underwriter, but not an author; and, similarly, an anonymous poster attached to a wall may have a writer, but he cannot be an author. In this sense, the function of an author is to characterize the existence, circulation, and operation of certain discourses within a society.".
[255] Michael Hanchett Hanson, 'Author, Self, Monster: Using Foucault to Examine Functions of Creativity.' (2012) 33 Journal of Theoretical and Philosophical Psychology 18, 22.

When analysing the position of the author and the emergence of copyright law in the 18th century, we have already briefly encountered the question whether authors should be given property right in their creations and different arguments were put forward. Due to its complexity and the unpredictable and rapid development of technology, the question, nonetheless, remains open. Moreover, it is entirely plausible that one can find himself in favour of existence of copyright law protection for the content creators, yet also in belief that parts of existing legal protection remain unjustified.[256] For example, Lawrence Lessig is of the opinion that current legal protection gives too excessive control to the content creators, which in the end has detrimental effects on innovation and well-being of other persons.[257] That is why this question requires a more thorough analysis. Namely, as Himma points out when discussing the rationale of intellectual property law, the question raises two ethical issues;[258] "first […] whether authors have a morally significant interest (i.e., one that receives some protection from morality) in controlling the disposition of the contents of their creations, which would include some (possibly limited) authority to exclude others from appropriating those contents […and…] the second […] whether it is morally permissible, as a matter of political morality, for the state to use its coercive power to protect any such interests authors might have in the contents of their creations."[259] In other words, to answer this quite intricate question, one essentially must consider interests of both sides - of the authors, but also of the society as a whole.[260] Moreover, historical overview has shown us that there is also a third group of interests that needs to be taken into account, the interest of investors and intermediaries. Namely, they played a significant part in the emergence of copyright law itself and it is important to analyse their position and possible changes they have undergone. In the following paragraphs, I will also slightly touch upon the normative theories of copyright law protection[261] - the natural law argument and the utilitarian argument.[262] However, it is important to state at the beginning that the representations of those theories are undeniably oversimplified and consequently

[256] Kenneth Einar Himma, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes' (2008) 59 Journal of the American Society for Information Science and Technology 1143, 1143.
[257] Lawrence Lessig, *The future of ideas*, (Random House 2001).
[258] Himma is talking about Intellectual property law protection in general, nonetheless it is applicable to copyright law as its branch.
[259] Himma (n 256) 1143.
[260] Himma (n 256) 1156.
[261] Sganga (n 11) 18 "Normative theories point to the philosophical or economic reasons that compel legal systems to protect authors, set the objectives of copyright, and provide the rationales to guide legislative drafting and orient the application of existing rules, defining the direction and priorities of a given regime".
[262] See also Hurt and Schuman (n 16) who group the justifications "under two headings: (1) those which are based on the rights of the creator of the protected object or on the obligation of society toward him and (2) those which are based on the promotion of the general well-being of society".

incomplete. Namely, it is my view that it is far more important to understand the underlying interests of the subjects involved, as none of the theories are solid enough to be used as a sole basis for copyright law protection. Namely, both arguments are cumulatively more or less present within the current copyright laws in a way that they complement each other[263] and it is, thus, a matter of legislator to choose on which model and to what degree will it base its copyright law.

Starting from the author's point of view, we need to look again at the creative process. Namely, the creative process requires time and effort. This can obviously vary. Every author has his/her own subjective creative process when creating a work. The creative process can depend on the type of the work, yet it can even be different for works of the same type. For example, drawing a mural usually requires significantly more time and work than writing a poem. However, that does not have to be the case with every mural. Moreover, writing one poem could require more time and effort than writing another. That does not mean that those requiring more time are more valuable or creative, it just means that it took more time and effort for the author when making it. It also means that the more time and energy the author invested in creating the work, the more time and energy was diverted away from other activities.[264] Moreover, it is also important to note that usually prior to the creative process precedes a period of author's education and honing of skills that have allowed him to be at the certain stage of creativity. Namely, as it was already discussed, creativity is not a pure result of individual genius and there has been considerable evidence from the area of psychology of creativity that hard work and intrinsic motivation together with the support of the environment play a central role in the individual creativity.[265] Hence, the point I want to make is that creation for an author creates certain cost and it is rationally and morally acceptable for an author to have an interest in reimbursing those costs. If not, an author will probably reconsider how much time and energy is he/she willing to invest in developing creativity.[266] However, it is important to note that,

[263] Sganga (n 11) 19 "None of the current legislative models are influenced by a single normative theory, but rather show the signs of their prismatic interplay. Even if it is true that the droit d'auteur model bears more natural law traits, while utilitarianism emerges more in the copyright system, the two regimes are in fact converging, particularly due to their supranational standardization".
[264] Himma (n 256) 1156.
[265] „Although laypeople and creativity theorists often make the assumption that individual creativity depends primarily on talent, there is considerable evidence that hard work and intrinsic motivation-which can be supported or undermined by the social environment-also play central roles" Teresa M Amabile, 'Beyond Talent: John Irving and the Passionate Craft of Creativity' (2001) 56 American Psychologist 333, 333.
[266] "It seems fairly clear that without some device to assist authors in receiving compensation for their services, some works with high costs of creation, as well as literary creation induced by the expectation of incremental income from subsidiary and reprint rights, may not be produced at all" Hurt and Schuchman (n 16) 426.

although this interest is a legitimate one, this correlation between creativity and reward should not be taken as absolute. Namely, as it was discussed before, what simulates creativity is an open-ended question and many authors pursue it for reasons other than reward.

1.2.3.1. The natural law argument

1.2.3.1.1. The Lockean argument

The argument of the process of creation being time and effort consuming is very much relied on when it comes to justifying the existent copyright law protection. It was in its own form firstly put forward by philosopher John Locke in the 17th century, just before the enactment of the first Copyright law statute. Locke's argument starts from the idea that humankind was entrusted with abundant natural resources open to use for everyone. However, to transform those natural resources into usable goods, one had to apply additional effort, labour.[267] Such product of his labour thus belongs to the man and "it is the labour that legitimates the individual appropriation of the resource."[268] Namely, a person is an owner of his body, thus of his labour, thus of the products of his labour. The idea, however, relies on the premise that "there are enough unclaimed goods so that everyone can appropriate the object of his labour without infringing goods that have been appropriated by someone else."[269] Although, Locke bases the appropriation on the idea of justice to receive the rewards of his/her labour, an underlying utilitarian argument is also present. Namely, Locke suggests that granting property right will in fact "increase the common stock of mankind."[270] This argument has been rightfully recognised by Justin Hughes as problematic because if one becomes an owner of the products of his labour, then those products do not form a part of common stock available for everyone else to use. Additionally, he suggests that if those products were free to use for everyone, it is hardly conceivable that a labourer would be willing to invest effort. However, that premise was further elaborated by Locke by introducing the "non-waste" condition which prohibits the appropriation of goods that would not be consumed by their owner. It is that surplus that then becomes a part of the common stock.[271] Applying the analogy to copyright law, an author is the

[267] Justin Hughes, 'Philosophy of Intellectual Property' (1988) 77 Geo. L.J. 287, 297.
[268] Sganga (n 11) 20.
[269] Hughes (n 267) 297.
[270] John Locke, "Second Treatise of Government", § § 138-40, in *Two Treatises of Government* (P. Laslett rev. ed. 1963) (3d ed. 1698) §37 as cited in Hughes (n 267) 299.
[271] Sganga (n 11) 21.

owner of his work because he/she has put effort and time into making it. An author, by putting effort through the creative process, gave an idea (which is considered as an abundant resource free to use) its own form and expression. It is assumed that such new expression entails a new idea (surplus) which becomes common and free for further use.[272] Thus, the condition of having good and enough resources for others to appropriate is perfectly fulfilled as there are vast number of ideas unceasingly available for others to use it.

Considering the two above mentioned issues, the theory adequately recognised the interest of an author for a reward as a morally acceptable and legitimate one. However, it falls short when considering whether it is socially permissible for the state to create and protect a property right which could exclude everyone else from enjoying the products of his/her creation. Moreover, there are numerous open questions that the theory leaves without an answer. What if the author gives an idea a new expression, while the idea remains the same as the one already available? Would that than be considered as an added value and would one want to incentivize such labour? Then again, the author is undeniably influenced by many great predecessors, so what exactly is the product solely of his labour? I would hence agree with Himma and conclude that "[e]ither way, this argument does not clearly succeed in justifying *material* property rights. One might plausibly think that we simply forfeit the expenditure of our labor property *and* the value we create when we labor on some object that does not belong to us. If I swim out to the middle of the Atlantic Ocean and somehow fence off a portion and improve it by cleaning it of all pollution, most people will agree that I do not thereby acquire a property right in that portion of the ocean. The claim that I own my labor, even if true, does not imply that I own whatever material entities I mix it with or use it to improve."[273] Moreover, the theory can be put to critique because it completely disregards the nuances and individuality of the creative process, merely analysing the creative works as products for commercial purpose and consumption. In the words of John Dewey: "The comparison of the emergence of works of art out of ordinary experiences to the refining of raw materials into valuable products may seem to some unworthy, if not an actual attempt to reduce works of art to the status of articles manufactured for commercial purposes. The point, however, is that no amount of ecstatic eulogy of finished works can of itself assist the understanding or the generation of such works."[274]

[272] Hughes (n 267) 316.
[273] Himma (n 256) 1154.
[274] Dewey (n 36) 28–29.

1.2.3.1.2. The Kantian and Hegelian argument

In that regard, the other notion coming from the author's point of view, nonetheless, takes the position that the creative process is, undeniably, a subjective and personal one. As already set out by German philosopher Fichte in the 19th century, the author through creation gives its own thoughts certain form. In a way, through the creative process, an author makes his inner world present in the real world. The creation can thus be considered as an expression of the author's soul or authentic self, as an emanation of one's personality. In that respect, one can find it legitimate that an author would have an interest in controlling the use of his/her work, in a sense that it prevents denigration or misappropriation, as well as an interest to seek recognition of authorship. It is my reading that Kant proposed such a view when stating that with his texts he starts a discourse with the audience. He considered the control, hence, to be the author's innate personal right. Moreover, a historical overview has showed us that an interest to be recognised as an author was also very much present in the ancient culture and beyond. However, it is hard to deem socially acceptable that on this argument alone, one could base a property right. Regardless, this argument is also very much present in the current copyright law debate and is usually associated with the German philosopher Hegel who put forward a theory that such a connection justifies recognition of property right in creation. Namely, it is Hegel's view that "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self."[275] At the core of the Hegel's theory lies person's will that constantly needs to actualize itself in the reality. According to Hegel, a person's will is the most important notion "in which thought and impulse, mind and heart, 'are combined in freedom.'"[276] A personality is then considered as will's struggle to actualise[277] and it is, thus, a first actualisation of the will. It is through personality that internal world of a person reaches its existence in the outer world. "To this end, the will has to appropriate material portions of the world, transforming them into external manifestations of the self by seizing, shaping or marking ownership of them."[278] Thus, it is the author's right to have property of such expression, as it is nothing by an emanation of self.

[275] Hughes (n 267) 330.
[276] Acton, 3 The Encyclopaedia of Philosophy, Hegel, Georg Wilhelm Friedrich 442 (1967 ed.) as cited in Justin Hughes, 'Philosophy of Intellectual Property' (1988) 77 Geo. L.J. 287, 331.
[277] Hughes (n 267) 330-331.
[278] Sganga (n 234) 23.

The theory remains nonetheless purely author-centric and although, similarly as the Lockean one, recognises a morally acceptable and legitimate interest of an author, it again fails to provide a substantial and acceptable justification of an exclusive property right. It provides no answer on the possible transformative uses of the works and it sets no limits to author's control. As Himma points out, we can all agree that an outfit reflects a person's style and, hence, personality. Yet it is not deemed socially acceptable that the person than has an ownership claim in that outfit. Not every expression of personality can amount to a property claim.[279] Moreover, as with the time and energy, it is safe to say that not every work will be considered as portraying the same amount of the author's self. An example of works made for hire quickly come into mind. Namely, an author is then to a certain extent directed by the thoughts of someone else, and although the creation will receive form as the author envisioned it, the input made by another author cannot be disregarded. Finally, how could one even determine whether a work reflects the author's personality? The problem has already been discussed as the wording of EU standard of originality indisputably relies on the theory. However, its case law suggests that the Court is not, nor it will ever be, prepared to delve into this philosophically deep question. Thus, it is my opinion that this theory, is unfortunately also of very little pragmatical importance.

1.2.3.1.3. Authorial interests within the justifications

Following all this, one can argue that both groups of interests are recognised by current copyright law. Namely, the interest for a reward is given protection by granting author's economic rights, while the interest of authorship recognition, maintaining integrity and discourse of the work can be said to be recognised as author's moral rights. However, it must be noted that today's copyright law generally recognises four individual economic rights – right of reproduction, distribution, communication to the public and adaptation. It is my judgment, however, that these rights have more to do with the protection of the investment rather than protecting solely the author's interests. Namely, the historical overview provided us with insight that from very early times, authors desired wide transmission of their works. As Plant describes "Erasmus went to Basle in 1522, not apparently to expostulate with Frobenius for daring to print his manuscript writings, but to assist the printer in the good work. The wider the circulation, the more universal the recognition the author would receive."[280] Thus, it is hard for

[279] Himma (n 256) 1155.
[280] Plant (n 13) 169.

me to imagine that authors would have the sole interest of having control over copying of their works regardless of getting the reward. The patronage system is a perfect example of a system in which authors got their reward and were hence liberated from any further economic concerns regarding the use of their works. I do not say that patronage is, hence, a better system than copyright law, but its longevity proves its efficiency when it comes to authors' interests for reward. Moreover, as Hurt and Schumann point out, some works require a costly creative process and the reward that would incentivise such works is more helpful if not given after (as copyright does), but during the creative process.[281] The interest to control copying and distribution was from the very beginning of copyright law more akin to investors, publishers and booksellers, who wanted to prevent competitors from copying their editions. It was then argued that such control is necessary for their willingness to invest in art production, and it is obvious that it is more of an interest of protection from unfair competition, rather than an interest of rewarding authors and incentivizing creativity. Again, creativity is a part of humanity and there will be art as long as there are humans. However, at that time publishers played an important role in contribution to the cultural scene by providing the audience with copies of the works that would otherwise be inaccessible to the largest part of society. Moreover, the Statute of Anne was thus primarily enacted "for the encouragement of learning".[282]

However, one must ask whether publishers' position and role has changed. Namely, just as printing press eventually transformed the socio-cultural setting at the time, the same, if not even more, can be said for internet. Internet and digital technologies have caused considerable changes when it comes to the relationship between the author, the audience, and the intermediaries. For example, if one wants to write a book, there is nothing preventing him from doing it. It is quite accessible to get to the computer and write it. Even if one does not own a computer, it can be assumed he/she will manage to find one (friends, library, etc.). Moreover, once the book is written, it can be shared with the audience online without any need for intermediaries. The work is thus available to anyone (who has internet access) according to the conditions set out by the legislation and the author. More importantly, digital dissemination requires no significant cost. Once it is online it can be downloaded and multiplied indefinitely without any additional cost that was previously entailed with printing and further circulation of

[281] Hurt and Schuchman (n 16) 426.
[282] It was proclaimed as such in Preamble "an Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies of printed books in the authors or purchasers of such copies, during the times therein mentioned" as cited in Davies (n 14) 4.

hard copies. However, the question is then how many people will actually visit the website and become aware of the existence of the book, let alone read it? This is where the role of intermediaries comes back in the picture. The role has, however, changed.[283]

Let us take an example of the academic journals. Scholars throughout the world write articles for numerous reasons including the desire for further promotion and academic advancement. Namely, to be eligible for an academic position at a university, one must publish certain number of articles in the journals of certain level of evaluation or rank. So, an author submits his work to the publisher of the journal. The publishers then have the cost of organising the peer-review process and (possibly) further hard copy printing. The author is usually not given any fee. On the contrary, there are even journals encumbering the cost upon the authors themselves, as they require a fee for the publication. Furthermore, for a publication to occur a contract must be signed and that requires a certain transfer of rights (reproduction, distribution, making available online) from the author to the publishers. While it is true that authors willingly enter such contractual arrangements, it is worth noting that authors are rarely given any pecuniary reward[284] from the publishers, and if they are, it is still insufficient for covering the cost of their research. The reward they might be given is potential satisfaction and feeling of pride or accomplishment for publishing a work in a journal of certain academic prestige, and eventually a higher academic rank. The pecuniary reward for the authors is given by universities as their employers, but, nonetheless, it does not come from the copyright law system. On the other hand, publishers are very eager when it comes to ensuring the protection of the rights transferred to them. They make works available either online or in hard copy. To get the hard copy, one must traditionally buy it, while to access the works online, one must often pay a subscription and agree with the set terms and conditions. The subscriptions are quite expensive for an individual, so it is normally universities or other similar institutions who can afford them. The paid subscription grants access to certain repertoire of works, depending on the chosen subscription. The access is also technologically protected to prevent unauthorised access or use of the works. Unauthorised use, however, does not necessarily coincide with the unlawful use, so the question that follows is when has such absolute control of the disseminators became morally acceptable for the society, especially when on the other side is not a morally significant interest of the

[283] See an interesting analysis of a change Mark Coker, 'Do Authors Still Need Publishers?' (*HuffPost* 18 March 2010, updated 25 May 2011) https://www.huffpost.com/entry/do-authors-still-need-pub_b_334539 last accessed 7 January 2022.
[284] "… most articles in the scholarly journals are submitted without pecuniary compensation" Hurt and Schuchman (n 19) 426.

author, responsible for creation. Following the above, our academic world seems to ensue universities paying its employers for research and writing and at the same time paying the subscriptions to the publisher so that their students and staff have access to ideas and knowledge published by their colleagues.[285] That undeniably creates significant cost, which is then spilled over to students who need to pay high tuition fees to gain education. [286] There is nonetheless, the social contribution of publishers present, if nothing else than in organising peer review and choosing what will be published. However, it is my opinion that such contribution does not justify absolute control given to them by the protection of technological protection measures. Especially, since, firstly, authors do not get the reward that would incentivise their creativity, and secondly, such control even prevents access needed for further creative flourishment of the humanity. "Traditional copyright justifications […] turn on rewarding or incentivizing a creator. The only difference is that instead of the public directly paying the artist a high price for her work, the public pays the distributor, and the distributor in turn pays the artist for the right to exact that high price from the public. Thus, the crux of any copyright justification is the claim of the artist, whose economic argument in turn is a purported need to incentivize creative activity."[287] This notion will be further discussed in greater detail in the subsequent parts of this thesis. It is mentioned here as, to my judgment, it is of crucial importance to bear in mind the positions and interests of disseminators/intermediaries involved when talking about justifications of copyright. Because, if copyright law system is merely used for upholding the publishing industry, then it is entirely futile to talk about any justifications arising from the notion of the author.

Moreover, the online environment and the emergence of the digital market created additional players in the field – platforms and online service providers who offer digital goods online (including intellectual content) such as Netflix, Amazon, Spotify etc. Their position is to certain extent similar to the above-described position of publishers in a sense that they offer a collection of works online. Access, however, could be free (e.g. YouTube) or based on a subscription paid by the user (e.g. Spotify, Netflix). The access is also usually accompanied by technological

[285] For a detailed view of academic publishing in digital environment see Vincent Larivière, Stefanie Haustein and Philippe Mongeon, 'The Oligopoly of Academic Publishers in the Digital Era' (2015) 10 PLOS ONE <https://dx.plos.org/10.1371/journal.pone.0127502>.
[286] Are we still dealing with the same problem from the 18th century when Lord Camden, being against perpetual common law copyright, proclaimed that "all our learning will be locked up in the hands of the Tonsons and Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are." 17 Parl. Hist. Eng., [HL 1774] at 1000. as cited in Davies (n 14) 32.
[287] Wendy J Gordon, 'The Core of Copyright: Authors, Not Publishers' (2014) 52 Houston Law Review 613, 668.

protection measures which ensure the enforcement of the terms and conditions of the agreement. Such intermediaries are nevertheless users of the work obliged to pay the fee. However, the remuneration rates seem to be extremely low. Spotify's per stream royalty, for example, not only is it low, yet it also varies among countries. For example, in Croatia it amounts to 0.001431802337 USD, in Spain 0.002396313677 USD, while in Netherlands 0.004357449181 USD.[288] Undeniably such platforms fulfil the author's interest for reaching wider audience and the society's need for availability of intellectual content. However, by providing such rewards, are we creating the environment that basically disregards the authors, the creators of that very content? The situation is, nonetheless, far more complex than just painting the streaming services as bad guys punishing the exploited authors. Spotify has stated that 70 percent of their revenues has been paid in royalties to right holders (which includes not only authors but also performers and discographers), thus it is arguable that higher rates could make such service economically impossible. Moreover, the small revenue ultimately afforded to authors was also a result of previous contracts with the discographers in which this type of use was not specifically regulated.[289] Nevertheless, the question whether copyright law provides satisfactory reward to authors in such environment persists and one can rightfully pose the question whether copyright law is slowly losing the link to its original and proclaimed foundations. Furthermore, as an increasing amount of content is being available and thus "locked-up" on such platforms, are we at the same time completely ignoring the public interest on the other side? Are we allowing access only to those who can afford it and only in countries deemed economically viable for provision of such service?

1.2.3.2. The utilitarian argument

If it weren't for users' desire for intellectual content, there would be no need for further discussion. So, it is safe to say that the society as a whole has an interest of having intellectual content available. However, it is hard to specify the purpose underlying the users' desire. Namely, copyright law encompasses quite a broad and diversified set of works. One could desire access for the purpose of education, the other would require access for the purpose of

[288] Igroove 'How much do I get per stream on Spotify? – 2021 edition' (*igroovemusic.com*, 28 June 2021) <https://www.igroovemusic.com/blog/how-much-do-i-get-per-stream-on-spotify-2021-edition.html?lang=en> accessed 6 January 2022.

[289] Patrik Wikström 'The music industry in an age of digital distribution (BBVA open mind, 2014) <https://www.bbvaopenmind.com/en/articles/the-music-industry-in-an-age-of-digital-distribution/> accessed 6 January 2022.

entertainment, while the third one could want it for the purpose of advertising. That also does not necessarily depend on the type of the work. For example, while movies are usually watched for the purpose of entertainment, if they are watched by art students learning to be future film directors, actors, costume designers etc., one could agree that then they are also being watched for the purpose of education and consequently for further creation. Similarly, journal articles could be read by professors and researchers for further research, but also by students for the purpose of learning and widening their knowledge. Moreover, a law student can also have an interest in literature or psychology and would like to read more about it. Although it might not strictly help him professionally, it could, nonetheless, have an impact on his development as a human being. It could broaden his horizons and open him to new ideas and ways of thinking. It might even stir him to create his own original work.

These examples are just a tiny bit of vast number of different purely legitimate and desirable interests of members of society when it comes to creative intellectual content. Purposes, being just as various as types of works, are, however, hard to be properly evaluated, in a sense of which purpose should be given protection by law and to what extent. In other words, just like it is hardly conceivable that the author's interest can lead to an exclusive property right with no exceptions, it is also hard to imagine that any of the society's interest would amount to an absolute right. Thus, it seems inevitable that to achieve an equilibrium of interest of authors and society, a careful balancing is required by the law makers, be that the judges or legislators. However, it must be noted that achieving such equilibrium is an incredibly burdensome, downright impossible task. Namely, if all the circumstances are not properly considered, copyright law protection could amount to a systematic deficiency, and digital environment seems to create a high potential for that to be the case.[290] For instance, "restrictions on the use of artistic content make it less available to persons with lower incomes and thereby either diminishes their pleasure, deprives them of a basic good needed for them to flourish, or frustrates their preferences."[291] Copyright law today usually recognises the importance of interests of a society as a whole through regulation of its limitations and exceptions, among other things.[292] In that respect national systems could be divided in two groups. The first group

[290] See further Stefan Kulk *Internet Intermediaries and Copyright Law: EU and US Perspectives* (Kluwer Law International 2019)
[291] Himma (n 256) 1151.
[292] "…exceptions are not the sole mechanism within copyright law to ensure such reconciliation. […] Yet, in a system characterised by long-lasting and wide-ranging exclusive rights, covering almost every conceivable use of a work, exceptions may be rightfully considered the tools par excellence for attaining that balance of interests. They are, as James Boyle tastefully put it, 'the holes [that] matter as much as the cheese'" Tito Rendas, *Exceptions*

entails systems which have an open-ended clause not specifying the exact conditions and purpose of the use (e.g.US fair use,), while the second group entails systems with specific rules regulating conditions and purposes of use of the work. The rapid technological changes seemed to show that the first open-ended approach, being more flexible, was more adequate to answer the questions for which the legislator's reaction is too slow and thus too late. Moreover, flexibility allows courts to take all the circumstances of the case and make an appropriate balance of the conflicting interests. On the other hand, it is often argued that specific limitations are considered as a better approach from the aspect of legal certainty. Subjects, being acquainted with the uses that are considered desirable, could be more prone to exercise such use than to take the risk and possibly wait for a judgment to decide on its legality.[293]

The historical overview showed us that interests of society were of significance not only from the beginning of copyright law, but also from the very first recorded creative works. In fact, the other normative theory of copyright law, the utilitarian argument, justifies copyright protection by taking the position of society as crucial. Namely, it justifies copyright protection and reward for creating the work, because it is socially desirable to have abundance of creative works. In other words, the reward for the author is desirable to the extent of its role in pursuing higher social goal.[294] It does not go into analysis whether each work is socially valuable, but is more focused on a general level, on the system. The theory itself does not determine what the higher social goal is, hence, leaving the decision up to the policy makers. Such approach thus leaves the space for steering the balance in favour of science and research, richer cultural production, education, or any other purpose. One of the most recognisable copyright law systems relying on this approach is the USA's, whose Constitution clearly states that "The Congress shall have power 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".[295] However, there are nonetheless two important issues following this theory. First, the vagueness of a higher social goal, can prove problematic if the interests of the society as a whole are disregarded and priority is given to the interests of the loudest and politically strongest groups or individuals and, second, there is no way to adequately assess the corelation between legal regulation and the desired goal, hence legislation could be put forward under the premise of

in EU Copyright Law In Search of a Balance Between Flexibility and Legal Certainty, vol 45 (Kluwer Law International 2021) 4.

[293] On the more thorough analysis of the limitations and exceptions, see Chapter 2.

[294] Sganga (n 11) 26.

[295] Article 8, Section 8, Clause 8 of the Constitution of United States of America.

fulfilling the higher goal, while at the same time pursuing other interests, or being completely ineffective regarding the proclaimed goal. As Hurt and Schumann point it out "here we enter an inconclusive area of speculation".[296] In fact, it has been questioned whether copyright law incentivising creativity is purely a myth which we tacitly decided to accept.[297]

One of the derivatives from the utilitarian argument, arising from the setting of neoliberal capitalism, is a theory recognised under the name of economic argument or rationale of copyright protection. The argument starts from the idea that creative works are socially valuable, and it is thus in the public interest to stimulate their creation. To achieve that goal, the argument relies on the strong proprietary entitlements of authors in their works. Namely, property rights to be economically efficient need to be exclusive, transferable, and enforceable. Exclusivity allows the owner to control and solely enjoy profit of the use of the work, transferability allows good market allocation, as it allows the owner to transfer the use of the work to the one who would use it more efficiently, and enforceability guarantees the owner the exclusion of everyone else.[298]

To my judgment there are two problems arising with such notions. Firstly, it assumes that profit making is the sole vehicle to incentivise creativity. However, as we have discussed previously, that is not nor has ever been the case.[299] While there is a usual interest of the author for an award, the authors have rarely been prompted to create primarily for the reason of profit maximisation.[300] One might argue that such interest in the reward could gain more importance as the socio-cultural setting of neoliberal capitalism puts high regard to the value of the money. Namely, previously artists seemed satisfied with social recognition and award given through the patronage systems, and today we have pop stars, best-seller writers etc., whose success

[296] Hurt and Schuchman (n 19) 432.
[297] See e.g. Diane Lennheer Zimmerman, 'Copyrights as Incentives: Did We Just Imagine That?' (2011) 12 Theoretical Inquiries in Law 29.
[298] Lucie Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 13.
[299] see e.g. Cohen (n 53) 1152 "Economic theorists of copyright work from the opposite end of the creative process, seeking to divine the optimal rules for promoting creativity by measuring its marketable byproducts. But these theorists offer no particular reason to think that marketable byproducts are either an appropriate proxy or an effective stimulus for creativity (as opposed to production), and more typically refuse to engage the question. The upshot is that the more we talk about creativity, the more it disappears from view. At the same time, the mainstream of intellectual property scholarship has persistently overlooked a broad array of social science methodologies that provide both descriptive tools for constructing ethnographies of creative processes and theoretical tools for modeling them."
[300] „…arguments seem to presuppose falsely that the only incentive there is to create content is material; academics and artists frequently create content without believing that they are even remotely likely to get paid for it." in Himma (n 256) 1153.

seems to be measured by number of sold books, albums, or concert tickets. Nevertheless, the notion of an author is still very much diverse, and those superstars accrue to less than 1 per cent. Moreover, it is hard for me to imagine that even the superstars make creative works for the pure reason of profitmaking. Secondly, the argument disregards the public interest on the other side. Namely, it values uses and purposes strictly from the view of profit maximisation. Exceptions and limitations to copyright are seen as legislative transfers of the right to use on another person. They will be acceptable only if such use proves to be more efficient and pursues "socially optimal allocation or reduc[es] or eliminat[es] transaction costs."[301] Such view is utterly inadequate to achieve a balance of conflicting interests. For instance, a pupil in school may use a photo taken from the internet in his school presentation. Following the economic argument, this use will not be of quality to produce higher profit than it can be produced by the author himself, so there is no value to such use. Hence, a user is expected to pay the fee to the author if the author is willing to give an approval for such use. The fact that the use was taken within the educational environment for the purpose of education and personal formation thus seems to be completely irrelevant, as those interests cannot be properly assessed in that regard. The view that "the social good will be maximised by maximising the reach and frequency of market transactions […] seeks to bring all human action into the domain of the market."[302] Thus in the words of Nick Grant "something as innocent as delight in learning, or the joy of play, can only confront the neoliberal as a challenge or threat, something to commodify, to turn from an intrinsic good into a saleable good, giving it a price before exchanging it for private gain."[303] Given that the EU copyright legislation was enacted "for the establishment and functioning of the internal market", [304] this argument has been relied on[305] to certain extent by the EU and this will further be discussed in Chapter 3 of this thesis.

1.2.4. Conclusory remarks

To conclude, this Chapter provided an insight that creativity is a concept inherent to humanity. What stimulates creativity will thus remain an open question rightfully answered by an

[301] Wendy Gordon 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 Columbia Law Review 1600, 1600 as cited in Sganga (11) 30.
[302] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 3.
[303] Nick Grant, „Foreword" in Dave Hill and Ravi Kumar (eds), *Global Neoliberalism and Education and Its Consequences* (1st edn, Routledge 2008), xii.
[304] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Article 114 (1).
[305] Sganga (n 11) 31.

inconclusive number of proposed answers and explanations. In that respect, the notion of an author, as a creator of the work and the bearer of the creativity, is similarly open. How each person approaches the creative process and gives his/her thoughts and emotions certain form, and expression is utterly unique, individual and subjective, sometimes even indescribable.[306] Moreover, each person has a unique path to developing skills, talent, and creativity. Creativity is not a product of a mere genius, yet it is very much result of the hard work and motivation one invested in it, propelled further by the support of the environment. Thus, if it is our goal as a society to have as much creative works as possible, then it is our job to ensure conditions for such honing of the creativity. On the one hand, we must ensure that authors are properly and adequately rewarded, while on the other, we must ensure that the public, consisting of numerous potential future authors, has the access to works of its predecessors. The phrase 'standing on the shoulders of the giants'[307] best describes how much knowledge and understanding provided by our predecessors is vital for intellectual or creative progress of the society. Putting these two goals in balance is, in my opinion, the main task for copyright law to achieve. Hence, the role of intermediaries must be assessed only with respect to their contribution in that regard. Protecting investment as such regardless of its contribution cannot be justified by copyright law. Digital transmission and technology development have in effect provided authors, or better say rightsholders, with almost complete control of the works online, allowing the balance to go in their favour. In order to re-establish that balance, it is my view, that the system should start focusing on the socially desirable and much needed public uses, especially when, due to the low and vague standard of originality, it potentially covers every work within literary, artistic and scientific domain. That is why the regulation of the limitations and exceptions and the protection given to covered uses is of crucial importance.

[306] "When asked to discuss the source of their inspiration, individual artists describe a process that is intrinsically ineffable." Cohen (n 53) 1151.

[307] "The best-known use of this phrase was by Isaac Newton in a letter to his rival Robert Hooke, in 1676: "What Descartes did was a good step. You have added much several ways, and especially in taking the colours of thin plates into philosophical consideration. If I have seen a little further it is by standing on the shoulders of Giants." Newton didn't originate it though. The 12th century theologian and author John of Salisbury used a version of the phrase in a treatise on logic called Metalogicon, written in Latin in 1159. Translations of this difficult book are quite variable, but the gist of what Salisbury said is: "We are like dwarfs sitting on the shoulders of giants. We see more, and things that are more distant, than they did, not because our sight is superior or because we are taller than they, but because they raise us up, and by their great stature add to ours." The phrase may even pre-date John of Salisbury, who was known to have adapted and refined the work of others." Phrases.org <https://www.phrases.org.uk/meanings/268025.html> accessed 10 January 2022.

Chapter 3 – The Social Dialogue

2.1. Introduction

Art, or in fact any other creation, has no life, meaning, nor value if it is left without its audience.[308] For instance, a poem, if it remains hidden within the poet's writings, is merely a collection of dead letters on a paper. Only when it finds its first reader the poem is brought to life as it becomes a contributory part of culture and, hence, human creative history. The same could be applied to any kind of scientific or theoretical thought, if it remains hidden in the mind of the author, it will never be subject to evaluation and further exploration. And that could be potentially detrimental to our progress as a society. It is, nevertheless, up to the author to decide whether he/she wants to publish his/her work and make it known to others, since the work in the end is an expression of the author's own internal thoughts and emotions. However, when the work gains its first member of the audience, even if this is only the author's best friend, the work has started communicating with the society. Namely, regardless of any further use of such work, once one has become exposed to a work, that work will nevertheless become a part of him,[309] as the work will inevitably stir emotion, thought or any other reaction within the person exposed to that work.[310] Whether in fact he/she acts upon such reaction and when and how will

[308] The notions of value, life and meaning are used in the sense of cultural contribution.

[309] Wendy J. Gordon, for example, argues that "artists integrate the prior work into themselves" in order to justify the need for borrowing see Wendy J. Gordon, 'Render Copyright Unto Caesar: On Taking Incentives Seriously' 71 University of Chicago Law Review (2004) 75, 84; However, Cohen rightly recognises that such argument "is not an argument that distinguishes between owned and common. It is an argument about social need: about the inseparability of idea and expression and the cumulative, iterative, interactive nature of creative practice" Cohen (n 53) 1201–1202.

[310] "The first great consideration is that life goes on in an environment; not merely in it but because of it, through interaction with it. No creature lives merely under its skin; its subcutaneous organs are means of connection with what lies beyond its bodily frame, and to which, in order to live, it must adjust itself, by accommodation and defense but also by conquest. At every moment, the living creature is exposed to dangers from its surroundings, and at every moment, it must draw upon something in its surroundings to satisfy its needs. The career and destiny of a living being are bound up with its interchanges with its environment, not externally but in the most intimate way." and "Experience is the result, the sign, and the reward of that interaction of organism and environment which, when it is carried to the full, is a transformation of interaction into participation and communication. Since sense-organs with their connected motor apparatus are the means of this participation, any and every derogation of them, whether practical or theoretical, is at once effect and cause of a narrowed and dulled life-experience."; further "An experience has a unity that gives it its name, that meal, that storm, that rupture of friendship. The existence of this unity is constituted by a single quality that pervades the entire experience in spite of the variation of its constituent parts. This unity is neither emotional, practical, nor intellectual, for these terms name distinctions that reflection can make within it. In discourse about an experience, we must make use of these adjectives of interpretation. In going over an experience in mind after its occurrence, we may find that one property rather than another was sufficiently dominant so that it characterizes the experience as a whole. There are absorbing inquiries and speculations which a scientific man and philosopher will recall as "experiences" in the emphatic sense. In final import they are intellectual. But in their actual occurrence they were emotional as well; they were purposive and volitional." Dewey (n 36) 31–32, 47,69-70.

such act occur, remains,[311] however, dependent upon different circumstances surrounding the person. Nevertheless, the work has conveyed a dialogue.[312] In the words of John Dewey: "For as we turn from reading a poem or novel or seeing a picture the effect presses forward in further experiences, even if only subconsciously"[313]

Thus, I will continue the discussion already started in the first Chapter and argue that the process of creation resulting in creative works cannot be severed from the social dialogue conveyed by the work itself. Namely, as it was previously explained, the notion that it is desirable to have abundance of creative works, which is the notion underlying the utilitarian argument of copyright law, must be complemented with the notion that it is desirable to have a social dialogue. Because if there is an abundance of creative works hidden in the author's drawers, that abundance, no matter how creative it might be, serves nothing and thus has no contributory value.

Similarly, if there is an abundance of works that do not stir the social dialogue significantly, it is arguable that their contribution to the human creative history is lesser than those of works that manage to stir it on a higher level. Hence, it is precisely the level of social dialogue stirred by the work that gives the work a certain level of recognition and therefore value. For instance, in academic world today it is deemed important to know how many times an article has been cited in other works. In other words, number of citations shows us how many other authors entered in dialogue with the article and how many in fact deemed that article important for their further creation. This evaluation, however, could lead us back to the question whether protection should than be granted only to works able to convey such dialogue. Theoretically, I would agree. However, the answer, just as it was discussed in Chapter one, the standard of originality ultimately lies in the eyes of the beholder. What provoked reaction in me does not necessarily provoke the same reaction within someone else. Moreover, one work can provoke significant reaction with only one person, while the other could provoke mild reactions within

[311] "At the same time, things retained from past experience that would grow stale from routine or inert from lack of use, become coefficients in new adventures and put on a raiment of fresh meaning." Dewey (n 36) 108.
[312] "Personal dialogues with collective culture begin in childhood, when children imagine themselves into favorite fictional worlds or when they conclude, because they do not see characters resembling themselves, that those worlds have no place for them." Cohen (n 53) 1202 referring to Anupam Chander and Madhavi Sunder, 'Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use' (2007) 95 California Law Review 597; see also "Memories, not necessarily conscious but retentions that have been organically incorporated in the very structure of the self, feed present observation. They are the nutriment that gives body to what is seen. As they are rewrought into the matter of the new experience, they give the newly created object expressiveness." Dewey (n 36) 155.
[313] Dewey (n 36) 231.

numerous people. Again, just as the author is a human being, so are the members of society, and the dialogue conveyed through the work and the member of audience is ultimately personal and individual. The point I, nevertheless, want to make is that flourishment of creativity and social dialogue should be regarded as goals of the same value. Hence, just as it is upon the system to ensure the conditions necessary for the flourishment of creativity, it is also upon the system to ensure conditions in which those creative works can stir proper social dialogue. In fact, as it was discussed already in the previous Chapter on the contours of the creative process, those conditions might prove to be very similar, interrelated and potentially overlapping. That would entail that within a legal system, copyright law should give both notions equal value and only then would a perfect balance be established, the one that reflects the balance inherent in the dynamics of the creative process itself. Currently, that might not be the case, as it will be further discussed in the following Chapter on the EU legal framework.

As it was seen in the first Chapter, all the justifications invoked for copyright protection start from the position of copyright protection (including the utilitarian which, nevertheless, entails understanding that such protection is necessary in the pursuit of higher social goal, it is still primarily focused on the copyright protection). Even the wording "limitations and exceptions" suggest that primary position was given to the copyright, thus taking the position of a rightholder[314] as central and dominant. All the socially desirable uses are, thus, merely regarded as limits to copyright protection. The question is usually not proposed in a way which primarily takes the point of view of members of society. It is never asked whether socially desirable purpose requires curtailing copyright protection. Rather, the question is usually approached from copyright angle asking whether socially desirable use deserves curtailing the scope of copyright protection. Thus, one can argue that such regulation from the start puts the balance in favour of copyright protection, and only in certain special cases does such balance result in the equilibrium.

Nevertheless, although not much focus was given to such understanding of creative process within the legal analysis,[315] this notion of creative process as a dialogue nevertheless correlates

[314] Contrary to the first chapter, in relation to exceptions and limitations, the term "rightholder" rather than "the author" will be used. Namely, when it comes to limitations and exceptions, they are considered as limits to the scope of certain right on the other side. Given that those rights are seldom present within one single person, the author, it is more precise to be using the term "rightholder" instead.

[315] "Social and cultural theories that emphasize the contingent, iterative, and performative development of knowledge are rooted in several philosophical traditions that liberalism has resisted, and of which copyright scholars have remained largely sceptical." See further for brief overview of different social, cultural, psychological or anthropological discussions of creative process in Cohen (n 53) 1166–1167.

with findings that have been long present within philosophical, social, or psychological theories of art and education. Cohen suggests that those findings are not given much thought within copyright legal scholarship because legal scholars are primarily concerned with "constructing overarching normative frameworks" and that "when pressed on the question of engagement with the particulars of creative processes, scholars […] sometimes respond that richer descriptive and theoretical models of creativity do not themselves dictate any particular arrangement of legal rules."[316] While it might be true that individuality and uniqueness of creative process can prove problematic for legislators, it is of my opinion, that that would be the case only if the legislators aim to create the system relying predominately on one factor only.[317] Such system, as already discussed in the previous chapter, would inevitably distance itself from the reality of life it is trying to regulate as the creative process is undoubtedly individual, complex and dependent upon various factors. The discussion of the first chapter on the usually invoked justifications of copyright law, natural rights, and utilitarian argument, already showed us that none of them is capable of providing solid theoretical foundation for entire copyright law system. Natural rights arguments are based on the unfortunately debatable an untested presumptions, while utilitarian argument from the very beginning requires a possibly arbitrary specification of a 'higher social goal' it aims to achieve. The findings from the area of social and humanistic sciences on the creativity and creative process could, hence, provide valuable guidance to fill the gaps, primarily the ones regarding the utilitarian argument. The previous chapter has already relied on those findings to illuminate the motivation of creativity and contours of creative process, focusing predominately on the position of the author as a creator. This chapter, prior to further legal analysis, will do the same, yet the notion of creative process will be perceived from a different angle, that is the angle of society, or users of creative works.

2.2. The creative process as a dialogue

In psychology creativity is seen as notion which entails "the production of something that is both novel and appropriate."[318] The requirement of novelty is sometimes also referred to as originality and it does corelate to certain extent to the previously discussed legal notion of originality. The notion of appropriateness, on the other hand, requires the idea to "be recognized

[316] Cohen (n 53) 1156.
[317] See Chapter 1 part 1.1.1.
[318] Richard E. Mayer, 'Fifty Years of Creativity Research', in Robert J. Steinberg (ed) *Handbook of Creativity* (1999) 449, 449 as cited in Mandel (n 3) 2002.

as socially useful or "valuable in some way to some community".[319] It is my reading that those requirements represent the yin and yang of the creative process in a sense of complementing each other. The first one, novelty, is more focused on the author. It requires the author to put his/her own thoughts in a form. As discussed in the previous chapter, by doing that he makes certain creative choices the result of which is a novel work, which has never been done before in the same manner. The notion of appropriateness, however, then requires the evaluation from members of society, which suggests that creativity without such evaluation is incomplete. "For a technological invention, appropriateness will often require functionality; for artistic expression, it may require the ability to keep the audience's attention or cause a powerful emotional effect."[320]

Similarly, John Dewey asserts two important notions to be considered. First, he asserts that "the work of art is complete only as it works in the experience of others"[321], and second, "because the works of art are expressive, they are a language" and "language exists only when it is listened to as well as spoken."[322] He further elaborates that "language involves what logicians call a triadic relation. There is the speaker, the thing said, and the one spoken to. The external object, the product of art, is the connecting link between artist and audience. Even when the artist works in solitude all three terms are present. The work is there in progress, and the artist has to become vicariously the receiving audience. He can speak only as his work appeals to him as one spoken to through what he perceives. He observes and understands as a third person might note and interpret." Dewey further continues comparing the language of art as any other language. "…They [objects of art] are many languages. For each art has its own medium and that medium is especially fitted for one kind of communication. Each medium says something that cannot be uttered as well or as completely in any other tongue. The needs of daily life have given superior practical importance to one mode of communication, that of speech. This fact has unfortunately given rise to a popular impression that the meanings expressed in architecture, sculpture, painting, and music can be translated into words with little if any loss. In fact, each

[319] R. Keith Sawyer, "Creativity, Innovation, and Obviousness", 12 Lewis & Clark Law Review (2008) 461, 462 as cited in Mandel (n 3) 2003.
[320] Dean Keith Simonton *Origins of Genius* (Oxford University Press 1999), 6; R. Keith Sawyer, "Creativity, Innovation, and Obviousness", 12 Lewis & Clark Law Review (2008) 461, 462 as cited in Mandel (n 3) 2003.
[321] Dewey (n 36) 238.
[322] Dewey (n 36) 180.

art speaks an idiom that conveys what cannot be said in another language and yet remains the same."[323]

The author does not necessarily create with the intention to communicate. "But it is the consequence of his work – which indeed lives only in communication when it operates in the experience of others. If the artist desires to communicate a special message, he thereby tends to limit the expressiveness of his work to others… Indifference to response of the immediate audience is a necessary trait of all artists that have something new to say. But they are animated by a deep convention that since they can only say what they have to say, the trouble is not with their work but those who, having eyes, see not and having ears, hear not. Communicability has nothing to do with popularity."[324]

Moreover, such communication is not a one-time occurrence and in fact it is the crucial feature of maintaining the work's life. "As a piece of parchment, of marble, of canvas, it remains (subject to the ravages of time) self-identical throughout the ages. But as work of art, it is recreated every time it is esthetically experienced." Without being experienced by others, the work is, hence, dead. In fact, in assessing such contribution of the work, Dewey completely disregarded the artist's point of view as absurd: "he himself would find different meanings in it at different days and hours and in different stages of his own development. If he could be articulate, he would say 'I meant just that, and that means whatever you or anyone can honestly, that is in virtue of your own vital experience, get out of it.'"[325] This notion can inevitably contribute to the findings of futility of the previously discussed originality standard required by EU law. Namely, assessing whether a work reflects one's personality seems to be an impossible task, not only for the judges, but also for the author himself/herself, hence making such standard both subjective and ultimately indeterminate.

2.2.1. Why is social dialogue important?

Having determined that creative work conveys dialogue, the discussion on why social dialogue is desirable shall follow. In that respect, I will point out two arguments. One is that a social dialogue has the potential to stimulate creativity, while the other entails the social dialogue's contribution to social progress. Both nevertheless correlate to each other and are potentially

[323] Dewey (n 36) 237–238.
[324] Dewey (n 36) 178–179.
[325] Dewey (n 36) 185.

overlapping, yet one is more concerned with the influence on the creator as the starting figure of the creative process, while the other is focused on the result of the very same creative process.

2.2.1.1. Social dialogue as creativity stimulator

As it has been already briefly discussed in the previous chapter,[326] the creation of work precedes a long process of interaction between the author and the environment. In such interaction, one starts communicating with various sources of culture, including works of art and science. Inevitably such numerous dialogues start shaping him and his internal desires. In the words of John Dewey, "individual's desires take shape under the influence of the human environment. The materials of his thought and belief come to him from others with whom he lives. He would be poorer than a beast of the fields were it not for traditions that become a part of his mind, and for institutions that penetrate below his outward actions into his purposes and satisfactions. Expression of experience is public and communicating because the experiences expressed are what they are because of experiences of the living and the dead that have shaped them."[327] It, hence, follows, that before coming to the role of an author, creator, a person is firstly, a user of creative works [328] and "the perceiver, as much as the creator, needs a rich and developed background which, whether it be painting, in the field of poetry, or music, cannot be achieved except by consistent nurture of interest."[329]

One thing, though, has to be made clear. The influence of culture on the individual is not absolute, since that would mean that every creation would be entirely predictable, and that is simply not the case. Moreover, each person separately gets involved in numerous different social dialogues with the environment, yet it does not result in being a creator himself/herself. So, the question is then under what conditions does such influence result in creativity? Looking for the answer, Cohen coins the term "play of culture" referring to "the 'play' that the networks of culture afford, including not only the extent to which they permit purposive creative experimentation, but also the extent to which they enable serendipitous access to cultural resources and facilitate unexpected juxtapositions of those resources.[330] In other words, to stir creative impulses within the individuals, one must create a system in which one is allowed to

[326] See Chapter 1 part 1.1.2.
[327] Dewey (n 36) 443.
[328] Cohen (n 53) 1179.
[329] Dewey (n 36) 438.
[330] Cohen (n 53) 1190.

experiment after being exposed to and possibly inspired by other cultural resources. It is in these circumstances that the process of creative play will potentially lead to the most creative works, since the author has the freedom to carelessly experiment and thus to bring something of his own to the already established set of cultural resources. Namely, as has already been discussed in the first chapter, the process of creation is a process which requires time and which constitutes of shaping and reshaping of the work. The work of art does not immediately follow the inspiration. Thus, for the system to enable proper and authentic creativity, two notions have to be kept in mind – first, the author has to be exposed to an abundant set of cultural resources,[331] and second, the author needs to be given freedom to experiment. What I mean by the second notion is that the author needs to have his primary needs taken care of. An author living in conditions where he can barely make ends meet does not enjoy such freedom as the condition of "carelessness" is ultimately not met.

2.2.1.2. Social dialogue as contributor to social progress

There is also another important notion following the premise that objects of art communicate a language. Namely, to be able better to understand the message conveyed, one must understand the language. "There must be indirect and collateral channels of response prepared in advance in the case of one who really sees the picture or hears the music. This motor preparation is a large part of esthetic education in any particular line. To know what to look for and how to see it is an affair of readiness on the part of motor equipment. A skilled surgeon is the one who appreciates the artistry of another surgeon's performance; he follows it sympathetically, though not overtly, in his own body. The one who knows something about the relation of the movements of the piano-player to the production of music from the piano will hear something the mere layman does not perceive—just as the expert performer "fingers" music while engaged in reading a score. One does not have to know much about mixing paints on a palette or about the brushstrokes that transfer pigments to canvas to see the picture in the painting. But it is necessary that there be ready defined channels of motor response, due in part to native constitution and in part to education through experience."[332]

[331] A study showed that the works of a group which was exposed to prior works of art were found to be more creative than works of other group which was not exposed to such prior works, Irena Čorko, Andrea Vranić (2007). Utjecaj informacije o postojećim produktima u domeni na kreativnost novih produkata (2007) 16 Društvena istraživanja 3, 613-626.
[332] Dewey (n 36) 168.

What that entails is that everyone in interaction with the object of art and science will not receive the same message, or better say, the message will not be of the same intensity and quality. It is precisely the level of maturity, experience and knowledge previously acquired that will give the message a certain shade. That, in fact, might be more discernible in science. Dewey, in that respect, points out that "science signifies just that mode of statement that is most helpful as direction"[333] giving the example of the statement that water is H_2O. Predominately it will be understood as "conditions under which water comes into existence. But it is also for those who understand it a direction for producing pure water and for testing anything that is likely to be taken for water."[334] The point I want to make by eliciting these examples is that each message is primarily coloured by the level of understanding of the message receiver. Thus, for the message to be fully and rightfully comprehended and possibly lead to further creation and social progress, a system must also be concerned with one's previous education and formation. In the words of Barnes: "There are," as he says, "in our minds in solution a vast number of emotional attitudes, feelings ready to be reëxcited when the proper stimulus arrives, and more than anything else it is these forms, this residue of experience, which, fuller and richer than in the mind of the ordinary man, constitute the artist's capital. What is called the magic of the artist resides in his ability to transfer these values from one field of experience to another, to attach them to the objects of our common life, and by his imaginative insight make these objects poignant and momentous"[335] In science, such education is, thus, important for the purpose of effective statement, in art for the purpose of expressiveness.[336] It has already been widely accepted that both in science and art, innovation is cumulative endeavour and "creativity […] frequently requires significant knowledge of that which came before."[337] A person equipped with more knowledge is thus better suited "to find valuable problems to solve in a way that a more ignorant person typically will not."[338]

2.2.2. Education – the enhancing tool for social dialogue and creativity stimulation

Through this analysis one important notion just became more discernible. It is the notion of education. The notion itself is very complex and encompasses both emotional and intellectual,

[333] Dewey (n 36) 146.
[334] Dewey (n 36) 146.
[335] Albert C. Barnes *The Art of Henri-Matisse* (Barnes Foundation Press 1978) 31 as cited in Dewey (n 3) 276.
[336] Dewey (n 36) 163.
[337] Fromer (n 1) 1456; see also R. J. Sternberg & T. I. Lubart, 'Creating creative minds' (1991) 72 Phi Delta Kappan, 608–614.
[338] Fromer (n 1) 1464.

as well as formal, non-formal and informal education. I will not at this point go further in the analysis of different types of the education. What I, nevertheless, want to point out is the importance of education both with respect to creativity and personal formation, which can ultimately lead to the progress of the society.[339] Namely, as shown above, one's previously acquired education is the tool which enhances social dialogue between the work and the audience, while the newly acquired education is in fact a substantive part and the result of that very dialogue. Namely, in order to receive a proper message from the work, in order to be able to recognise the problem and offer a creative solution,[340] one needs to have a proper base of knowledge and experience through which he further acts. Moreover, true authentic creativity in fact is preceded by a long process of subconscious maturation.[341] Together with the creative play, in both artistic and scientific domain, it has the potential to result in something utterly new and truly original. Education and cultivation of interest are, thus, never-ending processes inextricably bound with the creative process through which one can explore, develop, and finally express his creativity. It is, hence, arguable that education, cultivation of interest and increasing knowledge should be in fact considered as factors incentivising creativity. The argument itself is not something new as it has been confirmed at various instances, including by the studies conducted in the area of psychology.[342]

2.2.2.1. The importance of education and copyright law

The notion of education has unfortunately never been approached in such manner within the realm of copyright law, although I am very fond of pointing out that the first copyright act[343] was indeed enacted for the encouragement of learning. What I mean by that is that it has never been argued that education should curtail copyright protection in order for the society to have more creative works and that such curtailment is in fact in support of authors' interest, not against it. I am not trying to suggest that copyright law completely disregarded education, but

[339] See e.g. Nelson Mandela *Long Walk to Freedom* (Abacus London 1995) „Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that a son of a mineworker can become the head of the mine, that a child of farm workers can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another"
[340] Albert Einstein on the importance of problem recognition, "The formulation of a problem is often more essential than its solution . . .. To raise new questions, new possibilities, to regard old problems from a new angle, requires imagination and marks real advance in science." Albert Einstein & Leopold Infeld, *The Evolution of Physics* (1938) 95 as cited in Fromer (n 27) 1471 see further M. Csikszentmihalyi & J.W. Getzels, 'Creativity and Problem Finding in Art' Frank H. Farley & Ronald W. Neperud (eds), in *The Foundations of Aesthatics, Art, & Art Education* (1988) 91, 112-114.
[341] Dewey (n 36) 165–166.
[342] Daniel Fasko, 'Education and Creativity' (2001) 13 Creativity Research Journal 317; see also Čorko and Vranić (n 331) 613-626.
[343] Statute of Anne 1711.

it never put it on the same level as the interest for a material reward. All the justifications previously discussed are predominately concerned with justifying the reward for the author's work, yet not much focus has been put on the reality of the creative process and numerous other incentivising factors. Even Hegel's personality argument remains completely author-centric and does not go into the analysis of the environment in which such work was in fact created. It remains limited to the author's internal notions, yet forgets that the author is in fact a social being whose thoughts are subject to the influence of the surrounding environment. It is not surprising that the predominant economic concern of copyright stems from the very beginnings of copyright law and the book publishers' entrepreneurial desire for protection against unfair competition at that time, in which education was considered merely as one of the areas which copyright can have an impact on. Such entrepreneurial desire is still very much present with the new intermediary actors such as internet service providers, publishers, collective licensing societies etc., but such focus could, nonetheless, have detrimental effect on creativity.

Namely, and this will be further discussed in much greater detail, copyright law usually recognises the importance of education as one of the instances regulated by its limitations and exceptions. Unfortunately, from the very beginning, that creates a division between the author and the user. Such division is alas removed from the reality, as the author throughout the entire creative process constantly switches between the role of the creator and the role of the user. One is constantly learning and experiencing something new, while at the same time creating. One is constantly upgrading his/her creative capital and at every single moment there is a possibility of inspiration turning him/her to creator. One is not simply born an author; one is predominately a user developing his potential that turns him into the author. I do not find the division of roles within the legal framework problematic *per se*. However, it becomes problematic if copyright has no other effective limits except those determined by the provisions regulating limitations and exceptions.[344] Namely, it is impossible to have perfect legal norms that would cover all the desired uses with the appropriate amount of certainty regarding its scope. Moreover, rapid development of technology accompanied with the emergence of new uses makes it even harder. Hence, the legislator's task of regulating copyright exceptions and

[344] There are however other limits within the copyright law e.g. idea/expression dichotomy, term of protection, requirement of originality, however the main instruments for fine-tuning the balance between the right holders and users are considered to be provisions on limitations and exceptions, see in that respect Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions' in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 12 <https://www.cambridge.org/core/books/copyright-law-in-an-age-of-limitations-and-exceptions/justifications-for-copyright-limitations-and-exceptions/1FFC9FBD3A624B47A2005F4B3A46C258>.

limitations might even amount to a Sisyphean one. This will be further discussed within this chapter, but I it might be useful to reconsider whether we need to impose further limitations on copyright, similar to limitations in other areas of intellectual property law. Namely, in EU trademark law, a trademark owner may not oppose any use of the trademark, but only the one amounting to "use in the course of trade".[345] Similarly in patent law, the patent owner has the right to prevent only commercial use of the invention. If one wanted to observe the protected invention for the purpose of his/her own research, one would be more than welcome to do it. More importantly, the patent owner is not given any rights to prevent such, ultimately desirable, use. Once granted patent registration, the description of the invention is publicly accessible. If copyright, for instance, had such limitation that would allow copyright owner to prevent only certain use, it is arguable that such legal framework would be better suited for a vast number of socially desirable uses, such as the educational one. Namely, a creator would still be the user of previous works and the author of the new work, but through his/her creative process he/she would not encroach upon rights regarding previous works. Hence division, in that respect, would not be burdensome, but purely theoretical.

Copyright law approaches the balance of competing interests of rightholders and the public differently. Namely, in the EU Copyright law there are currently three rights harmonised within the European Union. Those rights are the right to reproduction, distribution, and communication to the public, which includes the right of making the work available online. Merely looking at the wording of provisions regulating their scope, it becomes clearly visible that the legislator had in mind very wide and over encompassing scope of those rights. Namely, the right to reproduction covers "direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part"; [346] right to distribution covers "any form of distribution to the public by sale or otherwise";[347] and right to communication to the public covers "any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."[348] In other words, all uses of copyright protected works are presumably a priori covered by copyright. To determine whether a use,

[345] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1, Article 9 (1)
[346] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Article 2 (1).
[347] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Article 4 (1).
[348] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Article 3 (1).

such as educational use, is lawful regardless of the consent of the copyright holder, rests upon the provisions regulating limitations and exceptions.[349] And that might be problematic due to the considerable difficulties involving drafting and further interpretation of those provisions.

There is also an important factor adding up to the intricacy of such legislative choice in the digital environment and that is the emergence of technological protection measures and the protection given to them. Namely, and this will be further discussed in the following chapter, technological protection measures are capable of preventing access to the work, regardless of whether the subsequent use is legitimate or not.[350] The technology does not recognise and differentiate educational use from commercial piracy. Thus, allowing the use of such measures without any effective safeguard for socially desirable uses covered by the provisions on limitations and exceptions can result in making these provisions utterly ineffective. Additionally, such use of technological protection measures delineates a very firm line dividing users from rightholders, thus, arguably interfering with the previously discussed reality and contours of the creative process. Let us again take the example of a researcher writing an academic paper. In order to write a proper paper, one must be acquainted with previous works. Furthermore, the process of research is undeniably merged and occurs at the same time as the process of writing. Hence, to produce the best paper up to one's abilities, one should be familiarised with as much works as possible. If access to previous works is prevented by technological protection measures for numerous reasons, one of them being that his/her university has not paid a subscription with certain terms and conditions, his/her starting position is indubitably at a lower creative level than the position of the one having such access. Why is that? Such a system does not leave space for full potential of the process of creative play in which writer does shaping and reshaping, or at this instance, researching, writing, contemplating and re-writing. That process repeats numerous times involving numerous previous works and not necessarily in that exact order. That is creative play, here research, leading to further progress. The question is hence, do we really want to prevent such creative play and not allow it to rise to its full potential? In other words, do we really want private

[349] "If traditional copyright dealt with the exclusive control of commercial and public *exploitation* of works, digital copyright deals with controlling any *use* (any *experience:* read, listen, view, etc.) of works. The boundaries used to be intrinsic to the definition of the exclusive exploitation rights granted to authors, exceptions being – as they should be – exceptional; now, the *boundaries of copyright* can only be found in the exceptions, which – rather than exceptional – have become fundamental" Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in Paul Torremans (ed) *Copyright Law A Handbook of Contemporary Research* (Edward Elgar 2007)

[350] Uma Suthersanen and Graham M Dutfield, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 4 Intellectual Property Quarterly 379, 399.

individuals (copyright holders) to decide on the conditions of such creative play? Do we really consider reward for private individuals more important than education and research, especially when that reward does not necessarily end in authors' pockets?

Moreover, having already determined in the previous chapter that, due to the very low threshold posed by the originality standard of the EU Copyright law, almost any intellectual endeavour within literary, artistic and scientific domain has the possibility of gaining very wide copyright protection. Hence, it is to be expected that nearly any material with potential to be used for the education and research purposes will enjoy copyright law protection. Moreover, even if the work is in the public domain,[351] technological protection measures could constitute a further barrier. Such legislative framework could pose a problem for the cumulative nature of creativity discussed above. Jessica Litman, in that respect, offered a very constructive and helpful understanding of the public domain[352] as "raw material that makes authorship possible"[353] and "device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."[354] I find such understanding to be very on point as it does not focus on the division between users and authors and in fact emphasises the very constructive and incentivising role of the public domain for further creativity. Because "the creations of today will be raw material for the creations of tomorrow" and what that entails in the light of copyright law system is that "the goods protected by intellectual property are not only one's output but also another's future input […and…] too much exclusivity can impede the production of new goods over time."[355]

2.2.3. General Functions of Education and Its Benefits

The discussion on the notion of education was so far limited solely on one beneficial aspect of education and that is its potential to stimulate creativity. However, without suggesting that this aspect is of lower significance, the notion of education has even been recognised as being of crucial importance in numerous other aspects relating to a person's life, as well as to the society as a whole. In fact, the beneficial aspects of education seem to be broadly accepted and hardly

[351] The term „public domain" is here understood not merely as works outside of copyright protection but as term including all the segments of the work which are outside of copyright protection.
[352] Jessica Litman similarly denotes public domain as „commons that includes those aspects of copyrighted works which copyright does not protect" Litman (n 252) 968.
[353] Litman (n 252) 965.
[354] Litman (n 252) 967–8.
[355] Joseph P Fisherman, 'Creating Around Copyright' 128 Harvard Law Review 1333, 1345–1346.

disputable. Although, one thing has to be noted. To determine the benefits of education, one inherently has to make a previous value judgment on what is good or desirable.[356] For example, if one says that education is good because it encourages critical thinking or creativity,[357] one has previously made a value judgment by which critical thinking and creativity have been deemed desirable. In that respect and considering that works are tools of communication and transmission, one would expect that access to numerous previous works and other cultural resources would hence encourage critical thinking and creativity in a person, as it would broaden his/her horizons and show the possibility of different solutions or approaches. If, on the other hand, one sees the desired outcome of the education to instil certain traditional or other social values, than the access only to certain type of works that transfer those specific values would be important, but not to the other. The point I want to make is that similar to the utilitarian argument of the copyright law which requires prior determination of a higher social goal justifying author's reward, the answer on beneficence of education is also dependent on the prior demarcation of desirable outcome.[358] I will not go at this point into further discussion on desirable purposes of education, but I will go back to it to the extent necessary when analysing the role and perception of education within the European Union policy and legal framework.

Regardless of the desirability of educational outcomes, education nevertheless performs certain functions. Those functions have been recognised on various occasions by different actors (e.g.,

[356] "This problem, which in the philosophical literature is known as the is-ought problem and was first identified by the Scottish philosopher David Hume in A Treatise on Human Nature (1739–1740), means that when we are engaged in decision making about the direction of education we are always and necessarily engaged in value judgements – judgements about what is educationally desirable. This implies that if we wish to say something about the direction of education we always need to complement factual information with views about what is desirable. We need, in other words, to evaluate the data and for this, as has been known for a long time in the field of educational evaluation, we need to engage with values" Biesta (n 5) 35. *See also* E.R.House & K.R. Howe *Values in evaluation and social research* (1999 Sage Publications); G.T. Henry 'Choosing criteria to judge program success: a values inquiry' (2002) 8 Evaluation 2 ,182– 204; T. Schwandt, T & P. Dahler-Larsen 'When evaluation meets the 'rough' ground' in communities' (2006) 12 Evaluation 4, 496–505.

[357] There are numerous views that critical thinking and creativity are very much interrelated, see for example Steve Padget, *Creativity and Critical Thinking* (Routledge 2013) 5 "Creativity and critical thinking go hand in hand and help to provide different ways of making sense of a situation; after applying analytical and logical critical thinking to our problem we can move towards the construction of a solution using our creative thinking. This is the place where creativity and critical thinking meet as we then go on to assess whether the solution we have arrived at is the best solution available. We will know this because we will have applied our critical thinking to the results of our creative thoughts" see also R.S. Nickerson (1999) 'Enhancing creativity', in R.J. Sternberg (ed) *Handbook of Creativity* (Cambridge University Press 1999).

[358] See e.g. "On the one hand the question of educational purpose might be seen as too difficult to resolve or even as fundamentally irresolvable. This is particularly the case when ideas about the purpose(s) of education are seen as being entirely dependent upon personal – which often means: subjective – values and beliefs about which no rational discussion is possible. This often lies behind a dichotomous depiction of views about the aims of education in terms of conservatism versus progressivism or traditional versus liberal. One question is whether such value positions are indeed entirely subjective and thus beyond rational discussion." Biesta (n 5) 37.

judges, scholars, human rights monitoring bodies). Naturally, the functions are differently categorised, but substantially, to my judgment, they remain very similar and at times overlapping. To elicit those functions, three observations will be presented, one put forward by a scholar in education and philosophy, one by a legal scholar and one by a judge.

Starting with the observation put by an education and philosophy scholar, Gert Biesta put forward that education serves three different functions: qualification, socialisation, and individuation.[359] By the qualification function he understands education as a tool "providing them [children, young people and adults] with the knowledge, skills and understanding and often also with the dispositions and forms of judgement that allow them to 'do something'". What he includes within this function is not merely providing knowledge for "the world of work", but also knowledge needed for citizenship (i.e., political literacy) and for general functioning within the society (i.e., cultural literacy).[360] The second function of socialisation is, further, perceived as the one through which "education inserts individuals into exiting ways of doing and being, and through this, [education] plays an important role in the continuation of culture and tradition." Through this function, a person becomes a "member of and part of particular social, cultural and political 'orders'". Finally, the last function of individuation in a way differs from the previous two because it is not about instilling certain values and certain orders, yet it is "about ways of being that hint at independence from such orders; ways of being in which the individual is not simply a 'specimen' of a more encompassing order." It is my reading that by recognising these three functions, Biesta establishes the basic contours and framework of educational system, although they are at times overlapping. Within such framework, one further makes value judgments and decisions on educational purposes or aims. For instance, whether individualisation function should be given priority, what kind of knowledge should be transferred, whether education should focused on skills necessary for the market, etc.[361]

The next observation will be the one by a legal scholar, Klaus Dieter Beiter. Unlike the previous more sociological approach to the notion of education, Beiter was predominately concerned with the right to education and its philosophical foundations and nature.[362] In that regard he

[359] Biesta (n 5) 39.
[360] Biesta (n 5) 39–40.
[361] Biesta (n 5) 39–41.
[362] In his analysis he predominately relied on the works of another legal scholar specialised in human rights law, especially Douglas Hodgson, *The Human Right to Education* (Dartmouth 1998).

puts forward four rationales justifying the recognition of the right to education: the social utilitarian argument; the argument that education is a prerequisite for individual development; the individual welfare argument and the man's inherent dignity argument. Although he does not specifically determine whether they are to be taken into account separately or cumulatively, it is my reading that they must be taken into account together, as they bring out four different aspects of the same right and that is how this section will approach it. By first rationale, the social utilitarian argument, he stresses the importance of one's education for the society, emphasizing predominately education as a transmitter of knowledge needed for citizenship and political literacy. This would without a doubt correlate to 'qualification' function as perceived by Biesta, at least partly as the qualification function is understood by Biesta in a much broader sense. By the second argument that education is a prerequisite for individual development, Beiter assumes "the consideration that without education the individual is unable to develop as a person and to realise his potential". Again, if we compare it to Biesta, this argument would inevitably correlate to the individuation function which puts the development of one's individual potential to the front. It is through education that one can fully develop his personality and enrich his/her inner authentic capital. By the third argument that education impacts individual welfare, he understands education as a transmitter of knowledge and skills necessary for enabling an individual to fully participate in a community and to find ways of satisfying his personal needs. That means that one "should be assisted to achieve such a standard of literacy and numeracy to enable him to function effectively in his community. Education should place the individual in a position to secure employment and thereby to satisfy his personal need, such as food or shelter." This function is on the one hand covered by the qualification function in a sense that education provides an individual with knowledge and skills necessary to 'earn a living'. On the other hand, to my judgment, it would be covered by the socialisation function, as well as it is education that provides the individual with the knowledge on cultural order and values in which he finds a way of his being. Finally, and according to Dieter himself, most importantly, "education should be seen as a requirement of human dignity".[363] What that means is that human dignity requires for a person to be deserving of having a right to education. This rationale seems to be the most 'legal' as it is concerned with the right to education on a very personal basis, seeing it as a notion pertaining to every human

[363] Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Brill | Nijhoff 2005) 26–27 <https://brill.com/view/title/11557>.

being. It is thus, not preoccupied with any of the functions education can perform, yet it could be understood as the foundational basis on which the rest of the arguments can rely.

Finally, the third observation is the one put forward by a decision of the US Supreme Court in *Brown v Topeka Board of Education*. Regardless of the territory and legal system in which one lives, this decision has seldom been bypassed by scholars interested in education. Namely, the US Supreme Court, banning the racial segregation in American elementary and secondary schools, unanimously pronounced that "education is perhaps the most important function of state and local governments. […] It is the very foundation of good citizenship. […] it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[364]

The decision is important, and often cited, not just because it recognises the importance of education as such, but because it in fact gives substance to the right of education and highlights its functions both with respect to society and to individual. Namely, it firstly considers the education as "the very foundation of good citizenship". In other words, an educated person is one who is well informed about her/his rights, about the political circumstances and, thus, who is capable of making informed political decisions and fully participate in political life and shaping of the society whose member he/she is. Again, to my judgment, this consideration inevitably corresponds to the qualification function with respect to political literacy. Moreover, the qualification function could also be seen in the Supreme Court's assessment that education "is a principal instrument in professional training". The Supreme Court further considers education as "a principal instrument in awakening the child to cultural values" and as a tool "helping him to adjust normally to his environment". These considerations would correspond to the socialisation function since they clearly place an individual within social environment of certain order and values. Finally, it is my reading that the Supreme Court is very much aware of education's impact on realisation and development of one's potential, as it states that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Thus, the Supreme Court also recognises the individuation function of education.

[364] Brown v. Topeka Board of Education, 347 U.S. 483 (U.S. 1954), 493.

Having read three different observations, it is quite visible that, although differently verbalised and classified, they substantially do not differ significantly. Namely, they all recognise education as a knowledge and skills transmission tool, whether it would be for work (qualification), citizenship (political literacy/qualification), culture (socialisation/qualification), or for individual development (individuation).[365] However, the one put forward by Biesta seems to me as the clearest and most encompassing, so in the further analysis I will rely on those three educational functions.

In that respect, coming back to the role and impact of education within the creative process, I argue that desirability of performance of all the functions is visible within the process of creativity. Namely, in order to be able to create, one has to have the knowledge of previous works and culture (qualification/socialisation); one has to have the skills necessary for expressing his creativity (qualification) and one has to be at that level of subconscious maturity to express something of his own and truly original (individuation). All that the author gets through education, formal and informal. This discussion on the educational functions allows us to further confirm and strengthen the position and role of education as a factor having the potential of stimulating creativity and production of creative works. I am perfectly aware that by giving such a role to education I have already made a value judgment in which creativity and production of more creative works is seen as desirable outcome. But in this judgment, I have merely corroborated with the "higher social goal" of utilitarian argument of copyright law and that is that more creative works are desirable. In other words, the statement that reward is necessary for more creativity must inevitably be accompanied with the statement that education is necessary for more creativity. That, however, leads us to the further question on quality of education.[366] I will not go into analysis of the quality of the education regarding creativity as in the end the outcome is determined by numerous factors, and it is way beyond the scope of this thesis. However, to illuminate how copyright law can impact the educational system, regardless of the aim pursued, I will merely outline those factors relying on the previous findings in the area of education. Namely, education or transfer of values and skills happens within a certain

[365] In that sense see also definition of education as encompassing "all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable that group to subsist." in Amadou-Mahtar M'Bow (former Director-General of the United Nations Educational, Scientific and Cultural Organization), "Introduction" in G. Mialaret (ed) *The Child's Right to Education* (1979) 9, 11

[366] For comparison, the utilitarian argument of copyright law should also lead us to the question of what kind of reward in fact incentivises creativity, however the utilitarian argument does not step in that direction, although there are investigations and findings present in the area of psychology on that topic e.g., B. A. Hennessey, T. M. Amabile 'Reward, Intrinsic Motivation, and Creativity' (1998) 53 American Psychologist 6, 674–675.

learning landscape. The efficiency of the learning landscape can be seen as determined by three main factors – the learning environment, the learning curriculum, and the content curriculum.[367] Without going into much analysis the learning environment is "the result of combination of factors – physical, social, intellectual, and cultural […] brought by the learners. Too put it simply, the educational outcome will depend on previously acquired capital of learners, their history, and the quality of their social environment and previous interactions. If we go back to the notions Dewey put forward, those are the criteria that give the dialogue between a work and a recipient a certain shade. The learning curriculum "consists of active development of those habits of mind, those interests and beliefs and the sense of identity that a learner brings with them." Having determined those predispositions, which are considered to be changeable and subject to further direction and formation, through the learning process one can develop them more. It is thus the teacher's task to rightfully assess the current state of the learner and direct him/her towards further development. And finally, content curriculum is understood as "that body of knowledge, skills, ideas and concepts that are to be taught over a given period".[368]

Since knowledge is transmitted through works (most probably protected by copyright), it is to be expected that copyright law will predominately have an impact on this factor, although that impact can potentially spill over on other factors. To elicit this point, I will offer an example. A professor wants to make a reading list for his students. To determine what articles/textbooks are to be included, he/she will have to rely on the works accessible in the university library or material accessible online in the databases his/her university has been provided access to. Due to the rise of the digital environment, and especially in the era of the COVID-19 pandemic, one could expect that digital databases would be mostly relied on. That conclusion can be reached as well when considering that printed textbooks in libraries are of a limited quantity,[369] usually lower than the number of students enrolled in the class. One could then expect that making a copy of a certain chapter of the book would solve the problem, but whether that is possible and lawful is to be determined by copyright law. Going back to digital databases of scholarly articles, the situation is also not the most encouraging one. As already determined, the professor can include only materials that students have access to. It depends on the conditions of access,

[367] See further Padget (n 357).
[368] Padget (n 357) 1–2.
[369] Developing countries have already and for too long been expressing their concerns over low accessibility of printed textbooks necessary for their education due to the unavailability of digital resources; see further Klaus Beiter, 'Access to Textbooks in Developing Countries, Copyright, and the Right to Education: Embracing Extraterritorial State Obligations in Intellectual Property Law in Daniel Gervais (ed), *Fairness, Morality and Ordre Public in Intellectual Property* (Edward Elgar, 2020) Pp. 96-123.

whether the students could download the article, what number of students can download the article, whether they could highlight or write notes etc. Moreover, some universities provide different levels of access for their staff and for students, so it is not entirely clear whether professors are in fact allowed to share the articles students have not previously been given access to.[370] Nevertheless, the allowed digital use is predominately determined by contractual agreements between universities and database providers and, only subsidiarily, by copyright law. This will be further discussed in much greater detail but, ironically, at times when we have technology that could make works easily accessible, that same technology could make it easily inaccessible, hence, depriving the society of the numerous benefits. Moreover, behind such technology there is a publisher, a private individual (legal entity/physical person) who, as seen in this example, makes decisions that potentially impact educational system. A private individual is naturally driven by certain private interests, and, legally speaking, the individual merely enters into contractual agreement with the other side, the users. Hence, no one can hold him accountable for not taking the interest of a society into consideration. Even if he/she/it does, the decision will be based on his/her/its good will, which could change at any moment. The result can nevertheless be very detrimental for the public interest in general. Therefore, it is the task of the legislator, here copyright law legislator, to ensure that a public interest, such as education, is given a stable and constant recognition.

2.2.4. Conclusory remarks

The discussion started in Chapter 1 and followed in this Chapter allows me, before going into the legal analysis of EU Copyright law, to reach the following conclusory remarks:

i. Reward is just one of the numerous factors with potential to incentivise creativity and contribute to the quality of the creative process.
ii. Due to the low threshold for copyright protection, most creative works enjoy copyright protection.
iii. Creative works convey dialogue and transfer certain a message (knowledge, information etc…)
iv. The level of the quality of the message transferred depends on one's previously acquired education and experience.

[370] That is due to the very wide interpretation of the communication to the public right by the CJEU, as students might be considered as a 'new public' not being encompassed by the rightholder's approval

v. Education (honing skills and gaining knowledge) and cultivation of interest are never ending processes inextricably bound with the process of creation and before becoming an author, one is previously and simultaneously a user of creative works.
vi. Education not only has the potential of stimulating creativity but performs a significant impact on a person's life through functions of qualification, socialisation and individuation.
vii. Regulation of copyright law has the impact of affecting education, as creative works are its necessary content.

What these conclusory remarks show us is, firstly, that building copyright law solely around the need for securing reward for the rightholders fails to portray the reality of the creative process. Secondly, the remarks provide us with knowledge of the importance of education in everyone's, including author's life. Moreover, they enlighten the role education can have on creativity, among other things and therefore too much exclusivity enshrined in copyright law could severely undermine that interest. Having these findings in mind, the following part shall turn to the analysis of EU copyright law.

PART II – EU COPYRIGHT LAW

Chapter 4 – EU Copyright law

3.1. Introduction

Copyright law has traditionally been developed within the national systems of EU Member States. However, since copyright protects and enables exploitation of a creative content, it gained recognition and importance in the context of the internal market of the European Union. The need for harmonisation of national copyright laws soon emerged. The harmonisation has so far been pursued through eleven directives and two regulations,[371] the most important being the one colloquially known as the InfoSoc Directive[372] and the recently enacted Directive for the digital single market, known as the DSM Directive.[373] Such approach to copyright law regulation brought within certain peculiarities. It introduced a new criterion to be taken into account when regulating copyright protection of creative works and that is the "smooth functioning of the internal market" and ensuring "help to implement the four freedoms of the internal market". This is something that has traditionally been foreign to copyright law, and it is quite indeterminate how in fact, such goal affects the content of copyright law.[374] The intricacy is even greater considering that copyright law, as discussed in the previous chapter, does not ensure protection only to the economic interests of the author/rightholder, but also the author's personal interest enshrined in moral rights. Furthermore, copyright law lays down conditions for the entire legal treatment of creative works. Hence, while it is true that creative works have commercial value and could be seen as commodities on the market, it must not be forgotten that those works are in fact a medium through which knowledge, information and culture are transmitted. In other words, and as already discussed, copyright law inevitably has an effect on culture and education, among other things. It might not be easy to commercially measure such interests, but that should not result in diminishing their importance. Thus, how EU approaches such interests is significantly relevant because the regulation at the EU level will inevitably spill over to national law. In that respect, there is an additional issue that needs to be discussed and that is the competences of the EU to fully regulate copyright law. So far, the EU copyright legal framework did not touch upon the moral rights, and it only partially

[371] For entire list of enacted directives see <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation>
[372] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.
[373] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.
[374] See Chapter 1 for the usually invoked justifications and rationales of copyright protection.

approached the regulation of limitations and exceptions, the areas in which cultural, social and educational interests are in fact recognised. The reason for that is that discretion on making policy decisions involving such interests remains within the Member States' jurisdiction. However, if strong harmonised protection for economic considerations is ensured within instruments with legal force above national law, it might become problematic for all the other interests left within the jurisdiction of Member States. Hence, in order to fully understand all the intricacies and complexities of EU copyright law and to properly evaluate its consistence and responsiveness to the reality of creation, a comprehensive legal analysis shall follow.

3.2. The Legal Basis and Objectives of EU Copyright Legal Framework

For the EU to be able to regulate in certain area, it must have a competence to do so. Namely, according to the principle of conferral enshrined in Article 5(2) of the Treaty on the European Union (hereinafter: the TEU), the EU is empowered to "act only within the limits of the competences conferred upon it by the Member States to attain the objectives set out therein."[375] Therefore, to regulate a matter pertaining to copyright law, such competence must be conferred to the EU. So far, 13 legal instruments have been enacted within the area, eleven directives and two regulations. All of them have relied on Article 114 of the Treaty on Functioning of the European Union (hereinafter: the TFEU)[376] as its predominant basis following the premise that harmonisation of different national copyright laws is necessary for the "establishment and functioning of the internal market".

However, at the time when the Treaty of Rome established the European Economic Community, copyright law was not considered as being an important factor for the creation of the common market, which was the primary goal of the Treaty. Copyright's economic dimension was overshadowed by the cultural one, seeing it primarily as law ensuring protection for artistic and creative works, rather than as a tool for commercial exploitation.[377] That, nevertheless, changed, primarily because of the development of technology which enabled new ways of exploitation of such works, including the cross-border exploitation. Hence, copyright law, especially its economic dimension, started gaining considerable importance in the context

[375] Article 5 (2) Treaty of the Europen Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[376] Article 114 Treaty of the Functioning of the European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[377] Agnès Lucas-Schloetter, 'Is There a Concept of European Copyright Law? History, Evolution, Policies and Politics and the Acquis Communautaire' in Irini Stamatoudi and Paul Torremans (eds) EU Copyright Law A Commentary (Edward Elgar Publishing 2021), 6.

of the internal market, eventually resulting in the creation of legal instruments that we now consider as forming copyright *acquis communautaire*[378] or EU Copyright law. Harmonisation, however, was never approached on a general comprehensive level, yet in fact it occurred very sporadically as the problems between the copyright law and the internal market were emerging. In fact, such problems were usually firstly identified within preliminary references before the CJEU. Thus, it is the jurisprudence of the CJEU that seems to be the starting point of national copyright law harmonisation. Such incidental approach, however, proved to be problematic to precisely determine the goals of copyright protection. Namely, the goals and justifications of copyright protection were previously (and to certain extent still are) determined by Member States in a single wholistic act and/or the jurisprudence of national courts. However, following the harmonisation within the EU, that no longer seemed to be entirely the case as the new goals and interests have undeniably started making an impact. Hence, to determine the European Union influence on the goals of copyright protection, the chronological analysis of the evolution of EU Copyright law will be conducted. What that entail is a thorough analysis of firstly, harmonisation measures, together with the preceding soft law policy documents adopted by the EU institutions and secondly, the jurisprudence of the CJEU.[379] The object of this research is to determine, the underlying foundational goal(s) of EU action in the field of copyright law and how such EU goals impacted the usually present tension between economic and cultural or other public policy goals intertwined in the copyright law.

The evolution of EU Copyright law, together with the CJEU jurisprudence on the matter, is usually chronologically divided in the literature in three phases, and such division will be maintained in the following text.[380] In fact such division has also been followed in the research on the evolution of the EU internal market which highlights the inseparability and influence of

[378] The EU's 'acquis' is the body of common rights and obligations that are binding on all EU countries, as EU Members. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; legislation adopted in application of the treaties and the case law of the Court of Justice of the EU; declarations and resolutions adopted by the EU; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the EU and those concluded by the EU countries between themselves in the field of the EU's activities see EURLEX, Glossary of summaries, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:acquis (las accessed 22 March 2022).

[379] Similarly, Paul Craig argues that any accurate evaluation of the meaning, content and development of the single market must take into account of four factors – primary Treaty articles, Community legislation, the CJEU jurisprudence and action taken by the Community institutions, see Paul Craig 'The Evolution of the Single Market' in Catherine Barnard, Joanne Scott (eds) *The Law of the Single European Market: Unpacking the Premises* (Bloomsbury Publishing 2002),1.

[380] See for example Alain Strowel and Hee-Eun Kim, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence', in Justine Pila, and Ansgar Ohly (eds)*The Europeanization of Intellectual Property Law* (Oxford University Press 2013) 125–126. Agnès Lucas-Schloetter (n 377) 6.

the two within the EU law.[381] The first phase encompasses the first 30 years of European Community in which most of the focus was put on the relationship between copyright law and EU primary law, namely fundamental freedoms of the internal market and competition law. The second phase follows the enactment of The Single European Act in 1987 and, due to the beginning of harmonisation process, is not merely preoccupied with the EU primary law, yet the CJEU was also challenged with questions on the interpretation of the provisions of the newly enacted secondary law. Finally, the third phase of EU Copyright law follows the enactment of the Lisbon Treaty, which is currently in force. This phase is mostly characterised by the CJEU jurisprudence filling the gaps of the secondary law[382] and deciding on issues previously not touched upon, such as limitations and exceptions to copyright, the relationship with fundamental rights, etc. However, the second and third phase will be analysed together. Namely, the CJEU jurisprudence of the third phase mostly gave interpretations of provisions of harmonisation measures enacted within the second phase hence they need to be analysed together.

3.2.1. The First Phase of EU Copyright Law (1957 – 1987)

3.2.1.1. Copyright law before the CJEU – the first encounter

The European Union and the CJEU were first encountered with the question of copyright law through the perspective and prism of the internal market law. Namely, the main objective of the EEC Treaty has from the very beginning been the establishment of the common market between the EU Member States. To build such common market, the EEC Treaty has, on top of the customs union, provided that fundamental market freedoms (freedom of movement of goods, services, workers and capital) are to be safeguarded. It has, hence, included "a number of provisions which prohibit[ed] the imposition of obstacles to the free movement of products and factors of production between the Member States."[383] In such an approach, and due to the predominately national copyright law protection, the copyright law protection very fast came into the clash with such fundamental market freedoms, setting out obstacles, firstly, to the freedom of movement of goods, and soon after to the freedom of movement of services. Such

[381] Craig (n 379) 1.
[382] Bernt Hugenholtz refers to this phase as "period of activist judicial interpretation by the Court of Justice of the EU" see in Hugenholtz (n 199) 58.
[383] Aliana Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Developmnet of the Court's Approach through the Years' in Catherine Barnard et al (ed), *The Outer Limits of European Union* (Bloomsbury Publishing 2009), 197.

clashes were left to be resolved by the CJEU and, through the establishment of the internal market, the CJEU undeniably determined the underlying principles on which the EU Copyright law has further developed - the principle of EU wide exhaustion, the principle of specific subject matter of copyright protection and the difference between the existence and exercise of copyright protection. Namely, the very first copyright cases were dealt by the CJEU in the 1970s, when negative market integration was of extreme significance. Thus, before the analysing the abovementioned principles, that have consequently begun to shape a line between the European Union's and Member States' regulatory competence in copyright law, to fully understand the circumstances of such decisions, a brief overview of the EU internal market law and the role of the CJEU within this phase must follow.

3.2.1.1.1. CJEU as the common market integrationist and policy maker

The European Union has from the very beginning opted for the common market as the model of economic integration. On top of the customs union, which was achieved in 1968,[384] the common market entails the freedom of movement of products and factors of production. For achieving that level of market/economic integration there are two main market integration techniques – positive and negative integration.[385] Both are aimed precisely at eliminating the obstacles that hinder the cross-border trade and the free movement of products and factors of production, but the approach of the two techniques differs. Positive integration assumes removing the obstacles through unification or harmonisation of diverse national rules through a legislative act, while the negative integration is in essence deregulatory and is relying on the principle of mutual recognition. The principle requires the Member States to accept, subject to certain exceptions, the goods that have been lawfully put on a market in another Member State. Positive integration, hence on the one hand, relies on the legislative bodies who enact acts within the legal basis specifically set out in the Treaty provisions. Negative integration, on the other hand, relies on the judicial bodies to invalidate the national measures creating the obstacles to cross border trade. Along with the national courts, the role of the CJEU is of considerable importance for market integration precisely as an instrument of negative integration. Namely, the CJEU is the court whose main task is primarily to give an obligatory

[384] With the coming into force of the common customs tariff on 1 July 1968 through Regulation 950/68 (OJ English Special Edition 1968 (I), p. 275), see further Tryfonidou (n 383) 197.
[385] See further Paul Craig, Grainne de Burca *EU Law Text, Cases, and Materials* (OUP 2020); Catherine Barnard *The Substantive Law of the EU The Four Freedoms* (OUP 2022).

interpretation of the EU law.[386] Due to the inevitable uncertainty and vagueness of the Treaty provisions on fundamental market freedoms, by offering such unique, yet binding interpretation to the national courts, the CJEU has been given the role of the policy maker who is up to certain extent allowed to decide which national measures must be curtailed for the establishment of the common market. It was in this role that CJEU had its very first encounter with the copyright law.

Moreover, it must also be borne in mind that, although the integration process relied on both techniques of market integration, up until the enactment of the Single European Act in 1987, the legislative process was facing some difficulties. Namely, positive integration mechanisms were either enacted on the basis of particular Treaty provisions dealing with certain specific matter or on the basis of the general provision enshrined in Article 100 of the EEC Treaty.[387] Under that provision, directives could be enacted for the approximation of the laws of the Member States for the purpose of establishing and functioning of the internal market. However, that provision required a unanimous vote in the Council, which proved to be quite problematic since the agreement between all Member States was not so easily attainable. Moreover, another difficulty for the legislative mechanism at the time was the ongoing technological development which rapidly generated new markets and hence posed numerous issues emerging one after another, leaving the EU Commission constantly behind in time when preparing legislation.[388] One of the areas of law significantly impacted by technology was in fact the copyright law. Hence, in such an environment, negative market integration led by the CJEU gained even more importance.[389] Miguel Maduro bluntly puts it in the following words: "The law-making process in the European Union and the plurality of national and ideological interests therein, emphasises these problems: deadlocks in the legislative process lead the Court to intervene and supplement the work of the Community legislative process."[390]

[386] It is set out in Article 267, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU).
[387] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 100, „The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."
[388] Craig and de Burca (n 385) 643; Craig (n 379), 5.
[389] Craig (n 379) 5-6 "It was the judicial contribution of the ECJ which radically altered the nature of both negative and positive integration."
[390] Luis Miguel Poiares Pessoa Maduro *We the Court: The European Court of Justice and the European Economic Constitution* (Bloomsbury Publishing 1998), 18.

3.2.1.1.1.1. Purposive interpretation as a tool in market integration

Article 267 TFEU[391] gives the CJEU, among others, the jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the acts of the institutions, bodies, offices or agencies of the Union. It is considered to be one of the crucial mechanisms of the development of the European Union law and the most significant mechanism through which the role of the CJEU in market integration has become visible. In fact, as Maduro points out, "one of the first moves the Court made was to construct Community law as the Community's own legal system"[392] starting by creating the principles of direct effect and supremacy through preliminary reference procedures.[393] There is plenty of literature on the role of the CJEU, both from the legal and political science perspective, mostly in the light of judicial activism and its legitimacy and there is no need for this research to delve into such questions.[394] Yet, what is important to bear in mind is that the CJEU rather indisputably played a significant part in the EU economic integration, hence producing an impact on all areas of law having an impact on economic integration in any way. One of such areas was the copyright law. Thus, a brief discussion on the role of the CJEU in market integration will follow.

Paul Craig recognised numerous "vital contributions [of the CJEU] to the creation of a single market" precisely in the period between the Rome Treaty and the Single European Act. He highlighted the three roles or three main contributions which, as it will be later discussed, were also very much visible within the creation of EU copyright law. The first one was the role of the CJEU as a legislative catalyst who, by according the direct effect to the Treaty provisions on fundamental freedoms, in fact preceded the legislative institutions to voice their wishes on the matter and constructed market freedoms as subjective rights. The second one was the recognition of the principle of the mutual recognition in *Cassis de Dijon*[395] and the third one was the purposive interpretation of the Treaty articles and Community legislation.

[391] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU), Article 267.
[392] Maduro (n 390) 1.
[393] See Case 6/64, Costa v. Enel [1964] ECR 585; Case 26/62, Van Gend en Loos [1963] ECR 1.
[394] See e.g. J.H.H. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", (1993) 31 JCMS, 417; A.-M.Burley, and W. Mattli, "Europe Before the Court: A Political Theory of Legal Integration", (1993) 47 International Organization, 41; J.H.H. Weiler "A Quiet Revolution: The European Court of Justice and Its Interlocutors", (1994) 26 Comparative Political Studies, 510;
[395] Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

In essence, without such purposive interpretation, it would not be possible to discuss any of the other contributions and it is, hence, by far the most important and foundational tool of shaping EU law in general. Namely, without the ability of such individual and binding interpretation, the CJEU would not have been able, for instance, to set down the principle of mutual recognition which nowadays is recognised as the core of the CJEU's and Commission's strategy for the creation of the internal market. More importantly, the CJEU has, by such decision, made a conscious choice on how to achieve market integration which put it in the ambit of creating a governance strategy together with the European Commission. In fact, the European Commission has often been considered as reactive in legislative proposals to the direction previously set by the CJEU which undeniably shows the CJEU's significant political strength.[396]

Moreover, through such purposive interpretation of EU law, the CJEU was also given the task to define the boundaries of the levels of governance (national and supranational). Namely, although every supranational organisation has rules defining the scope of the governance on different levels, in the EU "a definite line […] has never been drawn by the drafters of the various Treaties". Hence, "this delicate and politically charged issue was left to the Court of Justice which, through its case law, would, inter alia, have to specify the limits to the ambit of the various Treaty Articles."[397] For instance, through the interpretation of the terms like "economic activity", "measures having equivalent effect as quantitative restrictions" or "worker", the CJEU has been shaping the scope of EU law market freedoms and in fact setting the limits for national regulators.[398]

It is not surprising that some national governments were not at first welcoming towards such jurisprudence, arguing that it is not for the Court "to exercise a discretionary power reserved to the legislative institutions of the Community and the Member States."[399] Namely, national governments have been slowly "losing" the competence to the EU institutions and following

[396] Craig (n 385), 643; Craig (n 379) 10.
[397] Tryfonidou (n 383) 198.
[398] See further Tryfonidou (n 383) 197; Catherine Barnard "Restricting restrictions: lessons for the EU from the US?" (2009), 68 Cambridge Law Journal 3, 575-606;
[399] Case 2/74, Reyners v. Belgian State [1974] ECR 631; for freedom of movement of services see Case 33/74, Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299, para 7.

decisions in *Dassonville*[400] and *Cassis de Dijon*,[401] the principle of mutual recognition has made it even easier. This principle requires Member States to accept the products lawfully put on market in another Member State, regardless of whether they are in accordance with their own regulatory standards. In other words, national measures, which were not discriminatory towards the imported products, but could impede the trade in any way, even just potentially, were presumed to be incompatible with the provision set out in Article 30 of the EEC Treaty (today Article 34 TFEU).[402] Hence, such national measures would have to be set aside, unless they could be justified by certain derogatory reasons. The burden of proof has, thus, been removed from the importer to Member States, who now had to invoke special reasons to defend their national rules, some of "which have accumulated, often over the centuries".[403] One of such derogatory reasons expressly set out in Article 36 of the EEC Treaty[404] was in fact "the protection of industrial and commercial property" and EU Copyright law has started building its foundations precisely through the interpretation of that term offered by the CJEU. Hence, before analysing the main principles of the EU copyright law (the principle of wide exhaustion, the principle of the specific subject matter protection), a brief analysis of the derogations from the fundamental market freedoms must follow.

3.2.1.1.1.2. Derogations from the fundamental market freedoms

Fundamental market freedoms on the common market require a free flow of goods, services, persons and capital between Member States. Any measure which impedes such free movement is, hence, *prima facie* contrary to the EU law. This notion is, by all means, an oversimplified analysis of a far more complex matter, but its purpose is to illuminate the presumed illegality

[400] In the Case 8/74 Procureur du Roi v. Dassonville ECLI:EU:C:1974:82, para 5 the CJEU took the stance that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions."
[401] Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
[402] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 30 "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."
[403] Barnard (n 398) 579 referring to the Case 178/84 Commission v. Germany [1987] E.C.R. 1227 concerning the sixteenth century beer purity laws.
[404] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 36 "The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States"

of the national measure possibly contravening the market freedoms.[405] In such an architecture of legal norms, Member States are put in a more difficult position. Namely, Member States may, nevertheless, keep the national measure which restricts market freedoms alive, however, provided they justify it as valid. In that respect, they can rely on general justifications expressly provided by the Treaty provisions which are available to any measure hindering free movement. Or, following the CJEU's decision in *Cassis de Dijon*[406], national measures which are not discriminatory or are indirectly discriminatory may be justified by even a broader list of derogations beyond those expressly recognised in the Treaty provisions. Such a broader list of derogations has been developed by the CJEU jurisprudence under the term "the mandatory requirements" in the case of goods, "objective justifications" in the case of persons or even "imperative requirements".[407] In any way, EU internal market law has recognised the need that certain national interest may take priority over negative market integration, and this creates a space for national regulatory autonomy.

However, such autonomy still remains confined to the limits accepted and set out by the CJEU.[408] Such restraint is noted by Catherine Barnard: "…*the derogations and justifications are not necessarily what they seem. While they appear to give states considerable room for manoeuvre and an obvious way of preserving national regulatory autonomy, in practice the Court often says that, on the facts of a particular case, the Member State has failed to make out a justification. And, even where it accepts that the derogation/justification might be made out, the Court has deployed a variety of strategies to limit the possibility of state success. In particular, it has increasingly hemmed the derogations/ justifications in with limitations—proportionality, fundamental rights, effective judicial protection, legal certainty—thereby further drawing the teeth on the effective use of derogations/justifications by the Member States*."[409]

3.2.1.1.1.2.1. Strict interpretation of derogations

[405] See further Barnard (n 398) 575
[406] Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
[407] Catherine Barnard 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in Catherine Barnard and Okeoghene Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009), 273, 275.
[408] For the freedom of establishment see Case C-55/94, Gebhard [1995] ECR I-4165.
[409] Barnard (n 407) 273.

For a derogation to be applied in a specific case, it must be, firstly, recognised as a legitimate and a valid justification. To reach such a conclusion, one must, if it is envisioned by the Treaty, firstly determine the scope of a derogatory reason, like for example "public order" or "public policy" and, secondly, make an assessment whether the reason/justification invoked in the specific case falls within such scope. In the case of derogations not envisioned by the Treaty provisions, like for example, "consumer protection",[410] one must even reach a decision that logically precedes the conclusion on the scope, and that is the decision on the legitimacy. Namely, for such derogations, decision on their legitimacy has not been made by the Treaty drafters (Member States) and has instead been put within the ambit of the CJEU together with the determination of its scope. Hence the CJEU has through the recognition of such "mandatory requirements" opened another door for itself to shape the common market. Namely, even though the broader list of derogations does seemingly widen the margin of discretion of Member States, the final call on their legitimacy still remains with the CJEU. Such a role of the CJEU has, in fact, spurred some scholars to suggest that a "great degree of politically sensitive decision-making [is] occurring at EU level, even in the heartland of the economically bountiful project of market integration."[411] Although, it must also be pointed out, that national courts deciding on the merits are, in fact, the ones firstly facing such questions, but as Catherine Barnard observes, they "are placed in the difficult position of having to make decisions about the legitimacy and proportionality of national policy choices when they lack the institutional capacity to gather and process the relevant economic/social/cultural information."[412] So it is not surprising that they will ultimately rely on the guidance of the CJEU through the preliminary reference procedure. Otherwise, it is also highly likely that different outcomes and interpretations could be reached by different national courts, which is not viewed exceptionally well in the context of market integration. [413]

In fact, such a possibility of different outcomes seems to be one of the reasons for adding further limitations to the national regulatory autonomy. Namely, the CJEU has, already in the 1970s,

[410] Invoked in the Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
[411] Stephen Weatherill 'Competence and legitimacy' in Catherine Barnard and Okeoghene Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009), 17, 25 citing M Höpner and A Schäfer (2007). 'A new phase of European Integration: Organized Capitalisms in Post-Ricardian Europe' MPifG Discussion Paper 07/4 Max-Planck-Institut für Gesellschaftsforschung, Köln.
[412] Barnard (n 398) 576.
[413] See for example Sunday Trading saga in Catherine Barnard "Sunday Trading: A Drama in Five Acts" (1994) 57 The Modern Law Review 449; P. Diamond, "Dishonourable Defence: the Use of Injunctions and the EEC Treaty; Case Study of the Shops Act 1950" (1991) 54 M.L.R. 72; R. Rawlings, "The Euro-law Game: Some Deductions from a Saga" (1993) 20 J. Law and Soc. 309.

contrary to the wide scope given to the provisions on the market freedoms, made a decision that "derogations must be interpreted strictly so that their scope could not be determined unilaterally by each Member State without any control by Community institutions."[414] The goal of such decision seems, thus, rather obvious and that is to keep the Member States' margin of discretion as narrow as possible. Namely, unified interpretation of derogations needed for market integration does not necessarily require strict interpretation. It, in fact, constitutes a political choice in which national regulatory autonomy is simply set aside in all the areas having even the slightest impact on the common market.[415] It is a choice, made at the time which "Maduro terms as the 'market building' stage, which was focusing on 'promoting the new set of rights brought by the larger integrated area and to break the path-dependence of actors from national systems".[416] It is a choice made at the time in which EU consciously opted for an "activist intervention by 'federal' law, one based on removing obstacles or restrictions to free movement, i.e. eliminating national rules which have accumulated, often over the centuries."[417] Notably, such approach of removing unjustified national measures also bears one additional burden and that is that it pushes towards market deregulation, since the removed measure is seldom replaced by a new rule on the matter at the EU level.[418]

3.2.1.1.1.2.2. The principle of proportionality

Not only do the derogations have to be interpreted strictly, but, once they are recognised as legitimate, they have also been put under other limitations which further supress national regulatory autonomy and diversity of national rules. One of such limitations[419] is the principle of proportionality. [420] Namely, any justification invoked by the Member State must satisfy the proportionality test. According to Tridimas, the principle in essence consists of two tests that a national measure must pass in order to be upheld – a test of suitability and a test of necessity.

[414] Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, paras 26 and 27.
[415] "For a Court inspired by the goal of market integration, its stance can easily be understood: every derogation/justification successfully invoked by a Member State creates a barrier for traders/migrants/service providers from the other 26 states. Yet, for the defendant Member State, every failed justification is another nail in the coffin of its legislative autonomy and, more generally, for the diversity of national rules." in Barnard (n 407) 274
[416] Barnard (n 398) 579 citing Luis Miguel Poiares Pessoa Maduro, We the Court: The European Court of Justice and the European Economic Constitution (Oxford 1998), 88.
[417] Barnard (n 398) 579
[418] Barnard (n 398) 591.
[419] In the latter case law, other limitations have also been developed by the CJEU such as fundamental rights, principle of legal certainty and principles of good governance see further Barnard (n 407) 282.
[420] Case 118/75 Watson and Belmann [1976] ECR 1185, para 21.

In essence, the first one requires the measure to be suitable to achieve its objective, while the second requires that the measure employed "correspond[s] to the importance of the aim and […it is] necessary for its achievement." On the other hand, some consider the proportionality test to consist of three tests instead of two – test of suitability, test of necessity and test of proportionality (stricto sensu).[421] The difference is the that test of necessity requires determination whether there is a less restrictive measure capable of producing the same result, while the test of proportionality (stricto sensu) requires careful balancing whether "the measure has an excessive effect on applicant's interests".[422] There are judicial support to both of the classifications, since the CJEU does not make a clear delineation in its jurisprudence.

However, regardless of the classification, the tests comprised within the proportionality principle gives us an insight into further limitations to derogations and hence, further limitations to national regulatory autonomy. Moreover, it highlights yet another market integration tool in which the CJEU "is called upon to balance a Community against a national interest".[423] The principle of proportionality does not strictly concern derogations from market freedoms. In fact, it is present throughout the whole EU legal system.[424] Yet, when it comes to derogations from the market freedoms, the prevailing case law of the CJEU suggests that the principle is applied strictly. Community, hence, market, interests often enjoy priority over national ones, even in cases where a national measure pursues a justified and legitimate aim.[425] On most such occasions, the measure has been found not to be the least restrictive one and, thus disproportionate. [426]

3.2.1.1.1.3. Conclusory Remarks

From the very beginning, the establishment of the common market was the main goal of the European Union, and hence of the European Union law. In order to successfully achieve such a goal, it was inevitable that some national regulatory choices had to be abandoned, even though

[421] Grainne de Burca, "The Principle of Proportionality and its Application in EC Law" (1993) 13 YEL 105, 113.
[422] Takis Tridimas 'Proportionality in Community Law: Searching for the Appropriate Standard' in Ellis Evelyn (ed) *The Principle of Proportionality in the Laws of Europe* (1999 Hart Publishing), 65-84, 68.
[423] Tridimas (n 422) 66.
[424] Tridimas (n 422) 66.
[425] Stephen Weatherill 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market' in Catherine Barnard, Joanne Scott (eds) *The Law of the Single European Market: Unpacking the Premises* (Bloomsbury Publishing 2002), 41, 47. "…it is transparently true that most cases before the European Court are decided in a manner unfavourable to host State regulators with the result that trade integration is advanced and local regulatory preferences are suppressed. Cassis de Dijon itself is such a decision."
[426] Barnard (n 407) 273, 285; Tridimas (n 422) 66.

some of the choices had been present for centuries within the Member States' legal systems.[427] Member States, by accepting the EEC Treaty and the loyalty clause contained in its Article 5,[428] have arguably accepted such evolution. However, there are still, even among scholars, differing opinions on the jurisprudence of the CJEU and the development of EU law in the light of the common market.

For instance, Catherine Barnard is of the opinion that the "active judicial intervention, through the restrictions model, may generally be necessary in the EU to eliminate obstacles to free movement such as packaging requirements, rules on authorisation criteria and provisions on the recognition of qualifications, [but] it creates problems when applied to non-discriminatory measures which structure the national market on which trade occurs, such as employment and taxation laws and other welfare measures". She further argues that it is up to the CJEU to leave the space for the Member States to "regulate at least the matters which form the core of the welfare state" because, if not, "failure to do so may well lead EU citizens blaming the EU for the failure of the European social model which is so dependent on national welfare policies for its substance.[429] Weiler employs even stronger language describing the creation of internal market as "a highly politicized choice of ethos, ideology, and political culture: the culture of 'the market' [as well as] a philosophy […] that seeks to remove barrier to the free movement of factors of production, and to remove distortion to competition as a means to maximize utility."[430] He further observes that such need for creation of a common market, premised on the assumption of equality of individuals, pushes for the uniformity but also displays "a social (and hence ideological) choice which prizes market efficiency […] above other competing values."[431] On the other hand, Weatherill does not consider the CJEU as "being biased in favour of trade […but…] in fact engaged in weeding-out unrepresentative and outdated manifestations of national-level decision making […] inappropriate in an integrating European market".[432]

[427] The example of Beer Purity Act in Germany Case C-178/84 Commission v Germany ECLI:EU:C:1987:126
[428] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 5 "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." For more elaborate view on Member States obligations arising from the loyalty clause see e.g., John Temple Lang "Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice" (1986) 10 Fordham International Law Journal 503.
[429] Barnard (n 398) 579.
[430] Joseph H.H. Weiler, "The Transformation of Europe" (1991) 100 Yale LJ 2403, 2477.
[431] Weiler (430) 2478.
[432] Weatherill (n 425) 49.

Moreover, he sees the free movement law as a tool which requires Member states to justify their regulatory choices from the perspective of "constituencies who are not otherwise (adequately) represented in domestic local political processes", namely traders.[433] However, he still acknowledges that the case law of the CJEU, together with the presumed illegality of national measures which puts the burden of proof on the national regulator, makes it hard to refute that there is certain pro-trade bias present within such legal architecture.[434] On the other contrary, Maduro describes "European judicial activism as majoritarian activism: promoting the rights and policies of the larger European political community (the majority) against the "selfish" or autonomous (depending on the point of view) decisions of national polities (the minorities)."[435]

To choose any side is in essence the value judgment. However, it is arguable that the legal architecture, purposively interpreted by the CJEU, is set up more in favour of trade and market freedoms than any other value or reason market integration might come across with. Namely, the choice of interpreting the provisions on market freedoms widely, on the one hand, while interpreting the derogations strictly, on the other, indisputably tilts the balance towards the market freedoms. Furthermore, through such wide interpretation of the scope of provisions on market freedoms, almost any national measure is capable of hindering free movement.[436] Hence, in order to be kept "alive" it must be recognised as a legitimate and proportionate derogation. Such assessment requires careful balancing, and it can be successfully argued that putting focus on the market integration, the other values and goals are put in a secondary plan. That might create a problem because the balance is at the very beginning tilted in one direction. Namely, the rules that from the market perspective look like obstacles to the free movement, are, on the other hand, the rules regulating matters regarding social, cultural, educational or any other national policy. The importance and significance of such policies has never been given the recognition it deserves, because its assessment starts from the position of being a market obstacle. In order to remain, the policy must not be disproportionate to the free movement. The quality of the goal such policy pursues is not viewed separately from the market integration. Namely, the assessment does not consider whether such national policy goal is more desirable than market integration in that specific question. On the contrary, it assesses whether the national policy applies the least restrictive measure to the market freedom. Hence, the market

[433] Weatherill (n 425) 50.
[434] Weatherill (n 425) 48.
[435] Maduro (n 390) 11.
[436] The scope of market freedoms has been under constant scrutiny throughout the evolution of the EU law, for greater detail see e.g., Barnard (n 385).

freedom from the starting position has been given a higher regard than any other value it might clash with and that is already a significant political decision.

Moreover, national policies like culture or education are not within the EU competence and the achievement of market integration often "collides with Member States' powers to act in realms where the Community is not competent to act as a substitute legislator."[437] In areas like these, thus, the jurisprudence of the CJEU on the derogations from market freedoms comprises of fundamental choices which start shaping EU policy on the matter. Such a role of the CJEU is of incredible importance and should require CJEU's knowledge and awareness of specifications of certain industry/sector, other than the mere trade policy. Otherwise, it can be expected that legitimacy for such choice will be brought into question and subject down to further critique. Social policy is one of such matters in which often arises the question on what is the desirable scope of the free movement law spill over.[438] However, portraying the CJEU as completely market orientated and socially blind would be short-sighted and ultimately false. Paul Craig offers an interesting view regarding the imbalance of economic and social dimension within the EU. He ultimately characterises it as a Member States' choice on the powers that they are willing to refer to the European Union which results in a paradox. Member States' desire to preserve the competence over social policy results in the predominance of the economic over the social within the EU and then such predominance limits the Member States' freedom to choose the balance of the economic and social within their nation state.[439] There is truth in such assessment, but the fact remains that the CJEU opted for a certain way of market integration focused on removing obstacles to the freedom of movement. In that respect, Catherine Bernard offers a comprehensive comparison between the EU and US system of market integration.[440] Namely, ever since the US Supreme Court decision in *Pike v. Bruce Church*[441] a non-discriminatory rule will be upheld if it effectuates a legitimate local purpose and its effects on inter-state trade are only incidental. In other words, it will be upheld unless the burden imposed on such commerce is clearly excessive comparing to that legitimate local benefit. Namely, if the claimant succeeds in proving that the effect on the trade is more than incidental, then the

[437] Weatherill (n 411) 24.
[438] Weatherill (n 425) 50 citing Miguel Poiares Maduro, 'Europe's Social Self: "The Sickness unto Death"', in Jo Shaw (ed), *Social Law and Policy in an Evolving EU*, (Oxford, Hart Publishing, 2001).
[439] Paul Craig, "The EU, Democracy and Institutional Structure: Past, Present and Future" (2018) Articles by Maurer Faculty 2761 https://www.repository.law.indiana.edu/facpub/2761, 38.
[440] Barnard (n 398) 575; see also e.g., Georg Haibach, "The Interpretation of Article 30 of the EC Treaty and the "Dormant' Commerce Clause by the European Court of Justice and the US Supreme Court" (1999) 48 The International and Comparative Law Quarterly 155.
[441] Pike v. Bruce Church Inc 397 US 137 (1970).

balancing occurs. But such balancing, unlike the one employed by the CJEU, does not start from the presumption of illegality of the local rule. Hence, it allows the Supreme Court to take a more wholistic and not predominately economic approach. The point I am making is, that, irrespective of powers conferred by the Member States to the EU, it was ultimately the CJEU that through its jurisprudence and interpretations on Community law, opted for more "federal" or "supranational" approach when it comes to market integration, which resulted in diminishing the competing values and suppressing national regulatory autonomy even in the areas beyond EU explicit competence. And such approach brings an additional risk. Namely, if the national policy choice is struck down in such area, there is a risk that the rule will not be replaced by another, hence, a risk of the creation of market without rules and restraints appears.[442]

Copyright law is one of the areas of law developed within the ambits of national law of the Member States. It was also within those ambits that Member States have been formulating educational or cultural policy in which copyright law is of significance. The European Union at the time of the EEC Treaty, viewing the copyright protection predominately as a tool of cultural and not economic policy, did not express any need or interest to regulate it. However, the technology development in the 1970s and 1980s created new markets for commercial exploitation of the creative works protected by copyright. Copyright protection, hence, slowly gained its place within the creation and regulation of the common market. It arose as one of the obstacles/derogations to the free movement provisions. When it comes to free movement of goods the protection of industrial and commercial property was explicitly set out in Article 30 EEC, although it was not known at the time whether copyright or any other related right falls within the scope. By deciding those questions, the CJEU has through its jurisprudence, started shaping the EU policy on copyright law, regardless of having no explicit competence on the matter. For instance, through application of the principle of mutual recognition it created a new limit for the copyright distribution right (the principle of EU wide exhaustion). Furthermore, by interpreting the scope and legitimacy of derogations it delved into question of what specific subject matter of copyright is. Finally, to determine whether the copyright (or any other related right) falls within the scope of the free movement provisions it created a rather artificial and hardly applicable differentiation between the existence and exercise of right. The CJEU has,

[442] Barnard (n 398) 591 "And, if the national rules are struck down, it is only rarely that they are re-enacted at the federal level. This risks creating what Advocate General Tizzano describes as "a market without rules",102 thereby threatening the legitimacy of both the federal system (what right has the federal government to intervene in decisions taken by democratically elected state governments?) and the state government (why should the state bother to regulate and thus to experiment when its rules are likely to be found contrary to federal law?)"

thus, set the foundations of the EU Copyright law and started shaping the limits of national regulatory autonomy on the matter. Unfortunately, such legal mechanisms were far from clear. On the contrary, they gave the impression of tools in service of justification of the choices made by the CJEU. Moreover, non-economic concerns which have been inherent in the national copyright legal systems have been put on the side. To support such argument, the analysis of the jurisprudence of the CJEU on those fundamental principles will follow.

3.2.1.1.2. The Existence of a right v the Exercise of a right

"*Among the prohibitions or restrictions on the free movement of goods which it concedes Article 36 refers to industrial and commercial property. On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, although the Treaty does not affect the existence of rights recognised by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty*."[443]

This paragraph is the part of the very first judgment in which the CJEU has encountered the expected clash between one of the fundamental market freedoms (freedom of movement of goods) and copyright (more precisely a copyright related right) due to the territorial nature of national copyright protection. Namely, Article 36 of the EEC Treaty explicitly proclaimed "protection of industrial and commercial property" as one of the legitimate derogations to which the freedom of movement of goods might curtail.[444] Naturally, the questions regarding the scope and interpretation of such a derogatory reason emerged. For instance, the question whether copyright or a copyright related right are encompassed by the term industrial and commercial property? In other words, does it even come within the scope of the Treaty? The CJEU started shaping an answer to these questions by formulating certain legal principles. One of the very first principles was in fact the dichotomy between the existence and the exercise of a right that is visible in the paragraph above. In its essence the principle says that "the Treaty guarantees

[443] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487, para 11.
[444] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 36 "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

the existence of the right, but the exercise of the right may be limited by the prohibitions laid down in the Treaty."[445]

Such dichotomy has stirred critical discussion, mostly because the CJEU did not offer a clear definition of the principle.[446] It has been painted mostly negatively as "a contradiction in terms",[447] "unhelpful […and…] mysterious",[448] "empty and valueless"[449] and ultimately as "a clever tool for the CJEU to retain some discretion as to the IP[450] issues (belonging to the exercise) it wishes to address and those (belonging to existence) it does not."[451] On the other hand, there is an interpretation of the principle suggesting it has a certain theoretical value. According to such interpretation the "existence refers to the conditions which are to be fulfilled if the right is to be granted, while exercise concerns the effects that granting such rights will have."[452]

Before analysing its substance, quality, and practical applicability, there must be a brief discussion on the origins of the principle and reasons why the CJEU decided to apply it in the matter of copyright law. Namely, the very first time the CJEU applied the principle was in the 1966 case *Consten and Grundig.*[453] The case involved parallel imports, but had nothing to do with copyright law, nor the freedom of movement of goods specifically. It was a case concerning trademark law and the competition rules. Consten was a firm which was an exclusive distributor of Grundig's products in France bearing the Grundig owned national trademark "GINT". Another French Company started selling in France Grundig's products bought previously in Germany at a lower price than the one requested by Consten. Consten brought two actions against this parallel importer on grounds of trademark infringement and unfair competition. The alleged infringer, however, brought the matter to the European

[445] David Keeling, *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law* (OUP 2003), 51.
[446] Ramalho (n 19) 69.
[447] Hugh Laddie „National I.P. rights: a moribound anachronism in a federal Europe?" (2001) 23(9) European Intellectual Property Review 402, 404.
[448] David T. Keeling "Intellectual property rights and the free movement of goods in the European union" (1993) 20 Brooklyn J Int Law 127, 134.
[449] G. Tritton "Articles 30 to 36 and intellectual property: is the jurisprudence of the ECJ now of an ideal standard?" (1994) 16(10) European Intellectual Property Review 422, 423.
[450] Intellectual Property.
[451] Strowel and Kim (n 380) 130.
[452] G. Friden "Recent developments in the EEC intellectual property: the distinction between exercise and existence revisited" (1989) 26(2) Common Market Law Review 193, 193-194 as cited in Ramalho (n 19) 69.
[453] Joined cases C-56/64 and 58/64 *Consten and Grundig v Commission of the European Economic Community* ECLI:EU:C:1966:41.

Commission alleging that such exclusive distribution agreement between Consten and Grundig is contrary to Article 85 of the EEC Treaty (currently Article 101 TFEU).[454] The European Commission considered the agreement contrary to Article 85 and concluded that Grundig and Consten "are required to refrain from any measure likely to obstruct or impede the acquisition by third parties, in the exercise of their free choice, from wholesalers or retailers established in the European Economic Community, of the products…with a view to their resale in the contract territory."[455] Consten and Grundig expectedly appealed against such decision, arguing that the Commission's decision violated Article 222 of the EEC Treaty (today Article 345 TFEU),[456] which guarantees that the Treaties shall in no way prejudice the national systems of property ownership and that such guarantee of property ownership encompasses the trademark rights. To support such a line of argument they even referred to Article 36 of the EEC Treaty on the derogations to the free movement of goods provisions which explicitly listed industrial and commercial property as one of the legitimate derogatory reasons. The CJEU rejected the argument that Article 36 could be invoked against Article 85 of the EEC Treaty, since it does not concern the competition rules. However, it did to a certain extent accept the property argument stating that the Commission decision "does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1)."[457]

[454] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 81 "1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, - any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[455] Joined cases C-56/64 and 58/64 *Consten and Grundig v Commission of the European Economic Community* ECLI:EU:C:1966:41, para 304.

[456] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 222 "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

[457] Joined cases C-56/64 and 58/64 *Consten and Grundig v Commission of the European Economic Community* ECLI:EU:C:1966:41, para 345.

Even though the term used was "grant" instead of existence, the quoted paragraph has been recognised as the naissance of the dichotomy of the existence and exercise of national property rights. The CJEU further continued applying the dichotomy in cases regarding other intellectual property rights like patent rights and competition rules.[458] The *Deutsche Gramophone* case[459] was the first case where the CJEU decided to apply it to copyright (to be precise copyright related right) and not necessarily in the context of competition rules, yet also in the context of the free movement of goods. The case similarly as *Consten* concerned parallel imports and it involved an intellectual property economic right, but no explicit reason was given why the dichotomy was appropriate. *Deutsche Gramophone* (hereinafter: DG) was a company established in Germany whose principal products were gramophone records. In Germany records were sold directly through retailers and through two wholesale booksellers at a controlled price. In other EU member states, the distribution was organised through subsidiaries established in those member states. DG concluded licensing agreements by which it assigned to the subsidiaries the exclusive right to exploit its recording within the certain territory. Such a licensing agreement was concluded with Polydor, a company established in France for the territory of France. However, without any prior contractual agreement, another company established in Germany, Metro, started selling DG records, supplied by the French company Polydor. Since it was under no contractual obligation, Metro was selling records at a lower price than the one determined by the DG for German territory. DG found such a sale by Metro to be an infringement of their distribution right, claiming that the right had not been exhausted since the records were made for the French market, not German. Metro, on the other hand, claimed that such territorial distribution agreements containing price clauses were distorting competition, since they partition the market. Hence, the question posed before the CJEU was whether relying on the exclusive right of distribution to prohibit the marketing of sound recordings previously lawfully acquired in another Member State, is contrary to the rules of competition, specifically Article 85(1). Moreover, and although not specifically asked, the CJEU also decided to approach the question from the perspective of the free of movement of goods.

The CJEU quite easily answered the question from the competition law perspective. Namely, Article 85 (1) clearly prohibits all agreements between undertakings which may affect trade

[458] See Case C-24/67 *Parke, Davis and Co. v Probel* ECLI:EU:C:1968:11; Case C-15/74 *Centrafarm BV V Sterling Drug Inc* ECLI:EU:C:1974:114.
[459] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487.

between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. The CJEU hence held that the exercise of the exclusive right might fall under such prohibition "each time it manifests itself as the subject, the means or the result of an agreement which, by preventing imports from other Member States of products lawfully distributed there, has as its effect the partitioning of the market."[460] However, the CJEU did not stop there and continued with the answer by assessing the compatibility of the exercise of such an exclusive right with the provisions relating to the free movement of goods.

As described above[461], the legal architecture of the free movement provisions usually requires three steps to assess the compatibility of a national measure. The first one requires to determine whether the national measure falls within the scope of the provision. If it does, then one can proceed to the second step determining whether there is a legitimate aim for such national measure, and finally, whether such national measure is proportionate. The CJEU, however, in this case completely disregarded the first step and has not even briefly touched upon the question whether the exclusive national right to distribution falls within the scope of Article 30 of the EEC Treaty (today Article 34 TFEU), or in other words whether it constitutes a "measure having equivalent effect as a quantitative restriction."[462] Such occurrence has not been an isolated event in the early case law.[463] In fact, as Marenco and Banks describe it, "the traditional method of analysis of the European Court in dealing with the application of Articles 30 and 36 EEC to national laws on intellectual property starts with the distinction between the existence and the exercise of intellectual property rights, takes for granted the breach of Article 30, assesses such breach as against the "subject-matter" of the right in question and, when appropriate, goes on to examine whether any arbitrary discrimination or disguised restriction on trade is involved."[464]

[460] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487, para 6.
[461] See Chapter 3, Part 3.2.1.1.1.
[462] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 30 "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".
[463] The exception to such rule are the later judgments in the joined cases C 55/80 and 57/80 *Musik-Vertrieb v GEMA* ECLI:EU:C:1981:10 and Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242 [1988] ECR 2605 where the CJEU refers to national legislation as measures having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EEC Treaty. However, these cases do not mention the existence/exercise of the rights dichotomy.
[464] Giuliano Marenco, Karen Banks „Intellectual property and the community rules on free movement: discrimination unearthed" (1990) 15(3) European Law Review 224, 224.

That kind of assessment raised certain questions. First, it posed the question of what is in fact considered a "measure". In other words, what is the object of the analysis, is it the conduct of the rightholder or is it a national provision granting the rightholder such a right? With benefit of hindsight, the commercial conduct can now be ruled out,[465] but certain CJEU decisions in their operative part have expressly stated that "the exercise by the patentee"[466] or the "exercise, by the owner of a trademark of the right which he enjoys under the legislation of a Member State…is incompatible with the rules of the EEC Treaty concerning the free movement of goods."[467] Moreover, if we were to accept that the prohibitions in the free movement provisions extend to the commercial conduct/contract provisions, then that would mean that the Treaty provisions on the free movement of goods are in fact (and in law) capable of horizontal direct effect, and that has not yet been the case. Although any discussion nowadays might appear to be futile, the whole dichotomy for that reason alone is completely misconceived. Namely, the exercise of the right will undeniably relate to the conduct of the right holder based on the rights granted to him by national provisions. Disallowing certain exercise, thus, means, interfering with the very content of the right, with its existence and substance. Hence the principle according to which "the Treaty leaves the existence and substance of industrial property untouched (the national legislature decides these questions) [while] their exercise is completely subject to Community law"[468] loses any value or practical applicability.[469] Thus all the critique the principle has been put on undeniably stands.

However, regardless of the critique, in the period between 1971 and 1982, the CJEU referred to the dichotomy "almost ritualistically, in virtually every judgment in this field."[470] Moreover, the principle has also been expanded to the provisions on the free movement of services.[471] That expansion similarly lacked any substantial analysis and explanation resulting in the mere

[465] See Case C-311/85 *Vlaamse Reisbureaus v. Sociale Dienst* ECLI:EU:C:1987:418, para 30; Case C-118/86 *Openbar Ministerie v. Besloten Vennootschap Nertsvoederfabriek Nederland BV* ECLI:EU:C:1987:424, para 10; Case C-65/86, *Bayer v. Süllhöfer* ECLI:EU:C:1988:448, para 12 ; Case C-395/87 Ministère public v. Tournier ECLI:EU:C:1989:319, para 15.
[466] Case C-15/74 *Centrafarm BV v Sterling Drug* ECLI:EU:C:1974:114.
[467] Case C-16/74 *Centrafarm BV v Winthrop BV* ECLI:EU:C:1974:115.
[468] Opinion of the AG Roemer in Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:42.
[469] See also Marenco and Banks (n 464) 226 "…if this distinction makes perfectly good sense in the context of the competition rules, because the prohibitions contained in such rules tend to affect only a given use a rightholder makes of his intellectual property right, and not the right as such, the same cannot be said when a feature of national law in the field of intellectual property falls foul of the rules on free movement. In this case the very power granted by the law must be struck down."
[470] David T. Keeling "The dichotomy between the existence of the right and its exercise" in *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law* (OUP 2003), 55.
[471] Case C-262/81 *Coditel SA v Cine Vog Films SA* ECLI:EU:C:1982:334, para 13.

statement that "the distinction, implicit in Article 36, between the existence of a right conferred by the legislation of a Member State in regard to the protection of artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right, which might constitute a disguised restriction on trade between Member States, also applies where that right is exercised in the context of the movement of services." It is, obviously, another example of evidently purposive interpretation by the CJEU, however, unfortunately almost no effort had been made to justify the decision already made. Namely, the wording of the provisions on the free movement of goods and services significantly differs, as well as the enumerated derogations from those provisions in Articles 36 and 56 of the EEC Treaty. That does not mean that the decision could not stand, but it would have been more transparent and systematic if the legal architecture established by the Treaties had been observed. Moreover, as another argument for its inapplicability, after the initial phase of heavy reliance on the principle, the CJEU has, although not officially, in fact abandoned the principle.

3.2.1.1.2.1. Copyright as a property right

The decision to apply the principle of dichotomy between the existence and the exercise of the right is, however, significant in one very important aspect. It confirmed the position that from the EU law point of view, copyright (and copyright related rights) are considered to be property rights. From that the foundational balance between internal market and national copyright law systems has been established.

Firstly, it establishes, or at least tries to establish, the criteria between the EU and national competence to regulate the matter. Namely, according to Article 222 of the EEC Treaty (currently Article 345 TFEU),[472] the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. There have, however, been debates whether this Article is in fact applicable as a constitutional guarantee of the national property rights, let alone intellectual property rights. Namely, the origin of the provision is traced to Article 85 of the ECSC Treaty, the intention of which was to ensure the freedom of Member States "to determine whether enterprises subject to the ECSC Treaty were publicly or privately owned."[473] Advocate

[472] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Article 222 "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."
[473] G. Tritton "Articles 30 to 36 and Intellectual Property: Is the Jurisprudence of the ECJ Now of an Ideal Standard?" (1994) 10 EIPR 422, 423 as cited in Keeling (n 470) 56; similar view was put down by the European

General Roemer, on the other hand, however, disregarded such origin and offered an interpretation of Article 222 as "meaning that all the basic elements of the national system of property ownership must remain unchanged".[474] The CJEU has carefully avoided to take a clear stance on the application of Article 222 of the EEC Treaty and decided merely to follow the established dichotomy of the existence and exercise of the right. Although, that itself might be understood as an implicit confirmation of the applicability of the provision.

Nevertheless, according to the wording of the provision, and according to the CJEU in *Patricia*[475] and later in *Phill Collins,* "as community law now stands, and in the absence of the Community provisions harmonizing national laws, it is for the Member States to establish the conditions and detailed rules for the protection of literary and artistic property, subject to observance of the applicable international conventions."[476] Relying on the words alone, one would rightfully infer that it is entirely up to the Member States to regulate exclusive rights for the protection of literary and artistic property and that the EU law must guarantee such a right. However, this just seems to reiterate the dichotomy between the expression and the exercise of the right and leads us back to the very same discussion on its applicability. Namely, intellectual property rights are different than property rights over tangible things. They correspond to a set of exclusive rights recognised by law and if "Community law prevents any right in the bundle from being exercised, the property is to that extent diminished".[477] It is truly remarkable how the CJEU imposed such a rule that grants the Member States absolute freedom to regulate exclusive intellectual property rights which are absolutely capable of interfering with the free movement provisions, while at the same time delivering decisions severely limiting those exact rights.[478] It probably shows the unfortunate lack of understanding of the regulation of intellectual property rights, let alone the specific regulation of the copyright law. The fact that the doctrine was later tacitly abandoned by the CJEU might also corroborate such argument.

Secondly, by classifying copyright as a property right, the other balancing relationship has been established and that is the balance between the fundamental market freedoms and the copyright

Commission in Case C-24/67 *Parke, Davis and Co. v Probel* ECLI:EU:C:1968:11 "It may be doubted whether this provision really applies to the system of commercial and industrial property owner- ship. It is mainly intended to state that the Treaty leaves to Member States the freedom to decide, so far as regards observance of the obligations imposed on them by the Treaty, between a system of private property and a system of public property."

[474] Opinion of the AG Roemer in Case C-24/67 *Parke, Davis and Co. v Probel* ECLI:EU:C:1968:4.

[475] Case C-341/87 *EMI Electrola* v *Patricia Im-und Export and Others* ECLI:EU:C:1989:30, para 11.

[476] Joined cases C-92/92 and C-326/92 *Collins v Imtrat and EMI Electrola* ECLI:EU:C:1993:847, para 19.

[477] Derrick Wyatt, Alan Dashwood *The Law of the European Community* (Sweet & Maxwell, 1994), 574.

[478] e.g. joined cases C-241/91P and C-242/91 P *RTE and ITV v Commission (Magill)* ECLI:EU:C:1995:98.

as a derogatory reason, or copyright as a fundamental right to property. And with that balance further questions regarding specific subject matter of copyright or the substance of the property right emerge, which will be further discussed. Before this discussion, however, the position of the right to property within the EU legal order must be addressed.

3.2.1.1.2.1.1. The social function of right to property

It must be noted that the CJEU in this phase delivered significant decisions concerning the placement of the fundamental rights within the EU legal order, including the right to property. Namely, the fundamental rights were proclaimed to form an integral part of the general principles of law, which put them in the ambit of the EU primary law. Furthermore, in safeguarding those rights the CJEU had put itself under an obligation to draw inspiration from constitutional traditions common to the Member States, as well as the international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories.[479]

In *Hauer* in 1979, and even earlier in *Nold,* the CJEU recognised the right to property as "guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights."[480] Assuming that intellectual property falls within the fundamental right to property makes the copyright exclusive rights as such even more significant and stronger within the EU legal order. However, with such classification came one very important limitation. The right to property has never been considered as a non-derogable absolute right, but as a right that is in fact and in law subject to limitations. The CJEU, relying on Article 1 of the Protocol to the European Convention of Human Rights (hereinafter: ECHR),[481] confirmed this position. Namely, restrictions of the right to property are legal "to the extent to which they are deemed "necessary" by a State for the protection of the 'general interest'." In *Hauer,* the CJEU dealt with the evaluation whether a Community Regulation was contrary to the right to property. To reach a decision, the CJEU had to evaluate the justifiability of the objectives pursued by the Regulation and, if the objectives were found

[479] Case C-4/73 *Nold v Commission* ECLI:EU:C:1974:51, para 12-13.
[480] Case C-44/79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290, para 17.
[481] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) and Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, article 1.

to be justified for pursuing the general interest, it had to continue with the question whether Regulation "infringes the substance of the right to property".[482] The *substance of the right* thus became a standard of crucial importance when dealing with the potential infringement of a fundamental right. In that respect, one important notion concerning the interpretation of the right to property and its substance must be put forward and that is the CJEU's recognition of the social function of the property right. Namely, the CJEU, relying on the constitutional practices of the Member States, concluded that "numerous [national] legislative measures have given concrete expression to that social function of the right to property." [483] Hence, it decided that "the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder."[484]

Applying the principles to the situation where a copyright exclusive right impedes free movement of goods, we end up in an interesting position which first must be dissolved by the decision of priority of competing values. In other words, a choice of perspective, or a choice of a suitable test must be made. Namely, the clash can be assessed either from the internal market perspective in which the copyright exclusive right is seen as a derogation to the fundamental market freedoms, or from the fundamental rights perspective in which the fundamental market freedoms are limitations to the fundamental right to property. The chosen perspective determines further questions and further criteria to be taken into account. The CJEU opted for the internal market perspective, regardless.

3.2.1.1.2.2. Copyright as a derogation to the fundamental market freedom (the Internal Market perspective)

3.2.1.1.2.2.1. The barrier to the free movement

This perspective is the epitome of the previously described pursuit of the negative market integration. Hence, the underlying tone of the perspective is the broad interpretation of the fundamental market freedoms and strict interpretation of its derogations.[485] Regarding the

[482] Case C-44/79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290, para 30.
[483] Case C-44/79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290, para 20.
[484] Case C-4/73 *Nold v Commission* ECLI:EU:C:1974:51, para 14.
[485] This perspective is by giving priority to Community market interests already subject to crticism see e.g. David Keeling 'The specific subject matter of the right' in *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law* (OUP 2003), 68 "When a conflict arises between two such important interests as the free movement of goods and the protection of intellectual property, it hardly seems appropriate to assume *a priori* that one of those interests is more fundamental than the other. It would surely be more satisfactory to seek to balance the specific interests that are at stake in each case, to ask what is the intrinsic value of each and to

methodology, the starting point of this perspective is precisely the provision on the fundamental market freedom. Hence, the deciding court will have to determine whether national copyright exclusive right falls within the scope of the provision on the fundamental market freedom. For instance, in the case of the free movement of goods, the court must determine whether the copyright exclusive right falls within the term "measure having equivalent effect as quantitative restrictions" contained in Article 34 TFEU. If the question is answered positively, the consequence is then the presumed illegality of such a national provision granting such an exclusive right, because it creates a barrier to the free movement.

The early copyright case law of the CJEU, although it applied this perspective, offers a palette of rather inconsistent approaches. The predominant one is surprisingly the one in which the CJEU skipped this step entirely, merely assuming the breach of the fundamental market provision.[486] That is to a certain extent upsetting considering the consequence of illegality of the national provision and possible further unjustified limitation on national regulatory autonomy.

The second approach is, for instance, shown in the *Warner Brothers*[487] case regarding the rental right. The case is a perfect example of the purposive interpretation of the CJEU granting the wide scope to the free movement provisions. Namely, the case involved a Danish citizen, Mr. Christiansen, who bought a video-cassette of the film in the United Kingdom. The video-cassette was lawfully put on the market with the consent of the copyright holder, Warner Brothers. Mr. Christiansen was managing a video shop in Copenhagen and the reason he bought a copy was to hire it out in Denmark. He did not have any problems importing the copy in Denmark. However, Warner Brothers opposed his hiring out of the video-cassette in Denmark, relying on the Danish legislation, which enables the author or producer of a musical or cinematographic work to prohibit hiring-out of videograms without its consent. Although the national provision did not impede the free movement of goods per se (video cassettes could be imported and resold), the CJEU decided that such a prohibition of hiring-out is "liable to influence trade in video-cassettes in that State and hence, indirectly to affect intra-Community

determine on that basis whether a restriction on the free movement of goods is justified on grounds of the protection of intellectual property".

[486] See further Marenco and Banks (n 464) 227-230.

[487] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242

trade in those products" since the commercial distribution of video-cassettes increasingly takes the form of hiring-out to individuals who possess video-tape recorders and not only sales.[488]

Finally, the third approach is characterised by delving into the interpretation of the scope of Article 30 of the EEC Treaty by taking the criteria from Article 36 of the EEC Treaty. In *Basset* the CJEU decided that a right to charge "supplementary mechanical reproduction fee"[489] on the public performance of the work did not constitute a "measure having equivalent effect as quantitative restriction". However, not because it was not impeding the free movement, yet because such charging "must be regarded as a *normal exploitation* of copyright and does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[490] The inconsistency in this case is a bit upsetting because the decision that the national provision does not constitute measure having equivalent effect as quantitative restriction means that it is beyond the scope of Article 30 EEC and purely within national regulatory autonomy. Therefore, there should have been no space for further assessment by the CJEU on questions of legitimacy and proportionality (which the term "normal exploitation" hints to). The only thing the CJEU should have analysed is whether the national copyright provision hinders the free movement of goods. In other words, whether national provision, under which discotheques are charged not only for performance royalty but also for reproduction royalty, can hinder free movement of sound recordings. And only if the answer was positive, the CJEU could have continued to analyse whether such hindrance is then justified.

All of the above shows the methodological incoherence of the CJEU when dealing with the national copyright provisions in the context of the internal market. The decisions lack substantial analysis of the specific clash between the fundamental market freedom and national copyright provision. Thus, they seemed to be relying on somehow untested presumptions merely put forward by the CJEU. That is on the one hand surprising because the CJEU had been at the time developing the case law and certain methodology on the interpretation of the scope of Article 30. Namely, the CJEU could have easily in any of those cases merely referred

[488] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242, para 10.
[489] It appears from the judgment that the fee was charged noy on the importation or marketing of sound recordings but by reason of their public use, for example by a radio station, in a discotheque or in a device such as juke-box installed in a public place. That royalty was charged in addition to a performance royalty see Case C-402/85 *Basset v SACEM*, ECLI:EU:C:1987:197, para 16.
[490] Case C-402/85 *Basset v SACEM*, ECLI:EU:C:1987:197, para 16.

to the *Dassonville* judgment in which the CJEU itself deliberated that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[491] However, in none of the copyright cases of the time, even when delving into the question of the scope, did the CJEU refer to this well-established formula. The reasons for that are beyond comprehension and would remain in the ambit of pure speculation. Namely, due to the wide scope such formula grants to Article 30 EEC Treaty, it would be acceptable to say that a provision requiring payment of royalties or prohibiting certain use, highly likely amounts to measure having equivalent effect as quantitative restriction. On the contrary, the *Basset* case seems to suggest that the CJEU was instead looking for way to limit the scope of Article 30 EEC Treaty by excluding the national provisions that grant a normal exploitation of copyright. However, such practice has not been further confirmed.

3.2.1.1.2.2.2. The legitimate aim

The presumed illegality of a national measure does not necessarily mean the definitive illegality under EU law. The provision may still be "kept alive" if the Member State proves that such provision pursues a legitimate aim, and it is in accordance with the proportionality test. The legitimate aim invoked in cases involving intellectual property rights is mostly the protection of industrial and commercial property, as explicitly mentioned in Article 36 of the EEC Treaty (currently Article 36 TFEU) as a legitimate derogation to the free movement of goods.[492] The CJEU confirmed that copyright is encompassed by the term "industrial and commercial property", although there had been, for instance, arguments from France suggesting that copyright should be distinguished from other industrial and commercial property rights such as patents or trademarks because it does not only grant the author economic rights, but also moral rights such as paternity or integrity right.[493] In that case the CJEU, however, avoided the questions whether moral rights are encompassed by the mentioned derogation since the rights

[491] Case C-8/74 Procureur du Roi v. Dassonville ECLI:EU:C:1974:82, para 5.
[492] The CJEU jurisprudence recognised it also as a legitimate reason regarding other market freedoms see Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 15 regarding services „Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States."
[493] Joined cases 55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* ECLI:EU:C:1981:10 [1981] ECR 147, paragraphs 11-13.

in that particular case were of economic nature "to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment"[494] and, therefore, similar to other intellectual property rights. However, the confirmation on the position of moral rights within industrial and commercial property, although not explicitly, was later confirmed in *Collins* with the definition of "the specific subject matter of copyright" as both "to ensure the protection of the moral and economic rights of their holders."[495]

3.2.1.1.2.2.3. The principle of proportionality

The final part of this perspective is the proportionality assessment. As previously described[496] in its essence, the principle requires determination whether the copyright provision was suitable for the goal, if there was a less restrictive measure (for the market) applicable to pursue the goal and finally, whether the measure has an excessive effect on market interests. Applying it to copyright law, it is in this step that one encounters a very significant logical steppingstone. Namely, the suitability test requires determination whether national copyright provision is suitable for achieving "the protection of industrial and commercial property". Logically speaking that is impossible because the national copyright provision granting certain right is a part of the copyright protection system. So, if we ask ourselves whether the provision is suitable for the protection of copyright, such question is logically meaningless because the provision itself is defining a content of the copyright protection. The national provision is the copyright protection. Hence, the measure is, at the same time, an end to itself. From that, the following steps lose their value as well. It is impossible to determine whether this is the least restrictive measure for the market freedom and at the same time capable of pursuing the goal of granting protection when the measure is itself the protection. For instance, a rule prohibiting sale of diesel engine vehicles pursues a goal of environment protection. So, the rule is assessed in respect of that policy goal. The rule on copyright protection pursues a goal of copyright protection determined by the rule itself. There is no assessment as to the reason alone behind the copyright protection. Hence all the analysis is circular.

[494] Joined cases 55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* ECLI:EU:C:1981:10 [1981] ECR 147, paragraph 12.
[495] Joined cases C-92/92 and C-362/92 *Phil Collins v Imtrat Handelsgesellschaft mbH* ECLI:EU:C:1993:847, para 20.
[496] See Chapter 3, part 3.2.1.1.1.2.2.

The CJEU potentially recognised the logical setbacks and had not coherently applied the proportionality test in copyright cases. Instead, it delivered an adjusted formula[497] that protection of industrial and commercial property "only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject matter of such property."[498] At this point the CJEU could have delved into the policy question of what the purpose of national copyright protection is. For instance, is it to encourage creativity, is it to give reward for the creation etc. If it had done that, a more appropriate balancing could have been done. But it did not, and it merely applied the circular definition in which specific subject matter is considered as moral and economic exclusive rights, the substance of protection. On the contrary, when it came to trademarks, the CJEU did not say that the specific subject matter of trademark is the exclusive rights. Instead, it defined it as a function "to guarantee to the proprietor of the trade-mark the exclusive right to use that trademark for the purpose of putting a product into circulation for the first time and therefore to protect him against competitors wishing to take advantage of the status and reputation of the trade-mark by selling products illegally bearing that trade-mark."[499] From that the CJEU created a space for more nuanced balancing between the free movement interests and the "essential function of the trade-mark, which is to guarantee the identity of the origin of the trade-marked product."[500]

However, it must be admitted that delving into the question of goal of copyright protection had been difficult for the CJEU. Therefore, its reluctance is, as unfortunate, also expected. Namely, as discussed in Chapter 1,[501] there is no single coherent theory that would offer a substantial justification for the general copyright protection. Therefore, the Member States, based on their previous traditions have their own version of justifications which are usually a combination of different theories. Therefore, if the CJEU had delved into the question of what the specific

[497] See also Lawrence W. Gormley *Prohibiting restrictions on trade within the EEC. The theory and application of Articles 30-36 of the EEC Treaty* (Elsevier Science Publishers/ T.M.C. Asser Press 1985), 126 who considers "specific subject matter" doctrine as the concretization of principle of proportionality "the proportionality principle has been developed most significantly in relation to industrial and commercial property, in which context the Court has chosen to express the concepts of necessity and action less onerous to intra-Community trade by limiting the permissible derogations under this heading to those necessary to give effect to the 'specific object' of the right relied upon." as cited in Ramalho (n 19) 72.
[498] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487, para 11.
[499] Case C-102/77 *Hoffman – La Roche v Centrafarm* ECLI:EU:C:1978:108, para 7.
[500] Case C-102/77 *Hoffman – La Roche v Centrafarm* ECLI:EU:C:1978:108, para 7; Although later the CJEU modified the balance by introducing other functions of trademark such as communication, investment or advertising function see Case C-487/07 *L'Oreal v Bellure* ECLI:EU:C:2009:378.
[501] Chapter 1, Part 1.3. Justifications of Copyright Protection.

function of each national copyright system/provision was, the result could have been unsatisfactory for the creation of the common market as the one supervised by the CJEU. Namely, in each specific case, the CJEU would have had to determine what the national law said to ascertain the goal on the other side of the balance, and that goal and hence the interpretation of the "intellectual and commercial property" would have remained in the ambits of the Member States and not of the CJEU. That would not necessarily result in a poor outcome overall, as it would create space for different reasons of copyright protection and wider national regulatory autonomy, especially considering that national copyright provisions are in principle not discriminatory. It would also create a space for a more balanced institutional dialogue and more diversity. However, that does leave a part of the law on the legitimate market derogations within the Member States' competence. The other option the CJEU might have had is to try to define, by relying on the traditions of Member States, the minimum standards of copyright protection. However, some authors have put forward that such option might lack legal basis since there was nothing in the Treaty or the Community law that would grant such a competence to the EU.[502] Such line of thinking would also be in accordance with the principle of dichotomy between the existence and the exercise of rights which requires the existence and hence the goal of protection to be interpreted as belonging to the ambits of national competence. However, the same could be applied to other intellectual property rights, [503] yet the CJEU did end up defining their purposes/functions "on the basis of an implicit understanding of the level of protection generally enjoyed by patent and trademark proprietors in the Member States".[504] The fact that copyright as a form of protection has cultural or non-economic justification, might also cause the caution to delve into it. The result is that, although unfortunately, the CJEU created a paradoxical situation in which, by not delving into the existence and justification of the copyright protection (both on EU and national level), the protection became an end in itself[505] most prominently seen in the principle of "specific subject matter of copyright" protection.

[502] F.-K. Beier 'Industrial Property and the Free Movement of Goods' (1990) 21 IIC 13,148.
[503] See for trademark Case C-102/77 *Hoffman – La Roche v Centrafarm* ECLI:EU:C:1978:108, para 7; Case C-16/74 *Centrafarm BV and Adriaan de Peijper v Winthrop BV* ECLI:EU:C:1974:115, para 8; for patent Case C-15/74 Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc. ECLI:EU:C:1974:114, para 8-9 "In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort for the inventor, has the exclusive right to use an invention with the view to manufacturing industrial products and putting them into circulation for the first time".
[504] Keeling (n 485) 68.
[505] See also Caterina Sganga 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots' in in R.Caso, F.Giovanella (eds), *Balancing Copyright Law in the Digital Age. Comparative Perspectives*, Springer, 2015) 1, 7 depicting EU Copyright as "born as a sterile creature […] unable to embed the philosophical inspirations that have characterised the continental and Anglo-Saxon traditions since their onset."

3.2.1.1.3. Specific subject matter of Copyright

Instead of applying a coherent principle of proportionality,[506] the CJEU, when assessing whether national copyright protection can override the freedom of movement of goods, delivered an adjusted formula that "Article 36 [of the EEC Treaty] only admits derogations from that freedom to the extent justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property."[507] Interestingly, in the cases involving freedom of movement of services, the CJEU did not use the language *specific subject matter* and opted for *the essential function of copyright* instead.[508] The substance of the terms, although not defined in the early case law, seemed to coincide in the jurisprudence since they were both predominately focused on the rights that enable the commercial exploitation of the work. However, they offered little, if any, methodological value.[509]

Namely, in the *Deutsche Gramophone* case involving parallel imports of sound recordings, the CJEU by relying on the term *specific subject matter of copyright* (while not giving the definition of the term), decided that copyright exclusive distribution right must be exhausted once the work has been put on the market in any of the Member States. Without any substantial argumentation why does such a result derive from the *specific subject matter analysis,* the CJEU ended with a decision that otherwise the result would be the "isolation of national markets [which] would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market."[510] On the other hand, the case involving freedom of movement of services, the CJEU decided otherwise. In *Coditel,* the CJEU was essentially asked whether the principle of EU wide exhaustion applies to television broadcasts and further cable retransmission of motion pictures.[511] Unlike the decision regarding the distribution of gramophone records, which were in a material and tangible form and hence potentially interfering with the freedom of movement of goods, the CJEU here took a different position. It recognised the right of the owner of the copyright in a film to require fees for any showing of

[506] In the sense described in Chapter 3 part 3.2.1.1.1.2.2.;
[507] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487, para 11; Case C-58/80 *Dansk Supermerkad v Imerco,* ECLI:EU:C:1981:17, para 11.
[508] Case C-62/79 Coditel I ECLI:EU:C:1980:84, para 14.
[509] See e.g. Keeling (n 485) 62 suggesting that "the concept of specific subject-matter seems entirely superfluous to the process of reasoning by which the Court reached the view, in *Deutsche Gramophone".*
[510] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, para 12.
[511] The case involved a French Company, *La Boeite,* which assigned the exclusive right to broadcast a motion picture in cinema and television for the Belgian territory to *CineVog* for 7 years. For the German territory the right to television broadcasting was assigned to the German television broadcasting station and it was broadcast on the German television. *Coditel,* Belgian cable television companies, picked up directly on German aerial and then transmissioned the film by cable to its subscribers.

that film as part of the *essential function* of copyright[512] in this type of work and then concluded that "whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard".[513] However, again no definition nor criteria for the term essential function of copyright were set out. However, the term "essential function of copyright in this type of work" might suggest that such a function might differ for different kind of works. Finally, in Warner Brothers, the CJEU opted not to include any of the terms, yet merely proclaimed that the exclusive rights of performance and of reproduction are two essential rights of the author not called in question by rules of the Treaty.[514] Again, the CJEU did not offer argumentation on what makes those exclusive rights essential and merely continued with the importance of emergence of a new markets for commercial exploitation of the work. Namely, the CJEU recognised that the market of hiring out of video-cassettes reaches a wider public than the market for their sale, and […] offers great potential as a source of revenue for makers of films",[515] concluding that the national copyright protection prevails of the free movement of goods considerations. Interestingly, to justify the priority given to the national copyright protection, the CJEU also made an observation that collection of royalties on sales to private individuals and to persons hiring out video-cassettes does not guarantee for them a *satisfactory share* of the rental market.[516]

The specific subject matter of copyright has been later defined as meaning "to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. [The economic rights, on the other hand, give] the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties."[517]

However, as already discussed previously under the proportionality principle, defining the specific subject matter as exclusive rights of the copyright holder raises several concerns.

[512] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 14.
[513] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84 [1980] ECR 881, para 16.
[514] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242, para 13.
[515] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242, para 14.
[516] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242, para 15
[517] Joined cases C-92/92 and C-362/92 *Phil Collins v Imtrat Handelsgesellschaft mbH* ECLI:EU:C:1993:847, para 20.

Firstly, the protection becomes an end in itself, hence the balancing of interests between market integration and copyright protection loses the nuances. The rational discussion on differing interests and ways to achieve it is prevented. Namely, without defining the purpose of protection, the rights granted by copyright or any other related right lose their inherent limit and structure. The decision results in one or the other direction without clear methodology on how to achieve such a decision. This unavoidably opens the door for arbitrariness in which the CJEU plays the predominant role. The reasons underlying the CJEU's decision remain, thus, in the area of speculation and can never be put under strict control and evaluation. Secondly, the differentiation between copyright as an author's right and related rights slowly fades, since the exclusive rights granted to the right holders is of similar, if not the same content. Namely, by not delving into the policy reasons which form foundations of the copyright and related rights, both have been given the same recognition within the EU legal order. Both have thus been given the predominant role of tools enabling commercial exploitation through licenses.

Moreover, with the principle of the specific subject matter, the CJEU seemed to have, besides the usual proportionality test, slightly also abandoned the usual internal market structure, which requires strict interpretation of derogations and a wide scope of fundamental market freedoms. Apart from the decisions on parallel imports, the rest of the decisions in this phase resulted in prioritising the copyright protection, quoting that it "offers great potential as a source of revenue", [518] or that the owners of the copyright "have a legitimate interest in calculating the fees due in respect of the authorization."[519] It could be, hence, argued that the CJEU opted for the possibility of commercial exploitation as a justified interference with the internal market. The new technology, which, for instance, enables cable retransmission or hiring out of VHS cassettes, does not unite the market, rather it creates a new market. However, the CJEU has in essence given priority to such national copyright protection, regardless of the possibility of preserving the fragmented new national markets. In such an environment the copyright has been primarily viewed as tool of commercial policy which enables the commercial exploitation of literary and artistic works. And regardless of its impact on barriers to the free movement, the CJEU has for the time being, left it within the pure competence of the Member States. In that respect the CJEU jurisprudence on copyright law offered a different way of establishing the common market. The one, where national barriers are not removed if they contravene market freedom, provided they offer new sources of revenue and secure a normal exploitation or

[518] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242 [1988] ECR 2605, para 14.
[519] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 13.

satisfactory share of the market.[520] Regarding the value judgment, such approach does seem to resonate with putting the market efficiency above other competing values, even when the result remains a fragmented market such as the market of broadcasting.

Finally, some authors[521] have suggested that terms such as "satisfactory share of the market" or "normal exploitation" suggest a proportionality assessment, especially in the fairly recent CJEU cases such as *Premier League*[522] or *UsedSoft.*[523] In that respect Ramalho observes that "the Court [CJEU] clarified that the specific subject matter of an intellectual property right does not guarantee the opportunity to demand the highest possible remuneration – the right holder is only ensured an "appropriate remuneration".[524] I would not entirely agree that that enables the proportionality principle in the sense described above. Namely, although the decisions do seem to set certain limits for the remuneration height, there is still no room for clear methodology of the proportionality principle to determine what would be such appropriate remuneration. The protection of the specific subject matter defined as exclusive rights still remains a goal. Hence, the only assessment we are making is how much money can be returned through exercise of such exclusive rights. In other words, we cannot determine what is an appropriate remuneration necessary to safeguard the specific subject matter, because we have never delved into the policy arguments supporting copyright or related rights protection. Hence, the tools do suggest certain balancing, but the balancing remains stained with the incoherent methodology which again results in arbitrariness. Moreover, such shift of balance to question of appropriateness of remuneration puts the discussion of the limits of the copyright protection and public domain in the back seat.

3.2.1.1.4. The principle of EU wide exhaustion of the distribution right

Copyright and related rights, similarly as other intellectual property rights, grant their right holders a distribution right. It is an exclusive right under which the right holder is given the prerogative of controlling the circulation/distribution of the copyright protected work. However, there are limits to such right and it has been generally accepted that after first sale of the work, the right of distribution on that specific copy is exhausted and the copy can further

[520] Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242, para 15
[521] See for example Ramalho (n 19) 71.
[522] Joined Cases C – 403/08 and 429/08 *Football Association Premier League Ltd v QC and Karen Murphy v Media Protection Services Ltd* ECLI:EU:C: 2011:63, para 108.
[523] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* ECLI:EU:C:2012:407, para 63.
[524] Ramalho (n 19) 71.

freely circulate. Such principle has been recognised under the name of "the exhaustion of rights". The question that logically follows is the territorial scope of such principle. In other words, does the distribution right become exhausted internationally, or only within the national or regional territory.[525] The answer depends on the legislative choice of a state. The CJEU in its very first copyright and related rights case *Deutsche Gramophone* put forward the principle of the EU wide exhaustion of the distribution right. What that entails is that once the copyright protected work is put on the market of one Member State, the distribution right is exhausted on the Community wide territory. Hence, the Member States have in that respect lost the regulatory autonomy of preserving the principle to their national territory.

The reasons for the principle of exhaustion are usually threefold.[526] Firstly, it allows a "reconciliation of author's copyright and buyer's property right of the movable property consisting of a copy."[527] Secondly, it "makes the circulation of copies "flow" by privileging freedom of trade"[528] and "increasing the availability of cultural assets".[529] Thirdly, "it allows remuneration for the first sale, which is considered to be a sufficient 'fair profit' for the copyright holder."[530] The CJEU, however, when deciding on the matter in *Deutsche Gramophone* and later in *Musik Vertrieb*, did not invoke any of these reasons. The cases dealt with parallel imports of the sound recordings. In *Deutsche Gramophone* the CJEU ruled that a right holder may not, by relying on the distribution right, prevent the sale in one Member State of a sound recording originally put on a market in another Member State. In *Musik Vertrieb*, the CJEU decided that the German collecting society cannot receive the difference in royalties received for the sound recordings originally put on the market in the UK and subsequently imported in Germany. In both cases, the CJEU justified its decision by stating that otherwise the result would be repugnant to "the essential purpose of the Treaty, which is to unite national markets into a single market, [and that] could not be attained if, under the various legal systems

[525] On the more elaborate view on exhaustion see Andre Lucas 'International exhaustion' in Lionel Bentley, Uma Suthersanen and Paul Torremans (eds), *Global Copyright, Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing 2010), 306; Enrico Bonadio 'Parallel import sin a global market: should a generalised international exhaustion be the next step?' (2011) 33 (3) European Intellectual Property Review,153-161.
[526] See further Benedetta Ubertazzi 'The principle of free movement of goods: Community exhaustion and parallel imports' in Irini Stamatoudi and Paul Torremans (eds) *EU Copyright Law A Commentary* (Edward Elgar Publishing 2021), 33.
[527] Andre Lucas 'International exhaustion' in Lionel Bentley, Uma Suthersanen and Paul Torremans (eds), *Global Copyright, Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing 2010), 306.
[528] Ibid.
[529] Ubertazzi (n 526) 34.
[530] Ubertazzi (n 526) 34.

of the Member States nationals of those Member States were able to partition the market."[531] Hence the principle of EU wide exhaustion is in fact envisioned by the CJEU as a principle to prevent the partitioning of the markets by relying on national copyright (or related right) distribution right. The principle has been consistently applied in further freedom of movement of goods cases involving the distribution right. [532]

The methodology applied by the CJEU, however, did not involve any of the above-mentioned justifications and instead relied on the self-developed tool and principle of the *specific subject matter*. Namely, the CJEU concluded that it would be beyond the extent necessary for safeguarding rights which constitute the specific subject matter of such property[533] if the proprietor could prevent the importation of a product which has been lawfully marketed in another Member State by the proprietor himself, or with his consent."[534] At this stage, the CJEU did not delve much into the substantial reasons why would that contravene the necessary level of the safeguarding rights which constitute the specific subject matter. The answer, though, came lately in the 2011 case *UsedSoft,* where the CJEU decided on the exhaustion of the distribution right regarding the copies of computer programs downloaded from the internet. The CJEU ruled the right to be exhausted because "the first sale of the copy had already enabled the rightholder to obtain an appropriate remuneration". Hence, a restriction of further resale would go beyond what is necessary to safeguard the specific subject-matter.[535] Interestingly, the added EU justification for the exhaustion of the distribution right strongly resembles to the principle of mutual recognition, which is considered to be of foundational significance for the negative market integration. Yet, the CJEU opted not to explicitly rely on it in its judgments. Namely, according to the principle, once the product is lawfully put on the market in one Member State, such product can lawfully be resold in another Member State.[536]

However, when it came to other exclusive rights, the CJEU chose another direction. In *Coditel* the CJEU decided that the broadcast transmission of a film did not result in the exhaustion of the right. The case involved a cable retransmission in Belgium of a film broadcasted in

[531]Joined cases 55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* ECLI:EU:C:1981:10 [1981] ECR 147, para 14; Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, para 12.
[532] Case C-58/80 – Dansk Supermercad v Imerco, para 11-12; Case 395/87 Tournier, para 11;
[533] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, para 11.
[534] Joined cases 55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* ECLI:EU:C:1981:10 [1981] ECR 147, para 10.
[535] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* ECLI:EU:C:2012:407, para 63.
[536] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42, para 14.

Germany. Namely, according to the CJEU "a cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated" and the circumstances hence differ from the circulation of the material form of works.[537] In these circumstances the CJEU found the copyright owner to have a legitimate interest in calculating fees for any showing of a film, because such right is part of the essential function of copyright in this type of literary and artistic work.[538] Hence, the CJEU concluded that the rules of the Treaty on the free movement of services cannot in principle constitute obstacle to the geographical limits which the parties have agreed upon in order to protect the author.[539]

3.2.1.2. Soft law sources of the EU copyright law

The CJEU, by putting the market view on copyright and related rights, seemed to help steering the direction of EU copyright law regulation more towards its role of economic tool, rather than towards its previously dominant cultural aspect. Namely, interestingly the very first EU institutional act regarding the matter of copyright law was in fact 1974's European Parliament's Resolution on the protection of cultural heritage.[540] The European Parliament by that Resolution for the first time called upon the European Commission "to propose measures to be adopted by the Council to approximate the national laws on the protection of cultural heritage, royalties and other intellectual property rights."[541] It clearly viewed intellectual property law regulation as important in the achievement of cultural and educational goals. Namely, in the very same resolution the European Parliament clearly put forward that it "considers that those responsible for education and training of young people should pay the greatest attention to the means of acquiring knowledge and appreciation by the young of cultural works, both ancient and modern",[542] as well as it urged the Member States "to attach greater importance to the defence

[537] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 12.
[538] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 14.
[539] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 16.
[540] Resolution of the European Parliament on the motion for a resolution submitted on behalf of the Liberal and Allies Group on measures to protect the European cultural heritage [1974] OJ C 62/5
[541]Resolution of the European Parliament on the motion for a resolution submitted on behalf of the Liberal and Allies Group on measures to protect the European cultural heritage [1974] OJ C 62/5, point 6.
[542] Resolution of the European Parliament on the motion for a resolution submitted on behalf of the Liberal and Allies Group on measures to protect the European cultural heritage [1974] OJ C 62/5, point 2.

and promotion of works of culture, particularly by passing the laws and providing the funds necessary for the development of permanent education."[543]

The European Commission also quickly acted upon this call and issued Communication to the Council under the name "Community action in the cultural sector".[544] The Commission was at the time not much preoccupied with the question of competence of the Community and put forward that "[m]ost Community action in the cultural sector is nothing more than the application of the EEC Treaty to this sector." Namely it stated that it "involves freedom of trade, freedom of movement and establishment, harmonization of taxation systems and legislation" concluding that "the legal basis is the Treaty itself."[545] Interestingly, and not disregarding the importance of the remuneration for the creators, one of its starting points was the observation that "economic expansion is not an end in itself", followed by the understanding that "Community action in the cultural sector is […] centred on solving the economic and social problems which arise in the sector" and that "it aims to support culture by gradually creating a more propitious economic and social environment."[546] At this point, it was not clear what kind of environment the European Commission had in mind, however, it seemed to be open to accept both economic and non-economic considerations.

After having consultations with representatives of rights management societies, the cultural workers (creators and performers) and intermediaries (publishers, librarians, art dealers etc.), the European Commission identified "problems common to copyright and certain related rights", among which were duration, resale right, public lending right and which hence required harmonization of the national laws. The Commission, in analysing the importance of copyright law together with the changes made by the technological progress, again, made an assessment with respect to achieving cultural goals. It thus seemed that in the very beginnings, the European Commission acknowledged the importance of balance and interface of cultural and pecuniary interests regarding creative works. Namely, when analysing the changes brought by technological progress, mostly the possibility of photocopying, the Commission at the same time acknowledged "that what is in the interests of users often also aids the spread of culture",

[543] Resolution of the European Parliament on the motion for a resolution submitted on behalf of the Liberal and Allies Group on measures to protect the European cultural heritage [1974] OJ C 62/5, point 4.
[544] 'Community action in the cultural sector' Commission Communication to the Council COM (77) 560 (2 December 1977).
[545] 'Community action in the cultural sector' Commission Communication to the Council COM (77) 560 (2 December 1977), p 7.
[546] 'Community action in the cultural sector' Commission Communication to the Council COM (77) 560 (2 December 1977), p 5.

but nevertheless recognised the importance of the author's remuneration and publisher's revenue for the existence of the culture itself.[547] It went even further recognizing that "[a]ll Europeans, however ill-informed about cultural problems, realize that whilst the prosperity of cultural workers does not necessarily stimulate the creation of masterpieces, poverty is perfectly capable of preventing it. […] cultural workers should share the advantages of social progress, not only for obvious reasons of social justice but to ensure that culture itself is maintained and developed."[548] Finally, the Commission openly stated that the goal of the proposed harmonising measures is "to improve the social situation of workers in [cultural] sector" basing harmonization of laws on copyright and related rights "on the basis of the most favourable [which] will result in an increase in the financial yield from the entire range of rights from which many cultural workers live – or should live."[549]

It is my reading that by this approach to harmonisation of national copyright laws, the European Commission also set out two important guiding principles for the development of the EU Copyright law. Firstly, by opting for the most favourable treatment for the cultural workers, the European Commission not only delved into the regulation of the content of the copyright, but in fact gave clear precedence to the interest of content creators not even considering the potential clash with other interests. Secondly, by setting out the premise that the culture will be supported and maintained with improvement of social and economic conditions of the cultural workers, the Commission put forward a utilitarian rationale towards harmonisation of copyright laws. However, its utilitarian argument was relying on its negative premise. Namely, the main understanding was not that it will ensure greater creativity and more creative works ("it will not stimulate the creation of masterpieces"). The main idea was that ensuring good economic and social conditions would prevent potential cultural erosion. By putting down such guiding principles the EU institutions distanced itself from the traditionally invoked justifications of copyright protection on which national laws of member states were based and it seemed to have started developing its own version of the utilitarian justification.[550]

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[547] 'Community action in the cultural sector' Commission Communication to the Council COM (77) 560 (2 December 1977), p 13.
[548] 'Community action in the cultural sector' Commission Communication to the Council COM (77) 560 (2 December 1977), p 18.
[549] 'Community action in the cultural sector' Commission Communication to the Council COM (77) 560 (2 December 1977), p 18.
[550] That is not so uncommon when it comes to supranational regulation see e.g., Sganga (n 11) 17 "What makes the phenomenon particularly visible in IP law is the systematic chaos engendered by its supranational standardization, where alien concepts and rationales are often imposed over national models without performing a preventive compatibility check".

In another Communication to the European Parliament and the Council under the name "Stronger Community action in the cultural sector",[551] the Commission further unveiled the conditions and goals of the environment it aims to create. It clearly set out that "[c]ommunity [was] concerned with creators (writers, composers, painters…) and performers (actors, musicians, singers, and dancers…) seen in terms of their social situation as employees or self-employed people and not of their artistic personality which [was] their business and theirs alone."[552] In other words the aim, again, was not to encourage creativity within a person *per se*, but to ensure social and economic conditions that make professions including creativity and art desirable.[553] Hence, the European Commission, interestingly, used the wording "cultural workers" rather than artists, creators or performers.

Unfortunately, and following the discussion on stimulating creation in Chapter 1, it does seem that the European Commission approached the very complex notion of creativity one-sidedly, which raises questions on the viability and truthfulness of such premise. Namely, the European Commission clearly acknowledged that newly developed technology and media ensured enlargement of the audience of creative works and hence it raised a question of "what would be the point of having such miraculous means of transmission if we no longer have anything to transmit or are doomed to inanity?"[554] However, the creation of the creative content is stimulated by numerous factors different than the reward, and the creation of jobs for the culture does not necessarily result in more creative works. [555] In fact, it does not ensure that those positions will be filled with workers of high level of creativity developed through ages of their lifetime and experience. Then again, the Commission was arguably not preoccupied with such concerns, as the EU was at the time a purely economic organisation with the aim of establishing the internal market. The European Commission, hence, merely wanted creation of creative works that could be further commercially exploited. In that way, by promoting commercial exploitation of creative works, the Commission merely followed the line already established by

[551] 'Stronger Community action in the cultural sector', Commission Communication to the Council and Parliament COM (82) 590 final (16 October 1982).
[552] 'Stronger Community action in the cultural sector', Commission Communication to the Council and Parliament COM (82) 590 final (16 October 1982), p 5.
[553] "So, as we consider what must be done to conserve the architectural heritage or assess the impact of the rise of the audiovisual media (television and radio broadcasting, cable networks, machines for private reproduction and copying...), we cannot help but give the first priority to the fight against un- employment, and specifically here to the creation of jobs in the arts." Stronger Community action in the cultural sector', Commission Communication to the Council and Parliament COM (82) 590 final (16 October 1982), p 5.
[554] 'Stronger Community action in the cultural sector', Commission Communication to the Council and Parliament COM (82) 590 final (16 October 1982), p 5.
[555] In a sense of works involving high level of creativity, not merely a greater number of creative works.

the CJEU. Namely, the content, quality or in fact any other characteristic of the work itself seemed not to bother the Commission all that much. It might have had considered that quality assessment would have been made by its market success, but that remains a pure speculation since it remained silent on the matter. It is, thus, my reading that, although cultural goals were set out, the way of achieving those goals slowly developed in a purely economic one in a sense that the cultural sector should be marketized or regulated as one of the parts of the market, in which creators are seen as economic actors producing creative works, which are seen as commercial goods. So, even in the legislative area the cultural notion of copyright has slowly started being overshadowed by the commercial, economic one which was even more discernible in the following phase.[556]

Such evolution of events, however, gradually eroded the cultural notion of copyright law within the EU in general. Namely, cultural goals are seldom the subject of court litigation and usually remain within the institutional policy considerations.[557] Namely, it is easier to make a claim that someone made pecuniary damage by the unauthorised use of the copyrightable work, than in fact start proceedings because preservation of cultural heritage might be undermined by levels of protection granted to the cultural goals in Member States. In other words, private interests (especially pecuniary in nature) are more easily enforceable than those that are communal in nature, such as education or preservation of cultural heritage.[558] It seems, hence, quite important to have the communal interest set out in the legislation, because otherwise that interest will not be considered in the decision-making process and, hence, that interest is is under the threat of slowly fading away.

3.2.1.3. Conclusory remarks

The CJEU encountered the questions of copyright law in cases where national copyright law provisions came into the clash with the Treaty provisions ensuring fundamental market

[556] see also Ramalho (n 19) 15.
[557] „Economic rights constitute most of the issues addressed by the ECJ "see further Frederick Blockx „Reading Tea Leaves Differently? A Comparison of the Interpretive fingerprint of the CJEU and the US Supreme Court in Copyright Law" in Eleonora Rosati (ed) *Routledge Handbook of EU Copyright Law* (Routledge 2021) 486, 499.
[558] "Intangible heritage does not have inherent value and therefore should not be valued for its own sake but in consideration of the value it brings to the people. From the point of view that [intangible cultural heritage] is primarily a value which relates to the community, it can only be sufficiently protected if the value reaches an abstract level, which allows accommodating interests' supra-personae. The adherence to community evaluation makes it relational and therefore materialistic." Patricia Covarrubia, Lisa Albani 'Cultural Expressions: the intersection of culture and intellectual creations – Fado as a case study' (2017) 1 Intellectual Property Quarterly 29, 32.

freedoms and undistorted competition. However, although the CJEU methodologically remained within the legal architecture of the internal market law, it also shaped its own principles on which it relied when offering interpretations. Hence, it established the principle of dichotomy of the existence and the exercise of a right, the principle of specific subject matter and the principle of EU wide exhaustion of the distribution right. It is those principles that, hence, form the beginning and foundations of the EU copyright law.

However, those principles offered very little methodological value, which opened the door for a high level of arbitrariness. In that respect the principle of dichotomy between the existence and the exercise of a right, together with the principle of specific subject matter, mostly come forward. Namely, the principle of dichotomy between the existence and the exercise of copyright was supposed to serve as a guiding principle for deciding the question of competence between the Community and Member States. On the paper it does seem logical, as the rules relating to the grant/existence of rights remain with the competence of the Member States, while the exercise of the rights can be subjected to limitations emanating from the EU law. If interpreted literally that would mean that conditions for granting copyright protection remain with the Member States, and the exercise of rights on that copyright protected work can be subject to EU law requirements. However, copyright, as any other intellectual property right, differs from the property right on tangible things and in effect it grants its holder only a set of exclusive rights such as reproduction, performance, or distribution right. Limiting any of the exclusive rights in effect means intruding with the existence of that same right, regardless of if the holder remains the copyright or related right holder. The content of the right is, thus, not the same. Hence, and although in the beginning the CJEU delivered decisions contravening the principle in its effect while repeatedly relying on the principle, the principle was in fact subsequently abandoned, although such abandonment was never explicitly acknowledged by the CJEU itself. However, with benefit of hindsight, the decision of the CJEU in *Infopaq*[559] in which the CJEU proclaimed the standard of originality of the work as an autonomous legal concept, is a clear indication of such an abandonment. Namely, the CJEU delved into the question of conditions for gaining copyright protection, hence, in the very existence and grant of copyright.

[559] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*, EU:C:2009:465.

The other principle which attracted a lot of criticism is the principle of the specific subject matter. The aim of it seemed to be modification of the proportionality principle in the matters involving copyright or a related right. Namely, protection of intellectual and commercial property has been explicitly recognised as one of the legitimate derogations enlisted in Article 36 of the EEC Treaty. To approach the balancing between the interest of the freedom of movement of goods and interest of copyright protection, the CJEU developed a formula that says "Article 36 [of the EEC Treaty] only admits derogations from that freedom to the extent justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property."[560] The CJEU was reluctant at first to give interpretation of the term "specific subject-matter" which undeniably opened numerous questions regarding the balancing. It was finally defined in the *Phil Collins*[561] case as the moral and economic rights of the copyright or related right. Such definition did not solve any of the existing problems. Namely, the proportionality assessment in its essence assumes balancing of interests. To recognise the underlying interests, however, one must go into policy considerations. Otherwise, the rule becomes an end to itself. By not offering policy considerations for copyright protection, the CJEU created a legal framework unsuitable for any nuanced and transparent balancing. Namely, when one defines the specific subject matter as the exclusive rights, one essentially is posed with a question of whether the rule serves the exact same rule. Any answer is, hence, arbitrary and circular. Although there are reasons put forward which justify the CJEU's reluctance to delve into the question, one of them being possible lack of competence and the obedience of the dichotomy between the existence and exercise of the rights, the CJEU regardless opted for a different choice in decisions involving other intellectual property rights, such as patents and trademarks. It delved into the question of the function of those rights, hence, making the balancing little more viable. In the cases involving the freedom of movement of services, although it explicitly mentioned that the derogations from Article 36 of the EEC Treaty apply to the copyright matters involving services instead of the goods, the CJEU instead of using the term "specific subject matter" used the term of *essential function of the copyright*. Unfortunately, no interpretation of the term was given, which again opened the door for arbitrary decisions, for which argumentation can only be speculated and never really subject to a coherent critical analysis.

[560] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487, para 11; Case C-58/80 *Dansk Supermerkad v Imerco,* ECLI:EU:C:1981:17, para 11.
[561] Joined cases C-92/92 and C-362/92 *Phil Collins v Imtrat Handelsgesellschaft mbH* ECLI:EU:C:1993:847, para 20.

Finally, such reluctance to delve into policy considerations, apart from arbitrariness, brought one very significant consequence, and that is that within the EU legal order there is no differentiation between copyright as the author's right and related rights, as rights supporting the industry. Namely, the purpose and justifications of those rights differ and hence their scope should be to some extent adjusted. For instance, to encourage a writer to write, he is granted a copyright which would give him the right to reward and the right to control circulation and use of the writing, but subject to certain limitations. A publisher, on the other hand, is granted a related right so that he can recoup the investment he made to ensure production and dissemination of copyright protected material. When balancing interests, those interests slightly differ, and more nuanced balancing is possible when the purposes are clearly acknowledged.

3.2.1.3.1. Position of non-economic objectives/limitations and exceptions

As it has been already discussed in the previous chapters, the copyright law's aim is to establish the fair balance between the three set of interests – the author's, the intermediaries', and that of the public. In the ideal regulation, the interests of the author should be set out in the copyright exclusive rights, the interests of the intermediaries in the exclusive rights of the copyright related rights, and the interests of the public are envisioned through the limitations and exceptions to both of other sets of rights. In this phase, the CJEU has not dealt explicitly with limitations and exceptions in which the public interest is envisioned. The only exception the CJEU dealt with was the principle of the exhaustion of the distribution right on the tangible goods encompassed by the fundamental market freedom of movement of goods. However, the interest that was counterbalanced with the national copyright protection at the time was the interest of the internal market. In other words, the decision was in a way related to the value of market efficiency, in a sense of is it better to ensure copyright protection because it creates a new market and a new source of revenue for the right holders, or is it better to supress copyright protection and give support to the traders of goods, such as for instance the parallel importers of copyright protected goods. It is impossible to determine what would the CJEU have determined in the hypothetical *Coditel*-like scenario, in which an educational establishment would be the one that had caught and further transmitted the signal of the broadcasted film to its pupils. Would that have been encompassed by the *normal exploitation,* or would that fall outside of the *scope of satisfactory share of the market*? Would that be repugnant to the specific subject matter of copyright protection, or contrary to its essential function? Bearing in mind the

definition of specific subject matter of copyright as exclusive economic and moral rights, it does not seem to include any notion on the limitations of such rights. One possible answer is, hence, that it would have been determined purely within the national law on limitations and exceptions. But that would entail that national rule on limitations and exceptions could prevent the EU rule and that would have arguably jeopardised the principle of supremacy of the EU legal order. For instance, if one Member State had the limitation for the educational establishments to use the copyright protected work then the result in this *Coditel*-like scenario would be no copyright infringement, regardless of the rule established at the EU level, according to which "the right of the owner in the film and his assigns to require fees for *any* showing of that film is a part of the essential function of copyright."[562] If another Member State had no rule regarding such limitation, the EU rule would be applicable and the result would, thus, be a copyright infringement. The difference in rules on limitations and exceptions, hence, also results in the partitioning of the market, although the CJEU seemed to put that goal in the background regarding cinematographic works. However, since no judgment had been delivered, one can only guess what would have the CJEU done.

Nevertheless, the internal market legal framework in which fundamental market freedoms are counterbalanced with the CJEU's interpretation of the specific subject matter and essential function of the copyright protection does not seem to leave much, if any space, for the consideration outside of the exclusive rights. Namely, not going into policy reasons underlying the copyright exclusive rights and offering merely a circular definition of its essence, severely burdens the discussion on their inherent limitations. Any other public interest, apart from the market efficiency and creation of the market, had not seemed to be considered in the early copyright cases by the CJEU. Hence, once recognised cultural notion of the copyright law remained completely out of the methodological framework the CJEU developed for the copyright or related rights.

3.2.2. The Second and Third Phase (Harmonisation) of EU Copyright Law (1987 – 2023)

First phase showed the growing economic importance of copyright within the internal market due to the significant technological progress. The CJEU had been faced with numerous questions on copyright and related rights that, eventually the original EU view of copyright

[562] Case C-62/79 *Coditel v CinéVog Films* ECLI:EU:C:1980:84, para 12.

regulation as a tool of cultural policy started shifting towards the view of copyright regulation as more of a tool of economic policy.[563] Following the enactment of the Single European Act in 1987, a simplified decision-making process was introduced. Namely, unanimity was no longer required for the laws designed to establish the single market and Council could take decisions by the qualified majority. Thus, the door was opened for previously dominant negative market integration led by the CJEU to be supported by the legislative measures of positive integration. Induced by the technological development, the harmonisation of national laws on copyright and related rights had, hence, started within this phase. The harmonisation had, however, been approached sporadically, not considering the copyright and related rights legal system as a whole. Instead, the EU legislation was focusing on the single issues identified on the market, some of them recognised through the preliminary reference decisions of the CJEU.[564]

The harmonisation process has occurred through phases. The so called first generation of directives was enacted following the 1988 European Commission's *Green Paper on Copyright and the Challenge of Technology*[565]*(hereinafter: the 1988 Green Paper)* which identified six copyright issues requiring "immediate action": (i) piracy; (ii) audio-visual home copying; (iii) distribution right, exhaustion and rental right; (iv) computer programs; (v) data bases and (vi) the role of Community in multilateral and bilateral external relations. Shortly after, the European Commission published another paper, "Working Programme of the Commission in the field of Copyright and Neighbouring Rights, Follow-up to the Green Paper"[566] in which further areas requiring Community action were identified. Among those areas were duration of legal protection, moral rights, reprography and artists' resale rights, while broadcasting-related problems were even given a special chapter. Following those two papers and assessing the technological changes within the context of the internal market, the Commission, thus,

[563] See e.g. William Cornish when describing the influence of technology on copyright in general 'Copyright Across the Quarter-Century' (1995) 26 (6) International Review of Intellectual Property and Competition Law 801, 806 "By embracing this economically crucial aspect of computer technology at the moment when it spread to miniaturisation and mass production, copyright as a whole lost something of its cultural specificity; but it gained considerably in political awareness. There was a splay of studies demonstrating the contribution of copyright industries to the gross domestic products of various industrialised states. While one contributor to the Review viewed this cash-register utilitarianism with dismay, it was having to be accepted as a concomitant of the new importance."

[564] For example The Rental Right directive can be linked to Case C-158/86 *Warner Brothers v Christiansen* ECLI:EU:C:1988:242 or The Term Directive can be connected to Case C-341/87 *EMI Electrola* v *Patricia Im- und Export and Others* ECLI:EU:C:1989:30.

[565] Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, COM (88) 172 final (7 June 1988).

[566] Working Programme of the Commission in the field of Copyright and Neighbouring Rights, Follow-up to the Green Paper, COM (90) 584 final (17 January 1991)

proposed further legislative action which resulted in several directives. In 1991, the first directive on protection of computer programs was enacted (The Computer Programs Directive[567]). Shortly after it was followed by, in 1992, the Rental and Lending Rights Directive, in 1993, by the Satellite and Cable Directive and the Term Directive[568] and in 1996, by the Database Directive. [569] Among the rest of the legislative proposals set out by the 1988 Green Paper and its Follow-up, the directive on home copying of sound and audiovisual recordings has so far not been adopted, although certain issues have been approached within the InfoSoc Directive[570], adopted in 2001. Finally, Resale Right Directive[571] was adopted in 2001 while Enforcement Directive against piracy was enacted in 2004.[572]

Prof Hugenholtz, probably correctly, observes that "many of the issues identified by the European Commission as requiring harmonization concerned new information technologies – areas where no or few disparities (as yet) existed between the laws of the Member States" further commenting that "most likely, European Commission saw these largely uncharted terrains as 'easy' targets for early harmonization, since no deep-rooted national copyright doctrines or established case law would pose obstacles to approximation."[573] Moreover, as prof Hilty suggests, American lobbying could have also played an important part in enacting directive on computer programs. Namely, computer programs protection under copyright at that time "was not in the predominant economic interest of Europe -- but of the U.S."[574]

The second phase of harmonisation followed another Commission's Green Paper in 1995. Namely, due to the arrival of internet and the wide array of possibilities it enabled with respect to the use of the copyright protectable material, the European Commission had even greater ambition to urgently regulate the matter. Hence in 1995 it published the *Green Paper on*

[567] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122, p42–46.
[568] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290, p 9–13.
[569] Directive 96/9/EC Of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, p102-110.
[570] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p10-19.
[571] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art OJ L 272, p32–36.
[572] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, p16-25.
[573] Hugenholtz (n 199) 59.
[574] Reto M. Hilty 'Copyright in the Internal Market' 35 (7) International Review of Intellectual Property and Competition Law 760, 763.

Copyright and Related Rights in the Information Society.[575] At the same time at the international level the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty were concluded in 1996. Both were signed by the European Commission on behalf of the EU. Hence, the EU has also accepted commitment to implement the norms of the mentioned treaties within the harmonisation measures. The harmonisation effort, thus, shortly followed and in 1997 the European Commission proposed the Information Society Directive[576] (commonly known as the InfoSoc Directive) which was finally adopted by the legislation in 2001. Up to this day, the InfoSoc directive has remained the central piece of EU Copyright legislation. Namely, the InfoSoc Directive is considered to be a measure adopting fully horizontal approach. It went beyond the scope of the WIPO Treaties, and it is equally applicable both to analogue and digital copyrightable works. It harmonised the economic rights of the authors and the related rights holders and it even delved into the limitations and exceptions to such rights. In 2004 another horizontal directive was adopted, the Enforcement Directive.[577] It harmonised, however, the procedural aspect in case of infringements of all intellectual property rights, including copyright and related rights. The horizontal approach of this second generation of directives was not aimed to disrupt the previous first generation of directives. In fact, they are forming a slowly building EU Copyright law and "when one interprets the provisions of the first-generation Directives one should also take into account the provisions of the second set of Directives for the sake of uniformity and consistency of EU law."[578] Following the adoption of the second-generation directives of horizontal approach, the harmonisation process slowed down. The Rental and Lending Rights Directive, The Term Directive and the Computer Programs Directive were renumbered and negligibly updated until 2009. However, in 2011 the Term Directive introduced one significant substantial and severely criticised amendment and that is the extension of the term of protection for phonogram producers and performers with respect to their rights in the musical sound recordings. The term of protection was extended from previous 50 years to 70 years.[579]

[575] Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final (19 July 1995).
[576]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p10-19.
[577] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, p16-25.
[578] Cristophe Geiger, Franciska Schönherr, Irini Stamatoudi, Paul Torremans and Stavroula Karapapa 'The Information Society Directive' in Irini Stamatoudi, Paul Torremans (eds) *EU Copyright Law* (Edward Elgar 2021) 279, 281.
[579] Hugenholtz (n 199) 61.

In 2009 the Lisbon Treaty[580] entered into force and with that one important occurrence followed. Namely, according to Article 6(1) of the Treaty on European Union (hereinafter: TEU)[581] the Charter of Fundamental Rights of the European Union (hereinafter: Charter)[582] has been accorded the same legal value as the Treaties. In other words, the Charter has been recognised as a source of EU primary law which means that all the sources of EU secondary law must be in accordance with the Charter as well as with the other sources of primary law, including general principles of law. In the context of copyright law there are several things worth bearing in mind. One is that Article 17 (2) explicitly states that "Intellectual property shall be protected". However, the Charter at the same time in Article 13 provides that "the arts and scientific research shall be free of constraint" and that "academic freedom shall be respected".

The legislative actions, following the Lisbon Treaty, have remained sporadic and focused on certain issues rather than employing a holistic approach. Hence, in 2012 the Orphan Works[583] directive while two years later, in 2014, the Collective Rights Management Directive[584] were enacted. In 2017, following the conclusion of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled, the Marrakesh Treaty Directive[585] and the Marrakesh Treaty Regulation[586] were enacted. Finally in 2019, two directives were enacted, one of which is the Digital Single Market directive[587] that adopts the horizontal approach and the so-called Netcab directive.[588]

[580] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, [2007] C 306/01.
[581] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15.
[582] Charter of Fundamental Rights of the European Union [2016] C202/389.
[583] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance OJ L 299, p 253-260.
[584] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance OJ L 84, 20.3.2014, p 72–98.
[585] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242, 20.9.2017, p 6–13.
[586] Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled OJ L 242, 20.9.2017, p 1–5.
[587] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) OJ L 130, 17.5.2019, p 92–125.
[588] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations

3.2.2.1. EU Competence and Legal Basis of Harmonisation Measures

Having enumerated the harmonisation measures that have been enacted on the European Union level, the aim of this part of the research is to further assess the methodology and legal framework of the EU Copyright law focusing on the position of non-economic interests. As discussed above the EU copyright law has been initiated by the CJEU within the process of negative market integration. It was approached as an obstacle to the free movement of goods and services, and it was mostly found to be a valid and justified derogation which manages to survive. In those kinds of circumstances, it is to be expected that such justifiable derogations will not remain intact. Namely, although the objective and nature of derogation have been found as legitimate, the disparities between national legal systems probably remain which means that the obstacles are still present within the market. In situations like that it is, then, to be expected that such obstacles will be regulated in a more uniform manner on the EU level. In other words, the positive market integration comes to play. That has precisely occurred with the matters concerning copyright law. Hence, contrary to the first phase of EU Copyright law, the focus will slightly shift from the jurisprudence of the CJEU to the newly enacted directives and regulation, all enumerated above since they have become the centrepieces of EU Copyright law. The texts analysed will be the one currently in force. The same will apply when it comes to the Treaty versions. Therefore, the analysis will be based on the wording of the currently in force Lisbon Treaty. Namely, there have been no substantial changes which would require analysis of previous versions.

According to Article 5 TEU, in order for the EU to be able to regulate, it must have competence to do so. The limits of EU competences are governed by the principle of conferral, while the use of the competences is governed by the principles of subsidiarity and proportionality.[589] Principle of conferral provides that the EU shall act only within the limits of the competences conferred upon it by Member States in the Treaties to attain the objectives set out therein.[590] In other words, firstly, any action of the EU institutions shall have the legal basis provided by the Treaty provisions that legitimises such action. In the absence of such explicit provision, the

and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (Text with EEA relevance.) OJ L 130, 17.5.2019, p 82–91.

[589] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15, Article 5(1).

[590] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15, Article 5(2).

competence, at least formally, remains within the regulatory autonomy of Member States.[591] Secondly, every EU act shall pursue the objective set out by the Treaties. Those are the constitutional parameters that provide the EU legal framework when regulating certain areas of law, including copyright legal matters. Hence, prior to analysing the position of non-economic interest within the EU Copyright law, a brief analysis of the invoked legal bases and objectives must follow.[592]

3.2.2.1.1. Principle of conferral

As it was already mentioned, under the principle of conferral enshrined in Article 5(2) TEU the EU shall only act within the competences conferred upon it by the Member States in the Treaties.[593] Competences that are not conferred remain with the Member States. In other words, there is no general power of the EU to harmonise national laws. There has to be a concrete legal basis set out in the Treaties which delimits the scope of the EU action. Most of the directives and regulations that currently form part of the EU Copyright law have been enacted on the basis of Article 114 TFEU.[594] The only exceptions are The Satellite and Cable Directive and Collective Management Directives which as its bases enlist provisions currently placed in Articles 53(1) and 62 TFEU. Several directives have, besides Article 114 TFEU, also included the provisions currently contained in Articles 53(1) and 62 TFEU. Substantially such difference in choice of legal basis does not mean much. Namely, all of the mentioned legal bases are

[591] See further Robert Schütze 'EU Competences: Existence and Exercise' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 76, 77 "Member States retain those competences not conferred upon the Union. This picture is however seriously misleading, and that in two ways. First, the Union has historically been able to significantly 'expand' its competences into policy areas that were not expressly mentioned in the Treaties. In particular, the rise of teleological interpretation and the extensive use of 'general competences' have meant that the Union has come to enjoy a (bounded) competence to expand its own competences (Section 1). Secondly, it is incorrect to assume that the Member States only retain those competences not conferred in the Treaties. For with the exception of one very limited category of Union competence, the Union and the Member States 'share' their competences in such a way." that they may both act in a field in which the Union is competent to act (Section 2).

[592] For a further analysis on the competence of EU see e.g. Loïc Azoulai (ed) *The Question of Competence in the European Union* (OUP, 2014); Sasha Garben and Inge Govaere (eds) *The Division of Competences between the EU and the Member States* (Hart 2017); Paul Craig 'Competence: Clarity, Conferral, Containment and Consideration' (2009) 29 EL Rev 323; Stephen Weatherill 'Competence Creep and Competence Control' (2004) 23 YEL 1.

[593] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15, Article 5(2).

[594] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 114 (1) "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

commonly used to achieve internal market objectives. Article 114 TFEU provides the general basis for the harmonisation "of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market", while Articles 53(1) and 62 TFEU are commonly used where the scope of the harmonised area goes beyond goods and also covers the right of establishment and the services.[595]

HARMONISATION MEASURE	LEGAL BASIS: ARTICLE 114 TFEU	LEGAL BASIS: ARTICLES 53(1) AND 62 TFEU	LEGAL BASIS: OTHER PROVISION
Directive 2009/24/EC on the legal protection of computer programs	+	-	-
Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property	+	+	-
Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission	-	+	-
Directive 2006/116/EC on the term of protection of copyright and certain related rights	+	+	-
Directive 96/9/EC on the legal protection of databases	+	+	-
Directive 2001/84/EC on the resale right for the	+	-	-

[595] Stephen Weatherill 'The several internal markets' (2017) 36 Yearbook of European Law 125-178; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032513 (last accessed February 5th 2023).

benefit of the author of an original work of art			
Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society	+	+	-
Directive 2004/48/EC on the enforcement of intellectual property rights	+	-	-
Directive 2012/28/EU on certain permitted uses of orphan works	+	+	-
Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market	-	+	
Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market	+	-	-
Directive (EU) 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and	+	-	-

related rights in the information society			
Regulation (EU) 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled	+	-	-
Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC	+	+	-

3.2.2.1.1.1. Article 114 TFEU – EU Copyright law basis

As it can be seen from the table above, the directives and regulations forming part of the EU Copyright law, have predominantly relied on the basis of Article 114 TFEU. That is not entirely surprising since Article 114 TFEU is one of the most general competences of the European Union.[596] The general application of Article 114 TFEU, however, produces twofold results. On the one hand, it is commonly used, however, on the other, it is also considered to be one of the most ambiguous and, hence, problematic.[597] In order to determine the constitutional framework in which the EU Copyright law directives and regulations have been adopted, an analysis should follow. Article 114(1) TFEU states "save where otherwise provided in the Treaties […] the European Parliament and the Council shall, […] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which

[596] Schütze (n 591) 79.
[597] See further Weatherill (n 411) 17.

have as their object the establishment and functioning of the internal market."[598] Based on the wording of the provision, there are three important conditions that need to be satisfied in order for this legal basis to be deemed applicable. First one requires no applicability of other more specific provisions, second one requires the purpose of approximation of laws and the third one requires the objective of establishment and functioning of the internal market.

3.2.2.1.1.1.1. Residual legal basis

The wording "save where otherwise provided in the Treaties" suggests that Article 114 TFEU can serve as a legal basis only where there is no other applicable basis provided by the Treaties. In essence, it is a subsidiary or "residual"[599] legal basis. The CJEU confirmed it by stating that "if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision."[600] The Lisbon Treaty in the Article 118 TFEU introduced a new legal basis for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union.[601] However, that legal basis does not create a "self-standing competence to create EU intellectual property rights."[602] It remains within the sphere of the internal market as confirmed by the CJEU in case *Spain v Council.*[603] Hence, apart from opening the possibility of creating a unitary copyright title in the future, the Article 118 TFEU does not seem to substantially impact the legislative framework of copyright harmonisation, which is the internal market framework.[604]

3.2.2.1.1.1.2. Approximation of laws

[598] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 114 (1)
[599] Barnard (n 385) 561.
[600] Case C-533/03 Commission v Council ECLI:EU:C:2006:64, para 45.
[601] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 18 "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."
[602] Ana Ramalho 'Beyond the cover story – an enquiry into the EU competence to introduce a right for publishers (2017) 48(1) International Review of Intellectual Property and Competition Law 71, 74.
[603] Joined Cases C-274/11 and 295/11 Kingdom of Spain and Italian Republic v Council of the European Union ECLI:EU:C:2013:240, para 21.
[604] Prior to introducing Article 118 TFEU, the CJEU has held that Community may use Article 308 EC (today: 352 TFEU) as the basis for creating new intellectual property rights in addition to national rights see e.g. See Case C-436/03 European Parliament v Council of the European Union (ECS) ECLI:EU:C:2006:277, para 37.

Measures adopted on the basis of Article 114 TFEU must be for approximation/harmonisation[605] of laws which have as their object the establishment and functioning of the internal market. From here then follow the two conditions. One is that the adopted measure must be aimed for approximation of laws[606] and the second is that its object must be the establishment of the internal market. Namely, the CJEU ruled in *ECS*[607] that "measures which do not harmonise cannot be adopted under Article 114 TFEU."[608] It concluded that the regulation which had the purpose of creation of a new form of cooperative society in addition to the national form could not be relied on the basis of Article 114 TFEU since it "left unchanged the different national laws already in existence".[609] This notion might be of relevance for the EU Copyright law where creation of the new rights has been relatively common under the Article 114 TFEU serving as a legal basis, although no disparities existed on the national level. For instance, creation of the sui generis database right under the Database directive or the publisher's right in the DSM directive raises such questions on the validity. Namely, both of the directives rely on Article 114 TFEU in that respect even though the objectives of some of the provisions questionably have got something to do with harmonisation, but rather creation of the new rights. The Database directive introduced the *sui generis* right for non-original databases. Its object is to "ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration"[610] At the time, there were present protections of non-original databases only in Nordic countries. However, the directive did not aim to harmonise those rights, yet introduced a new right on the European level merely justifying it with the statement that "there is a risk that Member States may legislate expressly in widely differing ways."[611] Although it is obvious that the legislators ostensibly aimed at removing potential future obstacles which would put the directive within the ambit of harmonisation, it still remains quite dubious whether that is in fact the case. Another rather recent example of introduction of the related rights on press publications of

[605] The terms are used interchangeably by the CJEU see e.g. C-217/04 *UK v EP and Council* ECLI:EU:C:2006:279 para 43.
[606] See Case C-436/03 European Parliament v Council of the European Union (ECS) ECLI:EU:C:2006:277, para 44.
[607] See Case C-436/03 European Parliament v Council of the European Union (ECS) ECLI:EU:C:2006:277, para 44 "In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms".
[608] Barnard (n 385) 561.
[609] See Case C-436/03 European Parliament v Council of the European Union (ECS) ECLI:EU:C:2006:277, para 44.
[610] Directive 96/9/EC Of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, p 20-28, recital 40.
[611] See further Ramalho (n 19) 159.

publishers under DSM directive also seems to be contestable on the same ground. According to the recitals of the directive "the organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information." In order to achieve such goals, the directive concluded that it is "necessary to provide at Union level for harmonised legal protection for press publications in respect of online uses by information society service providers."[612] However, prior to enactment of the Directive, there were only two national examples dealing with the matter of press publications, the German and Spanish one. Germany introduced a one year limited related exclusive right of making available to press publishers, while Spain introduced an unwaivable remuneration right subject to collective management.[613] Both of the systems were facing practical difficulties mostly due to the commercial strength of the main news aggregation service provider Google News which unfortunately led to practical abolishment of such rights. Hence, the question of introducing related rights for press publications on a European level is contestable as harmonisation. Namely, it seems highly unlikely that, following the two examples, there would be introduction of new different national legal regimes for the press publications which would then possibly stir the need for harmonisation. Thus, the use of Article 114 TFEU remains questionable for introducing the new related right, abandoned on the national level and on the market.

3.2.2.1.1.1.3. Establishment and functioning of the internal market

The other condition that needs to be satisfied is that the harmonisation measure must have as their object the establishment and functioning of the internal market. To understand what those measures are, we must, again, rely on the CJEU jurisprudence. In the landmark judgment *Tobacco Advertising I* the CJEU ruled that those measures must *genuinely* have as its object the improvement of the conditions for the establishment and functioning of the internal market[614] and "actually have that effect."[615] Moreover, the CJEU confirmed that there are two type of

[612] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130, P 92-125, Recital 55.
[613] See for detailed analysis Ramalho (n 602) 77-78.
[614] Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 83-84.
[615] Barnard (n 385) 565 "Although not very clearly stated in *Tobacco Advertising I*, it can be seen in paras. 84,102,104, and 107-108.

alternate measures that have such genuine object.[616] First ones are those that contribute to the elimination of obstacles to the exercise of fundamental market freedoms while the second ones are those that contribute to the removal of appreciable distortion of competition.

Regarding the measures contributing to the removal of obstacles, the CJEU held that the mere finding of disparities between national rules and the abstract risk of obstacles to the exercise of fundamental freedoms is not enough to trigger the application of Article 114 TFEU. Otherwise, the CJEU held, it might lead to discarding of the judicial review of compliance with the proper legal basis.[617] However, that does not mean that only actual obstacles can be removed, the Article 114 TFEU can also be relied on "to prevent the emergence of obstacles to trade resulting from heterogeneous development of national laws."[618] However, such emergence of potential obstacles must be *likely* and the measure must be designed to prevent them.[619] The obstacles are considered likely if "Member States have taken or are about to take, divergent measures […] which bring about different levels of protection."[620] Finally, the obstacles need to be considered *appreciable*, meaning that their effect on fundamental market freedoms has to be more than "*uncertain and indirect*".[621] As for the measures that contribute to the removal of appreciable distortion of competition, the conditions are also quite similar. Namely, the Article 114 TFEU can be used to enact measures aiming to eliminate both actual and potential distortions of competition. The distortions are considered to be potential if they are likely to arise from the diverse national rules.[622] Also, distortions need to be appreciable, meaning that the effect they have on the competition must not be merely remote and indirect.[623]

The Tobacco Advertising judgment is significant in two ways. Firstly, it confirmed the constitutional principle of conferral by declaring that the Community legislature does not have a general power to regulate the internal market.[624] However, "*Tobacco Advertising* establishes a test which is far from precise." [625] One of the factors significantly contributing to such

[616] Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 67
[617] Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 84.
[618] See Case C-436/03 *European Parliament v Council of the European Union (ECS)* ECLI:EU:C:2006:277, para 39; Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 85.
[619] See Case C-436/03 *European Parliament v Council of the European Union (ECS)* ECLI:EU:C:2006:277, para 39; Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 85.
[620] Case C-380/03 *Tobacco Advertising II* ECLI:EU:C:2006:772, para 41.
[621] Barnard (n 385) 566.
[622] Case C – 300/89 *Commission v Council (Titanium Dioxide)* ECLI:EU:C:1991:244, para 15.
[623] Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 109.
[624] Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 83.
[625] Weatherill (n 592) 14.

imprecision is the inclusion of highly imprecise adverbs such as "genuinely" or "likely" or adjectives such as "probable" or "appreciable" which pave the way for high level of interpretational discretion.[626] It is hence not surprising that discussions on competence, such as the ones regarding database right or press publishers' rights, will pertain and that some of the legislation, legally questionable, will receive support within EU legislation institutions. With that in mind, the *Tobacco Advertising I* judgment is also significant because it confirms that the limits of European Union competence will be monitored. However, there is one very important limitation to such monitoring. Namely, if there is no petition questioning the validity of enacted measure before the CJEU, the questions on competence will mostly remain unanswered. On top of that Catherine Barnard also observes that despite sending "a strong message in *Tobacco Advertising I* […] subsequent cases suggest that the Court might be relaxing its tough stance, upholding a number of uses of Article 114 TFEU which might not apparently satisfy either the detail or the spirit of the *Tobacco Advertising I* ruling."[627] Hence, asserting limits to the EU competence is an excruciating downright impossible task.[628] This thesis will, hence, not go further into enlightening those limits,[629] yet it will accept the competence creep as a "fundamental structural truth of the EU law […] vividly illustrated by internal market law."[630] In that sense the policy decisions, brought within such wide constitutional framework, become significantly more important in the areas previously regulated on a national level and re-regulated on a European level. [631] And those policy choices are important in two aspects, one

[626] Similar line of thinking is seen in Stephen Weatherill 'Supply of and demand for internal market regulation: strategies, preferences and interpretation' in Niamh Nic Shuibhne (ed) *Regulating the Internal Market* (Edward Elgar 2006), 36.

[627] Barnard (n 385) 569; see also Weatherill (n 592) 14 ". Ex post control is in the first place only as good as litigants choose to make it, and then only as good as the Court is ready to make it."

[628] Especially in the case of indirect legislation such as the one regarding copyright legal matter see e.g. Sacha Garben 'Competence Creep Revisited' (2019) 57(2) Journal of Common Market Studies 205, 207 "[Indirect legislation] is the one that is most commonly understood as the core of the competence problem, namely the adoption of EU legislation in areas where the EU's direct legislative competence is limited. The Treaty's functional power – mostly, but not exclusively related to internal market – can cut horizontally through all policy areas, including those where the EU has no, or only complementary competence. This means that the EU can, through such indirect powers, legislate in areas that are considered to fall within national autonomy […and…] The CJEU has been instrumental in the validation of this cross-cutting approach, by categorically refusing to shield any type of policy from indirect EU action."

[629] On the topic of EU competence to regulate copyright law see e.g. Ramalho (n 19).

[630] Weatherill (n 595); available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032513 (last accessed February 5th 2023) see also Weatherill (n 592) 1; Stephen Weatherill, 'Better competence monitoring' (2005) 30 European Law Review 23; see also Garben (n 628) 206 "…cross-cutting governance is the EU's legal and political *Leit-motif*, meaning that realistically no single area or issue can be hermetically sealed from European integration."

[631] See for example Bruno de Witte 'Non-market values in internal market legislation' in Niamh Nic Shuibhne (ed) *Regulating the Internal Market* (Edward Elgar 2006) 61, 72 "…there is ample evidence and solid legal justification for the view that there is no a priori substantive limit to the kinds of public policy concerns that the European legislator may take into account when enacting internal market laws. This does not mean, obviously, that the way in which those public policies are pursued at the EU level will be identical to the way they were pursued at the national level. The EU legislator could also decide, in a given case, to overlook the non-market concerns in order

the choice of matters/areas that will be regulated and second the choice of the content/quality of the regulation.[632] In that respect, the EU legislator once it choses an area to harmonise, it becomes a "re-regulator"[633] and in the case of possible lack of input legitimacy in the form of competence creep, there is a pursuing need for output legitimacy in the form of better and more competent regulation of the matter.[634] The second choice of the content and its quality is of interest for this research.

3.2.2.1.1.1.4. Article 114 TFEU as a functional provision and its substantive limitations

According to the Article 4(2) TFEU, the internal market is an area falling under shared competence between the Union and Member States and, as discussed above, pursuant to principle of conferral, Article 114 TFEU provides conditions on when European Union legislator has the competence to regulate internal market. However, Article 114 TFEU offers little guidance as to the content of such EU regulation. In that respect some consider it to have a merely *functional* character requiring no normative content for the provisions enacted on its basis.[635] Such line of thinking inevitably leads to a very wide margin of discretion to the European Union legislator as long as it manages to tie it to market integration and harmonisation. However, it would not seem entirely correct to qualify Article 114 TFEU as completely value neutral, since there are several limitations within the EU legal framework offering certain substantive constraints.

Article 26 (2) TFEU defines the internal market as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured *in accordance with the*

to facilitate market integration, but this is a pure policy choice and not a choice dictated by constitutional principle."

[632] See similar point of view Weatherill (n 626) 52-53 "The Court's point is only that the threshold demand that a measure adequately contribute to improving the conditions for the establishment and functioning of the internal market must be crossed before any question about the quality of the European-level protective regime may be (and must be) addressed. The precise level of protection achieved is then dictated by the political debate."

[633] Loïc Azelai 'The Complex Weave of Harmonization' in Anthony Arnull and Damian Chalmers (eds) Oxford University Press 2015) 589, 599; see also Michael Dougan 'Legal Developments' (2010) 48 Journal of Common Market Studies Annual Review 163, 178 "…the power to harmonise involves an effective transfer of regulatory initiative to the Union legislature in a manner which can ultimately not merely displace but replace individual national political choices."

[634] For an analysis between EU competence and legitimacy see Weatherill (n 411) 22 "Once again the core problem is a structural weakness which places few brakes on the motors of 'creeping competence' supplied by the Treaty text itself and by the institutional set-up of the EU. The risk is that the EU does too much—and does it poorly. That slippage tends to damage its legitimacy in both a formal and a social sense;" see also Sacha Garben 'Competence Creep Revisited' (2019) 57(2) Journal of Common Market Studies 205.

[635] Ramalho (n 19) 108.

provisions of the Treaties."[636] The wording "in accordance with the provisions" of the Treaties does seem to suggest that "the goal of realising a free movement-driven internal market sits within – and is in fact contained by – the wider structure of the Treaties and the many objectives committed to therein."[637]. In that sense, there has sometimes been put forward a differentiation between the internal market in narrow and broad sense. The narrow one is limited only to the economic concerns while the broad one is "conceptualised in more holistic terms, to include not only economic integration"[638], but also "the non-economic aspects of integrated Europe."[639] Moreover, conceptualising internal market holistically as to ensure non-economic concerns also goes in line with Article 3 (3) TEU which goes as follows:

"*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."*[640]

The wording of the provision includes plenty of non-economic concerns which undeniably puts European Union's ambitions way beyond the economic confinement of fundamental market freedoms. That is also supported by plenty of EU legislative and policy documents on non-

[636] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 26(2).
[637] Niamh Nic Shuibhne 'Fundamental rights and the framework of internal market adjudication: is Charter making a difference?' in Panos Koutrakos and Jukka Snell (eds) *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 215, 215; see also Weatherill (n 626) 52 "The indissociable linkage between harmonisation as a tool of market integration and harmonisation as an exercise in selecting the appropriate technique for regulating the European market is recognised in Article 95(3) EC. This provides that '[t]he Commission, in its proposals envisaged in paragraph concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'. Moreover, there are relevant horizontal provisions in the EC Treaty which dictate that the choice of the content of the harmonised regime is not value-free."
[638] Craig (n 379) 38.
[639] Marja-Liisa Öberg *The Boundaries of the EU Internal Market Participation Without Membership* (Cambridge University Press 2020), 63.
[640] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15, Article 3(3).

economic considerations, for instance, environment, culture and media or education.[641] In other words, "the Union is not only a market to be regulated, but also has values to be expressed."[642]

However, there has to be borne in mind that the framework of judicial review of the internal market measures as put forward by the CJEU jurisprudence gives no substantial concern to the values and simply puts focus on market integration concerns. Therefore, although one can perfectly argue that Treaty objectives and other provisions regarding EU policies legally impose an obligation not to go against them or undermine them, when it comes to assessing the validity of measures enacted on the basis of Article 114 TFEU, those obligations are not within the ambit of consideration within the judicial review of a proper legal base.[643] Thus, it is logically conceivable and ultimately legal that within the internal market framework some of the concerns (potentially both economic or non-economic) may be disregarded without any following legal sanction. However, that is not necessarily the case in two situations. First, where concerns fall within the ambit of fundamental rights protection and second, when there are specific horizontal Treaty provisions which do not allow certain concerns to be disregarded.

Firstly, according to Article 6(1) TEU, Charter of Fundamental Rights of the European Union (hereinafter: the Charter) has been given the same legal value as the Treaties. Hence, fundamental rights, freedoms and principles enshrined in the Charter form part of EU primary law. That entails that validity of secondary EU law can be contested on the basis of a violation of Charter, which is a significant step forward to ensuring fundamental rights protection within EU legal framework.[644] It must be noted though that even prior to Lisbon Treaty the fundamental rights were already recognised as forming general principles of law, hence, primary law. However, the Charter enumerating fundamental rights, freedoms and principles inevitably contributed if nothing else than to a higher degree of legal certainty. Although, there

[641] See e.g. Craig (n 379) 36-40.
[642] AG Bot in Case C-34/10 *Brüstle* EU:C:2011:138, para 46 as cited in Niamh Nic Shuibhne 'Fundamental rights and the framework of internal market adjudication: is Charter making a difference?' in Panos Koutrakos and Jukka Snell (eds) *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 215, 215.
[643] Weatherill (n 626) 53 "The Court's point is only that the threshold demand that a measure adequately contribute to improving the conditions for the establishment and functioning of the internal market must be crossed before any question about the quality of the European-level protective regime may be (and must be) addressed."
[644] See e.g. joined cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662 for infringement of right to respect for private life and right to protection of personal dana; Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* EU:C:2011:100 for infringement of the prohibition of discrimination based on seks and requirement to ensure equality between men and women; Case C-401/19 *Poland v Parliament and Council* EU:C:2022:297 for alleged infringement of freedom of expression; Joined cases C-293/12 and C-594/15 *Digital Rights Ireland* EU:C:2014:238 for the annulment of entire directive on the basis of infringement of right to respect for private life and right to personal dana protection.

have been some sceptical remarks put forward that "in these circumstances, the Court will normally recognise a wide margin of appreciation for the EU legislature to balance the importance of safeguarding the rights and freedoms concerned and to make the political and legal assessments that are necessary in order to set its regulatory priorities."[645]

Secondly, there are horizontal provisions in the Treaty which do not allow for certain non-economic (e.g. health, culture) or even economic concerns (e.g. consumer protection) to be disregarded.[646] In that respect, for instance, Article 167(4) TFEU provides that "the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". In other words, with such "implicit cultural powers […] cultural considerations acquire a horizontal dimension, assuming the status of a cross-cutting concern to be reflected in overall Community practice."[647] Similarly, Article 168(1) TFEU or Article 169 TFEU provide such constitutional constraints for public health and consumer protection concerns. The question, however, remains what level of legal obligations such provisions address to European Union action. In other words, how can one determine whether those considerations have been successfully obeyed, and what are the legal consequences if not. In *Laserdisken*, the applicant challenged the validity of Article 4(2) of InfoSoc directive alleging *inter alia* the infringement of Article 167 TFEU (previously 151 EC Treaty) regarding culture and Article 169 TFEU (previously 153 EC Treaty) regarding consumer protection. The CJEU did not dismiss the claims as inadmissible, yet it delved into the merits of the claim. What that entail is that compliance with Articles 167 and 169 TFEU is subject to judicial review. However, how can one determine that such obligations have been respected is still not entirely clear. Namely, in *Laserdisken* the CJEU reached a decision that the obligations have been respected by merely relying on the Recitals of the InfoSoc directive, entirely disregarding the invoked provision. Regarding the compliance with Article 167 TFEU , the CJEU merely put forward that "any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation and a rigorous, effective system for their protection is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding

[645] Georgios Anagnostaras 'Balancing Conflicting Fundamental Rights: The Sky Österreich Paradigm' (2014) 39(1) European Law Review 111, 120.
[646] Weatherill (n 626) 52.
[647] Evangelia Psychogiopoulou *The Integration of cultural considerations in EU law and policies* (Martinus Nijhoff Publishers 2008), 26.

the independence and dignity of artistic creators and performers."[648] It further concluded that "adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint, and Article 151 EC requires the Community to take cultural aspects into account in its action."[649] Unfortunately, the CJEU not only chose not to make a substantive analysis of the compliance with Article 167 TFEU it also failed to provide the criteria for assessment of such compliance. Arguably, the result is that mere inclusion of the cultural aspects in the recitals is sufficient for recognition of compliance and, hence, validity.[650]

Interestingly, regarding the claim of infringement of Article 169 TFEU on consumer protection the CJEU decision came up with rather peculiar analysis, which will be further discussed on copyright limitations and exceptions. Namely, the CJEU recognised that "Article 153(1) EC (169 TFEU) provides inter alia that, in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community is to contribute to promoting their right to information and education." It then followed that "Article 5 of Directive 2001/29 provides for a system of exceptions and limitations to the various rights […] in order to enable Member States to exercise their powers inter alia in the fields of education and teaching" and concluded that "right to education, which the Community legislature must take into account in its action, has been fully taken into consideration."[651] This part is relevant, because it confirms that obligation to ensure a high level of consumer protection is also subject to judicial review. However, on top of that, this decision puts forward the notion that limitations and exceptions in the fields of education and teaching pursue also the objective of consumer protection even though such notion does not seem fully visible from the recitals. Furthermore, such recognition might influence the position of such limitations and exceptions within the copyright legal framework.[652]

Finally, there are already some of the non-economic concerns present within the wording of Article 114 TFEU itself. Namely, Article 114(3) TFEU expressly states that "proposals […] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on

[648] Case C-479/04 *Laserdisken* ECLI:EU:C:2006:549, para 75.
[649] Case C-479/04 *Laserdisken* ECLI:EU:C:2006:549, para 76.
[650] See e.g. Evangelia Psychogiopoulou 'Cultural mainstreaming: the European Union's horizontal cultural diversity agenda and its evolution (2014) 39(5) European Law Review 626, 632.
[651] Case C-479/04 *Laserdisken* ECLI:EU:C:2006:549, para 80.
[652] For a more detailed analysis see Giuseppe Mazziotti *EU Digital Copyright Law and the End-User* (Springer 2008).

scientific facts." Such obligation of taking a high level of protection substantially affects the internal market legislation that might touch upon those concerns as well as it confirms the important political value of those concerns within the internal market legislation by attributing them the high level of protection. [653] However, the problem of substantive assessment of such obligation remains open.

Having said all that, the internal market legislation is seldom solely about market integration and fundamental market freedoms. And despite the test employed in Tobacco Advertising I, the internal market legislation goes beyond mere removal of market obstacles or distortions of competition and fully engages in policy decision making. The legislation enacted on the copyright legal matters portrays that beautifully because cultural and economic policies are inevitably intertwined. For instance, the Resale right directive[654], was enacted on the basis of Article 114 TFEU. The competence to regulate the matter on that basis was justified by presence of disparities in national laws on the recognition and application of a resale right. Such disparities were proclaimed to have a direct negative impact on the proper functioning of the internal market[655] as well as to contribute to the distortion of competition. The resale right, commonly known as *droit de suite,* due to its origins in French legislation[656], entitles the creator of the artistic work and their heirs of a percentage of the resale price when the work is subsequently sold.[657] The resale right was, however, not recognised in the UK, among others, which was the biggest art market in Europe where, in fact big auction houses such as Christie's or Sotheby's were located. Understandably, UK was against the introduction of the resale right on the EU level and it pushed for the harmonisation through the "abolition" of the resale right justifying it that otherwise the art market would be pushed to US or Switzerland where such right was not recognised.[658] In the end, the right was introduced for the authors of graphic and plastic works of art with purpose to redress the balance between the economic situation of

[653] De Witte (n 631) 68 "Article 100a was even more telling since it instructed the Commission to strive at a high level of protection for health, safety, environmental protection and consumer protection in its proposals for legislation based on Article 100a. This presupposes, obviously, that pursuing these non-market objectives is a legitimate part of internal market law-making."
[654] Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32 p 32-36.
[655] Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32 p 32-36, Recital 10.
[656] Law of 20 May 1920, as amended by Law of 11 March 1957, Journal Of ciel de la République Française, J.O. 2723, 1957, Bulletin Législatif Dalloz, 197.
[657] Giuseppe Mazzioti 'Cultural Diversity and the EU Copyright Policy and Regulation' in Evangelia Psychogiopoulou (ed) *Cultural Governance and the European Union Protecting and Promoting Cultural Diversity in Europe* (Palgrave Macmillian 2015) 91, 97.
[658] Ibid.

authors and of other creators who benefit from successive exploitation of their works.[659] The harmonisation aim would have been fulfilled both by enactment of the resale right as well as by abolition. Namely, the level playing field for the art market would be created either way. Hence, the final decision is in fact a policy one, not determined by the internal market legal framework. Moreover, despite the possible burden this right might have for the business operators on the art market, the resale right is providing an additional source of income and possible incentive to "entry into art as an occupation."[660] Hence, through regulation of the resale right, the EU legislator predominately pursued a cultural policy objective, although Article 167(5) TFEU clearly excludes harmonisation. Following the *Tobacco Advertising I* judgment, it is arguable that Article 167(5) TFEU does not prevent harmonisation on the ground that cultural objectives were a decisive factor for the choices to be made as long as the conditions for the use of the Article 114 TFEU as a legal basis are fulfilled.[661] And the moment there are disparities in the national laws, the threshold is quite easy to attain. Hence, as Bruno de Witte notes it seems "that there is no a priori substantive limit to the kinds of public policy concerns that the European legislator may take into account when enacting internal market laws."[662] Hence, in order to see what kind of internal market (in the broad sense) is constructed for the certain type of goods or services, the legal framework actually provides little guidance. Namely, as Weatherill puts forward "in truth EU has several internal markets" and there are "different patterns sector by sector within the internal market".[663] Moreover, even though there are arguably substantive constraints affecting the content of the regulation, the practice shows wide array of different political choices. That is on the one hand result of the way the policy objectives within the Treaties are formed. For instance, the terms such as "contribute to the flowering of cultures" or "development of quality education" due its breadth end up offering little substantive value resulting merely in instruments being used to legitimise a priori made policy choice. On the other hand, the validity of enacted measures needs to be questioned in

[659] Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32 p 32-36, Recital 3.
[660] John L. Solow 'An Economic Analysis of the Droit de Suite' (1998) 22 Journal of Cultural Economics 209, 222.
[661] Case C- 376/98 *Tobacco Advertising I* ECLI:EU:C:2000:544, para 88 "Furthermore, provided that the conditions for recourse to Articles 100a, 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third paragraph of Article129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured;" see also Schütze (n 591) 83.
[662] De Witte (n 631) 71"…the prohibition of cultural harmonisation contained in Article 151 has not prevented the occasional use of European law-making powers to harmonise national cultural policy rules 'through the backdoor.'"
[663] Weatherill (n 595).

front of the CJEU in order to reach the final answer and that is not always the case. The result is hence that potentially questionable legal measures can de facto remain legal.

3.2.2.1.2. The application of principles of subsidiarity and proportionality to measures adopted under Article 114 TFEU

Article 5(3) TEU clarifies that in areas which do not fall within the exclusive competence of the EU (and internal market is such area), the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. What that entail is that two cumulative conditions have to fulfilled in order for the Union to be considered as having legitimacy to act: (i) the objectives cannot be sufficiently achieved by the Member States and (ii) the objectives can better be achieved at Union level. In essence the idea is that the rules are better made on a level closer to the citizens which contributes to its democratic legitimacy. However, based on the wording alone, it seems that the decision on fulfilment of conditions or lack of such fulfilment, indeed, allows a wide discretion of political decision making. In fact, commentators put forward that the CJEU "has been reluctant to review the merits of complaints alleging breach of subsidiarity, viewing subsidiarity more as a political than as a legal principle."[664] It has also been proclaimed that the CJEU has "deftly sustained subsidiarity as a legal principle on paper while conceding much in practice to legislative discretion" concluding that "once it is determined that a competence to establish common rules exists, the political decision to exercise that competence seems in practice immune from judicial subversion."[665] The CJEU did not entirely run away from such critics but put forward an explanation that "the Community legislature must be allowed a broad discretion […] which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments." Hence, "the legality of a measure adopted can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[666] Similar notions can be attributed to the principle of proportionality. Namely according to Article 5(4) TEU, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The elements of the test are also constructed as to allow

[664] Barnard (n 385) 576.
[665] Weatherill (n 411) 21.
[666] Case C- 491/01 *Ex p BAT* ECLI:EU:C:2002:741, para 123.

balancing of differing interests and circumstance which does result more into a political then purely legal choice.[667]

Putting into the context of internal market legislation, which pursues the objective of harmonisation of national laws with the aim of establishment and smooth functioning of the internal market, the threshold to be achieved seems quite easy to be attained. Namely, in the case of existing disparities between national law, it is evident that such removal of the obstacles for achieving market integration seems inevitable then to be pursued on the EU level. However, all the more reason why attention should be put on those political social and economic choices the EU legislator does when re-regulating certain areas in order to uphold the legitimacy of Union action. Hence, as it has been already said regarding the principle of conferral, this research will start from the position of accepting such blurriness of constitutional limits of the EU legal framework and will hence focus on the substantive choices conducted within such measures.

3.2.2.1.3. Treaty objectives

The objectives pursued by the Treaties are currently set out in the Article 3 TEU. They have been changing throughout the course of time by numerous Treaty amendments. In the beginning, the objectives were predominately economic, however, that has changed, and non-economic objectives were more and more recognised.[668] The objectives do not grant more power or competence, nor do they set the limits of the competences. Their role has mostly been accepted as "obliging the institutions to continuously pursue these objectives in the exercise of their powers" and as "serving as an interpretive lens favouring legal arguments pushing for the marginal extension of power, the limits of which were not entirely clear and need judicial clarification."[669]

[667] For the explanation of its conditions see Chapter 3, part 3.2.1.1.1.2.2.

[668] Joris Larik 'From speciality to a constitutional sense of purpose: on the changing role of the objectives of the European Union' (2014) 63(4) The International and Comparative Law Quarterly 935-962, 945 „Given that "the new list focuses on non-economic goals to a far greater extent than the EC Treaty',65 a turn from predominantly economic goals to an overarching range of objectives is undeniable"; see also K Lenaerts and P Van Nuffel, European Union Law (3rd edn, Sweet & Maxwell 2011) 107;.

[669] Larik (n 668), 938 see also e.g. Mark Dougan 'The Treaty of Lisbon 2007: Winning Minds not Hearts' (2008) 45 Common Market Law Review, 617, 653.

According to the Article 3 TEU, there are enlisted numerous objectives. This thesis will analyse the ones that could have an impact on copyright legal framework. In that respect, the following objectives were chosen:

(i) Promotion of the EU's values (the rule of law and respect for human rights)
(ii) Establishment of an internal market
(iii) Respect for cultural diversity and insurance that Europe's cultural heritage is safeguarded and enhanced.

At first glance, there are two that could be understood as non-economic and one as an economic one. The presence of both economic and non-economic objectives that could play part with respect to the copyright legal matters is not surprising since the copyright protection can both be understood as a tool of commercial and cultural, educational or other policy. In order to determine their role and position in the EU Copyright legal framework, their analysis should follow.

3.2.2.1.3.1. Establishment of the internal market

As it was already discussed,[670] the creation of an internal market was the chosen model for the EU economic integration.[671] At the core of the internal market are the fundamental market freedoms – freedom of movement of goods, services, workers and capital. In order to ensure those fundamental market freedoms and, hence, internal market, there are two market integration techniques – positive and negative integration. Both are aimed at removing obstacles to the cross-border trade, but the method of achieving the aim differs. Negative integration is in essence deregulatory in which the CJEU and national courts have the dominant role. Positive integration, on the other hand, assumes removing the obstacles through unification or harmonisation of diverse national rules through a legislative act. Positive integration involves regulation and naturally numerous questions regarding the competence, the objective and the content/quality of such regulation come forward. In the context of EU copyright law, the negative integration came to the fore in the first phase as discussed above. In the second and

[670] See Chapter 3, part 3.2.1.1.1. CJEU as the common market integrationist and policy maker.
[671] For further analysis see Laurence W. Gormley 'The internal market: history and evolution' in Niamh Nic Shuibhne (ed) *Regulating the Internal Market* (Edward Elgar 2006), 14.

third phase, the positive integration has taken the dominant position, although consistently backed with the CJEU as the negative integrationist.

Article 3(3) TEU[672], among other Union objectives, states the following: "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."*

Based on the wording of this provision alone, one can determine that the EU internal market is not only a legal construct ensuring an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[673] Yet, it is also a political construct.[674] In the words of prof. Weatherill, "the internal market is an area within which the free movement of goods, persons, services and capital is ensured, but they are not ensured in exactly the same way, and nor is their relationship with other EU policies fixed or clear."[675] Hence, creation of the internal market, while ensuring the fundamental market freedoms, assumes numerous political choices to be made. And those political choices do not necessarily touch solely on economic concerns yet are of relevance for the other policy sectors such as health, environment, culture or education. Moreover, the terms such as "sustainable development based on balanced economic growth" and "social market economy aiming at […] social progress"[676] or "scientific and technological advance" clearly suggest that the economic efficiency is not an end in itself within the EU legal framework and that other social goals are to be pursued. In fact, that that is the case was already confirmed by the heads of the state and

[672] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15, Article 3(3).
[673] Consolidated Version of the Treaty on The Functioning of the European Union [2012] OJ C 326/47, Article 26.
[674] Weatherill (n 595).
[675] Weatherill (n 595).
[676] For definition of the concept social market economy see e.g. De Witte (n 631) 77 „The concept of social market economy originated in German post-war legal-economic thought, but its significance in the context of the European Constitution is not at all clear; depending on whether one emphasises the word 'social' or the word 'market', it can provide ammunition both to those who think that the EU should act in a more market-oriented way and to those who argue that it should intervene more actively to regulate the operation of the market;" Doris Hildebrand *The Role of Economic Analysis in EU Competition Law: The European School* (Wolters Kluwer 2016), 18 "A social market economy is a form of market capitalism combined with social objectives. A social market economy contains central elements of a free market economy such as private property, free trade, exchange of goods, freedom of contract and free formation of prices. However, in contrast to a free market economy the state is not passive. It actively implements regulatory measures, in particular, with respect to protecting free market forces. Integrated within these regulatory mechanisms are social policy objectives that include a balancing of the distribution of gain and gain growth between the different economic actors. These elements are supposed to diminish many of the recurring problems of a free market economy. Thus, within a social market economy, the state's responsibility is to actively improve the market conditions and simultaneously to pursue a social balance."

government of Member States in 1972 at Paris summit. In the Statement from the Summit, the following was adopted: "*Economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind."*[677] Hence, establishment of internal market cannot be considered as purely economic objective. It is more of a legal construct aimed to ensure non-economic objectives within the internal market as well.

3.2.2.1.3.2. Promotion of EU's values

The Article 3(1) TEU states that "The Union's aim is to promote peace, its values and the well-being of its peoples." The Article 2 TEU then enumerates as one of the foundational EU values the rule of law and respect for human rights. Pursuant to the CJEU, the Article 2 TEU "is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, which are given concrete expression in principles containing legally binding obligations for the Member States."[678] Besides, as it was already mentioned, the Lisbon Treaty in the Article 6 (1) TEU, has accorded the Charter, enumerating fundamental rights and freedoms, the same legal value as the Treaties. On top of that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result for the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. [679] However, one important limitation must be observed and that is the one contained in Article 51(2) of the Charter. Namely, "the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."[680] In other words, European union cannot act on the basis contained in the Charter, the basis for the action needs to be found within the Treaties. Nonetheless, its proclaimed aim is "to strengthen the protection

[677] Statement from Paris Summit (10 to 21 October 1972) accesible at https://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf (last accessed on February 5th 2023).
[678] Case C-156/21 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97, para 232.
[679] Consolidated Version of the Treaty on European Union [2008] OJ C 326/15, Article 6(3).
[680] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, Article 51(2).

of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."[681]

3.2.2.1.3.3. Respect for cultural diversity

Article 3(3) TEU proclaims that one of the objectives of the EU action is respect for "rich cultural and linguistic diversity, and [insurance] that Europe's cultural heritage is safeguarded and enhanced." Moreover, pursuant to Article 2(5) and Article 6 TFEU, "culture forms part of the policy areas in which the European Union shall have competence to carry out actions that 'support, coordinate or supplement' the actions of the Member States."[682] On top of that it is worth pointing out that cultural considerations are also reflected within the fundamental rights protection, mostly through cultural rights such as freedom of expression, right to freely participate in cultural life or right to education.[683] In that respect, besides the Charter guaranteeing such rights and freedoms, the rights enshrined in other international conventions such as Universal Declaration of Human Rights (hereinafter: UDHR)[684] come forward as general principles of EU law.[685] Namely, UDHR recognises in its article 27(1) the right to freely participate in the cultural life of the community, to enjoy the arts, and the right to share in scientific advancement and its benefits as well as in the article 27(2) the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author. Similarly, International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR) is also of relevance by offering protection to right to education in its Article 13 putting forward that "education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. It further lays down the States' obligations to achieve the full realization of the right to education by progressively introducing free

[681] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, Preamble.
[682] Evangelia Psychogiopoulou 'The Cultural Open Method of Coordination' in Evangelia Psychogiopoulou (ed) *Cultural Governance and the European Union Protecting and Promoting Cultural Diversity in Europe* (Palgrave Macmillan UK 2015) 37, 37.
[683] Evangelia Psychogiopoulou 'Cultural rights, cultural diversity and the EU's copyright regime: the battlefield of exceptions and limitations to protected content in Oreste Pollicino, Giovanni Maria Riccio, Marco Bassini (eds) *Copyright and Fundamental Rights In The Digital Age A Comparative Analysis in Search of Comon Constitutional Ground* (Edward Elgar 2020) 124, 128-129.
[684] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Article 27.
[685] Psychogiopoulou (n 683) 128 "Several provisions from major international human rights treaties can thus advise on the protection of fundamental rights as general principles of EU law. An example is Article 27(1) and (2) of the Universal Declaration of Human Rights…"

education on all levels (primary, secondary and higher education).[686] Article 15 of the ICESCR also recognizes the right to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author. On the other hand, it puts down States' obligations to take steps to achieve full realization of such rights which shall include those necessary for the conservation, the development and the diffusion of science and culture.[687]

The cultural powers of the European Union, however, are set out in the Article 167 TFEU according to which they are limited to "contribut[ion] to the flowering of the cultures of Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."[688] The harmonisation of laws and regulations of the Member States on cultural matters is excluded pursuant to Article 167(5). However, that does not mean that European Union is entirely prevented from regulating matters of cultural concern. For instance, through harmonisation of laws for the establishment and functioning of the internal market purposes, the regulation might touch upon the cultural concerns. EU Copyright law is precisely one of the main policy areas in which cultural concerns should have and have received attention.[689] Moreover, Article 167(4), known also as cultural mainstreaming clause,[690] requires the European Union to take cultural aspects into account in its action under the provisions of the Treaties, in particular in order to respect and promote the diversity of its cultures. Hence, the respect and promotion of cultural diversity extends to a horizontal policy concern that needs to be portrayed within the EU action in general. Moreover, such cultural mainstreaming is fully supported and included in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, [691] of which the EU is a

[686] International Covenant on Economic, Social and Cultural Rights (1966) 999 UNTS 171 (ICESCR) Article 13.
[687] International Covenant on Economic, Social and Cultural Rights (1966) 999 UNTS 171 (ICESCR) Article 15.
[688] Consolidated Version of the Treaty on The Functioning of the European Union [2012] OJ C 326/47, Article 167(1).
[689] Psychogiopoulou (n 683)124.
[690] Psychogiopoulou (n 650) 628 "The adoption of art.167(4) TFEU, also referred to as the "cultural mainstreaming" clause of the TFEU,7 has been a direct consequence of the recognition that the grant of cultural powers to the Union, even if underpinned by cultural diversity precepts, would not suffice to countervail the possible adverse pressure exerted by other EU policies and actions on domestic cultural specificities. Interacting with various areas of Union activity, culture was considered to necessitate a systematic protection on behalf of the Union. By requiring the European institutions to take cultural aspects into account in their action in general, art.167(4) TFEU integrates sensitivity for culture and cultural diversity in particular, in all Union policies and activities. This is in line with the Charter of Fundamental Rights of the European Union (CFR), which pronounces in art.22 that "[t]he Union shall respect cultural, religious and linguistic diversity."
[691] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions available at https://en.unesco.org/creativity/convention/texts (last accessed 12th of March 2023).

party to. Namely, the UNESCO convention requires from States to protect and promote the diversity of cultural expressions; to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; to reaffirm the importance of the link between culture and development for all countries among other objectives[692] . The Council Decision 2006/515 on the conclusion of the UNESCO Convention[693] provides a list of EU competences in the areas covered by the Convention, and among them listed are precisely "internal market, including intellectual property."[694] Having said all that, the promotion and respect for cultural diversity and cultural flourishing within the constitutional framework are given a significant normative value which substantially should affect the EU action in general.

3.2.2.2. Internal markets for copyright protected goods/services

As it was seen above, the internal market is both a legal and political concept. At the core of the internal market are the fundamental market freedoms – freedom of movement of goods, services, workers and capital, otherwise referred as the internal market in a narrow sense. On the other hand, the internal market in a broad sense is "conceptualised in more holistic terms, to include not only economic integration"[695], but also "the non-economic aspects of integrated Europe."[696] The latter, hence, encompasses certain policy and value choices made by the EU legislator and/or CJEU when creating a certain internal market. The final outcome of the political choice is ultimately set out in the provisions of harmonisation measures as well as within the decisions of the CJEU when interpreting EU law. However, the legal reasoning and justification of the choice preceding drafting those provisions precisely lies in the recitals. Moreover, although recitals are not legally binding per se, they are a mandatory part of EU directives determining the aims and objectives and they are a considerable factor to stir the interpretation of the provision in a certain direction. Namely, according to the Article 288 TFEU, the directives are binding as to the result to be achieved. Therefore, when creating an internal market with measures of positive integration, and when those measures take the form of directives which is predominately the case in EU Copyright law, then the objectives and the

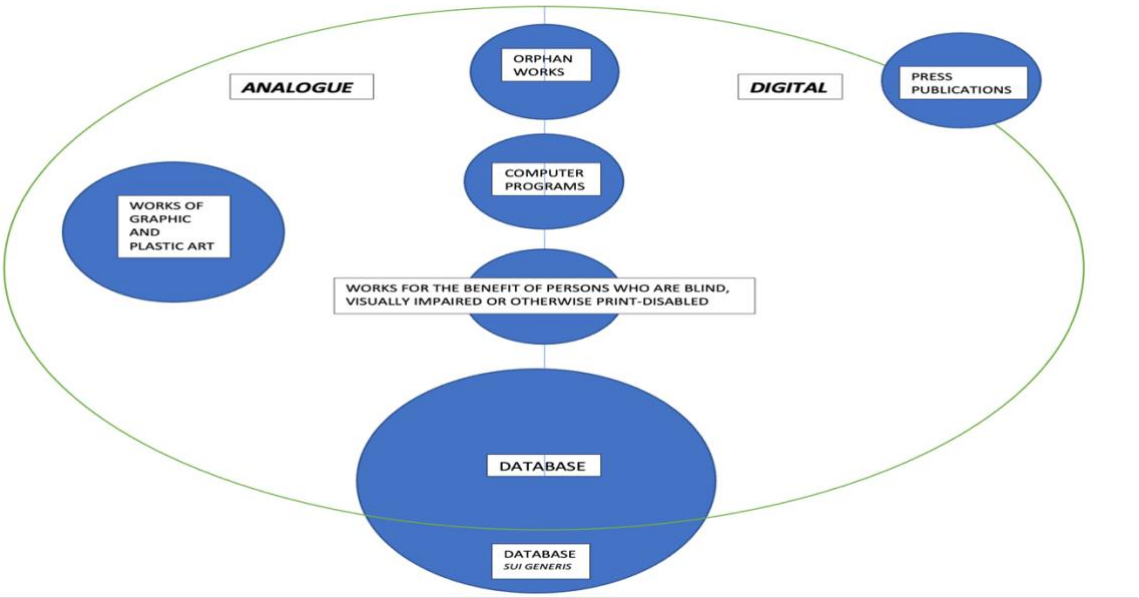
[692] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions available at https://en.unesco.org/creativity/convention/texts (last accessed 12th of March 2023), Article 1.
[693] Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2006] OJ L 201/15, p15.
[694] Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2006] OJ L 201/15, p15, Annex 1(b).
[695] Craig (n 379) 38.
[696] Öberg (n 639) 63.

resolution of a possible tension within concurrent objectives is methodologically relevant to determine the position of concurring and/or conflicting interests.

The EU Copyright, as seen above, does not encompass a single harmonisation measure regulating wholistically the market for the copyright protected goods or services. On the contrary, directives have been enacted either regarding special category of work or regarding certain exclusive rights granted to the right holder. In other words, the former category encompasses vertical approach while the latter are purely horizontal since they are equally applicable to all the goods and/or services under copyright or related rights protection. In the context of internal markets and their legal and value framework, it follows that there are different layers or levels of internal market of copyright or related rights protected goods and/or services. In that sense, there is a general internal market for copyright and related rights protected goods regulated by (i) the InfoSoc directive, (ii) the Term directive, (iii) the Enforcement directive, (iv) the Rental and lending rights directive, (v) the Satellite broadcasting and cable retransmission directive, (vi) the DSM directive, (vii) the Netcab directive. On top of that there are additional levels of internal market regulated by work specific legislation incorporating additional policy choices, objectives and values. Hence, there is a more specific level of internal market for orphan works (regulated by Orphan works directive), for computer programs (regulated by Computer programs directive), for works of graphic and plastic art (regulated by the Resale right directive), for works for the benefit of persons who are blind, visually impaired or otherwise print disabled (regulated by the Marrakesh Treaty directive and regulation) and for databases (regulated by the Database directive). In that sense, there are 6 different "internal markets" as legal and political concepts portraying the policy choices made on the basis of Article 114 TFEU, as visible in the picture below. The framework of the general market for copyright and related rights protected goods or services is a foundation, while the work specific frameworks are an add-ons bringing additional policy choices and objectives.[697] There is also one more notion that needs to be addressed and that is that the DSM directive is applicable only regarding digital markets while the rest (except the Resale right directive which is logically applicable solely to analogue market) are both applicable to analogue and digital markets. Finally, within the mentioned legislation, there have been introduced sui generis rights

[697] See for Computer programs directive Case C-355/12 *Nintendo v PC Box* ECLI:EU:C:2014:25, para 23 "That finding is not weakened by the fact that Directive 2009/24 constitutes a lex specialis in relation to Directive 2001/29;" Case C-128/11 *Usedsoft v Oracle* ECLI:EU:C:2012:407, para 56 "…Directive 2009/24, which concerns specifically the legal protection of computer programs, constitutes a lex specialis in relation to Directive 2001/29."

regarding databases and press publications that do not enjoy copyright protection per se. However, since they are regulated within the Database and the DSM directive, their factual exclusion from the market of copyright and related rights protected goods or services is of no relevance for assessment of the legal and value framework within the levels of the internal market.



Picture 1 *Levels of internal market for copyright and related right protected goods*.

3.2.2.2.1. General internal market of copyright or related rights protected work

3.2.2.2.1.1. Economic objectives

As it can be seen in the tables below, the economic objectives quantitatively prevail over the non-economic ones in every directive regulating the general internal market of copyright or related right protected goods. In that respect, copyright and related right protection were given the role of a tool of an economic and industrial policy of the European Union. In that sense the objective of copyright and related rights harmonisation has been determined as to "create a general and flexible legal framework […] in order to foster the development of the information society in Europe."[698] Copyright and related rights have been significantly praised in that regard

[698] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 2.

since "they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content."[699] The recitals further put down the importance of legal certainty and high level of protection of copyright and related rights with the aim to foster substantial investment in creativity and innovation which will then lead to growth and increased competitiveness of the European industry.[700] Such a legal framework, allegedly, would then safeguard employment and it would encourage new job creation and is deemed to be of fundamental importance for the economic development of the European Union.[701]

The aim of harmonisation and opting for a high level of protection is further justified as the tool to ensure the availability of an appropriate reward for authors or performers to continue their work as well as to guarantee and provide for the opportunity for satisfactory returns on investment required to produce copyrightable products.[702] It further highlights that such material resources are needed to ensure the European cultural creativity.[703] It also encourages the exploitation of the creative content[704] and pushes for smooth operation of contractual agreements and facilitation of clearance of rights.[705] Finally, it purportedly serves as a tool to combat piracy which is fundamental to prevent loss of confidence in the internal market in business circles with a consequent reduction in investment in innovation and creation.[706]

3.2.2.2.1.2. Non-economic objectives

Although the non-economic objectives remain the minority in the pool of objectives, they are still very much present within the harmonisation measures. In essence they reflect the obligation

[699] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 2.
[700] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 4.
[701] Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376, p 28-35, recital 3.
[702] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 9-10; Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376, p 28-35, recital 5.
[703] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 11-12.
[704] Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376, p 28-35, recital 4.
[705] Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15, recital 28.
[706] Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L 195/16, recital 9

of the European Union to take cultural aspects into account pursuant to Article 167 TFEU[707] and confirm the importance of copyright and related rights protection from a cultural standpoint. The objectives could be theoretically divided into two groups – one concerning the creators and other concerning the public as users of creative works. In that sense, it has been put forward that the high level of protection is "crucial to intellectual creation" and that it "helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large."[708] It, however, puts accent solely on the need for resources and appropriate reward as an incentive for further creation and as a tool to ensure the independence and dignity of artistic creators and performers.[709]

On the other hand, the legal framework acknowledges the need to promote learning and culture as one of the objectives.[710] In that respect, it recognises the educational and scientific interests, the freedom of expression and other public interest.[711] It recognises the interests of public institutions or "non-profit making establishments"[712] such as libraries or archives who are using the copyright protected goods for "disseminative purpose."[713] However, its achievement has been granted to the competence of Member States when implementing the exceptions and limitations to the copyright or related rights envisioned by the harmonisation measures. The discretion of the Member states is however confined to the limits set out by the Directive but in essence it requires the Member states to "duly reflect the increased economic impact that such exceptions or limitations may have." Namely, the EU legislator clearly puts forward that in the electronic environment such economic impact is greater which, according to the EU legislator, pushes for the more limited scope of certain exceptions and limitations.[714] *Argumentum a contrario* it follows that the economic impact is the factor to be taken into account when determining the scope. However, there is an acknowledged need to ensure a fair balance of

[707] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 12.
[708] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 9-10
[709] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 11.
[710] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 14.
[711] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 34.
[712] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 40.
[713] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 40.
[714] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 44.

rights and interests between the different categories of rightholders as well as between the different categories of rightholders and users.[715] Again, the achievement of this objective is also confined to the application of limitations and exceptions which the EU legislator further subjects to the three step test.[716] Finally, the legal framework recognises the need to respect fundamental rights as right of property and freedom of expression. Although no priority has been set out between the possibly conflicting fundamental rights, the Enforcement directive clearly puts forward that it "seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter."[717]

3.2.2.2.1.2. Tension between economic and non-economic objectives and its resolution

As it can be seen above, the regulation of copyright and related rights inevitably simultaneously pursues economic and non-economic objectives which at times may be or may not be at odds with each other. For instance, on the one hand, the cultural objective of maintenance and development of creativity as well as the economic objective of ensuring appropriate reward and satisfactory return of investment are pursued through the exact same tool and that is high level of protection of exclusive rights. On the other hand, the objectives of promotion of learning and dissemination of culture are pursued through the implementation of the provisions on limitations and exceptions to the copyright or related right exclusive rights. Disregarding the questionable correctness of the assumption that maintenance and development of creativity is solely pursued through ensuring appropriate reward or income[718], the former example represents the situation where the substantially different objectives are pursued equally. However, in the latter example, all the other public interest objectives such as education, research or freedom of expression which contribute to the social dialogue are pursued through the provisions on limitations and exceptions. Therefore, those public interest objectives are legally put at odds with both the objective of maintenance and development of creativity and the objective of ensuring appropriate reward and guarantee of a return of investment. Namely, limitations and exceptions are legally and factually disrupting the scope of exclusive rights and

[715] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 31.
[716] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 44.
[717] Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L 157/45, recital 32; Directive 2006/115/EC on rental and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28, recital 2.
[718] For a detailed discussion see PART I – Creativity, creative process and copyright.

hence, high level of protection. That notion might be relativised, though, if there are *a priori* limits to such high level of protection because high does not necessarily mean absolute. In that regard, it is worth pointing out that according to the recitals of The Rental and Lending directive, the protection does not need to be high, rather it has to be adequate.[719] Regardless there is indisputably a tension between certain objectives, not regarding their substance, but more as a result of different tools purported for their achievement.

The tension has not been fully resolved within the legislation, although some bias might be sensed in favour of copyright or related rights' exclusive rights. Namely, by propelling the copyright protection on a basis of a high level as a necessary tool towards economic and cultural development of European Union which will supposedly lead to increased competitiveness and safeguard new job creation, it has already been given a high policy regard.[720] On the contrary, limitations and exceptions to the exclusive rights have, already in the recitals, been subjected to the conditions of the three-step test requiring that they may not be applied in a way which prejudice the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter.[721] Moreover, when determining the scope of exceptions and limitations recitals put forward that economic impact of those limitations on the exclusive rights has to be taken into account.[722] In other words, arguably priority has been already been given to copyright exclusive rights as they are capable of providing resources and return of the investment. On the other hand, the limitations and exceptions to such exclusive rights are then seen as obstacles preventing or affecting certain resources or investment to be recouped. The scope of those limitations, and hence the scope of non-economic objectives they pursue, will be then determined according to their economic impact on exclusive rights. [723] The question of tension between economic and non-economic objectives has nevertheless been more clarified by the CJEU on three levels. Firstly, by proclaiming the high level of protection

[719] Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L 157/45, recital 32; Directive 2006/115/EC on rental and lending right and on certain rights related to copyrigth in the field of intellectual property [2006] OJ L 376/28, recital 3.
[720] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 4.
[721] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 44.
[722] Although it must be noted that Recital 31 of the InfoSoc directive states that the degree of their harmonisation should be based on their impact on the smooth functioning of the internal market, the CJEU when referring to that recital considered it in the sense of economic importance of the limitations and exception Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, paras 40- 44.
[723] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, recital 44.

of copyright and related rights as principle and essential objective. Secondly, by proclaiming provisions on limitations and exceptions as provisions that derogate from a general principle and thirdly, through balancing the concurrent fundamental rights.

The CJEU has declared that the principle and essential objective of InfoSoc directive is to establish a high level of protection allowing the right holders to obtain an appropriate reward.[724] Moreover it confirmed that the system for the protection of copyright must be rigorous and effective.[725] The same was also confirmed for related rights. Namely, the jurisprudence regarding related rights put an accent even more on the investments since the investments are especially high and risky for the production of phonograms and films[726] Hence, relying on the copyright protection to guarantee a satisfactory return is even more accentuated. On top of that, the Enforcement directive also further purports that the purpose is to ensure effective protection of intellectual property, including copyright and related rights.[727] It is worth noting that the high level of protection based on the recitals is merely a tool to achieve further objectives, to ensure an appropriate reward or maintenance and development of creativity. Yet, the CJEU proclaimed it to be the principle objective, which actually prevents any discussion on its capability of achieving the aims it is supposed to achieve. In other words, the tool has become the goal, high level of copyright and related rights' protection has become an end in itself.

Furthermore, acknowledging the high level of protection as a principle objective had significant repercussions on provisions which are at odds with exclusive rights, provisions on limitations and exceptions. Namely according to the well-established CJEU case-law, provisions which derogate from a general principle established by directive must be interpreted strictly.[728] And those provisions, within this legal framework, are precisely the ones regulating limitations and exceptions. Furthermore, in order to uphold its decision on strict interpretation of limitations

[724] Case C-306/05 *SGAE v Rafael Hoteles SA* ECLI:EU:C:2006:764, para 36; Case C-607/11 *iTV Broadcasting Ltd v TVCatchup Ltd* ECLI:EU:C:2013:147, para 20; Case C- 419/13 *Art & Allposters* ECLI:EU:C:2015:27 para 47; Case C-470/14 *EGEDA* ECLI:EU:C:2016:418 para 25; C-682/18 *Peterson v Google* ECLI:EU:C:2021:503 para 63; Case C-493/20 *Austro-Mechana Gesellschaft* ECLI:EU:C:2022:217 para 16; Case C-484/18 *SPEDIDAM* ECLI:EU:C:2019:970 para 39; C-263/18 *Tom Kabinet* ECLI:EU:C:2019:1111, para 48; C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 18.

[725] Case C-516/13 *Dimensione Direct Sales* ECLI:EU:C:2015:315, para 34; Case C-456/06 *Peek & Cloppenburg* EU:C:2008:232, para 37;

[726] Case C-277/10 *Luksan*, ECLI:EU:C:2012:65, para 77-83; Case C-265/19 *Recorded Artists Actors Performers ECLI:EU:C:2020:677*, para 50.

[727] Case C-275/06 *Promusicae,* ECLI:EU:C:2008:54 para 57; Case C-324/09 L'oreal v eBay ECLI:EU:C:2011:474, para 131.

[728] Case C-5/08 *Infopaq* ECLI:EU:C:2009:465, para 56.

and exceptions, the CJEU repeatedly invoked the requirements of the three-step test enshrined in Article 5(5) of the InfoSoc directive.[729] However, up to this point there has not been a single decision which would offer the interpretation of its requirements. In other words, what constitutes *normal exploitation,* and in regard to that, what are the limits of *high level of protection.* In *ACI Adam,* the CJEU peculiarly stated that "Article 5(5) of Directive 2001/29 is not intended either to affect the substantive content of provisions falling within the scope of Article 5(2) of that directive or, inter alia, to extend the scope of the different exceptions and limitations provided for therein."[730] But if it is used for upholding the position of strict interpretation, is it not already affecting the substantive content. If not, then the three-step test has no methodological value within the EU legal framework on copyright legal matters because the obligation of strict interpretation has already been solved by determining the high level of protection as the principle objective.[731] Moreover, this decision also affects Member states' discretion when implementing other public interests through implementation of provisions on exceptions and limitations. Namely, the CJEU confirmed that the discretion cannot be exercised as to compromise the principle of high level of protection.[732] Nevertheless, it must be noted that the strict interpretation of limitations and exceptions must also enable the effectiveness of such limitation and/or exception and should not be rendered meaningless.[733] In other words, non-economic objectives pursued through provisions of exceptions and limitations are not completely disregarded, but they are side-lined by the copyright exclusive rights protection. And that raises the question of what about the objective of safeguarding a fair balance between the rightholders and the users which is also one of the objectives the directives aim to achieve. Does that mean that balance the EU wants to achieve is always slightly tilted in favour of right holders? According to this legal framework, it seems so.

[729] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, Article 5(5) "The exceptions and limitations provided for in para- graphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."
[730] Case C-435/12 *ACI Adam* ECLI:EU:C:2014:254, para 26.
[731] See further regarding the use of three-step test within the EU Martin Senftleben 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket- How the EU Cultivates the Constraining Function of the Three-Step Test' in Jonathan Griffiths and Tuomas Mylly (eds) *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (Oxford University Press 2021), 83.
[732] Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798, para 107 - 109.
[733] Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798, para 133; Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, paragraphs 162 and 163); Case C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196, para 43.

Taking into account the jurisprudence of the CJEU within the first phase in which negative market integration was dominant, it must be observed that the CJEU together with the legislation is remarkably consistent. Namely, as it was discussed before, the copyright or related rights' exclusive right were seldom taken down regardless of their interference with the fundamental market freedoms. The decisions were justified by the occurrence that copyright exclusive rights are capable of creating a market and such capability became even more prominent due to the new ways of exploitation brought with the development of technology.[734] Although limitations and exception were not considered in the first phase, here they in fact become an obstacle to such market creation. Namely, they are the derogating provisions from the general principle of high level of protection as well as from the general principle that a work can only be used with author's prior consent. [735] The question then follows on what occasions can non-economic objectives pursued by provisions of limitations and exceptions be given priority? In other words, on what occasions fair balance requires tilting in favour of non-economic objectives?

In that respect, the economic impact of such limitations and exceptions may be of relevance. Namely, as seen in the recitals of the InfoSoc directive, the greater the economic impact of such limitations and exceptions, the higher the need for limiting their scope. Moreover, as confirmed by the CJEU in *Funke Medien* "in view of their more limited economic importance, […] limitations are deliberately not dealt with in detail in the framework of the proposal"[736] on the InfoSoc directive. In other words, if the economic impact is "limited", there is greater discretion for Member States, hence wider array of balancing for Member States. However, the discretion is still confined to the exhaustive list of limitations and exceptions and cannot be used as to compromise the high level of protection. On the other hand, if the economic impact becomes higher, then there is a probable need for uniform regulation and balancing is done on the EU level potentially resulting either in limiting their scope and/or in pursuing an economic policy and solving the market failure created by extensive copyright protection.[737] This line of thinking

[734] See Chapter 3, Part 3.2.1.
[735] Case C-301/15 *Soulier and Doke* ECLI:EU:C:2016:878, para 37.
[736] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 44.
[737] See also Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 25 "In that regard, it is clear from the case-law of the Court that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of Directive 2001/29 must be determined on a case-by-case basis, in particular, according to the wording of that provision (see, to that effect, judgments of 21 October 2010, Padawan, C 467/08, EU:C:2010:620, paragraph 36; of 3 September 2014, Deckmyn and Vrijheidsfonds, C 201/13, EU:C:2014:2132, paragraph 16; and of 22 September 2016, Microsoft Mobile Sales International and Others, C 110/15, EU:C:2016:717, paragraph 27; Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017, EU:C:2017:114, paragraph 116), the degree of the harmonisation of the exceptions and

allows me to question the introduction of mandatory exceptions for the digital market within the DSM directive. Namely, according to the proposal EU intervention was needed "to achieve full legal certainty as regards cross-border uses in the fields of research, education and cultural heritage" since "intervention at national level would not be sufficient in view of the cross-border nature of identified issues."[738] Furthermore, it was alleged that those new mandatory exceptions need to be adapted to achieve a fair balance and ensure legality of certain uses for the benefit of researchers, teachers and students. [739] However, although fair balance is a relevant objective to be achieved, it is still worth noting that according to the DSM directive, one of its objectives is in fact to ensure competitiveness of the European Union in the research area, which brings it a more economic shade, especially regarding the exception for text and data mining.[740] In other words, it is probably more likely that exceptions and limitations will gain more prominence on the EU level if they are seen as creating more than limited economic impact regardless of the objective they pursue. And if such impact is in fact showing a market failure, then the exceptions and limitations might even be granted a role within the EU economic policy. Hence, similarly as copyright in relation to fundamental market freedoms where it was found to be not only an obstacle but also a market and resource generator, now the limitations and exceptions might be pursuing the same role which results in the need for their harmonisation on the EU level. However, that means that EU legislator might always be behind the market failure created by too broad exclusive protection by copyright and related rights. In other words, there could be plenty of goods and services, which could contribute to the competitiveness and economic

limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of Directive 2001/29."

[738] Explanatory Memorandum to Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 2016/0280, p 5.

[739] Explanatory Memorandum to Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 2016/0280, p 2.

[740] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, recital 10 "As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer, unless steps are taken to address the legal uncertainty concerning text and data mining;" see also Michael Palmedo 'The Impact of Copyright Exceptions for Researchers on Scholarly Output' (2019) 2(6) Efil Journal of Economic Research 114, 119 "A small body of empirical work has shown relationships between the structure of copyright exceptions and various outcomes. Some papers address the link between copyright exceptions permitting datamining and research that relies on datamining, defined as machine-assisted analysis of large datasets. Datamining necessitates copying large quantities of content from original sources and therefore requires authorization from rightholders in many jurisdictions. However, some countries have specific exceptions for datamining, or have broad exceptions that permit the process without authorization. Handke, Guibault and Vallbé (2015) find that in "countries in which data mining for academic research requires the express consent of rights holders, data mining makes up a significantly lower share of total research output." Similarly, Filippov (2014) finds that the structure of copyright law in EU countries has reduced the number of published papers that utilize datamining techniques. Hargreaves et. al. (2014) use Filippov's data to find that the US and Canada produce more articles based on datamining than European countries that have more restrictive copyright limitations applicable to research."

and cultural development of the European Union, yet they will be *a priori* stifled by extensive copyright protection. And only if their voice is heard, they might be supported. Lobbying, hence, might play a significant role.[741]

Finally, tension between economic and non-economic objectives can be seen through the prism of conflict of fundamental rights. Namely, according to Article 17(2) of the Charter "Intellectual property shall be protected."[742] Although the wording might suggest the absolute protection[743], the CJEU has very early on rejected that option and stated that right to property is not inviolable and that it "must be balanced against the protection of other fundamental rights."[744] There are three types of cases in which such balancing has been confronted by the CJEU that are important for determining the position and tension between the objectives. The first one is where determining the scope of exclusive rights (i), the second when fundamental rights are used in order to influence the interpretation of the limitations and objectives(ii). The third is when enforcement measures ensuring copyright protection come across other fundamental rights (iii).

(i) Fundamental rights as limitations of scope of exclusive rights

In *Pelham* the CJEU was confronted with the technique of music sampling which involves the use of small parts of phonogram with the intention of making a new phonogram. The question

[741] Christina Angelopoulos and João Pedro Quintais 'Fixing Copyright reform. A better solution to online infringement' (2019) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 147, para 1 "In September 2016, the European Commission published its proposal for a new Directive on Copyright in the Digital Single Market (DSMD). The proposal was controversial from the start. Almost every step of the legislative process was the subject of intense lobbying and debate, up until the final text was approved in 2019;" see also Giovanni Maria Riccio 'The influence of the CJEU on national courts in copyright cases' in Oreste Pollicino, Giovanni Maria Riccio, Marco Bassini *Copyright and Fundamental Rights in the Digital Age A Comparative Analysis in Search of A Common Constitutional Ground* (Edward Elgar 2021) 155, 159 "[…]the European Union intervention on copyright appears disorganized, often driven by emergency reasons – for example, on new technologies – or by lobbyist pressures;" Psychogiopoulou (n 647) 200 "The main reason for prioritisation of production concerns was insistent lobbying by authors and cultural industries. Although many of their arguments were of a solid basis, one would have expected the EC to demonstrate a more measured balancing of the divergent interests in place. The one-sided approach followed discloses an incomplete mainstreaming effort. This could have been avoided, and the cultural benefits of the action undertaken secured, if the Community had acted more prudently as regards the scope of exceptions and their interaction with the application of technological measures. Internal market goals, predominantly economic in logic, would have been attained, with minimal harm to cultural interests, so supporting cultural diversity, had the two conflicting cultural objectives been more successfully reconciled."

[742] Charter of Fundamental rights of the European Union [2012] OJ C 326/391, Article 17(2).

[743] Tito Rendas 'Fundamental Rights in EU Copyright Law: an overview' in Eleonora Rosati (ed) *Routledge Handbook of EU Copyright Law* (Routledge 2021) 18, 21-22 "scholars initially feared that this statement meant that IP would benefit from unrestricted protection under the Charter."

[744] Case C-275/06 *Promusicae* ECLI:EU:C:2008:54, para 70 *;* Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, para 43-44; C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192, para 61.

was whether such reproduction of a very small part still falls within the scope of exclusive right of reproduction and hence subject to rightholders' authorisation. Although textual interpretation would result in an affirmative answer, the CJEU relied on the freedom of arts recognised in Article 13 of the Charter when reaching a final interpretation. Namely, sampling has been recognised as "a form of artistic expression which is covered by freedom of the arts."[745] From that the CJEU was faced with a clash between a right to intellectual property and freedom of arts. That, hence, required a balancing which resulted in the interpretation that "a sample taken from a phonogram and used in a new work in a modified form unrecognisable to the ear for the purposes of a distinct artistic creation"[746] does not fall within the scope of the exclusive right. The reasoning the CJEU offered was that contrary interpretation "would allow the phonogram producer to prevent another person from taking a sound sample, even if very short, from his or her phonogram for the purposes of artistic creation in such a case, despite the fact that such sampling would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment."[747] In other words, the economic impact of such sampling (however very limited scope of sampling confined only to the parts unrecognisable to the ear) was found to be of limited importance for the satisfactory return and hence the sampling use was given priority. One the one hand that confirms that rightsholder's position is still prioritised when making assessment, on the other hand, it confirms that the satisfactory return is not absolute. Regardless, there is no consideration of one of the main objectives of the directive and that is maintenance and development of creativity. In the present case the one being creative is legally considered a user, hence, this is an example of the situation where high level of protection is not a tool to develop creativity. Yet, the CJEU did not even consider the attainment of that non-economic objective when evaluating the scope of right.

On the other hand, in *Renckhoff* [748]the CJEU did not want to rely on the right to education to limit the scope of exclusive right, although the AG Sanchez-Bordona did.[749] The case involved a use of a photograph in a student presentation which was uploaded on the school's website. The question was whether such use falls within the scope of the exclusive right of communication to public enshrined in Article 3(1) of the InfoSoc directive. Again, the textual interpretation, supported by previous CJEU decisions, would highly likely result in the

[745] Case C- 476/17 *Pelham* ECLI:EU:C:2019:624 para 35.
[746] Case C- 476/17 *Pelham* ECLI:EU:C:2019:624 para 37.
[747] Case C- 476/17 *Pelham* ECLI:EU:C:2019:624 para 38.
[748] Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634.
[749] Opinion of AG Campos Sanchez-Bordona in Case C-161/17 *Renckhoff* ECLI:EU:C:2018:279.

affirmative answer. However, the right of education, enshrined in Article 14 of the Charter was invoked by the defendant. The CJEU did confirm that the use in question was encompassed by the right to education, however it did not resort to balancing and instead concluded that the balancing between conflicting fundamental rights has already been done by the legislation when it provided an option for Member States to provide for exceptions or limitations to exclusive rights "so long as it is for the sole purpose of illustration for teaching or scientific research and to the extent justified by the non-commercial purpose to be achieved."[750] However, it did not delve into interpretation of the limitation enshrined in Article 5(3)(a) of the InfoSoc directive and, yet it merely concluded that such use falls within the scope of exclusive rights and is, thus, subject to rightsholder's authorisation. It has to be noted, though, that the question referred by the German Federal Supreme Court did not ask for interpretation of Article 5(3)(a), however it would not be the first time that the CJEU would offer interpretation of other provisions of the same directive if it found it to be necessary for the referring court to decide the case, and this in fact might have been such a case. The decision was heavily criticised by the academics, invoking that "if copyright in digital environment is to restrict behaviour that in the eyes of the general public is, and has been, considered to be reasonable and justified, the system will be at risk of losing its social support and legitimacy […which…] may lead to an even greater lack of respect for copyright law."[751] Bearing in mind the importance of economic impact that a limitation might have on exclusive rights, a plausible interpretation would be that the CJEU deemed it high enough not to be excluded from the scope, regardless of the objective it pursues. There could have been a fear present at the CJEU that that might result in invoking all uses in the education environment as being excluded from the scope of exclusive right of communication to the public, which the CJEU evidently did not want to deal with. However, it could have at least decided and offer criteria that certain minimal uses are not included which would give at least the recognition of other objectives rather than solely focus on the return of the investment and prioritising right holder's position. That notion becomes even more disappointing when we might not have a clear answer of what is the purpose of copyright and related rights protection. Theoretically speaking, if this use does not affect the maintenance and development of creativity, why would it be prohibited? The only logical answer that follows is that the return of the investment/appropriate reward would be affected. And that exactly seems

[750] Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 43.
[751] Ole-Andreas Rognstad, Christophe Geiger, Marie-Christine Janssens, Alain Strowel and Raquel Xalabarder 'The delicate scope of economic rights in EU copyright law: opinion oft he European Copyright Society in light of case C-161/17, Land Nordrhein-Westfale v Renckhoff (Cordoba Case)' (2019) 41(6) European Intellectual Property Review 335, 336.

to be the line of the argument the CJEU was following, Namely when reaching the decision it proclaimed that allowing the use "would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work[…even though…] the specific purpose of intellectual property is, in particular, to ensure for the rights holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment for an appropriate reward for *each* use of the protected subject matter."[752] The CJEU, however, did not resort to explaining how in fact the return of the investment would be affected by posting a landscape picture in a student assignment on a school website. And bearing in mind that a picture in the case was a landscape picture of bridges where probably 100 more similar ones are taken every day, the decision becomes even more disappointing. However, the explaining might not be necessary if the CJEU considered each use to be under right holders' control.

(ii) Fundamental rights as factors of interpretation of provisions on exceptions and limitations

The other set of cases involving relying on the fundamental rights when interpreting the provisions on exceptions and limitations. The very first case where the CJEU resorted to fundamental rights when interpreting exceptions and limitations was *Painer.*[753] The case involved an unauthorised use of portrait photograph by media in order to help find a kidnapped girl and the question was whether such use can amount to quotation as envisioned by Article 5(3)(d) of the InfoSoc directive regardless of if it is not a literary work. The CJEU put forward that "Article 5(3)(d) […] is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject matter and the reproduction right conferred on authors."[754] It concluded that in the present case such fair balance is struck by favouring the exercise of the users' right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated."[755] Although the CJEU invoked the fundamental rights, the result would arguably be the same if it did not. Namely, there is no explicit exclusion of non-literary

[752] Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 34; later also confirmed in Case C-392/19 *VG Bild-Kunst* ECLI:EU:C:2021:18, para 53.
[753] Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798.
[754] Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798, para 134.
[755] Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798, para 135.

works from possibility of use for quotation, and the CJEU merely relied on the balance already done by the legislator. Another case worth discussing is *DR/TV2*[756] which involved the interpretation of exception for ephemeral recordings. Namely, in interpreting the term "own facilities" of a broadcasting organisation when applying the exception in respect of ephemeral recordings, the CJEU opted for an interpretation of a wider scope which is, in fact, contrary to the general principle of strict interpretation of limitations and exceptions. The CJEU justified such choice as it "ensures that broadcasting organisations have a greater enjoyment of the freedom to conduct a business, set out in Article 16 of the Charter of Fundamental Rights of the European Union, while at the same time not adversely affecting the substance of copyright."[757]

In the fairly recent case-law the CJEU confirmed in *Funke Medien* that Member States in transposing limitations and exceptions need to "ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order"[758] In that respect, when interpreting the provisions of Article 5(3)(c) and (d) of the InfoSoc directive regarding the publication of confidential information, the CJEU relied not only on the freedom of expression as set out in the Charter but also on the case law of the European Court of Human Rights insinuating the need to take into account the fact that the nature of the 'speech' or information at issue is of particular importance in political discourse and discourse concerning matters of the public interests when striking a balance.[759] Moreover, in *Pelham* it assessed the technique of music sampling through the application of quotation limitation by relying on the freedom of arts while in *Spiegel Online*[760] which involved publication of controversial essays written by a politician the CJEU rejected the idea that a user of protected work for the purposes of reporting current events must seek prior authorisation. It put forward that such authorisation might affect safeguarding the effectiveness of the exception or limitation and its purpose. And that was "to contribute to the exercise of the freedom of information and the freedom of the media since the CJEU has already indicated that the purpose of the press, in a democratic society governed by

[756] Case C-510/10 *DR TV2 v NCB* ECLI:EU:C:2012:244.
[757] Case C-510/10 *DR TV2 v NCB* ECLI:EU:C:2012:244, para 57.
[758] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 53.
[759] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 74.
[760] Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625.

the rule of law, justifies it in informing the public without restrictions other than those that are strictly necessary."[761]

However, the CJEU rejected the possibility to seek limitations outside of the exhaustive list set by the legislation. Namely, Member States are not allowed to go beyond the exhaustive list of exceptions and limitations contained in articles of the directives, most prominently Article 5 of the InfoSoc directive[762] as it "would endanger the effectiveness of the harmonisation of copyright and related rights affected by that directive, as well as the objective of legal certainty pursued by it."[763] It would further disrupt the consistent application of limitations and exceptions by Member States' implementation[764] and there is no need to go beyond since there are already within the directives "mechanisms allowing those different rights and interests to be balanced."[765]

(iii) Fundamental rights within enforcement measures ensuring copyright protection

Finally, another set of cases where right to intellectual property enshrined in Article 17(2) of the Charter goes directly against other fundamental rights is with respect to the enforcement measures put forward in the Enforcement directive. Article 8 of the Enforcement directive obliges Member States to ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the judicial authorities may order the information on the origin and distribution networks of the goods or services which infringe intellectual property right. Such right to information, the CJEU fully embraced and acknowledged it as a part of the "fundamental right to an effective remedy guaranteed in Article 47 of the Charter thereby to ensure the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter."[766] However, such right to information while at the same time ensuring the enforcement of intellectual property right goes directly against the right of users to protection of personal data which is also a part of the fundamental right enshrined

[761] Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 72.
[762] Case C- 476/17 *Pelham* ECLI:EU:C:2019:624 para 58; Case C-301/15 *Soulier and Doke* EU:C:2016:878, para 34, Case C-161/17 *Renckhoff* EU:C:2018:634, para 16.
[763] Case C- 476/17 *Pelham* ECLI:EU:C:2019:624 para 63.
[764] Case C- 476/17 *Pelham* ECLI:EU:C:2019:624 para 64.
[765] Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 43.
[766] Case C-580/13 *Coty Germany GmbH* ECLI:EU:C:2015:485, para 29.

in Article 8 of the Charter or the right to family life enshrined in Article 7 of the Charter.[767] The CJEU did not a priori resolve the tension between the conflicting rights. Yet it confirmed its case-law by stating that "EU law requires that, when transposing directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the EU legal order."[768] It went further to state that pursuant to Article 52(1) of the Charter "any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms […and…] a measure which results in *serious infringement* of a right protected by Charter is to be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights which must be reconciled."[769] By striking such fair balance the CJEU put forward that granting absolute protection for family members allowing them not to be compelled to comply with an obligation requiring to incriminate one another then that might render the right of effective protection of intellectual property right meaningless. Similar decision was reached in *Coty Germany GmbH* regarding the information that constituted banking secrecy. Namely unlimited and unconditional authorisation to invoke banking secrecy was found to be capable of seriously impairing the effective exercise of the fundamental right to intellectual property.[770] Finally in a recent case *Constantin Film*[771] in which a movie distributor asked from YouTube a disclosure of information including the IP address of the person who uploaded films in breach of copyright, the CJEU decided that the IP address does not fall within the term of "address" contained in Article 8(2)(a) of the Enforcement directive because otherwise it would disrupt the balance already struck by the legislation. In other words, the CJEU did not delve into balancing and opted potentially for a wider interpretation of the term address. Yet, it merely relied on the inner balance done by the legislation.

The other set of enforcement cases deals with filtering and blocking injunctions which have the legal basis of Article 11 of the Enforcement directive together with Article 8(3) of the InfoSoc directive. In those line of cases the CJEU was dealing with conflict of fundamental right to intellectual property and freedom to conduct business accompanied also by the users' right to protection of personal data and freedom to receive or impart information which are recognised

[767] Case C-149/17 *Bastei Lübbe* ECLI:EU:C:2018:841.
[768] Case C-149/17 *Bastei Lübbe* ECLI:EU:C:2018:841, para 45; Case C-580/13 *Coty Germany GmbH* ECLI:EU:C:2015:485, para 34.
[769] Case C-149/17 *Bastei Lübbe* ECLI:EU:C:2018:841, para 46; Case C-580/13 *Coty Germany GmbH* ECLI:EU:C:2015:485, para 35.
[770] Case C-580/13 *Coty Germany GmbH* ECLI:EU:C:2015:485, para 39-41.
[771] Case C-264/19 *ConstantinFilm v Youtube* ECLI:EU:C:2020:542.

in Article 8 and 11 of the Charter. The CJEU applied the same test requiring for a fair balance to be struck between fundamental rights and repeated that if a serious infringement of one of the rights occurred such balance would not be deemed fair. In that respect in *Scarlet Extended* the CJEU decided that an injunction requiring the installation of the contested filtering system "would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly permanent computer system at its own expense."[772] Moreover, such filtering systems would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent which would conflict with the protection of personal data[773] and it could potentially undermine freedom of information since the system might not distinguish lawful from unlawful content.[774] Similar decision and reasoning was also later confirmed in *Netlog*[775] *and McFadden.*[776]

Table 1. Market of copyright or related right protected work in general: The InfoSoc Directive	
Economic objectives: - to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.	Non-economic objectives: - To help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest. - Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.

[772] Case C- 70/10 *Scarlet Extended* ECLI:EU:C:2011:771, para 48.
[773] Case C- 70/10 *Scarlet Extended* ECLI:EU:C:2011:771, para 51.
[774] Case C- 70/10 *Scarlet Extended* ECLI:EU:C:2011:771, para 52.
[775] Case C-360/10 *SABAM V Netlog* ECLI:EU:C:2012:85.
[776] Case C-484/14 *Mc Fadden* ECLI:EU:C:2016:689.

- Through increased legal certainty and while providing for a high level of protection of intellectual property, the aim is to foster substantial investment in creativity and innovation and lead in turn to growth and increased competitiveness European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation. - To adapt and supplement the current law on copyright and related rights to respond adequately to economic realities such as new forms of exploitation. - To ensure legal certainty in protection not to hinder economies of scale for new products and services containing copyright and related rights - To ensure the availability of an appropriate reward for authors or performers to continue their work - To guarantee and provide the opportunity for satisfactory returns on investment required to produce products such as phonograms, films or multimedia products and services such as 'on-demand' services	- Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property. - to safeguard the independence and dignity of artistic creators and performers. - To promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching - To support the dissemination of culture - To safeguard a fair balance of rights and interests between the different categories of right holders, as well as between the different categories of rightholders and users of protected subject matter.

- to ensure that European cultural creativity and production receive the necessary resources - to ensure consistent application of technical measures to protect works - A broad definition of these acts is needed to ensure legal certainty within the internal market. - To facilitate the clearance of rights - To provide protection for technological protection measures	

Table 2. Market of copyright or related right protected work in general: Satellite Broadcasting and Cable Retransmission directive	
Economic objectives: - Pursue the Treaty objective to establish an ever closer union among peoples of Europe, fostering closer relations and economic and social progress by eliminating barriers - Broadcasts transmitted across frontiers are one of the most important ways of pursuing these Community objectives which are at the same time political, economic, social and cultural. - To create the desired European audio visual area and the acquisition of rights on contractual basis is making a vigorous contribution to its creation.	Non-economic objectives: - To create the desired European audio visual area and the acquisition of rights on contractual basis is making a vigorous contribution to its creation.

- To ensure continuation of contractual agreements and to promote their smooth application. - To ensure legal certainty - To ensure a high level of protection of authors, performers, phonogram producers and broadcasting organizations - To ensure that performers and phonogram producers are guaranteed an appropriate remuneration for the communication to the public by satellite of their performances or phonograms. - Not to allow a broadcasting organization to take advantage of differences in levels of protection by relocating activities, to the detriment of audio visual productions. - to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission.	

Table 3. Market of copyright or related right protected work in general: Directive on rental right and lending right and on certain rights related to copyright	
Economic objectives: - To combat piracy - To ensure adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, distribution right, right to broadcast and communication to the public as it can accordingly be considered as being of fundamental importance for the economic development of the Community. - To adapt copyright and related rights to new economic developments such as new forms of exploitation - To ensure an adequate income as basis for further creative and artistic work through adequate legal protection - To secure recouping the investment since the investments required for the production of phonograms and films are especially high and risky through adequate legal protection. - To make easier pursuit of creative artistic and entrepreneurial activities	Non-economic objectives: - To ensure adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, distribution right, right to broadcast and communication to the public as it can accordingly be considered as being of fundamental importance for cultural development of the Community.

- To introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them	

Table 4. Market of copyright or related right protected work in general: The Term Directive	
Economic objectives: - To prolong the protection of the rights since the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants. The average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations.	Non-economic objectives: - To ensure high level of protection of copyright and related rights since those rights are fundamental to intellectual creation. - To ensure maintenance and development of creativity in the interest of authors, cultural industries, consumers, and society as a whole. - to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community,

Table 5. Market of copyright or related right protected work in general: The DSM Directive	
Economic objectives:	Non-economic objectives:

- To provide high level of protection - To facilitate the clearance of the rights - To create a framework in which exploitation of protected subject matter can take place - To stimulate investment and production of a new content - To adapt and supplement Union copyright framework - To facilitate certain licensing practices as regards the dissemination of out-of-commerce works and other subject matter and the online availability of audiovisual works on video-on-demand platforms, with a view to ensuring wider access to content - To ensure the Union's competitive position as a research area - In order to provide for more legal certainty in such cases and to encourage innovation also in the private sector	- To stimulate creativity and innovation - To respect and promote cultural diversity while at the same time bringing European common cultural heritage to the fore - To adapt limitations and exceptions to copyright and related rights to digital and cross-border environments - Facilitate the use of content in the public domain - The exceptions and limitations provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other. - To ensure development of digitally supported teaching activities and distance learning

Table 6. Market of copyright or related right protected work in general: Enforcement directive	
Economic objectives: - To create an environment conducive to innovation and investment. In this	Non-economic objectives:

context, the protection of intellectual property is an essential element for the success of the internal market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness. - To allow the inventor or creator to derive a legitimate profit from his/her invention or creation - To ensure effective application of intellectual property law not to diminish investment - To promote free movement within the internal market or create an environment conducive to healthy competition. - To prevent loss of confidence in the internal market in business circles with a consequent reduction in investment in innovation and creation - To ensure a high, equivalent and homogeneous level of protection in the internal market.	- To allow the widest possible dissemination of works, ideas and new know-how - To not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet - To ensure effective application of intellectual property law not to diminish innovation and creativity - To respect the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter

Table 7. Market of copyright or related right protected work in general: Netcab directive	
Economic objectives:	Non-economic objectives:

- To facilitate the clearance of rights for the provision of ancillary online services across borders, it is necessary to provide for the establishment of the country of origin principle as regards the exercise of copyright and related rights relevant for acts that occur in the course of the provision of, the access to or the use of an ancillary online service. That principle should cover the clearance of all rights that are necessary for a broadcasting organisation to be able to communicate to the public or make available to the public its programmes when providing ancillary online services, including the clearance of any copyright and related rights in the works or other protected subject matter used in the programmes, for example the rights in phonograms or performances. - To ensure the efficient collective management of rights and the accurate distribution of revenues collected under the mandatory collective management mechanism introduced by this Directive	- To provide for wider dissemination in Member States of television and radio programmes that originate in other Member States, for the benefit of users across the Union, by facilitating the licensing of copyright and related rights in works and other protected subject matter contained in broadcasts of certain types of television and radio programmes. - Television and radio programmes are important means of promoting cultural and linguistic diversity and social cohesion, and of increasing access to information. - This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.

3.2.2.2.2. Internal market for computer programs

The Computer Programs directive has been recognised as *lex specialis* for protection of computer programs.[777] As it can be seen from the Table 8 below, the tension between economic and non-economic objectives, as stated out in the recitals is barely existent. In other words, strong economic objective of Community industrial development prevails which is not entirely surprising given the fact that this is in fact the first directive on copyright legal matters enacted within the EU legal framework. However, that does not mean that the protection granted is absolute, although the limits seem to be confined to those set out in the directive. Namely, according to Article 5 of the directive, there are three exceptions enlisted. (i) use of the lawful acquirer (ii) making of a back-up copy and (iii) the right to use a copy to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie the program. Moreover, although this is a *lex specialis* that does not mean that it does not enjoy the protection offered within the general internal market for copyright and related right protected goods. Namely, as the CJEU confirmed in *IT Development SAS* "the breach of a clause in a licence agreement for a computer program relating to the intellectual property rights of the owner of the copyright of that program falls within the concept of 'infringement of intellectual property rights', within the meaning of [the Enforcement directive], and that, therefore, that owner must be able to benefit from the guarantees provided for by that directive."[778] Therefore, the objective to ensure "a high, equivalent and homogeneous level of protection of intellectual property in the internal market" still persists.[779]

Table 8. Market: Computer programs (Computer Programs directive)	
Economic objectives: - Community industrial development	Non-economic objectives: - /

3.2.2.2.3. Internal market for databases

The protection of databases within the European Union has been almost completely economic or industry centric. Namely, as it can be seen from the Table 9., the objectives proclaimed in

[777] Case C-355/12 *Nintendo v PC Box* ECLI:EU:C:2014:25, para 23.
[778] Case C-666/18 *IT Development SAS* ECLI:EU:C:2019:1099, para 49.
[779] Case C-666/18 *IT Development SAS* ECLI:EU:C:2019:1099, para 38.

the recitals envision a protection of databases as a tool "to develop an information market"[780] and to "incentivise investment in modern information storage and processing systems within Community."[781] Namely, it was purported that without a stable and uniform legal protection the investment will not follow.[782] At the time, indeed "the electronic information industry was one of the fastest growing sectors of the economy"[783] and "databases were becoming an increasingly valuable and profitable product."[784] Moreover, the rise of technology "made electronically-stored data compilations vulnerable to piracy. The low cost and simplicity of copying data made it easy for free-riding competitors to exploit the efforts of original data compilers."[785] Hence, in order to answer to changes brought by technology and to ensure its competitive position within the newly created information market, the European Union decided to grant protection to databases. The directive offered both copyright protection for databases which formal elements are recognised to be an author's own intellectual creation and a new *sui generis* protection "against unauthorised use of the database contents throughout the Community."[786]

Such line of objective was followed by the CJEU jurisprudence[787] who proclaimed that "the purpose of the protection by the *sui generis* right […]is to promote the establishment of storage and processing systems for existing information"[788] as well as to "safeguard the results of the financial and professional investment made in obtaining and collection of the contents of a database."[789] Moreover, the CJEU put forward that in order to guarantee a return on investment in the creation and maintenance of the database, the rightholder must be protected against "acts

[780] Directive 96/9/EC Of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, p102-110, recital 3, 9.
[781] Directive 96/9/EC Of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, p102-110, recital 12.
[782] Directive 96/9/EC Of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, p102-110, recital 12.
[783] Debra B. Rosler, 'The European Union's Proposed Directive for the Legal Protection of Databases: A New Threat to the Free Flow of Information' (1995) 10 High Technology Law Journal 105, 111 as cited in Mark Schneider 'The European Union Database Directive' (1998) 13(1) Berkeley Technology Law Journal 551, 553.
[784] Robert Carolina, 'The European Database Directive: An Introduction Practitioners' (1996) 8 (9) Journal of proprietary rights 17, 17 as cited in Mark Schneider 'The European Union Database Directive' (1998) 13(1) Berkeley Technology Law Journal 551, 553.
[785] J.H. Reichman and Paula Samuelson 'Intellectual Rights in Data?' 50 Vanderbilt Law Review 51, 55 as cited in Mark Schneider 'The European Union Database Directive' (1998) 13(1) Berkeley Technology Law Journal 551, 553.
[786] Schneider (n 785) 555.
[787] The CJEU, however, in majority of the cases was dealing with sui generis database protection.
[788] Case C-46/02 *Fixtures Marketing* ECLI:EU:C:2004:694, para 34; Case C-604/10 *Football Dataco Ltd* ECLI:EU:C:2012:115, para 34; Case C-202/12 *Innoweb* ECLI:EU:C:2013:850, para 35.
[789] Case C-46/02 *Fixtures Marketing* ECLI:EU:C:2004:694, para 35; Case C-444/02 *Fixtures Marketing* EU:C:2004:697, paragraph 39-41;

by the user which go beyond [the] legitimate rights and thereby harm the investment of the maker."[790] Consequently, following such reasoning, the CJEU reached a decision that restricted acts must be given a wide interpretation.[791] Moreover, in order to determine what are the legitimate rights, the CJEU put forward that "the main criterion for balancing the legitimate interests at stake must be the potential risk to the substantial investment of the maker of the database concerned, namely the risk that that investment may not be redeemed."[792]

Following the above, it is quite clear that the reasoning is rightsholder centric and that the criteria used for determining the interpretation is again the return of the investment. Other objectives are not even considered. That is not surprising since the legal framework was aiming to attract investment, and the higher degree of such investment to be returned is undoubtedly such an incentive. Regarding the pursuit of non-economic objectives, the directive merely leaves the option for Member States to provide limitations to the rights (i) for private purposes of non-electronic database; (ii) for sole purpose of illustration for teaching or scientific research (iii) for the purposes of public security or for the purposes of an administrative or judicial procedure or (iv) where other exceptions to copyright which are traditionally authorized under national law are involved (in case of database protected by copyright).[793]

Table 9. Market: Database (Database directive)	
Economic objectives: - To develop an information market - To incentivise investment in modern information storage and processing systems within Community as such investment will not take place unless a stable and uniform legal protection is introduced. - To safeguard the position of makers of databases against	Non-economic objectives: - Member States should be given the option of providing for exceptions to the right to prevent the unauthorised extraction and/or re-utilisation of a substantial part of the contents of a database in the case of extractions for private purposes, for the purpose of illustration for teaching or scientific research, or where extraction and/or

[790] Case C-203/02 *William Hill* ECLI:EU:C:2004:695, para 45-46; *Innoweb* ECLI:EU:C:2013:850, para 36.
[791] Case C-203/02 *William Hill* ECLI:EU:C:2004:695, para 51.
[792] Case C- 762/19 *CV-Online Latvia* ECLI:EU:C:2021:434, para 44.
[793] Directive 96/9/EC on the legal protection of databases [1996] OJ L 77/20, p102-110, Articles 6 and 9.

misappropriation of the results of the financial and professional investment made in obtaining and collection. - To ensure protection of any investment in obtaining, verifying, or presenting the contents of a database - To afford a uniform level of protection of databases as a means to secure the remuneration of the maker of the database.	reutilization is carried out in the interests of public security or for the purposes of an administrative or judicial procedure;

3.2.2.2.4. Internal market of works for graphic or plastic art

As it was briefly touched upon,[794] the Resale Right directive regulates very specific market which involves paintings, drawings, sculptures, ceramics etc. In other words, work of graphic or plastic art. The directive introduced for the benefit of the author of an original work "a resale right, to be defined as an inalienable right, which cannot be waived, even in advance to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author."[795] The origin of the right dates back to France after the World War I, more precisely in 1920. Namely, French philanthropist were lobbying to create a right which would allow the visual artists to exploit their works since "the artists were returning from the war penniless."[796] Subsequently, several Member States have introduced the right with differing conditions, while some of them have not. Namely, on the international level[797] the right was optional and subject to the principle of reciprocity. Such a situation was not perceived well from the position of internal market. Namely, regardless of the aim the original *droit de suite* was looking to achieve the existence of the disparities in the national legislation were distorting competition within the internal market since major art sales were flocking towards the countries that did not have such right recognised within their national legislation, most

[794] See Chapter 3, part 3.2.2.2.1.1.4.
[795] Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32 p 32-36, Article 1(1).
[796] Jens Gaster and Irini Stamatoudi 'The Resale Right Directive' in Irini Stamatoudi, Paul Torremans (eds) *EU Copyright Law* (Edward Elgar 2021) 255, 256.
[797] Berne Convention for the Protection of Literary and Artistic Works

prominently the UK. However, following the decision in *Phil Collins,*[798] the general EU principle of non-discrimination required that rights granted to nationals cannot be denied to the nationals of other Member State. What that meant is that British artist selling in France, would have the right, while the French artist selling his work in UK would not. Hence, another push for the right to be uniformly regulated on the EU level has occurred. Although, the political compromise took several years to be achieved.[799] In order to ensure smooth functioning of the internal market, the EU could have opted either for abolition of right, which was heavily lobbied by the UK or by adopting and regulating it. Given that position of visual artists was at lesser advantage of the position of artists in other creative sectors in which continual exploitation of the work could occur, by adopting this right the EU in fact pursued a cultural policy objective to help equalise the position of visual artists by guaranteeing certain award. All of that can precisely be seen in Table 10 in the objectives as proclaimed in the recitals and what precisely the CJEU confirmed in *Fundación Gala-Salvador Dalí.*[800] Namely, the Resale right directive is based on two objectives. First, "to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art […and…], second, to put an end to the distortions of competition on the market in art, as the payment of royalty in certain Member States might lead to displacement of sales of works of art into those Member States where the resale right is not applied."[801] Finally, the directive also provided for the exception for the acts of resale by persons acting in their private capacity to not-for-profit museums or if the art gallery acquires the work directly from the artist. The exceptions were based on the specific considerations related to the sector in which art galleries usually promote and invest in young artists.[802]

Table 10. Market: Works of graphic or plastic art (Resale right directive)	
Economic objectives:	Non-economic objectives:

[798] Joined cases C-92/92 and C-326/92 *Phill Collins* ECLI:EU:C:1993:847, para 27 "It follows that copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and services, fall within the scope of application of the Treaty, are necessarily subject to the general principle of non- discrimination laid down by the first paragraph of Article 7 of the Treaty, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.
[799] Gaster and Stamatoudi (n 796) 257; see also Psychogiopoulou (n 647) 202.
[800] Case C-518/08 *Fundación Gala-Salvador Dalí* ECLI:EU:C:2010:191, para 27.
[801] Case C-518/08 *Fundación Gala-Salvador Dalí* ECLI:EU:C:2010:191, para 27; Case C-41/14 *Christie's* ECLI:EU:C:2015:119, para 15, 28.
[802] See Psychogiopoulou (n 647) 212.

- To ensure economic interest in successive sales of the work concerned - To enable the author/artist to receive consideration for successive transfers of the work. - To ensure that authors of graphic and plastic share in the economic success of their original works of art. - To help redress the balance between the economic situation of authors of graphic and plastic works of art and that of creators who benefit from successive exploitations of their works. - To provide the creators with adequate and standard level of protection - To preserve the competitiveness of the European market in the process of internationalisation of the Community market in modern and contemporary art	- The exclusion of right to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to public. With regard to the particular situation of art galleries which acquire works directly from the author, Member States should be allowed the option of exempting from the resale right acts of resale of those works which take place within three years of that acquisition. The interests of the artist should also be taken into account by limiting this exemption to such acts of resale where the resale price does not exceed EUR 10 000.

3.2.2.2.5. Internal market for orphan works

"The Orphan Works Directive was created to improve legal certainty across the EU for the digitisation and dissemination of a copyright-protected work for which rightsholders are impossible to identify or uncontactable."[803] Namely, cultural heritage institutions (museums, archives, libraries) were reluctant to start the digitisation and, hence, preservation, of the cultural works due to the significant number of orphan works, among other reasons. In other words, they could not get permission from the rightsholders to pursue such digitisation because

[803] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU): final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123

the rightsholders on the work were either unknown or beyond reachable contact. Moreover, due to the general EU copyright principle that every use needs to be authorised by the rightsholders,[804] the cultural heritage institutions were always facing the risk that at one point in time, the alleged rightsholders might reappear and claim the damages for the use and/or licensed fee for the continued use of their works. "More importantly, this is a risk many [cultural heritage institutions] cannot afford to accept in the absence of clear judicial and legislative rules on the exceptions."[805] Moreover, to understand the level of importance of such a problem, it is worth noting that due to the fact that copyright protection does not require registration, most copyrighted works today are, in fact, orphans.[806] What that entails, from the market perspective, is that on the one hand the situation involves a huge number of works/goods unable to be exploited. While, on the other hand, there are present institutions/actors willing to exploit those works within activities pursuing at the same time a significant public interest objective of ensuring dissemination and access to the cultural works. In other words, a broad copyright protection, nonetheless supported by other factors and circumstances, resulted in a market failure that needed to be addressed.[807]

The European Union legislator decided to address the problem "by creating an exception for the digitisation and publication of certain categories of works by cultural heritage institutions, under a preliminary condition: they must carry out a diligent search for the right holder."[808] The orphan work is not any work capable of copyright protection, it is confined to a list of

[804] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance OJ L 299, p 253-260, recital 6; Case C-301/15 *Soulier and Doke* ECLI:EU:C:2016:878, para 37.

[805] Uma Suthersanen and Maria Mercedes Frabboni 'The Orphan Works Directive' in Irini Stamatoudi, Paul Torremans (eds) *EU Copyright Law* (Edward Elgar 2021) 255, 257; see also Psychogiopoulou (n 647) 481.

[806] Joshua O. Mausner 'Copyright Orphan Works: A multi-pronged solution to solve a harmful market inefficiency' (2007) 12(2) Journal of Technology Law & Policy 396, 396 relying on Report on Orphan Works, A Report of the Registrar of Copyrights (Jan. 2006) available at http://www.copyright.gov/orphan; Comment of Creative Commons & Save the Music, available at http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf ; see also European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproģe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123 p 84 "An estimate from 2001 shows that there were more than 2.5 billion books and bound periodicals (volumes) in the libraries of the EU-25 Member States, while the proportion of orphan works in the case of print media can reach up to 50 %."

[807] Joshua O. Mausner 'Copyright Orphan Works: A multi-pronged solution to solve a harmful market inefficiency' (2007) 12(2) Journal of Technology Law & Policy 396, 399 "The orphan works problem is often described as a missing market form of market failure. An efficient market may exist between a copyright owner and a potential user, but because of a lack of information and prohibitive search costs, neither the owner nor the potential user are able to find one another to negotiate a permissive use. What results is the market inefficiency of unfulfilled demand for use of works."

[808] Marcella Favale 'Bouncing back from oblivion: can reversionary copyright help unlock orphan works?' (2019) 41(6) European Intellectual Property Review 339, 339.

works set out in Article 1 of the Orphan Works Directive.[809] Similarly, the exceptions granted by the directive are confined to exceptions regarding the right of making available and reproduction right (for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration) as set out in Articles 2 and 3 of the InfoSoc Directive.[810] The directive also provides a list of beneficiaries in which are enumerated publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations in order to achieve aims related to their public-interest missions.

As seen in the recitals set out in Table 11, the Directive aims to achieve predominately non-economic objectives, and that is primarily promoting mass digitisation and dissemination of European cultural heritage, and in order to ensure that it must provide a legal framework which would enable such digitisation, or in other words it must ensure legal certainty for the institutions that would carry out such activities. At the same time, although the broad copyright protection contributed to such situation, the EU legislator nevertheless still proclaims the importance of copyright as an "economic foundation for the creative industry".[811] In other words, the tension between the copyright and dissemination of culture is visible and there is reluctance from the EU legislator on questioning the scope of exclusive rights and instead the legislative technique it opts for is the technique of copyright limitations or exceptions which falls under the previously discussed conditions regarding the framework of general internal market for copyright protected goods. What that entail is strict interpretation strengthened by the conditions of the three-step test. In that sense, according to the Study on the application of the Orphan Works Directive, as one of the issues, half of the beneficiary respondents stated that "the permitted uses covered by the [Orphan Works Directive] are too narrow and that non-commercial offline uses should be permitted."[812]

With respect to the limitations, there is also another concern put down in the literature and practice that is that the legislator "does not coordinate the exception […] with the other

[809] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance OJ L 299, p 253-260.
[810] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance OJ L 299, p 253-260, Article 6(1).
[811] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance OJ L 299, p 253-260, Recital 5.
[812] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123, p 88.

exceptions that have already been adopted for libraries and similar institutions, i.e. the optional exceptions under Article 5, paragraph 2, letter (c) and paragraph 3, letter n) of the [InfoSoc Directive]."[813] Namely, Article 5(2)(c) InfoSoc Directive allows Member States to provide an exception to the reproduction rights in favour of publicly accessible libraries, educational establishments or museums, or by archives for specific acts of reproduction which are not for direct or indirect economic or commercial advantage. Article 5(3)(n) InfoSoc Directive allows Member States to provide an exception or limitation to both rights of reproduction and communication to the public in favour of the same institutions in order to allow communication of works or making them available online by dedicated terminals on the premises of establishments to the individuals for the purpose of research or private study. Both of the provisions were subject to interpretation by the CJEU in *Eugen Ulmer* precisely regarding the digitisation of works by a public library and the CJEU confirmed that Member States may grant publicly accessible libraries "the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments."[814] However, both exceptions and limitations are optional, meaning that Member States are not obliged to implement them within the national legislation. Hence, there is a possibility of national legislations including mandatory exception regarding orphan works and not regarding works in general. In other words, due to the optional nature of limitations and exceptions such strong objectives of promoting and achieving mass digitalisation of cultural heritage remain solely expressive and subject to extremely chaotic legal framework which is far beyond providing a level playing field for such digitisation services and for the attainment of the digitisation objectives. Another overlap is also pointed out regarding the regulation of out-of-commerce works in the DSM directive.[815] Considering the legal chaos created by such law-making, and on top of that a fear of re-emerging rightsholders regarding the orphan works,[816] it is not surprising that "the cultural heritage institutions tend to concentrate on digitising works in the public domain, due to the

[813] Maria Lilla Montagnani and Laura Zoboli 'The Making of an "Orphan": Cultural Heritage Digitization in the EU' (2017) 25(3) International Journal of Law and Information Technology 196, Available at SSRN: https://ssrn.com/abstract=2757245, p 11.
[814] Case C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196, para 49.
[815] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123, p 92.
[816] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123, p 91.

lack of resources (both human and financial), as these works can be used freely, with no compensation/licensing fee necessary."[817]

Table 11. Market of orphan works: The Orphan works Directive	
Economic objectives: - Copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. - Copyright is an important tool for ensuring that the creative sector is rewarded for its work. - To incentivise digitisation, the beneficiaries of this Directive should be allowed to generate revenues in relation to their use of orphan works - Contractual arrangements may play a role in fostering the digitisation of European cultural heritage,	Non-economic objectives: - To create European Digital Libraries - To facilitate electronic search and discovery tools which open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analogue search methods - To promote free movement of knowledge and innovation - To create a legal framework to facilitate the digitisation and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located - Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. - To promote learning and the dissemination of culture, Member

[817] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123, p 92.

	States should provide for an exception or limitation - To foster access by the Union's citizens to Europe's cultural heritage, it is also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State may also be made available to the public in other Member States

3.2.2.2.6. Internal market of certain copyright or related rights protected work for the benefit of blind, visually-impaired or otherwise print-disabled persons

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (hereinafter: The Marrakesh Treaty)[818] was adopted within WIPO Member States on the 27th of June 2013 and entered into force on the 30th of September 2016. The European Union, on behalf of its Member States, ratified the Marrakesh Treaty on the 1st of October 2016[819] and to implement the obligations required by it, the EU enacted a directive [820] and a regulation.[821] Namely, discussions have started on the international level on the phenomenon known as "the global book famine". The term stands for situation in which more than 285 million people are blind or visually impaired (and 90% of them are in the developing countries) while at the same time there are "less than 5% of books

[818] The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled https://www.wipo.int/treaties/en/ip/marrakesh/ (last accessed 9th of March 2023).
[819] Raquel Xalabarder 'The Marrakesh Treaty' in Irini Stamatoudi, Paul Torremans (eds) *EU Copyright Law* (Edward Elgar 2021) 610, 611-613.
[820] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242, 20.9.2017, p 6–13.
[821] Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled OJ L 242, 20.9.2017, p 1–5.

published every year worldwide […] made available in formats accessible"[822] to blind and visually impaired persons. On top of that, "there are less than 10% of all published material"[823] accessible in such formats. To address such situation the Treaty "require[d] Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules to permit reproduction, distribution, and making available of published works in formats designed to be accessible to [visually impaired persons], and to permit exchange of these works across borders by organizations that serve those beneficiaries."[824]

The EU implemented the obligation through the directive which provides for a mandatory exception to all of the exclusive rights harmonised on the EU level in favour of the beneficiary person (a visually-impaired person) or an authorised entity authorised to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis to make, use and supply of the accessible format copy.[825] On top of that, the Marrakesh directive provides a mandatory exception allowing cross-border exchange of the accessible format copies within the internal market.[826] The regulation, on the other hand, "lays down uniform rules on the cross-border exchange of accessible format copies […] between the Union and third countries that are parties to the Marrakesh Treaty without the authorisation of the right holder […] in order to prevent jeopardising the harmonisation of exclusive rights and exceptions in the internal market."[827]

Based on recitals, both the directive and regulation have clearly predominant non-economic objectives of conducting measures to ensure better availability and circulation of books and other works in formats accessible for the visually impaired persons. However, given that it is

[822] Xalabarder (n 819) 611.
[823] Xalabarder (n 819) 611.
[824] Summary of the Marrakesh Treaty https://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html (last accessed on March 9th, 2023).
[825] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242, 20.9.2017, p 6–13, Article 3.
[826] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242, 20.9.2017, p 6–13, Article 4.
[827] Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled OJ L 242, 20.9.2017, p 1–5, Article 1.

regulated within the internal market framework, the market shade is inevitable. Namely, from the market perspective it could still be considered as a market failure since the market did not provide enough of such copies on its own and it needed to be pushed. By liberating the maker of the accessible format copies of the cost of copyright and related rights licence fees, the authorised entities are given the incentive to invest and create market for such copies.

Table 12. Market of certain copyright or related right protected work for the benefit of blind, visually impaired or otherwise print-disabled persons[828]: The Marakesh directive	
Economic objectives: - To provide legal certainty and a high level of protection for rightholders, and constitute a harmonised legal framework. That framework contributes to the proper functioning of the internal market and stimulates investment and the production of new content, including in the digital environment	Non-economic objectives: - To provide legal certainty and a high level of protection for rightholders, and constitute a harmonised legal framework. That framework contributes to the proper functioning of the internal market and stimulates innovation and creation, including in the digital environment - To promote access to knowledge and culture by protecting works and other subject matter and by permitting exceptions or limitations that are in the public interest. - To safeguard a fair balance of rights and interests between rightholders and users - Taking into consideration the rights of blind, visually impaired or otherwise print-disabled persons as

[828] It is a work in the form of a book, journal, newspaper, magazine or other kind of writing, notation, including sheet music, and related illustrations, in any media, including in audio form such as audiobooks and in digital format

	recognised in the Charter of Fundamental Rights of the European Union (the 'Charter') and the United Nations Convention on the Rights of Persons with Disabilities (the 'UNCRPD'), measures should be taken to increase the availability of books and other printed material in accessible formats, and to improve their circulation in the internal market - The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the 'Marrakesh Treaty') was signed on behalf of the Union on 30 April 2014 (1). Its aim is to improve the availability and cross-border exchange of certain works and other protected subject matter in accessible formats for persons who are blind, visually impaired or otherwise print-disabled. The Marrakesh Treaty requires contracting parties to provide for exceptions or limitations to copyright and related rights for the making and dissemination of copies, in accessible formats, of certain works and other protected subject matter, and for the cross-border exchange of those copies. The

	conclusion of the Marrakesh Treaty by the Union requires the adaptation of Union law by establishing a mandatory and harmonised exception for uses, works and beneficiary persons covered by that treaty. - aims to ensure that beneficiary persons have access to books and other printed material in accessible formats across the internal market. Accordingly, this Directive is an essential first step in improving access to works for persons with disabilities.

Market of certain copyright or related right protected work[829]: The Marakesh regulation	
Economic objectives: - /	Non-economic objectives: - This Regulation aims to implement the obligations under the Marrakesh Treaty with respect to the export and import arrangements for accessible format copies for non-commercial purposes for the benefit of beneficiary persons between the Union and third countries that are parties to the Marrakesh Treaty, and

[829] It is a work in the form of a book, journal, newspaper, magazine or other kind of writing, notation, including sheet music, and related illustrations, in any media, including in audio form such as audiobooks and in digital format.

	to lay down the conditions for such export and import in a uniform manner within the field harmonised by Directives 2001/29/EC and (EU) 2017/1564 in order to ensure that those measures are applied consistently throughout the internal market and do not jeopardise the harmonisation of exclusive rights and exceptions contained within those Directives - This Regulation should ensure that accessible format copies of books, including e-books, journals, newspapers, magazines and other kinds of writing, notation, including sheet music, and other printed material, including in audio form, whether digital or analogue, which have been made in any Member State in accordance with the national provisions adopted pursuant to Directive (EU) 2017/1564 can be distributed, communicated, or made available, to a beneficiary person or authorised entity, as referred to in the Marrakesh Treaty, in third countries that are parties to the Marrakesh Treaty. Accessible formats include, for example, Braille, large print, adapted e-books, audio books and radio broadcasts. Taking into account the 'non-

	commercial objective of the Marrakesh Treaty' (4), the distribution, communication to the public or making available to the public of accessible format copies to persons who are blind, visually impaired or otherwise print-disabled or to authorised entities in the third country should only be carried out on a non-profit basis by authorised entities established in a Member State. - This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter and the UNCRPD. This Regulation should be interpreted and applied in accordance with those rights and principles,

3.3. Conclusory remarks

As it can be seen on the majority of analysed internal markets (with the exception of internal markets for orphan works and for the goods suitable for visually impaired persons), the economic objectives prevail, especially the objective of ensuring high level of protection. Namely, the CJEU explicitly proclaimed it as a principle objective which is ensuring the need for an appropriate reward and a safeguard for the return of the investment. It has been proclaimed as such under the narrative that such high level of protection is needed for the maintenance and the development of creativity which will in the end result in increased competitiveness of the European Union and new job creation.

However, although the non-economic objective of maintenance and development of creativity is allegedly ensured through high level of protection, the decision in *Pelham* shows that such

objective is not of the CJEU's primary concern. Namely, the case involved sampling and freedom of arts was invoked in order to set the limits to the broad interpretation of the exclusive rights. The CJEU relied on the freedom of arts when deciding to limit the scope, however, in reaching that decision the only criterion taken into account was whether such small reproduction used in sampling and creating a new work substantially affected the rightsholder's need for appropriate reward. The fact that the possibly infringing use was in fact a manifestation of creativity, was not taken into consideration and the scope was limited only to exclude from the scope a minimal part. Similarly in the case of *Renckhoff* which encompassed the use of a work in student presentation uploaded on the school's website, the CJEU did not delve into reasons why such use might be socially desirable and in fact ensuring student's creativity. It did confirm that it such single use by a pupil is encompassed by the right to education, but it also put forward that the purpose of intellectual property rights is to ensure for the rights holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment for an appropriate reward for *each* use. In that sense, the appropriate reward and grant of licenses are regarded as more important than the non-economic objective the use might pursue. What seems more transparent from this case is that in the case where such a use can be repeated numerously, there lies an option for licensing mechanism and the economic impact of such use is more than limited. That might result in uniform regulation on the EU level, as it was precisely in the case when ensuring a mandatory digital and cross-border use in teaching activities which, as will be discussed below was still overshadowed by licensing schemes.

The other non-economic objectives such as promotion of learning and dissemination of culture are entrusted to the provisions on limitation and exceptions. That, unfortunately, diminishes their importance since the provisions on limitations and exceptions are deemed as derogations from the general principle of high level of protection. Namely, they are not to be interpreted in a way that would jeopardise such high level of protection regardless of the desirability and importance of the non-economic objective they pursue.

Finally, when it comes to the balancing of the fundamental rights, the fundamental rights such as freedom of expression were invoked when ensuring the application of limitations or exceptions for the purpose of news reporting. The CJEU was not aiming at limiting those rights, however, it must be noted that such cases involve incidental one-time occurring use which is not the most suitable for licensing. Namely, news changes every day and use of the work is

hence merely incidental. Thus, it is not surprising that the CJEU is more open to balancing of the fundamental rights in the cases where the economic impact to exclusive rights is limited, while where it is not, as in *Renckhoff*, such balancing is avoided. Moreover, when it comes to balancing regarding the enforcement measures (injunctions and filtering) the CJEU showed readiness to balance the right to intellectual property with the right to conduct business, often taking the side of business as dominant and prevailing one. However, when it came to privacy and protection of private life, the CJEU seemed to be less reluctant to give priority to the latter, taking in fact prior to assessing the balance the position of intellectual property right as a primary position determining the other. The only exception seemed to be if the legislature has already done the balance instead.

Chapter 5 – Limitations and exceptions to copyright and related rights for education purpose

As it was set out before, copyright law has been mostly developed through the national legislation of Member States. Although differences regarding justifications, regarding thresholds for protection among other issues, existed within the various national copyright legal systems, the national copyright laws were mostly developed as to grant a set of exclusive rights to the rightsholders. However, in order to prevent the absolute scope and reach of those rights, national legislators envisioned certain exceptions or limitations which have developed either through legislation or through adjudication.[830] Usually, by provisions on exceptions and limitations the legislator outlines the situations in which it deems more appropriate to prioritise some other interest rather than the interest of the copyright or related rights rightsholder.[831] Such interests can occur in different situations and perform various functions, which can range from protecting public interest such as freedom of expression, access to culture or information to protecting economic interests such as fostering competition or ensuring protection of consumers' interests, among numerous others. Member States have naturally, thus, developed different set of exceptions and limitations[832] with its own underlying reasoning and justifications.

Considering the resurrection of copyright and related rights protection as a possible obstacle to the fundamental market freedoms of goods and services the limitations and exceptions to copyright caught some of the European Union's attention. However, only within the harmonisation measures and only to certain extent. Adding on to the analysis of 6 different levels of internal market for copyright or related rights protected goods as differing legal and political concepts in Chapter 3, the analysis on the tension between non-economic and economic objectives will continue. However, it will now be focused on the tension within the regulation of limitations and exceptions for education purposes. Namely, apart from obvious predominance of economic objectives within the internal markets, the limitations and exceptions were given the primary role of tools for pursuit of non-economic objectives (apart from the non-economic objective of maintenance and development of creativity which was

[830] Samuelson (n 344) 12-13.
[831] Robert Burrell, Allison Coleman *Copyright Exceptions The Digital Impact (*Cambridge University Press 2005), 5.
[832] Samuelson (n 344) 24.

entrusted to the provision of high level of protection). So, to further assess the position and importance the non-economic objectives were given within those internal markets, the analysis of limitations and exceptions must follow. In order to easily follow the arguments, the exceptions and limitations for the education purposes within the EU copyright law are summarised in table 13 below:

Table 13. Limitations and exceptions for education purpose	
Internal Market for databases	
Database directive	
Exclusive rights:	**Exception/limitation**
CHAPTER II (COPYRIGHT) ***Article 5*** **Restricted acts** In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize: (a)temporary or permanent reproduction by any means and in any form, in whole or in part; (b)translation, adaptation, arrangement and any other alteration; (c)any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;	**CHAPTER II (COPYRIGHT)** ***Article 6*** **Exceptions to restricted acts** (2) Member States *shall have the option* of providing for limitations on the rights set out in Article 5 in the following cases: b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council

(d)any communication, display or performance to the public; (e)any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).	
CHAPTER III (SUI GENERIS RIGHT) ***Article 7*** **Object of protection** (1) Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database. (2) For the purposes of this Chapter: (a)'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form; (b)'re-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of	**CHAPTER III (SUI GENERIS RIGHT)** ***Article 9*** **Exceptions to the sui generis right** (1) Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790

transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community; Public lending is not an act of extraction or re-utilization. (3) The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence. (4) The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents. (5) The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted	
DSM directive	
Exclusive rights:	**Exception/limitation**

See above – DATABASE DIRECTIVE	*Article 5* **Use of works and other subject matter in digital and cross-border teaching activities** (1) Member States shall provide for an exception or limitation to the rights provided for in **Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC […]in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:** **See below DSM directive**
Internal market for computer programs	
Computer Programs directive / DSM directive	
Article 4 (Computer Programs Directive) **Restricted acts** (1) Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise: (a)the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer	*Article 5* **Use of works and other subject matter in digital and cross-border teaching activities** (1) Member States shall provide for an exception or limitation to the rights provided for in **[…] Article 4(1) of Directive 2009/24/EC […]** in order to allow the **digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-**

program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder; (b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program; (c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. 2. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.	**commercial purpose to be achieved, on condition that such use:** **See below DSM directive**
Internal market of copyright or related right protected work in general	
InfoSoc directive	
Exclusive rights:	**Exception/limitation**
Article 2 **Reproduction right** (1) Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works;	***Article 5*** **Exceptions and limitations** (2) Member States **may provide for exceptions or limitations to the reproduction right** provided for in Article 2 in the following cases: **(c) in respect of specific acts of reproduction made by publicly accessible**

(b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broad- casts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.	**libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council;**
Article 2 **Reproduction right (see above)** ***Article 3*** **Right of communication to the public of works and right of making available to the public other subject-matter** (1) Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. (2) Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members	***Article 5*** **Exceptions and limitations** (3) Member States **may provide for exceptions or limitations to the rights provided for in Articles 2 and 3** in the following cases: (a) **use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive** (EU) 2019/790;'. n) **use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the**

of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broad- casts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. (3) The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.	**premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;**
DSM Directive	
Exclusive rights:	**Exception/limitation**
Article 2 InfoSoc directive **Reproduction right (see above)** ***Article 3 InfoSoc directive*** **Right of communication to the public of works and right of making available to the public other subject-matter (see above)**	***Article 5*** **Use of works and other subject matter in digital and cross-border teaching activities** (1) Member States shall provide for an exception or limitation to the rights provided for in **[…] Articles 2 and 3 of Directive 2001/29/EC, […]** in order to allow the **digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the**

	non-commercial purpose to be achieved, on condition that such use: (a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible. (2) Notwithstanding Article 7(1), Member States may provide that the exception or limitation adopted pursuant to paragraph 1 **does not apply or does not apply as regards specific uses or types of works** or other subject matter, such as material that is primarily intended for the educational market or sheet music, **to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.** Member States that decide to avail of the first subparagraph of this paragraph **shall take the necessary measures to ensure that the licences authorising the acts referred to in paragraph 1 of this Article are available and visible in an appropriate manner for educational establishments.** (3) The use of works and other subject matter for the sole purpose of illustration for

	teaching through secure electronic environments undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established. (4) Member States may provide for fair compensation for rightholders for the use of their works or other subject matter pursuant to paragraph 1.
Rental and Lending Directive	
CHAPTER II **RIGHTS RELATED TO COPYRIGHT** ***Article 7*** **Fixation right** (1) Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances. (2) Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. (3) A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations. ***Article 8***	***CHAPTER II*** **RIGHTS RELATED TO COPYRIGHT** ***Article 10*** ***Limitations to rights*** (1) Member **States may provide for limitations to the rights** referred to in this Chapter in respect of: (d) use **solely for the purposes of teaching or scientific research.** (2) Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

Broadcasting and communication to the public (1) Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation. (2) Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them. (3) Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.	

Article 9 **Distribution right** (1) Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter 'the distribution right': (a) for performers, in respect of fixations of their performances; (b) for phonogram producers, in respect of their phonograms; (c) for producers of the first fixations of films, in respect of the original and copies of their films; (d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2). (2) The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent. (3) The distribution right shall be without prejudice to the spe- cific provisions of Chapter I, in particular Article 1(2). (4) The distribution right may be transferred, assigned or sub- ject to the granting of contractual licences.	
Internal market for press publications	

DSM directive	
Article 15 **Protection of press publications concerning online uses** (1) Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers. The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users. The protection granted under the first subparagraph shall not apply to acts of hyperlinking. The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication. 2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their	*Article 5* **Use of works and other subject matter in digital and cross-border teaching activities** (1) Member States shall provide for an exception or limitation to the rights provided for in **[…] Article 15(1) of this Directive** in order to allow the **digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:** **See above DSM directive**

works and other subject matter independently from the press publication in which they are incorporated. When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired. 3. Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 of the European Parliament of the Council ([19]) shall apply mutatis mutandis in respect of the rights provided for in paragraph 1 of this Article. 4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published. Paragraph 1 shall not apply to press publications first published before 6 June 2019. 5. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.	

4.1. Exceptions and limitations to copyright and related rights – EU legal framework

Chapter 3 showed us that EU Copyright law has started within the process of negative market integration before the CJEU. The CJEU got caught up with questions on how to reconcile territorial national copyright law protection with the fundamental market freedoms and from such preliminary references, the first issues requiring positive integration occurred and first directives have been enacted. EU Copyright law has, however, lacked any coherent approach in which the issue of limitations and exceptions was far beyond the radar of the European Union. Limitations and exceptions have also never been fully harmonised on the international level, and mostly stayed within the sphere of national legislation which could craft it with more or less precision or flexibility.[833] The end result were, hence, numerous different variations of limitations and exceptions present with the national legal systems pursuing different functions.[834] From the market perspective, such disparities within national legal systems inevitably pose a hindrance to the fundamental market freedoms and it would have been expected from the European Union to regulate the matter just like it delved into regulation of the exclusive rights of the copyright or related rights. Namely, limitations and exceptions and exclusive rights are two sides of the same coin assuring the balance between concurring and/or conflicting interests. In that sense, some states prefer the wide scope of exclusive rights in which the provisions of exceptions and limitations serve as well-elaborated fences or constraints to exclusivity, while some states prefer the other option of keeping the scope of exclusivity limited and relying on the open-ended and flexible provision covering limitations and exceptions (e.g.

[833] Lucie Guibault, 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment', UNESCO e-Copyright Bulletin, October-December (2003), <http://portal.unesco.org/culture/en/files/17316/108747977511_ guibault_en.pdf/l_guibault_en.pdf> (last accesed March 14th 2023), 2 "As mentioned above, the limitations on copyright and related rights have never been harmonised at the international level. The limitations listed in the Paris Act of the Berne Convention are the result of aserious compromise by national delegations – between those that wished to extend user privileges and those that wished to keep them to a strict minimum – reached over a number of diplomatic conferencesand revision exercises. Consequently, all but one limitation set out in the text of the Berne Conventionare optional: countries of the Union are free to decide whether or not to implement them into their national legislation. As it will be shown in more detail in the sections below, these provisions are meant to set the minimum boundaries within which such regulation may be carried out."

[834] Samuelson (n 344) 25 "Like the L&Es themselves, justifications can vary in type and range. Some rationales are grounded in normative values and perspectives on copyright, while others are more pragmatic responses to the complex difficulties inherent in the law making process and the need to balance competing interests. Some L&Es may be justified in national laws based not only on the purpose of the use, but also on remuneration that goes to rights holders. In some instances, more than one justification may apply. Many of the justifications for L&Es can be grouped in general categories, such as concerns about authorship, user interests, the public interest, economic rationales, political expediency, and the need for flexibility."

fair use in the United States[835]). In any way, the point I want to make is that it is utterly non-sensical to regulate copyright exclusive rights without regulating the limitations and exceptions at the same time. Especially from the perspective of market integration. Unfortunately, the European Union, although not entirely, opted to focus on exclusive economic (not moral) rights, while leaving the regulation of exceptions and limitations within the sphere of national competence (however, limited national competence). Such decision is, thus, highly questionable not only from the question of attaining fair balance of conflicting interests, but also from the perspective of ensuring smooth functioning of the internal market.[836] In that respect, the EU legislation has been criticised by academics, who consider that "[t]he harmonization of exceptions and limitations within the EU poses probably one of the biggest challenges to the objective of 'better regulation' in the area of copyright and related rights [and that] [t]he desire to remove disparities between national laws dealing with exceptions and limitations on copyright and related rights has so far been met with only limited success."[837] Such an approach was usually justified by the subsidiarity principle.[838] However, considering the vagueness and limited realisation of coherent application of the subsidiarity principle[839], the reason for omitting coherent provisions on limitations and exceptions substantially might be more of a result of a political than a legal decision.[840]

Today provisions on limitations and exceptions are contained in several directives: (i) the Computer Programs Directive, (ii) the Database Directive, (iii) the Rental and Lending Right Directive (iv) the InfoSoc Directive (v) the Orphan Works directive (vi) the Marrakesh Treaty Directive and (vii) the DSM directive. Those directives provide a different set of exceptions and limitations with respect to different type of copyright or related rights protected work. For instance, the Computer Programs Directive provides for more technical exceptions which are

[835] Seen United States Copyright Act, section 107.
[836] Lucie Guibault 'Why Cherry-Picking Never Leads to Harmonisation The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 JIPITEC 55 available at https://www.jipitec.eu/issues/jipitec-1-2-2010/2603/JIPITEC%202%20-%20Guibault-Cherrypicking.pdf.pdf (last accessed on March 15th, 2023).
[837] Mireille M.M. van Echoud *Harmonizing European copyright law the challenges of better lawmaking* (Kluwer Law 2009), 94.
[838] Raquel Xalabarder 'The role of the CJEU in harmonizing EU copyright law' (2016) 47(6) International Review of Intellectual Property and Competition Law 635, 635.
[839] See Chapter 3, part 3.2.2.1.2. *The application of principles of subsidiarity and proportionality to measures adopted under Article 114 tfeu.*
[840] For instance, there was no recognition of the issue of limitations and exceptions in policy documents preceding first set of legislation see e.g. *Green Paper on Copyright and the Challenge of Technology – Copyright issues requiring immediate action* COM (88)172 final or *Green Paper on Copyright and Related Rights in the Information Society* COM(95) 382 final. On the contrary, the more recent *Green Paper on Copyright in the Knowledge Economy* COM (2008) 466 final recognises certain exceptions as an issue to be dealing with, however the institute of limitations and exceptions as a whole remains beyond European Union attention.

aimed at enabling the use of the program or for the purpose of observing, studying or testing the functioning of the computer program in order to determine the ideas and principles underlying the program.[841] The Database Directive provides for an optional list of exceptions for the purposes such as illustration for teaching or scientific research or reproduction for private purposes. The Orphan Works Directive, similarly as the Marrakesh Treaty Directive, provides for a special mandatory exception or limitation in order to ensure digitisation of orphan works or creation of accessible format copies for visually impaired persons. In any way, in EU Copyright law, the set of limitations and exceptions tremendously vary depending on the type of work as well as whether the exception set out on the European Union level is mandatory or merely optional. On top of that, the issue of contractual overridability as well as the conflict with protection of technological protection measures add on to the chaotic diversity of the legal framework.

However, following the enactment of the InfoSoc Directive in 2001 the issue of regulation of limitations and exceptions has been approached on a more consistent general level regarding the copyright or related rights protected works.[842] Nevertheless, the task of "choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States proved to be a daunting task for the drafters of the Information Society Directive. Between the time when the Proposal for a directive was first introduced in 1997 and the time when the final text was adopted in 2001, the number of admissible limitations went from seven to twenty."[843] The end result was, hence, an exhaustive list of mostly optional limitations where Member States could choose which one(s) they want to implement in national law. Moreover, the previous exceptions and limitations set out by other directives remained and the question of potential overlapping appeared. It was, nonetheless, solved by Article 1(2) of the InfoSoc Directive which prescribes that it "shall leave intact and in no way affect existing […] provisions." Such horizontal approach to the purpose of limitations and exceptions was reintroduced with the DSM directive, however only regarding digital uses of the copyright or related rights protected work.[844] It introduced the new mandatory exceptions and although, it

[841] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122, p42–46, Article 5.
[842] Although *Green Paper on Copyright and Related Rights in the Information Society* COM(95) 382 final preceding the proposal remained silent on the matter.
[843] Van Echoud (n 837) 99.
[844] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) OJ L 130, 17.5.2019, p 92–125, Article 1(2).

should also have left intact the existing provisions (except in enumerated cases), the potential overlaps remain to be determined. That is especially so in the context of new mandatory exception for use of works and other subject matter in digital and cross-border teaching activities considering the previous existence of exceptions for use for the sole purpose of illustration for teaching or scientific research.[845]

Following the analysis of the internal markets as both legal and political concepts from Chapter 3 of this thesis,[846] the same method will be applied when determining the position of non-economic objective of promotion of learning and culture within the provisions on limitations and exceptions for the education purposes. In that respect, it can be seen from Table 13 above that there are several internal markets recognising the exceptions for education purposes. Those markets are: (i) the internal market for computer programs (ii) the internal market for databases (including databases enjoying sui generis protection) and (iii) the internal market for copyright and related rights protected works in general. In each of those markets, the following problems will be analysed: (i) division of competence; (ii) mandatory or optional nature of limitation and exception (iii) contractual overridability of the provisions on exceptions and limitations and (iv) relationship with the provisions on protection of technological protection measures. The analysis will, similarly as in Chapter 3, start from the general market for the copyright or related right protected goods and then follows on to the more specialised concepts of internal market regarding specific work.

4.2. Division of competence between the European Union and Member States

4.2.1. General internal market for copyright or related rights protected works

Due to its horizontal approach towards the issue of regulation of limitations and exceptions, the provisions contained in Article 5 of the InfoSoc directive together with the provisions in Article 5 of the DSM directive reserve a central position within the legal framework both for the works protected by copyright or related rights. However, for the subject matter protected by the related rights, such as fixations of performances or broadcasts, still remain of relevance the provisions

[845] Giulia Priora, Bernd Justin Jutte and Peter Mezei 'Copyright and digital teaching exceptions in the EU: legislative developments and implementation models of Art.5. CDSM Directive' (2022) 53(4) International Review of Intellectual Property and Competition Law 543, 558-559.
[846] See explanation in Chapter 3, part 3.2.2.3.

contained in Article 10 of the Rental and Lending directive, although much of the same exceptions and limitations are introduced by the InfoSoc directive. However, since there have been some overlaps between the exclusive rights, "the logical consequence is that the limitations of Article 5 of the [InfoSoc] directive are applicable to related rights owners"[847] In any way, all of those provisions formulate the legislative framework for the general internal market for copyright or related right protected goods, so they will be analysed altogether.

4.2.1.1. The InfoSoc directive

Article 5 of the InfoSoc directive provides a list of exceptions and limitations to the harmonised exclusive rights of reproduction and communication to the public (including the right of making available online) contained in Articles 2 and 3 of the InfoSoc directive.[848] The list has been repeatedly addressed as being a closed list of exhaustive nature.[849] What that entails is that Member States must implement limitations and exceptions which are deemed mandatory (the wording "shall"), or have discretion to choose limitations (the wording "may") contained in the list, but are not at liberty of going beyond the list. According to the Recital 32 of the InfoSoc directive, such law-making aimed to "take due account of the different legal traditions in Member States, while at the same time, aiming to ensure a functional internal market." In that sense the discretion of Member States remains limited to the confinement of the provisions set out on the European Union level. Otherwise, it has been put forward that it "would endanger the effectiveness of the harmonisation of the copyright and related rights effected by [InfoSoc] directive, as well as the objective of legal certainty pursued by it."[850] Moreover, it would run contrary to the principle and requirement of consistent application.[851] By relying on those principles and exhaustive nature of the list, the CJEU also expressly rejected the possibility of relying on fundamental rights enshrined within the Charter as a limitation to the copyright and

[847] Stefan Bechtold 'Directive 2001/29/EC – on the harmonization of certain aspects of copyright and related rights in the information society' in Thomas Dreier and Bernt Hugenholtz (eds) *Concise European Copyright Law* (Kluwer Law International 2006), 370 as cited in van Echoud (n 837) 100.
[848] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, Article 2 -3.
[849] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, Recital 32 confirmed by CJEU jurisprudence see e.g. Case C-301/15 *Soulier and Doke* EU:C:2016:878, para 34; Case C-161/17 *Renckhoff* EU:C:2018:634, para 16; Case C-476/17 *Pelham* ECLI:EU:C:2019:624, para 58.
[850] Case C-476/17 *Pelham* ECLI:EU:C:2019:624, para 63.
[851] Case C-476/17 *Pelham* ECLI:EU:C:2019:624, para 64.

related rights exclusive rights beyond those enumerated in the directive. Namely, it opted not to delve into the question beyond the express intention of the EU legislature.[852]

That decision is interesting in one important aspect and that is that the decision of EU legislature portrayed in the provisions of EU secondary law (directives) will not be questioned in the light of primary law (Charter). To put it into perspective, an exception enshrined in Article 5(3)(a) provides an optional exception or limitation to the exclusive rights for the *sole purpose of illustration for teaching or scientific research.* Logically, one can assume that such an exception serves to pursue the interests such as freedom of the arts and sciences (enshrined in Article 13 of the Charter[853]) as well as the right to education (enshrined in Article 14 of the Charter)[854]. No one questions that that is not achieved through such exceptions and limitations. However, the control of whether that right and freedom possibly require more will never be contested and faith was blindly put into the hands of the legislature. That is even more so when taking into consideration that Article 13 of the Charter states that "the arts and scientific research shall be free of constraint." It has to be noted, though, that such faith has been put into the hands of the legislature by the CJEU, who is in fact the one competent to decide on the validity of secondary law in light of the primary law. In that sense the CJEU's decision could clearly be legitimate and upheld, however, it is sort of disappointing when there is no substantial assessment of reasoning leading to the decision. The same can be held for exceptions and limitations that might not be included in the list, yet are very much needed in the context of fundamental rights protection. That especially might be the case in the future due to the development of technology and rapid creation of new desirable uses, which might unfortunately be prevented due to the outdated law. However, as it has already been discussed, the CJEU did not disregard the Charter entirely, yet, on occasions, it relied on the Charter when offering interpretation of provisions on limitations and exceptions.[855] Then again, there is an interesting question posed by Tito

[852] Case C- 516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 40-49.
[853] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, Article 13 "The arts and scientific research shall be free of constraint. Academic freedom shall be respected."
[854] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, Article 14 "1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right."
[855] See Chapter 3, part 3.2.2.3.1.2. *Tension between economic and non-economic objectives*

Rendas whether not implementing an optional limitation and exception can be seen as "not compatible with EU Copyright law when interpreted in the light of the Charter."[856]

Having established that Member States discretion when choosing limitations or exceptions is confined to the limits of Article 5 of the InfoSoc directive, the discussion on the limits of their discretion within those limits must follow. The CJEU in *Funke Medien* provided several steps to be taken into account in order to determine the level and scope of discretion.

Firstly, the level of discretion will depend based on the criterion whether provisions shall be interpreted as *constituting measures of full harmonisation*. Namely, based on the principle of supremacy of EU law, rules of national law cannot be allowed to undermine the effectiveness of the EU law.[857] Therefore, if the provision is interpreted as constituting a measure of full harmonisation, the Member States have no discretion when implementing such provision. Such situation is, thus, entirely regulated by EU law, and national authorities cannot apply any national standards when implementing such provisions, including the standards contained in national constitutions. On the other hand, if situation in which Member States action is not entirely determined by the EU level, then certain discretion exists, including the discretion to apply national standards of fundamental rights protection, however, on the condition that the level of protection provided for by the Charter, and the primacy unity and effectiveness of EU law are not compromised.[858]

The question is how to determine whether a provision shall be interpreted as constituting a measure of full harmonisation or not. The CJEU stated that the decision must be determined on a case-by-case basis. In that respect it found provisions on exclusive rights of reproduction and communication to the public as such provisions since their objective is to ensure a high and even legal protection of those rights and they are in fact defining those rights without subjecting the application of the provision to any additional conditions or requirements.[859] On the other hand, when it comes to provisions on limitations and exceptions contained in Article 5, the CJEU put forward two factors to be taken into account when determining the scope of Member

[856] Tito Rendas 'Are EU Member States required to have a sense of humor?' (2023) 54(1) International Review of Intellectual Property and Competition Law 1, 3.
[857] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 29-30.
[858] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 32; Case C-399/11 *Melloni* EU:C:2013:107, para 60; Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, paragraph 29.
[859] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, paras 35-37.

States' discretion in the implementation of particular exception or limitation into national law. First is the wording of the provision while second is the degree of the harmonisation intended by the EU legislature and that degree is based on the impact the limitation or exception has on the smooth functioning of the internal market.[860]

Regarding the first factor, the wording of the provision, the Member States are required to observe the parameters governing those exceptions and limitations in a sense that they may only implement the limitation or exception "if they comply with all the conditions laid down in […] provision."[861] But, if the provisions contain wordings such as "in accordance with fair practice, and to the extent required by specific purpose" such wording allows for a wide scope of discretion.[862] Regarding the impact on the smooth functioning of the internal market, the CJEU, when interpreting the provision on limitations and exceptions for purposes of news reporting relied on the Explanatory Memorandum to the Proposal for InfoSoc directive and put forward that "in view of their more limited economic importance, those limitations are deliberately not dealt with in detail in the framework of the proposal, which only sets out minimum conditions for their application, and it is for the Member States to define the detailed conditions for their use, albeit within the limits set out by that provision."[863] In other words, if the economic impact on the market, and that would entail market created by copyright or related rights, of the specific limitation or exception is limited, the European Union does not consider it necessary to be fully regulated on the European Union level, hence, leaving more discretion for the Member States.

On the other hand, in *Deckmyn*, the CJEU defined the concept of parody as an autonomous concept of EU law since the provision of a directive does not contain any reference to national laws.[864] The Explanatory Memorandum remains silent on the exception and it remains unclear why in this specific case Member States are not granted discretion in determining what constitutes a parody, especially since there are no exact requirements from the wording of the provision of the InfoSoc Directive. However, if we look at it from the position of the internal market, unlike the exception for news reporting which encompasses incidental, one-time occurring situation, parody, especially in the context of social medial and online platforms, can

[860] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 40.
[861] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, paras 46-48.
[862] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 43.
[863] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 44.
[864] Case C-201/13 *Deckmyn*, ECLI:EU:C:2014:2132, paras 14-17.

include a possibility of using the work more than once for the purpose of making a parody.[865] Hence, the market impact and return of the investment could be affected which might be the trigger to require uniform regulation on the EU level. Interestingly, however, the CJEU mentioned none of those reasons and put forward that limitations and exceptions in Article 5 seek to achieve a fair balance between the interests of authors and users[866] and that the exception for parody must strike a fair balance between the interests of the author and the freedom of expression. Moreover, the CJEU went even further by introducing the principle of non-discrimination stating that rightsholders "have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message."[867] Such a line of reasoning resonates more with the protection of moral, rather than economic rights, and moral rights are still entirely within the discretion of Member States.[868] Moreover, it has considered that such line of reasoning is "disturbing" since it puts copyright in the role of "mechanism for regulating discriminatory speech."[869]

In any way, Member States' discretion when implementing provisions on limitations and exceptions is subject to further limitations. In that respect, Member States are required to comply with the general principles of EU law, including the principle of proportionality, "from which it follows that measures which the Member States may adopt must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it."[870] In that respect, it must be noted that the non-economic objectives pursued through the provisions on limitations and exceptions are put in the secondary plan because they are seen as obstacles to copyright or related rights exclusive rights. Namely, regardless of the importance and desirability of the objective they pursue, the pursuit is limited to the least restrictive option for the copyright exclusive rights. That line of reasoning is also confirmed by the CJEU, which stated that "the exceptions and limitations […] cannot be used so as to compromise the objectives of [InfoSoc] directive that consist in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market." Namely, as it was

[865] Article 17 DSM directive in that sense introduces obligatory exception for the purpose of parody in the environment of online content-sharing service providers.
[866] Case C-201/13 *Deckmyn*, ECLI:EU:C:2014:2132, para 26.
[867] Case C-201/13 *Deckmyn*, ECLI:EU:C:2014:2132, para 31.
[868] Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder, Lionel Bently 'The European Copyright Society's "Opinion on the judgment of the CJEU in Case C-201/13 Deckmyn" (2015) 37(3) European Intellectual Property Review 127, 129-130.
[869] Ibid.
[870] Case C-469/17 *Funke Medien* ECLI:EU:C:2019:623, para 49; Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798, para 105-106.

discussed in the Chapter 3, that very same directive also pursues the objective "to promote learning and culture",[871] "a fair balance of interests",[872] or the objective of "proper support for the dissemination of culture",[873] yet the CJEU leaves those objectives outside of the scope of consideration. In other words, the exclusive rights are not seen as obstacles to achieving those goals. However, it must be noted that the CJEU paid attention to the objective of fair balance when obeying the Member States to ensure the effectiveness of the limitation when implementing it into national legislation.

4.2.1.1.1. Limitations and exceptions for the education purposes

4.2.1.1.1.1. Article 5(2)(c)

Article 5 (2)(c) of the InfoSoc directive states the following "Member States *may* provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(c) *in respect of specific acts of reproduction made by publicly accessible libraries, educational establishment or museums, or by archives, which are not for direct or indirect economic or commercial advantage.*

As it can be seen, the wording "may" clearly put the exception and/or limitation in the ambit of optional ones, meaning that Member States may implement it in national legislation, but are not obliged to do it. However, if a Member State wanted to regulate the matter differently to pursue the objective of dissemination of cultural and educational material, it is not at liberty to do so, as explained above. From the perspective of the internal market, the EU legislature sent a very strong message when building the internal market through this directive. Namely, it clearly stated that is not of relevance whether goods protected by copyright or related rights could be used for the purpose of education without necessary authorisation from the rightsholders. If a Member State does not introduce this exception or limitation, which pursues the objective of

[871] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, Recital 14.
[872] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, Recital 31.
[873] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10–19, Recital 22.

promotion of learning and culture enshrined in Recital 14, from the perspective of EU law as it stands, no consequence will follow, and the use of such goods will, thus, remain subject to the general principle which requires authorisation from the rightsholders prior to use.[874]

If a Member State, however, opts for introducing the limitation or exception into its national law, it must obey the requirements set out above. That means the following: (i) it is a limitation or exception only with respect to the reproduction right enshrined in Article 2 of the InfoSoc directive; (ii) the limitation or exception covers only "specific acts of reproduction;" (iii) such acts must be made by publicly accessible libraries, educational establishments or archives and (iv) such acts are not for direct or indirect economic or commercial advantage. The requirements will be analysed below.

(i) limitation or exception only with respect to the reproduction right enshrined in Article 2 of the InfoSoc directive;

Firstly, Member States may introduce this limitation and/or exception. Although there is no strict definition of exception and or limitation, the usually invoked meanings are that "exceptions entitle the user to engage in the permitted act without having to pay the copyright owner [while] limitations permit the use, but require payments, at rates usually set by government authorities who establish compulsory licenses."[875] The CJEU considered the terms in *VG Wort* where it put forward that the exclusive right may be either, as an exception, totally excluded, or merely limited. In case of limitations, the CJEU continued, "it is conceivable that such a limitation may include, depending on the particular situations that it governs in part an exclusion, a restriction, or even the retention of that right."[876] Moreover, the CJEU stated that if the right is excluded, "any authorising act the rightholders may adopt is devoid of legal effects under the law of that State."[877] On the other hand, if the right is limited, "it is necessary to

[874] Case C-457/11 *VG Wort* ECLI:EU:C:2013:426, para 36 "It must also be noted that, pursuant to Article 5(2) and (3) of Directive 2001/29, it is open to Member States to decide to introduce, in their national law, exceptions or limitations to the exclusive reproduction right. Where a Member State does not make use of that option, rightholders retain, within that State, their exclusive right to authorise or prohibit reproduction of their protected works or other subject-matter."
[875] Jane C Ginsburg 'Overview of Copyright Law' in Rochelle Dreyfuss an Justine Pila (eds) *Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018); Columbia Public Law Research Paper NO.14-518 (2016) available at: https://scholarship.law.columbia.edu/faculty_scholarship/1990 (last accessed March 17th 2023), 23.
[876] Case C-457/11 *VG Wort* ECLI:EU:C:2013:426, para 34.
[877] Case C-457/11 *VG Wort* ECLI:EU:C:2013:426, para 37.

establish whether, in the particular case, the national legislature intended to preserve the […] right from which the authors benefit."[878]

Secondly, the limitation or exception may concern only the exclusive right to reproduction enshrined in Article 2 of the InfoSoc directive. As confirmed by the Explanatory Memorandum to the InfoSoc directive (hereinafter: Explanatory Memorandum) it does not apply to the communication to the public right because "in view of the economic impact at stake, a statutory exemption for such uses would not be justified."[879] In other words, since every digital reproduction encompasses both the reproduction right and the right of communication to the public, this limitation or exception is confined solely to tangible copies of work. "Thus, for instance, the making available of a work or other subject matter by a library or an equivalent institution from a server to users on-line should and would require a licence of the rightholder or his intermediary and would not fall within a permitted exception."[880] Otherwise, it continued, however without any substantial explanation, that the exception would be contrary to the three-step-test as it would conflict with the normal exploitation of protected material on-line and would unreasonably prejudice the legitimate interests of right holders. Namely, the fact that "the communication of a copyright protected material by a library, or its making available via a library homepage will […] be in competition with commercial on-line deliveries of material"[881] according to the EU legislator outweighs any other public interest concern that would possibly allow such use. More precisely, the legislator did not even consider it from that perspective. Similarly, according to the Explanatory Memorandum, not providing such an exception or limitation to cover the online uses, does not aim to prevent libraries and equivalent institutions from performing such tasks, however, "such uses can and should be managed on a contractual basis, whether individually or on the basis of collective agreements."[882]

However, it is worth noting, following the CJEU decision in *Eugen Ulmer* this limitation might not be strictly confined to offline uses. Namely, it can also be understood as providing an ancillary right of reproduction to digitise books within the beneficiary's collection for the

[878] Case C-457/11 *VG Wort* ECLI:EU:C:2013:426, para 38.
[879] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 31.
[880] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 31.
[881] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 31.
[882] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 31.

purpose of making those books available to individuals by dedicated terminals on the premises of the library (which is covered by the exception provided in the Article 5(3)(n) of the InfoSoc directive. In that specific case the national legislation introduced both optional exceptions in the national law, what would be the case if one of them is not, is not entirely clear. Moreover, classifying this exception as an ancillary user's right also opens the door of possible uses for purposes offered by other exceptions even for online uses, as long as they cover both communication to the public and reproduction right.

(ii) the limitation or exception covers only "specific acts of reproduction"

Neither the InfoSoc directive, nor the Explanatory memorandum define what those specific acts of reproduction are, meaning that it remains within the discretion of a Member State. "Member States may not, however, exempt all acts of reproduction, but will have to identify certain special cases of reproduction, such as copying of works which are no longer available on the market."[883] The CJEU offered an interpretation in *Eugen Ulmer*[884] regarding the possibility of digitisation of the library collection and considering the right to specific act of reproduction ancillary (enshrined in Article 5(2)(c)) to the library's right of communication to the public (enshrined in Article 5(3)(n)). The CJEU reached the conclusion, again, that not all acts of reproductions could be exempted and that, hence, "the establishments may not digitise their entire collection."[885]

(iii) such acts of reproduction must be made by publicly accessible libraries, educational establishments or archives

The provision evidently limits the scope of the exception/limitation to certain closed circle of beneficiaries – publicly accessible libraries, educational establishments or archives. The definition of the beneficiaries is, however, not provided neither by the directive nor by the jurisprudence which allows us, up to the point of no existing CJEU jurisprudence, to conclude that it remains within the discretion of the Member States.

[883] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 31.
[884] Case C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196.
[885] Case C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196, paras 44-45.

(iv) such acts of reproduction are not for direct or indirect economic or commercial advantage.

There are not so many guidelines as to determine what would "direct or indirect economic or commercial advantage" encompass. Pursuant to recital 42 of the InfoSoc directive, "when applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect." To put it into context it seems pointless to exclude beneficiaries from the limitation or exception if they charged a membership fee or require payment of scholarship fee for their services or even if they require the payment for the copies as such. For instance, a student comes to the library, founds an article, and wants to make a tangible copy, the fact that the student covers the cost of making that copy would be too burdensome to exclude such act of reproduction from the scope of the exception. Especially, taking it into account together with the private copy exception enshrined in Article 5(2)(a) or (b), although then subject to the requirement of fair compensation. However, another question is then who is the one doing the reproduction? Is it a student or an institution? Because if it is a student than it remains outside of the scope of the beneficiaries, hence, outside of the scope of Article 5(2)(c). On the other hand, if it is an institution, the Article 5(2)(b) regarding private use is inapplicable. Regardless, the exception or limitations should not be devoid of any effect because an activity might make create some little economic advantage.

4.2.1.1.1.2. Article 5(3)(a)

Pursuant to Article 5(3)(a) of the InfoSoc directive Member States *may* provide for exception or limitation to both the reproduction right enshrined in Article 2 of the directive, as well as to the communication to the public right enshrined in Article 3 of the InfoSoc directive, in the case of:

"use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved."

As it can be seen, the exception or limitation is again optional, leaving the choice up to discretion of the Member States. This again, sends a strong message regarding the importance the education and teaching have on the EU level when regulating internal market.[886] Namely, by leaving out the possibility that this interest might not be recognised on the national level without any consequences, in a way disregards the importance of the freedoms and rights enshrined in the Charter when regulating the internal market. Because the EU legislator seems perfectly satisfied as long as the exclusive copyright or related rights are harmonised. Regardless, if the Member States opts to introduce this limitation or exception for the teaching purpose it must obey the requirements contained within. This time, both right to reproduction and communication to the public are covered which opens the door for uses in the digital environment.[887] That also seems to follow from the wording of Recital 42 of the InfoSoc directive which uses the term "distance learning", inevitably having in mind the use of the exception or limitation in the digital environment as well as from the Explanatory Memorandum.[888]

The conditions that have to be fulfilled by Member States are the following: (i) use most be for the sole purpose of illustration for teaching or for scientific research; (ii) the source, including the author's name must be indicated (unless this turns out to be impossible); (iii) the use is limited to the extent justified by the non-commercial purpose such use aims to achieve.

(i) Use must be for the sole purpose of illustration for teaching or for scientific research

As it can be seen, there are two purposes covered with this limitation or exception. One is the purpose of illustration of teaching, while the other is for scientific research. Logically considering the use of the word "or", it is possible to cover the use that is for both purposes at the same time. Namely, student research projects in which students research and then present their findings would possibly amount to such use. However, numerous questions follow. Firstly, who is the beneficiary of the exception or limitation? Secondly, does such research amount to

[886] Psychogiopoulou (n 683)139 "The optional list of exceptions or limitations offered national authorities flexibility to choose and implement those that best matched domestic cultural priorities. It should be stressed, however, that the voluntary nature of the exceptions or limitations set forth failed to send a clear message about the need to secure users' rights and interests throughout the internal market. The emphasis was put on promoting a trade environment that stimulates creativity and cultural production without setting high standards for bolstering access to content in tandem."
[887] Xalabarder (n 349) 380-381.
[888] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 32.

the level of scientific research? Or what does it mean the sole purpose of illustration for teaching? Does that include uploading the learning material online or does that mean that, for instance, in the literature class one can solely read or comment the work. All that, however, depends ultimately on the one hand, on the interpretation taken by the CJEU as well as, on the other, by the implementing national legislation so no definitive answer can be yet attained. This research will not go into national implementation as it is focused on the EU level of regulation of the internal market and legal and policy choices made within.

Firstly, regarding the question of beneficiary, in the case *Renckhoff*, the CJEU seemed to decide that the action of the pupil which involved the use of the copyright protected photograph in the student presentation which was a part of the language workshop is covered by that exception. Although, it must be noted that the CJEU did not directly say that. Namely, it put forward that such use is covered by the right of education enshrined in Article 14 of the Charter and then continued that the fair balance between the right to education and the protection of the right to intellectual property is achieved since "the EU legislature provided an option for Member States to provide for exceptions or limits to the rights laid down in Articles 2 and 3 of that directive so long as it is for the sole purpose of illustration for teaching or scientific research and to the extent justified by the non-commercial purpose to be achieved."[889]

Unfortunately, the CJEU did not offer the interpretation of Article 5(3)(a) of the InfoSoc directive. Namely, what does the sole purpose of illustration for teaching mean? If we look at the facts of this case, then it arguably encompasses incidental, possibly, one-time occurring use that does not create a more than economic impact on the copyright rightsholders.[890] Such narrow interpretation of including only incidental uses seems to be in line with the decision by the CJEU when it seemed to have ruled out the possibility to apply it in situations of uploading the same presentation containing the photograph on the school website. Moreover, it has to be noted that the photograph included was already publicly accessible via travel portal website (and the source was indicated in the presentation). Namely, when deciding this way, the CJEU

[889] Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 43.
[890] See e.g. Rendas (n 292) 182 "The text of the exception adds an important restricting condition: the use must be made only for purposes of *illustrating* the ideas expressed by teacher or researcher. The term 'illustration' implies that only the use of extracts of works is allowed, in order to avoid the substitution effect in relation to original works (e.g. the course textbook)"; although it is arguable that the word illustration is applicable only to the teaching purpose only see in that respect European Commission, Directorate-General for Research and Innovation, Angelopoulos, C., Study on EU copyright and related rights and access to and reuse of scientific publications, including open access : exceptions and limitations, rights retention strategies and the secondary publication right, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2777/891665, p 16.

merely put forward that author's rights to authorise use of work are preventive in nature and if the author, if no longer wishes his/her work to be published, is incapable of removing it because of additional hyperlinks leading to the work, his/her preventive rights would be rendered obsolete.[891] Not questioning the preventive nature and the general principle of authorising use *a priori*, one must consider the nature of the situation in question. The work is used solely within the educational environment, solely for the purpose of teaching a pupil through creative student assignment. If we accept such situation as being subject to rightsholders' control then it is highly likely that, due to the additional cost and effort needed for the use of the work, works freely available online will not be used and that creates an impact on the quality of education that cannot be ignored. The decision by the CJEU sends even a stronger message regarding the value and importance the notion of right to education has within the internal market legislation regulating copyright legal matters. Namely, if the option of providing such limited exception or limitation is supposedly ensuring fair balance between the intellectual property right and right to education, one can ask what is the added value of the Charter's enshrinement ofthe right to education. In other words, how would not subjecting this situation within the scope of intellectual property right result in the serious infringement of copyright?

The Explanatory Memorandum is not particularly helpful either to ensure a more flexible interpretation. Namely, it puts forward that the exception might be used for making compilations of an anthology but emphasises the taking into account the "significant economic impact such an exception may have when being applied to the new electronic environment." And concludes that "[such economic impact] implies that the scope of application may have to be even more limited than with respect to 'traditional environment' when it comes to certain new uses of works and other subject matter."[892]

On the other hand, there are no guidelines as to the notion of *scientific research.* Namely, it still remains to be seen whether any kind of research can amount to scientific, or if there are any special requirements that need to be satisfied. Moreover, following the judgment in *Renckhoff* , whether the use in the student assignment amount to such research or is it reserved for special group of professionals as beneficiaries still remains unsolved.[893] Also, considering the

[891] Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 44.
[892] Explanatory Memorandum to Proposal for a European Parliament and Council directive on the harmonization of certain aspects of copyright and related rights COM (97) 628 final, p 32.
[893] See e.g. Rendas (n 292) 182 "The beneficiaries of this possibility will primarily be university professors and researchers."

importance of the economic impact an exception or limitation has on the exclusive rights, it is interesting to see whether that would possibly leave the big research including a big number of works possibly outside of the scope of the exception.

Finally, regarding two other conditions ((ii) the source, including the author's name must be indicated (unless this turns out to be impossible) and (iii) the use is limited to the extent justified by the non-commercial purpose such use aims to achieve), there is still not much to be said. The second one evidently observes the authorial moral interest usually enshrined in the paternity right on the level of national legislation. The third requirement on the other hand seems to observe the authorial economic interest, in which it constrains the use solely to the limits justified by the non-commercial purpose of teaching or scientific education. Such limits are in fact hard to ascertain on a general level so there should be a wide scope of discretion given to the Member States when implementing the exception or limitation. However, it is expected that when drawing those limits, the economic impact will be taken into consideration. Unfortunately, that might significantly narrow the scope of those non-commercial purposes which the provision aims to achieve. Namely, if the economic impact is significant, it is probable that the non-commercial objective would not be capable of trumping such impact.[894]

4.2.1.1.1.3. Article 5(3)(n)

Pursuant to Article 5(3)(n) Member States *may* provide for exception or limitation to both the reproduction right enshrined in Article 2 of the directive as well as to the communication to the public right enshrined in Article 3 of the InfoSoc directive in the case of:

"use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;"

As the wording *may* points out this is also an optional exception or limitation left up to the choice of the Member States when implementing it into national legislation. Although not explicitly stated, the beneficiaries seem to be the exact same institutions as referred in Article

[894] See e.g. Rendas (n 292) 183 "Purely for-profit teaching platforms and courses, which are not integrated in a recognised educational establishment, would however be excluded."

5(2)(c) – publicly accessible libraries, educational establishments and archives. In fact, following the *Eugen Ulmer* judgment, both limitations or exceptions are needed in order to be able to ensure the digitisation of the works contained in the collection of the library or similar establishments since the digitisation involves both reproduction and communication to the public right.

The requirements prescribed by the provision are the following: (i) use includes communication to the public or making available (ii) work is communicated or made available to individual members of the public; (iii) work is made available or communicates by dedicated terminals on the premises of establishments; (iv) works and other subject matter are not subject to purchase or licensing terms and (v) works are contained in their collections.

Taking into account all of the requirements, it is important to point out the one contained in (iv) and that is that the application of this limitation or exception is limited only to works and other subject matter which are not subject to purchase or licensing terms. Namely, what the wording alone suggests is that the works whose use is subject to licensing terms is beyond the scope of the exception. The CJEU interpreted the provision in *Eugen Ulmer* regarding the question whether such exclusion encompasses only works who are subject to existing contractual relations or are mere prospects of contracts or licenses to be concluded sufficient. It, fortunately, opted for the first option because "if the mere fact of offering to conclude a licensing agreement were sufficient to rule out the application [of the exception or limitation], such an interpretation would be liable to negate much of the substance of the limitation provided for in that provision, or indeed its effectiveness, since, were it to be accepted, the limitation would apply […], only to those increasingly rare works of which an electronic version, primarily in the form of e-book, is not yet offered on the market."[895]

However, this nonetheless portrays the priority position given to the contractual relations with regards to exceptions and limitations. This also undermines to certain extent the purpose of public interest which exceptions or limitations are pursuing. In other words, the EU law relies on the private actors to pursue the public interest, such as, in this example, education and research. In that respect, the CJEU is merely following the EU legislation. Namely, according to the Recital 45 of the InfoSoc Directive "the exceptions and limitations referred to in Article

[895] Case C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196, para 32.

5(2), (3) and 4 should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightsholders." However, the question is then what if the public interest is not sufficiently pursued or protected. In other words, what if, legally speaking, the contractual relations determining the terms of use are not in accordance with the requirements of the right to education or freedom of arts and science enshrined in Charter or in general principles of law? The application of Charter in horizontal relationships might be a possibility, however, the actual possibility of legally questioning that issue is practically minimal. Another possible issue is that the rightsholders might raise prices to the point that not every institution in every Member State can afford it. Such consequence then puts some of the citizens of the Member States in more or less advantageous position regarding the fundamental rights enshrined in Charter. Namely, according to the econometric tests it has been shown that "copyright exceptions for researchers are associated with greater publishing of scholarly works, that the effect is stronger when copyright protection is stronger, and that the exceptions matter more to researchers in less wealthy countries."[896] Moreover, in favour of such outcome contributes the fact that due to the usually complicated and expensive licensing schemes, the institutions in practice ended up digitising only the works already in public domain, hence free of any exclusive rights. [897]

4.2.1.2. The DSM directive

4.2.1.1.2.1. Article 5

The recently enacted Directive on copyright and related rights in the Digital Single Market (the DSM directive) introduced a mandatory exception regarding the use of works and other subject matter in digital and cross-border teaching activities. This line of law-making ensuring mandatory exceptions, already portrays a shift from the usual decision of the EU legislature to leave the exceptions and limitations to the exclusive rights up to the choice and regulation of Member States, justifying it by the application of principle of subsidiarity.[898] According to the

[896] Michael Palmedo 'The Impact of Copyright Exceptions for Researchers on Scholarly Output' 2(6) Efil Journal 114, 130.
[897] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123, p 92.
[898] Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p5 "Since exceptions and limitations to copyright and related rights are harmonised at EU level, the margin of manoeuver of Member States in creating or adapting

Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market[899] the alleged reason for such a shift is twofold. One is that "to achieve a fair balance between the rights and the interests of authors and other rightholders on the one hand, and of users on the other."[900] The other reason put forward is that "these exceptions remain national and legal certainty around cross-border uses [was] not guaranteed."[901] However, in the context of ensuring the objective of legal certainty, it seems peculiar to limit the focus of the EU legislature only on several fields, and only regarding specific types of uses pursuing non-economic objective, such as education, scientific research and preservation of cultural heritage. Moreover, the driving force behind such legislative shift seems to be to introduce modern legal framework in which, among others "teachers and students will be able to take full advantage of digital technologies at all levels of education."[902] However, to achieve such non-economic objective the EU legislator still aims for the minimal harm at the rightholders income and licencing revenues and limited impact on the business model of scientific and educational publishers."[903]

The mandatory exception or limitation is introduced regarding the reproduction right (enshrined in the Article 2 of the InfoSoc directive), the right to communication to the public (enshrined in Article 3 of the InfoSoc directive) "in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved." In order for this exception or limitation to apply two further cumulative conditions must be fulfilled. (i) the digital use takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or

them is limited. In addition, intervention at national level would not be sufficient in view of the cross-border nature of the identified issues. EU intervention is therefore needed to achieve full legal certainty as regards cross-border uses in the fields of research, education and cultural heritage."

[899] Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p2.

[900] Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p2.

[901] Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p2 "In addition, these exceptions remain national and legal certainty around cross-border uses is not guaranteed. In this context, the Commission has identified three areas of intervention: digital and cross-border uses in the field of education, text and data mining in the field of scientific research, and preservation of cultural heritage."

[902] Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p2.

[903] Explanatory Memorandum to a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p8-9.

students and teaching staff and (ii) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

Comparing it to the previously discussed exception or limitation in Article 5(3)(a) of the InfoSoc directive, this one is significantly more limited as it applies only to digital uses conducted under the responsibility of educational establishment on its premises or through a secure electronic environment. The definition of educational establishment is not yet given. However, Recital 20 states that it should "benefit all educational establishments recognised by a Member State, including those involved in primary, secondary, vocational and higher education […and that] the organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature."[904] Regarding the use covered, the recital 22 quite extensively describes the types of activities which can be covered e.g. examinations, teaching activities, uses on the whiteboard.[905] Moreover, "the concept of illustration would, therefore, imply the use only of parts or extracts of works, which should not substitute for the purchase of materials primarily intended for the educational market."[906]

However, one significant limitation imposed to this exception or limitation is enshrined in Article 5(2). Namely, Member States "could decide to subject the application of the exception or limitation, fully or partially, to the availability of suitable licences, covering at least the same uses as those allowed under the exception or limitation."[907] This optional "licensing carve-out"[908] significantly undermines the significance and purpose of such limitation or exception[909] and again positions the ensuring of interest of EU citizens, the attainment of non-economic objective of education, within the scope of private actors, making rational for profit decisions.

[904] Dsm 20
[905] Dsm 22
[906] Dsm 21
[907] Dsm 23
[908] Giulia Priora, Bernd Justin Jutte and Peter Mezei "Copyright and digital teaching exceptions in the EU: legislative developments and implementation models of Art.5 CDSM Directive" (2022) 53(4) International Review of Intellectual Proeprty and Competition Law 543, 550.
[909] See for a similar view Psychogiopoulou (n 683)144 "What is highly problematic, however, is that Member States have been afforded the possibility to make the exception inapplicable, fully or partially, if 'suitable' licences' are easily available on the market'. This implies that Member States can evade their obligations under the digital teaching exception or limitation, if licences authorizing the same uses as those allowed under the exception or limitation and covering the needs of educational establishments exist on the market. Although Member States are required, when opting for the licensing approach, to take concrete measures to ensure that adequate licensing schemes 'are available and visible in an appropriate manner for educational establishments', by allowing national authorities to give precedence to licensing, the DCDSM clearly sets an uneasy precedent, undermining the mandatory nature of the exception."

Not only that, but with prioritising licenses and contractual relations, this significantly limits the role of exceptions and limitations as constraining factor to the scope of copyright or related right exclusive rights. It seems, thus, from this exception and limitation such role has been severely diminished, and the EU legislator is more focused on creating a licensing market in which the right to education plays a secondary, if any, role.

4.2.2. Internal market for computer programs

Regarding the internal market computer programs, the Computer Programs directive did not provide specific exception or limitation for the education purpose, apart from the one ensuring the lawful user to study and observe the functioning of the program. However, the mandatory exception for digital and cross border teaching activities also applies to the restricted acts set out in Article 4 of the Computer Programs directive. In that respect, all the above regarding that exception applies here as well.

4.2.3. Internal market for databases

The Database directive provided in Article 6 (regarding database protected by copyright) and in Article 9 (database protected by sui generis right) the option for Member States to introduce limitations to the exclusive rights (enshrined in Article 5 and 7 of the Database directive) for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.

As it can be seen the wording used equals the wording of the exception or limitation enshrined in Article 5(3)(a) of the InfoSoc directive, hence all the above discussed is applicable here.

4.3. Contractual overridability and technological protection measures with respect to provisions on exceptions and limitations

Due to the optional nature of exceptions and limitations in the InfoSoc directive, the possibility of contractual overridability of those provisions remained open. Moreover, Recital 45 of the InfoSoc directive clearly puts contractual relations before the exceptions and or limitations regardless of the objective the pursue. Namely, it states that “the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual

relations designed to ensure fair compensation for the rightholders insofar as permitted by national law." That has severe consequences for the non-economic objectives ensuring dissemination of the culture because the value, necessity and social desirability of their existence is trumped again by the desire to ensure fair compensation. Moreover, what constitutes fair compensation, and thereby making the position of rightsholders increasingly stronger, is regulated by contract. This regulation has been severely criticised proclaiming it to adopt 'privatisation' of copyright law.[910]

On top of that, through protection of technological protection measures, the rightsholder were given additional layer of protection, the one that enables the rightsholders to control not just the use but the access to the work. [911] Although, pursuant to Article 6(4) of the InfoSoc directive, "Member States shall take appropriate measures to ensure that rightsholder make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned," the practice shows the numerous practical problemes when ensuring such uses.[912]

The newly introduced Article 7 of the DSM directive precludes the contractual overridability of the new mandatory exceptions, although article 5(2) on the digital and cross-border teaching activities clearly diminishes such norm, as the licensing is obviously preferred. Article 7(2) however keeps the same relationship between the exceptions and limitations and technological protection measures.[913]

4.4. Conclusory remarks

European legislator did not entirely disregard the provisions on limitations and exceptions, however, when providing for an exhaustive and optional list in Article 5 of the InfoSoc directive, it sent a message that their regulation is not its primary concern. Namely, provisions and limitations and exceptions mostly pursue non-economic objectives which ensure among

[910] Geiger et al. (n 578) 337.
[911] Geiger et al. (n 578) 337.
[912] Geiger et al. (n 578) 337.
[913] Psychogiopoulou (n 683) 145.

other thing, promotion of learning and dissemination of culture and hence social dialogue. In the case of the lack of their implementation within the national laws of Member States, the EU does not seem to be preoccupied whether their implementation jeopardises the attainment of those objectives, as well as the attainment of certain level of fundamental rights protection. The decision is justified by the application of the principle of subsidiarity, but that does not give us a clear answer, due to the flexibility of application of the principle.

Morever, in that respect, the contractual overridability of the provisions on limitations and exceptions together with the protection of technological protection measures might raise a question whether EU legislation in fact undermines the applicability of the subsidiarity principle even more. Namely, the essence of the subsidiarity principle is to ensure that the area is regulated on a level closer to its citizens ensuring, among others, its democratic legitimacy. Hence, in this sense it is assumed that the matter of regulating provisions on exceptions and limitations is better achieved on the national level. Disregarding the fact that such choice and regulation possibly undermine the harmonisation efforts and hence creation of the internal market, the provisions on contractual overridability and technological protection measure also might significantly undermine the position of national regulators when wanting to ensure non-economic objectives such as the promotion of learning. Namely, if rightsholders can regulate the nature of use through contractual arrangements and ensure the enforcement of such terms of use with technological protection measures, the national legislation on ensuring those limitations and exceptions is at best at a disadvantage in ensuring those objectives for which it is deemed to be more suitable.

Finally, it seems that even when deciding to raise some limitations and exceptions on the level of mandatory exceptions (such as the case of mandatory exception for digital and cross border uses in teaching activities), the possibility of subjecting them to licensing mechanisms still seems to be a desired option.

Chapter 6 - Conclusion

This research provides a critical assessment of the EU legal framework for resolution of the clash between the allegedly adversarial interests of copyright protection on the one hand and insurance of social dialogue within the educational environment on the other. To be precise, the question the research was dealing with was how and to what extent the European Union safeguards the social dialogue and circulation of knowledge and ideas in the educational environment when regulating the internal market regarding copyright and related rights.

The first chapters (Chapters 2 and 3) showed the importance of the social dialogue both in order to ensure the maintenance and development of creativity as well as to contribute to the personal development of a human being and, consequently, for the progress of the well-being of a society. Namely, by relying on the findings present within the social sciences, the first two chapters showed the basic contours of the creative process in which the creative work follows a process involving time, and improvisation until the creator is satisfied with the produced result. It showed the importance of cumulative nature of creativity and dependence of the author to sociocultural context in which he/she creates. It showed that factors supporting and incentivising creativity are multiple, complex, and deeply individual as the creative process itself. Creators do not primarily act as economic analytical actors on the market in pursuit of reward when creating. One of such factors is precisely, the level of exposition of a person to the works of previous creators. Namely, by experiencing the work, or entering in the social dialogue with the work, there is a higher possibility that a person might be influenced and inspired in pursuing further creation. And it is upon society to ensure the system that would be beneficial and supportive of creative endeavours. It provided us with knowledge that when evaluating legal systems dealing with creativity, and such is copyright law, the multitude of factors are to be taken into account by the rule makers because arbitrarily choosing one over another can lead to an unwanted result. In that instance, high and broad protection of copyright and related rights can lead to the rise of the investment, but at the same time it can disturb the social conversation, transfer of unprotected ideas and knowledge and well-being of people. Having all this in mind this research put forward that systems regulating copyright should be reassessed provided they are aiming to support and incentivise creativity. Hence, the need to secure appropriate reward must be accompanied with the correlating need to ensure accessibility of previous works in order to enable social dialogue between the public and previous works. Furthermore, the research assembled the knowledge and findings permeating

social sciences to point out the important functions the education performs in one's life with respect to both personal and societal development.

Having established the importance of the social dialogue stirred through the creative works enjoying copyright protection, the second part of the research then made a shift to the main focus of the research and that is to provide a critical assessment of the European union legal framework when approaching the question of how and to what extent the European Union safeguards the social dialogue and circulation of knowledge and ideas in the educational environment when regulating the internal market regarding copyright and related rights.

The question was approached by analysis of two separate internal market constitutional frameworks that correlate to the methods of positive and negative market integration as well as to the chronological phases of EU Copyright law. Namely, due to its specific development the EU Copyright law has been approached and understood as internal market legislation (and CJEU jurisprudence) regulating the copyright and related rights' legal matters. Namely, in the first phase, the copyright legal matters were perceived as national barriers to the fundamental market freedoms. Hence, the framework provided by the Treaty provisions was analysed and the CJEU played a dominant role in creating rules on copyright legal matters by offering interpretations of the Treaty provisions. In the second phase, following the Single European Act, the legislation overtook the dominant role and harmonisation of copyright legal matters started on the basis of Article 114 TFEU.

In the first phase of EU Copyright law, the national provisions on copyright and related rights were seen as obstacles to the freedom of movement of goods and of services. Namely, article 34 TFEU, in relation to the freedom of movement of goods, explicitly provides *the protection of industrial and commercial property* as a legitimate derogation. However, interestingly the usual internal market methodological structure which encompassed the analysis of whether the national measure falls within the scope of the fundamental market provision and if yes, whether pursues the legitimate aim pursuant to principle of proportionality was rarely followed. Instead, the CJEU started forming new principles such as the dichotomy of existence and the exercise, the specific subject matter of copyright and the principle of EU wide exhaustion. Through creation and interpretation of these principles CJEU started putting forward determining factors to be considered when deciding the internal market issue concerning copyright or related rights. The principle of specific subject matter of copyright is especially important because it puts

forward the CJEU's view on the essence of copyright or related rights protection within the internal market.

Namely, instead of applying the principle of proportionality, the CJEU delivered an adjusted formula that "Article 36 [of the EEC Treaty] only admits derogations from that freedom to the extent justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property."[914] When defining what that specific subject matter is it concluded it to be to ensure the protection of the moral and economic rights of their rightholders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. [The economic rights, on the other hand, give] the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties."[915] What is important to note is that such definition is not suitable to be subjected to principle of proportionality, because the purpose of exclusive rights in the national provision is the national provision itself. In other words, there is no policy consideration of what the copyright or related rights protection aims to achieve. Hence, there are *a priori* no inherent limitations to the exclusive rights. In other words, if there is a possibility to commercially exploit the work, the mere hindrance on that possibility would amount to be contrary to the principle of specific subject matter. Moreover, when analysing the methodological placement of a non-economic objective of ensuring social dialogue and circulation of ideas and knowledge, defining specific subject matter without taking into account the policy reasons behind it, left very little place for consideration of non-economic objectives. Namely, the principle provides no answer if there would be a socially desirable use which would be upheld as legitimate even if it embarked on the possibility of commercial exploitation. Interestingly, however, when defining the specific subject matter of other intellectual property rights, unlike for copyright or related rights, the CJEU delved into policy reasons.

The principle has been invoked even in the subsequent CJEU jurisprudence, which shows the foundational nature it has on EU Copyright law. Namely in *Renckhoff* the CJEU confirmed that the specific purpose of intellectual property is, in particular, to ensure for the rights holders

[914] Case C-78/70 *Deutsche Gramophone v Metro* ECLI:EU:C:1971:59, [1971] ECR 487, para 11; Case C-58/80 *Dansk Supermerkad v Imerco,* ECLI:EU:C:1981:17, para 11.
[915] Joined cases C-92/92 and C-362/92 *Phil Collins v Imtrat Handelsgesellschaft mbH* ECLI:EU:C:1993:847, para 20.

concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment for an appropriate reward for *each* use of the protected subject matter."[916] The infringing use in that specific case was the act of uploading a student presentation (involving copyright protected photograph) on a school website. Even though, the use by the pupil was found to be encompassed by the right to education, the act of uploading it on the school website, however, was not. In other words, when there is a possibility to commercially exploit the work, the other objectives remain outside of the scope of methodological consideration. Hence, whether such use contributes to the student's creativity, whether such uploading to the website makes the presentation accessible to other students to get some influence for their presentation is not deemed a relevant criterion when making a decision. Hence, ensuring social dialogue is not considered as the factor when deciding copyright legal matters within this constitutional framework.

In the second phase of copyright law, due to the ability of exclusive rights to create a market and enable commercial exploitation of the work, the harmonisation of diverse national laws quickly followed. The directives and regulations were enacted on the basis of Article 114 TFEU which have as their object the establishment and functioning of the internal market. There was no uniform act regulating copyright and, instead, the directives and regulations were focused on specific market issues, specific subject matter or specific exclusive rights. In other words, the EU legislator adopted a piecemeal approach when building internal markets involving copyright legal matters. That resulted in several different internal markets (as different political and legal concepts) in which different objectives and values were reflected. The majority of such internal markets are pursuing both the economic and non-economic objectives; however, the former ones are predominant putting the copyright and exclusive rights in the role of economic foundation ensuring that the creative sector gets rewarded for its work.

There are two specific internal markets in which the non-economic objectives prevail. Those are the internal market for orphan works and the internal market for works for the benefit of visually impaired persons. The first one is specific, because the Orphan Works directive introduced a mandatory obligation which would ensure the digitisation of orphan works and hence the accessibility of significant amount of creative material or cultural capital. Namely, due to the very broad scope of exclusive rights, the cultural heritage institutions were reluctant

[916] Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 34; later also confirmed in Case C-392/19 *VG Bild-Kunst* ECLI:EU:C:2021:18, para 53.

to engage in digitisation due to the risk of reappearance of alleged rightsholders claiming the damages and licence fees for further use. However, based on recently published study, although the directive pursues the non-economic objective of ensuring accessibility to cultural content, in practice it has minimum success. Namely, this exception concerns solely orphan works, whose authors are unknown or unavailable to commercially exploit the work. Hence the economic impact is barely minimum because without such limitation or exception, the exploitation would not occur. However, the EU legislator did not want to pursue the same objective of assuring accessibility and dissemination regarding other works. The InfoSoc directive, provides though, two optional exceptions enshrined in Articles 5(2)(c) and 5(3)(n), however, they are not coordinated with this mandatory one. Hence, the result is that "the cultural heritage institutions tend to concentrate on digitising works in the public domain, due to the lack of resources (both human and financial), as these works can be used freely, with no compensation/licensing fee necessary."[917] Regarding the internal market for works for the benefit of visually impaired persons, the Marrakesh Treaty directive aims to promote access to knowledge to visually impaired persons and also provides for a mandatory exception ensuring accessible format copies of work. The directive, however, is a result of the conclusion of the Marrakesh Treaty, hence EU legislator had fairly limited scope of discretion.

Regarding the other internal markets, the most prominent position for assessing the position of non-economic objectives adequate to pursue the social dialogue belongs to the general internal market for copyright or related right protected works, due to the central position of the InfoSoc directive, followed by the DSM directive. Namely, InfoSoc directive pursues both economic and non-economic objectives and there are two ways of achieving those objectives. Namely, the starting position is that the high level of protection of exclusive rights is needed to foster substantial investment in creativity and innovation which will then lead to growth and increased competitiveness of the European industry and new job creation. On the other hand, non-economic objectives such as promotion of learning and dissemination of culture is regulated within the provisions on limitations and exceptions.

Such objectives have unfortunately been put at odds with each other. Namely, according to the jurisprudence of the CJEU, the high level of protection is regarded as the primary objective to

[917] European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, J., Sproġe, J., Omersa, E., et al., Study on the application of the Orphan Works Directive (2012/28/EU) : final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123, p 92.

ensure the appropriate reward and return of the investment. Following that assessment, the provisions on limitations and exceptions pursuing other non-economic objectives, are derogating from the general principle of high level of protection so they must be interpreted strictly. This already poses a significant methodological setback for non-economic objectives pursued through provisions on limitations and exceptions. On top of that when determining the scope, the economic impact of such exceptions and limitations on exclusive rights is of importance. If the economic impact is of limited nature, the limitations and exceptions can enjoy broader scope and Member States wide array of discretion. That seemed to be the case regarding limitations and exceptions for the purpose of news reporting where the CJEU, relying on the fundamental rights, opted for a broader interpretation of a limitation or an exception. If, however, the limitation or exception produces more than limited economic impact than there is either a need for uniform regulation at EU level which either limits the scope or is used as a way of pursuing an economic policy and solving the market failure created by extensive copyright exclusive rights protection. That might be the case for the newly introduced text and data mining limitation or exception in order to ensure EU competitiveness in the research area. Unfortunately, it follows that the greater the economic impact, the lower the possibility of ensuring non-economic objective which might contribute to ensuring access and social dialogue. Finally, the same logic applies even when the non-economic objective assumes exercise of a fundamental right. Namely, if it is found to be of limited economic importance, then the fundamental right prevails, however, if it is not, it is highly unlikely to be the case.

Another important moment for determining the placement of ensuring non-economic objective of ensuring social dialogue and circulation of knowledge, is the fact that most directives, including the InfoSoc directive are providing an exhaustive optional list of limitations and exceptions from which Member States may choose which ones they will implement into the national legislation. That is firstly, significantly problematic in order to ensure a level playing field for the use of copyright protected works and secondly, it sends a strong message that the EU legislator does not deem it important enough in order to ensure the enjoyment of rights pursuing non-economic objectives on equal terms to all citizens throughout the Europe. Moreover, the possible contractual overridability and the protection of technological protection measures might actually make the provisions on limitations and exceptions futile since the terms of use and the objectives they might pursue are left up to the discretion of rightholders through contractual arrangements.

Such law-making of ensuring optional list of exceptions and limitations is allegedly justified by the principle of subsidiarity. However, the exact contractual overridability of the provisions on limitations and exceptions together with the protection of technological protection measures might raise a question whether EU legislation in fact undermines the applicability of the subsidiarity principle, and in the end harmonisation itself. The essence of the subsidiarity principle is to ensure that the area is regulated on a level closer to its citizens ensuring, among others, its democratic legitimacy. Hence, in this sense it is assumed that the matter of regulating provisions on exceptions and limitations is better achieved on the national level. However, if the provisions can be easily overruled by the contract and ensured by the technological protection measures that can put at disadvantage the position of national legislators when wanting to ensure non-economic objectives such as promotion of learning. In other words, it is not that the national legislators are better equipped, it is the rightsholders with strong bargaining position when drafting contracts.

When it comes to limitations and exceptions pursuing the education purpose, hence ensuring social dialogue within the educational environment, all of the above mentioned applies. Moreover, even the newly introduced mandatory exception for digital and cross-border uses in teaching activities provides the option of licensing carve-out which significantly undermines the mandatory nature of the exception. In other words, non-economic objectives will depend on their economic impact on the commercial exploitation of copyright, regardless of if they pursue the valid socially desirable goal, even when protected by fundamental rights such as education.

Having all this in mind, such law making raises numerous questions. Can such law-making be reconciled with the obligation under Article 167(4) TFEU of taking cultural aspects into account when regulating internal market? What is the purpose of Charter of fundamental rights, when it is the economic impact that is the main criterion deciding on the position of non-economic objectives? Are objectives enshrined in Article 3 TEU such as *cultural diversity, scientific and technological advance, social market economy* in the end futile. In the end, the EU Copyright law opted for a reasoning strongly resembling to the economic rationale of copyright protection in which non-economic objectives might be given a chance if they are market failures and in case of lack of licensing mechanism. Such law-making is heavily relied on prising the market efficiency as a value slightly superior to others. However, such line of thinking unfortunately entails that even entities ensuring public goals and creators themselves

are seen as market actors. Hence, if a library cannot provide services due to a high cost, a rational market decision would be the extinction of libraries (unless heavily supported by public funds). Interestingly it can be argued that nowadays, if there already were no libraries, there would be no incentive to create them now. The level of investment could be very high with very low output, because what they pursue is a not-for-profit objective of communal value, not easily put into mathematical and economic numbers. The way to make it more resembling to the actual social relations it regulates, might be the notion of social function of property which would allow encompassing the non-economic objectives ensuring social dialogue within the scope of copyright or related right exclusive rights. That, however, remains a topic for further research.

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