The Three Step Test of International Copyright Law: Is Fair Use the Key to Balancing Interests in the Digital Age?

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Í þessari ritgerð er leitast við að svara þeirri spurningu hvort að þriggja þrepa prófið í alþjóðlegum höfundarétti geti verið túlkað í ljósi Bandarískra laga um ‘sanngjarna notkun’. ‘Sanngjörn notkun’ er lagahugtak sem að leyfir endurnýtingu höfundarréttarvarins efnis án leyfis frá handhafa höfundaréttar í þeim tilgangi að finna jafnvægi milli handhafa og höfunda sem endurnýta efni á ‘gerfihnattaöld’. Þriggja þrepa prófið er að finna í 2 mgr. 9. gr Bernarsáttmálans til verndar bókmenntum og listaverka en þar segir til um að undantekningar séu leyfðar í sérstökum undantekningartilvikum sem hafa ekki áhrif á venjulega nýtingu höfundar í viðskiptalegum tilgangi eða að öðru leiti fari gegn lögmætum hagsmunum handhafa höfundarréttar. Annar kafli ritgerðarinnar setur stafræna menningu internetsins í samhengi við sögu höfundarréttar og alþjóðlegra samninga. Þriðji kafli leitast við að finna hvort að höfundarréttur sé í krísu á internetinu með tilliti til hraðra breytinga á viðskiptamódelum og áhrifa hagsmunahópa á lagasetningu auk þess að kynna sjónarmið til túlkunar áhrifa internetsins og starfrænna tóla. Fjórði kafli greinir undantekningar í alþjóðlegum höfundarétti og leitast við að skýra hvernig notkun getur rúmast innan merkingu orða þeirra. Í kaflanum er einnig framkvæmdur samanburður á því hvernig reglurnar hafa verið túlkaðar í framkvæmd, allra helst með tilliti til hugtaksins um ‘sanngjarna notkun’. Fimmti kafli kynnir hvaða eðlis sú notkun er sem að gæti átt undir högg að sækja í núverandi höfundarréttarkerfi. Sjötti kafli greinir hjálplegar hugmyndir og kenningar auk þess að kynna tegundir og umsvif framtaka á sviði leyfa sem undanskilja verk að hluta til eða öllum leiti undan höfundarétti á netinu. Í sjöunda kafla er komist að þeirri niðurstöðu að við lagasetningu sé nauðsynlegt að gæta að sveigjanleika með tilliti til hraðrar tækniþróunar og ‘sanngjarnar notkunar’ og við túlkun á alþjóðlegum reglum er hjálplegt að líta til þróunar í þessum málflokki um víðan völl.

Abstract

This thesis will search for a guiding principle in balancing the right of authors and other copyright owners and if there is a need for more freedom for exceptional secondary uses on the internet. After the first chapter has introduce the topic the second chapter will introduce the history of copyright in context of the topic of this thesis and look back on the history of copyright agreements. The third chapter will explore how the internet is challenging for copyright with regard to ever changing online business models and digital tools. Lobbyists influence on the development of copyright will also be considered as well as Lawrence Lessing's theory on read only vs. write only culture. The fourth chapter introduces copyright exceptions in today's law, firstly at the international level with special regards to the three step test and what use can be fitted within the test's wording. Secondly, the fourth chapter will take on a European perspective and briefly look at national implementation of European copyright exceptions. Thirdly, chapter four will look at various aspects of copyright exceptions in the United States and find what is to be learnt from the fair use doctrine. The fifth chapter looks at what kind of use might be suffering from the current status of copyright and introduces different concepts of secondary work. Second to last, chapter six will discuss practical suggestions for balancing interests and introduce information commons incentives. Finally, chapter seven will come to the conclusion that legislators should be mindful of the issues raised in this thesis and that when courts are assessing secondary use or distribution online it is within their limits to actively apply the three-step test in a current context.

Foreword

This thesis researches the three-step test of copyright and if 'fair use' can be used a tool for balancing rights in a digital age. Is there a guiding principle that can be used to explain every exceptional case that can be fitted within the interpretation of the Berne Convention's three step test that all 171 parties to the convention have to adhere to?

While searching for an answer, this thesis in biased to the author's own legal and political views of the ideal outcome, even though I am convinced it would lead to the best overall outcome. My bias comes from the experiences of my relatively short life that have lead me to have a strong inclination towards a digital world where people can have legal certainty while recreating culture and sharing knowledge. Along with my friends, I founded and ran for two years a creative lifestyle website. We generated new content nearly everyday, mixing content from the internet with our own writing, vision and imagery. As a flutist I have contributed to covers of contemporary works that have been posted on YouTube. As a law student I have found content online that is precisely the material I wish to read to further my knowledge only to find that access will cost me around 30 dollars. But it is not only my own education that could benefit from the ease of information flow on the internet as I have the rare privilege of a university education. As an inhabitant of this planet I am motivated by the cause of tapping into the resource of brilliant minds in developing countries that are now in many instances in the position to access information through digital medium that can lead to further scientific and technological advantages for the preservation of the earth. That potential should not be limited to a small portion of the world's population. As a lover of art and music I especially prefer collages and sampled or remixed music, hence my interest in the legal framework for those types of work. As a consumer I want to be able to access content in the most convenient and reasonably priced way and recognize that there is a need for authors to be fairly compensated and for copyright that supports modern business models. I am personally motivated to live in a world where the internet is allowed to further those goes and that shapes my political views on how copyright should function in an online environment. This thesis is written in a solution orientated manner, looking predominantly to scholars whose writings aim to balance interests of copyright holders and others in a digital age.

One didn't get paid for ideas, but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not in the thought conveyed.
In other words, the bottle was protected, not the wine.

Now, as information enters cyberspace, the native home of Mind, these bottles are vanishing. With the advent of digitization, it is now possible to replace all previous information storage forms with one metabottle: complex and highly liquid patterns of ones and zeros.

To assume that systems of law based in the physical world will serve in an environment as fundamentally different as cyberspace is a folly for which everyone doing business in the future will pay.

-John Perry Barlow, The Economy of Ideas[1]

[1] John Perry Barlow, 'The Economy of Ideas' [1994] *Wired* <http://www.wired.com/1994/03/economy-ideas/>.

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Table of Figures

Primary Sources

Canada

CCH v. Law Society of Upper Canada [2004] SCC 13

Hubbard v. Vosper [1972] 1 All E.R. 1023,

Michelin-Michelin & Cie v. National Automobile (CAW-Canada), [1997] 2 FC 306.

European Court of Human Rights

Autonic v. Switzerland ECHR, 22 May 1990, Application No. 12726/87

Groppera Radio AG v. Switzerland ECHR, 28 Mach 1990, Application No. No. 10890/84

Intern Verlag GmbH and Klaus Beermann v. Germany ECHR, 20 November 1989, Application No. 10572/83,

Sunday Times v. The United Kingdom ECHR, 26 April 1979, Application No. 6538/74

European Union

Cases

Eva Maria Painer v. Der Standard, CJEU, 1 December 2011, Case C-145/10, Para. 134,

Dior v. Evora, CJEU, 4 November 1997, Case C-337/95, Para. 58-59

Footbal Association Premir League v. QC Leisure, CJEU, 4 October 2011, Cases C-403/08 and C-429/08, Para 162-164.

Law

Council Directive 91/250 on the Legal Protection of Computer Programs, OJ L 122, 42–46,

Council Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society,

Council Directive 96/9 on the Legal Protection of Databases, OJ L 77, 20–28,

France

Law

Code de La Propriété Intellectuelle - Article L122-5 Modifié Par LOI n°2009-669 Du 12 Juin 2009 - Art. 21

Cases

Studio Canal, Universal Pictures Video France and SEV v. S. Perquin and UFC Que Choisir Court of Cassation (1st Chamber, Civil Section), 28 February 2006

Germany

Kraftwerk, et Al. v. Moses Pelham, et Al., Decision of the German Federal Supreme Court No. I ZR 112/06, Dated November 20, 2008

Israel

Geva v. Walt Disney Company, CA 2687/92 48(1) PD 251 [1993]

United Kingdom

Law

Copyright, Designs and Patents Act 1988 c 48 as Amended (UK) ("CDPA")

The Statute of Anne, Copyright Act of 1709, 8 Ann. C. 21

Cases

Burnet v Chetwood, UKSC (1721) 2 Mer 441

Donaldson v. Beckett, (H.L. 1774) 1 Eng. Rep. 837,

Gyles v Wilcox, Barrow, and Nutt [1740] Court of Chancery of England 3 Atk 143; 26 ER 489

Millar v. Taylor (1769) 4 Burr. 2303, 98 ER 201

United States

American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1995)

Basic Books, Inc. v. Kinko's Graphics Corp ,758 F. Supp. 1522 (S.D.N.Y. 1991)

Bridgeport Music, Inc. v. Dimension Films 410 F.3d 792 (6th Cir. 2005)

Feist Publications, Inc. V. Rural Telephone Service Company 499 U.S. 340 (1991)

Harper & Row Publishers, Inc. v. Nation Enters., 571 U.S. 539, 548-49 (1985)

Rogers v Koons 960 F 2d 301 (2d Cir 1992)

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)

Wall Data, Inc. v. L.A. County Sheriff's Dept. , 447 F. 3d 769, 778 (9th Cir. 2006)

Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973)

International Law

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1c, Legal Instruments-Results of the Uruguay Round vol. 3, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994),

Rome Convention for the Protection of Performers, Producers of Phonograms and Breadcasting Organizations (Adopted 26 October 1961, Entered into Force 18 May 1964) [1992] ATS 29 / 496 UNTS 43,

The Berne Convention for the Protection of Literary and Artistic Works (Adopted 9 September, 1886, as revised at Stockholm on 14 July, 1967, 828 U.N.T.S. 221,

WIPO Preformances and Phonograms Treaty, 20 December 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17 (1997) 36 I.L.M. 76 (1997),

WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 S. Treaty Doc. No. 105-17 (1997): 36 I.L.M. 65 (1997)

1 Introduction

Technological development has brought about a fundamental change in function and effectiveness of copyright law and lead to the evolution of new business models. There are conflicting interests and with the development come new threats to copyright holders and users of copyrighted content.[2] This thesis will take a look at the objectives of copyright in a historical context and how it translates into the digital sphere. This thesis will also look at how the internet information and culture is created and shared without taking physical form and thus why digital 'copies' can in some instances not be treated the same way as physical ones. In the words of Barlow: "If I sell you my horse, I can't ride him after that. If I sell you what I know, we both know it."[3] This is of course a simplification as somewhere in between those extremes we have the copyright of someone's work, physical or otherwise. In theory, the internet free of copyright is simple and allows for a more creative and enlightened world. Moreover, financially strong companies can prosper by offering services that give customers added value of quality and convenience which they are willing to pay. This leaves the independent authors and smaller publications, those that might be considered unlikely to thrive where the online marketplace to be free of copyright. Economic theory teaches that property rights for creative works leads to more creative works, to the point where preexisting claims prevent the creation of new work. However, finding where the protection starts having a reverse effect is the real challenge. Creative works are often made without the incentive of copyright such as academic papers with the intention of spreading ideas, art for public accolades or when software is programmed for the ideal of an open source or peer recognition. There are many unmeasurable factors surrounding authorship. Methods of subsidizing authors from the analogue-era do not necessarily work in the internet era but when short of solutions authors' interest groups have lobbied to expand blank tape levies to PC[4], even though they will likely only minimally be used to copy protected work.[5] Scholars and legislatures collectively agree that copyright is in need of clarification if it ought to be

[2] C. Geiger and others, 'Declaration A Balanced Interpretation of The "Three-Step Test" In Copyright Law.' preface <https://www.jipitec.eu/issues/jipitec-1-2-2010/2621> accessed 29 April 2016.

[3] Barlow (n 1).

[4] Rúv, '„Æ erfiðara að lifa af listinni"', *Víðsjá* (18 March 2016) <http://ruv.is/frett/ae-erfidara-ad-lifa-af-listinni> accessed 19 March 2016.

[5] 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9 Marquette Intellectual Property Law Review 26

able to function in a digital age but where to begin? Is it possible to find a guiding rule applicable to every exception as to allow for recreation of creative content and consumption of information? Transformative uses have been argued to be protected by free speech rights but there are undoubtedly other non transformative copying activities that should not be excluded from that protection, such as copying for research or educational purposes.[6] The internet is global and does not have much regard for borders and different legal systems. When something is made available online it is done so globally (with the exception of local censorship) and therefore harmonization is especially important for online legal certainty. For that reason, this thesis will be focused on copyright on the international level whilst comparing legislation and practice where copyright exceptions have been in the limelight.

The cornerstone of exceptions to copyright on the international level is the three-step test of the Berne Convention[7]. It guides national legislatures regarding exceptions to the reproduction right and is the standard for determining whether a national copyright exception is TRIPS-compliant.[8] It is the model for copyright exceptions in the TRIPS agreement (Art 13), WIPO Copyright Treaty (Art 10) and the WIPO Performances Phonograms Treaty (Art 16). According to the test exceptions apply 1) in certain special cases; 2) that do not conflict with the normal commercial exploitation of the work; and 3) do not unreasonably prejudice the legitimate interests of the author.[9] In practice the words 'special' and 'normal' have been found problematic since the internet has made way for new business models that have not been common, but there has been helpful dialogue that will be introduced in chapter 3.2.[10] The European Information Society Directive ('InfoSoc')[11] has an exhaustive list of exceptions Member States may choose to implement with the only mandatory exception being for transient copies that "form an integral and essential part of a technological process". The directive's preamble notes that "exceptions or limitations in

[6] Rebecca Tushnet, 'Copy This Essay- How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 The Yale Law Journal 535, 537.

[7] 'The Berne Convention for the Protection of Literary and Artistic Works ((Sept. 9, 1886)'.

[8] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 28.

[9] ibid 14.

[10] ibid 16.

[11] 'Council Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society'.

the public interest for the purpose of education and teaching" and to the need to safeguard a "fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users through exceptions and limitations", which "have to be reassessed in the light of the new electronic environment."[12] There have been suggestions as to how we can move forward, one of them being Daniel Gervais' 'reverse three-step test' where he combines the U.S. fair use criteria for legal unauthorized use of copyrighted material with the Berne three-step test to build copyright for the future.[13] Gervais finds that the guiding rule should be that if use does not meet the two effective steps of the Berne test, the use is unfair. That is; should this type of use or user normally be licensed on a transactional or collective basis when normalcy of commercial exploitations is to be viewed as dynamic in context with technological development and consumer behavior of that time.[14] Secondly if the use is in respect of any commercial significance the author has a preventive right, otherwise a valid public interest purpose should prevail.[15] Transformative reuse is of great importance to the topic of copyright exceptions for the online environment since allowing for new creation to emerge without negative effect on the market of the preexisting work, is a matter of public interest. This thesis will give special regard to Gervais' approach that attempts taking the minimum standards of international copyright and turning it into a coherent normative approach to regulating uses of material based on the effect of the use.[16]

This thesis looks at various aspects of of how exceptions and limitations of copyright function, it's development and relevant markets. The main goal is to find an internationally applicable way of moving forward by looking at theories of how entwining a fair use analysis with the international three-step test can render copyright capable of balancing interests in a digital era. The main concern are the uses of copyrighted work that are not easily fitted within descriptive legal frameworks and finding ways to offer legal certainty for rightsholders and users of secondary works. The coverage will include relevant legal theory and is written from a progressive political stance on copyright. The internet promotes and

[12] ibid Prefix 74.
[13] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 28.
[14] ibid 29.
[15] ibid 30.
[16] ibid 34.

enhances freedom of expressing and information. The OECD has noticed that the advanced search engines, interactive platforms and user-generated content have a remarkable potential for economic growth.[17] Those aspects will be discussed even though the focus is on fringe uses that cannot easily be listed on and exclusive list – ones that need to be decided on a case by case bases after a guiding principle that by national courts on the basis of international guiding principles in time with technological developments, new markets and creative reuse. – Education, libraries, etc. are inevitably intertwined but the main focus are fringe uses and if there is a guiding principle that could be used to guide users of digital tools and distributors of that material via the internet. This is a highly theoretical field with many different opinions where contradictory interests are at stake.

This thesis will search for a guiding principle in balancing the right of authors and other copyright owners and if there is a need for more freedom for exceptional secondary uses on the internet. Available methods of balancing interests will be researched with the aim of finding best practice and minimizing tradeoff.[18] The first chapter will introduce the history of copyright in context of the topic of this thesis, look back on the history of copyright agreements and explore Lawrence Lessing's theory on read only vs. write only culture. The second chapter will explore how the internet is challenging for copyright with regard to ever changing online business models. Lobbyists influence on the development of copyright will also be considered. The third chapter introduces copyright exceptions in today's law, firstly at the international level with special regards to the three step test and what use can be fitted within the test's wording. Secondly, the third chapter will take on a European perspective and briefly look at national implementation of European copyright exceptions. Thirdly, chapter three will look at various aspects of copyright exceptions in the United States and find that what is to be learnt from the fair use doctrine. The fourth chapter looks at what kind of use might be suffering from the current status of copyright and introduces different concepts of secondary work. Fifthly, chapter five will discuss practical suggestions for balancing interests and introduce information commons incentives. Finally, chapter six

[17] Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' abstract <https://www.jipitec.eu/issues/jipitec-1-2-2010/2605/JIPITEC%202%20-%20Senftleben-Three%20Step%20Test.pdf> accessed 25 April 2016.

[18] Tushnet (n 6) 537.

will come to the conclusion that legislators should be aware of the issues raised in this thesis and that when courts are assessing secondary use or distribution online it is within their limits to actively apply the three-step test in a current context.

2 History of Copyright – Positioning the Digital Era in Context

Copyright in written work originated in the 15th century[19] when Gutenberg is believed to have invented the first printing press in Germany.[20] It is likely that he did not realize the consequences of his invention, that would result in copyright law and widespread literacy and education. Before the printing press, authors had manual copyists reproduce their work with the limitations of copies that limited their chance of making a living from commercial sales. For the same reason unauthorized copies were not profitable and not a threat to authors, at the most introducing their works to a broader audience. The printing press made mass copying possible and consequently the benefits of free riding.[21] The English Crown set up a system so that the crown could profit from licensing and censor dangerous ideas but left the task of policing the compliance of printers with the licensing laws to a guild of printers, bookbinders and booksellers called the Stationers' Company, that in turn had the exclusive right of printing and publishing licensed works. The Parliament rebelled against the Crown by allowing the last Licensing Act to expire resulting in the Stationers' Company loss of power. The Company then lobbied for the first modern copyright law that granted rights to authors instead of printers and publishers, then allowing them to acquire copyright from the authors they published.[22]

This first copyright statute in the United Kingdom was the Statute of Anne passed in 1710.[23] It enabled authors and publishers to prevent reuse by other publishers that printed books which they saw were profitable and free-riding the system. The law had limited coverage, applying only to new books and for the term of 14 years that the authors could renew for the same period after which the work went into the public domain after the maximum of 28

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[19] Deborah Tussey, *Complex Copyright: Mapping the Information Ecosystem* (Ashgate 2013) 35.

[20] Azariah S Root, 'THE PRESENT SITUATION AS TO THE ORIGIN OF PRINTING.' (1910) 5 9, 9.

[21] Thomas F Cotter, 'Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism 91.2 (2003): 323–392. Web...' (2003) 91 California Law Review 323, 325–326.

[22] ibid 326, 327.

[23] 8 Ann. c. 19.

years. This law improved the previous system, benefitting authors by limiting the overreach of publishers and protecting the public domain.[24] Publishers tried to fight the law after the fact in the case of *Millar v. Taylor* in 1769[25] where they succeeded to convince the court that authors had perpetual common law right under natural law that could be assigned to publishers in perpetuity. Five years later The House of Lords overruled *Millar* in *Donaldson v. Beckett* [26] barring the return of the stationers' monopoly. Later, copyright immigrated to North America with English settlers and the first U.S. copyright statute of 1790 was modeled after the Statute of Anne.[27] This law corrected commercial imbalance and gave publishers incentive to invest in publication of new books and protected the main platform of authors at the time.

In Continental Europe author's rights historically differ from the Anglo-American utilitarian copyright with a strong emphasis on personal rights, where author's rights were born as natural rights and therefore held a special status not easily limited.[28] The longstanding differences between the common law and civil law system regarding moral rights began merging in the late 19th century through the globalization of copyright.[29] The French term '*droit moral*' (moral rights) was first used in a legal manner in 1878 and a moral rights provision was inserted into the Berne Convention in 1928. Previously the moral rights had been protected through a 'patchwork of unrelated doctrines' not specifically addressing moral rights.[30] At the end of the 19th century, cases concerning the rights of disclosure, attribution and integrity were now associated with moral rights in France, and the right of personality in Germany and Italy (this is a terminological difference only) instead of law of contracts and literary property. The 'dualist' approach to copyright that was new at the time was mainly defined by the theory that moral rights were completely separate from the

[24] Tussey (n 19) 36.
[25] (98 Eng. Rep. 201 (1769)
[26] 1 Eng. Rep. 837 (H.L. 1774)
[27] Tussey (n 19) 37.
[28] Viktor Mayer-Schönberger, 'Beyond Privacy, Beyond Rights—toward a "systems" Theory of Information Governance". California Law Review 98.6 (2010): 1853–1885. Web...' (2010) 6 98 California Law Review, 1867.
[29] Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law, American Society of Comparative Law 67, intro.
[30] ibid 69.

economic 'copyright', both in a formal and conceptual understanding.[31] For instance, in France author's rights have endured and are still held sacred and there are few copyright exceptions for users in addition to the exception for private use. Art L22-5 of the French Copyright law states that after a work has been published the author cannot prevent private family performances, copies for the private and personal use of the copier but when it comes to works of art, computer programs and databases the exception are stricter with where a single safeguarded copy is allowed.[32] Interestingly, France and Germany have a recognition that authors have a certain freedom to reuse works of other authors, a right that is of a higher level than a commercial user.[33] For the longest time, copyright was primarily exercised against infringers in the publishing industry but also against publishers that exploited authors beyond what was considered acceptable. Copyright history continued to develop to include forms of creation such as cinema, radio, and television and as a result, clarifying a list of rights of exploitation in relation to each form of works as it became necessary. Until the 1990s these rights aimed at and were used against professional entities, legitimate or 'pirate' entities that sold content to end users.[34] Copyright has been used as a tool to organize markets where some disruptive technology has emerged. The internet has been the biggest technological leap in recent history and therefore copyright might have been reassessed by legislatures in order to become better equipped to organize the marketplace.[35]

American copyright law did not regulate 'copies' from 1790 until 1909 but "printing, reprinting, publishing and vending". Principal features of the original U.S copyright legislation still persist.[36] Derivative work that were primarily commercial were then added to the scope of protection in 1870. When the law was revised in 1909 the right to 'copy' a statute required permission of a copyright owner but not to 'copy' a book. The act's revisers dismissed this distinction and expanded authors' rights and this word began to reach every technology that was copied, expanding the effective scope of regulation without stating that

[31] ibid 105.
[32] 'Code de La Propriété Intellectuelle - Article L122-5 Modifié Par LOI n°2009-669 Du 12 Juin 2009 - Art. 21'.
[33] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 22.
[34] ibid 5.
[35] ibid 7.
[36] Cotter (n 21) 328.

intention.[37] The 1909 U.S. Copyright Act also granted authors rights over translations and dramatizations and further in 1976 the right to derivative works. An example of this expansion is Disney's[38] exclusive right to authorized stuffed animals, or anything else identifiable by characters from their copyrighted work.[39]

2.1 History of International Copyright Agreements

International agreements are a way to extend copyright beyond national borders. The Berne Convention for the Protection of Literary and Artistic Works is one of the most enduring international agreements. Since 1886 it has been reviewed five times and been subject to two additional acts. It has survived economic development, technological advances and different copyright philosophies.[40] The Convention currently has 171 Contracting Parties with the newest parties being Sao Tome and Principe that accessed on March 14 2016.[41] The U.S. legislation was not brought into compliance with the Berne convention until 1988 and took effect in 1989.[42] The Convention was lobbied for by a group of European authors with the French Victor Hugo at the forefront. The authors were responding to international copying of their work but before the Convention bilateral treaties offered insufficient enforcement means beyond national borders.[43] A number of bilateral agreements had been signed between 1837-1850 and they continued to be important after the formation of the Berne Convention.[44] The Convention has three core principles and contains a series of provisions that determine the minimum protection to be granted and ways for developing countries to participate. The basic principles are; work originating in a member state will receive the same protection in other member state that is given to its own artists (principle of 'national treatment'); protection will not be conditional on formalities (principle of

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[37] Lawrence Lessing, *Remix: Making Art and Commerce Thrive in the Hybrid Economy.* (Penguin 2008) 101 <http://www.scribd.com/doc/47089238/Remix>.

[38] The Walt Disney Co.

[39] Tushnet (n 6) 542.

[40] Peter Burger, 'Berne Convention: Its History and Its Key Role in the Future' (1988) 3 JL & Tech Introduction. Introduction

[41] World Intellectual Organization, 'Contracting Parties, Berne Convention' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 4 January 2016.

[42] Jane C Ginsburg and John M Kernochan, 'One Hundred and Two Years Later: The U.S. Joins the Berne Convention' [1988] VLA J.L & Arts pt. Introduction.

[43] Globe Business Media Group, 'Victor Hugo - a Driving Force Behind the Creation of the Berne Convention on Copyright' <http://www.iphalloffame.com/inductees/2006/Victor_Hugo.aspx> accessed 4 January 2016.

[44] William Patry, *How to Fix Copyright*, vol Electronic Reproduction (Oxford University Press 2011) 245–246.

'automatic protection'); and protection is independent of the existence of protection in the country of origin of the work (principle of 'independence' of protection).[45] There are certain limitations and exceptions on economic rights that allow for protected work to be used without authorization of the owner of copyright, and without payment of compensations. They are referred to as 'free uses' of protected work by the WIPO and are set forth in Article 9(2) (reproduction in certain special cases), Article 10 (quotations and use of works by way of illustration for teaching purposes), 10bis (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11bis(3) (ephemeral recordings for broadcasting purposes). Copyright law has spread around the globe with significant variations and been incorporated into different bodies of national law through independent development in many European Countries, through trade and colonization, international conventions and treaties. The Berne Convention bound its signatories to certain common copyright principles.[46]

The World Intellectual Property Organization (WIPO) governs the Berne Convention as well as the WIPO Copyright Treaty (WCT) that entered into force in 2002. The WIPO is a specialized agency for intellectual property of the United Nations.[47]

The WCT is a special agreement under the Berne Convention that especially deals with the protection of works and the rights of their authors in the digital environment. In addition to the rights recognized by the Berne Convention, certain economic rights are granted to authors. There are two specific subject matters that shall be protected under the WCT; computer programs, of whatever mode or form; and compilations of data or other material ('databases').[48] Article 10 of the WCT entails the limitations and exceptions to copyright and contains the same three step test that is embodied in Article 9 of the Berne Convention.[49] The WCT eliminated existing gaps in the Berne convention in the case of right to distribution

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[45] Laurence Jarvik, 'Copyright, Victor Hugo & the Berne Convention' <http://laurencejarvikonline.blogspot.dk/2007/02/copyright-victor-hugo-berne-convention.html> accessed 31 March 2016.

[46] Tussey (n 19) 37.

[47] World Trade Organization, *A Handbook on the WTO TRIPS Agreement* (Cambridge University Press 2012) pt Preface <https://www.wto.org/english/res_e/publications_e/handbook_wtotripsag12_e.pdf> accessed 4 January 2016.

[48] World Intellectual Organization, 'WIPO Copyright Treaty (WCT)' <http://www.wipo.int/treaties/en/ip/wct/> accessed 4 January 2016.

[49] 'WIPO Copyright Treaty (WCT)' <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157>.

with Article 6(1) that provides for an exclusive right to authorize making originals and copies of works available to the public.[50]

The WIPO Performances and Phonograms Treaty (WPPT) from 1996 deals with the rights of two kinds of beneficiaries, especially in the digital environment, that is performers (actors, singers, musicians, etc.) and producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds').[51]

The Agreement on Trade-Related Aspects of Intellectual Property[52] (TRIPS Agreement) is a treaty that binds Members of the World Trade Organization (WTO) that are not party to the Berne Convention to the principles of national treatment, automatic protection and independence of protection as well as to the 'most-favored-nation treatment'. WTO Members that are not party to the Berne convention are bound by the substantive law provisions of the Berne Convention but not the moral rights provisions.[53] TRIPS came in play in 1994 as a part of a cluster of agreements at the end of the Uruguay Round of trade negotiations.[54] TRIPS was the first enforceable global agreement on Intellectual Property rights on minimum standard IP protection.[55] The three step test of exceptions to copyright appears in Article 13 of the TRIPS agreement.

3 Is there a Problem with Copyright on the Internet?

The million Dollar question, or Euro if you will, is whether the 'international' copyright system as organized today is capable of supporting a healthy market of intellectual content online. There are different views on how copyright should react to the internet and they can even be categorized into three predominant rationales. Firstly, the 'neoclassics' are of the opinion that today's copyright is perfectly capable of dealing with the exploitation of works

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[50] Philip Louis Landolt, *Collective Management of Copyright and Related Rights* (Kluwer Law International 2006) 54.

[51] 'WIPO Preformances and Phonograms Treaty (WPPT)' <http://www.wipo.int/treaties/en/ip/wppt/> accessed 4 January 2016.

[52] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1c, Legal Instruments-Results of the Uruguay Round vol. 3, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [Hereinafter TRIPS Agreement].

[53] 'Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)' <http://www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed 4 January 2016.

[54] World Trade Organization (n 47).

[55] Ben Willis, 'The Arguments For and Against the TRIPS Agreement' <http://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/> accessed 4 February 2016.

on the internet. In their view the problem is the internet and new methods of exploitation and dissemination and if changes were to be made it would be to strengthen authors rights in the digital environment. Secondly, 'minimalists' want to reduce copyright in favor of the user in the digital environment. They are opposed to strengthening and expanding author's right on the internet. This rationale can be divided in two subcategories, 'radical liberalism' that doubts copyright's justification and 'democratic minimalism' that feels that citizens should be a part of a democratic dialogue when decisions are made and that each member of the public should be able to be a part of the creative process by making derivative works. Thirdly, the 'eclectics' draw from a diverse range of ideology and seek to find a reasonable balance to the rights of authors and the abilities available to users in the digital environment. This rationale can also be divided in two subcategories, the first invokes to the right of information and the value of added work and the second refers to historical analysis of copyright and its adaptability to technological evolution.[56] No matter what category we belong to we must all seek to ensure that copyright laws are the drivers of creativity and knowledge they were intended to be. We must make sure copyright laws are consistent with prevailing markets and technologies so that they are able to fulfill their purpose.[57]

To understand how copyright organizes information it is helpful to draw a conceptual map of the information universe. An extensive map would include natural languages, abstract mathematical and scientific knowledge, organizational and institutional concepts, cultural heritage (such as art), inventions, artistic expression, and technical information. The public interest in free flow of unoriginal material was recognized in the US Supreme Court's 1991 *Feist Publications, Inc. V. Rural Telephone Service Company*, an opinion where an unanimous Court found that even though it may seem unfair that labor may be used by others without compensation it is creativity not labor that copyright seeks to further.[58] Intellectual property rights reserve a portion of the information universe as private or public property with patents, trademark or copyright law. When those ideational objects are subtracted what is

[56] Kapellakou Galateia, 'Illegal Downloading: Proposed Solutions from the EU Member States' 1–2.
[57] Patry (n 44) 1–2.
[58] ibid 134.

left is the 'information commons'.[59] In a formal sense most informational and creative objects that are communicated via the internet are subject to copyright by automatic means. In general, themes, ideas and basic concepts are more likely to be held in common. Excluded from copyright are those works that have expired their copyright protection and have become a part of the public domain or the 'information commons'. Sadly, relevance of work after the term of their copyright is unlikely as statistics show that we benefit most from having access to work in their first decade of existence when its copyright is in force.[60] The fair use exception is inherent to copyright. It could be said that when the the fair use defense is accepted by courts a partial common ownership has been accepted of ideational creations.[61] It can be deducted that in this conceptual context 'fair use' exist on the borders of 'information commons' and 'information property'.

The *de facto* reality of property rights online has departed from the *de jure* state of information described above. Many legal entities are abandoning private property rights of the information they create on different levels, some expressly and others by implication. This seems to be quite common practice and has become somewhat of a norm for many sectors of the content industry. Therefore, a strict formalist legal conception does not have complete practical relevance for publications on the internet. When using a realism approach one has a better chance of finding the true nature and state of the internet information environment.[62] The institutional design of copyright renders this realist definition of information commons incomplete for that the "entire expressive output of society" is granted automatic copyright under the Berne Convention.[63] If there was any doubt that the publication of an original work via the internet fell within the exclusive domain of a copyright owner it was eradicated with article 8 of the WCT and Article 2 of the WPPT that entail 'the right of communication to the public'.[64] The Irish John Cahir has presented the 'interest theory of rights' that explains the *de facto* information commons and the four different stages of a person's exercise of property rights when they have created and

[59] John Cahir, 'The Withering Away of Property: The Rise of the Internet Information Commons' 2 Oxford Journal of Legal Studies 619, 635.
[60] Patry (n 44) 133.
[61] Cahir (n 59) 636.
[62] ibid 637.
[63] ibid 641.
[64] ibid 637.

made work available via the internet. The right of the *de jure* owner is based on an interest. When that interest is not present and he does not need or want to charge a monopoly price the correlative duty of others becomes irrelevant and a *de facto* information commons is created.[65] (1) In the first scenario the owner makes the work available but conditions access to a monetary sum. In this case the copyright owner asserts his economic interest and fully exercises his property right. Examples are *Westlaw* legal information database and the *Wall Street Journal* internet subscription service. (2) In the second scenario the owner makes the work available without the condition of monetary payment but signals to recipients that they are expected to respect their legal duty not to communicate the informational object through a copyright notice or terms and conditions. This is an indirect assertion of economic interest as an exercise of a property right. There are rational economic explanations for granting free access but not allowing further communication of acts of the informational object, for example the free-to-view service such as *Wired* magazine. The 'loss leader' model of offering a free version of a services that will then stimulate sales of a paid service, e.g. the Times and the Economist newspapers websites. This way of making available does not fall within the information commons as there is an economic interest when the owner could expect loss of readers or users were it to allow further communication of the information. (3) The third scenario is a grey area. That is when the owner is silent on obligations so there is an implicit understanding that that recipients are released from the duty not to communicate the work. This could be non-governmental organizations, university professors or works of bloggers. These cases would require a subjective analysis of the owner's motivations and intentions but for all practical purposes property rights have been abandoned. (4) The fourth scenario is where the owner makes the work available on the internet free of charge and is expressive about releasing recipients from their duty not to engage in further communicative acts with the work. This is an unambiguous signal of forging the economic interest of copyright and an effective abandonment of property right. This can e.g. be a software released under the General Public License (GPL)[66] or the Creative Commons licenses that counted over 1.1 billion licensed works in 2015. Those works are then partly (some rights reserved) or wholly a part of the information commons or the public domain. The creative commons contain various content types such as images, open educational resources, research

[65] ibid 638.
[66] ibid 639–640.

(journal articles), audio tracks, videos, texts, and other multimedia.[67] A graphical presentation of Cahir's 'interest theory of rights' can be seen in graph 1.1 below. The divergence that has emerged between the *de jure* state of information ownership and the *de facto* reality of the digital environment is a problem that is partly being solved by creative initiatives but not by legislatures.[68]

3.1 Read Only Vs. Read and Write Culture

On the verges of use that is forbidden due to the exclusive rights of copyright holders and

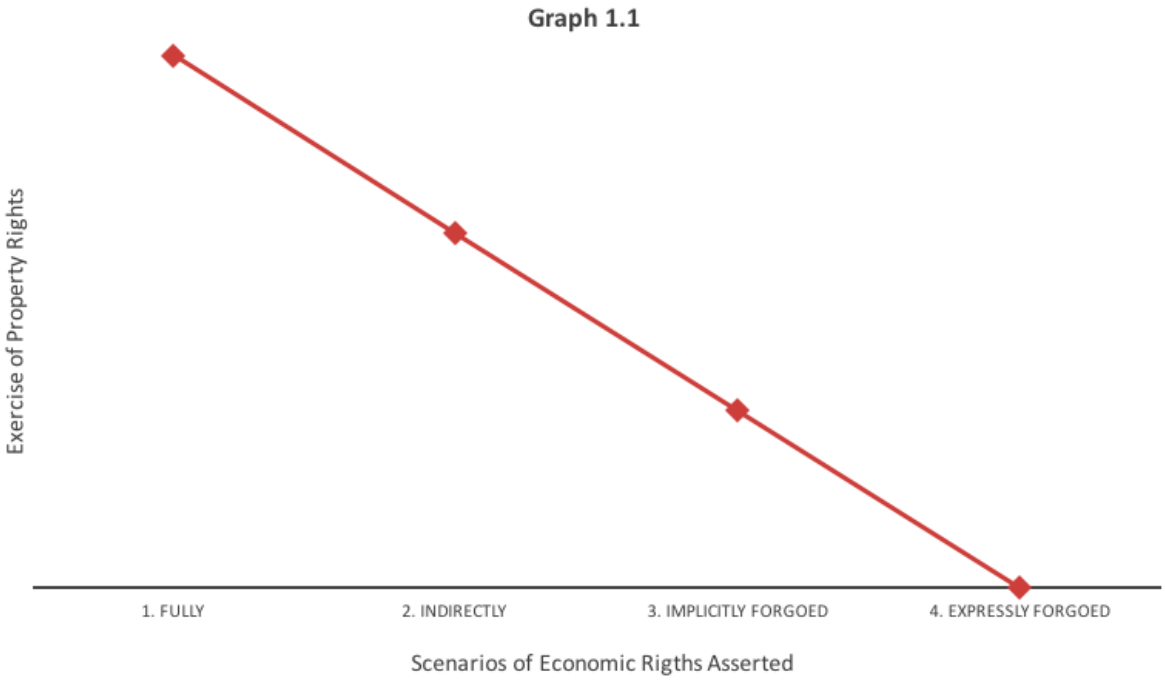

Figure 1: Graph 1.1

what is allowed for the purpose of private use or other accounts of limitations and exceptions is a grey zone of creative content and other information. This grey zone of content is ill-fitted within the realms of modern copyright and has been significantly expanded by digital tools and the internet. We tend to only remember recent history and how culture is usually consumed in our lifetime, for many of us that means being mere recipients. We have turned on the radio or the television with our peak involvement being when we sing along to the latest corporate megastar in our car or guess who is the

[67] Ryan Merkley, 'State of the Commons' <https://stateof.creativecommons.org/2015/> accessed 4 April 2016.
[68] Cahir (n 59) 636.

murderer on our favorite crime show, not participating in the creation and re-creation of our culture. But a growing number of people are, especially young people and even children. The celebrated internet lawyer Lawrence Lessing has written many books on freeing online culture from what are in his opinion outdated copyright restrictions. One of them is Remix, where he argues in favor of Read/Write (RW) culture that allows consumers to "create art as readily as they consume".[69] The opposite of RW is Read Only (RO) culture where the public are passive recipients as a result of 20th century technology such as the radio and television.[70] In Remix, Lessing tells us about the American composer John Philip Sousa that testified before The United States Congress in 1906 on copyright reform. Sousa worried that gone were the days where "you would find young people together singing the songs of the day or the olds songs. Today you hear these infernal machines going night and day. We will not have a vocal chord left".[71] The 'infernal machines' Sousa was referring to was the radio. Before the internet, broadcasting was the terror to the content industry and those that controlled performance rights demonstrated their power over the broadcasters.[72] The copyright of today fits the RO culture well and assumes what was mostly true, when you were making a 'copy' you were truly infringing the rights of the author except in specific exceptional circumstances. The internet radically changed this and brought us back to the possibility of RW culture and that is what the World Wide Web's inventor, Tim Berners-Lee, envisioned when he had people develop their tools in a way that encourages reading and writing.[73] Text is a part of the RW culture of the internet with over 100 million blogs and corresponding comments.[74] The ease of launching a medium from your home has greatly stripped the traditional publications of deciding whose voice shall be heard with some of the most known characters of society being YouTube stars and

[69] MJ Stephey, 'Lawrence Lessig: Decriminalizing the Remix - TIME' (time.com, 17 October 2008) <http://content.time.com/time/business/article/0,8599,1851241,00.html> accessed 6 March 2016.
[70] Lawrence Lessing, 'Laws That Choke Creativity' (Ted, ted.com, March 2007) <https://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity?language=en> accessed 13 January 2016.
[71] Lessing (n 37) 24, 25, 26.
[72] Lessing (n 70).
[73] Lessing (n 37) 58.
[74] ibid 58,59.

bloggers.[75] In the words of John Perry Barlow, "and is in an oral tradition, digitized information has no 'final cut'".[76]

Interestingly, Lessing argues that text is today's Latin and just as the masses spoke English, French and German in Europe during the middle ages the masses of today gather information through TV, film, music and music videos in favor of text. Digital technology in turn enables the masses to write and share this common culture.[77] Lessing feels that American copyright law favors RO culture over RW, in essence the mechanism of user is given permission to consume culture he has purchased.[78] While digital technology tore down the limits of users technological capacity the law regulates ordinary use as making a copy and therefore makes it acceptable to 'copyright'. Because of digital technology, copying is now a normal part of consuming content and by not changing legislation regarding this aspect copyright reaches beyond the professional intermediaries copyright was originally designed to control and regulates what users can do with their legally purchased copies. This did not happen through positive assertion of legislative power but because lawmakers remained passive to the change in the platform consumers gain access to their culture.[79] This makes RW culture illegal by default and stops users for securely generating some types of creative content.[80] There is an important difference between making something new by remixing songs or other digital material and taking something wholesale and distributing without a license. There is an important balance missing from the reality of online copyright. One side activates auto-takedown of material without regard to the fairness of the use. The other finds copyrights nothing more than something that should be ignored and of course both are wrong.[81]

Looking back at how the printing press once revolutionized how we consume information, it is interesting to find that the internet might have an important benefit over paper. Research shows that internet growth significantly decreases aggregate paper consumptions in paper

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[75] ibid 61.
[76] Barlow (n 1).
[77] Lessing (n 27) pp. 68-69.
[78] ibid 97.
[79] ibid 99.
[80] ibid 100.
[81] Lessing (n 70).

categories that are likely to be affected by the diffusion of the internet.[82] Most paper manufacturing techniques have serious adverse consequences on the environment and human health and the pulp and paper industry ranks third in pollution after the chemical and primary metal industries in the United States. The internet has displaced paper consumption in many ways, with for example online newspapers, magazines and eBooks and other content less relevant to copyright such as billing, advertising and emails.[83]

3.2 Ever-Changing Business Models

Until the late 18th century when creation was industrialized, creators used the service model like the entire professional class of today with doctors, lawyers, consultants and architects working on a retainer. Writers, composers and artists produced their work in the service of patrons. Michelangelo was one of the first that served under the Roman Catholic Church patronage to insist on a personal attribution.[84] John Perry Barlow predicted that creative people would return to this model without having objects to distribute in a mass market, but unlike the old days, serve many patrons.[85] Although it remains an exception, we have seen a reflection of this arrangement on the internet where various platforms have formed around 'crowdsourcing'. 'Crowdsourcing' is when projects are outsourced to a crowd of people for various skills, ideas, design and content where the 'patron' has offered a fee and a deadline and can then choose to buy the work he likes the best.[86]

The biggest disruption to modern content business models have arguably been the streaming services. Initially, the copyright industries were not in a hurry to adapt to the internet, spending most of their collective efforts on fighting the revolutionary platform instead of focusing their means on getting to the marketplace faster. Furthermore, new markets and technologies require new business models and that can mean unemployment in a legacy business. That is 'an economic fact of life' and copyright can not be made to

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[82] Andres, Luis; Zentner, Alejandro; Zentner, Joaquin., 'Measuring the Effect of Internet Adoption on Paper Consumption' pt Abstract <http://documents.worldbank.org/curated/en/2014/07/19760469/measuring-effect-internet-adoption-paper-consumption>.

[83] ibid 2.

[84] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 4.

[85] Barlow (n 1).

[86] David Bratvold, 'What Is Crowdsourcing?' <http://dailycrowdsource.com/training/crowdsourcing/what-is-crowdsourcing> accessed 23 March 2016.

serve markets that have been surpassed.[87] The creative and media industries are catching up and the digital market share of 2015 is as follows; games 60%, music 45%, films 21%, books 20%, magazines 7% and newspapers 4%.[88] The internet and its digital tools democratizes creation with low barriers to entry, low costs of production and distribution, and global reach. With a multitude of small transactions to be made in digital abundance, the days of analog artificial scarcity that favored 'gatekeepers' are fading.[89] Owning is a fleeting goal of most consumers and selling ownership of copies of work can therefore no longer be the principal business model for the copyright industries. Collectively, we prefer to listen and watch temporary streams of music and movies instead of CDs or DVDs.[90]

The new 'business model' approach of the internet was suggested as early as in 1998 by Daniel Gervais and other forward thinking minds.[91] Gervais found that even though it would be technically easier to create a digital infrastructure without copyright, one that is accessible by anyone for any purposes, that system would be rejected by those that create and own works of value. Therefore, he suggested building an electronic infrastructure that utilizes the digital environment whilst keeping the copyright backbone: an electronic copyright-management system. He envisioned a 'one stop shop' for copyrighted material and all related rights. In his view a specific challenge of this system would be to allow access for reuse and creation of new products.[92] Around 2000 the text industry went largely online and scientific journals, in many cases with the model of paying for copies or subscription. The recording industry took longer to offer downloads of music files for sale after putting effort into battling peer-to-peer networks in court the same way the movie industry did.[93] 1999 was a record year for the music industry with wholesale revenues peaking at $23.7 billion. The music-sharing service Napster was founded the same year and revenues in the

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[87] Patry (n 44) 2–3.

[88] IFPI - Representing the Recording Industry Wordwide, 'Global Music Report: Music Consumption Exploding Worldwide (State of the Industry Overview 2016)' (IFPI 2106) 12 <http://www.ifpi.org/downloads/GMR2016.pdf>.

[89] Patry (n 44) 3.

[90] ibid 12.

[91] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 3.

[92] Daniel Gervais, 'Electronic Rights Management and Digital Identifier Systems' (1999) 4 The Journal of Electronic Publishing <http://quod.lib.umich.edu/j/jep/3336451.0004.303/--electronic-rights-management-and-digital-identifier-systems?rgn=main;view=fulltext;q1=daniel+gervais> accessed 14 March 2016.

[93] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 3.

music industry have dropped with little disturbance until now.[94] Today's streaming models have redefined old business models that were based on physical copies of albums and reliant upon scarcity,[95] Netflix being the most prominent service for movies and television series and Spotify the leading services for music. These services use the business model of offering subscriptions of unlimited streaming with a fixed monthly fee, a reasonably priced user friendly solution.

As of 2016 there are almost 400 music sites available to consumers according to IFPI's global tracker.[96] The better these services are at engaging with users and finding new ways to serve them the stronger incentive people have to sustain from illegal peer to peer downloading services. The most successful streaming services are those that are native to the internet and seem to be able to get to the marketplace faster, surpassing financially strong more established companies of the content industry that might be holding on to ways that have proven successful in the past.[97] The growth in digital streaming services had led music industry revenues to an expansion by 3.2%, to 15% in 2015. 45% of the market was digital with physical goods such as CDs continued to fall to 39% of sales with digital replacing physical formats as the primary revenue stream for recorded music.[98] Businesses like Spotify, Deezer and Apple music that use the subscription-based streaming model are the fastest-growing category with revenues in 2015 rising by 59%, to more than $2.3 billion. The legal digital downloading services such as iTunes accounted for $3 billion of sales with a decline of 10.5% from 2014, underlining that consumers seem to find streaming music sufficient access and turning away from buying their very own copy in digital form. The market is still 36% smaller than in was in 1999 but various forms of piracy, such as copying from digital sources such as streaming services or YouTube rose by about 20 million between the end of 2013 to the beginning of 2015.[99] IFPI, the international organization of the recording industry, estimates that 900m people get music from 'ad-supported user-upload' services like YouTube, that circumvent rules that apply to music licensing that

[94] 'Scales Dropped' <http://www.economist.com/news/business/21696962-more-people-are-paying-stream-music-industry-still-wobbly-scales-dropped> accessed 18 April 2016.
[95] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 7.
[96] IFPI - Representing the Recording Industry Wordwide (n 88) 12.
[97] Patry (n 44) 37.
[98] IFPI - Representing the Recording Industry Wordwide (n 88).
[99] 'Scales Dropped' (n 94).

creates a 'value gap'. IFPI finds this to be a 'legislative anomaly' that has allowed digital platforms to build major businesses by profiting on the creative content of others and used safe harbor rules that were intended form truly passive online intermediaries from copyright liability. According to a Communication from December 2015, The European Commission plans to close this 'value gap' and make its first proposals for a solution public in 2016. Interestingly, there has been a resurge in the sales of vinyls that shows that convenience is not the only factor music consumers value but that others enjoy building a collection and the ritual of days past. Half of Warner Music's physical sales in Norway come from vinyl.[100]

There are many instances of friction, where copyright holders enforce their rights to the fullest where it could be mutually beneficial to forgo some of their rights. An example of this is that copyright laws were the main reason only about 5% of published books were accessible in formats for the visually impaired, making it a copyright civil rights issue that could be mended with a global, binding instrument of compulsory licenses and exemptions. Efforts for the development of such a treaty began in 1983 and visually impaired people were kept waiting until the 2013 Marrakesh VIP Treaty came along.[101] It represented a new way of dealing with limitations and exceptions in international copyright law and is the only treaty dedicated to regulating a specific area, facilitating access to published works by visually impaired persons or print disabilities. It allows authorized entities to fulfil the tasks of production and dissemination of alternative format copies such as textured print books and audio books.[102] In 2009 Amazon.com offered a feature that brought text to speech of purchased books on Kindle 2 with an electronic voice. This was great help to the blind but of course no substitute for audio books with human readers. The Authors Guild of America objected and the Guild's president admitted that the dispute was all about the money.[103] Another example of this discrepancy is the position of some of the newspaper industry that has been declining for a long time but often blames internet search engines for their loss in ad revenue. Interestingly web crawlers make the newspaper articles appear in search

[100] IFPI - Representing the Recording Industry Wordwide (n 88) 12.
[101] Patry (n 44) 10.
[102] Jørgen Blomqvist, *Primer on International Copyright and Relatied Rights* (Edward Elgar Publishing 2014) 168–169.
[103] Patry (n 44) 9.

engines and therefore directs traffic to them. Interestingly, Author Neil Gaiman found that when he put his book online for free the sales of physical copies went up 300%. The digital market for books in still only 20% as of 2015 while 80% of the market for books still prefer physical copies.[104] The more people know of something the more people will want to buy it.[105] The same happened with the The Monty Python BBC series launched a free YouTube channel with segments and additional material the sales of their DVDs increased 23,000 %.[106] The best chance for a voluntary cooperation with copyright laws is responding to market demand.[107] Noncommercial distribution of information increases the sale of commercial information contrary to what happens in a physical economy. When dealing in ideas fame is fortune.[108]

The fallacy with the economic arguments for copyright is that the money spent on artificially high prices (in cases where free-riding is not the issue) will not benefit the economy by other means, such as through groceries or clothes. One theory is that copyright inflation affects the economy as a whole and supports investments in winner-take-all markets, helpful to superstars but not the majority of authors and artists.[109] The stance of artists and other right's holders vary on this topic. In full compliance with the assertion of copyright, digital technology has streamlined the consumption of music with consumers new buying the songs they really want without having to buy the whole album, freeing them from spending money on things they do not want with subsequent effect on the music industry.[110] It is important to be able to see between a legal problem and a market problem where copyright owners have not adapted to changing markets and the technologies that are driving consumer demand. The most effective ways to battle piracy have evidently been where creative businesses have responded by making lower priced legal products available in a form consumers want.[111] An independent report commissioned by the Prime Minister of

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[104] IFPI - Representing the Recording Industry Wordwide (n 88) 12.
[105] Patry (n 44) 157.
[106] ibid 158.
[107] ibid 166.
[108] John Perry Barlow, 'The Next Economy of Ideas' [2000] *Wired* <http://www.wired.com/2000/10/download/> accessed 3 February 2016.
[109] Patry (n 44) 10–12.
[110] ibid 69.
[111] ibid 141.

the UK in 2011 on intellectual property and growth found that laws designed over three centuries ago to create economic incentives for innovation by protecting the rights of creators has the adverse effect today.[112]

3.3 Refocusing on Effect instead of Nature

Today's copyright legislation is expressed in terms of the nature of the use: reproduction, performance, adaption as is evident international agreements such as the Berne Convention and the TRIPS agreement. The affect on markets is what is truly important to the rightsholders, not the technological nature of the use.[113] For an example, broadcasting, not copying is the real act many legislators have exempted the act of copying from copyright infringement liability.[114]The focus of copyright should not be copies but on rules for access for that "copyright without copies does not make much sense but serve and ancient regime as in the statute of Anne where 'copying' simply meant printing".[115] Copyright law must be neutral to technology and reflect modern markets by focusing on building a structure that will get authors paid and give the public access to their creations. Technology is eliminating control over uses of copyrighted work and for better or for worse we have to rethink how authors get paid.[116] William Patry, author of 'How to Fix Copyright' and Google's senior copyright counsel suggests that rights should be paid through statutory licensing, collective management of rights and levies. Laws create regimes that protect investment in markets not the markets themselves, only demand can create successful markets.[117]

In the Report on the enforcement of intellectual property rights in the internal market for the European Parliament's Committee on Legal Affairs from 2010 the European Parliament recognizes that knowledge sharing and dissemination of innovation are strong traditions in the European Union. It also finds online IPR infringement to be of worrying proportions for

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[112] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) 1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 22 March 2016.

[113] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 10–11.

[114] ibid 11.

[115] Patry (n 44) 12,41.

[116] ibid 47.

[117] ibid 37.

the creative content industries.[118] It also states that is has not been established if the current legal framework is capable of balancing the interests of rights holders and consumers on the internet. The battling of online infringement will erode public support for intellectual property rights in general if it not supported by the public. The report suggests that emphasis should be given to the need for a "consistent, efficient and balanced system of protection of intellectual property rights, which takes into account users' rights and obligations and fundamental freedoms, enhances innovation, creates better incentives and supports legal clarity for both rights-holders and consumers on the internal market".[119] It should be noted that the primary concern of the committee concerns counterfeit goods and is beyond the scope of this thesis, even though it is relevant to copyright in the online environment.[120] The European Commission published a Communication in 2014 that considered the internet's vital role for the cultural and creative sectors. It recognized that the internet accounts for about 3.4% of GDP in 13 countries surveyed in 2011 and reportedly almost a quarter of global internet traffic infringes copyright. This infringement is of digital goods such as music, audio-visual content and software but also physical goods that are traded on e-commerce platforms. Physical goods are beyond the scope of this thesis even when they are being traded online as well as the role of internet service providers in this context.[121]

3.4 Lobbyists Influence on the Development of Law

Copyright reform must be based on data and evidence, not 'policy motivated evidence-making'. We have to able to see through inflated figures, false correlations and unsupported assumptions that have arguably been used to control the public's access to culture and knowledge.[122][123]

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[118] Committee on Legal Affairs, 'Report on Enforcement of Intellectual Property Rights in the Internal Market (2009/2178(INI))' 4–5.
[119] ibid 16.
[120] ibid 18–20.
[121] 'Communication From the Commission to the European Parliament, The Council and the European Econmoic and Socail Committee' 6 <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf> accessed 4 May 2016.
[122] Patry (n 44) 61.
[123] For further evidence, please see "How to fix Copyright"

In the U.S. it often seems as the reality of lawmaking is laws being drafted on the speculations of a philosopher and the wish list of a lobbyist. The Statute of Anne is older than the theoretical justifications now offered for the existence of copyright. Copyright has been subject to influence from lobbyists of powerful industries and the results are law that are so complicated that consumers and legislators alike are puzzled.[124] Since the Stationers company in England that were mentioned in chapter two, different industries that profit most from publishing monopolies have successfully lobbied legislators for the expansion of the scope and duration of copyright protection from the original maximum 28 years to the current one of author's life plus 70 years.[125] When the U.S. copyright act was revised in 1909 congress invited influential copyright industries to negotiate provisions but this is still known practice with The UK's Digital Economy Bill in 2010 was actually being drafted by recording industry lobbyists. This suggests a flawed system as not all interested parties are likely to be represented.[126] The Internet slightly shifted this and enabled coordinated opposition of copyright industry proposals of public interest groups, scholars and ordinary users. Copyright legislation is still very much true to its historical pattern with The Digital Millennium Copyright Act (DMCA)[127] backing up legal prohibitions against circumventing digital rights management systems. The result was an act with extraordinarily complex provisions of broad protection with narrow exceptions.[128] Copyright laws are firmly rooted in the world of 'physical, artificial scarcity' and efforts have been for preserving analog-based laws or a hybrid where that way of thinking is stretched onto digital abundance, e.g. with digital lock provisions. Powerful special interests affect law over time and askew the true needs of society.[129] The White Paper was the beginning of the DMCA, with protections that were designed to make copyright industries comfortable with taking their content online where it could be appropriated by others. When the legislation was stalled in congress because of criticism from technology providers, authors, and public interest groups, the Administration took its proposals to WIPO. The paper then became a part of

[124] Tussey (n 19) 35.
[125] ibid 38.
[126] ibid.
[127] 17 U.S.C. && 512, 1201-1205 (2006)
[128] Tussey (n 19) 39.
[129] Patry (n 44) 6.

ongoing negotiations over the WCT resulting in some of their demands being met with signatories being required to provide legal protection and remedies against technological circumventions.[130] The DMCA then emerged from the implementation of the WCT by the U.S. Congress.[131]

One of the major reasons for the existence of copyright is the remuneration of authors themselves. There have been conflicts between authors and the distributors they sell their copyrights, including over the amount of royalty payments and distribution rights on new media. If policymakers would enact laws, e.g. ones that would allow artists to categorize deals with iTunes as a licensing deal (typically 50% royalties) instead of sale of copies (typically 10-15% royalties) it has been estimated that artists might receive $2.15 billion in total because of unpaid digital music royalties if they are successful in their current disputes with record labels. If policymakers were to support artists by enacting those laws they would be putting themselves in conflict with record labels, music publishers and other powerful corporate constituencies.[132]

There is reason to believe that the method of 'guesstimating' is often used to predict the effect of digital piracy to make the impression that the creative world will come to an end unless the content industries call for stronger laws are met. This method is probably used by those that call for development in the opposite direction as it is tempting for anyone trying to make their point for that matter. In 2010 the International Chamber of Commerce stated that there would be a cumulative loss of between 611,000 and 1,217,000 jobs in Europe between 2008-2015 due to piracy. This statement was based on no lists of actual jobs and with a 100% margin of error. Another example of 'guesstimating' was revealed in the Column 'Bad Science' Dr. Ben Goldacre, an English physician. He discovered that claims that downloading would cost GBP 120bn yearly, or 10th of the entire GDP of the United Kingdom were false and based on an old one-page document from a law firm with no further verifications.[133]

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[130] Tussey (n 19) 40.
[131] ibid 41.
[132] Patry (n 44) 8–9.
[133] ibid 63–64.

Industries such as chemical, pharmaceutical and entertainment have pressed for stricter IPR protection within the U.S. from the 1970s and corporate lobbyists have moved to the global level when they succeeded to place intellectual property protection on the Uruguay Round Agenda of the World Trade Organization shaping the terms of the TRIPS agreement. The purpose was to maintain a competitive advantage in the emerging knowledge-based, high-technology sectors of the global economy. IPR agreements that are beneficial to developed countries are likely to have the adverse effect on under developed countries leading to exclusion rather than competition and diffusion and for that reason exceptions are of great importance.[134]

4 Copyright Exceptions in Today's Law

4.1 The Three-Step Test

Limitations and exceptions have been natural to the protection of literary and artistic works since the first incarnation of the Berne Convention in 1886. In his closing speech Numa Droz, the president of the original convention, stated that 'limitations on absolute protection are dictated, rightly in my opinion, by the public interest'. Since then copyright exceptions in international instruments have only broadened and the Berne Convention contains the most diverse specific limitations and exceptions of all international instruments. The three-step test is at the center of international copyright limitations. It is the most important and comprehensive basis for introduction of national use privileges.[135] Several revisions conferences over the years reflect technological developments and changing times. Usually the words 'limitations' and exceptions are used together or interchangeably but WIPO has sometimes made a distinction having the former mean exclusions from rights granted (such as quotance in accordance with good practice or a single copy for research) and the latter exclusions from the protected subject matter (such as from protecting statutes and court decisions).[136] It should be noted that articles 5(1) on national treatment and Article 20 on special agreements between countries of the Union are built on the understanding that the Convention contains minimum requirements for protection and members can grant

[134] Willis (n 55).
[135] Martin Senftleben (n 17) abstract.
[136] Blomqvist (n 102) 157–158.

protection that goes above and beyond.[137] The term 'minor reservations' is an application of the general *de minimis* principle within the meaning that the law should not be bothered with unessential details where the value of the protection of owner's rights are not compromised. Today, the term should be understood in the light of the three-step test to also cover economic rights besides the right to reproduction as the test could be considered somewhat of a rephrasing of the 'minor reservations' principle.[138]

The Rome Convention[139] for the protection of 'related rights' was set up in addition to the existing system of copyright protection of literary and artistic work. The provisions on limitations and exceptions had already been worded and stronger protection of influence and exercise was not given for related rights and therefore Article 15(2) contains a general reference that permits contracting states to provide for the same kinds of limitations of the protection of performers, producers of phonograms and broadcasting organizations, as their domestic laws and regulations provide on the protection of literary and artistic works.[140]

The 'three-step test' was added as Article 9(2) as a general clause on exceptions and limitations at a revision conference for the Berne Convention in Stockholm, 1967 when the minimum right of reproduction was introduced.[141] All three steps have to be fulfilled from the limitation or exception to be admissible under the Convention.[142] The three-step test is the general rule of the Berne Convention that guides national legislators with respect to the right of reproduction. It allows for exceptions to the reproduction rights in (1) certain special cases; (2) that do not conflict with the normal commercial exploitation of the work; and (3) do not unreasonably prejudice the legitimate interests of the author. This three-step test has become the model for almost all exceptions to all intellectual property rights on the international level and is found in Article 13 of the TRIPS agreement, Article 10 of the WCT, and Article 16 of the WPPT. As a part of the TRIPS agreement the three-step test even

[137] ibid 159.
[138] ibid 175–176.
[139] 'Rome Convention for the Protection of Performers, Producers of Phonograms and Breadcasting Organizations (Adopted 26 October 1961, Entered into Force 18 May 1964) [1992] ATS 29 / 496 UNTS 43'.
[140] Blomqvist (n 102) 178.
[141] ibid 181.
[142] ibid 182.

applies to industrial design protection in Article 26(2) and patent rights in Article 30.[143] Article 10 of the WCT permits the Contracting Parties to extend the appropriate limitations and exceptions in their national laws that have been considered acceptable under the Berne Convention into to the digital environment. Although, Contracting Parties may take the limitation out of force by explicitly reserving the right.[144] The 'making available' right was added to the flora of rights that needed to be cleared when the 1996 World Intellectual Property Organization (WIPO) Treaties[145] were implemented, often requiring three or more separate authorizations for a single economic operation.[146] Private use is not expressly mentioned in the Berne Convention and a number of national law because it was not relevant to copyright holders until the invention of the VCR and double-deck cassette players that did not gain popularity until the 1970s. As a result, many countries introduced a regulation to allow this practice with compensation to rightsholders by levies on blank tape and sometimes recording equipment. Those regulations were tested, perhaps most noticeably in the *Sony* case[147] in the United States. That case will be introduced further in chapter 4.4 on the fair use concept.

Where there is friction between the interests of rightsholders and other members of the public there must be effort to bring them into balance. Article 7 of the TRIPS agreement and the preamble of the WCT emphasize the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information. The three-step test should take into account not only the interests of rightsholders but also consider third party interests.[148] Understanding the meaning of the words of the three-step test and how they have been interpreted is essential for unlocking the potential of the test.

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[143] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 13–14.

[144] Blomqvist (n 102) 163.

[145] 'World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997) [Hereinafter the WCT])'.

[146] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 12.

[147] 'Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984'.

[148] C. Geiger and others (n 2) 119.

4.2 The meaning of 'Special', 'Normal' and 'Unreasonable' in the Three Step test

4.2.1 Special

The term 'special' has been found to mean that the exception must have a purpose and be justified by public policy. This purpose interpretation of the Berne Convention is reinforced by the use of the phrase 'to the extent justified by the purpose' in Article 10 concerning exceptions for quotation, teaching and reporting of current events. In 2001 the meaning of 'special' within the first step of the test was interpreted for the first time by an international tribunal in a World Trade Organization (WTO) decision on section 110(5) of the U.S. Copyright Act.[149] Aspects of Article 13 of TRIPS Agreement were being discussed but can arguably be applied for the interpretation standard of the three-step test in all the international instruments on copyright related rights where the test appears even though the interpretation has no legal effect beyond the TRIPS agreement. In this case the European Communities had made a complaint against the United States because the U.S. Copyright Act permitted, under certain conditions the playing of radio and television music in public places without royalty payments. This exception was found inconsistent with obligations under Article 9(1) of the TRIPS Agreement, which requires compliance with Articles 1-21 of the Berne Convention. The tribunal dismissed aforementioned purpose approach and looked to the Oxford dictionary for guidance. It found that the meaning of 'special' should be interpreted to have an individual or limited application or purposes or exceptional in its scope. It can be deducted from this interpretation that the exception or limitation must be limited in the scope of application and should therefore be narrow in a quantitative and a qualitative sense.[150] The conclusion elevates the threshold of acceptance under the three-step test of the Berne Convention.[151] All exceptions are arguably special and therefore this first step of the test is of least guidance. In the 1967 Stockholm Conference it was found to be the last filter after reproduction had been considered against 'normal exploitation' and considered for 'unreasonable prejudice'. Only then certain special cases should be considered. The demand of narrowing exceptions and limitations down to 'certain

[149] 'United States - Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS160/R (June 15, 2000) [Hereinafter Panel Report]'.
[150] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 14–15.
[151] ibid 15.

special cases' leads to a practical issue if Contracting Parties wish to enact a broad and indeterminate exceptions and limitations. Legislative rules such as 'fair use' or fair dealing' have a general reach that is then given substance through jurisprudence. When the three-step test was drafted those exceptions where accepted in the national legislation of a number of countries following the common law tradition. The British dialect of fair dealing includes an exception that is frequently permitted in general terms regarding e.g. criticism and teaching in addition to a number of a specific limitations which was already the case at the time of the Stockholm convention. The case might be assessed differently regarding the U.S 'fair use' statutory provision developed out of jurisprudence that allows free use of works, controlled by four general factors. At the time the U.S. joined the Berne Convention the scope of the provision was well-defined in jurisprudence, fulfilling the demand for certainty and special scope but the later 'fair use' legislation might not be compatible with the three-step test.[152] In addition, the 'broad extended collective licenses' under European law in the InfoSoc directive (Recital 18) may not withstand review under international copyright and related rights law. They grant a license under national law to use protected subject matter of rights owners that are not represented by a collective management organization without their consent if the user has an agreement with a such an organization. Then the work the use in question becomes a part of a statutory license unless the owner has explicitly prohibited such use which could be interpreted as a de facto formal requirement for protection, one that might be better fitted to only apply in 'certain special cases'.[153] Daniel Gervais argues that only the latter two steps can be operationalized.[154]

4.2.2 Normal Commercial Exploitation

Step two allows for limitations and exceptions that 'do not conflict with the normal commercial exploitation of the work'. 'Exploitation' in this context means use of the work by the copyright owner to maximize value.[155] The wording is aimed at exploitation that is made, or expected to be made, by the owner or his or her contracting parties, not the beneficiaries of the limitations and exceptions. The economic exploitation should be taking place or be

[152] Blomqvist (n 102) 184.
[153] ibid 185.
[154] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 16.
[155] ibid 13.

probable with respect to new markets. The wording 'does not conflict with' implies that the influence of the limitation or exception must be more than marginal and that gives the provision value. The uses allowed may not enter into completion with the way owners derive economic outcome from their work and reduce potential income to the effect of which will be determined independently work each separate mean of exploitation. Economic factors cannot solely determine the outcome as channels that authors use to make their works available to the public, for example unremunerated writing for scholarly purposes, represent normal commercial exploitation.[156] But what does 'normal' mean? This question is relevant because of the new business models, particularly in the light of what the internet has made possible that has not previously or 'normally' been possible. For example, collective rights management in various fields of exploitation have much more importance than when the three-step test was first formulated and the exploitation of digital content will assumable continue to develop worldwide.[157] When the Berne Convention was reviewed in Stockholm in 1968[158] the concept was used to refer to all forms of exploiting a work that were likely to acquire or had acquired considerable economical or practical importance. If the exception or limitation is used to limit a commercially significant market or compete with the copyright holder it is prohibited.[159]

4.2.3 Unreasonable Prejudice to Legitimate Interests of Rightsholder

The reason that the third step is the most challenging are all these concepts that are open to interpretation. As with all limitations and exceptions, there is permitted a certain prejudice but only within reason. The General report of the Stockholm conference pointed to the weight of the limitation or exception on the economic picture and must be linked to a payment of equitable remuneration. It is clear that this step only applies when normal exploitation has been settled but other determination is left for national legislation. The interests of the authors at stake is to be supplementary remunerated for a lower level utilization of their work.[160] The world 'legitimate' can mean to be authorized by law or

[156] Blomqvist (n 102) 186.
[157] ibid.
[158] 'Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, WIPO, Geneva, at 1145 (1971) [Hereinafter Records of the Stockholm Conference].'
[159] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 16–17.
[160] Blomqvist (n 102) 187.

principle or to be conformable to a recognized type. Gervais believes that this third step is the part of the Berne Convention that is most open[161] to the balancing of economic and non-economic rights of authors and interests of authors that want to build upon that work.[162] The Records of the Stockholm Conference show that the United Kingdom took a more restrictive view of 'legitimate' finding it to mean simply 'sanctioned by law' while other countries found it to mean 'justifiable' as in supported by social norms and public policies. The view of the WTO panel points to those that are protected by law.[163] But what is the meaning on 'unreasonable prejudice'? 'Unreasonable' indicates a level of prejudice is justified, e.g. if a country would like to implement an exception, for example for a small number of private copies, it may be required to impose a compensation scheme if the prejudice level becomes unjustified.[164] In case of differences of opinion on interpretation the French wording on article 9(2) of the Berne convention prevails over other languages in accordance with Article 37(1)(c). The wording '*préjudice injustifié*' signals that limitations and exceptions need to be balanced against a reference point to be justifiable, that is capable of finding a specific purpose it is suited to fulfil. The assessment will then be made of the proportionality of the limitation and exception to the interests of the owner.[165] To determine the parameters of international exceptions to copyright it is helpful to look at regional and national legislation to see how international treaties have played out.[166]

4.3 Exceptions in European Copyright Law

The European InfoSoc directive[167] entails broad mandatory rights and Article 5 sets out a list of narrow, unauthorized uses that are optional and then subject to the three step test.[168] The InfoSoc directive was meant to implement international obligations that arose from the WIPO Treaties. However, before the InfoSoc Directive versions of the three-step test were

[161] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 17.
[162] 'Martin Senftleben, Copyright, Limitations and the Three-Step-Test 226-27 (2004)'.
[163] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 17–18.
[164] ibid.
[165] Blomqvist (n 102) 188.
[166] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 19.
[167] 'Council Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (n 11).
[168] Patry (n 44) 214.

included in Article 6(3) of the 'Software Directive'[169] that states that the the articles provisions 'may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program'. A substantially identical provision can be found in Article 6(3) of the 'Database Directive'[170] that covers databases.[171]

The closed catalogue method used for the InfoSoc directive reflects the continental European approach. There is a mandatory exemption for temporary acts of reproduction and then there are optional exceptions that relate to private copying; use of copyrighted material by libraries, museums, and archives; ephemeral recordings; reproductions of broadcasts made by hospitals and prisons; illustrations for teaching or scientific research; use for the benefit of people with a disability; press privileges; use for the purpose of quotations, caricature, parody, and pastiche; use for the purposes of public security and for the proper performance or reporting of administrative, parliamentary, or judicial proceedings; use of political speeches and public lectures; use during religious or official celebrations; use of architectural works located permanently in public places; incidental inclusions of a work in other material; use for the purpose of advertising the public exhibition or sale of artistic works; use in connection with the demonstration or repair of equipment; use for the reconstruction of buildings; and additional cases of use having minor importance.[172] This current European copyright legislation arguably fails to take advantage of the flexibility of the three-step test.[173] In the ECJ's opinion of 2009, *Infopaq International A/S v. Danske Dagblades* the general principle that legal permissible unauthorized use in national law must be narrowly construed was created. That conclusion is troublesome for the broad, social goals of copyright that can hardly be reached with a narrow list of exemptions drafted by officials to spell out in advance all permitted uses.[174] There are two sets of exceptions. Firstly, the only mandatory exception for transient copies that "for an integral and essential part of a technological process". The Directive also contains an

[169] 'Council Directive 91/250 on the Legal Protection of Computer Programs, OJ L 122, 42–46.'

[170] 'Directive 96/9 on the Legal Protection of Databases, OJ L 77, 20–28.'

[171] Richard Arnold and Eleonora Rosati, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10 Jnl of Intellectual Property Law & Pract 741.

[172] Martin Senftleben (n 17) 68.

[173] ibid abstract.

[174] Patry (n 44) 214.

exhaustive list of permitted purpose-specific exceptions that EU Member States can choose to implement in their national copyright legislation.[175] Article 5(5) of the directive establishes the three-step test as an overarching test for all the exceptions permitted. The test is fixable and could be used by national courts for instances where were there is no specific exception if national law would allow it. [176]

Article 10 of the WCT is important in the context of the InfoSoc directive and in Recital 44 it says that the directive aims to implement new international obligations for the WIPO Treaties, particularly the three-step test in Article 10. The provision was similarly understood to permit Contracting Parties to devise new exceptions and limitations appropriate to the digital network environment. This balanced view is the result of deliberations at the 1996 WIPO Diplomatic Conference that led to the adoption of the WIPO Internet Treaties where the attendee for the U.S. sought to safeguard the 'fair use doctrine'[177] and Denmark feared that a test that was a response to the emerging phenomena of photocopying was not appropriate in the digital world. He further felt that the strengthening of the protection of basic rights such as those of reproduction and making available to to public should not be a 'straight jacket' for existing exceptions that were essential for society. It was further noted that:

> *When a high level of protection is proposed, there is reason to balance such protection against other important values of society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.* [178]

4.3.1 National Implementation EU Copyright Exemptions and Lack of Harmonization

The international three-step test is the basis for a wide variety of national copyright limitations even though those limitations are not explicitly mentioned in international copyright law. National legislators in European Community member states have chosen

[175] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 20.
[176] ibid 19.
[177] Martin Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law. Methods and Perspectives in Intellectual Property'' 16–17.
[178] 'WIPO Doc. CRNR/DC/102 § 488-489'.

exceptions for the catalogue of Article 5 of the InfoSoc directive and consequently the domestic scope of exception may differ between countries.[179] The Dutch Supreme Court had already developed jurisprudence prior to the adoption of the InfoSoc directive that is in line with the suggested implementation of a fair use three-step test that will later be suggested in chapter 6.1.1. in the 1995 decision *Dior/Evora*[180]. In the national case that preceded the later judgment of the European Court of Justice (CJEU), the Dutch Supreme court tried to open up a closed catalogue of exceptions of the Dutch Copyright Act to balance interests. In this case concerning the advertising of parallel import of Dior perfumes sold in Drugstores, The Dutch Supreme Court found that exceptions that are meant to balance the interests of copyright owners against social or economic interests of third parties or against public interest do no exclude the possibility that the limits must in other cases be able to balance interests when the lawmaker was not aware of the need for limitation concerned and the latter fits in with the system of the law. In those cases, the exceptions enumerated in the law can be used as a reference point. The Dutch Supreme Court did not give much weight to Dior's interests of using exhausted copyright of the packaging and bottles as a 'weapon' against further reproduction and distribution in advertising. The drugstores interests in advertising and resale of Dior perfume in the Netherlands prevailed as long as no harm would come from the way in which it would do so.[181]

The CJEU has not taken a clear position on the interpretation of the three-step test although it has given some indications. In the aforementioned CJEU's opinion of 2009, *Infopaq International A/S v. Danske Dagblades* questionable indication of the general principle that unauthorized use exceptions must interpreted restrictively was created. Two years later the CJEU lent weight to the objective and purpose underlying the exceptions that are at issue in *Football Association Premier League*.[182] Even though the Court recognized that the interpretation of the mandatory exemption of temporary acts of reproduction in Article 5(1) of the InfoSoc, the effectiveness of the exception had to be safeguarded with a fair balance of rights and interests of rightsholders, and users of protected works who wish to utilize

[179] Martin Senftleben (n 17) 71–72.
[180] 'CJEU, 4 November 1997, Case C-337/95, Dior/Evora, Para. 58-59, Available at Curia.eu.'
[181] Senftleben (n 177) 21.
[182] 'CJEU, 4 October 2011, Cases C-403/08 and C-429/08 Footbal Association Premir League/QC Leisure, Para 162-164'.

new technologies. Therefore, the CJEU came to the conclusion that transient coping preformed within the memory of a satellite decoder and on a television screen was compatible with the three step test of Article 5(5) of the InfoSoc directive.[183]

Noticeably, the CJEU referred to the freedom of expression as a counterbalance of the guarantee of copyright protection in the case of *Eva Maria Painer/Der Standard*. The case was on the right of quotation recognized in Article 5(3)(d) of the InfoSoc directive and the conclusion was that the Article was intended to strike a fair balance between the work's (or other protected subject matter) users right to freedom of expression and the reproduction right conferred on authors.[184] Fundamental rights will be discussed further in chapter 4.6.

If the three-step test is incorporated into national law, there it is made obvious that users that rely on copyright exceptions will be additionally scrutinized in the light of the three-strep test. According to the French Intellectual Property Code (Article L. 122-5) the listed statutory exceptions my neither conflict with normal exploitation of the work nor prejudice the author's legitimate interests. This mixture of specific statutory exceptions and open-ended three-step test limits the flexibility of the system and user privileges even further and a freezing effect can be seen in the French *Mulholland Drive* case.[185] The case was brought by a buyer of a DVD that wanted to transfer the film onto VHS format so he could be able to watch it at his mother's house. Technical anti-copying measures had been applied on the medium but that had not been clearly indicated on the cover. The French Supreme Court found that when interpreted in the light of the three-step test the exemption for private copying could not be invoked against the application of technical protection measures when the intended act of copying would then conflict with a 'normal exploitation' of the work concerned. The reasoning of the Court was the added risk of piracy in the digital environment and that the exploitation of cinematographic works on DVD was important to recoup the investment in film productions.[186] German case law demonstrates the lack of flexibility of the current European framework for copyright restrictions. The closed

[183] Senftleben (n 177) 23.

[184] 'CJEU, 1 December 2011, Case C-145/10, Eva Maria Painer/Der Standard, Para. 134.'

[185] 'Court of Cassation (1st Chamber, Civil Section), 28 February 2006, Studio Canal, Universal Pictures Video France and SEV v. S. Perquin and UFC Que Choisir'.

[186] Martin Senftleben (n 17) 71.

catalogue of precise exceptions had proved problematic with regard to distribution of primary and secondary markets for information products and services, especially the right of quotation.[187] By looking at case law it is apparent that the highly restrictive way of applying the third-step test on the list of exceptions is not capable of balancing interests in the digital age. However, the process of updating European legislation is no easy task. It requires lengthy negotiations at the Community level as well as national implementation of acts in all member states and that put even more emphasis on the necessity of a fair use element for future developments. The European Community should provide national courts with the necessary tools to maintain the delicate balance of copyright, even in these times of constant technological developments.[188]

4.4 The U.S. Fair Use Concept

The fair use exemption originated in eighteenth century England when common law judges were interpreting the 1710 Statute of Anne and found that learning should be encouraged through unauthorized uses when they did not undermine the sales of the original work. Fair use is not an unfamiliar afterthought to copyright but an inherent aspect.[189] The Anglo-American copyright statutes were designed by legislatures so that common law judges could fill in substantive details in each case.[190] The best known modern version of this exemption is the United States fair use doctrine[191] that is at its core principles that strive to ensure the goal of creativity is not impeded by an overly restricted copyright.[192] The doctrine permits the unauthorized use of copyrighted material for purposes "such as criticism, comment, news reporting, teaching […], scholarship, or research." The four factors are then set forth in the provision and shall be taken into account along with other considerations that may be relevant.[193] This is a limitation to the broad rights granted under section 106 of the act.[194] Scholars do not see eye to eye when it comes to the compatibility of the U.S. fair use

[187] ibid.
[188] ibid 73.
[189] Patry (n 44) 215.
[190] ibid 179.
[191] 17 U.S.C. § 107
[192] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 20.
[193] Martin Senftleben (n 17) 68.
[194] Barton Beebe, 'An Empirical Study of U.S Copyright Fair Use Opinions, 1978-2005' (2008) 156 University of Pennsylvania Law Review 549, 551.

doctrine with international law. However, there has not been a single complaint that the results of fair use cases before the U.S Supreme Court or decisions of lower courts are incompatible with international law. Professor Ruth Okediji argues that the indeterminacy and breadth of fair use are inconsistent with the Berne Convention and the TRIPS agreement[195] but William Patry comes to the opposite conclusion as well as the Berne scholar professor Sam Ricketson.[196]

Judge Leval of New York has over three decades of experience applying fair use and he has found that "Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design."[197] Lawyers dealing with copyright make determinations on fair use all the time, even the author of this thesis has been in that situation numerous times.[198] The consequences are not always clear as the doctrine is flexible and the lawfulness of a use is determined by a court on a case-by-case bases, allowing it to adapt to new technology. The result is driven by whether or not the claim furthers the goals of copyright, that can mean a win for the plaintiff bringing an infringement claim because of an unfair use or that the unauthorized user gets to continue the use without permission or payment on the basis of fair use. The same company is often on both sides of the argument in different instances, pursuing their own copyrighted work and relying on the fair use defense.[199] The Fair use doctrine is a tool to further socially beneficial behavior and consists of four factors that the fair use analysis is primarily built upon and courts shall consider.[200] It is not certain that all factors are important in each case. (1) The first factor is the purpose and character of the defendant's use, such as commercial nature or nonprofit educational purposes.[201] (2) The second factor examines the nature of the copyrighted work, for example factual or fictional.[202] (3) The third factor looks at the amount and substantiality of copyrighted work that was copied. (4) The fourth factor concerns the effect of the defendant's work on

[195] Ruth Okedui, 'Toward an International Fair Use Doctrine."' (2000) 39 Colum. J. Transnat'l L 75, intro.
[196] Patry (n 44) 219.
[197] ibid 212.
[198] ibid.
[199] ibid 213–215.
[200] Beebe (n 194) 551.
[201] ibid.
[202] Patry (n 44) 212.

plaintiff's market for its work[203], e.g. do we want copyright owners to stop this use?[204] The Doctrine has been in effect since January 1, 1978, or for 38 years.[205] Until 2015 there were 306 opinions that made substantial use of the fair use four factor test or 10.9 a year, where an average 4.6 of them found fair use.[206]

There are leading cases that have been at the forefront of fair use but only with a comprehensive view of case law can the doctrine be seen in practice.[207] The hierarchy of the U.S. court system places decisions of the U.S. Supreme Court over all lower courts and the decisions of circuit courts govern all decisions of trial courts within that circuit.[208] The Supreme Court has addressed the fair use doctrine in seven opinions on only four cases, *Sony v. Universal City Studios, Inc.* (464 U.S. 417 (1984), *Harper & Row, Publishers, Inc. v. Nation Enterprises* (471 U.S. 539 (1985), *Stewart v. Abend* (495 U.S. 207 (1990)) and *Campbell v. Acuff-Rose Music, Inc.* (510 U.S. 569 (1994)).[209] Barton Beebe preformed an empirical study on the application of the U.S. fair use doctrine in case law and found some interesting statistics. Of the circuit courts the Second and Ninth Circuits contributed by far the most fair use cases with their opinions having an above average influence on other circuits while at the district level the Southern District of New York (in the Second Circuit) accounted for 31.3% of district court opinions and the Northern District of California (in the Ninth Circuit) for almost 7.6%.[210] The nonvirtual print media had dominated the facts of the fair use case law[211] with computer software and internet technology case law first coming into play in 1988. Beebe found that from 1988 through 2005 21.6% of opinions involved computer software and/or the internet. Any form of video constituted for 20.6% of the opinions and music only 6.2%. Whole of 84.6% addressed facts were both parties work appeared in the same medium. Free speech concerns were involved in 25% of the opinions

[203] Beebe (n 194) 552.
[204] Patry (n 44) 216.
[205] Beebe (n 194) 564.
[206] ibid 565.
[207] ibid 553.
[208] Patry (n 44) 219.
[209] Beebe (n 194) 566.
[210] ibid 567.
[211] ibid 573.

with the First Amendment being prominently invoked.[212] The Supreme Court has overturned the circuit courts' reversals of the district courts' opinions in fair use cases in *Sony*, *Harper & Row* and *Campbell* and therefore case law on fair use might seem unstable.[213] In *Harper & Row Publishers*, *Inc. v. Nation Enters*[214], whereas the analysis of ratio of use is not limited to quantitative elements holding that 'generous verbatim excerpts' of a particularly quantitatively important part of a book did not constitute fair use.[215]

Innovation is dependent on laws to have the flexibility to adapt to new technologies and markets, such as fair use and other flexible legal doctrines (e.g. implied license). The fact that Silicon Valley, California companies that constantly bring out new products were responsible for a little under 20% of all new employees in California strengthens that claim.[216] Innovative companies favor fair use or flexible functional equivalents but vested rights holders interests favor closed lists.[217] The 'open ended' nature of fair use does not *de facto* lead to more uncertainty than for example the closed list of exceptions in the European InfoSoc directive. Copyright infringement actions are equally open-ended inquiry in all countries, one that requires quantitative and qualitative assessments on the similarities of the copyrighted expressions in question.[218] Whether a work infringes another or whether someone's moral rights have been violated will not be known before a court has decided on the matter. For the most part the same inquiries are taken under infringement analysis in Europe as under the U.S. Fair Use Doctrine. The common law of fair use had developed over two centuries through case law into a coherent set of principles that are recognized in the statute of the fair use doctrine with compatible principles found in fair dealing provisions in other countries. The possibility of reaching the wrong result is inevitably in place and a close list does not provide certainty of the correct decision but rather constricts courts to possibly outdated conclusions as it is impossible to select words

[212] ibid.
[213] ibid 574.
[214] 'Harper & Row Publishers, Inc. v. Nation Enters., 571 U.S. 539, 548-49 (1985)'.
[215] Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11:4:841 Vanderbilt J. of Ent. and Tech Law 841, 859.
[216] Patry (n 44) 217.
[217] ibid 225.
[218] ibid 218.

with necessary precision before someone engages in the conduct.[219] However, there is a difference in the flexibility that gives U.S. companies a distinct advantage that did not go unnoticed by the British Prime Minister David Cameron in 2010 when he called for a review of English copyright law. Ironically, fair use was a British invention. Regardless of the label we should strive for laws that function so that they enable conduct we wish to permit and that can respond in a common sense in a flexible way.[220] In the opinion of Justice Douglas in *United States v. Causby*[221] common sense 'revolted at the idea' that air traffic would be subject to landowners permission and that older laws had attached to the ownership of the sky to the one of land had no place in the modern world. Legislatures cannot be expected to think of all uses, technologies or markets that not yet exist and with the pace of innovation with the internet and digital tools as its accelerator it is even further-fetched that static laws can keep up. Adherents to this perspective are concerned that by preserving fair use in the digital environment of low transaction costs, the doctrine can be undermined to the extended that it rests solely upon a market-failure rational.[222] Nevertheless, when all things are considered copyright laws should not inhibit the growth of disruptive technologies and stand in the way of desirable conduct. Online search engines are an example of this as they make copies of content to provide search results without harming the market for copyrighted works but connect potential purchasers to rights holders.[223] The name of the game is no more than a meaningless distraction, whether it is called the reproduction right, the making available right, the performance right or anything else the law is a means to a socially desirable behavior. Dynamic and flexible legal principles, such as the ones found in the U.S. fair use doctrine are likelier to be capable of responding to changes in behavior. Enabling socially desirable behavior, rather than identifying who has an entitlement will be the biggest step in making copyrights laws effective.[224]

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[219] ibid 219–220.
[220] ibid 223.
[221] 328 U.S. 256 (1946)
[222] Cotter (n 21) 370.
[223] Patry (n 44) 225–226.
[224] ibid 227.

4.4.1 Applying the Fair Use Factors

The most prominent U.S case law of each fair use factor will now be examined to the gain a deeper understanding of the application of the factors. As mentioned, the first factor concerns the purpose and character of the use, that includes whether the use is of commercial nature or for non-profit educational purposes and if it should be deemed transformative. In the *Sony Corp of America v. Universal City Studios Inc*. the court examined whether the user had actual motive for monetary gain from the use of the Betamix videotape recorder that allowed them to tape TV programs.[225] This recording use found to be non-commercial and therefore this unauthorized but permitted and uncompensated use was allowed. It can be said copyright owners have *de facto* had this case law overturned through legislation that covers digital locks.[226] The Court quoted its first factor analysis from *Sony* in *Stewart v. Abend* where fair use was not found in the unauthorized use of an original story to create a derivative motion picture.[227]

In *Campbell v. Acuff-Rose Music, Inc.* the district court had found that an appropriation of certain elements of Roy Orbison's 'Pretty Woman' were a parody that constituted as fair use. The Sixth Circuit found that insufficient weight had been given to the presumption of the *Sony* Court that a decade earlier found that "very commercial use of copyrighted material is presumptively [unfair]" and reversed and remanded the judgment. Finally, the Supreme Court rejected the *Sony* presumption and demoted commerciality of the use to one issue to be considered among others as a part of the analyzes of the first fair use factor and remanded for further fact finding under factors three and four of the doctrine. Lower courts still continued to apply and cite the *Sony* presumption.[228] The Supreme Court did consider the effect on the market for 'derivative uses' and normal licensing.[229] Today in the U.S. commercial uses tend to weigh in favor of the plaintiff.[230]

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[225] Giuseppia D'Agostino, 'Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use' (2008) 53 McGill LJ 309, 35.
[226] Patry (n 44) 43.
[227] Beebe (n 194) 600.
[228] ibid 572.
[229] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 215) 865.
[230] Giuseppia D'Agostino (n 225) 36.

In the case *Rogers v Koons*[231] the court found bad faith and copying for profit-making motives. In this case Koons was an artist the sculpted a 'string of Puppies' to parody a photograph of eight 'puppies' that was widely successful. If a parody can be expressed without directly copying work and the parody is commenting on a general idea but not the work itself there is not a need to copy and therefore the court did not find fair use.[232] Another case where the first fair use factor came to play was the *Basic Books v. Kinko Press*[233] where copyrighted material was used for educational purposes by a commercial company. Kinko had assembled photocopied material into low-cost 'course packets' to sell to students for a profit. The use was non-transformative and on a commercial scale and therefore it was not found to be fair use. In contrast when the government copied articles from medical journals and disseminated them upon request in the case of *Williams & Wilkins*[234], the purposes where acceptable because their objectives were socially useful. In addition, fair use guidelines had been established and no fee was charged. The court held that balancing the interests of science with those of publishers required a legislative solution.

When evaluating where they boundaries between fair and unfair lie under the first factor there seems to be no clear guiding line. In the *Sony* case copying a complete audiovisual work was found to be fair use since the copyright owners were not deprived of revenue. In the *Campbell* case using a small portion of a song in a transformative manner was found fair use and therefore established that commerciality does not make for a presumption of unfair use, it is simply one of the elements that should be weighted as a part of the fair use inquiry. However, in the *Koons* case the court found bad faith and therefore unfair use where there was no need to imitate a photograph for a parody sculpture and the use was not sufficiently transformative as an average person could recognize the copying. In the Kinko case non-transformative use for commercial purposes was found unfair but in the *Williams* case fair use found for libraries that allowed photocopying for scientific research. Looking at the main principles applied in each of the aforementioned cases it can be

[231] 'Rogers v Koons 960 F 2d 301 (2d Cir 1992)'.
[232] Giuseppia D'Agostino (n 225) 36–37.
[233] 'Basic Books, Inc. v. Kinko's Graphics Corp ,758 F. Supp. 1522 (S.D.N.Y. 1991)'.
[234] 'Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973)'.

deducted that if the use is for monetary gain the work must be substantially transformative or the copied part of the original work minimal. If the work is not transformative, the use cannot be for monetary gain and/or the use has to be socially beneficial.

The second factor is the nature of the copyrighted work, whether it is factual or fictional and if it is published or unpublished.[235] The case of *Harper & Row* put in place a presumption against fair use for unpublished work that set an example for lower courts as the court stated that "the unpublished nature of a work is key, though not necessarily determinative, factor rending to negate a defense of fair use". This presumption was overruled by Congress in response to concerns of the publishing industry with amendments to §107 title 17 of the United States Code regarding unpublished works enacted in October, 1992 stating that "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors".[236] In this case The Nation magazine had published unauthorized and unpublished article on memoirs from former US president Ford that Harper & Row Publishers had made a deal with Time magazine on the exclusive right of publication that they subsequently lost. The arguments for denying fair use were that the author had the right to control the first appearance of the work. In addition, the memoirs were subject to a confidentiality agreement and the article would have needed an approval, there were a number of inaccuracies and facts were disseminated. Although the quantity of the memoirs used were unsubstantial in portion they represented "the heart of the book".[237]

The third fair use factor concerns the amount and substantiality of copyrighted work that was copied and leads to a sliding scale in the sense that if the use is more that a *de minimis* use it is likelier that fair use will be rejected. Quality over quantity of the work used is the rule as was apparent in the *Harper and Row* case where 300-400 words in the article were verbatim quotes taken from the memoir.[238] In *Basic Books* the third factor of the test failed the defense as the use was both quantitatively and qualitatively significant as entire

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[235] Giuseppia D'Agostino (n 225) 37.

[236] 'Copyright Laws of the United States and Related Laws Contained in Title 17 of the United States Code' 19 <http://www.copyright.gov/title17/circ92.pdf>.

[237] Giuseppia D'Agostino (n 225) 38.

[238] 'Harper & Row Publishers, Inc. v. Nation Enters., 571 U.S. 539, 548-49 (1985)' (n 214).

chapters were copied. The opposite is true of the 'Pretty Woman' parody in *Campbell v. Acuff-Rose Music* whereas distinctive lyrics were produced and when the character of the use is considered entire works may be found to be fair use.[239] Transformative works will be considered further in chapter 5.1.1. If the use is *de minimis* but is highly transformative it could still be considered fair use judging from the case law interpreting factor one. If the U.S. fair use test is to have practical relevance in the digital age, through international best practices standards or by other means, little weight should be given the *de minimis* test of factor two.

Lastly, the forth factor is on the effect of the use upon the potential market for the copyrighted work. *Harper and Row* is an example of when the author's potential market is undermined as Time magazine cancelled their agreement pursuant of the publication of Nation magazine. *Basic Books* is another example of use of the forth factor as the need to purchase full texts was undermined with the purchase of a course pack.[240] When the defendants work is a parody it can be more problematic to prove that the work will have an effect on the non-parody market as was the case in *Campbell v Acuff-Rose*. The court came to the opposite conclusion in *Rogers v Koons*.[241] If progressive strides are to be made in the direction of a less restricted flow of information and culture online, moving forward at the international level this factor has to be interpreted in a way that the secondary work needs to have a substantial negative effect on the potential market for the primary work if the use is to be found unfair.

Out of the 306 U.S. fair use cases studies by Barton Beebe commerciality has received the most attention being explicitly considered in 84% of cases and the attention to commerciality has regrettably been consistent across time. The commerciality inquiry persists even though The Supreme Court in *Campbell v Acuff-Rose* was dismissive of this factor on the grounds that nearly all expression in our culture is produced for profit or aimed at producing income in some sense. 38.2% of cases explicitly considered the

[239] Giuseppia D'Agostino (n 225) 39.
[240] ibid.
[241] ibid 40.

transformativeness of the defendants use under the same factor. [242] Judge level wrote an article *Toward a Fair Use Standard* where he argues for strengthening the secondary users justification against factors that favor copyright owners if the secondary use adds value to the original *"..if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding"* it is the very type of activity the fair use doctrine is intended to protect for the enrichment of society.[243] Importantly, when non-leading cases have declined to follow the leading cases in U.S. fair use practice, they have done so in a repeated and systematic way to expand the scope of the fair use 'defense' that is worthy of being followed.[244]

4.4.2 Fair Dealing

Common law countries, other than the U.S. have adopted the 'fair dealing approach that is generally modeled after the U.K. Copyright Act of 1911. They consist of a list of situations where "dealing with protected work is allowed if the use is 'fair' in light of the purpose of the use." Usually these purposes are related to criticism and review, news reporting, teaching, archives and libraries, or use by visually impaired readers. The UK doctrine of fair dealing has thus developed in courts for over two centuries. Scholars do not see eye to eye on the effectiveness of the UK's fair dealing provision as some find that it lacks principles and contains obstacles that undermine its applicability. Others argue that the UK courts have adopted a liberal interpretive approach.[245] The UK's fair dealing provisions are found in Chapter III of the 1988 Act on Copyright, Designs and Patents.[246] The Gowers review recommended that several new exceptions would be carved, most noticeable for parody and format-shifting, without amending the legislation. Balanced and flexible rights that would enable consumers to use material without damaging the interests of rights holders support citizens trust in the system.[247] In the UK, research and private study must be for non-commercial purpose in order to be exempt for copyright. What is meant by commercial

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[242] Beebe (n 194) 597–598.
[243] ibid 603–604.
[244] ibid 622.
[245] Giuseppia D'Agostino (n 225) 26.
[246] 'Copyright, Designs and Patents Act 1988 c 48 as Amended (UK) ("CDPA")'.
[247] 'Growers Review of Intellectual Property' 4 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf> accessed 4 March 2016.

is not clear but Recital 42 of the InfoSoc Directive mandates that the activity should be considers over the "organizational structure and means of funding the establishment". Other important factors are; the amount taken, if the work is readily available, and the effect on the market.[248] In the case of *Hubbard v Vosper* before the Court of Appeals of England and Wales[249] the Court attempted to set out the main test for 'fairness' as regard to the fair dealing provision at the time found in section 6 of the 1956 Copyright Act. Hubbard, the founder of the Church of Scientology of California sued Vosper, a former member of the Church, for infringement of his work when he wrote a book criticizing Scientology. Vosper successfully defended the claim under the fair use doctrine and Lord Denning for the Court of Appeal found that whether a dealing is fair is a matter of fact and degree and all the circumstance of a particular case must be taking into account.[250] In the case of *Ashdown v Telegraph Group Ltd* before the same court, a claim of fair dealing failed as the court established a hierarchy of factors when deciding on fair dealing; (1) whether there was a market substitute for the dealing (if so, fair dealing will 'most certainly fail'), (2) whether the work was published or previously exposed to the public (if not, fair dealing will fail especially if the work was obtained by breach of confidence or some other underhanded way – here motive is relevant), and (3) extent of the work taken (though a substantial part or entire work can be allowed). [251]

Canada and Israel have both cultivated the principle of fairness at their highest courts out of fair dealing legislation.[252] In the landmark case *of CCH v. Law Society of Upper Canada*[253] the Canadian Supreme Court interpreted the research factor very broadly and applied it to research for profit when it found that photocopying services to researchers fell within the fair dealings exception under s. 29 of the Canadian Copyright Act. Chief Justice McLachlin noted that fair dealing is an integral part of the Copyright Act that is characterized as a user right that must be balanced against rights of copyright owners rather than merely being a defense. The outer boundaries of copyright must be held whilst obtaining a just reward for

[248] Giuseppia D'Agostino (n 225) 28.
[249] '[1972] 1 All E.R. 1023 (CA) ("Hubbard").
[250] Giuseppia D'Agostino (n 225) 30.
[251] ibid 33.
[252] 'Nair, Meera. 2012. Canada and Israel: Fairness of Use. PIJIP Research Paper No. 2012-04 American University Washington College of Law, Washington, D.C.' abstract.
[253] 'CCH v. Law Society of Upper Canada [2004] SCC 13 (Can)'.

the creator.[254] This case strengthened fair dealing but at the same time created uncertainty as the court had raised a narrow exception of private use to a level of a general principle.[255] Defendants that claim 'fair dealing' must show (1) that the dealing was for the purpose of research or private study and that (2) it was fair.[256] In this the respect the fairness factor usually requires that no more than needed was used of the copyrighted work for the purpose.[257] Justice McLachlin examined the fair dealings factors that are to be considered when assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. This useful list of factors is an analytical framework for the determining of fairness in future cases was constructed by Justice Linden of the Canadian Federal court of Appeal that had previously incorporated English and US views to define sic factors that determine fairness.[258]

Israel is not a common law country but one that has fair dealing provisions and when the determining if the dealing was fair the Israeli Supreme Court used the U.S. fair use criteria[259] in the case *Geva v. Walt Disney Co*.[260] The late artist Dudu Geva had modeled a character after Disney's Donald Duck in his work *The Duck Book* that was a critique on Israeli society. Geva's image was named differently and sporting a cultural Israeli hat. Geva's freedom of expression argument relied on exceptions to copyright and that his use was in a manner consistent with the U.S. doctrine of fair use. The Israeli Supreme Court denied the petition after recognizing that parody and satire are legitimate purposes for exception and that there is a multi-facetted inquire when considering the exception. Justice Maltz stated that the term 'criticism' should be interpreted in a broad sense and found that the final balancing between freedom of speech and the copyrights owner should be postponed to the stage in witch the fairness of the use is examined. The court had recognized the common heritage of the Israeli fair dealing and U.S. fair use and subsequently adopted the

[254] CCH para 48
[255] Giuseppia D'Agostino (n 225) 1.
[256] CCH para 50
[257] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 21.
[258] CCH para 53
[259] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 22.
[260] 'CA 2687/92 Geva v. Walt Disney Company 48(1) PD 251 [1993]'.

four-factor analysis. Even though Geva was not successful in his plea, the fact that the Court took full advantage of the U.S. experience to explore the nature of parody and satire can be considered positive for creative endeavor.[261]

4.5 Comparing Case Law

It draws a drastic contrast that the Dutch Supreme Court in *Dior/Evora* referred to the "development of copyright as means of protecting commercial interests" unlike the U.S. understanding of the fair use doctrine where it is a safeguard to freedom of speech within the copyright system. The Dutch court did not point to that the drugstores advertising could be found to be an important form of commercial speach that should be protected as the fundemental rights of free speach. Finding the use transformative is often an important factor of the U.S. fair use analyzis where in *Campbell v. Acuff-Rose*[262] mere repackagining or republication was said to be insufficient. The Duch Court found, that because of the development of copyright, there was a need for additional use privileges as means to protect commercial interests. This is in line with the concept of 'entrepreneurial copyright' that referres to the inclusion of works of 'applied art' in the copyright system. This case could be viewed as a matter of protecting the free movement of goods and service in the internal European market. Grosheide claims that this additional use privalage became nessasary because copyright act's were predominantly based on individual authors and balancing copyright interests for a competition law purpose became necessary when enterprises invoked copyright as to strengthen their position when fighting for market shares.[263] The *Dior/Evora* judgement was primarily concerned with regulation of competition in the internal European market and did not establish Dutch flexible copyright limitations compatable to the U.S. fair use doctrine as it was not sufficiently characterised by freedom of speach aspects or a strong transformative use element. However, that could be done with the incorporation of a new Article 5(5) to the InfoSoc directive. That proposal will be introduced in chapter 6.1.1.

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[261] 'Nair, Meera. 2012. Canada and Israel: Fairness of Use. PIJIP Research Paper No. 2012-04 American University Washington College of Law, Washington, D.C.' (n 247) 14–16.

[262] section A. Cf. Leval, supra note 28. P. 1111

[263] Senftleben (n 177) 22.

When the EU copyright legislation is compared to the U.S. fair use doctrine there can be found impulses for reform. Even though the fair use doctrine might not be perfect, it can serve as a reference point for further development of the present EU system. The EU system is based on a closed catalogue of precisely defined exception while the open-ended U.S. fair use doctrine allows courts to keep pace with technological developments with the copyright instruments to balance rights. This difference in case law between the common law and civil law systems is understandable when the regulations of copyright limitations are based different theoretical groundwork. The theoretical basis of the Anglo-American copyright is utilitarian in the sense that copyright is granted to enhance the overall welfare of society. Ensuring sufficient supply of knowledge and information is the goal and can therefore not go further than to grant rights strong enough to produce intellectual works. Therefore, the limitation is flexible and the fair use provision open ended. Putting it overly simply, the freedom of use is the rule and rights are the exception. Following the natural law that underpins continental Europe's *droit d'auteur* the opposite could be said. The work is perceived as the author's personality materialized. The author-centered nature of the civil law system calls for the legislator to safeguard rights to ensure that authors profit from the use of their self-expression and ban uses of work that might hinder their exploitation.[264] There are different merits to both approaches. A closed set of exceptions offers foreseeability that can be used as a basis for the exploitation of copyrighted material. On the other hand, the common law open ended approach is flexible and capable of balancing exclusive rights and the competing social, cultural and economic needs. There is less need for constant amendments of legislation that could otherwise not keep pace with technological development.[265] At its core, the differences between the two systems are laws versus binding precedents and even though they might lead to the same conclusion in many instances the open ended approach might be more capable of coping with fast changes in the digital age.

[264] Martin Senftleben (n 17) 68.
[265] ibid 69.

4.6 Are Fundamental Rights at stake?

Freedom of expression protects the right of individuals to express themselfs without limitations being imposed upon the content of their speach and copyright law prevents individuals from expressing themselfs through another's copyrightable expression. The relationship between those two rights is a compeating one where the relsolution tends to search for a balance through compromise.[266] Searching for balance can lead to the restriction of the communicative activity both rights are intentend to further, e.g. maximising flow of culture and channels of communication between members of society. When the copyright system fosters free expression it strengthens its internal coherence.[267] When a copyright holder is given complete monopoly over the use of the copyrighted work, those private intrests are hostile to the freedom if expression of other members of the public.[268] The fair use doctrine of the U.S. is understood as being a safeguard to a freedom of speech (the first Amendment of the United States Constitution.[269]) within the copyright system.[270]

In the *Michelin*[271] case before the Canadian Supreme Court individual property rights trumped democratic outcomes when the freedom of expression and copyright seemingly clashed. When that is the outcome, copyright loses its coherence and therefore its legitimacy.[272] In that case the defendants were campaigning to become trade union representatives in the plaintiff's factory plants and for that purpose distributed leaflets that featured the 'Michelin Man' stomping on the head of a worker standing beneath him. The image was trademark and copyright protected by the plaintiffs. The court interpreted the

[266] 'Carys J. Craig. "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright". The University of Toronto Law Journal 56.1 (2006): 75–114. Web' introduction.
[267] ibid 76.
[268] ibid 77.
[269] United States Constitution – Fix footnote
[270] Senftleben (n 177) 22.
[271] Compagnie Générale Des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), [1997] 2 FC 306.
[272] 'Carys J. Craig. "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright". The University of Toronto Law Journal 56.1 (2006): 75–114. Web' (n 266) 114.

law as to allow copyright interests to silence the parody critique and did not perform a balancing inquiry, raising freedom-of-expression concerns.[273]

Since copyright has entered the private sphere with end users in some cases ceasing to be at the end of the chain, copyright has to compromise with the right to privacy, a fundamental right secured in article 8 of the European Convention for the Protection of Human Rights and fundamental Freedoms (ECHR)[274] The issue of privacy depends on if the tools that are used to monitor the actions of end-users are invasive or non-invasive.[275] Private use has proven technically uncontrollable policy wise since rights against private users are practically unenforceable.[276] If a user makes a mere copy available online or otherwise the user's act would typically rest of First Amendment grounds. The exceptions in the InfoSoc directive are supported by the fundamental guarantee of freedom of expression and information in Article 11 of the EU Charter of Fundamental Rights as well as Article 10 of the European Convention of Human Rights. When interpreting those exceptions, the CJEU could develop a freedom of speech approach to the interpretation of the modern EU three-step test suggested in chapter 6.1.1.[277]

In the case of *Autronic AG v Switzerland*[278] before the European Court of Human Rights it was recognized that under Article 10 on the freedom of expression of ECHR companies are permitted to receive information across boarders for purely economic gain. The Court noted that its applicability to profit-making corporate bodies had already been held on three occasions, in the Sunday Times judgment of 26 April 1979[279], the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989[280], and the Groppera Radio AG and Others judgment of 28 March 1990[281]. The balance between copyright and the freedom of expression on one hand and copyright and the right to privacy on the other is best described as an instrument that needs to be finely tuned each time a conflict arises. In itself, freedom

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[273] ibid 87.
[274] Convention for the Protection of Human Rights and Fundamental Freedoms (As amended)
[275] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 215) 852.
[276] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 14.
[277] Senftleben (n 177) 24.
[278] 'ECHR, 22 May 1990, Application No. 12726/87, Autonic v. Switzerland'.
[279] 'ECHR, 26 April 1979, Application No. 6538/74, Sunday Times v. The United Kingdom'.
[280] 'ECHR, 20 November 1989, Application No. 10572/83, Intern Verlag GmbH and Klaus Beermann v. Germany'.
[281] 'ECHR, 28 Mach 1990, Application No. No. 10890/84, the Groppera Radio AG v. Switzerland'.

of expression cannot be made to trump copyright in every turn but it is a fundamental right highly relevant to the application of copyright. As the right to privacy has acted like a brick wall on the enforcement of copyright online, it is clear as technology becomes more perfect the right to privacy will continue to counterbalance the possibility of entering the private sphere of individuals for the sake of copyright and other purposes.

5 What kind of Use Is Under Protection?

The increase in derivative rights are the biggest expansion of rights in the last century even though derivative works are by definition an imperfect substitute or not a substitute. 'Derivative work' is defined in the U.S. Copyright Act as "…work based upon one or more pre-existing works, such as translation, music arrangement, dramatization, fictionalization, motion picture versions, sound recordings, art reproduction, abridgment, condensation, or any other form in which a work may be recast transformed, or adapted…"[282] A general derivative right was introduced in Anglo-American copyright in 1909 in the US and in 1911 in the UK. Previously, a case-by-case approach had been taken where courts assessed if the work provided new creativity and insights or it they were a mere substitution for the original work. The Statute of Anne was silent about derivative works and courts interpreted the silence as meaning that the right over adaptions was not exclusive.[283] In the 1721 case *Burnet v. Chetwood*[284] Lord Macclesfield did not find translations to be illegal and in the 1740 case *Gyles v. Wilcox*[285] it was stated that for infringement to be found there the secondary work had to have been only minimally altered as to deliberately evade the reach of the copyright statute. Courts at that time looked at what was added with the new work, not what was taken from the old and if new adaptions introduced old work to new markets allowing for the dissemination of knowledge that supported the overall ideas of the

[282] 'Copyright Laws of the United States and Related Laws Contained in Title 17 of the United States Code' (n 236) 3.
[283] Patry (n 44) 103.
[284] *UKSC Burnet v Chetwood (1721) 2 Mer 441*.
[285] *Gyles v Wilcox, Barrow, and Nutt* [1740] Court of Chancery of England 3 Atk 143; 26 ER 489.

Enlightenment.[286] It could be valuable to consider returning to that sound approach in some form.[287]

The rapid development of user-friendly interfaces in personal computers combined with the development of a user friendly internet with pages and hyperlinks and by the turn of the 21st century an efficient search system to locate and share information had a huge impact on creation. The internet usage of consumers blew up with the subsequent expansion in available commercial and noncommercial web content. Many of us spend a substantial part of our days online on social networks, blogs or online stores. Smartphones have allowed us to perform many functions in the palm of our hand that formerly required an array of computers.[288] In the Green Paper[289] of the European Union (May 2010) it said that "Unlocking the Potential of Cultural and Creative Industries" that "in order to be able to fully unleash their dual and economic potential, the cultural and creative industries need an increased capacity for experimenting and innovating." That is not achieved by closed list and restrictive application of the Berne Convention's three step test.[290] Calling use that is socially beneficial but unauthorized 'limitations and exceptions' makes the default state of affairs the unfettered property right even though the owner might be a large, multinational corporation with purely economic stakes.[291] Creativity is served by encouragement; we should encourage as many as often as possible. In some instances, 'that means giving one set of authors the right to stop other authors from performing unauthorized acts with copyrighted works but sometimes that means giving the latter group of authors the right to do things with copyrighted works without permission or payment to the first set of authors. Both acts should be natural to copyright law and in an ideal world the latter should not be a limitation or exception.[292] Policymakers that truly want to increase creativity should liberalize the ability a person has to transformatively copy another with enough breathing

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[286] Patrick R. Goold, 'Why the U.K. Adaptation Right Is Superior to the U.S. Derivative Work Right' (2014) 92 Neb. L. Rev. 850 <http://digitalcommons.unl.edu/nlr/vol92/iss4/5> accessed 5 August 2016.
[287] Patry (n 44) 103.
[288] Tussey (n 19) 62–63.
[289] European Commission, 'Green Paper on the Potential of Culturanl and Creative Industries'.
[290] Patry (n 44) 222.
[291] ibid 228.
[292] ibid 229.

space to draw from the whole of culture. "Culture is behavior, creatively duplicated".[293] Work that substitutes the original ads little value or insight and can therefore not be considered creative.[294] In 1803 in the English case of *Cary v. Kearsley*, Lord Ellenborough described the policy[295] when science was referred to as the 18th century conception of knowledge:

> *"That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public…. While I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science."*

The practice of finding minimal uses to be infringing is a trend that is not in line with the basis of copyright. The Beatles admittedly started out playing the songs of others because theirs "weren't good enough yet" and the Rolling Stones "took everything they knew" from Chicago blues. The music of the Rolling Stones is a good example of how complex the legalities of derivative works can be. The Verve (a British band) made the very successful 'Bittersweet Symphony' that sampled a five-note sample from an orchestral version of the Rolling Stones' 'The Last Time' that it licensed from Decca Records but did not get permission for the underlying composition until after the fact.[296] The Rolling Stones' former manager Allan Klein persisted with his company's claim got the Verve settling out of court awarding Mick Jagger and Keith Richards songwriting credit and full publishing rights. Ironically, the Rolling Stone's song was not much more than a cover of the traditional gospel song recorded by the Staples Singers in 1955.[297] For hundreds of years' painters went to museums and copied works hanging there, one of them being Henri Rousseau (1844-1910) who learned his technique by going to the Louvre and copying works on display.[298] Artists will always find new ways to express themselves and digital technology has brought many

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[293] ibid 94.
[294] ibid 90–92.
[295] ibid 91.
[296] Matthew Wilkening, 'How Allen Klein Made the Rolling Stones Millions From "Bitter Sweet Symphony" - Exclusive Excerpt' <http://ultimateclassicrock.com/rolling-stones-bitter-sweet-symphony/> accessed 5 October 2016.
[297] 'The Staples Singers - This May Be the Last TIme' <http://b-sting.com/2010/06/07/the-staple-singers-this-may-be-the-last-time/> accessed 5 October 2016.
[298] Patry (n 44) 96.

new media options.[299] Similarly, Gervais suggests that when courts apply the fair use test to online derived content they must include adequate fairness that fits within the first and fourth criteria by looking at whether the derived work is parasitic (has negative effect) or free-riding (no lost sales). In *Texaco*[300] the Second Circuit did not do so and found that the existence of a viable licensing solution should be considered in determining market harm.[301] In this case a private, for-profit corporate library should not have relied on fair use while making single copies of eight scientific articles from various issues of a scholarly journal. Because the 'Copyright Clearance Center' offered licenses for photocopying and Texaco used those in other instances, the failure to use those licenses for all photocopying deprived the rightsholders of licensing revenue. Since in theory all use can be licensed, applying the forth factor in this manner suggests that there is no such thing as a fair use.[302] The terminology on different types of 'secondary' work is not consistent between scholars or legislative bodies. For the purposes of this thesis the term 'secondary work' will apply to works where the creator has to some extent or at some point during the creative process made use of one or more portions of pre-existing copyrighted works.[303] Ideally, content that has an underlying creative work needs to be permitted to be created and distributed on the same conditions as content that has not been found to use portions of pre-existing works.[304]

5.1 User Generated Content – Amateur Creation

User generated content (UGC) is a term often used as a blanket term for content created by users of a platform of service but it has also been used for secondary or transformative works in general.[305] It can involve the right of reproduction and the right of adaption, for example the right to prepare derivative works found in the U.S. fair use doctrine. It is in fact a 'tangled web' that Daniel Gervais has attempted to map by proposing taxidermy of types

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[299] ibid 227.

[300] 'American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1995)'.

[301] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 215) 867–868.

[302] Nicole B Cásarez, 'Deconstructing the Fair Use Doctrine: The Cost of Personal and Workplace Copyring After Amercian Geophusical Union v. Texaco, Inc.' (1996) 6 Fordham Intellectual Property, Media and Entertainment Law Journal 644.

[303] Eric Östlund, 'Transforming European Copyright - Introducing an Exeption for Creative Transformative Works into EU Law' 12–13 <http://www.imk.uu.se/Portals/4/IMCseries/2014/3/IMCPaperSeries2014-3_%C3%96stlund.pdf> accessed 21 January 2016.

[304] ibid 14.

[305] ibid.

of amateur creation and reuse.[306] Gervais defines UGC as "content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools". This shift in content creation might be best embodied by the remix phenomenon that has made fan fiction, mashups, music remixes and collages possible on a vast scale.[307] There has been an inability or unwillingness to license to these end users as well as uncertainty of the scope of fair use in this context and this has created tension in the copyright system. Collective licenses are typically for non-altering uses since most content is designed to be viewed, read, or listened to, ignoring to reflect the empowerment that digital tools have given users.[308] Traditionally amateur use has overlapped with private use and professional use with public use. That has since shifted and some have argued for an amateur 'exception' to allow remix. But what types of amateur use are we looking at?[309]

The Organization for Economic Co-operation and Development (OECD) has distinguished UGC along two axes, one the type of content (e.g. text, images, music video) and according to distribution platform (e.g. blogs, social networking sites, file-sharing sites). Gervais finds this effort helpful but unsatisfactory since copyright has tried to be technologically neutral by not drawing distinctions between categories of content.[310] To understand how copyright can be applied Gervais puts UGC into four categories; user-authored content, user-derived content, user-copied content and peer-to-peer sharing as UGC. Firstly, user-authored content is simple because it is neither a copy nor derivation nor adaption. The author is therefore free to use the content as he pleases, copyright, uploading, performing, and making available under any or no license. The content may be under restrictions of the UGC-empowering site or technologies if a license has been conveyed to the operator of the site.[311] In other cases by accepting terms you have granted a non-exclusive license to the operator, as is the case with Instagram, the photo/video sharing application that claims a non-exclusive, fully-paid and royalty-free, transferable, sub-licensable, worldwide license to

[306] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 215) 841.
[307] ibid 842–843.
[308] ibid 849.
[309] ibid 856.
[310] ibid 857.
[311] ibid 858.

use content that you post on the services.[312] In any case, the user should not have to rely on a fair use defense as there should unless the user is sharing copyrighted content by a different author.[313] Secondly, user-derived content is complicated in terms of copyright because analysis will have to be preformed on the underlying right. If the derived use is considered fair under the fair use doctrine or under other exceptions outside the U.S. the factor is of less importance.[314] Thirdly, user-copied content is prima face infringement if fair use is not at play, where the user simply copies preexisting content that is generally illegal and illegitimate.[315] Fourthly, peer-to-peer as UGC is generally illegal but it is not economical for content industries to persist on their rights as litigation is expensive and will raise public interest conscience to force down internet accounts or networks. Gervais wrote in 2009 that controlled monetizing through subscription services is the best possible outcome for all parties and as evidence of the international music industry report for 2016 explained in chapter 1.4.[316]

To determine if user-copied content is fair use the application would likely be focused on if there are other channels available for communication of the oppressed speech. The 'Google defense' in *Perfect 10, Inc. v. Google, Inc*.[317], possibly extended the doctrine where a decision that found making thumbnails of 'adult' images was not fair use was overturned. The Ninth Circuit had referred to *Campbell v. Acuff-Rose* where the first fair use factor required a court to consider the purpose and character of the use and determine to what extent the work is 'transformative'. The court considered if there was something new added that furthered to purpose or was of different character altering the first expression with a new meaning or message.[318] The Ninth Circuit also quoted its own *Wall Data*[319] opinion that supports that to be transformative the copyrighted work used has to be transformed into a new creation, changing the mode of access in not sufficient.[320] Dissemination may also be

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[312] Instagram, INC., 'Terms of Use' <https://help.instagram.com/478745558852511> accessed 16 April 2016.
[313] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 195) 865.
[314] ibid 858–859.
[315] ibid 859.
[316] ibid 860.
[317] 416 F. Supp. 2d 828, 836, (C.D. Cal. 2006
[318] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 215) 861–862.
[319] 'Wall Data, Inc. v. L.A. County Sheriff's Dept. , 447 F. 3d 769, 778 (9th Cir. 2006)'.
[320] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (n 215) 862–867.

fair use but not necessarily on the grounds of transformativeness even though that could possibly be the result of a 'fresh' reading of the 1976 copyright act.[321]

5.1.1 Transformative Work

Transformative use was defined by the Australian Government's Law Reform Commission (ALRC) in its paper released in 2013.[322] The Commission used the term 'transformative' to refer to uses of pre-existing works to create something new that is more than a mere substitute for the pre-existing work. Works that are considered transformative include those described as 'sampling', 'mashups' or 'remixes'. Sampling is taking a part of work and reusing it in a different work, often many sound recordings, and using them in a different composition. This is a well-know known concept in music. A mashup is a composite work that is comprised of other works, in music this is blending two or more songs, usually by overlaying a vocal track of one song onto the music of other. Remixes are then a combination of the altered sound recordings of music works. Many instances of sampling, mashups and remixes are spread across the internet that include musical compositions, new films, art works and fan fiction.[323]

If we treat transformative copying as copyright infringement or something that is not creative we are going against the natural way of art creation. The talented have long 'copied' the work of others without authorization and for instance it has been estimated that by the middle of the sixteenth century most masses were parody masses, not to make fun but to show respect and appreciation while showing of the skills of the second composer.[324] The great composers of the Renaissance, Baroque, Classical and romantic eras could not have written many of their masterpieces under current copyright laws. Today's version are the remixes, mash-ups or 'pastiche': a new work that gives fresh insights by taking pieces from other work in a highly creative manner. With his computer as his instrument, Gregg Gillis or 'Girl Talk' makes new compositions from thousands of samples of others' works. Brian Burton or 'Danger Mouse' was affected by EMI's efforts to ban the

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[321] ibid 863–864.
[322] Östlund (n 303) 13.
[323] 'Copyright and the Digital Economy (Discussion Paper 79) Discussion Paper by the Australian Law Reform Commission (ALRC) (2013)', 194.
[324] Patry (n 44) 99.

distribution of his Grey Album that sampled from the Beatles and Jay-Z.[325] His creative efforts had gone into deconstructing the sounds in a highly challenging way, a true art form. Jay-Z himself then commented[326] on the use of his song as an informed artist would "I champion any form of creativity and that was a genius idea to do and it sparked so many others like it." Jay-Z added that he was honored to be on the same song as the Beatles and that he did not feel ripped because he did not get paid.[327] Another relevant quote would be from RZA of the Wu-Tang Clan where he commented on the creative process of sampling: "I've always been into using the sample more like a painter's palette than a Xerox".[328] The art of 'Sampling' is a music style strongly connected to hip-hop. A recent example is Kanye West's introduction of Nina Simone's haunting voice to new audiences on his latest two albums. In essence the recycling of culture is the art of sampling and West does that masterfully by sampling 17 song on his 2016 album 'Life of Pablo'.[329]

The case of *Bridgeport music, Inc. v. Dimension films*[330] the Bridgeport publishing house, the owners of material by George Clinton and the Funkadelics sued because of the use of a two-second sample where the pitch had been lowered and the sample looped to last sixteen beats. The district court found the sample to be unrecognizable and therefore no infringement. The court of appeals reversed the opinion and found that the right to duplicate work was the exclusive right of the copyright owner with no *de minims* threshold. The court did not find this to stifle creativity in any significant way, artists should just get a license. The judgment had a chilling effect on sampling because of the high financial and transactional costs of clearing licenses.[331] The court noted that the decision did not preclude the availability of other defenses such as fair use if its criteria had been met. The Bridgeport case was quoted in the Kraftwerk[332] case, the first sampling case of the highest German Civil

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[325] ibid 101.

[326] Interview by Terry Gross on National Public's "Fresh Air" Program.

[327] Patry (n 44) 102.

[328] ibid.

[329] Claire Lobenfeld and Miles Bowe, 'Kanye West's The Life of Pablo: Exploring the Songs Behind Its Samples' <http://www.factmag.com/2016/02/14/kanye-west-samples-the-life-of-pablo/> accessed 20 April 2016.

[330] 'Bridgeport Music, Inc. v. Dimension Films 410 F.3d 792 (6th Cir. 2005)',.

[331] Patry (n 44) 93.

[332] 'Metall Auf Metall, Decision of the German Federal Supreme Court No. I ZR 112/06, Dated November 20, 2008 (Kraftwerk, et Al. v. Moses Pelham, et Al.)'.

Court. Like the Court of appeals in the Bridgeport case, the German Court found that the quantity and quality of the sampled material was irrelevant in determining infringement of the exclusive reproduction and distribution right of a sound recording. The determining fact is proving that a part of a protected sound recording has been copied without permission even though the courts came to their conclusion through different methods.[333]

In a broader sense transformative use can also refer to other 'appropriation-based artistic practices'. This can be the art form of collage, where images or objects are re-contextualized as in the aforementioned *Rogers v. Koons* case.[334] The Icelandic Erró (Guðmundur Guðmundsson) is a pioneer in 20th century art having developed his own form of collage paintings as a mix of 'new realism' and Pop Art. His unique body of art defies all categorization where his paintings combine unthinkable characters such as Hitler and Mikey Mouse.[335] The level of transformativeness can differ and should be evaluated in each case. Lack thereof has gotten Erró in a predicament, perhaps most noticeably with artist Brian Bolland that wrote Erró an open letter after finding that he had for the most part copied his poster '*Tank Girl*'.[336] Bolland respects collage as a medium but found that Erró should have made more transformative effort if his work were not to infringe noting that:

> *"…You consider yourself "a kind of columnist or reporter". Reporters quote their sources all the time in order to get at a greater understanding of events. Their reports, like your work, are made up almost entirely of quotes. The difference between reporters and you, Erró, is that they name the source of their quotes and an honest reporter would be careful not to misrepresent his sources or take their quotes out of context. If he did he'd be deliberately setting out to discredit them. In your 'Tank Girl' print you 'quote' a whole piece of work by me. At a particular moment you consciously deleted my name – the artist's name. In so doing you are claiming that this wasn't done by an artist – it wasn't done by anybody in fact –*

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[333] Tom H. Braegelmann, 'English Translation: Metall Auf Metall (Kraftwerk, et Al. v. Moses Pelham, et Al.), Decision of the German Federal Supreme Court No. I ZR 112/06, Dated November 20, 2008' (2009) 56 Journal of the Copyright Society 1017, intro.

[334] 'Copyright and the Digital Economy (Discussion Paper 79) Discussion Paper by the Australian Law Reform Commission (ALRC) (2013)', (n 323) 194.

[335] Sanha Lazic, 'Erró: American Comics' <http://www.widewalls.ch/erro-exhibition-hilger-mana-contemporary/>.

[336] Rich Johnston, 'Brian Bolland Takes on Erro and Wins' <http://www.bleedingcool.com/2010/05/20/brian-bolland-takes-on-erro-and-wins/>.

therefore it's not 'art' it's just 'stuff'. Just raw material for your 'Synthesizing' process.

...Your work is about 'Recontextualizing'. I.e. taking something out of one place and putting it somewhere else, thereby showing it in a different (possibly ironic) light. In view of the fact that your poster of my Tank Girl is selling for 600 Euro. I suggest you stop selling it and I invite you to recontextualize the money you got from the sale of it out of your bank account into mine." [337]

Looking at those two particular pieces of art, the fact that Bolland's work remains the dominant feature of Erró's work and Erró presents it entirely as his own (even erasing Bolland's name that had been incorporated into the primary work) suggests unfair business purposes and therefore it is likely that infringement would have been found. When analyzing the nature of Erró's work under the first fair use factor, the fact that Erró stood to make substantially more money from the work than the less known Bolland leads to the conclusion that fair use would not have applied would the case have reached courts.

6 To Improve or Start a New

Moving forward it has been suggested that viewing copyright as a complementary part of the content ecosystem that exists between intellectual property rights and the public domain or as a 'semi-commons' where private and common uses are dynamically related would be beneficial.[338] Other cyber visionaries find that intellectual property law cannot be "patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover allocation of broadcasting spectrum".[339] William Patry suggests measuring the effectiveness of the current laws for society as a whole. He finds that a halt should be put to the introduction and passage of any new legislation until the methodology of all proposals has been tested and reviewed for their effectiveness. To be truly beneficial, all existing laws would have to be tested against those methodologies and

[337] ibid.
[338] Tussey (n 19) 56.
[339] Barlow (n 1).

repelled or suitably amended if they fail the review. The methodologies established should be independent, rigorous and economically verifiable.[340] For the ultimate, practically relevant copyright system it is necessary to assess all legislation in this way and 'clean house'. Additionally, for the sake of the internet, it has to be done internationally. Patry goes so far as to say that those that think current laws can be adapted without a systemic overhaul taking place are 'dangerously denying reality'.[341]

However, amending international agreements such as TRIPS is a complicated political task that most likely demands tremendous political will and patience. Since the three-step test is accepted as the international standard for determining whether an exception to copyright in national legislation is TRIPS-compliant, idea of building copyright of the future on its basis and combining it with the criteria of fair use is worth considering. After studying the fair use practice in the U.S. in chapter four up to this date it as apparent that it is the methodology of the test rather than previous application that will provide a practical tool for the new digital era. That goal might be reach through an international best practice standard for interpreting the three-step test in a digital age. Gervais suggests reversing the test based on the assumption that what the three-step test does not allow on a multilateral level and the fair use test at a U.S. domestic level is what in fact copyright was intended to protect. If fair use is 'A' universe, the 'non-A' universe contains uses that require a license. This approach of reversing the test allows for focus on the effect of the use on rightsholders. Arguably, it is by definition TRIPS-compliant since this method is simply an interpretation of the three-step test.[342] Unfair use would then be uses that would not meet the two practical steps of the three-step test, interferes with normal commercial exploitation or unreasonably or unjustifiably prejudices the copyright holder's rights. With Gervais's method, any use that can be demonstrated to substantially reduce financial benefits of the copyright owner under 'normal' commercial circumstances (in context with the dynamic world of the internet) would then be 'unfair' without authorization. 'Commercial exploitation' would then be assessed by looking at if the users should have obtained the content with a normal commercial transaction, not if he got value without

[340] Patry (n 44) 5.
[341] ibid 6.
[342] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (n 5) 28.

paying.[343] This approach is still quite conservative and holds copyright to a standard that excludes some of the objectives of public interest mentioned earlier in this thesis. In addition, Gervais does not consider the moral rights that are at the core of copyright in Continental Europe. Even though this thesis in not particularly focused on moral rights, it should be noted that if an author of secondary work intentionally removes the mention of the author of the primary work or communicates the work without making the author known when possible should not be exempt from copyright under the three-step or fair use test.

6.1 Useful Suggestions

Patry suggests an evidence-based approach to lawmaking consisting of effective copyright laws that make sure those that have created work can protect them and benefit economically, if that will lead to a broader application of the fair use exception is unclear.[344] With the current system authors go uncompensated where they should rightfully be compensated for two reasons, the volume of unauthorized activity through digital formats that is uncontrollable. It is proven impossible to prevent copyrighted material and therefore it is wiser to seek compensation for authors instead of relying on payment for access. Like many American scholars, Patry does not consider moral rights but instead focuses on the right to remuneration. The four principal ways of getting paid are (1) relying on negotiation by exercising an exclusive right; (2) mandatory statutory licensing for specific works and uses, such as the mechanical compulsory license in the US for 'cover versions' (3) levis on recording media that varies between countries in technology and amounts; and (4) collective licensing.[345] The European Commission has given up its 16 year effort for harmonization of levies and turned to a mediator that cannot impose a final solution. Patry finds that the problem is a lack of political will not data. Patry suggests something that is strongly agreeable, a 'worldwide exhaustion of digital rights once a work has been licensed in one country' as the exhaustion in one country is a residue of the analog world[346].

[343] ibid 29.
[344] Patry (n 44) 11.
[345] ibid 180.
[346] ibid 182.

6.1.1 Balanced interpretation of the three-step test in the EU

The three-step test is used to enhance flexibility in EU copyright law by interpreting Article 5(5) of the InfoSoc directive under the guidance of 'The Declaration on a Balanced Interpretation of the Three-Step Test'. If that is done the result is a European Copyright legislative framework that is even more flexible than the U.S. fair use doctrine because the European model provides copying exceptions for the payment of fair compensation. This proposed semi-open norm remains bound to the closed list of legitimate exception purposes of Article 5 of the InfoSoc directive.[347] Martin Senftleben argues that a legislative reform is needed to align the EU three-step test for it to be able to function as an engine of national copyright limitations as the test is capable of doing at the international level. Copyright scholars across the European Union concerned with the future of European Copyright law proposed redefining the role of the three-step test in Article 5(5) as follows:

In certain special cases comparable to those reflected by the exceptions and limitations provided for in paragraphs 1,2,3 and 4, the use of works or other subject-matter may also be excepted from the reproduction right provided for in Article 2 and/or the right of communication and making available to the public provided for in Article 3, provided that such use does not conflict with normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightsholder.[348]

This proposed article could be a reference point for identifying further cases of permissible unauthorized use that are special in the sense of the three-step test. This is a fair use provision based on the three-step test that offers flexibility to cope with changes due to the rapid development of the internet and digital tools serving to supplement the EU catalogue of specific exceptions. In addition, it would safeguard the freedom of expression and freedom of competition. This could be the bases of a European system that is consistent in being flexible without sacrificing legal certainty. The norm is semi-open because it allows courts to further develop the limitation infrastructure on the examples given in in Article 5(1-4) of the InfoSoc directive. This proposed redefinition of the three-step test could enhance legal certainty with the EU system by preventing courts from using the test to add

[347] Senftleben (n 177) 18–19.
[348] ibid 20.

constraints on statutory expectations that are precisely defined in national legislation. In that way users of copyrighted material could rely on the scope of respective national provisions.[349] In line with the InfoSoc directive, the catalogue of legitimate purposes that can justify an exception would remain closed and EU judges would thus not be entitled to identify new use privileges not explicitly found in the copyright statute unless a new European copyright legislation would be made. If new EU copyright legislation were to made it should take full advantage of the flexibility inherent to the three-step test. [350] The test could be used as a flexible balancing tool with the current catalogue of exceptions in Article 5 of the InfoSoc acting as examples of 'certain special cases'. Courts would then be entrusted with identifying comparable further cases of unauthorized uses that are permissible in light of the abstract criteria of "no conflict with a normal exploitation" and "no unreasonable prejudice to legitimate interests". This type of 'EU fair use doctrine' could possibly have a beneficial effect on the international harmonization of interpretation of the three-step test of the Berne Convention.[351]

6.2 Creative Commons and the Public Domain

What are 'the commons'? In the language of legal theory is a situation 'where no individual or entity is recognized under law as having the right to exclude others from access to or use of a resource, all persons have freedom to access it and use it for their own ends'. When it comes to material resources, public or private ownership will most often be necessary for the risk of overcrowding. Therefore, a social or legal rule must be in place for 'peaceful and productive enjoyment'. This is not the case with abstract objects such as ideational resources and that is where material and ideational objects differ. They can be simultaneously consumed and used by a potentially infinite number of people.[352] The 'internet information commons' can then be understood as to refer to an instance where:

> *'an individual, group or legal entity creates and makes available an informational object via the Internet in the understanding, either expressly or by implication, that*

[349] ibid.
[350] ibid 24–25.
[351] ibid 25.
[352] Cahir (n 59) 634.

non-owners are not under a legal duty to refrain from engaging in communicative or transformative acts with respect to that informational object'[353].

The Information Commons' embrace the decentralized communicative architecture of the internet and hold that advantage over commercial systems.[354] The most prominent American legal scholars on the 'Internet Informational Commons' are Lawrence Lessing, Yochai Benkler and James Boyce.[355] The most remarkable example of information commons incentives is the Creative Commons Organization. Founded in 2001 the Creative Commons are a technical and legal infrastructure that offers variations of free license creators can use. Artists can then choose if they are freely available for creative use but not for example commercial use a neutral platform to participate in a more-free creative online community.[356] There objectives go beyond the CC licenses driving various cooperation across the spectrum of open knowledge and free culture. CC licenses work is retained, reused, revised, remixed and redistributed in infinite ways.[357] Creators can refine the automatic 'all rights reserved' copyright and become licensors in a way they choose. The CC do not affect exceptions and limitations to copyright law such as fair use since they are not an instrument of legislative nature. There are three 'layers' to the CC licenses, legal code layer, the commons deed (human readable), and machine readable (for technology such as search engines). These layers give the concept practical functionality. Then there are seven different types of CC licenses creators can attribute to their work. (1) CC BY or attribution license lets others distribute, remix, tweak and build upon the work, even for commercial purposes as long as the creator of the original creation is credited. This license allows for a maximum dissemination and use of licensed materials and is the most accommodating of the CC licenses. (2) CC BY-SA or Attribution-ShareAlike license lets other remix, tweak, and build upon the work, even for commercial purposes as long as the creator is credited and the new creations are licensed under identical terms. That way the creator can help the digital commons grow by restricting the use to 'ShareAlike' that is inspired by the General Public License (GNU) that is used by many free and open source software projects.

[353] ibid 638.
[354] ibid 641.
[355] ibid 633.
[356] Lessing (n 70).
[357] Merkley (n 67).

Wikipedia uses this CC license and is the license recommended for materials that would benefit from new content being incorporated. (3) CC BY-ND or Attribution-NoDerivs license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole with credit to the creator. (4) CC BY-NC or Attribution-NonCommercial license lets others remix, tweak, and build upon the work non-commercially, and the new work must also acknowledge the creator and be non-commercial but do not have to license their derivative works on the same terms. (5) CC BY-NC-SA or Attribution-NonCommercial-ShareAlike license lets others remix, tweak, and build upon the work non-commercially, as long as the creator is credited and the new creation is licensed under the identical terms. (6) CC BY-NC-ND or Attribution-NonCommercial-NoDerivs license is the most restrictive of the six main licenses that only allows for downloads of the work and sharing among others when the creator is credited but they cannot be changed in any way or be used commercially. (7) lastly the CC provide tools that work as a 'all rights granted' to the public domain. By using those tools licensors can waive all rights and mark their work as being in the public domain forgoing their property rights completely.[358] By offering these user friendly licenses the Creative Commons have enabled creators to choose if they what to lift some or all of the restrictions of copyright and change the landscape of online content.

Other examples of progressive online licensing of copyrighted work is the EU funded Arrow Project (Accessible Registries of Rights Information and Orphan Works) that facilitates the licensing of the digitization of library collections for electronic clearance of orphan works.[359] Some models are more regressive and depend on the development and acceptance of 'licensing standards'. An example of this is the news industry's ACAP protocol (Automated Content Access Protocol) that builds on the concept that publishers should be allowed to

[358] 'About the Licenses' <https://creativecommons.org/licenses/> accessed 23 March 2016.

[359] Ben Sanderson, 'Electronic Clearance of Orphan Works Significantly Accelerates Mass Digitisation' <http://www.bl.uk/press-releases/2011/september/electronic-clearance-of-orphan-works-significantly-accelerates-mass-digitisation> accessed 4 January 2016.

control their content[360] and UltraViolet (operated by the Digital Entertainment Content Ecosystem) that delivers interoperable digital locks for home networks.[361]

In an ideal world every author would have to choose a license for their work upon creation, signaling to other users if and how the material can be used. That is not the case even though the creative commons are widespread they remain the exception to the automatic copyright. For the maximization of the social and cultural potential of the internet considerable would have to be made to international copyright policy with regards to copyright exceptions and limitations. When asked to comment on the Creative Commons licenses the vice president of the Motion Picture of Association of America said "you're talking about democratizing culture, which is not one of our interests, it really isn't my interest".[362]

7 Conclusion

Copyright exceptions and limitations in a global context are a fragmented field of law. When searching for a guiding principle in international, regional, and national laws many discrepancies have been found. Preferably there will be a clear guiding principle that explains every exception. A globally applicable and flexible understanding of the three step-step test of the Berne Convention is the seemingly best chance for nurturing transformative works on the internet and elsewhere without major legislative reform at the international level. The decentralized nature of the internet has made its astounding growth possible and thus made creativity more dynamic and something for everyone and the sharing of creativity without gatekeepers. Technology can undermine or promote the interests of various stakeholders making flexibility to interpret limitations and exceptions a crucial aspect of a healthy online marketplace. When it comes to exceptional uses in an online environment, detailed rules do not work for dynamic situations but they can work for static situations with identifiable fact patterns.[363] The solution to balancing interests could lie outside the law and courts and play a complementary role as legal intervention might not

[360] 'Frequently Asked Questions about ACAP' <http://the-acap.org/FAQs.php> accessed 4 March 2016.
[361] Patry (n 44) 242.
[362] ibid 13.
[363] ibid 224.

be wanted. Establishing 'best practices' for the solution of fair use cases could also be a promising way to go. Giuseppia Agostino suggests that parties directly affected in any given specific industry could develop those guidelines together.[364]

In a digital age the role of copyright in our access to and participation in a cultural dialogue has increased. Technological advantages are continuingly improving the potential of free and unrestrained access and disseminations of work while lowering costs of the production of meaning. The interests of the copyright holder and the public are mutually dependent and entirely compatible for that the copyright owner's rights are justified through public interest, not in spite of it.[365]

The fundamental differences of the common and civil law systems have been shortly explored. With the international three-step test that is binding on all parties of the Berne Convention and the transnational nature of the internet it is logical and practical to develop a harmonized interpretation of the test with regards to exceptional secondary uses in an online environment. Taking from the experiences of vast case law of the U.S. interpretation of the fair use doctrine is a step in the direction of developing a universal system for coherence of this aspect of copyright.

Furthermore, there are practical reasons for copyright holders to strive for a more coherent international copyright system. Whereas the copyright system is only partly harmonized, internationally licenses have to be negotiated for each country while the authors are losing income from countries where deals aren't made and the public is being deprived of a legal option to access content. The European Commission has commented that Europe lacks a unified market in the content sector and some find that global licensing will only be possible by legislative and treaty action through bold political decisions were right to restrict licenses to specific areas will not be reserved for authors.[366]

Furthering the public interest is said to be an important goal in all copyright systems. However, as creativity and economical development varies around the world the public

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[364] Giuseppia D'Agostino (n 225) 2.

[365] 'Carys J. Craig. "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright". The University of Toronto Law Journal 56.1 (2006): 75–114. Web' (n 267) 111.

[366] Patry (n 44) 186–188.

interest is not the same in all countries and to further that interest needs would have to be identified. That is often dismissed and assumed that the public interest is automatically best served by granting copyright.[367] Authors are a part of that public and have an interest to be able to copy from others in the creation of new works even though that may conflict with the interest of earlier authors. There are many stakeholders and their interests are not necessarily the same, e.g. "*book reviewers, parodists, satirists, libraries, archivists, preservationists, consumer electronic manufacturers, and internet service providers"* all claiming that they represent the public interest. When public interest uses are listed it is wise to offer a safety valve such as the one of the US fair use doctrine to make sure copyright does not stifle creativity.[368] The exclusive list of the InfoSoc directive might therefore not be easily applied to other fair uses even with the intention of balancing rights written in its preamble. The WCT declares that its purpose is to "maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information."[369] The metaphor of balance in law:

> *"presumes legislatures and judges objectively 'weighing' interests of those opposing forces and then coming to the correct result based on a determination of what is right and just"*[370]

We should measure the effect policies have on cultural products and aid the promotion of knowledge that is in the public's interest and that includes authors. The balance of interests of competing parties cannot be measured as they are only in or out of balance in relation to other things from an initial ideological bias.[371] The reality is that legislators generally pursue their own intellectual interests and those that are important to their constituents.[372] After positioning the digital era in context with the history of copyright, looking into the challenges copyright faces on the internet, taking a hard look at copyright's exceptions and limitations and how they can be fitted to different types of content the fact remains that

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[367] ibid 131.
[368] ibid 132.
[369] ibid 134.
[370] ibid 135.
[371] ibid 136.
[372] ibid 137.

courts are left with a hard task every time they are asked to interpret the fragmented legislative body of copyright exceptions and limitations.

8 References

'About the Licenses' <https://creativecommons.org/licenses/> accessed 23 March 2016

Andres, Luis; Zentner, Alejandro; Zentner, Joaquin., 'Measuring the Effect of Internet Adoption on Paper Consumption' <http://documents.worldbank.org/curated/en/2014/07/19760469/measuring-effect-internet-adoption-paper-consumption>

Arnold R and Rosati E, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10 Jnl of Intellectual Property Law & Pract 741

Barlow JP, 'The Economy of Ideas' [1994] *Wired* <http://www.wired.com/1994/03/economy-ideas/>

——, 'The Next Economy of Ideas' [2000] *Wired* <http://www.wired.com/2000/10/download/> accessed 3 February 2016

Beebe B, 'An Empirical Study of U.S Copyright Fair Use Opinions, 1978-2005' (2008) 156 University of Pennsylvania Law Review 549

Blomqvist J, *Primer on International Copyright and Relatied Rights* (Edward Elgar Publishing 2014)

Bratvold D, 'What Is Crowdsourcing?' <http://dailycrowdsource.com/training/crowdsourcing/what-is-crowdsourcing> accessed 23 March 2016

Burger P, 'Berne Convention: Its History and Its Key Role in the Future' (1988) 3 JL & Tech

C. Geiger and others, 'Declaration A Balanced Interpretation of The "Three-Step Test" In Copyright Law.' <https://www.jipitec.eu/issues/jipitec-1-2-2010/2621> accessed 29 April 2016

Cahir J, 'The Withering Away of Property: The Rise of the Internet Information Commons"' 2 Oxford Journal of Legal Studies 619

‘Carys J. Craig. “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright”. The University of Toronto Law Journal 56.1 (2006): 75–114. Web’

Cásarez NB, ‘Deconstructing the Fair Use Doctrine: The Cost of Personal and Workplace Copyring After Amercian Geophusical Union v. Texaco, Inc.’ (1996) 6 Fordham Intellectual Property, Media and Entertainment Law Journal

Committee on Legal Affairs, ‘Report on Enforcement of Intellectual Property Rights in the Internal Market (2009/2178(INI))’

‘Communication From the Commission to the European Parliament, The Council and the European Econmoic and Socail Committee’ <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf> accessed 4 May 2016

‘Compagnie Générale Des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), [1997] 2 FC 306’

‘Copyright and the Digital Economy (Discussion Paper 79) Discussion Paper by the Australian Law Reform Commission (ALRC) (2013)’,

‘Copyright Laws of the United States and Related Laws Contained in Tıtle 17 of the United States Code’ <http://www.copyright.gov/title17/circ92.pdf>

Cotter TF, ‘Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism 91.2 (2003): 323–392. Web...’ (2003) 91 California Law Review 323

European Commission, ‘Green Paper on the Potential of Culturanl and Creative Industries’

‘Frequently Asked Questions about ACAP’ <http://the-acap.org/FAQs.php> accessed 4 March 2016

Galateia K, ‘Illegal Downloading: Proposed Solutions from the EU Member States’ <file:///Users/johannaedwald/Downloads/papers-kapellakou_galateia_full.pdf>

Gervais D, ‘Electronic Rights Management and Digital Identifier Systems’ (1999) 4 The Journal of Electronic Publishing <http://quod.lib.umich.edu/j/jep/3336451.0004.303/--electronic-rights-management-and-digital-identifier-systems?rgn=main;view=fulltext;q1=daniel+gervais> accessed 14 March 2016

——, ‘Towards a New Core International Copyright Norm: The Reverse Three-Step Test’ (2005) 9 Marquette Intellectual Property Law Review

——, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11:4:841 Vanderbilt J. of Ent. and Tech Law 841

Ginsburg JC and Kernochan JM, ‘One Hundred and Two Years Later: The U.S. Joins the Berne Convention’ [1988] VLA J.L & Arts

Giuseppia D’Agostino, ‘Healing Fair Dealing - A Comparative Copyright Analysis of Canada’s Fair Dealing to UK Fair Dealing and US Fair Use’ (2008) 53 McGill LJ 309

Globe Business Media Group, ‘Victor Hugo - a Driving Force Behind the Creation of the Berne Convention on Copyright’ <http://www.iphalloffame.com/inductees/2006/Victor_Hugo.aspx> accessed 4 January 2016

‘Growers Review of Intellectual Property’ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf> accessed 4 March 2016

H. Braegelmann T, ‘English Translation: Metall Auf Metall (Kraftwerk, et Al. v. Moses Pelham, et Al.), Decision of the German Federal Supreme Court No. I ZR 112/06, Dated November 20, 2008’ (2009) 56 Journal of the Copyright Society 1017

Hargreaves I, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 22 March 2016

IFPI - Representing the Recording Industry Wordwide, ‘Global Music Report: Music Consumption Exploding Worldwide (State of the Industry Overview 2016)’ (IFPI 2106) <http://www.ifpi.org/downloads/GMR2016.pdf>

Instagram, INC., 'Terms of Use' <https://help.instagram.com/478745558852511> accessed 16 April 2016

Jarvik L, 'Copyright, Victor Hugo & the Berne Convention' <http://laurencejarvikonline.blogspot.dk/2007/02/copyright-victor-hugo-berne-convention.html> accessed 31 March 2016

Johnston R, 'Brian Bolland Takes on Erro and Wins' <http://www.bleedingcool.com/2010/05/20/brian-bolland-takes-on-erro-and-wins/>

Landolt PL, *Collective Management of Copyright and Related Rights* (Kluwer Law International 2006)

Lazic S, 'Erró: American Comics' <http://www.widewalls.ch/erro-exhibition-hilger-mana-contemporary/>

Lessing L, 'Laws That Choke Creativity' (Ted, ted.com, March 2007) <https://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity?language=en> accessed 13 January 2016

——, *Remix: Making Art and Commerce Thrive in the Hybrid Economy.* (Penguin 2008) <http://www.scribd.com/doc/47089238/Remix>

Lobenfeld C and Bowe M, 'Kanye West's The Life of Pablo: Exploring the Songs Behind Its Samples' <http://www.factmag.com/2016/02/14/kanye-west-samples-the-life-of-pablo/> accessed 20 April 2016

Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' <https://www.jipitec.eu/issues/jipitec-1-2-2010/2605/JIPITEC%202%20-%20Senftleben-Three%20Step%20Test.pdf> accessed 25 April 2016

'Martin Senftleben, Copyright, Limitations and the Three-Step-Test 226-27 (2004)'

Mayer-Schönberger V, 'Beyond Privacy, Beyond Rights—toward a "systems" Theory of Information Governance". California Law Review 98.6 (2010): 1853–1885. Web...' (2010) 6 98 California Law Review

Merkley R, ‘State of the Commons’ <https://stateof.creativecommons.org/2015/> accessed 4 June 2016

‘Nair, Meera. 2012. Canada and Israel: Fairness of Use. PIJIP Research Paper No. 2012-04 American University Washington College of Law, Washington, D.C.’

Okedui R, ‘Toward an International Fair Use Doctrine."’ (2000) 39 Colum. J. Transnat’l L 75

Östlund E, ‘Transforming European Copyright - Introducing an Exeption for Creative Transformative Works into EU Law’ <http://www.imk.uu.se/Portals/4/IMCseries/2014/3/IMCPaperSeries2014-3_%C3%96stlund.pdf> accessed 21 January 2016

Patrick R. Goold, ‘Why the U.K. Adaptation Right Is Superior to the U.S. Derivative Work Right’ (2014) 92 Neb. L. Rev. <http://digitalcommons.unl.edu/nlr/vol92/iss4/5> accessed 5 August 2016

Patry W, *How to Fix Copyright*, vol Electronic Reproduction (Oxford University Press 2011)

‘Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, WIPO, Geneva, at 1145 (1971) [Hereinafter Records of the Stockholm Conference].’

Rigamonti CP, ‘The Conceptual Transformation of Moral Rights’ (2007) 55 The American Journal of Comparative Law, American Society of Comparative Law 67

Root AS, ‘THE PRESENT SITUATION AS TO THE ORIGIN OF PRINTING”.’ (1910) 5 9

Rúv, ‘„Æ erfiðara að lifa af listinni“’, *Víðsjá* (18 March 2016) <http://ruv.is/frett/ae-erfidara-ad-lifa-af-listinni> accessed 19 March 2016

Sanderson B, ‘Electronic Clearance of Orphan Works Significantly Accelerates Mass Digitisation’ <http://www.bl.uk/press-releases/2011/september/electronic-clearance-of-orphan-works-significantly-accelerates-mass-digitisation> accessed 4 January 2016

‘Scales Dropped’ <http://www.economist.com/news/business/21696962-more-people-are-paying-stream-music-industry-still-wobbly-scales-dropped> accessed 18 April 2016

Senftleben M, ‘Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law. Methods and Perspectives in Intellectual Property’’

Stephey MJ, ‘Lawrence Lessig: Decriminalizing the Remix - TIME’ (*time.com*, 17 October 2008) <http://content.time.com/time/business/article/0,8599,1851241,00.html> accessed 6 March 2016

‘Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)’ <http://www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed 4 January 2016

‘The Staples Singers - This May Be the Last Time’ <http://b-sting.com/2010/06/07/the-staple-singers-this-may-be-the-last-time/> accessed 5 October 2016

Tushnet R, ‘Copy This Essay- How Fair Use Doctrine Harms Free Speech and How Copying Serves It”’ (2004) 114 The Yale Law Journal 535

Tussey D, *Complex Copyright: Mapping the Information Ecosystem* (Ashgate 2013)

‘United States - Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS160/R (June 15, 2000) [Hereinafter Panel Report]’

Wilkening M, ‘How Allen Klein Made the Rolling Stones Millions From “Bitter Sweet Symphony” - Exclusive Excerpt’ <http://ultimateclassicrock.com/rolling-stones-bitter-sweet-symphony/> accessed 5 October 2016

Willis B, ‘The Arguments For and Against the TRIPS Agreement’ <http://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/> accessed 4 February 2016

World Intellectual Organization, ‘Contracting Parties, Berne Convention’ <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 4 January 2016

World Trade Organization, *A Handbook on the WTO TRIPS Agreement* (Cambridge University Press 2012) <https://www.wto.org/english/res_e/publications_e/handbook_wtotripsag12_e.pdf> accessed 4 January 2016