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The Implications of a Human Rights Compliant Protection of
'Borrowing' *Political Protest Art* for European Copyright Law and
its Enforcement

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Summary

This thesis explores the relationship between 'borrowing' *political protest art* and copyright from a human rights perspective. Analysing and applying the pan-European human rights instruments as well as the general principles set out by the European Courts in their related, authoritative, interpreting case-law, the thesis establishes the protection granted to 'borrowing' *political protest art* under European human rights law and derives the implications for European Copyright Law and its enforcement therefrom.

Starting with a general introduction to the concept of 'borrowing' *political protest art*, the European Union's harmonising regulatory framework's notion of copyright and to the potential conflict between 'borrowing' *political protest art* and copyright, the current state of European human rights law is assessed and applied to the relation between the artist and the copyright holder, before the human rights compliant protection of 'borrowing' *political protest art* and its implications for European Copyright Law and its enforcement are presented.

Considering the uncertainties revolving around the definitions of art and *protest art* as well as the unclear situation of the relation between freedom of (artistic) expression and copyright under European human rights law, it is however particularly to emphasise that the provision of generally valid answers to the questions of 'what a human rights compliant protection of 'borrowing' *political protest art* is' and 'which implications such a protection has for European Copyright Law and its enforcement' cannot, should not and will not be claimed since any such claim would be presumptuous. The thesis merely examines (i) what a human rights compliant protection of 'borrowing' *political protest art* would be, if 'borrowing' *political protest art* was defined in a particular way, (ii) what such a human rights protection would require and (iii) which implications this protection would have for European Copyright Law and its enforcement.

The conclusions of the thesis eventually demonstrate that, while various opinions could legitimately be held and as many approaches be taken, there is still some room and to a certain degree also a need for reconsideration of European Copyright Law and its enforcement. For this reason, some suggestions on the issue of how the European copyright framework as well as its enforcement could be made "a bit more compliant" with the current state of human rights law - at least until the Courts deliver their final ruling on the interface between freedom of (artistic) expression and copyright - round off the thesis at its very end.

Preface

Dear Reader,

Art and especially *protest art* attracted me since I was a boy. The various forms and masterpieces, the history, the mystery, its philosophical background and underpinning, the complexity and multi-dimensional nature, its characteristic to break with traditional regularities and most of all the hidden messages cast their spell over me from the very first moment and never let go ever since.

Influenced by this fascination, the idea for this thesis was born. The European Courts' still quite recent case law on the interface between freedom of expression and copyright, which revived the scholarly interest in the relation between those rights and initiated a currently ongoing debate, made it possible to combine my interest in art and *political protest art* with human rights and intellectual property law. Inspired by *Farida Shaheed's* report on the right to freedom of artistic expression and creativity, in which she indicated that copyright could be used as a limitation on creativity and expression, *Dirk Voorhoof's* article on the implications of freedom of expression for European copyright law and additionally driven by my own motivation to promote freedom of the arts and art in its entirety as - as Picasso once put it - "*the lie that enables us to realise the truth*", I wanted to examine what a human rights compliant protection of 'borrowing' *political protest art* is, how *protest art* interacts with copyright and which implications such a human rights compliant protection of 'borrowing' *political protest art* would or should have for European Copyright Law and its enforcement.

But, before leaving you to my assessment of these rather interesting questions, I want to express my gratitude to all those who helped to finalise this project of (seemingly) ever increasing scope in one way or another. For this reason, I wish to thank my supervisor, Aurelija Lukoseviciene, for her guidance, her assistance, her patience and especially for encouraging me to stick to, develop and pursue this topic and I am particularly grateful to my family for their always loving support, their help and their unshakeable belief in me. Thank you so much!

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Abbreviations

Ab.	About
AG	Aktiengesellschaft (Stock Company)
App.	Application
Art.	Article/s
Av. at	Available at
BBC	British Broadcasting Corporation
BeckOK	Beck-Online Kommentar (Beck-online commentary)
BVerfGE	Bundesverfassungsgerichtsentscheidung (Decision of the German Federal Constitutional Court)
CESCR	Committee on Economic, Social and Cultural Rights
Cf.	Compare
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CVBA	Coöperatieve vennootschap met beperkte aansprakelijkheid (Company with limited liability)
Doc.	Document
E.g.	Exemplia gratia
EC	European Community
ECB	European Central Bank
ECFR	European Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice (cf.: CJEU)
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EMRK	Europäische Menschenrechtskonvention (European Convention for Human Rights)
EU	European Union
EUR	Euro
EvBl	Evidenzblatt (Evidence sheet)
GG	Grundgesetz (German Basic Law)
GmbH	Gesellschaft mit beschränkter Haftung (Private limited company)
HR	Human Rights

HRC	Human Rights Committee
Inc.	Incorporation/ Incorporated
InfoMedienR	Informations- und Medien Recht (Information and media law)
KG	Kapitalgesellschaft (Capital company)
KSVG	Künstlersozialversicherungsgesetz (Artist's Social Security Act)
Ltd.	Limited
MoMa	Museum of Modern Art
No.	Number
Nos.	Numbers
NV	Naamloze vennootschap (Translated: "Nameless venture"; Belgian form of corporation)
ODIHR	Office for Democratic Institutions and Human Rights
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
P.	Page
Para.	Paragraph
Paras.	Paragraphs
Pp.	Pages
SA	Societe Anonyme
SAU	Sociedad Anonima Unipersonal (Single shareholder corporation)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
V.	Versus
Vol.	Volume
VZW	Vereniging zonder winstoogmerk ('not-for-profit' association)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1. Introduction

“What do you think an artist is? An imbecile who only has eyes, if he is a painter, or ears if he is a musician, or a lyre in every chamber of his heart if he is a poet, or even, if he is a boxer, just his muscles? Far from it: at the same time he is also a political being, constantly aware of the heart-breaking, passionate, or delightful things that happen in the world, shaping himself completely in their image. How could it be possible to feel no interest in other people, and with a cool indifference to detach yourself from the very life which they bring to you so abundantly? No, painting is not done to decorate apartments. It is an instrument of war.”¹ - Pablo Picasso

1.1 General Background

While it is difficult to define the historical origins and beginnings of *protest art* since too many variations of the concept can be found throughout history, it can be observed that modern times and especially the last thirty years recorded a steady increase in the creation and dissemination of *protest art*. Facilitated by technological progress, globalisation, the Internet and Social Media and fueled by a worldwide raise in awareness about human rights and political as well as social justice, more and more artists adopted and used this trend of art as an instrument to express antagonistic views, as a means of non-violent struggle and as a tool to initiate, stimulate, and heat up debates. In line with *Picasso's* idea of art as an instrument of war, movements like Otpor² or the political opposition in the Arab Spring countries³, groups like Pussy Riot⁴ or the Guerilla Girls⁵, as well as individuals like Ai Weiwei⁶, Hak-Chul Shin⁷, Banksy⁸ or Petr Pavlensky⁹ used or use their art to convey a particular message of protest in their respective struggle against dictators, totalitarianism, oppression, injustice, concrete human rights violations or mere political and societal deficiencies. However, the multiplied use of *protest art* and

¹ *Picasso Quote*, <http://www.goodreads.com/quotes/335037-what-do-you-think-an-artist-is-an-imbecile-who> (Date:16.02.2016);

² For further information ab. Otpor see: *Popovic, Srdja/ Miller, Matthew*, Blueprint for Revolution, How to use rice pudding, Lego men and other non-violent techniques to galvanize communities, overthrow dictators or simply change the world, 2015;

³ Cf.: *Bouaissa, Malikka*, The Arab Spring Art Revolution, available at: <http://www.alartemag.be/en/en-art/the-arab-street-art-revolution/> (Date: 25.04.2016);

⁴ For further information about Pussy Riot, their work and impact see: (1) *The Huffington Post* on 'Pussy Riot Protest', available at: <http://www.huffingtonpost.com/news/pussy-riot-protest/> (Visited on 26.03.2016); (2) *Samoutsevitch, Katia*, 'Pussy Riot is political art', available at: <https://www.amnesty.org/en/latest/campaigns/2016/03/pussy-riot-is-political-art/> (Visited on 26.03.2016); or Pussy Riot's official website: <http://pussyriotthemovement.com> (Visited on 26.03.2016);

⁵ For further information ab. the Guerilla Girls see: <http://www.guerrillagirls.com/#open> (Visited on 26.03.2016);

⁶ For further information ab. Ai Weiwei see: (1) *Sierzputowski, Kate*, Ai Weiwei Wraps the Columns of Berlin's Konzerthaus with 14,000 Salvaged Life Vests, available at: <http://www.thiscolossal.com/2016/02/ai-weiwei-konzerthaus-refugee-life-vests/> (Visited on 26.03.2016); (2) Ai Weiwei's official website: <http://aiweiwei.com> (Visited on 26.03.2016);

⁷ For further information ab. Hak-Chul Shin see: (1) United Nations, *Human Rights Committee*, Hak-Chul Shin v. Republic of Korea, Communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000 (2004); or (2) Hak-Chul Shin's official website: http://www.hakgojae.com/page/2-1-view.php?artist_num=25 (Visited on 26.03.2016);

⁸ For further information ab. Banksy see: (1) *Ellsworth-Jones, Will*, The Story Behind Banksy, On his way to becoming an international icon, the subversive and secretive street artist turned the art world upside-down, available at: <http://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/?no-ist> (Visited on 26.03.2016); (2) *BBC News Channel*, Council orders Banksy art removal, av. at: http://news.bbc.co.uk/2/hi/uk_news/england/london/7688251.stm (Visited on 26.03.2016); or (3) Banksy's official website: <http://banksy.co.uk/out.asp> (Visited on 26.03.2016);

⁹ For further information ab. Petr Pavlensky see: (1) *Gessen, Masha*, The Protest Artists Who Stumps Putin, available at: <http://www.newyorker.com/news/news-desk/the-protest-artist-who-stumps-putin> (Visited on 26.03.2016); or (2) *Nechepurenko, Ivan*, How Russia's 'most controversial artist' persuaded his interrogator to change sides, available at: <http://www.theguardian.com/world/2015/jul/28/petr-pavlensky-artist-scrotum-red-square-interrogator> (Date: 26.03.2016);

the artist's ambition to convey the message in the most catchy, concise, popular, and memorable manner increased the likelihood of copyright infringing uses¹⁰ and, thus, the probability of conflicts between 'borrowing' *protest art* and copyright, so that an engagement with and an analysis of their relation are urgently required.

Moreover, the interface between the underlying rights to freedom of expression and intellectual property protection kept the European and national courts on tenterhooks over the last years. Case law like *Plesner v Louis Vuitton Mallatier SA*¹¹, *Ashby Donald and Others v France*¹², *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*¹³ and *Deckmyn v Vandersteen*¹⁴ brought a new dimension to the relation between copyright and freedom of expression since freedom of expression was found to function as a potential restriction to or rather as an external constraint on the scope of copyright protection and its enforcement,¹⁵ which revived the scholarly interest in the rights' relation and their respective reciprocal impact.

Since, thus, due to the rising probability of conflict, a need to determine the relation between 'borrowing' *political protest art* and copyright exists, since, simultaneously, an enormous scholarly interest in the intersection between the rights to freedom of (artistic) expression and copyright protection is to observe and since both relations are additionally inherently interrelated, this thesis has regard to these three issues in the following. In doing so, the thesis explores how the human rights of the relevant actors interrelate, it examines and establishes what a human rights compliant protection of 'borrowing' *political protest art* is and requires, and it demonstrates by way of conclusion which implications such a human rights compliant protection would or should have for European copyright law and its enforcement.

1.2 Research Questions

When addressing these issues, the thesis seeks to eventually provide an answer to the main research question, which asks the following: "*What are the implications of a human rights compliant protection of 'borrowing' political protest art in situations of conflict with copyright for European copyright law and its enforcement?*"

¹⁰ Encompass and include accidental, unintentional as well as intentional uses of proprietary contents in *protest art*;

¹¹ District Court of The Hague, *Nadja Plesner Joensen v Louis Vuitton Mallatier SA*, Case Number 389526/KGZA11-294, Judgment of 4th May 2011;

¹² ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013;

¹³ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013;

¹⁴ CJEU, Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België*, [2014], Judgment of 03.09.2014;

¹⁵ Since the ECtHR found in its *Ashby Donald and Others v France* judgment (paras.34,35) and in its *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden* decision (p.10, The Law, A) that copyright enforcement constitutes an interference with freedom of expression, which would entail a violation of Art.10 of the European Convention on Human Rights, if the interference was not justified by means of Art.10 (2) ECHR, it is plain that freedom of expression is to observe and to comply with in the pursuit to protect and enforce copyright. If one thus turned the relation around, one can hold that freedom of expression became an important restriction to or rather an important external constraint on copyright and its enforcement, which needs also to be considered in terms of the regulations in place and, thus in particular, concerning EU's copyright law framework.

Since, however, this question is still quite vague and since its various aspects need to be examined and assessed in detail before an answer to the question can finally be given, I had to divide this research question into further subquestions, which were as follows: (1) Do *political protest art* and copyright conflict with each other and, if so, how do they conflict? (2) Can artists claim particular human rights on the basis of *political protest art* expressions and, if so, under which conditions? (3) Could an exception to copyright for the purposes of *political protest art* be anchored in the European Union's copyright framework in accordance with the copyright holder's human rights and, if so, under which conditions? (4) How do the protest artist's rights to freedom of expression as well as freedom of the arts and the copyright holder's rights to intellectual property protection as well as peaceful enjoyment of his possessions interrelate according to the European Courts' case law? (5) Is the EU's harmonising copyright law framework proportionate and compliant with the current relation between the rights? (6) What is a human rights compliant protection of 'borrowing' *political protest art* and what does it require? (7) And, finally, what are the implications of such a human rights compliant protection of 'borrowing' *political protest art* for European copyright law and its enforcement?

While it is plain that each of these subquestions needed again to be divided into several smaller questions and that even each of these smaller questions could independently fill whole master theses, I nonetheless decided to attempt to examine and answer them all - at least in general terms - since many aspects of this topic were not researched or explored yet and since, in my opinion, only the provision of the full or bigger picture helps to understand the complexity of the relations between 'borrowing' *political protest art* and copyright, between the human rights affected and between these interrelated relations themselves.

1.3 Objective and Purpose

In investigating these questions, the thesis pursues the objective of raising awareness that there could be aspects of free expression, which could enjoy protection under human rights law and would therefore necessitate the anchorage of a permitting limitation on copyright, but which were either not considered as being protectable, or merely missed by the EU when the exhaustive catalogue of limitations was enshrined in Art.5 of Directive 2001/29/EC.

In line with this objective, the thesis shall further serve the purpose of strengthening free expression in general and *political protest art* in particular by clarifying the current state of the law, by adding a new aspect to the discussion on the interface between the rights and by drawing conclusions not only concerning the human rights protection of 'borrowing' *political protest art*, but also regarding the resulting implications for copyright law and its enforcement.

1.4 Method and Materials

In the pursuit to answer the research questions indicated above, I decided in general to conduct secondary research and to apply a classic legal analytical approach since the topic required, firstly, the

evaluation of the current legal state of the relations between 'borrowing' *political protest art* and copyright, on the one hand, and the rights to free (artistic) expression and intellectual property protection, on the other, as well as, secondly, the application of the law throughout the thesis to allow conclusions regarding a human rights compliant protection of 'borrowing' *political protest art* and concerning the protection's implications for European copyright law and its enforcement.

Since the topic thus necessitated to stay as close as possible to the law, the research was mainly based on regional European legal instruments as well as the authoritatively interpreting case law of the European Court of Human Rights and the Court of Justice of the European Union. Nonetheless, related research reports, handbooks, fact sheets, commentaries, books, relevant articles of leading scholars, case law-analysing textbooks as well as literature on the respective legal, philosophical, economic or social justification of the rights were used to establish the current state of the law and to display the dominating views. Databases like HUDOC¹⁶ and Beck-online¹⁷, Lund University library's subscription system "LUBsearch"¹⁸ as well as Internet webpages like WIPO's official webpage¹⁹ were additionally accessed and served to gather the relevant information.

It should however be mentioned that I had to deviate from this analytical approach in Chapter 2.1 since the concept of *political protest art* is not defined in an operational manner. The literature, that I reviewed in this regard, appeared, on the one hand, to deliberately uphold the inclusiveness of an open and undefined concept of *protest art* and, on the other, to avoid a definition due to the uncertainties that derive from the potential indefinability of art, from the problematic demarcation between protest and *protest art* including the question of where protest ends and art starts, and from the immense range of variations and subtrends of the concept. To circumvent this lack of a definition in the literature reviewed and to provide an operational concept that can be scrutinised in the following, I therefore derived the concept for the purposes of this thesis myself, whereby I attempted to define the concept under due consideration of the literature's use of the term '*protest art*'. It is here however to emphasise that I do not claim any authority and that deviating views could clearly be held.

1.5 Delimitations

Furthermore, although the relation between *political protest art* and intellectual property is extremely interesting and worth exploring in whole, some limitations had to be made.

In this respect, it is primarily to note that topic and research question already narrowed the subject matter of this thesis. The thesis is therefore limited to the examination of the relation between 'borrowing' *political protest art* and copyright, which means that, firstly, other forms of expression as well as other forms of intellectual property were excluded from the thesis' scope and, secondly, that

¹⁶ HUDOC database: <http://hudoc.echr.coe.int> (Visited on 27.04.2016);

¹⁷ Beck-online database: <https://beck-online-beck-de.ludwig.lub.lu.se/Home> (Visited on 27.04.2016);

¹⁸ LUBsearch is part of the Lund University Library's subscription system;

¹⁹ World Intellectual Property Organization website: <http://www.wipo.int/portal/en/index.html> (Visited on 27.04.2016);

the thesis' assessment is restricted to those situations of conflict, in which *political protest art* 'borrows' or uses proprietary contents without authorisation and in which the copyright holder asserts and enforces his rights. In this context, the author chose to limit the thesis to *protest art's* political dimension since (a) only in terms of an expression reaching the level of protection afforded to political expression and debate, a distinct outcome (compared to the one in *Ashby Donald and Others v France*²⁰ and *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*²¹) could be expected, (b) since the author is of the opinion that free political debate should be protected in accordance with its importance as "*the very core of the concept of a democratic society*"²², which should, in his opinion, at least entail the consideration of the possibility that other rights, including copyright protection, could be trumped and (c) since the author has also a personal interest in and a preference for *political protest art* himself.

Besides these demarcations, also further delimitations were made. In this regard, I decided initially that the thesis' focus shall be on the regional European sphere only (1) since the ECtHR's recent case law caused a currently still ongoing debate about the intersection and interrelation of free expression and copyright in Europe, (2) since the European Human Rights regime appeared to me as being the most comprehensive and fruitful one in this respect and (3) since the thesis seeks to elaborate upon the implications of a human rights compliant protection of *political protest art* for European copyright law, which in my opinion necessitated the restriction of the examination to regional law. Moreover, while other rights are clearly also affected in the relation between the 'borrowing' protest artist and the copyright holder, the thesis is due to its shortage also limited with regard to the rights assessed and focuses only on the protest artist's rights to freedom of expression²³, free artistic expression²⁴ and freedom of the arts²⁵ as well as the copyright holder's rights to intellectual property protection²⁶ and peaceful enjoyment of his possessions²⁷. In addition to that, further smaller limitations had to be made in the text due to the shortage and/or the focus of the thesis.

1.6 Structure

Concerning the structure, it is to note that the thesis was designed and written with the intention to eventually answer the main research question by way of conclusion. Each and every chapter should therefore contribute and serve this purpose.

For this reason, Chapter 2 is initially devoted to providing a basic understanding of the concept of *political protest art*, of European copyright law and its enforcement and to shedding light on, defining and illustrating the situation, in which the concepts of *political protest art* and copyright con-

²⁰ ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013;

²¹ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013;

²² ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para. 42;

²³ Art. 11 of the Charter of Fundamental Rights of the European Union; Art. 10 of the European Convention of Human Rights;

²⁴ Art. 10 of the European Convention of Human Rights;

²⁵ Art. 13 of the Charter of Fundamental Rights of the European Union;

²⁶ Article 17 (2) of the Charter of Fundamental Rights of the European Union;

²⁷ Article 1 of the First Protocol to the European Convention of Human Rights;

flict with each other.

Building on Chapter 2's foundation, Chapter 3 then points out the law and the authoritative interpretation thereof, before it applies the established legal framework to the relation between the protest artist and the copyright holder in the form of an applied legal framework. In this respect, the chapter firstly, analyses the current state of protection of the protest artist under human rights law, goes on to address the question of whether a limitation on copyright could lawfully be anchored under the copyright holder's human rights and proceeds to display the interface between the human rights to freedom of expression and copyright protection by means of the European Courts' case law on the intersection, before it concludes with some critical observations in this regard.

On the basis of Chapter 3, Chapter 4 then addresses the questions of what a human rights compliant protection of *political protest art* is, what it requires and whether the current European copyright framework complies with the standard of protection afforded to 'borrowing' *political protest art* under human rights law.

And finally, footing on the findings of each respective precedent chapter, Chapter 5 eventually concludes with answering the main research question and making suggestions for the implementation and anchorage of the thesis' findings in European copyright law.

2. Background - The Clarification of the Concepts and The Display of Potential Conflict

To start with, considering that this thesis elaborates upon the concepts of 'borrowing' *political protest art* and *copyright* as well as their interrelation in the human rights sphere, it may be necessary and useful to provide a basic understanding of the concepts and their relation first. For this reason, this chapter clarifies the concepts, before it subsequently points out how they conflict with each other and how *copyright* constitutes a limitation on 'borrowing' *political protest art* respectively.

2.1 The Concept of 'Borrowing' *Political Protest Art*

Since this chapter is thus intended to provide a basic understanding of the concept of 'borrowing' *political protest art*, the concept must be determined and clarified. When defining the concept, primarily five particular aspects, (1) the concept of art, (2) the question of what *protest art* is, (3) its determining characteristics, (4) the question of when *protest art* becomes political and (5) the questions of when and why *protest art* 'borrows', need to be assessed. For this reason, this chapter is devoted to the examination and determination of these issues.

It should however be reiterated again that I derived the concept of 'borrowing' *political protest art* for the purposes of this thesis myself to circumvent the lack of a definition in the literature reviewed²⁸ and to provide an operational concept that can be scrutinised in the following. While duely considering the relevant contents of the literature reviewed in my attempt to provide a workable concept, it is to adhere that I approximated the concept for the purposes of this thesis only and that diverging views may be held in this regard.

2.1.1 The Question of What is Art, Art's Indefinability and the Legal Concept of Art

At first, since *protest art*, as its name already implies, constitutes a subcategory or trend of art and since this thesis focuses on the concept's legal effects, the underlying notion of *art*, its definition and the legal conceptualisation of art should primarily be assessed and displayed. The examination of these aspects is considered necessary in this context to demonstrate the uncertainties revolving around the determination of *protest art's* underlying concept of art and, thus, of *protest art* itself, and to justify the thesis' subsequently self-made definition of *protest art*.²⁹

Going *in medias res* therefore, one initially realises that, when legally addressing art, three particular questions are of particular importance, namely (1) 'What is art?', (2) 'Can art be defined?'

²⁸ The 'literature reviewed' included: Art glossaries (like: MoMa, Glossary of Art Terms; Tate, Glossary of Art Terms, and other glossaries;), various art (history) books, related books (like *Popovic, Srdja/ Miller, Matthew*, *Blueprint for Revolution*, *How to use rice pudding*, *Lego men and other non-violent techniques to galvanize communities, overthrow dictators or simply change the world*, 2015; *Mesch, Claudia*, *Art and Politics, A Small History of Art For Social Change Since 1945*, 2014; or *Jonson, Lena*, *Art and Protest in Putin's Russia*, 2015;), articles, etc..., but none of them provided or included a definition of *protest art*. The only definition of the concept, that could be found, was an entry on Wikipedia (av. at: https://en.wikipedia.org/wiki/Protest_art), which did however not appear as constituting a suitable source for a master thesis.

²⁹ The findings of Chapter 2.1.1 will thus be particularly relevant in regard to Chapter 2.1.2 as well as Chapter 2.1.3;

and (3) 'How is art legally conceptualised and made operational in the legal sphere respectively?'. For this reason, this subchapter elaborates upon these questions in the aforementioned chronological order.

Commencing with the question of what art is, it is to adhere that everyone knows and utilises the term 'art', that everyone anticipates various emotions, creations, worktypes and experiences with it, but that it is hard to explain art in depth and its entirety at the same time, let alone to define it encompassingly. When consulting a dictionary in this respect, one will generate answers stating that 'art' is (1) "[t]he expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power"³⁰; that 'art' is (2) "[a] skill at doing a specific thing, [which was] typically [...] acquired through practice"³¹; that 'art' is a (3) "[c]reative activity resulting in the production of paintings, drawings, or sculpture"³²; or that 'art' must be understood as (4) the "[w]orks produced by human creative skill and imagination"³³. One will also be told that 'the arts' present (5) "[t]he various branches of creative activity, such as painting, music, literature, and dance."³⁴ But are these periphrases not still to regard as being vague and unclear? Do they not inherently differ in terms of their inclusion or exclusion of particular aspects? Is our understanding of art not dependent on whether we approach art either by picking one of these periphrases, or all of them, or whether we go even beyond that by seeing art as an open, all-including concept? And would it not be more appropriate to infer that, while a common understanding of art is indicated, the determination of art depends on the answer to the questions of whether art can be defined, how it is defined and what the concept shall include or exclude according to the definition adopted?

If one therefore turned towards the questions of whether art can be defined, how it is defined and what the concept of art includes or excludes, one would primarily realise that these questions occupied specialists and engaged whole branches of science in the past. Art scholars, philosophers, sociologists, anthropologists, representatives of particular art movements, artists themselves and many others participated in the debate and contributed with their own interpretations and definitions, which beguiled *Stein* into stating that "[t]he number and variety of alternative definitions of art is bewildering."³⁵ While it is out of the scope of this thesis to present all the definitions, that were provided in the past, it is to note that, whereas, for example, early traditional definitions characterised artworks by means of representational, expressive, and/ or formal properties³⁶ as for instance *Plato's* assumption

³⁰ *OxfordDictionaries.com* on "art": av. at: <http://www.oxforddictionaries.com/definition/english/art> (Visited on 03.03.2016)

³¹ *OxfordDictionaries.com* on "art": av. at: <http://www.oxforddictionaries.com/definition/english/art> (Visited on 03.03.2016)

³² *OxfordDictionaries.com* on "art": av. at: <http://www.oxforddictionaries.com/definition/english/art> (Visited on 03.03.2016)

³³ *OxfordDictionaries.com* on "art": av. at: <http://www.oxforddictionaries.com/definition/english/art> (Visited on 03.03.2016)

³⁴ *OxfordDictionaries.com* on "art": av. at: <http://www.oxforddictionaries.com/definition/english/art> (Visited on 03.03.2016)

³⁵ *Stein, George P.*, On the definition of Art: Two Views: On Its Indefinability, p.102;

³⁶ *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 2, available at: <http://plato.stanford.edu/entries/art-definition/> (Date: 7.5.'16);

that *the arts are representational or mimetic* (also translated as 'imitative')³⁷ or *Kant's definition that art is "[...] a kind of representation that is purposive in itself and, though without an end, nevertheless promotes the cultivation of the mental powers for sociable communication [...]"*³⁸, today's contemporary definitions, which can be divided into, on the one hand, modern, conventionalist and, on the other hand, less conventionalist definitions, differ significantly in terms of their core and focus from definitions provided before. Whereas the modern, conventionalist definitions, which again can be distinguished in institutional³⁹, historical⁴⁰ and functional⁴¹ definitions, focalise "[...] *on art's institutional features, emphasizing the way art changes over time, [the] modern works that appear to break radically with all traditional art, and the relational properties of artworks that depend on works' relations to art history, art genres, etc. [...]"*⁴², the less conventionalist definitions make "[...] *use of a broader, more traditional concept of aesthetic properties that includes more than art-relational ones, and [concentrates] on art's pan-cultural and trans-historical characteristics.*"⁴³

Nonetheless, albeit hundreds and hundreds of definitions of art were provided over the course of time and while - also today - definitions are still accepted and applied, it was purported that all of these definitions, besides featuring particular strengths and weaknesses, suffer from a common defect, which lies, as *Stein* summarized it, "[...] *in the traditional search for a definition of art where no definition is possible.*"⁴⁴ Scholars heatedly discussed whether the concept of art is indefinable in its entirety⁴⁵ whereby it was even claimed that exactly that is the case since (1) the technical and technological progress, the artists' strife for uniqueness and their frequent breach with traditional regularities changed, developed and reinvented art over and over again,⁴⁶ (2) since, consequently, many of the

³⁷ *Plato*, *The Republic*, in *Cooper, John M./ Hutchinson, D.S.*, *Plato, Complete Works*, 1997; See also: *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Chapter 2, available at: <http://plato.stanford.edu/entries/art-definition/> (Date: 7.5.'16);

³⁸ *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Chapter 2, available at: <http://plato.stanford.edu/entries/art-definition/> (Date: 7.5.'16);

³⁹ Institutional, conventionalist definitions typically require an expression to be an artifact of a kind that is created by an artist to be presented to an artworld public to constitute a work of art. For further informations on institutional definitions see: *Danto, Arthur C.*, *The Transfiguration of the Commonplace*, 1983; *Dickie, George*, *Art and the Aesthetic: An Institutional Analysis*, 1974; *Dickie, George*, *The Art Circle, A Theory of Art*, 1984; and *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Chapter 4.2, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴⁰ Historical, conventionalist definitions demand that an expression must stand in an art-historical relation to some set of earlier artworks to constitute a work of art. For further informations on historical definitions see: *Levinson, Jerrold*, *Music, Art, and Metaphysics*, 1990; or *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Chapter 4.3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴¹ Functional, conventionalist definitions necessitate that the expression shows some function or intended function to constitute a work of art, whereby only aesthetic definitions, which connect art in essence with the aesthetic, are considered. For further informations on functional definitions see: *Beardsley, Monroe*, *The Aesthetic Point of View*, 1982; or *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Chapter 4.4, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴² *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Introduction, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴³ *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Introduction, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴⁴ *Stein, George P.*, *On the definition of Art: Two Views: On Its Indefinability*, p.102;

⁴⁵ Cf.: *Stanford Encyclopedia of Philosophy*, *The Definition of Art*, Chapter 3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴⁶ Cf. e.g.: *Benjamin, Walter*, *The Work of Art in the Age of Mechanical Reproduction*, 1936; (*including *Paul Valeries* quote: "*We must expect great innovations to transform the entire technique of the arts, thereby affecting artistic invention itself and perhaps even bringing about an amazing change in our very notion of art.*" - *La conquete de l'ubiquite*, 1928);

definitions could not adjust because of their restrictive, inflexible or simply linguistically limited character, and (3) since, additionally, shortcomings of the pursuit to establish a definition of art were philosophically detected⁴⁷. The main philosophical arguments, that were invoked in favor of an indefinability of art, included, besides arguments revolving around the value and usefulness of a definition or arguments stating that, as a matter of historical fact, there is no stable definiendum for a definition of art,⁴⁸ the '*argument from fatigue and discouragement*', the '*argument from unspeakableness*', the '*argument from circularity*', the '*argument from rapture*' and the '*argument from openness*', which together formed a valid basis for the assumption of art's indefinability.⁴⁹ However, since *Stein* and other observers⁵⁰ highlighted that none of these arguments is set in stone, but that they could even be refutable, one had to infer that, as *Stein* put it, the defining "*efforts may be misdirected, but [that] they are not inherently wasted.*"⁵¹

However, since the scepticism about the possibility to find a definition, that encompasses art in its entirety, and about the value and usefulness of such a definition respectively formed and still form an intrinsic part of the discussion revolving around the definition of art, it is to observe that at least "[...] *uneasiness about the definitional project persists.*"⁵² Since it could further be expected that also our current contemporary definitions of art, which were already heavily criticised,⁵³ will be disproven, rendered obsolete or be considered as being too restrictive in the short or long term due to art's reinventive character or the philosophical shortcomings of the pursuit to establish a definition, it is to adhere that also these definitions can only serve as momentary indicators and that, therefore, neither the question of 'What art is', nor the question of 'Whether art can be defined' can be answered with certainty. Due to this uncertainty, it can also not finally be determined what the concept of art includes or excludes and what constitutes art or non-art respectively, although indicating definitions exist.

Since the concept of *art* thus suffers from its intricacy as well as the resulting uncertainty and difficulties in terms of its definition, it is eventually to examine how art was legally conceptualised and made operational in the legal sphere. In this respect, it is initially to observe that, in European democratic societies, pluralism, the state's obligation of neutrality resulting thereof as well as the need to demarcate art from non-art confront each other. While it is considered to be prohibited or unjust to achieve legal operability to the detriment of neutrality or rather at the expenses of a pluralistic and

⁴⁷ Cf.: *Stein, George P.*, On the definition of Art: Two Views: On Its Indefinability, pp.102-105; *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴⁸ Cf.: *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁴⁹ Due to the shortage of this thesis, a detailed presentation of the arguments is here not possible. For further information see: *Stein, George P.*, On the definition of Art: Two Views: On Its Indefinability, pp.102-105; and *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁵⁰ *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁵¹ *Stein, George P.*, On the definition of Art: Two Views: On Its Indefinability, p.105;

⁵² *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 3, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

⁵³ *Stanford Encyclopedia of Philosophy*, The Definition of Art, Chapter 4 and 5, av. at: <http://plato.stanford.edu/entries/art-definition/> (7.5.16);

inclusive understanding of the concept of *art*, it is simultaneously forbidden to waste public money and to grant rights or benefits to persons who are not entitled to. Neutrality and tolerance towards a pluralistic understanding of art, which would in principle demand the application of an open and inclusive concept of art, can thus not be regarded as providing a sufficient basis to absolve the state from its obligation to demarcate art from non-art when tasked with the grant of benefits or rights.⁵⁴

Since democracy and pluralism thus generally require an open and inclusive understanding of art, while simultaneously an obligation to demarcate exists, it is to assess how states operationalised the concept of *art* for the purposes of demarcation. In this regard, it is primarily to stress that a clear distinction was made between the concept of *art*, on the one hand, and the demarcation, on the other. Whereas European states in principle agree on the application of an open and inclusive scope of the concept of art,⁵⁵ it is to observe that the demarcation is simultaneously conducted on the basis of legislative and/or judicative means of approximation that are or were inspired by existing definitions of art and their inherent, contentual demarcation between art and non-art. While national legislators approached the legal terms '*art*'⁵⁶ and '*artist*'⁵⁷ in a similar manner and only for particular purposes, one has to adhere that no uniform approach can be found regarding the judicative means of approximation. Whereas some national judicial branches approximate art by means of interpreting formulas⁵⁸, others pursue to demarcate between art and non-art on the basis of particular determining criteria⁵⁹.

Nonetheless, while the legislative and/or judicative means of approximation are applied to demarcate in daily legal practice, it is to note that also these approximating means can only serve as indicators for those forms of art that were already recognised as well as those human expressions that fall within the scope of existing definitions of art. Since the process of demarcation has however to be orientated on the inclusiveness of an open concept of *art* to prevent censorship, arbitrariness, rendering the rights footing on the concept void or making the benefits unreachable, it is considered prohibited to unjustifiedly exclude new working methods, forms of expression or trends of art on the basis or

⁵⁴ Cf.: *Hömig, Dieter*, Nomos Kommentar Grundgesetz, 8th Edition, 2007, p.105, para.30; See also: OHCHR, Response No.3 of Germany to the Special Rapporteur's questionnaire on the right to artistic freedom, Answer to question 4 on page 4. Available at: <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ResponsesArtisticFreedom.aspx> (Visited on 04.03.2016);

⁵⁵ Cf.: BeckOK InfoMedienR/Cornils, EMRK Art. 10, paras. 29-31; ECtHR, Müller and Others v Switzerland, App.-No.: 10737/84, Judgment of 24th May 1988, para.27;

⁵⁶ E.g.: Ireland: For the purposes of the Irish Arts Act 2003 Section 2 (1) of the Arts Act sets out that "*arts*" means any creative or interpretative expression (whether traditional or contemporary) in whatever form, and includes, in particular, visual arts, theatre, literature, music, dance, opera, film, circus and architecture, and includes any medium when used for those purposes";

⁵⁷ E.g.: For the purposes of the German Artists' Social Security Act ("*Künstlersozialversicherungsgesetz*") §2 of the KSVG provides that "*Within the meaning of this Act, an artist is anyone who creates, practises or teaches music, the performing arts or the fine arts.*"; OHCHR, Response No.3 of Germany to the Special Rapporteur's questionnaire on the right to artistic freedom, Answer to question 4 on page 4. Available at: <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ResponsesArtisticFreedom.aspx> (Visited on 04.03.2016);

⁵⁸ E.g.: Federal Constitutional Court of Germany: Approximation by an open, a formal and a material concept of '*art*' ("*Offener, Formeller and Materieller Kunstbegriff*") of which solely one has to be fulfilled to render an expression or creation art. (Cf.: BeckOK GG/Kempfen, GG Art. 5, paras.161-163); *Open concept of 'art'*: BeckOK GG/Kempfen, GG Art. 5, para.160 - for example in BVerfGE 81,278 (291ff.); *Formal concept of 'art'*: BeckOK GG/Kempfen, GG Art. 5, para.159 - for example in BVerfGE 67, 213 (226,227); *Material concept of 'art'*: BeckOK GG/Kempfen, GG Art. 5, para.158 - for example in BVerfGE 30,173 (189); BVerfGE 67, 213 (226);

⁵⁹ E.g.: The Austrian Supreme Court demands "*Ehrlichkeit des künstlerischen Strebens der Urheber*", "*objektiver Niederschlag*" and that "*ansatzweise das Niveau eines Kunstwerks erreicht [wird]*", cf.: OGH in EvBl 1974/258;

by means of these approximating means,⁶⁰ which in turn necessitates that the demarcating approximation is designed in a way, which allows "to respond to a constant stream of new developments."⁶¹

Hence, concluding this subchapter, it is thus to keep in mind that, while a common understanding as well as hundreds and hundreds of definitions of art exist, (1) it is not possible to answer the questions of 'What art is' and 'Whether art can be defined' with certainty due to the reinventive nature of art and the philosophic difficulties and uncertainties revolving around its definition. It is further to adhere (2) that the states, confronted with the intricacy and the claim of indefinability of art, approximated the concept for the purposes of demarcation by legislative and/or judicative means, whereby they draw inspiration from existing definitions, and (3) that these approximating means have to be orientated on the generally agreed inclusiveness of an open concept of art since not only pluralism and neutrality demand so, but since also censorship, arbitrariness and the *de facto* nullification of the rights and benefits footing on the concept need to be avoided.

2.1.2 What is 'Protest Art'?

On this indistinct definitional basis of *protest art's* underlying concept of art, it is not easy, but to examine what *protest art* actually is to determine the concept that will be scrutinised throughout the thesis.⁶² In this respect, it is initially to reiterate that, even after a deep and comprehensive research, no definition of *protest art* could be found. The entire literature reviewed⁶³ did not define *protest art* since either the inclusiveness of an open concept of *protest art* should be upheld, or since a definition was avoided due to the uncertainties deriving from the potential indefinability of art, from the problematic demarcation between protest and *protest art* including the question of where protest ends and art starts, and from the immense range of variations and subtrends of the concept. Nonetheless, the way, in which the literature makes use of the term, allows to infer that the term *protest art* is intended to refer to artistic expressions or creative works that either are deliberately produced by artists, activists, groups or movements to convey a particular message of protest, or that are perceived by the public as pursuing this objective.⁶⁴ On this basis and since the term '*protest*', which is defined as any "*statement or action expressing disapproval of or objection to something*"⁶⁵, additionally constitutes a

⁶⁰ See: *Hömig* on the prohibition of an inadmissible content review: *Hömig, Dieter*, Nomos Kommentar Grundgesetz, 8th Edition, 2007, p.105, para.30;

⁶¹ OHCHR, Response No.3 of Germany to the Special Rapporteur's questionnaire on the right to artistic freedom, Answer to question 4 on page 4. Av. at: <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ResponsesArtisticFreedom.aspx> (Visited on 04.03.2016);

⁶² The findings of Chapter 2.1.2 and 2.1.3 will be particularly relevant in terms of Chapter 2.3, 3.2 as well as Chapter 4.;

⁶³ The 'literature reviewed' included: Art glossaries (like: MoMa, Glossary of Art Terms; Tate, Glossary of Art Terms, and other glossaries;), various art (history) books, related books (like *Popovic, Srdja/ Miller, Matthew*, Blueprint for Revolution, How to use rice pudding, Lego men and other non-violent techniques to galvanize communities, overthrow dictators or simply change the world, 2015; *Mesch, Claudia*, Art and Politics, A Small History of Art For Social Change Since 1945, 2014; or *Jonson, Lena*, Art and Protest in Putin's Russia, 2015;), articles, etc..., but none of them provided or included a definition of *protest art*. The only definition of the concept, that could be found, was an entry on Wikipedia (av. at: https://en.wikipedia.org/wiki/Protest_art), which did however not appear as constituting a suitable source for a master thesis.

⁶⁴ Cf.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.12;

⁶⁵ *OxfordDictionaries.com* on "protest": av. at: <http://www.oxforddictionaries.com/definition/english/protest> (14.03.2016);

broad and inclusive term, which also extends to objectives like activism, resistance, critique or civil disobedience, it is possible to draw two conclusions in terms of *protest art*, namely, on the one hand, that other recognised subcategories of art like '*activist art*' or '*resistance art*' are to subsume under the term *protest art* rendering the term a 'catchall term' and, on the other, that *protest art* is to approximate as being the instrumentalisation of art for the purposes of protest, resistance, activism, critique or civil disobedience or, as *Picasso* would put it, as the utilisation of art as "*an instrument of war*"⁶⁶.

Since, however, for the reasons mentioned above, no conclusive definition of *protest art* was offered by the literature reviewed, I will approximate this trend of art in the following under due consideration of the literature's use of the term *protest art* to provide a common understanding and a workable concept for the purposes of this thesis.

2.1.3 The Determining Characteristics of *Protest Art*

As a result of the previous elucidation and the literature's use of the term *protest art*, three particular main characteristics could be made out, which could enable *protest art*'s determination. These characteristics are (a) the existence of an artistic expression as the *means used*⁶⁷, (b) the presence of protest as the *purpose and/or objective pursued*⁶⁸ and (c) the *intentional* or *perceptive link* between the two beforementioned criteria⁶⁹. Having regard to these criteria, it would primarily be required that (a) the *means used* and thus an artistic expression exists. Any form of human expression that carries "[...] *an aesthetic and/or symbolic dimension, using different media including, but not limited to, painting and drawing, music, songs and dances, poetry and literature, theatre and circus, photography, cinema and video, architecture and sculpture, performances and public art interventions* [...]"⁷⁰ could in this context constitute an artistic expression, so that the first criterion would be fulfilled, if such an artistic expression was given. Moreover, concerning the criterion (b) *objective and/or purpose pursued*, it would be demanded that the means is actually utilised to convey a message of protest or rather that the artistic expression reflects the explicit or implied instrumentalisation for such purposes. The artistic expression would thus have to mirror the objective or purpose to express protest, resistance, activism, critique or civil disobedience by means of its expression to satisfy the criterion, even if additional interpretation and/or knowledge were necessary to detect them. In respect of the last criterion, which would require the establishment of (c) an *intentional* or *perceptive link* between the two beforementioned criteria, it would eventually be demanded that either the artist's *intention* to express protest by means of the artistic expression, or the public's *perception* of the expression as pursuing this objective must be present to establish the required link between the *means* and the *objective and/or purpose*

⁶⁶ *Picasso* Quote, <http://www.goodreads.com/quotes/335037-what-do-you-think-an-artist-is-an-imbecile-who> (16.02.2016);

⁶⁷ Cf.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.12;

⁶⁸ Cf.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.12;

⁶⁹ Cf.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.12;

⁷⁰ Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed*, The right to freedom of artistic expression and creativity, A/HRC/23/34 of 14 March 2013, para.5;

pursued. Hence, if these three criteria were cumulatively fulfilled in terms of a particular expression, one could regard and determine it as constituting *protest art*.

2.1.4 The Political Dimension - When Is 'Protest Art' Political?

Furthermore, to establish the concept of *political protest art*, which will be relevant in the following course of this thesis⁷¹ since only in terms of an expression reaching the level of protection afforded to political expression and debate, a distinct outcome could be expected and since, thus, an examination of the question of whether *political protest art* reaches the said level of protection will be required, it is to determine whether, how and when *protest art* could be regarded as being political. In this respect, three aspects, namely the question of whether *protest art* is political, the criteria that render *protest art* political and the determination of the point at which *protest art* becomes political, need to be assessed.

Starting with the question of whether *protest art* is political, one immediately realises that protest is used in real life in many forms and for various reasons. Due to the fact that, besides political concerns, also societal, religious, cultural and other reasons serve as motivation or trigger for protest, it is to infer that *protest art* could, but does not necessarily have to be political. For this reason, it is required to demarcate political from other *protest art*.

In addressing this issue, the term '*political*' serves as an indicator. It includes - as being '*political*' - anything that relates "[...] to the government or public affairs of a country"⁷², that relates "[...] to the ideas or strategies of a particular party or group in politics"⁷³, or any human conduct that is "[m]otivated by a person's beliefs or actions concerning politics"⁷⁴. From the term's meaning and content displayed, one could thus derive the first decisive criterion of *political protest art*, namely the requirement of a *contentual reference* to politics⁷⁵. Concerning the *contentual reference*, one could thus adhere that (a) any artistic expression that relates to acts of the state, of a party, of a group in politics or a single politician, (b) that any artistic expression that relates to an omission of these named actors where a simultaneous obligation would demand an active intervention, and, (c) that any artistic expression, which is motivated by, bears reference to, participates in or contributes to a political debate, would be to regard as fulfilling this criterion by its inherent reference to a political in- or action of a political person or entity or merely by its reference to political content.⁷⁷

⁷¹ The findings of Chapter 2.1.4 will be of particular importance in Chapter 3.4.3, 4.1.1 read in conjunction with 3.2.4.1.2 and 3.2.4.1.3 as well as Chapter 4.2;

⁷² *OxfordDictionaries.com* on "political": av. at: <http://www.oxforddictionaries.com/definition/english/political> (14.03.2016)

⁷³ *OxfordDictionaries.com* on "political": av. at: <http://www.oxforddictionaries.com/definition/english/political> (14.03.2016)

⁷⁴ *OxfordDictionaries.com* on "political": av. at: <http://www.oxforddictionaries.com/definition/english/political> (14.03.2016)

⁷⁵ This finding is in line with the literature's assumption: Cf.e.g.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, Masterthesis 2008, p.48 - Content is decisive for the determination as political protest art.

⁷⁶ Concerning the person or entity against whom or which protest is directed: Cf.e.g.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, Masterthesis 2008, pp.55-59;

⁷⁷ Cf.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, pp.48-50; See also: *Mesch, Claudia*, Art and Politics, A Small History of Art For Social Change Since 1945, pp.1-13 & selection of works;

However, since *Herrmann* and others held that the subversion is rendered *political protest art* not only by political artistic activism, but also by means of the *affirmation by fellow 'combatants' or 'campaigners'*, it appears that the affirmation presents another, somehow non-obvious requirement.⁷⁸ It could thus be necessary to show that *protest art* constitutes a depiction of a political view held in the population or rather that it mirrors some societal acceptance to be rendered *political*.⁷⁹ Whereas *protest art*, that takes the stance of recognised political opinions, views or ideologies, allows the presumption of affirmation by fellow campaigners since it solely follows and contributes to these already existing streamings, one will realise that the same cannot apply to the production of new antagonistic ideologies or regarding novel, intermediary or combining political approaches. Regarding the latter, it is therefore required that the novelty is positively affirmed by fellow campaigners, which, if such an affirmation was present, would render the artistic expression to *political protest art*. Nonetheless, in the light of pluralism and of the related, humorously called '*theory of the last friend*', which demands in the context of the right to peaceful assembly the presence of at least two persons or of a 'last friend' for the assumption that an assembly exists,⁸⁰ it could be held that a majoritarian acceptance of the new view is not to demand or expect, which would consequently mean that the affirmation of another person or a small social group would be sufficient.⁸¹ Since it is additionally plain that also an expression of such a new view has to be made first, before any affirmation would be possible, one could further hold that the affirmation needs not to be present yet, but that, instead, the message conveyed has only to be open or amenable to affirmation. *Protest art* would thus only have to show that its message could be weaved into a political debate or that it allows to be adopted by others.

Hence, if one followed this argumentation, one could thus hold that *protest art* would be rendered political, if the criteria *contentual reference* and *openness to affirmation by fellow campaigners* were present. It could therefore be inferred that the point, at which *protest art* becomes political, would be defined by the moment, in which these criteria were fulfilled.

2.1.5 The Questions of When and Why *Political Protest Art* is 'Borrowing'

Eventually, to encompass the concept of 'borrowing' *political protest art* in its entirety, also the questions of (1) 'When does *protest art* 'borrow'?' and (2) 'Why are such 'borrowing' uses necessary?' must briefly be addressed. The resulting findings will in the course of this thesis be of relevance (a) in terms of a potential conflict between *political protest art* and copyright as well as (b) concerning the issue of a human rights compliant protection of 'borrowing' *political protest art*.⁸²

⁷⁸ Cf.e.g.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.48;

⁷⁹ Cf.:*Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.48;

⁸⁰ *OSCE/ODIHR*, Guidelines on Freedom of Peaceful Assembly, p.29 f., para.16;

⁸¹ Cf.: *Herrmann, Pablo*, Kunst und Protest, Wechselwirkungen in unserer Gesellschaft, 2008, p.48;

⁸² The findings of Chapter 2.1.5 will be of particular relevance in Chapter 2.3, 3.4, 4.1.2 as well as Chapter.4.2;

Thus, beginning with the former question, it is to note that, in the context of this thesis, the term 'borrowing' shall always refer to infringing uses of copyrighted materials. *Political protest art* is therefore to regard as being 'borrowing' whenever the protest artwork used proprietary contents without the authorisation of the author or copyright holder of an original work.⁸³

If one therefore turned towards the latter question and asked why such 'borrowing' uses should be regarded as being necessary, one would initially find that the use of the word 'necessary' may in this context be out of place since, in principle, other venues for an expression of ideas or information, that do not include infringing uses, would generally be available.

However, on second thoughts, it becomes evident that *protest art* generally necessitates the use of recognised and associated (including proprietary) signs, sayings, etc. to convey the message of protest in the most concise, catchy and most memorable manner. The interpretative competences of the receiver are in this context decisive for and influence the artist's strategic method.⁸⁴ Since protest artists have thus - at least sometimes - to use, erase or bracket the message content of existing signs, sayings, etc. to be able to instrumentalise the old or to establish and utilise a new message content (comparable to the rearrangement in remixes⁸⁵), it becomes obvious that alternative venues are not available in any case since the rare signs, sayings, etc., with which the public associates or anticipates a particular meaning, emotion or message, must inevitably be used to achieve the intended effect.⁸⁶

Since it is additionally to notice that there are particular signs or sayings that, despite their intellectual property protection, become common cultural signs or sayings with a unique inherent message or meaning (a) by either, as *Schwabsky* and *Peverini*⁸⁷ observed, being detached from their original *specific context*, being transferred into an *abstract context* and subsequently being appropriated and filled with new meanings and message contents⁸⁸, or (2) by developing an additional meaning besides their original one,⁸⁹ it is also necessary to allow uses of these unique, common cultural meanings and, thus, of the signs, sayings, etc. - irrespective of their protection - since the message could otherwise not be

⁸³ For further information about Copyright see: Chapter 2.2;

⁸⁴ Addressing the comparable issue of remixes and activism, *Peverini* observed in this respect that "[t]he effectiveness of any form of remix does not stem merely from the skill used in selecting a set of cultural resources on the paradigm plane and then recombining them [...] [but that it is] instead based on the enunciator's strategic capacity to recognise and handle the know-how possessed by the interlocutor, in other words planning his/her moves according to the interpretative competences of the receiver." - Cf.: *Peverini, Paolo*, *Remix Practices and Activism, A Semiotic Analysis of Creative Dissent*, p.335;

⁸⁵ See e.g.: *Navas, Eduardo*, *Regressive and Reflexive Mashups in Sampling Culture*, p.161; *Peverini, Paolo*, *Remix Practices and Activism, A Semiotic Analysis of Creative Dissent*, pp.334-335;

⁸⁶ *Peverini, Paolo*, *Remix Practices and Activism, A Semiotic Analysis of Creative Dissent*, p.335; (Quote supra note 84);

⁸⁷ Addressing the comparable issue of remixes and activism, *Peverini* observed in this respect that "[...] whenever a text is sampled, its meaning is always renegotiated and reopened." Cf.: *Peverini, Paolo*, *Remix Practices and Activism, A Semiotic Analysis of Creative Dissent*, p.335;

⁸⁸ *Barry Schwabsky*, who applied *Robert Smithson's* observation that "[...] the power of a word lies in the very inadequacy of the context [in which] it is placed [...]"⁸⁸ to signs of protest, observed that signs in general have at least two contexts, namely the specific context, in "[...] which [a sign] is supposed to have been raised [...]"⁸⁸, as well as the abstract context, in which the sign is "[...] detached from any clear link to the identity of its maker [...]". - Cf.: *Schwabsky, Barry*, *Signs of Protest*, published in *The Nation*, January 2, 2012, Vol. 294, Issue 1, pp. 43-45, p.44;

⁸⁹ If one has regard to the famous Dutch case of *Plesner v Louis Vuitton*, one realises that, besides the original meaning of Louis Vuitton's 'Audra' bag as a handbag, also the common cultural equation of products of Louis Vuitton with "luxury" existed, which gave the 'Audra'-bag and Louis Vuitton's Multicolor Canvas design a distinct meaning, of which Plesner made use in her *protest art* paintings "Darfurnica" and "Simple Living". - Cf.: District Court of The Hague, *Nadja Plesner Joensen v Louis Vuitton Mallatier SA*, Case Number 389526/KGZA11-294, Judgment of 4th May 2011;

conveyed in an equally effective or as easily remembered way, which again eliminates alternative venues for the particular expression.

On top of that, it could further be considered whether the fact that, as *Peaverini* put it, "[the practices of 'borrowing' and r]emix can be conceived as a political act in itself [...]"⁹⁰ and, thus, as already constituting an act of protest, contains an inherent necessity in itself. Nonetheless, even though comprehensive research was conducted, the author of this thesis was not able to find any further necessity to 'borrow' proprietary contents in this regard that would go beyond the displayed lacks of available venues. However, since it was previously found that in particular circumstances no other equally effective, equally catchy, equally recognised, equally associated or equally memorable venues for expressions exist, it is to infer that borrowing of proprietary works in *protest art* is at least in these cases necessary.

Hence, it can thus be concluded that *protest art* 'borrows' whenever it uses proprietary contents without the copyright holder's authorisation and that such 'borrowing' uses could be regarded as being necessary due to the lack of alternative, equally effective, catchy and equally memorable venues.

2.1.6 Intermediary Result

Concluding this chapter, it is thus to adhere that, for the purposes of this thesis, the concept of *borrowing political protest art* shall be defined as (1) the instrumentalisation of art for the purposes of protest (determinable by the criteria (a) *means used*, (b) *objective and/or purpose pursued* and (c) *intentional or perceptive link*), which (2) mirrors the *contentual reference* to politics as well as *openness to affirmation by fellow campaigners* and which (3) makes use of proprietary contents without the authorisation of the respective copyright holder.

2.2 European Copyright Law and its Enforcement

Furthermore, (a) to enable the subsequent examination of a potential conflict between copyright and 'borrowing' *political protest art* and (b) to facilitate the assessment of potential implications of a human rights compliant protection of 'borrowing' *political protest art* for European copyright law and its enforcement, also the European concept of copyright and its enforcement must briefly be examined and clarified.⁹¹ While in principle focussing on the EU's harmonising regulatory framework for copyright, this chapter commences with a general introduction to copyright and its general principles to encompass and provide an overview also over those aspects of copyright, which should be known for this thesis, but are not harmonised yet. After this introduction, the chapter then briefly addresses copyright's regulation on the European plain, proceeds with pointing out the substance of European copyright protection and its enforcement and displays the justifications of copyright eventually.

⁹⁰ *Peaverini, Paolo*, *Remix Practices and Activism, A Semiotic Analysis of Creative Dissent*, p.335;

⁹¹ The findings of Chapter 2.2 concerning the European concept of copyright will be relevant throughout the thesis, but particularly in Chapter 2.3, 3.3, 4.1.2.1 and Chapter 5.;

2.2.1 The Notion of Copyright in General and a Brief Display of its General Principles

Thus, if one seeks to establish what European copyright and its enforcement is, it will probably be expedient to start the assessment on a general level first. For this reason, this subchapter is devoted to providing a general definition of copyright as well as displaying copyright's general principles first, before the specific European framework will be addressed in the following subchapters.

Therefore, beginning with the determination of what copyright generally is, it is primarily to note that "[c]opyright is a form of legal protection that allows authors, photographers, composers, and other creators to control some reproduction and distribution of their work."⁹² Put in a nutshell, the legal notion of copyright could - applying *WIPO's* guidance concerning copyright - be defined as being the normatively informed, by jurisdiction territorially delimited⁹³ *exclusive right* of an author⁹⁴ of an original⁹⁵ work, which allows him or her, for a legally prescribed period of time,⁹⁶ to exclude others from any non-authorised use or exploitation of the work that is not covered by an exception for permitted uses.⁹⁷ According to *WIPO*, copyright could thus generally be understood as the author's exclusive rights "to authorise others to use the protected work"⁹⁸ and to prevent non-authorised uses. Nonetheless, besides being exclusive, copyright is, as a rule, regarded as constituting only a *negative right* since, as *WIPO* phrased it, "the use to which a work may be put has nothing to do with its protection"⁹⁹. Legal prohibitions and the rights and interests of others have still to be observed.¹⁰⁰ It is therefore to recognise that copyright - since it generally grants no right to implement or use the work¹⁰¹ - is merely concerned with the protection of creative works against non-authorised uses. Copyright can consequently be described as the negative monopoly rights of an author to authorise others to use or exploit his work and to prevent any non-authorised uses thereof, unless a temporal or geographic limitation on or an exception to copyright for permitted uses would allow the use.

If one thus turned towards the clarification of copyright's general principles on this basis and sought to define them, five particular questions would be to answer, namely (a) 'What is copyright in particular?', (b) 'What is protected by copyright?', (c) 'What is excluded from copyright's subject matter?', (d) 'Who is the owner?' and (e) 'What is a copyright infringement?'. For this reason, these questions are briefly assessed in the following to provide a common understanding.

⁹² *Smith Levine, Melissa*, Copyright Basics, 2013, published on the University of Michigan Library's official website. Available at: <http://www.lib.umich.edu/copyright/copyright-basics> (Visited on 18.05.2016);

⁹³ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 50, para.2.228;

⁹⁴ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.220; See for further information ab. authorship: *Bently, Lionel/ Sherman, Brad*, Intellectual Property Law, 3rd Edition, pp.119-126;

⁹⁵ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 42, para.2.174;

⁹⁶ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 50, paras.2.225-2.227; For further information about Duration see: *Bently, Lionel/ Sherman, Brad*, Intellectual Property Law, 3rd Edition, pp.160-168;

⁹⁷ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 43, paras.2.178/2.179;

⁹⁸ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 43, para.2.179;

⁹⁹ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 42, para.2.174;

¹⁰⁰ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 43, para.2.178;

¹⁰¹ It is to note that the opinion setting out that 'copyright would entail a 'right to use' because otherwise it would not grant a right at all' has to be regarded as self-defeating at this point, since the right to actively control the use of the work and, thus, a pursuable right is already granted.

Starting with the question of what copyright in particular is, it is to note that copyright itself, as *Smith Levine* for instance pointed out, is composed of or made up by a set of several distinct rights¹⁰² that pursue to grant adequate and effective protection to creative productions. Due to the enormous reach of the *WIPO*-administered Berne Convention¹⁰³, one could adhere in this respect that the rights comprise in general - subject to exceptions and limitations that would allow particular uses without the rightholder's permission - the copyright holder's exclusive rights to authorise others the following acts: (i) the reproduction of the work in whole or in part¹⁰⁴, (ii) the production of derivative works¹⁰⁵, (iii) the distribution of copies of the work by sale, rental or loan¹⁰⁶ as well as (iv) any public performance and/or display of the work¹⁰⁷. The previously discussed notion of copyright could thus be understood as being further defined by the respective rights granted in the respective copyright regime.

Proceeding to the questions (b) and (c) or rather to the issues of copyright's protected and excluded subject matter, it is to realise that copyright extends in principle to any creative¹⁰⁸, original¹⁰⁹ literary, scientific or artistic production¹¹⁰ irrespective of its mode or form of expression¹¹², provided that, if it was required, some kind of fixation would exist¹¹³.¹¹⁴ *WIPO*'s Copyright Treaty (WCT) and the *WTO*-administered TRIPS-Agreement clarify however, as *Taubman, Wager and Watal* observed,¹¹⁵ that ideas, procedures, methods of operation and mathematical concepts are excluded from copyright's subject matter.¹¹⁶ While further exclusions could also be made on the basis of Art.2bis of the Berne Convention, it is nonetheless safe to infer that copyright's subject matter at least extends to original literary, scientific or artistic productions, which have been fixed in some material form.

¹⁰² *Smith Levine, Melissa*, Copyright Basics, 2013, published on the University of Michigan Library's official website. Available at: <http://www.lib.umich.edu/copyright/copyright-basics> (Visited on 18.05.2016);

¹⁰³ Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979.

¹⁰⁴ Cf.: Art. 9 (2) read in conjunction with Art.16 of the Berne Convention;

¹⁰⁵ Cf. e.g.: Art. 8, 12, 14 of the Berne Convention;

¹⁰⁶ Cf. e.g.: Art.11 (Rental Right) or Art.14ter (1) (First sale right) of the Berne Convention;

¹⁰⁷ Cf. e.g.: Art. 11, 11bis, 11ter and 14(1)(ii) of the Berne Convention;

¹⁰⁸ "Original: A work must be created independently and not copied." - Cf.: *Smith Levine, Melissa*, Copyright Basics, 2013, published on the University of Michigan Library's official website. Av at: <http://www.lib.umich.edu/copyright/copyright-basics> (Visited on 18.05.2016);

¹⁰⁹ "Creative: There must be some minimal degree of creativity involved in making the work." - Cf.: *Smith Levine, Melissa*, Copyright Basics, University of Michigan Library's official website. Av. at: <http://www.lib.umich.edu/copyright/copyright-basics> (Visited on 18.05.2016);

¹¹⁰ Cf.: Art.2(1) of the Berne Convention read in conjunction with Art.1(4) of the WCT and Art.9(1) of the TRIPS Agreement; *World Trade Organization*, A Handbook on the WTO TRIPS Agreement, p.39; *World Intellectual Property Organization*, *WIPO Intellectual Property Handbook*, Chapter 2, p. 42, para.2.174;

¹¹¹ Indicating, but non-exhaustive display of encompassed types of works listed in *World Intellectual Property Organization*, *WIPO Intellectual Property Handbook*, Chapter 2, p. 42,43, para.2.176;

¹¹² *World Intellectual Property Organization*, *WIPO Intellectual Property Handbook*, Chapter 2, p. 42, para.2.174;

¹¹³ Cf.: Art.2 (2) of the Berne Convention;

¹¹⁴ See: *Bently, Lionel/ Sherman, Brad*, *Intellectual Property Law*, 3rd Edition, pp.58-90; See also: *Smith Levine, Melissa*, Copyright Basics, 2013, published on the University of Michigan Library's official website. Available at: <http://www.lib.umich.edu/copyright/copyright-basics> (Visited on 18.05.2016);

¹¹⁵ *World Trade Organization*, A Handbook on the WTO TRIPS Agreement, edited by *Taubman, Antony/ Wager, Hannu/ Watal, Jayashree*, p.41;

¹¹⁶ Cf.: Art. 2 of the WCT; also Art.9(2) of the TRIPS Agreement;

Moreover, turning to question (d) and the issue of ownership, it is to adhere that the person, who produced or created the work ('author'), represents the initial owner and holder of the described exclusive rights.¹¹⁷¹¹⁸ While the moral rights¹¹⁹ inseparably remain with the author or creator,¹²⁰ it is to observe that the economic rights could be assigned¹²¹ or licensed¹²² - wholly or in part. While licencing does not affect or shift the ownership since "[...] *the owner* [only] *authorizes* [another person or entity] *to exercise all or some of his rights* [...]"¹²³, it must be noted that assignments transfer the economic rights from the previous owner to another person or entity by means of which the other person or entity becomes the new owner of copyright¹²⁴. Hence it is to keep in mind that, while the author constitutes the initial owner of copyright, the ownership could change by means of assignment.

Eventually, concerning question (e) and its issue of what a copyright infringement is, it can be observed that copyright could generally be infringed in two possible ways, namely by means of infringement or piracy. The concepts of infringement and piracy should thus briefly be introduced. Pursuant to *WIPO*, an *infringement* would in this regard be to assume, if "[...] *one of the acts requiring authorization of the owner is done by someone else without his* [or her] *consent* [...]"¹²⁵, while *piracy*, on the other hand, would be present, if any "[...] *unauthorized copying of copyright materials for commercial purposes* [or any] *unauthorized commercial dealing in copied materials* [...]"¹²⁶ was given. Hence, if one of these acts was committed without being justified by a limitation or an exception permitting the use, it would imperatively be to conclude that the rightholder's rights were violated.¹²⁷

Concluding this section, it is thus to keep in mind that copyright generally constitutes the normatively informed, by jurisdiction territorially delimited negative, exclusive right of an author of a creative, original literary, scientific or artistic production (or of an assigned copyright holder), which allows him or her, for a legally prescribed period of time, to authorise uses of his copyrighted materials or to prevent non-authorised uses thereof that are not covered by a permitting exception. 'Borrowing' uses, that are not covered by an exception, constitute thus infringements of the right.

2.2.2 The Regulation of Copyright on the European Plain

After the general clarification of the notion of copyright and its general principles, it is now briefly to examine where and how *copyright* is regulated in Europe. In this respect, it is primarily to distinguish

¹¹⁷ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.220; See for further infos ab. 'first ownership' e.g.: *Bently, Lionel/ Sherman, Brad*, Intellectual Property Law, 3rd Edition, pp.127-132;

¹¹⁸ Exceptions to this principle could be enshrined in national law. - Cf. for example: Employment;

¹¹⁹ Cf.: Art.6bis of the Berne Convention;

¹²⁰ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.222;

¹²¹ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.223;

¹²² *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.224;

¹²³ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.224;

¹²⁴ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.223;

¹²⁵ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 51, para.2.232;

¹²⁶ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 51, para.2.232;

¹²⁷ For further information about copyright infringement see e.g.: *Depreeuw, Sari/ Hubin, Jean-Benoit*, Of availability, targeting and accessibility: online copyright infringements and jurisdiction in the EU, *Journal of Intellectual Property Law & Practice*, Sept. 2014, Vol.9, No.9, pp. 750-764; *Bently, Lionel/ Sherman, Brad*, Intellectual Property Law, 3rd Edition, pp.170-198;

between three different dimensions that are, firstly, the EU's own regime of obligations under the international copyright framework, which is informed by and composed of the obligations deriving from the international treaties the EU acceded to¹²⁸; secondly, the Member States' own national copyright and enforcement systems, which are also informed by international treaties;¹²⁹ and, lastly, the legal framework¹³⁰ that was adopted by the EU to harmonise the regimes of its Member States in order to maintain the "four freedoms"¹³¹ and to uphold the functioning of the internal market¹³², which, as the *European Commission* put it, 'reflects'¹³³ the duties of both, the EU as well as its Member States.¹³⁴

In respect of the first dimension, it is to note that a EU's own regime of obligations did not exist until the EU ratified the TRIPS-Agreement in 1995¹³⁵.¹³⁶ The regime put in place by this event was subsequently expanded by the EU's accession to the *WIPO Copyright Treaty*¹³⁷ in 2010¹³⁸, which lets infer that the EU's regime of obligations is mainly informed by these two multilateral treaties.¹³⁹ However, since the TRIPS-Agreement as well as the WCT declared Art.1-20¹⁴⁰ and 21¹⁴¹ of the *Berne Convention* to be directly binding upon the EU and its institutions, it can be concluded that these three

¹²⁸ See: *European Commission*, The European Copyright Legislation, The International Framework, available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (Visited 18.05.2016); For further information see e.g.: *Dreier/ Hugenholtz*, Concise European Copyright Law, Second Edition, Wolters Kluwer Law International, 2016;

¹²⁹ See: *Martin-Prat, Maria*, The future of Copyright in Europe, 38 Colum. J. L. & Arts, Vol.38, Issue 1 (2014), pp. 29-32; See also: *European Commission*, The European Copyright Legislation, The International Framework, available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (18.05.2016); *Cook, Trevor*, The Future of Copyright Protection in the European Union, Journal of Intellectual Property Rights, March 2013, 18(2), p.181, Abstract;

¹³⁰ *Martin-Prat, Maria*, The future of Copyright in Europe, 38 Colum. J. L. & Arts, Vol.38, Issue 1 (2014), pp. 29-32; See also: Cf.e.g.: *Cook, Trevor*, The Future of Copyright Protection in the European Union, Journal of Intellectual Property Rights, March 2013, 18(2), p.181, Abstract;

¹³¹ The term "four freedoms" refers to the European guarantees of free movement of goods (Art.28,30,34,35 TFEU), capital (Art.63TFEU), services (Art.56TFEU) and people (Art.21,45,49 TFEU);

¹³² Cf.: Recital 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society;

¹³³ "[m]any of the EU directives reflect Member States' obligations under the Berne Convention and the Rome Convention, as well as the obligations of the EU and its Member States under the World Trade Organisation's 'TRIPS' Agreement and the two 1996 World Intellectual Property Organisation (WIPO) Internet Treaties [...]." - Cf.: *European Commission*, The European Copyright Legislation, The International Framework, available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (Visited 18.05.2016);

¹³⁴ See underlying distinction between the regimes in: *Katsarova, Ivana*, The challenges of copyright in the EU, Summary, p.1;

¹³⁵ *WTO.org* on 'Members and Observers', av. at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (18.3.'16)

¹³⁶ Concluded from *European Commission*, The European Copyright Legislation, The International Framework, available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (Visited 18.05.2016); and the respective accession date.

¹³⁷ WCT as adopted in Geneva on December 20, 1996; Entered into force with respect of the EU on 14 March 2010;

¹³⁸ Accession on the basis of Art. 47(2), 55, 95, 300(2) respectively 300(3) of the *Treaty establishing the European Community* and Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty;

¹³⁹ While also the 1996 WIPO Performances and Phonograms Treaty, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention) could be invoked here as forming the international framework of copyright and neighbouring rights, it is to note that the thesis' focus is on copyright and not on related rights. The international framework on copyright to which the EU is bound is thus mainly formed by the TRIPS-Agreement, the WCT and the Berne Conventions Articles 1-21; - Cf. division in: *Dreier, Thomas/ Hugenholtz, P. Bernt*, Concise European Copyright Law, Second Edition, Wolters Kluwer Law International, 2016.

¹⁴⁰ Art.9(1) of the TRIPS Agreement includes Art.1-21 of the Berne Convention except Art.6bis, which however is rendered binding by its inclusion under Art.1(4) of the WCT; Art.1(4)WCT requires compliance w. Art.1-20 of the Berne Convention;

¹⁴¹ Art.9(1) of the TRIPS Agreement;

multilateral copyright treaties cumulatively inform and define the EU's obligations under the international framework.¹⁴²

The European Member States, on the other hand, enacted and still maintain their own copyright and enforcement systems within the framework of their national legislation, informed by international treaty obligations, which the states accepted upon themselves (second dimension).¹⁴³

Nonetheless, due to the Member States' transferral of sovereignty rights to the EU, the EU was enabled to adopt and to enact secondary EU law¹⁴⁴ in the form of specialised directives¹⁴⁵ in order to harmonise the national copyright regulations in its pursuit to maintain the functioning of the internal market. These specialised directives, which in sum constitute the third dimension, affect the national copyright regimes due to the Member States' obligation to respond by implementation into the national sphere, even if a binding effect would only be to attest in terms of the aim pursued^{146, 147}

Hence, copyright is regulated on the European plain in three dimensions. Since the EU's international obligations (first dimension) inform¹⁴⁸ and are thus inherently contained or, as the *European Commission* put it, 'reflected'¹⁴⁹ in the EU's harmonising framework (third dimension) and since the national regimes (second dimension) must implement the harmonising framework,¹⁵⁰ this thesis will in

¹⁴² Confirming: *European Commission*, The European Copyright Legislation, The International Framework, available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (Visited 18.05.2016); For further information about obligations under TRIPS influencing the European regime see e.g.: *Subramanian, Sujitha*, EU Obligation to the TRIPS Agreement: EU Microsoft Decision, *European Journal of International Law*, Vol. 21, Issue 4 (2010), pp. 997-1024; For further information about obligations under WCT see e.g.: *Reinbothe/ Lewinski*, The WIPO Treaties on Copyright, A Commentary to the WCT, the WPPT, and the BTAP, Second Edition, Chapter 7, and there especially Article 18, para.7.18.1.;

¹⁴³ Cf.: *Martin-Prat, Maria*, The future of Copyright in Europe, 38 *Colum. J. L. & Arts*, Vol.38, Issue 1 (2014), pp. 29-32;

¹⁴⁴ Cf.: Art.288 Treaty on the Functioning of the European Union;

¹⁴⁵ E.g.: *Council Directive* 91/250/EEC of 14 May 1991 on the legal protection of computer programs; *Council Directive* 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; *Council Directive* 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; *Council Directive* 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights; *Directive* 96/9/EC of the *European Parliament* and of the *Council* of 11 March 1996 on the legal protection of databases; *Directive* 2001/29/EC of the *European Parliament* and of the *Council* of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; *Directive* 2001/84/EC of the *European Parliament* and of the *Council* of 27 September 2001 on the resale right for the benefit of the author of an original work of art; *Directive* 2004/48/EC of the *European Parliament* and of the *Council* of 29 April 2004 on the enforcement of intellectual property rights; *Directive* 2006/115/EC of the *European Parliament* and of the *Council* of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; *Directive* 2006/116/EC of the *European Parliament* and of the *Council* of 12 December 2006 on the term of protection of copyright and certain related rights; *Directive* 2009/24/EC of the *European Parliament* and of the *Council* of 23 April 2009 on the legal protection of computer programs; *Directive* 2011/77/EU of the *European Parliament* and of the *Council* of 27 September 2011 amending *Directive* 2006/116/EC on the term of protection of copyright and certain related rights; *Directive* 2012/28/EU of the *European Parliament* and of the *Council* of 25 October 2012 on certain permitted uses of orphan works; and *Directive* 2014/26/EU of the *European Parliament* and of the *Council* of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market;

¹⁴⁶ See: Art.288(3) of the Treaty on the Functioning of the European Union; See also: *Slaughter and May*, Introduction to the legislative processes for European Union directives and regulations on financial service matters, pp.6,7, paras.3.3.-3.6.;

¹⁴⁷ Cf.: *Martin-Prat, Maria*, The future of Copyright in Europe, 38 *Colum. J. L. & Arts*, Vol.38, Issue 1 (2014), pp. 30-32;

¹⁴⁸ Cf.: Recital 15 of *Directive* 2001/29/EC of the *European Parliament* and of the *Council* of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society;

¹⁴⁹ *European Commission*, The European Copyright Legislation, The International Framework, available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (Visited 18.05.2016);

¹⁵⁰ *Slaughter and May*, Introduction to the legislative processes for European Union directives and regulations on financial service matters, pp.6,7, paras.3.3.-3.6.;

the following -due to its shortage- generally focus on the interrelating third dimension (as '*reflecting*' the other regimes) and here in particular on the Directives 2001/29/EC¹⁵¹ and 2004/48/EC¹⁵².

2.2.3 Copyright Protection and Enforcement in the EU's Harmonising Regulatory Framework

Moreover, since it is thus clear where and how copyright is regulated in Europe, it is now to scrutinise what the EU's harmonising framework substantially provides in terms of copyright protection and its enforcement (a) to enable the subsequent examination of a potential conflict and (b) to facilitate the assessment of potential implications of a human rights compliant protection of '*borrowing*' *political protest art* for European copyright law and its enforcement.

2.2.3.1 Copyright Protection

Beginning with the issue of copyright protection, it is to note that, while in principle building on the general notion of copyright and its related general principles, many of the aspects displayed before were not harmonised yet and are thus not part of the EU's harmonising framework.¹⁵³ The InfoSoc Directive 2001/29/EC enshrines however two main components, which together form the copyright protection that is generally to grant in each and every Member State. These are: (a) the set of rights composing *copyright* as well as (b) the set of *limitations* on and the *exceptions* to copyright. Thus, to enable the beforementioned evaluations, this subchapter is devoted to their display and clarification.

2.2.3.1.1 The Rights Comprised in or Composing Copyright

Starting with the rights comprised in or rather composing the harmonising framework's concept of copyright, it is initially to reiterate that copyright generally grants the author of an original¹⁵⁴ work the negative, exclusive rights "*to authorise others to use the protected work*"¹⁵⁵ and to prevent non-authorised use.¹⁵⁶ Recalling also that copyright could be understood as being further defined by the respective rights granted in the respective copyright regime¹⁵⁷ and having therefore regard to the harmonising regulatory framework in general as well as the InfoSoc¹⁵⁸ and the Rental Right¹⁵⁹ Directives in particular, it is primarily to observe that the harmonising framework's *set of rights* is limited to *eco-*

¹⁵¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society;

¹⁵² Directive 2004/48/EC of the *European Parliament* and of the *Council* of 29.4.2004 on the enforcement of IP rights;

¹⁵³ Cf.: Content of the Directives pointed out in *supra* note No. 145;

¹⁵⁴ *World Trade Organization*, A Handbook on the WTO TRIPS Agreement, p.41,42;

¹⁵⁵ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 43, para.2.179;

¹⁵⁶ See Chapter 2.2.1;

¹⁵⁷ See Chapter 2.2.1;

¹⁵⁸ Directive 2001/29/EC of the *European Parliament* and of the *Council* of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; For further information about the contents of the InfoSoc directive see: *Stamatoudi, Irini/ Torremans, Paul*, EU Copyright Law, A Commentary, Part II, Chapter 11;

¹⁵⁹ Directive 2006/115/EC of the *European Parliament* and of the *Council* of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; For further Information about the contents of the rental right directive see: *Stamatoudi, Irini/ Torremans, Paul*, EU Copyright Law, A Commentary, Part II, Chapter 10;

onomic rights. Moral rights¹⁶⁰ were excluded from harmonisation as a matter of national law¹⁶¹. While thus clearly not dealing with moral rights, the EU's harmonising regulatory framework nonetheless encompasses and guarantees (a) the exclusive right of the author to authorise or prohibit the direct or indirect, temporary or permanent reproduction of the work by any means or in any form¹⁶², (b) his or her exclusive right to authorise or prohibit any form of distribution of the work or of copies thereof¹⁶³, (c) the author's exclusive right to authorise or prohibit any communication of the work to the public¹⁶⁴, including his or her exclusive rights to authorise or prohibit the making available of the work to the public¹⁶⁵, and (d) the author's exclusive right to authorise or prohibit rental and/ or lending¹⁶⁶ with an associated right of equitable remuneration¹⁶⁷. Hence, while moral rights were excluded as purely national matters, the EU's harmonising regulatory framework for copyright stipulates a comprehensive set of exclusive rights, which in sum define and form the framework's concept of *copyright*.

2.2.3.1.2 The Limitations on and Exceptions to Copyright

The EU's harmonising legal framework does however not establish an unlimited concept of *copyright*. It inherently contains as well as intentionally anchors three distinct forms of restrictions to which copyright is subjected, namely a geographical limitation, a temporal limitation as well as exceptions for the purposes of permitted uses.

In terms of the framework's geographical limitation¹⁶⁸, it is to adhere that the limitation is merely inherently contained in the EU's legal regime. Copyright as a normative concept is contingent on the applicability of the legal regime providing it, while, at the same time, the legal regime's applicability is dependent on the respective territorial jurisdiction.¹⁶⁹ The EU's harmonising framework and, thus, its particular concept of copyright are therefore confined to the territorial borders of the EU.

¹⁶⁰ The rights protected and granted by Art.6bis of the Berne Convention are (a) the right of the author to claim authorship even after the economic rights were transferred (Art.6bis(1)), (b) the author's right to prevent the use of another person's name on a work that he produced (Art.6bis(1)), (c) the author's right to object to distortion, mutilation, or modification of the work or any other derogatory action that would prejudice his or her honor or reputation (Art.6bis(1)).

¹⁶¹ Recital 19 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; also Art.6 bis (3) of the Berne Convention;

¹⁶² Art. 2 (a) of Directive 2001/29/EC; See also: *Stamatoudi/Torremans*, EU Copyright Law, Commentary, paras.11.04-11.12; For further reading see e.g.: *Cook, Trevor*, The Restricted Acts of Reproduction and Distribution in EU Copyright Law, Journal of Intellectual Property Rights, 2015, 20(2), pp.122-126;

¹⁶³ Art. 4 (1) of Directive 2001/29/EC; See also: *Stamatoudi/Torremans*, EU Copyright Law, A Commentary, paras.11.36-11.61; *Cook, Trevor*, The Restricted Acts of Reproduction and Distribution in EU Copyright Law, Journal of Intellectual Property Rights, 2015, 20(2), pp.122-126;

¹⁶⁴ Art. 3 (1) of Directive 2001/29/EC; See also: *Stamatoudi/Torremans*, EU Copyright Law, Commentary, paras.11.13-11.35;

¹⁶⁵ Art. 3 (1) of Directive 2001/29/EC; See also: *Stamatoudi/Torremans*, EU Copyright Law, Commentary, paras.11.24-11.27;

¹⁶⁶ Art. 3 (1) (a) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; also Art.11 TRIPS Agreement and Art. 7 WCT;

¹⁶⁷ Art. 5 (1), (2) of Directive 2006/115/EC;

¹⁶⁸ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 50, para.2.228;

¹⁶⁹ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 50, para.2.228;

The framework's temporal limitation, on the other hand, was actively enshrined in Directive 2006/116/EC¹⁷⁰. Art.1 of the Directive stipulates in this connection that copyright or rather the exclusive rights composing copyright shall only be protected for the period of time defined by the lifetime of an author plus 70 years after his death.¹⁷¹ Copyright protection is thus temporally limited.

Directive 2001/29/EC eventually prescribes the exceptions to copyright for the purposes of permitted uses¹⁷². In this regard, Art. 5 of Directive 2001/29/EC enshrines an exhaustive list¹⁷³ of potential exceptions to copyright, which are to differentiate in mandatory¹⁷⁴ and optional¹⁷⁵ ones and would only be amenable to enactment, if they complied with the criteria required by the InfoSoc Directive's '*three-step test*'¹⁷⁶. The '*three-step test*' demands in this context that the permitting exceptions must be confined to *special cases*, that they shall *not conflict with the normal exploitation of the work* and that *the legitimate interests of the rightholder may not unreasonably be prejudiced*.¹⁷⁷

Since the fulfilment of one of these limitations or exceptions would implicitly contain the permission to use the proprietary materials without the rightholder's authorisation, it can conclusively be held that also these restrictions define the framework's concept or conceptualisation of copyright.

2.2.3.1.3 Intermediary result

Hence, it could thus be inferred that the EU's harmonising framework protects - as '*copyright*' - the displayed set of negative, geographically as well as temporally limited, exclusive, economic rights of an author, that are not subject to an exception for permitted uses (in the concrete case).

2.2.3.2 Copyright Enforcement

Furthermore, since it was obvious that copyright and its protection would not be respected without appropriate measures of enforcement and since, additionally, unity as well as the functioning of the internal market were to maintain in this regard, the EU also tackled and regulated the issue of enforcement in its harmonising copyright framework. Art. 8 of Directive 2001/29/EC¹⁷⁸ as well as the provisions of the specialised Enforcement Directive 2004/48/EC¹⁷⁹ are down to the present day of particular importance in this respect. According to these provisions, the Member States are obliged (1)

¹⁷⁰ Directive 2006/116/EC of the *European Parliament* and of the *Council* of 12.12. 2006 on the term of protection of copyright and certain related rights; See also: *Stamatoudi/Torremans*, EU Copyright Law, A Commentary, Part II, Chapter 8;

¹⁷¹ Art.1 of Directive 2006/116/EC of the *European Parliament* and of the *Council* of 12.12. 2006 on the term of protection of copyright and certain related rights; See also: *Stamatoudi/Torremans*, EU Copyright Law, A Commentary, paras.8.01-8.18;

¹⁷² Art.5 of Directive 2001/29/EC; See also: *Stamatoudi/Torremans*, EU Copyright Law, A Commentary, paras.11.62-11.106;

¹⁷³ Recital 32 of Directive 2001/29/EC;

¹⁷⁴ Art.5 (1) of Directive 2001/29/EC;

¹⁷⁵ Art.5 (2), (3) and (4) of Directive 2001/29/EC;

¹⁷⁶ Enshrined in Art. 5 (5) of Directive 2001/29/EC;

¹⁷⁷ Art. 5 (5) of Directive 2001/29/EC;

¹⁷⁸ See for further information: *Stamatoudi/Torremans*, EU Copyright Law, A Commentary, paras. 11.143-11.170;

¹⁷⁹ See for further information: *Stamatoudi/Torremans*, EU Copyright Law, A Commentary, Part II, Chapter 12;

to provide appropriate measures, remedies and procedures concerning infringing activities¹⁸⁰ and, (2) to ensure¹⁸¹ that copyright holders are enabled to bring actions for damages, to apply for injunctions or, where appropriate, for the seizure of infringing materials. In addition to that, the EU anchored that, in implementing the harmonising directives, Member States have also to observe the guiding principle that measures, procedures and remedies have to be *effective, proportionate* and *dissuasive*.¹⁸² It could thus be held that, in its pursuit to install an effective protection of copyright, the EU completed its task by establishing and requiring an effective, proportionate and dissuasive enforcement regime.

2.2.3.3 Intermediary Result

Hence, the EU's harmonising regulatory framework for copyright sets out and protects a particular concept of copyright - while and by requiring its effective, proportionate and dissuasive enforcement.

2.2.4 Justifications

Eventually, an anchorage of such a monopoly right should however also be justified. The exclusive right of an author or copyright holder found its philosophical justification in this respect primarily in three main forms of arguments,¹⁸³ namely in *personality-based* justifications, in *utilitarian incentives-based* arguments and in *Lockean* justifications¹⁸⁴, whereby each of them features its own unique strengths and weaknesses.¹⁸⁵ *Personality* theorists such as *Hegel*¹⁸⁶ maintain in this regard that intellectual property constitutes "[...] *an extension of individual personality* [...]"¹⁸⁷, that personality is embedded in the work, which in turn reciprocally influences a person's personality and that therefore the "[...] *external actualization of the human will requires property* [...]"¹⁸⁸, or rather copyright protection. *Utilitarian* proponents, on the other hand, base their arguments for copyright protection on the social need of authors to receive incentives in order to engage in creation or production of innovative and creative works¹⁸⁹, while *Lockeans* argue that copyright is justified due to the labour and work put into a creation, which entitle the author to what he produced¹⁹⁰. Furthermore, in addition to these three

¹⁸⁰ Art.8 (1) of Directive 2001/29/EC; Art.1 (1) of Directive 2004/48/EC;

¹⁸¹ Art.8 (2) of Directive 2001/29/EC; Art.1 (1) of Directive 2004/48/EC;

¹⁸² Art.8 (1) of Directive 2001/29/EC; Art.1 (2) of Directive 2004/48/EC;

¹⁸³ See e.g.: *Stokes, Simon*, Art an Copyright, pp.10-18; See also: *Davies, Gillian*, Copyright and the Public Interest, paras. 2-001-2-008; *Bently, Lionel/ Sherman, Brad*, Intellectual Property Law, 3rd Edition, pp.34-39;

¹⁸⁴ *Stanford Encyclopedia of Philosophy* on 'Intellectual Property', Chapter 3; Available at: <http://plato.stanford.edu/entries/intellectual-property/#JusCri> (Visited on 17.03.2016);

¹⁸⁵ *Stanford Encyclopedia of Philosophy* on 'Intellectual Property', Chapter 3; Available at: <http://plato.stanford.edu/entries/intellectual-property/#JusCri> (Visited on 17.03.2016);

¹⁸⁶ Cf.: *Hegel, G.W.F.*, Elements of the Philosophy of Right, 1821, Allen Wood (ed.), Cambridge University Press, 1991;

¹⁸⁷ *Stanford Encyclopedia of Philosophy* on 'Intellectual Property', Chapter 3 and 3.1; Available at: <http://plato.stanford.edu/entries/intellectual-property/#JusCri> (Visited on 17.03.2016);

¹⁸⁸ *Stanford Encyclopedia of Philosophy* on 'Intellectual Property', Chapter 3.1; Available at: <http://plato.stanford.edu/entries/intellectual-property/#JusCri> (Visited on 17.03.2016);

¹⁸⁹ *Stanford Encyclopedia of Philosophy* on 'Intellectual Property', Chapter 3.2; Available at: <http://plato.stanford.edu/entries/intellectual-property/#JusCri> (Visited on 17.03.2016);

¹⁹⁰ Cf.: *Locke, John*, Two Treatises of Government and A Letter Concerning Toleration, 1689/1690, Ian Shapiro (ed.), Chapter V, Of Property, p.111 ff.; *Attas, Daniel*, Lockean Justifications of Intellectual Property, in *Gosseries/Marciano/Strowel*,

main philosophical justifications, arguments for copyright were also based on the social purpose of copyright to reward an author for his accomplishment of a creative work,¹⁹¹ on the rationale that copyright is equity since it has to be regarded as fair that the author draws "*some benefit from others using the fruits of his or her creative efforts*"¹⁹², as well as on considerations conceiving copyright as a means contributing to and necessary for social, cultural and economic development¹⁹³. Hence, since the application of copyright to the benefit of the author could thus be regarded as being justified, it is consequently necessary to consider and weigh these rationales whenever an exception or restriction to, or a renunciation of the concept is discussed or intended to be anchored.

2.2.5 Intermediary Result

Therefore, concluding this chapter, it is to recapitulate and keep in mind that (a) copyright could in general be defined as the normatively informed, by jurisdiction territorially delimited¹⁹⁴, *negative, exclusive right* of an author¹⁹⁵ of an original¹⁹⁶ work, that allows him or her, for a legally prescribed period of time,¹⁹⁷ to authorise the use or exploitation of his work and to prevent non-authorised uses thereof¹⁹⁸; (b) that the EU's harmonising regulatory framework for copyright protects - as '*copyright*' - the displayed set of negative, geographically as well as temporally limited, exclusive, economic rights of an author, that are not subject to an exception for permitted uses (in the concrete case); (c) that the EU's framework protects its particular concept of copyright - while and by requiring an effective, proportionate and dissuasive enforcement thereof; and (d) that the enactment and application of copyright is justified or at least justifiable by means of philosophical, social and economic arguments.

2.3 Copyright as a Limitation on 'Borrowing' Political Protest Art

After the notions of 'borrowing' *political protest art* and copyright were thus clarified, the questions of whether, how and when copyright and *protest art* conflict with each other must briefly be examined. In doing so, this chapter addresses the issue of copyright as a limitation on 'borrowing' *political protest art* in general terms first, before it attempts to illustrate the conflict by means of a selected scenario.

Intellectual Property And Theories Of Justice, p.29 ff.; *Stanford Encyclopedia of Philosophy* on 'Intellectual Property', Chapter 3.3; Available at: <http://plato.stanford.edu/entries/intellectual-property/#JusCri> (Visited on 17.03.2016);

¹⁹¹ *World Trade Organization*, A Handbook on the WTO TRIPS Agreement, p.37;

¹⁹² *World Trade Organization*, A Handbook on the WTO TRIPS Agreement, p.37;

¹⁹³ E.g.: *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 1, p. 3, para.1.1; Chapter 2, p. 41, paras.2.165,2.166; Recital 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society;

¹⁹⁴ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 50, para.2.228;

¹⁹⁵ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 49, para.2.220;

¹⁹⁶ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 42, para.2.174;

¹⁹⁷ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 50, paras.2.225-2.227;

¹⁹⁸ *World Intellectual Property Organization*, WIPO Intellectual Property Handbook, Chapter 2, p. 43, paras.2.178/2.179;

2.3.1 General Depiction of Copyright as a Limitation on 'Borrowing' *Political Protest Art*

Considering the issue of copyright as a limitation on *protest art*, it is primarily to reiterate that copyright grants its owner the exclusive rights to authorise others to use the work and to prevent non-authorised use. Copyright thus excludes protest artists *de jure* from non-authorised use of proprietary contents unless an exception to *copyright* would permit the use.¹⁹⁹ The exhaustive catalogue²⁰⁰ of exceptions in Art. 5 of Directive 2001/29/EC, which sets out limited, mostly optional and strictly formulated exceptions to copyright, does however not provide such a permitting exception for the purposes of *protest art*. *Protest art* constitutes no temporary reproduction²⁰¹, it is usually not intended to serve for private uses²⁰², and most protest artists are not using photographic or similar processes²⁰³. *Protest art* can usually not be regarded as constituting caricature, parody or pastiche,²⁰⁴ it is not used for the purposes of teaching²⁰⁵ or reconstruction²⁰⁶ and it does not present the characteristics of quotations²⁰⁷ or advertising²⁰⁸. *Protest art* is also usually not making available published articles on current topics, it is not reporting on current events,²⁰⁹ but only a reaction to the events or reports, and protest artists cannot be directly equated with the press.²¹⁰ Hence, since no exception permits 'borrowing' uses for the purposes of *protest art*, it is to conclude that any unauthorised use of copyrighted materials in *protest art* could automatically constitute an infringement of copyright, which, if enforced, would entail sanctions, penalties, damages or cease and desist orders. It is thus to infer that 'borrowing' *protest art* could *de jure* be limited and that copyright presents a limitation on certain forms of 'borrowing' *protest art*.

Copyright protection and its enforcement could in this context impact on 'borrowing' *protest art* in two significant ways. On the one hand, they could impact *directly* by means of the displayed enforcement measures, which negatively affect 'borrowing' *protest art* and its artists. On the other hand, it is to observe that copyright protection could also *indirectly* or even psychologically prejudice *political protest art* by hindering the artist's free artistic expression and creativity by means of the preventive deterrence emanating from its enforcement, which *de facto* establishes the *artist's* obligations to (a) priorly scrutinise whether an intended design vocabulary or creation infringes copyright and, if this was to answer in the affirmative, (b) to abstain from 'borrowing' the copyrighted contents.

Hence, it can be concluded that, if and whenever *political protest art* 'borrowed' proprietary contents, *copyright* and *political protest art* could conflict with each other and that copyright could

¹⁹⁹ The author presumes here the situation that neither the geographical, nor the temporal limitation on copyright apply.

²⁰⁰ Recital 32 of Directive 2001/29/EC;

²⁰¹ Art.5 (1) of Directive 2001/29/EC;

²⁰² Art.5 (2) (b) of Directive 2001/29/EC;

²⁰³ Art.5 (2) (a) of Directive 2001/29/EC;

²⁰⁴ Art.5 (3) (k) of Directive 2001/29/EC;

²⁰⁵ Art.5 (3) (a) of Directive 2001/29/EC;

²⁰⁶ Art.5 (3) (m) of Directive 2001/29/EC;

²⁰⁷ Art.5 (3) (d) of Directive 2001/29/EC;

²⁰⁸ Art.5 (3) (j) of Directive 2001/29/EC;

²⁰⁹ Art.5 (3) (c) of Directive 2001/29/EC;

²¹⁰ Art.5 (3) (c) of Directive 2001/29/EC;

thus, due to the lack of a permitting exception, constitute a limitation on *political protest art*, which could not only directly, but also indirectly impede 'borrowing' *political protest art* and its creation.

2.3.2 Depiction by Means of the Illustrating Scenario "*Aylan Kurdi*"

To point out the practical relevance of this finding, this subchapter exemplifies the potential conflict between *copyright* and 'borrowing' *political protest art* by means of the illustrating scenario "*Aylan Kurdi*" in the following. Since the facts of the scenario are set out in Annex I²¹¹, I strongly recommend at this point to have regard to Annex I first, before proceeding to the scenario's assessment.

Commencing with the illustrating scenario's assessment, it is to note that this scenario concerns the artistic reproduction of a photograph displaying a migrant boy lying dead in the shore of Bodrum (Turkey), which was taken by *Nilufer Demir* on September 2, 2015 and subsequently became the icon of the European migrant crisis and the political debate surrounding it.²¹²

The original photograph presents a proprietary work that grants the author or rather the person taking the picture the exclusive rights enshrined in copyright protection. As the person, who took the photograph, *Nilufer Demir* is thus to regard as the copyright holder.²¹³

The photograph's artistic reproduction "*Europa tot - Der Tod und das Geld*", on the other hand, was created and finalised by the artists *Becker* and *Sen* in March 2016. The artists intended and pursued the objectives to, on the one hand, protest against the EU's political failure to solve the migration crisis in a uniform, humane and human rights compliant manner and, on the other, to provide a counter to or a societal reminder against upcoming xenophobic, racist, and right-wing tendencies in Germany. Since the artistic reproduction thus meets the requirements *means used*, *objective/purpose pursued* and *intentional link*, since it *contentually refers* to the icon of the political debate surrounding the European migrant crisis and, thus, to politics and since *affirmation* can be presumed on the basis of the views held in society²¹⁴, the reproduction can be regarded as constituting *political protest art*.

Since *Becker/Sen's* protest artwork, which is publicly displayed in an easily accessible location confronting the *European Central Bank*, additionally copies or rather makes use of the most significant part of *Nilufer Demir's* proprietary work without the copyright holder's authorisation²¹⁵, it is to adhere that an unauthorised reproduction and, thus, 'borrowing' *political protest art* is present. An infringement or an interference with the copyright holder's exclusive right to authorise or prohibit the reproduction would therefore be to assume, if the reproduction was not covered by an exception to

²¹¹ Annex I - Illustrating Scenario "*Aylan Kurdi*";

²¹² Annex I - Illustrating Scenario "*Aylan Kurdi*", p.1 and 2;

²¹³ Cf.: Annex I, p.1: Due to the lack of information regarding the contractual agreements between *Nilufer Demir* and her employer DHA as well as between her employer and Associated Press, the author of this thesis decided for reasons of simplicity to assume that the copyright remained with the original owner, the photographer shooting the photograph.

²¹⁴ *Affirmation* is presumable, since the artistic reproduction followed an existing migration-friendly political view/ opinion held in society - Cf.: "*Refugee's Welcome*";

²¹⁵ The use of the photograph is only permitted by the rightsholder for editorial use, since other clearances are still required. - Cf.: Annex I, p.1;

copyright permitting the use. Examining the InfoSoc Directive's exhaustive catalogue²¹⁶ for a permitting exception in this respect, it is however to note that *Becker/Sen's protest art* expression neither shows the characteristics of quotation²¹⁷, advertising,²¹⁸ caricature, parody or pastiche,²¹⁹ nor that it is reproducing the proprietary content merely for private use²²⁰. Since graffiti painting can additionally not be regarded as a photographic process, since the artists are not to equate with the press and since the reproduction and display of the work cannot be covered by the exception permitting reporting on current events due to the fact that the death of the migrant boy took place half a year earlier, it is to infer that no exception permits the use of the proprietary work and, thus, the reproduction.

Hence, since an infringement is thus present, it is to adhere that, if *Nilufer Demir* asserted her right to prevent non-authorised use, *Becker/Sen's* 'borrowing' protest artwork would be to overpaint or destroy, other enforcement measures be announced and copyright would, thus, constitute a limitation.

2.3.3 Intermediary Result

Conclusively, it is thus to adhere that *political protest art* and copyright could conflict with each other, if and whenever *political protest art* 'borrowed' proprietary contents, due to the absence of an exception to copyright in European copyright law, which would permit the 'borrowing' uses in *protest art*. Since the 'borrowing' uses would thus automatically constitute unjustified infringements, it can be inferred that, if enforced, copyright would present a limitation on 'borrowing' *political protest art*.

2.4 Intermediary Result

Summarizing Chapter 2, it is thus to keep in mind that (1) for the purposes of this thesis, 'borrowing' *political protest art* is defined as the instrumentalisation of art for the purposes of protest (determinable by the criteria *means used*, *objective and/or purpose pursued* and *perceptive or intentional link*), which mirrors the *contentual reference* to politics as well as *openness to affirmation by fellow campaigners* and which makes use of proprietary contents without authorisation; (2) that the EU's harmonising regulatory framework for copyright protects - as '*copyright*' - the displayed set of negative, geographically as well as temporally limited, exclusive, economic rights of an author, that are not subject to an exception for permitted uses (in the concrete case); and (3) that European copyright, due to the absence of such a permitting exception for the purposes of *political protest art* in EU copyright law, could conflict with and constitute a limitation on 'borrowing' *political protest art*, if it was enforced.

²¹⁶ Art.5 of Directive 2001/29/EC;

²¹⁷ Art.5 (3) (d) of Directive 2001/29/EC;

²¹⁸ Art.5 (3) (j) of Directive 2001/29/EC;

²¹⁹ Art.5 (3) (k) of Directive 2001/29/EC;

²²⁰ Art.5 (2) (b) of Directive 2001/29/EC;

3. Setting the Scene: The Legal Framework and Its Application to the Relation of Protest Artists and Copyright Holders under European Human Rights Law

Since copyright could thus - contrary to the previously described necessity to use copyrighted materials in *protest art* where no other venues for expression are available - in effect completely exclude protest artists from the use of copyrighted works on the basis of (a) its characteristic as a monopoly right, (b) its strong enforcement procedures, (c) its long term of protection and (d) due to the absence of a permitting exception to copyright, it is to ask whether this prevention of 'borrowing' uses in *protest art* complies with the protection granted under human rights law. For this reason and to provide the necessary basis for the following assessment and determination of this question, this chapter seeks to set the scene by pointing out and applying both, the legal framework and the European Courts' related interpretative case law. In doing so, the chapter briefly introduces the European human rights regime first, proceeds then to displaying the human rights protection of *political protest art* and copyright, before it subsequently addresses and demonstrates the European case law on their intersection.

3.1 The European Human Rights Regime and the Relationship between the *Charter of Fundamental Rights of the European Union* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*

Approaching the European human rights regime first, one has to note that the regime is for the most part formed and informed by two pan-European instruments. Starting from the concept of *sovereignty*²²¹, which grants a state the right to exercise unlimited powers within its jurisdiction²²² unless constraints are positively accepted, justiciable European human rights were regionally regulated and accepted by the European states in the *European Convention on Human Rights*²²³ (ECHR) and the *Charter of Fundamental Rights of the European Union*²²⁴ (ECFR). While similarities exist between these treaty-based systems since for example each of these instruments constitutes legally binding and applicable law²²⁵ that is monitored, applied and interpreted by a competent court, namely by the *European Court of Human Rights* (in the following also *ECtHR* or *Strasbourg Court*) regarding the ECHR and by the *Court of Justice of the European Union* (*CJEU* or *Luxembourg Court*) concerning the

²²¹ The concept of *sovereignty* can be defined as "[...] the power possessed by [...] states and the right or ability to exercise [...] authority over all the individuals living in the state's territory [...]" - Cf.: Mansell, Wade/Openshaw, Karen, International Law, A Critical Introduction, 2013, p.29;

²²² The concept of *jurisdiction* is to understand as "the limits of the legal competence of a [s]tate [...] to make, apply and enforce rules of conduct upon persons" - Cf.: Staker in Evans, Malcom D., International Law, 4.Edition, 2014, p.309;

²²³ Formally *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as opened for signature in Rome on 04.11.1950, entered into force on 03. September 1953 and amended by its Protocols No.1-16;

²²⁴ As ratified and solemnly proclaimed on 07.December 2000; Having direct binding effect as primary EU Law since 01.12.2009 due to the Treaty of Lisbon's entry into force;

²²⁵ The **ECHR** is an international treaty, which is - contingent on its ranking in the national hierarchy of norms - considered as being either constitutional (E.g.: Austria), or normal law (E.g.: Germany), that would be binding upon and to apply or to observe by the national authorities, if the statute, granting consent for ratification is adopted and/or if the treaty is ratified by (direct) implementation. The **ECFR**, on the other hand, is a directly applicable legal instrument that binds the authorities of EU Member States (whenever they implement EU law) due to its nature as primary EU law and the primacy of application of EU Law in times of conflict with national law.

ECFR,²²⁶ and since both of their courts draw additional inspiration for the instruments' *autonomous European interpretation* from other human rights regimes, it is to adhere that also significant differences can be found. The regimes differ in this connection in terms of (a) their underlying objectives, (b) their Courts' mandates, (c) their contents as well as (d) regarding their reach.

Regarding their objectives and the Courts' respective mandates, it is initially to note that the ECtHR pursues to live up to the Convention's objective to provide a *minimum standards human rights protection*²²⁷ by means of its own interpretation of the ECHR as well as its references to, for example, the Inter-American human rights regime²²⁸, while its mandate or rather the mandated power to review the decisions of national courts is limited²²⁹, subsidiary²³⁰ and solely directed at ensuring "*that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable*"²³¹. The CJEU, on the other hand, seeks - fully mandated in respect of EU law - to further *harmonise*²³² the European legal and economic area in accordance with the Charter by means of its own interpretation thereof and by drawing inspiration from the general principles of EU law²³³, including the common constitutional traditions²³⁴²³⁵, the ECHR and, to a limited extent, the United Nations' human rights treaties²³⁶, or as the CJEU itself put it:

"Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The [European Convention] has special significance in that respect."²³⁷

Concerning their contents and reach, it is on the other hand to observe that, while the ECHR textually prescribes the civil and political rights of an individual within the jurisdiction of one of the 47 *Council of Europe* Member States, the ECFR enshrines, besides civil and political, also the social and econom-

²²⁶ Cf.: *Butti, Elena*, The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection, published on Jurist.Org, 12 September 2013, Introduction.

²²⁷ *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, pp.118,119; See also: *Butti, Elena*, The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection, published on Jurist.Org, 2013, ECJ and ECtHR: Different Theoretical Rationales.

²²⁸ Cf. e.g.: Council of Europe/ European Court of Human Rights, Research Report, References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights, 2012;

²²⁹ *Grosse Ruse-Khan, Henning*, Overlaps and conflicts norms in human rights law: Approaches of European courts to address intersections with intellectual property rights, p. 81;

²³⁰ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, paras. 48-50;

²³¹ ECtHR, *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, Judgment of 11 January 2007, para.86;

²³² *Butti, Elena*, The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection, published on Jurist.Org, 2013, ECJ and ECtHR: Different Theoretical Rationales; See also *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, pp. 118,119;

²³³ Art.6(3) of the Treaty on European Union;

²³⁴ The finding of a common constitutional tradition results from a comparison of the national constitutional regimes.

²³⁵ Cf.: CJEU cases: Case C-29/69, *Stauder v Ulm* [1969]; Case C-4/73, *Nold v Commission* [1974]; Case C-36/75, *Rutili v Minister for the Interior* [1975]; Case C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970]; Case C-5/88, *Wachauf v Bundesamt* [1989]; Case C-44/79, *Hauer v Land Rheinland-Pfalz* [1979]; Case C-13/94, *P v S and Cornwall CC* [1996]; Case C-36/02, *Omega* [2004].

²³⁶ Cf.: CJEU Case C-540/03, *European Parliament v Council* [2006];

²³⁷ CJEU: Case C-540/03, *Parliament v Council* [2006], para. 35; Reiterating: Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms* [1996], para. 33; Case C-274/99 P, *Connolly v Commission* [2001], para. 37; Case C-94/00, *Roquette Frères* [2002], para. 25; Case C-112/00, *Schmidberger* [2003], para. 71 ; Case C-36/02 *Omega* [2004], para. 33;

ic rights that are applicable within the legal area of the European Union or rather within the jurisdiction of its twentyeight Member States.

Nonetheless, even if these differences between the two treaty regimes exist, it is to note that both instruments similarly stipulate an independent regime of human rights and corresponding obligations. Human rights, which, above all, are regarded as defence rights against the state, but which could also have effect in the relationship between privates among themselves via *indirect*²³⁸ *third-party effect*, correspond in this context to obligations of the state, which were described as the *duties to respect, to protect and to fulfil* the rights²³⁹ or as the *negative and positive obligations*²⁴⁰ of a state under the respective rights. A state would accordingly generally be obliged to respect the rights and, thus, be required to refrain from interfering²⁴¹, it would be obliged to protect those rights and, thus, to prevent thirds from any interference²⁴² and it would be obliged to fulfil these rights, which means that it has to take all necessary measures to enable the full realisation of the rights granted²⁴³.

However, while the ECtHR accepted such negative and positive obligations in its standing case law,²⁴⁴ the EU and its institutions, including the CJEU, are somehow special in this regard²⁴⁵. Although, the EU and its institutions are according to Art.6 (1), (3) of the Treaty on European Union (TEU), read in conjunction with Art.51 (1) of the Charter, obliged to observe and to apply human rights in their actions as a precondition of legality, whereby the human rights obligations originate from the European Charter of Fundamental Rights²⁴⁶ and the '*general principles of EU law*²⁴⁷, the EU and especially the CJEU with its self-proclaimed competence "[...] to define the obligations the [Un-

²³⁸ The *indirect third-party effect* ("*mittelbare Drittwirkung*") is a legal concept that corresponds to the obligation to protect. It stipulates that human rights, while generally not being applicable in the relation of privates among themselves, have to be observed by public authorities, when dealing with for example disputes between private persons. Thus, human rights are indirectly applicable to and to protect in relations between privates, whenever public authorities are tasked in this regard.

²³⁹ Cf.e.g.: *Alston, Philip/ Goodman, Ryan*, International Human Rights, pp.181-185; *Koch, Ida Elisabeth*, Human Rights as Indivisible Rights, The Protection of Socio-Economic Demands under the European Convention on Human Rights, pp.13-28;

²⁴⁰ The term '*negative obligation*' corresponds to the duty to respect, whereas the term '*positive obligation*' encompasses the duties to protect and to fulfil. - Cf.: *Alston, Philip/ Goodman, Ryan*, International Human Rights, pp.181-185; See also: *Harris/ O'Boyle/ Warbrick*, Law of the European Convention on Human Rights, Second Edition, pp.18-21;

²⁴¹ HRC, General Comment No. 34 (2011), Art.19: Freedoms of opinion and expression, para.7; CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), para. 33; CESCR, General Comment No. 13 (1999), The right to education (Article 13), paras. 46,47; CESCR, General Comment No. 12 (1999), The right to adequate food (Article 11), para. 15;

²⁴² CESCR, General Comment No. 15 (2002), The right to water, para. 23; CESCR, General Comment No. 12 (1999), The right to adequate food, para. 15; CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), para. 33; CESCR, General Comment No. 13 (1999), The right to education (Article 13), paras. 46,47;

²⁴³ CESCR, General Comment No. 13 (1999), The right to education (Article 13), paras. 46,47; CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), para. 33; CESCR, General Comment No. 15 (2002), The right to water (Articles 11 and 12), para. 25;

²⁴⁴ While negative obligations were derived directly from the ECHR's wording, the ECtHR found that the rights set out by the ECHR must be adequate and effective, which could in certain circumstances entail positive obligations that are then "*inherent in an effect respect of the rights concerned*" - Cf.: *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

²⁴⁵ See - also for further information - e.g.: *Ahmed, Tawhida/ de Jesus Butler, Israel*, The European Union and Human Rights: An International Law Perspective, European Journal of International Law, Vol. 17, Issue 4 (2006), pp. 771-801;

²⁴⁶ Art.6(1) of the Treaty on European Union;

²⁴⁷ Art.6(3) of the Treaty on European Union;

ion] has entered into [...]”^{248,249}, are “[...] less ready to acknowledge that human rights, of themselves, also carry a duty to protect and [to] promote their realisation [...]”²⁵⁰ due to the EU's lack of competence²⁵¹. Albeit, the EU thus, in general, solely accepts the *duty to respect* as the substantial content of its human rights obligations while being hesitant in terms of positive obligations corresponding to the duties *'to protect'* and *'to fulfil'*, one has to adhere that the EU's restrictive approach applies only until positive obligations are or were accepted.²⁵² In this respect, Art.52 (3) ECFR prescribes that whenever the ECFR contains rights which correspond to rights guaranteed by the ECHR “[...] *the meaning and scope of those rights shall be the same as those laid down by the said Convention* [...]”.²⁵³ Thus, even if differences between the ECFR and the ECHR exist for example regarding the wording, the content or the scope of corresponding rights, the meaning, scope and, thus, the obligations under the rights enshrined in the ECFR shall be consistent with or even more protective²⁵⁴ than the ones of the rights stipulated in the ECHR regime. For this reason, it can be held that via Art.52 (3) ECFR, read in conjunction with Art.6 (1) TEU, the EU accepted the negative as well as the positive obligations recognised in the ECHR regime as legally binding upon itself and its institutions. If one thus seeks to establish the meaning, the scope or the obligations under a relevant right of the ECFR, one has, firstly, to examine whether the ECFR's right constitutes a corresponding right and, secondly, if this is to answer in the affirmative, to have regard to the ECHR's conceptualisation of the corresponding right.

Hence, it is conclusively to infer that, while the pan-European instruments ECHR and ECFR establish two independent human rights regimes with considerable similarities as well as differences, their interrelation is to define as being characterised by the ECHR's predominant role, which derives from the EU's legal acceptance of the ECHR's conceptualisation of a right as the substantial content of the ECFR's own corresponding right.

²⁴⁸ *Grosse Ruse-Khan, Henning*, Overlaps and conflicts norms in human rights law: Approaches of European courts to address intersections with intellectual property rights, p. 74;

²⁴⁹ The CJEU on its self-proclaimed competence: “*The Court [...] has jurisdiction to define the obligations which the Community has [...] assumed and, for that purpose, to interpret the provisions [...]*.” - Cf.: ECJ, Case C-431/05, *Merck Genericos-Produtos Farmaceuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda* [2007], para.33;

²⁵⁰ UN HR - Office of the High Commissioner/ Europe Regional Office, *The European Union and International Human Rights Law*, p.14; See also: *Ahmed, Tawhida/ de Jesus Butler, Israel*, *The European Union and Human Rights: An International Law Perspective*, *European Journal of International Law*, Vol. 17, Issue 4 (2006), pp. 771-801, p.701;

²⁵¹ ECJ, Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms* [1996], para. 27;

²⁵² The EU's move from a human rights ignoring position to a human rights respecting one is well rehearsed, see for further information e.g.: *Alston, Philip/Weiler, J.H.H.*, An ‘Ever Closer Union’ in Need of a Human Rights Policy, *The European Union and Human Rights*, pp.3-66; *Ahmed, Tawhida/ de Jesus Butler, Israel*, *The European Union and Human Rights: An International Law Perspective*, *European Journal of International Law*, Vol. 17, Issue 4 (2006), pp. 771-801, Chapter 2; *Weiler, J.H.H./Fries, S.C.*, A Human Rights Policy for the European Community and Union, *The Question of Competences*, pp.147-166; *De Vries, Sybe A.*, EU and ECHR: Conflict or Harmony?, *Utrecht Law Review*. 9(1), pp.78–79;

²⁵³ Cf.: *Butti, Elena*, *The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection*, published on Jurist.Org, 12 September 2013, CFR and ECHR: the Two EU Human Rights Protection Texts.

²⁵⁴ Cf.: Art.52 (3) of the Charter of Fundamental Rights of the European Union: “*This provision shall not prevent Union law providing more extensive protection.*”; See also: *Butti, Elena*, *The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection*, published on Jurist.Org, 12 September 2013, CFR and ECHR: the Two EU Human Rights Protection Texts.

3.2 The European Human Rights Protection of Protest Artists - The Fundamental Rights to Freedom of Expression and Freedom of the Arts

After an overview over the European human rights regime was thus provided, it is now to assess whether protest artists could claim human rights on the basis of *protest art* expressions. For this reason, this chapter is intended to examine and demonstrate the potential protection that could be granted to protest artists under the aforementioned regime. Nonetheless, before starting with the assessment, three issues must be stressed first to clarify the delimiting decisions that were made in this regard:

Firstly, in respect of *political protest art*, it is initially to recognise that numerous rights could be relevant and applicable contingent on the circumstances of the concrete case.²⁵⁵ Starting from the obviously concerned rights to freedom of expression and freedom of the arts²⁵⁶, one will see that, besides others, also the right to freedom of thought, conscience and religion²⁵⁷, the right of peaceful assembly²⁵⁸ and the protest artist's rights to property or copyright could play a significant role. Nonetheless, due to the thesis' shortage and its ambition to address the interface between the protest artist's rights to freedom of expression as well as artistic expression and the copyright holder's right to copyright, this chapter is limited to the display of the artist's rights to freedom of expression and freedom of the arts, whereby the presentation of these rights is restricted to the aspects relevant for the determination of a human rights compliant protection of *political protest art* in times of conflict with copyright.

Secondly, when considering the protection of protest artists, it is to adhere that the nature of *protest art*, which was previously defined as the 'instrumentalisation of art for the purposes of protest', necessitates that a distinction is made between the protection granted to the *means used* and the protection afforded in regard to the *message conveyed*. Whereas the *message conveyed* falls within the ambit of freedom of expression, it is to observe that artistic expressions or rather expressions, that instrumentalise the *means art*, concern the rights to freedom of the arts and free artistic expression. For this reason, both rights are scrutinized in the following and their contents independently displayed.

Thirdly, since the ECFR's right to freedom of expression, as prescribed by Art.11 (1) ECFR, as well as its right to freedom of the arts, as enshrined in Art.13 ECFR, constitute corresponding rights in the sense of the preceding chapter,²⁵⁹ this chapter focalises on and solely demonstrates the rights' conceptualisation under Art.10 ECHR.

²⁵⁵ Cf.: Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed*, The right to freedom of artistic expression and creativity, A/HRC/23/34 (14 March 2013), paras.9-11;

²⁵⁶ Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed*, The right to freedom of artistic expression and creativity, A/HRC/23/34 (14 March 2013), paras.9,10;

²⁵⁷ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.435; Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed*, The right to freedom of artistic expression and creativity, A/HRC/23/34 (14 March 2013), para.11;

²⁵⁸ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.435; Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed*, The right to freedom of artistic expression and creativity, A/HRC/23/34 (14 March 2013), para.11;

²⁵⁹ See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, pp.115,116, 123;

3.2.1 The Regulation and Principle of Freedom of Expression under Art.10 ECHR

Thus, commencing with an introduction of the right's regulation and its conceptual principle, it is initially to emphasise that Art.10 (1) ECHR stipulates the right to freedom of expression including the freedoms to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. While being of exceptional importance as "[...] *one of the essential foundations of [...] a [democratic] society, one of the basic conditions for its progress and for the development of every man [...]*"²⁶⁰, the right to freedom of expression is subject to a number of limitations, which are enshrined in Art.10 (2) of the Convention. Albeit limitations on the right could thus be lawfully imposed, it is however to observe that these limitations have to be construed strictly²⁶¹, that they have to be established convincingly²⁶² and that the limitations must comply with the demands of the '*triple test*' set out by Art.10 (2) ECHR since the Strasbourg Court frequently accentuated that "*overbroad, non-pertinent or disproportionate restrictive interferences with the right [...] risk to have a chilling effect, which in itself is detriment for a democratic society.*"²⁶³ Hence, the conceptual principle of freedom of expression, as prescribed by Art.10 ECHR, can thus be understood as constituting and granting a right, which due to its accompanying 'duties and responsibilities' opens the possibility for public authorities to interfere with the right - provided that the interference is 'prescribed by law', that it pursues one of the 'legitimate aims' enumerated in paragraph 2 and that the limitation is 'necessary in a democratic society' to promote that aim.

Consequently, if one seeks to determine whether an artist's *protest art* expression is protected by Art.10 of the Convention, one would be required to address five particular issues. One would have to assess, firstly, whether protest artists are entitled to the right to freedom of expression, secondly, to examine whether *protest art* constitutes a protected expression in the sense of Article 10 ECHR and, thirdly, to establish to which particular rights protest artists would actually be entitled to when expressing themselves by means of *protest art*. After the assessment of the first three issues, one would then be required to scrutinise what exactly would constitute an interference with the right to freedom of expression and eventually to analyse under which conditions the limitations could lawfully be imposed. Since the determination of a potential protection of *protest art* constitutes a necessary prerequisite for the thesis upcoming elaborations, these issues are investigated and displayed in the following.

3.2.2 Scope of Protection

Focussing on the first three of these issues, this subchapter primarily points out the personal and material scope of the rights to freedom of expression and artistic expression, before it subsequently answers

²⁶⁰ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; ECtHR, *The Sunday Times v the United Kingdom*, App.-No.: 6538/74, Judgment of 26 April 1979, para.65; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.41;

²⁶¹ ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, App.-No.: 16354/06, Judgment of 13 July 2012, para.48;

²⁶² ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, App.-No.: 16354/06, Judgment of 13 July 2012, para.48;

²⁶³ Cf.: *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.333;

the questions of whether protest artists are entitled to the rights, whether *protest art* constitutes a protected expression in the sense of Art.10 ECHR and to which particular rights protest artists are entitled to when expressing themselves by means of *protest art*.

3.2.2.1 Personal Scope

At first, tackling the issue of entitlement, Article 10's personal scope is to determine. In this respect, it is easily to recognise that the personal scope of the rights to freedom of expression and artistic expression is defined by Article 10's wording, which encompasses and grants protection to "*everyone*". The Strasbourg Court also repeatedly reiterated in this regard that the "[...] *Convention offers [...] protection to all participants in debates on matters of legitimate public concern.*"²⁶⁴ The personal scope consequently includes any natural or legal²⁶⁵ person participating in such a communication process.²⁶⁶

Nonetheless, since Art.1 ECHR merely requires that "[...] *Contracting Parties [...] secure [the rights to freedom of expression and artistic expression] to everyone within their jurisdiction [...]*"²⁶⁷, it is to note that, in principle, the rights as well as their respective personal scopes are restricted by the Convention's applicability and, thus, by a state's jurisdiction, on which the applicability depends..

Hence, since the personal scope of Art.10 ECHR comprises any natural or legal person that participates in a debate on matters of legitimate public concern within the jurisdiction of a Contracting Party, it is to infer that protest artists as well as groups or movements expressing or imparting *protest art* would be entitled to the rights enshrined in Art.10 ECHR, if they participated in a debate within the jurisdiction of a Contracting Party and if the criteria of the Article's material scope were satisfied.

3.2.2.2 Material Scope

The material or substantial scope of Art.10 ECHR, on the other hand, concerns and encompasses various aspects and forms of communicative behaviour. Starting from the individual's rights to form and hold opinions, Article 10 comprises the freedom to receive and impart information and ideas, the right to artistic expression²⁶⁸ as well as the dissemination of the ideas and information expressed. Since the general freedom of expression thus implicitly contains the right to free artistic expression²⁶⁹, it is possible to make some general statements that apply to both, the right to freedom of expression as well as the right to free artistic expression. For this reason, these general statements are presented in the following first, before the particular rights and their contents are set out subsequently.

²⁶⁴ Cf.: ECtHR, *Braun v Poland*, App.-No.: 30162/10, Judgment of 04 November 2014, para. 47;

²⁶⁵ Legal persons or entities are only insofar encompassed by Art.10 ECHR's personal scope as they constitute a non-state organisation in the sense of Art.34 ECHR;

²⁶⁶ *BeckOK InfoMedienR/Cornils, EMRK Art. 10*, para.12;

²⁶⁷ Art.1 of the European Convention of Human Rights;

²⁶⁸ Cf.: ECtHR, *Müller and Others v Switzerland*, App.-No.: 10737/84, Judgment of 24th May 1988, para.27;

²⁶⁹ Cf.: ECtHR, *Müller and Others v Switzerland*, App.-No.: 10737/84, Judgment of 24th May 1988, para.27;

3.2.2.2.1 General Statements Concerning the Scopes of the Rights to Free Expression and Free Artistic Expression

When dealing with the substantial scope of the rights to freedom of expression and free artistic expression respectively, four generally applicable statements can be made.

Firstly, the rights' substantial scopes extend "[...] *not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population [...]"*²⁷⁰ since "[...] *pluralism, tolerance and broadmindedness without which there is no "democratic society" [...]"*²⁷¹ demand so.²⁷²

Secondly, since the majority of observers consider Art. 17 ECHR as presenting a mere justification of state-imposed limitations on the rights,²⁷³ it can generally be held that any content review or exclusion of contents is prohibited at the material scope's level.²⁷⁴

Thirdly, since the substantial scopes thus extend to expressions *that offend, shock or disturb* and since content reviews as well as exclusions are prohibited, it can in principle be assumed that the rights' material scopes comprise all forms of expressions irrespective of their medium²⁷⁵ and irregardless of their content^{276, 277}.

And lastly, since the ECtHR additionally understands Article 10 as protecting "[...] *not only the substance of the ideas and information expressed, but also the form in which they are conveyed [...]"*²⁷⁸, especially since the way in which opinions, ideas or information are expressed usually has an

²⁷⁰ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; See also ECtHR, *The Sunday Times v the United Kingdom*, App.-No.: 6538/74, Judgment of 26 April 1979, para.65; ECtHR, *Prager and Oberschlick v Austria*, App.-No.: 15974/90, Judgment of 26 April 1995, para.38; ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, App.-No.: 16354/06, Judgment of 13 July 2012, para.48; ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, para. 59 (a);

²⁷¹ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.41;

²⁷² Cf.: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, pp. 444-445;

²⁷³ Another opinion can be held in this regard. The proponents of this opinion demand that particular contents (E.g.: hate speech, incitement to hatred or violence, holocaust denial, denial of the genocide regarding the Armenians or war propaganda) are already in this stage removed from protection under Article 10 by application of Article 17 ECHR. Whereas this opinion can be held on the basis of the ECtHR's reasoning stating that particular contents "*would be removed from the protection of Article 10 by Article 17 [of the Convention]"* (Cf.: ECtHR, *Lehideux and Isorny v. France*, App.-No.: 25662/94, Judgment of 23 September 1998, para.47; See also *Norwood v United Kingdom*, App.-No.: 23131/03, Decision of 16 November 2004, p.4.); the author of this thesis decided against an adoption of this opinion and instead follows the majority's opinion holding that Art.17 ECHR works as a direct justification which has no excluding effect on the scope's level since the author is of the opinion that the right to freedom of expression should not be placed at a judge's disposal. (Cf. also: *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, para.17.1);

²⁷⁴ *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, paras.17-18.1;

²⁷⁵ Exemplifying list of already recognised media: Paintings, books, cartoons, films, video-recordings, statements in radio interviews, information pamphlets and the internet... - Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.435,436;

²⁷⁶ No content review is conducted by the ECtHR. Also incitement to hatred as well as pornography fall within the scope of the right. - Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.436;

²⁷⁷ Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.435,436;

²⁷⁸ ECtHR, *Jersild v Denmark*, App.-No.: 15890/89, Judgment of 23 September 1994, para.31; ECtHR, *Thoma v. Luxembourg*, App.-No.: 38432/97, Judgment of 29 March 2001, para.45;

independent meaning in itself²⁷⁹,²⁸⁰ it is to adhere that the rights' protective scopes extend not only to the content of an expression, but also to its form of conveyal.

Hence, it is thus in general to infer that the material scope of Art. 10 ECHR is inclusive, that a content review is prohibited at this stage, that all forms of expressions irrespective of their medium and irregardless of their content fall within the rights' scopes and that not only the substance, but also the form of conveyal is protected.

If one thus applied these general statements to *political protest art*, it could conclusively be held that *protest art* expressions fall within the scope of Article 10 irrespective of their medium and irregardless of their content, that *political protest art* constitutes a protected expression in the sense of Art.10 ECHR and that its message (*message conveyed*) as well as its form of conveyal (*means used*) are encompassed by the material scopes and, thus, by the rights' protection.

3.2.2.2.2 The 'Active' Freedoms to Form and Hold Opinions and to Express and Impart Ideas and Information

Turning to the presentation of the particular rights and their contents respectively, one initially observes that the first set of rights, that is relevant in terms of *protest art*, encompasses the rights to form and hold opinions as well as the rights to express and impart information and ideas. While the 'inward-looking' rights to form and hold opinions would only be of relevance for protest artists and those affirming their protesting course, if and whenever protection from indoctrination was needed,²⁸¹ one immediately realises that particularly the 'outwardly-oriented' rights to express and impart information and ideas are of crucial importance for *protest art*. The latter rights, which are generally "[...] of the greatest importance for the political life and the democratic structure of a country [...]"²⁸², allow protest artists in this context to freely express and impart their ideas and information in all forms and by any means²⁸³ as long as the expression's meaning is describable²⁸⁴. For this reason, it can initially be inferred that expressly stated as well as the implicitly contained messages of *protest art*, could be protected, provided that they are understandable and describable.

To entitle the artist to the right to express and impart information, *protest art* or the *message conveyed* would however also have to constitute an idea or an information. Article 10 protects in this

²⁷⁹ E.g.: Expression using Irony, Satire, Exaggeration or provocation additionally transfers a second, somehow hidden message. - Cf.: ECtHR, *Thoma v. Luxembourg*, App.-No.: 38432/97, Judgment of 29 March 2001, para.46; ECtHR, *Prager and Oberschlick v Austria*, App.-No.: 15974/90, Judgment of 26 April 1995, para.38;

²⁸⁰ *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, para.13;

²⁸¹ *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, para.14;

²⁸² *Council of Europe/Macovei, Monica*, Freedom of Expression, A guide to the implementation of Article 10 of the European Convention of Human Rights, Human rights handbook, No.2, p.8;

²⁸³ *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, para.14;

²⁸⁴ The criterion "*as long as the meaning is describable*" is particularly important in regard to implied messages or concerning conclusive conduct, which are recognised under the condition that their meaning is understandable and describable. - Cf.: *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, para.19;

context any *value judgment* as 'ideas' and any *statement of fact* as 'information'.²⁸⁵ Making a careful and clear distinction between facts and value judgments, the Strasbourg Court stated that

"[...] the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. [...] As regards value judgments this [truth] requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 [...] of the Convention."²⁸⁶

Nonetheless, pointing out that some factual basis must also be present in terms of value judgments the ECtHR held that "[...] *even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.*"²⁸⁷ Since the Court's statement, however, refers to the later stages of necessity and proportionality of an interference, one can conclude that all forms of value judgments and statements of fact, including those that "[...] *offend, shock or disturb [...]*"²⁸⁸, fall within the scope of Article 10 - irrelative of their truth and irrespective of their medium or content. Since it is additionally plain that *protest art* regularly constitutes either a value judgment, or a statement of fact, which provides a sufficient factual basis due to its cause or the reason protested against, it is thus to adhere that Article 10 permits artists to freely express and impart their information and ideas, including their *protest art*, "[...] *provided that they do not harm democracy itself [...]*".²⁸⁹ Protest artists are thus entitled to the rights and their protection.

3.2.2.2.3 The 'Passive' Freedoms to Receive and Access Information and Ideas

It may however not be forgotten that the protest artist's '*active*' rights to express and impart information and ideas are informed by the public's '*passive*' right to receive information and ideas.²⁹⁰ The scope of the right to receive information and ideas, which originally included "[...] *the right to gather information and to seek information through all possible lawful sources [...]*"²⁹¹ as well as "[...] *the right of the public to be adequately informed, in particular on matters of public interest [...]*"²⁹², was

²⁸⁵ ECtHR, *Sorguc v. Turkey*, App.-No.:17089/883, Judgment of 23 June 2009, para.29; *Council of Europe/Macovei, Monica*, Freedom of Expression, A guide to the implementation of Article 10 of the European Convention of Human Rights, Human rights handbook, No.2, pp.9, 10;

²⁸⁶ ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.46;

²⁸⁷ ECtHR, *Dichand and Others v Austria*, App.-No.: 29271/95, Judgment of 26 February 2002, para.43; See also: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.505;

²⁸⁸ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; See also ECtHR, *Prager and Oberschlick v Austria*, App.-No.: 15974/90, Judgment of 26 April 1995, para.38; ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, App.-No.: 16354/06, Judgment of 13 July 2012, para.48;

²⁸⁹ ECtHR, *Manole and Others v. Moldova*, App.-No.: 13936/02, Judgment of 17 September 2009, para.95; See also: ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, App.-No.: 38433/09, Judgment of 7 June 2012, para.129; ECtHR, *Socialist Party and Others v. Turkey*, 20/1997/804/1007, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998, para.47;

²⁹⁰ ECtHR, *Times Newspaper Ltd v United Kingdom* (Nos 1 and 2), App.-No.: 3002/03 and 23676/03, Judgment of 10 March 2009, para.27;

²⁹¹ *Council of Europe/Macovei, Monica*, Freedom of Expression, A guide to the implementation of Article 10 of the European Convention of Human Rights, Human rights handbook, No.2, p.10;

²⁹² *Council of Europe/Macovei, Monica*, Freedom of Expression, A guide to the implementation of Article 10 of the European Convention of Human Rights, Human rights handbook, No.2, p.11;

broadened by the ECtHR in its recent case law as nowadays "[...] embrac[ing] a right of access to information."²⁹³ In this respect, the ECtHR frequently reiterated that strong and convincing reasons must be provided for any state measure "[...] *limiting access to information which the public has the right to receive*".²⁹⁴ Hence, the public would have a right to receive *political protest art* and its message, especially when the particular artwork concerns a matter of public interest.

Moreover, as a result of their importance for communication in general, the freedoms to impart and receive information and ideas have a special dimension in the Internet-context. Pointing out that "[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general"²⁹⁵, the ECtHR asserted in its *Yildirim* case²⁹⁶ that "[...] the Internet has [...] become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest."²⁹⁷ Since the Strasbourg Court required in the same judgment (a) that any restrictive measure on access to the Internet or on the right to receive information on the Internet must be based on a precise and specific rule, (b) that a legal framework must be put in place "[...] ensuring both, tight control over the scope of bans and effective judicial review to prevent any abuse of power [...]"²⁹⁸, (c) that public authorities have to analyse whether a less far-reaching measure could be adopted²⁹⁹ and (d) that such a measure is only imposed in the event that an encroachment on the rights of thirds can be ruled out³⁰⁰, one can infer that *political protest art*, that is imparted or disseminated in the Internet, is restrictable only under the same conditions. This argument was further strengthened by the observation of two Members of the Court, who transferred, by finding that "[i]n the world of the Internet the difference between journalists and other members of the public is rapidly disappearing [...]"³⁰¹ and that there "[...] can be no robust democracy without transparency, which should be served and used by all citizens [...]"³⁰², the primary watchdog-function of the press at least partly onto the shoulders of the individual citizen participating in the de-

²⁹³ ECtHR, *Youth Initiative for Human Rights v Serbia*, App.-No.:48135/06, Judgment of 25 June 2013, para.20; See also: ECtHR, *Társaság a Szabadságjogokért v. Hungary*, App.-No.: 37374/05, Judgment of 14 April 2009, para.35;

²⁹⁴ ECtHR, *Timpul Info Magazin and Anghel v Moldova*, App.-No.: 42864/05, Judgment of 27 November 2007, para.31; See also: ECtHR, *Wegrzynowski and Smolczewski v Poland*, App.-No.: 33846/07, Judgment of 16 July 2013, para.57;

²⁹⁵ ECtHR, *Times Newspaper Ltd v United Kingdom* (No.1&2), App.-No.:3002/03 and 23676/03, Judgment of 10 March 2009, para.27; *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.337;

²⁹⁶ ECtHR, *Ahmet Yildirim v Turkey*, App.-No.: 3111/10, Judgment of 18 December 2012;

²⁹⁷ ECtHR, *Ahmet Yildirim v Turkey*, App.-No.: 3111/10, Judgment of 18 December 2012, para.54;

²⁹⁸ ECtHR, *Ahmet Yildirim v Turkey*, App.-No.: 3111/10, Judgment of 18 December 2012, para.64;

²⁹⁹ ECtHR, *Ahmet Yildirim v Turkey*, App.-No.: 3111/10, Judgment of 18 December 2012, para.64;

³⁰⁰ ECtHR, *Ahmet Yildirim v Turkey*, App.-No.: 3111/10, Judgment of 18 December 2012, para.65;

³⁰¹ ECtHR, *Youth Initiative for Human Rights v Serbia*, App.-No.:48135/06, Judgment of 25 June 2013, Joint Concurring Opinion of Judges Sajo and Vicinic, para.1;

³⁰² ECtHR, *Youth Initiative for Human Rights v Serbia*, App.-No.:48135/06, Judgment of 25 June 2013, Joint Concurring Opinion of Judges Sajo and Vicinic, para.1;

bate on matters of public interest and, thus, also onto the shoulders of an artist imparting or disseminating *political protest art* via the Internet.

Hence, while primarily being a right of the public, the right to receive information and ideas not only informs the artist's 'active' rights to freely express and impart information and ideas, but it also extends the protection of these rights by requiring that any state measure, that limits '*access to information which the public has the right to receive*', must comply with the conditions set out above and, thus, by limiting the possibilities of the public authorities to impose limitations on those rights, especially in the Internet-context.

3.2.2.2.4 The Freedom of Artistic Expression

Contrary to other European legal frameworks that expressly protect freedom of the arts,³⁰³ but similar to those implicitly protecting the 'right to express oneself by means of art' via the general freedom of expression,³⁰⁴ Article 10 further "[...] includes freedom of artistic expression - notably within [the] freedom[s] to [express, impart and receive] information and ideas [...]"³⁰⁵. The right to freedom of artistic expression "[...] affords [in this connection primarily] the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds."³⁰⁶ By stating that the applicants "[...] exercised their right to freedom of expression [...] by painting and then exhibiting the works [...]"³⁰⁷, the ECtHR established in its seminal judgment *Müller and Others v Switzerland* that the protective scope of freedom of artistic expression encompasses not only the manufacturing or producing activity in the process of creation and the artistic expression itself, but also the work's subsequent scope of operation for example in exhibitions or other display. Besides the process of creation, the artistic expression itself and the expression's scope of operation, Article 10 additionally extends to the dissemination of art. In this respect the Court stated that, since all "[...] [t]hose who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society [,] the State [is obliged] not to encroach unduly on their freedom of [artistic] expression."³⁰⁸ Hence, since the protective scope of the right to free artistic expression comprises the process of creation, the artwork itself, the expression's scope of operation as well as the dissemination of art, it is to note that (a) protest artists have the right to express themselves by the means of art irrespective of medium or content, (b) that *protest art* is, besides its beforementioned protection

³⁰³ E.g.: European Union regime: Art.13 of the Charter of Fundamental Rights and Freedoms of the European Union; Germany: Art.5(3) of the Basic Law ("*Grundgesetz*"); Austria: Art.17a Basic Law on the General Rights of Citizens ("*Staatsgrundgesetz über die allgemeinen Rechte der StaatsbürgerInnen*"); France: Art.1 of the *Projet de Loi relatif à la liberté de la création, à l'architecture et au patrimoine* (Texte adopté n°591, 6 octobre 2015) in conjunction with Article XII of the Declaration des Droits de l'Homme et du Citoyen de 1789: " La création artistique est libre. ";

³⁰⁴ E.g.: United Kingdom: Section 1 (1) (a) and Section 2 (1) (a) of the UK's Human Rights Act 1998 in conjunction with Art.10 ECHR; Denmark: Art.77 of the Constitutional Act of Denmark; Ireland: Section 40.6.1. of the Irish Constitution; Italy: Art.21 of the Italian Constitution ("*Costituzione della Repubblica italiana*");

³⁰⁵ ECtHR, *Müller and Others v Switzerland*, App.-No.: 10737/84, Judgment of 24th May 1988, para.27;

³⁰⁶ ECtHR, *Müller and Others v Switzerland*, App.-No.: 10737/84, Judgment of 24th May 1988, para.27;

³⁰⁷ ECtHR, *Müller and Others v Switzerland*, App.-No.: 10737/84, Judgment of 24th May 1988, para.27;

³⁰⁸ ECtHR, *Vereinigung Bildender Künstler v. Austria*, App.-No.: 68354/01, Judgment of 25 January 2007, para.26;

as a form of conveyal, also protected as the product or work itself and (c) that, also, all those involved in distributing and exhibiting *protest art* may invoke their right to free artistic expression as a defence against any interference not meeting the conditions of a legitimate interference (cf.: Art.10 (2) ECHR).

3.2.2.2.5 Intermediary result

Consequently, since *protest art* thus, dependent on the concrete circumstances, constitutes an expression of either ideas, or information, that, irrespective of medium or content, falls within the scope of the rights and fulfils the requirements of Article 10 of the Convention, it is to adhere that (i) protest artists are entitled to the rights to form and hold opinions, (ii) to express and impart information and ideas, (iii) that they have the right to free artistic expression and (iv) that their rights are informed and even partly extended by the public's related right to receive information and ideas, especially in the Internet-context.

3.2.2.3 The Negative and Positive Obligations under Article 10 ECHR

Moreover, since protest artists can thus invoke the rights deriving from freedom of expression and artistic expression, it is of particular interest to determine the associated obligations of a Contracting Party, especially in the relation between protest artists and copyright holders. Approaching these obligations, it is to note that the Convention primarily sets out the negative duty to respect. However, besides the negative obligation to respect, Article 10 also anchors and entails the positive obligation to protect the right to freedom of expression.³⁰⁹ Public authorities have therefore not only to refrain from interfering with the right in the *vertical* dimension, but also to protect the right against interferences by private persons in the *horizontal* sphere. In this respect, the Court repeatedly remarked that "[...] *although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. [...] Genuine, effective exercise of [the right to freedom of expression] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]*"³¹⁰

Moreover, concerning a Contracting Party's positive obligations under Article 10, the ECtHR recognised *inter alia* that "[a] court decision in a conflict between private parties is [...] considered as a measure of the state [...]"³¹¹, which entails that "[t]he responsibility of the authorities would [...] be

³⁰⁹ Cf.: Harris, D.J./ O'Boyle, M./ Warbrick, C., Law of the European Convention on Human Rights, pp.446-447;

³¹⁰ ECtHR, *Özgür Gündem v. Turkey*, App.-No.: 23144/93, Judgment of 16 March 2000, para.42,43; See also: ECtHR, *Fuentes Bobo v Spain*, App.-No.: 39293/98, Judgment of 29 February 2000, para.38; ECtHR, *Palomo Sánchez and Others v. Spain*, App.-Nos.: 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, para.58; *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, pp. 4,5;

³¹¹ *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

engaged if the facts complained of stemmed from a failure on [the state's] part to secure to the applicants the enjoyment of the right enshrined in Article 10 of the Convention [...]"³¹². The Court held further that states "[...] are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear [...]"³¹³ and that the imparting of information and ideas of general interest, which the public is entitled to receive, "[...] cannot be successfully accomplished unless it is grounded in the principles of pluralism, of which the State is the ultimate guarantor."³¹⁴

While, in general, obligations were thus recognised by the Strasbourg Court not only in the vertical, but also in the horizontal sphere, it is to note that, in the relation between protest artists and copyright holders, which constitutes a relation between privates among themselves, no positive obligation in favour of freedom of expression was found by the Court yet. The ECtHR generally accepted the indirect horizontal effect of Article 10 in the relation between freedom of expression and property rights,³¹⁵ as well as its own obligation not to "[...] remain passive where a national court's interpretation of a legal act [...] appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention"³¹⁶, but it did not find or establish any positive obligation down to the present day.³¹⁷ However, albeit no obligation was thus found yet, it is particularly to emphasise that "[...] the Court did not rule out the possibility [either,] that the state [could] be under a positive obligation to regulate property rights to protect Article 10."³¹⁸

As a result, it is thus to adhere that, while recognising negative as well as positive obligations under Article 10 in general, the ECtHR did neither find a positive obligation in favour of freedom of expression, nor did it rule out the possibility of an existence of such a positive obligation in the relation between freedom of expression and property rights. Hence, since the Court did not rule out the possibility of an obligation to protect Article 10, it is to keep in mind that an obligation to protect freedom of (artistic) expression and, thus, to regulate property rights (including copyright) could exist.

3.2.2.4 Intermediary Result

Concluding this subchapter, it is thus to adhere that protest artists are entitled to the rights deriving from Article 10 since the Article's personal scope is designed inclusive, since *political protest art* con-

³¹² ECtHR, *Palomo Sánchez and Others v. Spain*, App.-Nos.: 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, para.60;

³¹³ ECtHR, *Dink v. Turkey*, App.-Nos.: 2668/07, 6102/08, 30079/08.7072/09 and 7124/09, Judgment of 14 September 2010, para. 137; See also: *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

³¹⁴ ECtHR, *Informationsverein Lentia and Others v. Austria*, App.-No.: 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, Judgment of 24 November 1993, para.38; Also: *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

³¹⁵ ECtHR, *Appleby and Others v United Kingdom*, App.-No.: 44306/98, Judgment of 6 May 2003, paras.39, 41-49;

³¹⁶ ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, App.-No.: 23883/06, Judgment of 16 December 2008, para.33;

³¹⁷ Cf.: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.447;

³¹⁸ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.463; See also: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.447;

stitutes an expression in the sense of the Article and since *protest art* expressions would generally meet the requirements of the Article's material scope. Artist can thus, besides the right to form and hold opinions, particularly assert the important rights to express and impart ideas and information as well as the inherently contained right to free artistic expression. While, concerning these rights, negative as well as positive obligations were in principle recognised as corresponding duties, one has further to keep in mind that a positive obligation to protect freedom of (artistic) expression was neither found, nor ruled out in the relation to property rights and, thus, copyright down to the present day.

3.2.3 Interference with the ECHR's Right to Freedom of Expression

Since protest artists are therefore entitled to the rights enshrined in Article 10, it is to determine what exactly constitutes an interference with these rights and whether an interference with the right to free (artistic) expression exists when *political protest art* and copyright conflict with each other. Due to the fact that the ECtHR, while taking "[...] a broad view of what constitutes an interference with free expression [...]"³¹⁹, distinguishes in its assessment of interferences between interferences that relate to negative obligations and interferences relating to the positive obligations of a Contracting Party, this subchapter briefly displays the distinct approaches first, before it addresses the relation between protest artists and copyright holders subsequently.

Initially, regarding interferences relating to negative duties, the Court examines whether a Contracting Party did not refrain from interfering with the right to free (artistic) expression. In this respect, it can be said that any shortening of the right's protected scope that can be attributed to the state and, thus, any state regulation or measure, be it *de jure* by means of an executive, legislative or judicative imperative that directly or indirectly affects its addressee, or *de facto* by means of an actual conduct that encroaches on the right, would constitute an interference, if it impeded an effective enjoyment of the right, if it kept the rightholder from such an enjoyment or if it had a chilling effect on future expression.³²⁰

While applying this approach in terms of interferences relating to the negative obligation to refrain from interference, the ECtHR deviates from this approach regarding interferences relating to positive obligations. In terms of the latter, the Court particularly reviews whether a non-performance of a positive obligation exists. The Strasbourg Court evaluates therefore whether Article 10 contains a positive obligation concerning a horizontal impairment of free (artistic) expression³²¹ and, if this was to answer in the affirmative, it would proceed to examine whether the state fulfilled the duty derived.

³¹⁹ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.436;

³²⁰ Cf.: *BeckOK InfoMedienR/Cornils*, EMRK Art. 10, para.34; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp. 436,437;

³²¹ ECtHR, *Appleby and Others v United Kingdom*, App.-No.: 44306/98, Judgment of 6 May 2003, paras.39, 41-49;

If one thus recalls that, due to the lack of a permitting exception to copyright for the purposes of *protest art*, *political protest art* and copyright conflict with each other whenever the situation arises that (a) protest artworks 'borrow' proprietary contents and that (b) the copyright holder claims and enforces his or her right, one will see that two potential interferences come into question, namely, on the one hand, the enactment of a legal framework regulating copyright and its enforcement without a permitting exception, which in effect excludes protest artists from the sometimes even necessary use of proprietary contents, and, on the other hand, the delivery of a court decision that, while being concerned with the conflict between private parties, fails "[...] to secure to the [protest artist] the enjoyment of the right enshrined in Article 10 of the Convention."³²²

Regarding the former, it is to note that the European legislators imperatively regulated copyright and its enforcement by means of secondary EU law directives, which are to implement on the national level. Due to its lack of a permitting exception, this framework could be regarded as a violation of the negative obligation not to interfere with the right to free expression since it, while aiming at the protection of the economic rights of the copyright holder, indirectly affects protest artists by means of its preventive deterrence and its threat with sanctions for unauthorised uses respectively, which could be understood as having a chilling effect on future expression (See Chapter 2.3.1). The enactment of this framework could thus constitute an interference, which will entail "[...] a violation of Article 10 [...] if it does not fall within one of the exceptions provided for in [Art.10 (2) ECHR]."³²³

Concerning the latter, it is to reiterate that any court decision delivered in the conflict between private parties, which fails "[...] to secure to the [protest artist] the enjoyment of the right enshrined in Article 10 [...]"³²⁴, primarily constitutes a direct "*measure of the state*"³²⁵. Such a measure could also present an interference. However, a failure to secure the protest artist's rights in his relation to the copyright holder would only be to assume, if a positive obligation to protect freedom of (artistic) expression existed. Since the Court did not rule out the possibility that Article 10 could enshrine such an obligation,³²⁶ it is to note that an obligation to regulate copyright could be given. Since it is thus not to preclude, that such an obligation exists, it is to infer that any court decision concerned with the conflict between privates, which fails to secure to the artist the enjoyment of his rights, could thus present an interference with the right to free (artistic) expression, which would require justification.

Hence, the application of the Court's approaches regarding interferences in the relation between protest artist and copyright holder results in the finding that two interferences with the artist's rights could exist, which would entail a violation of Article 10, if they were not justified.

³²² ECtHR, *Palomo Sánchez and Others v. Spain*, App.-Nos.: 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, para.60;

³²³ ECtHR, *Observer and Guardian v United Kingdom*, App.-No.:13585/88, Judgment of 26 November 1991, para. 49;

³²⁴ ECtHR, *Palomo Sánchez and Others v. Spain*, App.-Nos.: 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, para.60;

³²⁵ Cf.: *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

³²⁶ See Chapter 3.2.2.3;

3.2.4 Limitations on the ECHR's Right to Freedom of Expression

Since these interferences would constitute violations of Article 10 ECHR, if they were not justified, it is to address whether and under which conditions these interferences could be justified. While Article 10's limitations are predominantly prescribed by Art.10 (2) ECHR, it is worth mentioning that limitations could also derive from Art.17 ECHR. Since Article 17 sets out the prohibition of abuse of Convention rights and since it, thus, prescribes the legal limits of the protection of freedom of expression and of *political protest art* respectively, this chapter initially elaborates upon the exceptions to the protest artist's right to free expression deriving from Article 10, before it subsequently points out the limits of *political protest art* under Article 17 of the Convention for the sake of completeness.³²⁷

3.2.4.1 The Limitations Inherently Contained in Article 10 of the Convention

Commencing with the limitations inherently contained in Article 10, it is to realise that, whereas the Article's first paragraph expressly permits particular restrictions regarding the licensing of broadcasting, television or cinema enterprises, Article 10 (2) ECHR requires that the limitation on the right to freedom of expression, including restrictions, conditions, formalities and penalties, is 'prescribed by law', that it pursues one of the 'legitimate aims' listed and that the limitation is 'necessary in a democratic society'.³²⁸ While particular limitations can thus lawfully be imposed under Art.10 (1) ECHR without the need to fulfil any requirements, it is probably useful, let alone necessary, to provide a basic understanding regarding the criteria determining whether a limitation can be justified by Art.10 (2) ECHR. For this reason, this subchapter briefly presents the Strasbourg Court's interpretation of the '*triple test's*' criteria first, proceeds then to demonstrating the concept of the '*margin of appreciation*' and indicates eventually in how far these criteria are relevant in the relation in question.

3.2.4.1.1 The Strasbourg Court's Interpretation of the 'Triple Test' Criteria Enshrined in Article 10 (2) of the European Convention on Human Rights

As indicated before, Article 10 (2) ECHR's '*triple test*' requires that the respondent State establishes that any limitation is 'prescribed by law', that it pursues - at least - one of the 'legitimate aims' enumerated, and that the limitation is 'necessary in a democratic society'. In its jurisprudence, the ECtHR subsequently interpreted and defined these criteria further. To fulfil the criterion 'prescribed by law', the Court initially required that a limitation needs to show 'some basis in national law'³²⁹, that it has to

³²⁷ For further information ab. the relation between Art.10 and 17 see: Cf.: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, pp.449-450;

³²⁸ ECtHR, *Observer and Guardian v United Kingdom*, App.-No.:13585/88, Judgment of 26 November 1991, para. 49; ECtHR, *The Sunday Times v the United Kingdom*, App.-No.: 6538/74, Judgment of 26 April 1979, para.65; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.35;

³²⁹ Examples of cases in which the ECtHR found violations due to a lack of a basis in national law: ECtHR, *Mikhaylyuk and Petrov v Ukraine*, App.-No.: 11932/ 02, Judgment of 10 December 2009; ECtHR, *Djavit An v Turkey*, App.-No.: 20652/92, Judgment of 20 February 2003; Regarding laws that did not enter into force yet, see: ECtHR, *Republican Party of Russia v Russia*, App.-No.: 12976/07, Judgment of 12 April 2011;

be adequately 'accessible'³³⁰ and that the limitation must be 'foreseeable' to an extent that is reasonable in the circumstances³³¹ "[...] *to enable the citizen to regulate his conduct [...]*"³³².³³³ Moreover, in respect of the consideration whether a limitation pursues one of the 'legitimate aims' listed,³³⁴ the ECtHR held that, in order to 'pursue such a legitimate aim', "[...] *a restriction must be in furtherance of, and genuinely aimed at protecting, one of the permissible grounds set forth in Article 10 (2)* [of the Convention]."³³⁵ Defining the criterion 'necessary in a democratic society', the Strasbourg Court then additionally demanded, while clarifying that a limitation is not required to be 'indispensable' to be 'necessary'³³⁶, that a limitation has to correspond to a 'pressing social need',³³⁷ that it must be proportionate to the aim pursued³³⁸ and that "[...] *the reasons given by the national authorities to justify the actual [measure] of "interference" [have to be] relevant and sufficient [...]*"³³⁹.³⁴⁰ It can thus generally be held that a limitation would be justified, if it satisfied these demands.

3.2.4.1.2 The Doctrine of the 'Margin of Appreciation'

Furthermore, in its case law, the ECtHR heavily relied on the doctrine of the '*margin of appreciation*'. This doctrine, which can be defined as the 'range of discretion' or the "[...] *latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies [...]*"³⁴¹, plays a crucial role in the determination of whether a limitation on the right to freedom of expression is 'necessary in a democratic society' since it allows for compromises between the objectives and aspirations of the Convention, on the one hand, and the concrete circumstances faced by a state, on the other. Concerning the existence of a 'pressing social need', the ECtHR held in this respect that it "*is for the national authorities to make the initial assessment of the reality of the pressing social need*"³⁴² and that, "[c]onsequently, Article 10 para.2 [...] leaves to the Contracting

³³⁰ ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, paras. 51,52;

³³¹ ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, paras.51,53;

³³² *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³³³ Cf.: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, pp. 471-474; *Jacobs, White & Ovey*, The European Convention on Human Rights, 2014, p.310; See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³³⁴ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.314; For further information: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, Second Edition, pp.474-493;

³³⁵ *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³³⁶ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.48; See also: *Janis/Kay/Bradley*, European Human Rights Law, Text and Materials, p.242;

³³⁷ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.48;

³³⁸ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.48; See also: *Janis/Kay/Bradley*, European Human Rights Law, Text and Materials, p.242; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.438;

³³⁹ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.50;

³⁴⁰ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, paras. 48-50; See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³⁴¹ *Yourow, Howard Charles*, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, p.13;

³⁴² ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.48;

States a margin of appreciation [...]"³⁴³. While not granting "[...] the Contracting States an unlimited power of appreciation [...]"³⁴⁴, but instead reserving itself the right "[...] to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression [...]"³⁴⁵, the Strasbourg Court ruled that the "[...] domestic margin of appreciation [...] goes hand in hand with a European supervision [...]"³⁴⁶ "[...] embracing both the law and the decisions applying it [...]"³⁴⁷. The ECtHR's supervision is in this connection not "[...] limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith [...]"³⁴⁸, but it rather allows the Court "[...] to look at the interference complained of in the light of the case as a whole [, to] determine whether it was "proportionate to the legitimate aim pursued" and [to assess] whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". "³⁴⁹ Thus, whereas national authorities have a particular range of discretion, it is to adhere that the margin of appreciation is limited by the Strasbourg Court's requirements, its supervision and its right to the final ruling on reconcilability of a limitation with the protest artist's rights to freedom of expression and free artistic expression.

Besides that, it is however to mention that "[t]he margin of appreciation allowed to Contracting Parties in restricting freedom of expression [varies] depending on the purpose and nature of the limitation and of the expression in question."³⁵⁰ While the "[...] doctrine is of relevance both in considering the scope of a Contracting Party's choices regarding [the interferences with a right]³⁵¹ as well as] in considering the steps which a Contracting Party must take to guarantee the rights protected [...]"³⁵²³⁵³, it can be said that (1) it "[...] is not easy to provide a definition of the doctrine which applies in every case, (2) [that] the concept has been regarded as indeterminate and (3) [that] its application [is] difficult to predict."³⁵⁴ Nonetheless, particular constants can be made out.

³⁴³ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para. 48; ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, para.59 (c); See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118; *Janis/Kay/Bradley*, European Human Rights Law, Text and Materials, pp.242/243;

³⁴⁴ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49;

³⁴⁵ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; See also: ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, para.59 (c); ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.39;

³⁴⁶ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.39; See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³⁴⁷ ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, para.59 (c); ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.39;

³⁴⁸ ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, para.59 (d); See also: *Janis/Kay/Bradley*, European Human Rights Law, Text and Materials, p.243;

³⁴⁹ ECtHR, *Observer and Guardian v the United Kingdom*, App.-No.: 13585/88, Judgment of 26 November 1991, para.59 (d); ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.39; See also: *Janis/Kay/Bradley*, European Human Rights Law, Text and Materials, p.243;

³⁵⁰ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.325, 437; See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³⁵¹ Concerns the negative obligation to respect freedom of expression and to refrain from interference with the right.

³⁵² Concerns the positive obligations found under freedom of expression, which the states have to fulfil.

³⁵³ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.325;

³⁵⁴ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.325;

Concerning purpose and nature of the limitation, it is in this connection to note that the ECtHR frequently derives the first part of its determination of the margin of appreciation, which *George Letsas* helpfully labeled as the determination of the *structural margin of appreciation*³⁵⁵,³⁵⁶ from the examination of four particular criteria. The Court asks in this respect (a) whether there is a uniform European approach to the particular issue at stake³⁵⁷ with the result that, if this was to answer in the affirmative, the margin would be narrowed³⁵⁸; (b) it assesses whether a situation is at hand, in which national authorities have to balance competing rights or to interfere with one of the rights to protect the other (positive obligations),³⁵⁹ which, if such a situation was given, would broaden the domestic margin³⁶⁰; (c) the ECtHR further addresses the nature of the general interest³⁶¹ with which the individual's right conflicts and grants dependent on the importance of the interest a wider or a narrower margin³⁶²; and (d) it scrutinizes whether the national authorities are actually in a better position³⁶³, which, if the better position was to assume, would widen the margin again.

Moreover, the ECtHR additionally developed special criteria in terms of each particular Convention right that define *Letsas' substantial margin of appreciation*³⁶⁴ and significantly influence the determination of the final margin. In terms of the right to freedom of expression, the Court established that the purpose, nature and form of an expression³⁶⁵, the extent of the restriction³⁶⁶, the severity of a (potential) penalty³⁶⁷ and the context³⁶⁸, in which an expression is made, constitute the criteria that define the protection afforded and subsequently influence the determination of the domestic margin. Having regard to these criteria, it is particularly noteworthy that the Strasbourg Court distinguishes, with regard to purpose and nature of an expression, between three main categories, namely between political, artistic and commercial expressions, contingent on the "[...] *importance of [the expression's]*

³⁵⁵ The '*structural margin of appreciation*', which addresses the intensity of review by the ECtHR, is typified by the cases in which the Strasbourg organs refuse to intervene due to for example a lack of an European consensus.

³⁵⁶ *Letsas, George*, A Theory of Interpretation of the European Convention on Human Rights, p.91;

³⁵⁷ Cf.: ECtHR, *Alekseyev v Russia*, App.-Nos.: 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, paras.83, and particularly 84; ECtHR, *Dudgeon v United Kingdom*, App.-No.: 7525/76, Judgment of 22 October 1981, para.60; See also: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.328,329;

³⁵⁸ Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.328,329;

³⁵⁹ Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.327,328;

³⁶⁰ Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.328;

³⁶¹ ECtHR, *The Sunday Times v the United Kingdom*, App.-No.: 6538/74, Judgment of 26 April 1979, para.65; See also: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.330,331;

³⁶² Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.330,331;

³⁶³ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, paras.48-50: "*By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion [...but the state's engagement is subject to and...] goes hand in hand with a European supervision.*"; See also: *Janis/Kay/Bradley*, European Human Rights Law, Text and Materials, p.242;

³⁶⁴ The *substantial margin of appreciation* addresses the substantial relationship between individual freedoms and collective goals. It was labelled by *George Letsas* and typified by the limitation clauses enshrined in Art.10 (2) ECHR. - Cf.: *Letsas, George*, A Theory of Interpretation of the European Convention on Human Rights, p.85;

³⁶⁵ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.437, 438;

³⁶⁶ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.438;

³⁶⁷ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.451;

³⁶⁸ ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, paras.40,43;

content [...]”³⁶⁹. While it is commonly recognised and accepted in this regard that the Court affords a high level of protection to political expressions³⁷⁰ since it perceives “[...] *freedom of political debate* [as being] *at the very core of the concept of a democratic society which prevails throughout the Convention* [...]”³⁷¹ and that a low level of protection is afforded to commercial expressions³⁷², it is to note that the level of protection granted to artistic expressions is controversial and more difficult to define. Seeking to determine the level of protection afforded to artistic expressions (since *political protest art* constitutes the subject matter of this thesis), it is primarily to distinguish between *political* and *non-political artistic expressions*.³⁷³ Concerning *non-political artistic expressions*, scholars generally agree on the fact that such expressions are of a lower level of protection than political expression,³⁷⁴ but of a higher level of protection than commercial expression.³⁷⁵ The *Council of Europe's Research Division* explicitly pointed out in this connection that the ECtHR always “[...] *applied a high level of protection when it has dealt with artistic works* [...]”^{376,377}, but that this high level of protection is usually lowered or lost due to the impact of a particular artistic expression's form and dependent on the answers given to the questions of whether the particular form's impact is 'dangerous'³⁷⁸ (= potential of damage) or 'limited'³⁷⁹ (= a form's reach or whether it appeals to a narrow or broader audience).³⁸⁰ Whereas, thus, compared to the level of protection afforded to political expression, a lower level is generally to assume in terms of *non-political artistic expressions*, it can be observed that, while still being contest-

³⁶⁹ *Council of Europe/ Macovei, Monica*, Freedom of Expression, A guide to the implementation of Article 10 of the European Convention of Human Rights, Human rights handbook, No.2, p.7; *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116;

³⁷⁰ See e.g.: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.455; *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116,117; *Mowbray, Alastair*, Cases and Materials on the European Convention on Human Rights, pp.639-661;

³⁷¹ ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.42; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.438;

³⁷² Cf.: *Council of Europe/ Macovei, Monica*, Freedom of Expression, A guide to the implementation of Article 10 of the European Convention of Human Rights, Human rights handbook, No.2, p.9; See also: ECtHR, *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, App.-No.: 10572/83, Judgment of 20 November 1989, paras.32,33; ECtHR, *Jacobowski v. Germany*, App.-No.: 15088/89, Judgment of 23 June 1994, para.26; See also: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.461; *Mowbray, Alastair*, Cases and Materials on the European Convention on Human Rights, p.672, Note 2; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.438;

³⁷³ For distinctions made in the literature see: *Lester, Anthony*, Art for Art's Sake, Artistic expression and the European Court of Human Rights, p.1; *Mowbray, Alastair*, Cases and Materials on the European Convention on Human Rights, p.672, Note No.2 - p.668; *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.459;

³⁷⁴ See e.g.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.438;

³⁷⁵ See e.g.: *Mowbray, Alastair*, Cases and Materials on the European Convention on Human Rights, p.672, Note No.2; *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116,117; *Lester, Anthony*, Art for Art's Sake, Artistic expression and the European Court of Human Rights, p.1;

³⁷⁶ *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3;

³⁷⁷ *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116,117;

³⁷⁸ Cf.: ECtHR, *Karatas v Turkey*, App.-No.: 23168/94, Judgment of 8 July 1999, para.52; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.438;

³⁷⁹ *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3;

³⁸⁰ *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3; *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116,117;

ed³⁸¹, the same conclusion cannot be drawn in regard to *political artistic expressions*³⁸². In this respect, it is initially to adhere that two underlying views as to the categorisation of *political artistic expression* could and appear to be held in the literature reviewed since the Strasbourg Court did not explicitly categorise the '*artistic expressions having a political dimension*', when it was confronted with the issue in its *Karatas v Turkey*³⁸³ and *Alinak v Turkey*³⁸⁴ cases. Regarding the views, it could here, on the one hand, either be held that *political artistic expressions* fall within the ambit of the category of political expression and that they, thus, constitute political expressions³⁸⁵ or, on the other, that *political artistic expressions* present a *sui generis* or - as Mowbray called it³⁸⁶ - a '*hybrid form*'. While weighty reasons could be invoked in favor of each of these views (see for the former view supra note³⁸⁷ and for the latter view supra note³⁸⁸), a decision between these views is not necessary at this point since in principle the same protection is afforded under both of them. Having regard to the Court's landmark ruling in *Karatas v Turkey*, two particular aspects can be derived, which are relevant for the determination of the level of protection afforded to *political artistic expressions*: Firstly, it can be observed that the Strasbourg Court afforded the same level of protection to '*artistic expressions having a political dimension*' as it usually grants to political speech.³⁸⁹ It can thus initially be inferred that also an adoption of the *sui generis* assumption would entail the same high level of protection as the one, which would be granted, if one assumed that *political artistic expressions* would constitute political expression. Secondly, one would further notice that the ECtHR additionally addressed the form's impact³⁹⁰ - irrespective of the question of whether or not a political expression was at hand - with the result that, irrespective of their categorisation as either *sui generis* form, or political expression, *political artistic*

³⁸¹ See e.g.: Lester, Anthony, Art for Art's Sake, Artistic expression and the European Court of Human Rights, p.1; Mowbray, Alastair, Cases and Materials on the European Convention on Human Rights, p.672, Note No.2 - p.668; Harris, D.J./O'Boyle, M./Warbrick, C., Law of the European Convention on Human Rights, p.459;

³⁸² ECtHR, *Karatas v Turkey*, App.-No.: 23168/94, Judgment of 8 July 1999;

³⁸³ ECtHR, *Karatas v Turkey*, App.-No.: 23168/94, Judgment of 8 July 1999;

³⁸⁴ ECtHR, *Alinak v Turkey*, App.-No.: 40287/98, Judgment of 29 March 2005;

³⁸⁵ Lester, Anthony, Art for Art's Sake, Artistic expression and the European Court of Human Rights, p.1;

³⁸⁶ Mowbray, Alastair, Cases and Materials on the European Convention on Human Rights, p.666, Note No.4; Harris, D.J./O'Boyle, M./Warbrick, C., Law of the European Convention on Human Rights, p.459;

³⁸⁷ The view that political artistic expressions fall within the ambit of political expression could in this connection be based on two particular arguments found by the author: Firstly, the assumption that political artistic expressions constitute political expressions is in line with the Court's case law which mirrors that no distinction is made as to the form of an expression and that the Court solely requires an expression to deal "[...] with political issues of public interest [...]" (ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.43) in order to fall within the category of political expressions. Secondly, since the ECtHR in *Karatas v Turkey*, after finding that the artistic expression in question had a political dimension, solely pointed out the protection afforded to political expressions (See: para.50), it could further be argued that (a) also the Court is of the opinion that a political artistic expression constitutes a political expression and (b) that, thus, besides the three main categories no other category exists. Against this view it could, however, be argued that the Court took account of the form's impact and, thus, of the criteria common to the determination of artistic expression.

³⁸⁸ In favor of the latter view holding that political artistic expressions present a *sui generis* form, it could on the other hand be invoked that, in its *Karatas v Turkey* judgment, (a) the Court addressed - contrary to its usual assessments of political expressions - the impact of the form of the poem in question which is common to the determination of artistic expressions and that (b) the ECtHR explicitly did not call the poem in question a political expression, but instead an '*artistic expression having a political dimension*'.

³⁸⁹ ECtHR, *Karatas v Turkey*, App.-No.: 23168/94, Judgment of 8 July 1999, para.50;

³⁹⁰ ECtHR, *Karatas v Turkey*, App.-No.: 23168/94, Judgment of 8 July 1999, para. 52; See also: ECtHR, *Alinak v Turkey*, App.-No.: 40287/98, Judgment of 29 March 2005, paras. 45, 40,41;

expressions would have to show that their impact is neither 'limited', nor 'dangerous' and that dependent on the assessment of these criteria their level of protection is either maintained, or lowered.

Since it can thus be held that *political artistic expressions* start from an equally high level of protection as political expressions³⁹¹ (either as political expression, or as *sui generis* form of expression) and that their level of protection is merely lowered dependent on their form's impact, it could thus be inferred that a hierarchy between the three (*or four) categories exists, which (i) initially puts political and *political artistic expressions* on top, (ii) political artistic and other artistic expressions, that lost their level of protection due to their high potential of damage, their limited appeal to a narrow audience or due to their non-political content³⁹², in the middle and (iii) commercial expressions at the lowest level of protection. Since the level of protection afforded to *political artistic expressions* could thus be approximated or in particular circumstances even be equated with the one granted to political expression, one can conclude that, similar to political expression, *political artistic expressions* render the substantial margin of appreciation a narrow one, whereas states enjoy a wider margin in terms of *non-political artistic expression* and a particularly wide margin when limiting commercial expression.³⁹³

Hence, while the domestic margin of appreciation and, thus, the latitude of deference granted to the national authorities with regard to the demonstration of both, the existence of a 'pressing social need' as well as the interfering measure's proportionality, play a crucial role in the determination of whether an interference is 'necessary in a democratic society', it is to adhere that its width is heavily dependent on the criteria displayed and the results of their application in the concrete case.

3.2.4.1.3 Application of the Court's Interpretation of the 'Triple Test' Criteria

If one therefore applies the criteria of Article 10 (2) ECHR - as interpreted by the ECtHR - to the relation between the protest artist and the copyright holder in the situation of conflict described before, one will see that (1) the aim, which the state pursues in its implementation of the EU's harmonising directives, can be based on Article 10 paragraph 2's exception for the '*rights of others*' since copyright constitutes a fundamental right under the Convention,³⁹⁴ (2) that the implementing copyright regulation is in furtherance of and genuinely aimed at the protection of the copyright holder's rights and (3) that the limitation imposed on freedom of expression by means of this regulation can be regarded as being 'prescribed by law' since the EU's harmonising directives as well as their implementation in national law constitute laws, which in principle are accessible, foreseeable and, thus, enabling the citizen to regulate his conduct.

³⁹¹ See: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116,117;

³⁹² This criterion is only applicable in terms of mere non-political artistic expressions.

³⁹³ Cf.: ECtHR, *Jacobowski v. Germany*, App.-No.: 15088/89, Judgment of 23 June 1994, para.26;

³⁹⁴ Displayed in greater detail in Chapter '3.3 Copyright as a Fundamental Right';

However, it can further be observed that (4) a final determination of the criterion 'necessary in a democratic society' cannot be made yet. Concerning the determination of an existence of a 'pressing social need', in which the national authorities enjoy the margin of appreciation, one primarily notes that, while (i) a European consensus can be found which would narrow the margin, (ii) the protection of copyright constitutes a general interest of high value, (iii) that a situation, in which competing rights need to be balanced, is present and (iv) that the national authorities are considered to be in a better position, which in sum lets infer that a wide structural margin of appreciation is to assume.

Nonetheless, if proprietary contents were used in *political protest art*, the substantial margin could be rendered a narrow one due to the respective level of protection afforded to political and *political artistic expression*, so that, under the condition that *political protest art* actually reaches the level of protection necessary, the previously found wide structural margin could be narrowed by a narrow substantial margin with the result that the state's discretion is limited.

Since it is additionally questionable whether the copyright regime's potential prevention of a protest artist's use of proprietary contents can be regarded as being proportional to the aim pursued since apparently no fair balance is struck between the rights involved, it is to conclude that a further evaluation of the criterion 'necessary in a democratic society' is required.

Hence, while many of Article 10 (2) ECHR's criteria could already be regarded as fulfilled, it is to note that uncertainty remains regarding the justification's crucial demand that a limitation has to be 'necessary in a democratic society'.

3.2.4.1.4 Intermediary result

Thus, it is conclusively to infer that an interference with the protest artist's rights to freedom of expression and free artistic expression could be justified and fall under one of the exceptions set out by Art.10 (2) ECHR respectively, if the criteria displayed were fulfilled.

3.2.4.2 The Limits of *Protest Art* under Article 17 of the Convention

For the sake of completeness, also Article 17 of the Convention and the limitations it imposes on freedom of expression must briefly be displayed. Article 17 prohibits in this context the abuse of the rights set out in the Convention. While some observers argue in this regard that Article 17 excludes particular contents already from the scope of protection, which can be based on the Court's reasoning stating that particular expressions "*would be removed from the protection of Article 10 by Article 17 [of the Convention]*"³⁹⁵, it appears, following the majoritarian opinion³⁹⁶, to be more appropriate to classify

³⁹⁵ Cf.: ECtHR, *Lehideux and Isorny v. France*, App.-No.: 25662/94, Judgment of 23 September 1998, para.47; See also *Norwood v United Kingdom*, App.-No.: 23131/03, Decision of 16 November 2004, p.4;

³⁹⁶ Cf.e.g.: *Jacobs, White & Ovey*, *The European Convention on Human Rights*, Sixth Edition, 2014, p.441;

Article 17 as a direct justification of an interference since solely this approach prevents that the right to freedom of expression is placed at a judge's disposal. Nonetheless, irrespective of the view taken, Article 17 sets out either way the limits to free expression and, thus, to *political protest art*. It prevents that "[...] *the Convention [is used] as a tool to obtain protection for actions which, in their essence, threatened the rights and freedoms guaranteed by the Convention.*"³⁹⁷ Since it is additionally to observe that the ECtHR applied Article 17 in the context of statements spreading, inciting, promoting or justifying hatred based on intolerance or discrimination (E.g.: in respect of islamophobia³⁹⁸ and homophobia³⁹⁹), regarding expressions inciting to violence, in terms of any justification of a pro-Nazi policy⁴⁰⁰ and in respect of the denial of established historical facts⁴⁰¹, such as the Holocaust or the Armenian genocide, it can generally be held that any limitation on *political protest art* would immediately be justified by Article 17, if the protest artwork expressed such contents.

Hence, it is conclusively to adhere that limitations on freedom of expression could also be justified via Art. 17 of the Convention, which sets the contentual limits to *political protest art*.

3.2.4.3 Intermediary Result

It can thus conclusively be held that Art.10 (2) ECHR stipulates the conditions for exceptions to the protest artist's right to freedom of (artistic) expression for the purposes of particular legitimate aims, whereas Art.17 ECHR enshrines the contentual limits to the protection of *political protest art*.

3.2.5 Intermediary Result

Concluding this chapter, it is therefore to keep in mind that (i) protest artists are entitled to the rights enshrined in Article 10 since the Article's personal scope is designed inclusive, since *political protest art* constitutes an expression in the sense of the Article and since *protest art* expressions would generally meet the requirements of the Article's material scope; (ii) that, while negative as well as positive obligations were recognised under Article 10, a positive obligation in favour of freedom of expression was neither found, nor ruled out in the relation to copyright; (iii) that the enactment of the EU's copyright regime⁴⁰² and its national implementation respectively, as well as any court decision based on this framework, which fails to take into account or to properly afford the protection granted to protest

³⁹⁷ *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.118;

³⁹⁸ Cf.: ECtHR, *Norwood v United Kingdom*, App.-No.: 23131/03, Decision of 16 November 2004;

³⁹⁹ Cf.: ECtHR, *Vedjeland v Sweden*, App.-No.: 1813/07, Judgment of 9 February 2012;

⁴⁰⁰ ECtHR, *Lehideux and Isorny v. France*, App.-No.: 25662/94, Judgment of 23 September 1998, para.47, 53; See also: ECtHR, *Garaudy v. France*, App.-No.: 65831/01, Decision of 24 June 2003;

⁴⁰¹ ECtHR, *Lehideux and Isorny v. France*, App.-No.: 25662/94, Judgment of 23 September 1998, para.47, 53; See also: ECtHR, *Garaudy v. France*, App.-No.: 65831/01, Decision of 24 June 2003;

⁴⁰² It should be mentioned that the EU is not directly meant here, but solely the Council of Europe states that implemented the EU's directives. The EU is, according to Art.51(1) ECFR, read in conjunction with Art.6(1)TEU only bound to comply with the ECFR. But, since regarding freedom of expression corresponding rights are at hand, the ECHR's conceptualisation of rights becomes binding upon the EU via the corresponding rights of the ECFR, which should entail the same outcome.

artists under Article 10, could be regarded as interferences with the protest artist's right to free (artistic) expression; and (iv) that these interferences would entail a violation of Article 10, if they either did not fall within one of the exceptions provided in Art.10 (2) ECHR, or if they were not justified by means of the contentual limits set out by Art.17 ECHR.

3.3 Copyright as a Fundamental Right

Since it is - as already indicated before - the ambition of this thesis to further determine the interface between freedom of expression and copyright, it is necessary in the opinion of the author to also display the copyright holder's human rights and to answer the questions of 'whether his human rights would allow the anchorage of an exception to copyright for the purposes of *protest art*' and, if this was to answer in the affirmative, 'under which conditions such an exception could lawfully be anchored'. In answering these questions and pointing out the protection afforded, this chapter is, due to the thesis' focus and shortage, limited to the demonstration of the copyright holder's right to copyright protection, as enshrined in the pan-European instruments ECHR and ECFR, and it presents, while corresponding rights are at hand,⁴⁰³ the ECFR's conceptualisation of the right separately to address its peculiarity.

3.3.1 Article 1 of Protocol No.1 to the European Convention of Human Rights

Commencing with Article 1 of Protocol No.1 to the ECHR, it is to remark that Article 1 (1) of Protocol No.1 guarantees the right of peaceful enjoyment of one's possessions to every natural as well as legal person. When dealing with complaints concerning this right and the protection of property respectively, the Strasbourg Court pursues the "[...] *same methodology as it adopts in relation to complaints of violations of the rights protected by Art.8 to 11* [ECHR.]"⁴⁰⁴ It is therefore to examine whether the personal and material scope are fulfilled, whether the enactment of an exception to copyright for the purposes of *protest art* would constitute an interference with the copyright holder's human right to property and whether the interference could be justified.

In terms of the right's personal and material scope, it is to note that Article 1 (1) grants the right to property to every natural as well as legal person, who or which proves to have a 'possession' in the sense of the Article. On the factual basis that the term 'possession' is considered to have a broad and autonomous meaning that "[...] *extends beyond physical goods, and covers a wide range of rights and interests* [...]"⁴⁰⁵, the European Commission on Human Rights (ECommHR) as well as its succes-

⁴⁰³ *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.163;

⁴⁰⁴ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.493;

⁴⁰⁵ ECtHR, *Gasus Dosier- und Fördertechnik GmbH v Netherlands*, Judgment of 23 February 1995, para.53; See also: ECtHR, *Anheuser-Busch Inc. v. Portugal*, App.-No.: 73049/01, Judgment of 11 January 2007, para. 63; See also: *Harris, D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.656;

sor, the ECtHR, found that the term also includes intellectual property as such.⁴⁰⁶ Whereas the Commission accepted patent rights in its first decision on IP rights⁴⁰⁷ as "[...] *personal property which is transferable and assignable* [...]"⁴⁰⁸, the ECommHR and the ECtHR repeatedly confirmed ever since that the various forms of intellectual property, including patents⁴⁰⁹, trademarks⁴¹⁰ and copyright⁴¹¹, would constitute possessions in the sense of the Article⁴¹², provided that (a) the work or invention is recognised and protected as intellectual property in national law⁴¹³ and (b) that it is not rejected by the national authorities⁴¹⁴. In this respect, it is nevertheless to stress that Article 1, while also extending to "[the] *“legitimate expectation” of obtaining an asset* [...]"⁴¹⁵ (if certain circumstances were at hand), primarily "[...] *applies only to a person’s existing possessions* [since] *it does not guarantee the right to acquire possessions* [...]"⁴¹⁶. However, since copyright would constitute and meet the requirement of a possession, if it was recognised under national law, and since also acquired licenses are considered as falling within the scope of Article 1⁴¹⁷, it is at least possible to hold (i) that the person owning copyright in a literary, scientific or artistic work as well as the licensee of the rights deriving from copyright are to regard as having a 'possession' in the sense of Article 1 and (ii) that Article 1's personal and material scope would be fulfilled, if a nationally recognised copyright holder or licensee was claiming.

⁴⁰⁶ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.496; See also: *Aplyn, Tanya/Davis, Jennifer*, Intellectual Property Law: Texts, Cases, and Materials, p.9;

⁴⁰⁷ ECommHR, *Smith Kline and French Laboratories Ltd v the Netherlands*, App.-No.: 12633/87, Admissibility Decision of 4 October 1990, D.R. No.66, pp. 70, 79 (1990);

⁴⁰⁸ *Helper, Lawrence R.*, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, pp.12,13;

⁴⁰⁹ Cf.: ECommHR, *Lenzing AG v the United Kingdom*, App.-No.: 38817/97, Admissibility Decision of 9 September 1998, last paragraph before the verdict; ECommHR, *Smith Kline and French Laboratories Ltd v the Netherlands*, App.-No.: 12633/87, Admissibility Decision of 4 October 1990, D.R. No.66, pp. 70, 79 (1990);

⁴¹⁰ Cf.: ECtHR, *Anheuser-Busch Inc. v. Portugal*, App.-No.: 73049/01, Judgment of 11 January 2007, paras. 71, 72-78;

⁴¹¹ Cf.: ECommHR, *Oguz Aral, Galip Tekin and Inci Aral v Turkey*, App.-No.: 24563/94, Admissibility Decision of 14 January 1998, 'The Law' No.4 para.2-4; ECtHR, *Balan v Moldova*, App.-No.: 19247/03, Judgment of 29 January 2008; ECtHR, *Dima v. Romania*, App. No. 58472/00, Admissibility Decision of 26 May 2005; ECtHR, *Melnychuk v. Ukraine*, App. No. 28743/03, Applicability Decision of 5 July 2005;

⁴¹² *Harris,D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, p.656; See also: See also: *Aplyn, Tanya/Davis, Jennifer*, Intellectual Property Law: Texts, Cases, and Materials, p.9; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.496;

⁴¹³ See for example the problematic concerning the authorship in ECtHR, *Dima v. Romania*, App. No. 58472/00, Admissibility Decision of 26 May 2005 (especially para.78), which is encompassingly discussed in *Helper, Lawrence R.*, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, pp.14-18; *Grosse Ruse-Khan* observed in this regard additionally that "To the extent that the existence or scope of copyright protection is contested or uncertain, the ECtHR leaves it to domestic courts to resolve the matter."- Cf.: *Grosse Ruse-Khan*, Overlaps and conflicts norms in human rights law: Approaches of European courts to address intersections with intellectual property rights, p.80;

⁴¹⁴ ECtHR, *Anheuser-Busch Inc. v. Portugal*, App.-No.: 73049/01, Judgment of 11 January 2007, para. 69; See also: ECtHR, *Dima v. Romania*, App. No. 58472/00, Admissibility Decision of 26 May 2005;

⁴¹⁵ ECtHR, *Anheuser-Busch Inc. v. Portugal*, App.-No.: 73049/01, Judgment of 11 January 2007, paras. 65, 73-78; ECtHR, *Balan v Moldova*, App.-No.: 19247/03, Judgment of 29 January 2008, paras. 31, 33; See also: *Harris,D.J./ O'Boyle, M./ Warbrick, C.*, Law of the European Convention on Human Rights, pp.656/657;

⁴¹⁶ ECtHR, *Marckx v Belgium*, App.-No.: 6833/74, Judgment of 13 June 1979, para.50; See also: ECtHR, *Anheuser-Busch Inc. v. Portugal*, App.-No.: 73049/01, Judgment of 11 January 2007, para. 64; ECtHR, *Balan v Moldova*, App.-No.: 19247/03, Judgment of 29 January 2008, paras. 31,32; ECtHR, *Van der Musselle v Belgium*, App.-No.: 8919/80 ,Judgment of 23 November 1983, para.48;

⁴¹⁷ Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.496; - The Strasbourg Court regards also licences as constituting 'possessions' in the sense of Article 1 of Protocol No.1 to the ECHR;

Since the copyright holder could consequently invoke his or her right, it is further to examine whether the anchorage of an exception to copyright for the purposes of 'borrowing' *political protest art* would constitute an interference with the copyright holder's right to property.

In this respect, one could initially hold the view that the limitation on copyright would not even present an interference with the copyright holder's right to property since, as the ECtHR confirmed by limiting itself to the review of legal and factual errors of national courts⁴¹⁸, the national law plays the essential role "[...] *in determining the protectable subject matter under Art.1 [...]*"⁴¹⁹. Since national law thus determines - in effect - the subject matter protected under Art.1 of Protocol No.1, it is in turn to infer that, owing to the Court's review practice, the right to property is dependent on the national sphere's legal definition and conceptualisation of copyright, which renders the human right to a "normatively-informed" one ("*normgeprägtes Eigentumsrecht*"⁴²⁰). If an exception to copyright for the purposes of *protest art* was thus anchored in national law, it would be possible to hold that the enactment would not even present an interference with the right to property. The permitting exception would not only allow the 'borrowing' uses and, thus, suspend or exclude the copyright holder's rights on the national level, but, due to Article 1's dependency, also have the same effect on the Convention level. The copyright holder's rights to authorise the use of his copyrighted material and to prevent the protest artist from non-authorized use would therefore be suspended or even excluded from the scope of protection of Article 1 due to the fact that non-authorized uses of proprietary contents in *protest art* would be legitimate under national law.

However, while this view could legitimately be held, it could, on the other hand, be invoked that this view fails to recognise the fact that the EU's Member States already granted and still protect copyright without any such exception in their respective copyright frameworks. Since national law thus priorly defined copyright without a permitting exception, also the concept of copyright under Art.1 of Protocol No.1 to the ECHR did not contain any exception in this regard. Since, thus, a shortening of the protective scope of Art.1 of Protocol No.1 would consequently be to observe, if the exception was anchored, it is to conclude that, instead of the view holding that the copyright holder's rights⁴²¹ are *de jure* excluded from Article 1's scope, it would be more appropriate to assume that, in the case of an enactment of such a permitting exception, an interference with the right to property exists.

It is therefore to assess whether the subsequent enactment of such an exception to copyright would constitute an interference in the form of a *deprivation* or in the form of a *control of use*. The

⁴¹⁸ *Helper, Lawrence R.*, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, p.16; See also: ECtHR, *Dima v. Romania*, App. No. 58472/00, Admissibility Decision of 26 May 2005;

⁴¹⁹ *Grosse Ruse-Khan*, Overlaps and conflicts norms in human rights law: Approaches of European courts to address intersections with intellectual property rights, p.80;

⁴²⁰ The English language contains no equivalent to the German legal term "normgeprägtes Eigentumsrecht", which exactly describes what the author seeks to indicate. For this reason, the German term was used to point out the particular meaning.

⁴²¹ Refers to the copyright holder's general rights to authorise other to use the work and to prevent non-authorized use.

Strasbourg Court distinguishes, as many scholars observed,⁴²² between these two forms of interferences by means of the criterion 'extinction of rights', which defines that "[t]he essence of deprivation of property is the extinction of the legal rights of the owner [...]"⁴²³ and which would not be present in terms of the control of use. Applying this to the exception to copyright, it is to note that the exception's adverse impact on the right to property cannot be equated with an 'extinction of rights' since the exception would not make the right to copyright disappear. The copyright holder would still have copyright and the rights deriving therefrom. The rights would only be suspended or rather be declared unenforceable in the event that the exception on behalf of *protest art* would take effect. In addition, it must be remarked that even in this situation the author would still have his moral rights untouched. It is thus to infer that an interference in the form of a control of use would be more appropriate to assume.

Therefore, assuming that the exception would constitute a control of use, it is further to assess under which conditions such an interference would be lawful. A control of use could in this context be justified, if three particular criteria were satisfied. The exception would thus need (1) to have some basis in law, irrespective of whether the basis is found in national or EU law,⁴²⁴ (2) it would have to be in the general interest, whereby modern case law places "[...] greater emphasis on the need to secure a fair balance between the [individual's] and the general interest [...]"^{425, 426} and (3) it would, eventually, be required that the exception is deemed necessary by a responding state.⁴²⁷

Applying these criteria to the exception to copyright, one could adhere that the exception in question would be enshrined in EU as well as national law and, thus, satisfy the first criterion. One could further observe that the third criterion is somehow intertwined with and determined by the second criterion since the general interest to some degree defines what the state deems necessary and which policy it pursues. Turning therefore to the second criterion, one primarily finds, reconsidering the elaborations of the precedent chapter, that freedom of expression, including *protest art*, is of exceptional importance and value as "[...] one of the essential foundations of [...] a [democratic] society, one of the basic conditions for its progress and for the development of every man [...]"⁴²⁸. To anchor the exception to copyright on behalf of *protest art* could thus be regarded as being in the general interest since, pursuant to its justifying rationales, (a) freedom of expression "[...] fosters a "marketplace of

⁴²² See for example: *Pellonpää, Matti*, Reflections on the notion of "deprivation of possessions" in Article 1 of the First Protocol of the European Convention on Human Rights, p.1087; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.503-507;

⁴²³ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.503; See also: *Harris, D.J./O'Boyle, M./Warbrick, C.*, Law of the European Convention on Human Rights, p.677;

⁴²⁴ Cf.: ECtHR, *Bosphorus Airways v Ireland*, App.-No.: 45036/98, Judgment of 30 June 2005; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.515: "[...] the underlying legal basis for measures which interfere with property rights may lie in EU law."

⁴²⁵ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.515;

⁴²⁶ Cf.: ECtHR, *Chassagnou and Others v France*, App.-Nos.: 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, para.75; *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.515,516;

⁴²⁷ *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, pp.514-517;

⁴²⁸ ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; ECtHR, *The Sunday Times v the United Kingdom*, App.-No.: 6538/74, Judgment of 26 April 1979, para.65; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.41;

ideas" [...] "⁴²⁹, which promotes democracy⁴³⁰, (b) since it furthers the individual's self-realisation⁴³¹ and (c) since it empowers every person by means of the exchange of ideas, which should - at least in sum - be considered as being in every individual's as well as every democratic society's interest.

The legitimate interests of the copyright holder to peacefully enjoy his possessions and to be morally and economically rewarded for his work, on the other hand, provide in this context the counterpart to freedom of expression in the balancing act, in which a "fair balance"⁴³² between the rights and interests is to strike. However, having regard to the Court's case law on Article 1 in this respect, it is to observe that the ECtHR repeatedly granted wide margins of appreciation to the states "[...] *with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question* [...]"⁴³³, which in effect leaves it to the state and its national authorities to determine what a fair balance is, whether the second criterion is fulfilled and, thus, whether the exception would meet the conditions of a legitimate interference.⁴³⁴

Hence, summarizing these findings, one could thus adhere that, while the copyright holder would in principle have a right to peaceful enjoyment of his possessions under the Convention, an exception to copyright for the purposes of 'borrowing' *political protest art* could lawfully be anchored, if a state deemed the anchorage of the exception to copyright necessary in the general interest.

3.3.2 Article 17 (2) of the Charter of Fundamental Rights of the European Union

Moreover, protection of intellectual property is on the European plain also guaranteed under Article 17 (2) ECFR, which straightforwardly stipulates that 'intellectual property shall be protected'. While the Article enshrines a corresponding right, meaning that, in principle, the same protection should be granted to the copyright holder as under Art.1 of the First Protocol to the ECHR, a significant peculiarity could be at hand. Article 17 (2) ECFR could mirror an instance, in which the EU made use of its authorisation enshrined in Art.52 (3) ECFR to provide a more extensive protection than the European Convention on Human Rights. The indicators suggesting such an understanding could here be found, on the one hand, in the systematic separation of the protection of intellectual property (Art.17 (2)) from the *lex generalis*⁴³⁵ provision Art.17 (1) ECFR, which protects property in general, and, on the other hand, in Art.17 (2) ECFR's conceptualisation of the right to intellectual property, which, contrary to the Charter's qualified right to property, appears at first glance as an absolute right.⁴³⁶ As an abso-

⁴²⁹ Helfer, Lawrence R./Austin, Graeme W., Human Rights and Intellectual Property: Mapping the Global Interface, p.223;

⁴³⁰ Helfer, Lawrence R./Austin, Graeme W., Human Rights and Intellectual Property: Mapping the Global Interface, p.224;

⁴³¹ Helfer, Lawrence R./Austin, Graeme W., Human Rights and Intellectual Property: Mapping the Global Interface, p.225;

⁴³² Cf.: ECtHR, *Chassagnou and Others v France*, App.-Nos.:25088/94,28331/95,28443/95, Judgment of 29.4.1999, para.75;

⁴³³ ECtHR, *Chassagnou and Others v France*, App.-Nos.:25088/94,28331/95 & 28443/95, Judgment of 29 April 1999, para.75;

⁴³⁴ This may apply, while the possibility of an overruling of the state's assumption by the ECtHR cannot be ruled out.

⁴³⁵ *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.164;

⁴³⁶ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, pp.342,343;

lute or unqualified right, Art.17 (2) ECHR would thus, as a right that is at the sole discretion of the person having the right, not allow any interferences with the right. An exception to copyright for the purposes of *protest art* could thus not lawfully be anchored since the interference would lack the possibility of justification from the beginning.

However, the right enshrined in Art.17 (2) ECFR must be contextualised and be situated in the human rights framework enclosing it. *Voorhoof* brilliantly formulated this as follows:

"The declaratory and somewhat enigmatic character of this provision should however be situated in the framework of Art.17 (1) and Article 1 of the First Protocol to the ECHR, leaving sufficient room for exceptions and limitations on intellectual property rights in the general interest or in respect of balancing the application or enforcement of copyright with other human rights. Furthermore, Article 17 (1) and (2) must also be read together with Article 52 on the scope and interpretation of the rights and principles enshrined in the EU Charter and especially in relation with Article 53."⁴³⁷

While Article 53 ECFR already stipulates in this connection that the Charter shall not be interpreted as restricting or adversely affecting human rights and fundamental freedoms, including those set out in the ECHR, it is to observe that also the CJEU accepted in its recent case law that Art.17 (2) ECFR must be contextualised or, in other words, that intellectual property and copyright are limited, when conflicting with other fundamental rights enshrined in the Charter. In this respect, the Luxembourg Court stated in its *Scarlet Extended v SABAM*⁴³⁸ and *SABAM v Netlog*⁴³⁹ cases that

"The protection of the right to intellectual property is indeed enshrined in Article 17 (2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected."⁴⁴⁰

Since Art.17 (2) ECFR does thus not constitute an absolute right in the CJEU's opinion, it is to note that the protection of intellectual property rights "*must be balanced against the protection of other fundamental rights*."⁴⁴¹ Starting with its *Promusicae* case⁴⁴² and confirming the approach in its cases *Scarlet Extended v SABAM*⁴⁴³ and *SABAM v Netlog*⁴⁴⁴ in terms of intellectual property, the Luxembourg Court requires that, in the event of conflicting rights, the authorities must ensure that concerning any measure taken "[...] *a fair balance is struck between the various fundamental rights protected*

⁴³⁷ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.343;

⁴³⁸ CJEU, Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011], Judgment of 24 November 2011;

⁴³⁹ CJEU, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012], Judgment of 16 February 2012;

⁴⁴⁰ CJEU, Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011], para.43; CJEU, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012], para. 41;

⁴⁴¹ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.344;

⁴⁴² ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008], Judgment of 29 January 2008;

⁴⁴³ CJEU, Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011], paras.44-46;

⁴⁴⁴ CJEU, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012], paras.42-44;

[...]"⁴⁴⁵ and that the authorities shall "[...] *not rely on an interpretation [...] which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.*"⁴⁴⁶ The enactment of an exception to copyright for the purposes of *protest art* would consequently be possible under the ECFR, if (a) a fair balance was struck between both, the copyright holder's right to intellectual property protection, as prescribed by Art.17(2)ECFR, as well as the artist's rights to freedom of expression and freedom of the arts, as enshrined in Art.11,13 ECFR, and (b) if the general principles, including especially the principle of proportionality, were observed.

Hence, since this result corresponds to the one found under the ECHR regime, it is to conclude that, in general, the same protection is granted to the copyright holder and that an exception to copyright could also be lawfully anchored under the ECFR.

3.3.3 Intermediary Result

Concluding this chapter, it is thus to adhere that, while the copyright holder has the rights to peacefully enjoy his possessions and to protection of intellectual property or copyright respectively, the EU and its Member States could - even contrary to Recital 32's⁴⁴⁷ declaration of exhaustiveness of the list of exceptions⁴⁴⁸ - lawfully enact the exception to copyright since such an interference would be justified, if the measure was in the general interest and if proportionality was observed. Due to the granted wide margin in terms of a determination of whether these requirements are met, one could however hold that the interference would already be justified, if a state deemed the exception necessary.

3.4 European Case Law on and the Court's Approaches to the Intersection of the Rights

Eventually, having regard to the case law and the particular approaches of the European Courts' in respect of the interface between the conflicting rights displayed, this chapter initially addresses the questions of how the Courts approached the issue and what they decided in this context, before critical observations regarding the Courts' approaches and their findings round off this chapter.

⁴⁴⁵ ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008], para.68;

⁴⁴⁶ ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008], para.68;

⁴⁴⁷ Recital 32 of Directive 2001/29/EC;

⁴⁴⁸ In this respect, it is firstly to note that Recital 32, as enshrined in secondary EU law, would be rendered ineffective, if it was inconsistent with primary EU law, including the Charter. As Chapter 3.4, 4.1.2.2 and Chapter 4.2 will show, it is legitimate to hold the view that freedom of expression could trump copyright under human rights law, if expressions reaching the level of protection afforded to political expression and debate were at hand. Given that this view is adopted, Recital 32 would be in conflict with Recital 31's demand to safeguard a fair balance between the rights and interests affected. Regarding such a case, *Slaughter and May* observed that, "[w]hilst the ECJ recognises that recitals can help to establish the purpose of a provision, it has stated on numerous occasions that recitals cannot take precedence over the relevant operative provisions of EU legislation. Therefore, if a recital is irredeemably inconsistent with the operative text then the ECJ will ignore the recital and give effect to the text of the operative provisions." - Cf.: *Slaughter and May*, Introduction to the legislative processes for European Union directives and regulations on financial service matters, pp.17,18; Recital 32 would thus yield to Recital 31.

3.4.1 The CJEU's Approach

Starting with the CJEU's approach, it is to say that, among others,⁴⁴⁹ also the Court's quite recent *Deckmyn v. Vandersteen* case⁴⁵⁰, which concerned the interpretation of the concept of parody enshrined in Article 5 (3) (k) of Directive 2001/29/EC, comprehensively illustrates the Luxembourg Court's approach to the interface between both rights. This case, in which the Court decided that [i]t is for the national court to determine, in the light of all the circumstances of the case [...], whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, [...], preserves [a] fair balance [between the rights involved]"⁴⁵¹, clearly demonstrates that the CJEU, when dealing with the intersection of freedom of expression and copyright, balances the rights by means of a reconciling interpretation of the respective legal terms in question. It is further to observe that *Deckmyn v. Vandersteen* constitutes another example for the CJEU's consistent pursuit of applying its previously described⁴⁵² conflicting rights approach and the frequently repeated requirement that authorities have to ensure that the interfering measure itself⁴⁵³ and the application or interpretation thereof⁴⁵⁴ have to strike a 'fair balance' that takes into account the circumstances of the concrete case.⁴⁵⁵ Since the Court, however, only provides a case-orientated reconciling interpretation of the legal terms at issue without making any general statements or findings regarding the interface *per se*, it is to infer that the CJEU's approach is a restrictive one that has no defining or clarifying effect concerning the general relation between the conflicting rights.

3.4.2 The ECtHR's Approach

Whereas the CJEU was tasked to decide cases on the interface between the conflicting rights already since 2011⁴⁵⁶, the ECtHR had not got the chance to rule in this respect until early 2013. Only months after judge *Dean Spielmann* described the ECtHR's case law for this reason as being relatively 'scant'⁴⁵⁷, the Strasbourg Court's judgment in *Ashby Donald and Others v France*⁴⁵⁸ and its decision in *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*⁴⁵⁹ changed this completely and reinvigorated not only the interest in the conflict between the rights, but also the need to find solutions in this regard.

⁴⁴⁹ In addition to the cases invoked in Chapter 3.3.2: ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008]; CJEU, Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011]; and CJEU, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012];

⁴⁵⁰ CJEU, Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België*, [2014], Judgment of 03.09.2014;

⁴⁵¹ CJEU, Case C-201/13, *Deckmyn v Vandersteen* [2014], para.35;

⁴⁵² See: Chapter 3.3.2;

⁴⁵³ CJEU, Case C-201/13, *Deckmyn v Vandersteen* [2014], para.26;

⁴⁵⁴ CJEU, Case C-201/13, *Deckmyn v Vandersteen* [2014], para.27; See also: para.34;

⁴⁵⁵ CJEU, Case C-201/13, *Deckmyn v Vandersteen* [2014], para.27; See also: paras.34,35;

⁴⁵⁶ See: CJEU, Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011], Judgment of 24 November 2011;

⁴⁵⁷ *Spielmann, Dean*, Variations on an Original Theme: Music and Human Rights, p.368; See also: *Council of Europe/ Division de la recherche - Research Division*, Internet: case-law of the European Court of Human Rights, p.36;

⁴⁵⁸ ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013;

⁴⁵⁹ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013;

In these cases, which concerned the convictions of the applicants on the basis of copyright law for their respective copyright infringement,⁴⁶⁰ the ECtHR found for the first time that the convictions and sanctions imposed would constitute interferences with the right to freedom of expression under Article 10 ECHR,⁴⁶¹ which would entail violations of the Article, if the convictions and sanctions were not prescribed by law, pursuing a legitimate aim and necessary in a democratic society to attain the aim⁴⁶². After finding that the interferences were prescribed by law and that they pursued a legitimate aim,⁴⁶³ the ECtHR then assessed whether the sanctions were necessary in a democratic society. Following its approach to grant states a wide margin of appreciation whenever they have to balance and protect competing rights,⁴⁶⁴ the ECtHR held that the responding "[...] *State benefits from a wide [structural] margin of appreciation [...]*"⁴⁶⁵. Reiterating that "[...] *the width of the margin of appreciation afforded to States varies depending on a number of factors, among which the type of information at issue is of particular importance [...]*"⁴⁶⁶ and finding that the expressions at hand did not reach the "[...] *same level as that afforded to political expression and debate [...]*"⁴⁶⁷, which rendered the substantial margin additionally wide, the Court inferred that the accumulation of these two wide margins⁴⁶⁸ "[...] *makes the [final] margin of appreciation particularly wide [...]*"⁴⁶⁹. Concluding with the finding that the sanctions imposed could not be regarded disproportional,⁴⁷⁰ the Court then unanimously held in *Ashby Donald and Others v France* that there was no violation of Article 10⁴⁷¹ and it rejected the application in *Neij and Kolmisoppi v Sweden* as being inadmissible⁴⁷².

Hence, since the ECtHR's rulings suggest that the particularly wide margin of appreciation applies in all cases, in which the protection of an expression does not reach the "[...] *same level as that*

⁴⁶⁰ Cf.: ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, paras.4-18: conviction of photographers for the unauthorised publication of photos taken at fashion shows on an Internet website; ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.2-5: conviction of the co-founder of *The Pirate Bay* for involvement in the running of a website, which made it possible for its respective users to share digital material, which was copyright-protected;

⁴⁶¹ ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.34; ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.10 - The Law, A;

⁴⁶² ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.35; ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.10 - The Law, A;

⁴⁶³ ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.36; ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.10 - The Law, B,C;

⁴⁶⁴ Cf.: ECtHR, *Von Hannover v. Germany (No. 2)*, App.-Nos.: 40660/08 and 60641/08, Judgment of 7 February 2012, para.107; See also: ECtHR, *Hachette Filipacchi Associes ("Ici Paris") v France*, App.-No.: 12268/03, Judgment of 23 July 2009; ECtHR, *Axel Springer AG v Germany*, App.-No.: 39954/08, Judgment of 7 February 2012;

⁴⁶⁵ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.40;

⁴⁶⁶ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; See also: ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.39;

⁴⁶⁷ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; See also: ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, paras.39,43; The expressions in this case were classified as commercial expressions (paras.39,43);

⁴⁶⁸ The wide structural margin (*balancing interest*) and the wide substantial margin (*nature of the information*).

⁴⁶⁹ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.41;

⁴⁷⁰ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.12 - The Law, D; ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.43;

⁴⁷¹ ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, para.45;

⁴⁷² ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.12;

*afforded to political expression and debate [...]'*⁴⁷³, it is eventually to conclude that the ECtHR's approach is, contrary to the CJEU's approach, aiming at determining the interface in general and that it allows to make the general statement that expressions that are less protected than political expression and debate yield to the protection of copyright in the relation between free expression and copyright.

3.4.3 Critical Observations regarding the European Courts' Approaches and Case Law

However, five particular issues must be stressed or even criticised in terms of the European Courts' approaches to and their recent case law on the intersection between the rights.

Firstly, the CJEU's restrictive approach, which solely interprets existing law in a reconciling manner, appears in my opinion, (i) due to its lack of enriching general statements or findings regarding the interface, (ii) due to the Court's general practice to leave the determination to the states and (iii) due to the fact that the interface was not finally determined in the human rights sphere yet, somehow stuck in approaching the 'fair balance'. While urging that the 'fair balance' is struck by the authorities whenever the fundamental rights compete, the Luxembourg Court's case law does not provide any clear or instructive guidelines that could generally be applied and which could further determine the relation between copyright and free expression. The CJEU should therefore intensify its contribution to the debate on the interface, commence to disentangle itself from the restrictions set by, for example, requests for preliminary rulings and use its judgments to deliver *orbiter dicta* by defining precisely (a) how it regards the intersection generally, (b) what it considers to be a fair balance between the rights and interests involved in the concrete case, (c) which criteria informed its decisions in this regard and (d) how much weight it put or puts on the particular criteria in the concrete circumstances.

Secondly, turning towards the ECtHR's approach and case law, it is primarily to observe and adhere that the ECtHR granted the particularly wide margin of appreciation only due to the accumulation of both, the wide structural margin (*balancing interest*) and the wide substantial margin (*nature of information*), which was solely possible because of the commercial character of the expressions in question⁴⁷⁴.⁴⁷⁵ While the Court's judgment⁴⁷⁶ as well as its decision⁴⁷⁷ did not provide any guidance to predict what the outcome would be, if particular copyright infringing expressions reached the level of protection afforded to political expression and debate, one has particularly to emphasise that they did nonetheless allow to presume that a new assessment and, thus, another potentially distinct result is to expect in this regard, which should be kept in mind for the upcoming elaborations in Chapter 4.

⁴⁷³ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; See also: ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, paras.39,43: The expressions in this case were classified as commercial expressions (paras.39,43);

⁴⁷⁴ The commercial character of the expressions at hand rendered the substantial margin of appreciation wide, so that no counterbalance to the wide structural margin was at hand. (Cf: Elaborations in Chapters 3.2.4.1.2 and 3.2.4.1.3);

⁴⁷⁵ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, pp.348,349;

⁴⁷⁶ ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013;

⁴⁷⁷ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013;

Thirdly, in this connection, it should - inspired by *Voorhoof's* observation⁴⁷⁸ - further be stressed that the protective scope of the right to freedom of expression as well as its impact are clearly not limited to political expression and debate. By granting the particularly wide margin in terms of all expressions not reaching the level of protection, the Court contradicted this standing opinion by granting the states a nearly unlimited power with regard to both, the determination of the existence of a pressing social need as well as the proportionality of the measures taken with the sole exception of expressions reaching the level of protection afforded to political expression and debate, which *de facto* placed all expressions not reaching the said level of protection at the disposal of the states. Since freedom of expression should - in the opinion of the author - not be treated or reduced that way, the supervision of the Court should not be restricted to expressions reaching the required level of protection.

Fourthly, it is also at least questionable that the ECtHR unrestrictedly granted the states a wide structural margin of appreciation on the mere assumption that they had to balance competing rights. since, as *Voorhoof* rightly observed, "[n]either of the national courts explicitly struck a fair balancing of the rights at issue, justifying the interference solely on the application of the copyright law."⁴⁷⁹ The national courts' *legal positivistic* adherence to copyright law and their failure to consider, let alone properly balance, freedom of expression should be considered unacceptable and should, while states in principle may enjoy the benefit of a wide structural margin whenever they are tasked to balance competing rights, not be rewarded by granting them the benefit of the wide structural margin. The Court should thus make it a precondition for granting the benefit that the balancing act is actually conducted.

Lastly, the final point of criticism concerns the ECtHR's breach with its previously consistent approach⁴⁸⁰ to the nature and gravity of sanctions, which explicitly set out that the "[...] *imposition of a prison sentence [...] will be compatible with [...] freedom of expression [...] only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence [...]*"⁴⁸¹ and that also fines or the award of damages have to be proportionate⁴⁸² due to their chilling effect on future expressions. In both of its cases on the interface, the ECtHR found however that the national authorities did not overstep their discretion and that the sanctions, which in *Ashby Donald and Others v France* amounted all together to damages of more than 250,000 EUR and in *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden* to damages of

⁴⁷⁸ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.349;

⁴⁷⁹ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.348;

⁴⁸⁰ Cf.: ECtHR, *Cumpana and Mazare v Romania*, App.-No.: 33348/96, Judgment of 17 December 2004, para.115; ECtHR, *Sürek and Özdemir v Turkey*, App.-Nos.: 23927/94 and 24277/94, Judgment of 8 July 1999, paras.62-64; ECtHR, *Feridun Yazar and Others v Turkey*, App.-No.: 42713/98, Judgment of 23 September 2004, para.27-29; ECtHR, *Eon v France*, App.-No.: 26118/10, Judgment of 14 March 2013; ECtHR, *Marchenko v Ukraine*, App.-No.: 4063/04, Judgment of 19 February 2009, paras.52-54; ECtHR, *Kasabova v Bulgaria*, App.-No.: 22385/03, Judgment of 19 April 2011, paras.69-73; - For further information see also: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.451;

⁴⁸¹ ECtHR, *Cumpana and Mazare v Romania*, App.-No.: 33348/96, Judgment of 17 December 2004, para.115; ECtHR, *Feridun Yazar v Turkey*, App.-No.: 42713/98, Judgment of 23 September 2004, para.27; ECtHR, *Sürek and Özdemir v Turkey*, App.-Nos.: 23927/94 and 24277/94, Judgment of 8 July 1999, para.63;

⁴⁸² Cf.: ECtHR, *Eon v France*, App.-No.: 26118/10, Judgment of 14 March 2013, paras.61,62; ECtHR, *Kasabova v Bulgaria*, App.-No.: 22385/03, Judgment of 19 April 2011, paras.71,72; See also: *Jacobs, White & Ovey*, The European Convention on Human Rights, 2014, p.451;

5,000,000 EUR and additional prison sentences of ten and eight month respectively,⁴⁸³ could "[...] *not be regarded as disproportionate*."⁴⁸⁴ The arguments invoked by the Court can in this context not be regarded as presenting a convincing basis which could have justified the severity of the sanctions, the amount of damages and, above all, the prison sentences since, as *Voorhoof* also observed, copyright infringement is definitely not to equate with expressions that "[...] *cause significant damage to society, such as e.g. cases of incitement to discrimination, violence or hatred, or other forms of 'hate speech'*."⁴⁸⁵ While the Court should already have held in these cases that the sanctions were disproportionate for the reasons displayed, a return to its previous approach is thus to recommend, but it remains to be seen how the issue will be dealt with in the future.

3.4.4 Intermediary Result

Hence, while their approaches and case law is open to critique, it is to adhere that both Courts shed light on the interface between the rights to free expression and copyright, whereby the ECtHR called the tune concerning the determination of their relation in general.

3.5 Intermediary result

Summarizing Chapter 3, it is therefore to keep in mind (1) that both, the protest artist as well as the copyright holder have rights under the respective European human rights regimes; (2) that these rights compete with each other (in the situation in which the protest artist 'borrows' proprietary contents and the copyright holder asserts his rights) because of the lack of an exception to copyright for the purposes of *protest art* in the EU's harmonising regulatory framework; (3) that the enactment of such an exception to copyright could - even contrary to Recital 32's declaration of exhaustiveness of the *InfoSoc* Directive's list of exceptions⁴⁸⁶ - lawfully be anchored under Art.17 (2) ECFR and Article 1 of the First Protocol to the ECHR, if the control of use was striking a fair balance between the general and the individual's interest, or rather if the state deemed it necessary (due to the states' wide margin in this regard); (4) that, in principle, the artist's rights to freedom of expression and artistic expression could potentially yield to the protection of copyright, if the interfering measure was prescribed by law, if it pursued a legitimate aim and if it was necessary in a democratic society to attain the aim; and (5) that the European Courts, while already having delivered judgments on the interface between both rights, did not determine the interface between copyright and freedom of expression regarding expressions reaching the same level of protection as the one afforded to political expression and debate.

⁴⁸³ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.348;

⁴⁸⁴ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.12 - The Law, D;

⁴⁸⁵ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.349;

⁴⁸⁶ See Chapter 3.3.3 and the related footnote;

4. The Questions of 'Whether the EU's Copyright and Enforcement Framework is Compliant with the Current State of the Rights' Relation under Human Rights Law', 'What a Human Rights Compliant Protection of 'Borrowing' *Political Protest Art* is' and 'What it Requires'

As a result of the aforementioned elaborations and findings, it became evident that, to be able to determine what a human rights compliant protection of 'borrowing' *political protest art* is, what it requires and how a fair balance between the rights to freedom of expression and copyright could be struck, answers must be given to the following questions: (a) Does *political protest art* reach the level of protection afforded to political expression and debate'? (b) Could the EU's "prevention"⁴⁸⁷ of a protest artist's non-authorised use of copyrighted contents be regarded as being 'proportionate' or 'necessary in a democratic society' and, thus, as being compliant with the current state of the rights' relation under human rights law? (c) Does the ECtHR require a particular protection of the rights in this situation? (d) And finally, could or should a positive obligation in terms of expressions reaching the said level of protection be found due to the current state of this relation?

For this reason, this chapter is devoted to the examination of these questions, whereby it is divided into two parts. While part one is initially concerned with the proportionality of the EU's "*de facto* prevention" under the European Courts' approaches, part two will subsequently elaborate upon the issues of what a human rights compliant protection of *political protest art* is and what it requires.

It should here nonetheless be emphasised and kept in mind that the approaches taken in this chapter as well as the findings resulting thereof must be regarded as hypothetical ones, which are used and made for the purposes of this thesis only, since it is unclear how the Courts will approach the issue and since their rulings could deviate from or even contradict the chapter's results.

4.1 Compliance and Proportionality of the EU's "Prevention"

Initially, to be able to determine whether the EU's copyright and enforcement framework is compliant with the current state of the rights' relation, it is to assess whether the "prevention" is 'proportionate' (CJEU) or 'necessary in a democratic society' (ECtHR). Since the proportionality assessment is dependent on the intensity of review, which in turn is contingent on the question of whether *political protest art* reaches the level of protection afforded to political expression and debate, this chapter examines the issue of intensity first, before it subsequently scrutinises the proportionality by means of the Courts' approaches.

⁴⁸⁷ The EU's non-allowance of 'borrowing' uses in *political protest art* and its simultaneous enforcement of copyright in times of conflict (= situation, in which (a) non-authorised 'borrowing' uses of proprietary contents in *political protest art* are at hand and in which (b) the copyright holder asserts and enforces his rights.) will be described by the term '**the EU's "prevention"**' in the following for the reason of simplicity and due to the shortage of this thesis.

4.1.1 The Intensity of the Courts' Proportionality Review and the Question of Whether *Political Protest Art* Reaches the Required Level of Protection

Having therefore regard to the Courts' intensity of review first, it is to reiterate that the review's intensity varies dependent on the margin of appreciation, on the nature and extent of the powers granted to the relevant authorities and contingent on the nature of the interests concerned.⁴⁸⁸ If a margin was found to be wide or if the bounds of discretion of legislative, judicative or executive power were widely drawn, the Courts would usually exercise deference and consider a marginal review as being appropriate.⁴⁸⁹ If, however, an important interest like fundamental human rights were impinged upon, the review of both Courts would be strict or at least stricter.⁴⁹⁰ Since it is additionally to observe that the CJEU follows in essence the ECtHR's reasoning in its assessment of the level of intensity with regard to both, the structural as well as the substantial margin, whenever fundamental rights are at hand,⁴⁹¹ it is possible to infer that a determination of the level of intensity under the ECHR regime would be sufficient to define the level of review under both regimes. For this reason and due to the shortage of this thesis, regard will be had to the ECtHR's assessment only.

Concerning the ECtHR's intensity of review, it is primarily to recall that, as already mentioned before⁴⁹², the ECtHR provides the states with a wide structural margin of appreciation whenever they have to balance competing rights. The intensity of review would thus generally be a deferential one.

However, since the Court frequently points out that "[...] *the width of the [final] margin of appreciation afforded to States varies depending on a number of factors, among which the type of information at issue is of particular importance [...]*"⁴⁹³, it is to adhere that also the substantial margin and, thus, the nature of information are of particular importance for the final determination of the level of intensity. Since the ECtHR's findings in *Ashby Donald and Others v France* and *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden* suggest that the particularly wide margin of appreciation applies only to expressions, which do not reach the "[...] *same level [of protection] as that afforded to political*

⁴⁸⁸ Cf.: Concerning ECtHR: See elaborations in Chapter 3.2.4.1.2; / Concerning CJEU: See *Thouvenin, Jean-Marc*, European Governance 2: The Principle of proportionality, C - Intensity of the ECJ's proportionality review, paras.5,6;

⁴⁸⁹ Cf.: Concerning ECtHR: See elaborations in Chapter 3.2.4.1.2; / Concerning CJEU: See *Thouvenin, Jean-Marc*, European Governance 2: The Principle of proportionality, C - Intensity of the ECJ's proportionality review, paras.5,6;

⁴⁹⁰ Concerning ECtHR: See elaborations in Chapter 3.2.4.1.2; / Concerning CJEU: *Thouvenin, Jean-Marc*, European Governance 2: The Principle of proportionality, C - Intensity of the ECJ's proportionality review, paras.6,8;

⁴⁹¹ See for example: *Thouvenin, Jean-Marc*, European Governance 2: The Principle of proportionality, C - Intensity of the ECJ's proportionality review, paras.8,9; - *Thouvenin* observes: "*If the individual interest harmed by the contested measure or decision is a fundamental right, the Court's review will also be strict. Once again, however, this rule is not absolute, since not every individual fundamental right is considered to be of like importance. For example, the Court sees less reason to apply a strict test in a case concerning restrictions of commercial expression than in cases concerning interferences with press freedom. Furthermore, the ECJ will only apply a strict test if a measure restricts the exercise of a fundamental right. If, by contrast, a certain measure is aimed at protecting fundamental rights and interests, the Court will commonly show deference. Finally, if the impaired interest is not a Community interest, but rather a national or individual interest (not being a fundamental right), the Court's review is generally deferential.*";

⁴⁹² See Chapter 3.2.4.1.2, Chapter 3.2.4.1.3, Chapter 3.4.2 and Chapter 3.4.3;

⁴⁹³ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; See also: ECtHR, *Ashby Donald and Others v France*, App.-No.:36769/08, Judgment of 10 January 2013, para.39;

expression and debate [...]”⁴⁹⁴, and since therefore a narrower substantial margin, a narrower final margin, a stricter review of the Courts as well as a distinct outcome would only be to expect, if expressions were at hand which reached the level of protection afforded to political expression and debate, it is to determine whether *political protest art* reaches the said level of protection.

Commencing with the examination of this question and the assessment of the ECtHR's related general principles, it is initially to adhere that *political protest art*, as an instrumentalisation of the means art, primarily presents an artistic expression in the sense of Article 10. It is further to recall that (a) the Strasbourg Court affords a high level of protection to political expression as well as *political artistic expressions*⁴⁹⁵ and (b) that the Court would lower the level of protection of *political* as well as *non-political artistic expressions*, if their form's impact was dangerous⁴⁹⁶, if their form's impact was limited⁴⁹⁷ or if their content was non-political⁴⁹⁸. Going *in medias res* therefore, it is primarily to note that, since *political protest art* - in the form, in which it was defined for the purposes of this thesis - already inherently contains the contentual reference to politics and since it thus constitutes a *political artistic expression*, it is afforded a high level of protection. If one therefore turned towards the impact of its form, in particular the expression's potential of danger and its reach are to address. Regarding the form's potential of danger, the Strasbourg Court applies the maxime saying 'the greater the form's potential for damage, the less protection is granted'⁴⁹⁹, so that in consequence audio-visual media for instance would, due to their more powerful and immediate effect, be more likely to be of a lower level of protection than print media.⁵⁰⁰ Concerning the forms limitation or reach on the other hand, the Court addresses whether the artistic expression appeals to a narrow or a broader audience, whereby it affords the highest level of protection to expressions showing an equal amount of recipients as the mass media.⁵⁰¹ It can therefore be held that *political protest art* - as a *political artistic expression* - would maintain its high level of protection and, thus, be of the same level of protection as political expression, if its form's potential of danger as well as its reach gave no reason to lower it.

Additionally, also the criterion 'context' appears to be of crucial significance. If one returned to the ECtHR's statement that expressions have to reach the same level of protection as the one afforded to 'political expression *and* debate', one could infer that the expression has to be made in the context of

⁴⁹⁴ ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013, p.11 - The Law, D; See also: ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013, paras.39,43;

⁴⁹⁵ See Chapter 3.2.4.1.2; See also: *EU Network of Independent Experts on Fundamental Rights*, Commentary of the Charter of Fundamental Rights of the European Union, 2006, p.116,117; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986; *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3;

⁴⁹⁶ See Chapter 3.2.4.1.2; See also: *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3;

⁴⁹⁷ See Chapter 3.2.4.1.2; See also: *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3;

⁴⁹⁸ This criterion applies only in regard to mere non-political artistic expressions. - See Chapter 3.2.4.1.2;

⁴⁹⁹ Cf.: ECtHR, *Murphy v Ireland*, App.-No.: 44179/98, Judgment of 10 July 2003, para.74;

⁵⁰⁰ Cf.: ECtHR, *Pedersen and Baadsgaard v Denmark*, App.-No.: 49017/99, Judgment of 17 December 2004, para.79;

⁵⁰¹ *Council of Europe/European Court of Human Rights, Research Division - Division De La Recherche*, Cultural rights in the case-law of the European Court of Human Rights, 2011, p.5, para.3;

a debate. However, the Courts statement is ambiguous in this regard and could be interpreted in two distinct ways. On the one hand, one could understand that, in addition to expressions reaching the level of protection afforded to political expressions, a current debate must be at hand (cumulative existence), which in effect would raise the required level of protection since the Court understands "[...] *freedom of political debate* [as being] *at the very core of the concept of a democratic society* [...]"⁵⁰², but the statement could also be interpreted as indicating that either an expression reaching the level of protection afforded to political expression, or debate could be sufficient (alternative existence) since the Court considers both to be of a high level of protection. Due to the fact that the Court did not clarify yet which interpretation should be applied and since deductions are not possible, the author adopts here - without taking a stance - an inclusive approach for reasons of simplicity and due to the shortage of this thesis, so that the cumulative existence of both criteria shall be needed in the following.

On the basis of the findings made in applying the ECtHR's general principles, it can therefore be concluded that *political protest art* - as a *political artistic expression* in the sense of Art.10 ECHR - would reach the required level of protection and, thus, render the substantial margin of appreciation a narrow one, if the impact of its form was neither dangerous, nor limited and if the expression was made in the context of a debate⁵⁰³. Since, given that a political protest artwork would satisfies these criteria, a narrow substantial margin would confront the previously found wide structural margin, it is to note that the states' range of discretion would be reduced, that, consequently, the ECtHR's intensity of review would be increased and that, in turn, the ECtHR's review would be a stricter one. Thus, whenever dealing with political protest artworks like *Banksy's "One Nation under CCTV"*, *Becker/Sen's "Europa Tod-Der Tod und das Geld"* or *Ai WeiWei's* life vest installation in Berlin, the European Courts would have to scrutinise the proportionality thoroughly.

[An exemplifying application of these general principles to Annex I's illustrating scenario "Aylan Kurdi" had to be moved into Annex II due to the shortage of this thesis, but can be found there.⁵⁰⁴]

4.1.2 Proportionality under the European Charter and the European Convention

Since it is thus clear that the European Courts' proportionality review would be a stricter one, if they were concerned with the main conflicting rights in the relation between 'borrowing' *political protest art* and copyright, it is now to assess whether the interference with freedom of political expression is to regard as being 'proportionate' (CJEU) and 'necessary in a democratic society' (ECtHR). Since the principle of proportionality forms the crucial basis of both of these assessments and since both Courts pursue a distinct approach in this respect, it is useful to briefly introduce the general principle of pro-

⁵⁰² ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.42;

⁵⁰³ If the alternative interpretation requiring only the presence of either political expression, or debate was applied, it would be to conclude that the requirement that an expression had to be made in the context of a debate is cancelled.

⁵⁰⁴ See Annex II - Application and Illustration;

proportionality first, before the particularities of the respective Courts' approaches are displayed and applied subsequently.

4.1.2.1 General Introduction of the Principle of Proportionality

If one therefore seeks to briefly describe the principle of proportionality, one should start stating that the principle constitutes a legal tool that is used to balance conflicting rights and interests in the adjudication of disputes. The principle ensures in this context that the interference with a protected right is not greater than is necessary to address a particular public interest or social need.⁵⁰⁵ Traditionally, the principle of proportionality, which is primarily inspired by German constitutional and administrative law, rests on the assumption that states have to act rationally and that they have to apply measures that are suitable and proportionate to the objective pursued.⁵⁰⁶ In the principle's daily application, the courts determine the questions of 'whether such a rational conduct is at hand' and 'whether suitable and proportionate measures were applied by the state' by means of the so called 'proportionality test'. The test formulates three particular demands that must be complied with to meet the principle of proportionality. To be proportional, the interfering state measure must thus initially fulfil the *principle of suitability*, which requires that a measure "[...] *must be suitable for the purpose of facilitating or achieving the pursued aim* [...]"⁵⁰⁷; it must satisfy the *principle of necessity*, which demands "[...] *that a suitable measure must also be necessary in the sense that there is no other equally suitable measure available, which is less restrictive to the protected right* [...]"⁵⁰⁸; and it has eventually to comply with the *principle of proportionality stricto sensu*, which requires that "[...] *a suitable and necessary measure may not upset the fair balance and/or destroy the essence of the right* [affected]"⁵⁰⁹. Hence, the principle of proportionality can thus be described as the legal tool that ensures by means of the criteria suitability, necessity and proportionality *stricto sensu* that a state is not applying a disproportionate measure or, as *Fleiner* once put it, that the state is not "*using a sledghammer to crack a nut*"⁵¹⁰.

4.1.2.2 The CJEU's Approach: Is the Interference 'Proportionate'?

While being related, the concept of proportionality deployed by the CJEU is an autonomous European one. Identifying the principle of proportionality already in 1956 as "[...] *a generally-accepted rule of law* [according to which a] *reaction by the high authority to illegal action* [...] *must be in proportion to*

⁵⁰⁵ Cf.: *Jacobs, White & Ovey*, The European Convention on Human Rights, Sixth Edition, 2014, p.325;

⁵⁰⁶ *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, p.28; *Thouvenin, Jean-Marc*, European Governance 2: The Principle of proportionality, A - Origins of the principle, paras.1,2;

⁵⁰⁷ *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, p.20;

⁵⁰⁸ *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, p.20;

⁵⁰⁹ *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, p.20;

⁵¹⁰ Cf.: *Fleiner, Fritz*, Institutionen des deutschen Verwaltungsrechts, 1911, p.323; - Der Staat "*soll nicht mit Kanonen auf Spatzen schießen... Das schärfste Mittel muss stets die ultima ratio bleiben.*" / Translation: The state "shall not use a sledghammer to crack a nut... the most restrictive means must always remain ultima ratio.";

the scale of that action [...]”⁵¹¹, the Court perceives and applies the principle of proportionality today as a fundamental general principle of Community law.⁵¹² The proportionality test applied by the Luxembourg Court requires in this context that three criteria are met, namely that an interfering measure is not “[...] *manifestly inappropriate* [with regard to achieving the objective pursued]”⁵¹³, that the measure is *necessary*, which would be the case, if there was “[...] *no less restrictive alternative* [...]”⁵¹⁴ (*‘least onerous means-test’*) and, eventually, that the measure is *proportional stricto sensu*, which would be fulfilled, if all the rights and interests protected were taken into account and fairly balanced⁵¹⁵ or, in other words, [if] *the adverse effect (on the individual)* [was] *not excessive when weighed against the aim of the measure* [...]”⁵¹⁶.⁵¹⁷ Hence, if the interfering measure met these requirements, meaning that it is appropriate, necessary and proportionate in the narrow sense, the CJEU would perceive the interference as compliant with the current human rights situation and, thus, as a lawful exercise of the state's right to limit the rights of the individual in the public interest.

If one thus applied the CJEU's proportionality test to the relation between the protest artist expressing 'borrowing' *political protest art* and the copyright holder and considered the EU's "prevention" of 'borrowing' uses in *political protest art* in the light of the criteria required by the CJEU's test, one could observe the following:

Firstly, the enactment of the European copyright and enforcement framework without an explicit exception to copyright for the purposes of *political protest art* is to regard as being appropriate to achieve the objective of protection of the copyright holder's rights and interests since it, on the one hand, provides the copyright holder with effective means to assert his rights and since it, on the other hand, protects his rights by means of deterring prevention, sanctions as well as punishment.

⁵¹¹ ECJ, Case C-8/55, *Federation Charbonniere De Belgique v High Authority of the European Coal And Steel Community*, [1956], Judgment of 29 November 1956, ["Fedechar"] - Law, A), I) - on p.229;

⁵¹² Cf.: ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008], para.68; ECJ, Case C-101/01, *Bodil Lindquist* [2003], Judgment of 6 November 2003, para.87;

⁵¹³ ECJ, Case C-265/87, *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989], Judgment of 11 July 1989, para.22; ECJ, Case C- 344/04, *The Queen on the Application of: International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006], Judgment of 10 January 2006, para.80; See also: Tillotson, John/ Foster, Nigel, Text, Cases and Materials on European Union Law, 4.Edition, p.240;

⁵¹⁴ Tillotson, John/ Foster, Nigel, Text, Cases and Materials on European Union Law, 4.Edition, p.240; See also: CJEU, Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013], Judgment of 22 January 2013, para.48; ECJ, Case C-131/93, *Commission of the European Communities v Federal Republic of Germany* [1994], Judgment of 13 July 1994, paras.19-27;

⁵¹⁵ Cf.: ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008], para.68;

⁵¹⁶ Tillotson, John/ Foster, Nigel, Text, Cases and Materials on European Union Law, 4.Edition, p.240; See also: CJEU, Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013], Judgment of 22 January 2013, para.48; ECJ, Case C-131/93, *Commission of the European Communities v Federal Republic of Germany* [1994], Judgment of 13 July 1994, paras.19-27;

⁵¹⁷ Thouvenin, Jean-Marc, European Governance 2: The Principle of proportionality, - B) The ECJ's Proportionality Review, 'a) Effectiveness (or appropriateness, or suitability)'; 'b) Necessity and subsidiarity'; and 'c) Proportionality stricto sensu';

Secondly, addressing the criterion of necessity, it is to observe that, whereas a flexible exception for the purposes of freedom of expression,⁵¹⁸ which weighs the rights and interests at stake in the concrete circumstances, would allow to permit particular uses of copyrighted materials in *political protest art* within the limits set by human rights law and the relation between the rights, the categorical and exhaustive nature of the list of exceptions enshrined in Art.5 of Directive 2001/29/EC would prohibit the acceptance of such an exception to copyright for the purposes of *political protest art*, even if the Court came to the conclusion that the protest artist's right to free expression trumped the copyright holder's right to copyright protection. Since, thus, a less restrictive, while equally effective measure can be found, which could have been applied by the EU, it is to adhere that the EU's copyright and enforcement framework could potentially be understood as not presenting the least onerous means and that it could consequently be regarded as not being necessary. Since, however, a decision in favor of copyright, which would justify the EU's framework in its entirety, is also not ruled out by the ECtHR, it is to conclude that it cannot be determined whether the measure is necessary.

Thirdly, turning towards the requirement of proportionality *stricto sensu*, one could further see that in its assessment of whether an interference is proportionate in the narrow sense, in which the Court examines whether an interference was greater than necessary to pursue the aim, the CJEU initially points out all the rights and interests competing with each other, proceeds then to weighing them also by means of the defining criteria set out by the ECtHR for the particular relation between the rights and, eventually, addresses the question of whether the interfering measure struck a fair balance between the rights and interests affected.⁵¹⁹ If one thus seeks to establish whether an interfering measure was proportionate, one will - pursuant to the CJEU's approach - have to highlight the rights and interests involved, to weigh them under due consideration of the ECtHR's criteria and its understanding of the rights' relation and, finally, to decide whether a fair balance was struck. Since it is the ambition of this thesis to elaborate upon a human rights compliant protection of 'borrowing' *political protest art*, upon the relation of free expression and copyright and upon the compliance of the existing regulations with human rights law to be enabled to draw conclusions regarding the implications of a human rights compliant protection of 'borrowing' *political protest art* for European copyright law, it is thus necessary to apply the Court's approach in the following.

Initially, concerning the rights and interests involved, it can easily be found that, in the relation between 'borrowing' protest artist and copyright holder, primarily⁵²⁰ the rights to freedom of expression and freedom of the arts as well as the right to protection of one's intellectual property are

⁵¹⁸ In terms of solutions in form of flexible exceptions, *Voorhoof* for example argues for the enactment and application of a US-like 'fair use' clause, which due to its inherent flexibility would allow to weigh the interests and rights involved. - Cf.: *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.351;

⁵¹⁹ Cf.: CJEU, Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011], Judgment of 24 November 2011; CJEU, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012], Judgment of 16 February 2012; ECJ, Case C-275/06, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008], Judgment of 29 January 2008;

⁵²⁰ While primarily these rights are affected on a general basis, also other rights could be involved or interfered with. However, due to the shortage and the focus of this thesis only the named rights are taken into account. (Chapter 3.2 & 3.3);

affected. On this basis, it can further be identified that the protest artist has an interest in freely expressing himself and his ideas, that he has an interest to freely express these ideas by means of art and that he has an interest in sharing his political views by contributing to a public debate, whereas the copyright holder's central interest, on the other hand, focuses on an effective protection of his copyright against non-authorised use to enable him to peacefully enjoy his work and the benefits deriving therefrom.

It may however not be forgotten that also the general public is to some degree involved in this relation. As already indicated before, the public has a right to receive information and ideas of any kind, especially in the Internet-context, and it could in principle be said that the public is interested in both, the maintenance of a free and pluralistic exchange of political ideas as well as in economic progress originating from new ideas for which intellectual property protection as a reward as well as an incentive presents the necessary prerequisite. Thus, while primarily individual rights and interests are at stake, also the public's rights and interests must be taken into account, be weighed and fairly balanced.

Moreover, in the pursuit to strike a fair balance between the rights and interests involved, the Court is usually tasked, when dealing with situations involving third-party effects, to assess whether and how the rights of the individuals could be reconciled and to derive from the result of this assessment in how far a state has the 'right'⁵²¹ to limit a particular right to the benefit of the other as well as the extent to which it can make use of this right.

Therefore, commencing with the questions of whether and how the individual rights and interests could be reconciled, one would have to examine the weight of the particular rights in the concrete circumstances first, then to address the criteria set out by the ECtHR concerning their relation and, finally, to provide an answer to the questions. In this respect, it is primarily to note that, both rights, freedom of expression as well as copyright, are considered by the CJEU, as being of utmost importance not only for the individual, but also for the society in its entirety. While the CJEU understands freedom of expression corresponding to the perception of the ECtHR as "[...] *one of the essential foundations of [...] a [democratic] society, one of the basic conditions for its progress and for the development of every man [...]*"⁵²² and, thus, as constituting one of the overarching values of a democratic society, one will see that also the right to copyright protection fulfils an essential role. It secures not only the individual's rights, but it also ensures societal progress and prosperity by stimulating intellectual creation and cultural or scientific innovation⁵²³. Whereas it could thus be assumed that, in a situation, in which these two rights conflict with each other on an individual basis, both rights are approximately of equal value, one has nonetheless to adhere that the right to copyright pro-

⁵²¹ See for the state's right to limit an individual right: *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, pp.33,34;

⁵²² ECtHR, *Handyside v. United Kingdom*, App.-No.: 5493/72, Judgment of 7 December 1976, para.49; ECtHR, *The Sunday Times v the United Kingdom*, App.-No.: 6538/74, Judgment of 26 April 1979, para.65; ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.41;

⁵²³ Cf.: Recitals 4 and 9 of Directive 2001/29/EC;

tection appears to be in a somehow weaker and therefore more protectable position. Since copyright solely aims at protecting copyrightable works and since other venues for the artist's expression would usually be available (i) since the ideas of proprietary works are not protected and (ii) since, in principle, most opinions, ideas or informations could be expressed in other forms or be circumscribed without using copyrighted contents, it may appear unjust even to consider that the protest artist's right to free expression could trump copyright in particular circumstances. For these reasons, the general call for the greatest possible protection of copyrighted materials and copyright seems in principle reasonable and just.

However, there may be cases, in which (a) the copyright holder's economic rights are not harmed by the artists unauthorised use, (b) in which the reputation of neither the author, nor the work is damaged, (c) in which the artist expresses particular ideas and information that contribute and stimulate a current (political) debate, (d) in which the artist solely intends to make a statement without any commercial agenda and (e) in which other venues, while still being available, would not express, describe or even mean the same, if particular proprietary contents had for example become culturally recognised and accepted sayings, signs or icons.⁵²⁴ In such cases, which especially include and concern 'borrowing' *protest art* uses - as the famous Dutch case of *Nadja Plesner v Louis Vuitton*⁵²⁵ pointed out⁵²⁶ - since (i) the protest artist usually makes a statement without any commercial agenda, (ii) since 'borrowing' uses in *political protest art* usually constitute special cases that regularly do neither conflict with the normal exploitation of the work, nor with the reputation of the author or work and (iii) since *protest art* needs to instrumentalise the most memorable and associated cultural signs to convey its message as catchy and easy to remember as possible,⁵²⁷ it seems unjust - at least in the opinion of the author of this thesis - to uphold the absolute protection of copyright in this respect. If one therefore kept these particular cases in mind, in which the absolute copyright protection is perceived as unfair or unjust (at least by the author), and returned from the moral assessment to the actual law and its authoritative interpretation, one would initially have to reiterate that the ECtHR did not exclude the possibility that freedom of expression could trump the right to copyright protection, provided⁵²⁸ that the expression reaches the level of protection afforded to political expression and debate.⁵²⁸ Since the possibility is thus not excluded, it could *ex negativo* be argued that expressions reaching the level afforded to political expression and debate would surpass copyright in general. While other opinions, which for example uphold the absolute protection of copyright, could also clearly be held in this regard, it is however to note that one could make a further *ex negativo* argument in support of the view that freedom of

⁵²⁴ Cf.: Chapter 2.1.5 The Questions of When and Why *Political Protest Art* is 'Borrowing';

⁵²⁵ District Court of The Hague, *Nadja Plesner Joensen v Louis Vuitton Mallatier SA*, Case Number 389526/KGZA11-294, Judgment of 4th May 2011;

⁵²⁶ For further information about the case of *Nadja Plesner Joensen v Louis Vuitton Mallatier SA* see: Annex III - "Nadja Plesner v Loius Vuitton"; or <http://www.nadiaplesner.com/simple-living--darfurnica1> (Visited on 25.03.2016);

⁵²⁷ Cf.: Chapter 2.1.5 The Questions of When and Why *Political Protest Art* is 'Borrowing';

⁵²⁸ Cf.: ECtHR, *Ashby Donald and Others v France*, App.-No.: 36769/08, Judgment of 10 January 2013; ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden*, App.-No.: 40397/12, Decision of 19 February 2013;

expression trumps copyright. On the basis that exceptions to copyright were already anchored and accepted in the pursuit to strike a fair balance between the rights,⁵²⁹ which in effect allowed uses of copyrighted materials for purposes like caricature, parody or pastiche,⁵³⁰ that surely do not reach the level of protection afforded to political expression and debate in each and any case, meaning that also less protected forms of expressions were considered to surpass copyright, it could be reasoned that, since less protected forms of expressions were already accepted as trumping copyright, also the higher valued and more protected expressions reaching the said level of protection must be understood as surpassing the right to copyright protection. Hence, while it may be emphasised once more that other opinions can be held since the ECtHR did also not exclude the possibility that copyright could trump freedom of expression whenever copyrighted materials are used, it is to adhere that, according to the current state of the law, the view holding that political expression and debate surpasses copyright could definitely be supported and held.

Nonetheless, due to the fact that a general allowance of uses of copyrighted materials for the purposes of expressions reaching the level afforded to political expression and debate could get out of hand, be abused and, thus, unduely impinge upon the right of the copyright holder, the author of this thesis is of the opinion that the allowance or rather the situations, in which copyright is trumped, should be restricted to those cases that were perceived as being unjust, namely to those particular cases in which (a) expressions reaching the level of protection afforded to political expression and debate would be at hand, (b) in which the copyright holder's economic rights and reputation would not be harmed by the non-authorized use of the proprietary contents and (c) in which the copyrighted material would present a culturally recognised and accepted icon, saying, etc., which due to its conciseness, reference or meaning would not allow other venues for the particular expression.

If one thus followed the latter view, which appears to reconcile the rights consistently with the current state of the law and to strike a fair balance under due consideration of the potential effects on copyright, one would thus find that, the protest artist's right to freely express *protest art* would outweigh the copyright holder's right to copyright protection, if and whenever a situation occurred in which (a) expressions reaching the level of protection afforded to political expression and debate were at hand, (b) in which the copyright holder's economic rights and reputation were not harmed by the non-authorized use of the proprietary contents and (c) in which the copyrighted material presented a culturally recognised and accepted icon, saying, etc., which due to its conciseness, reference and meaning allowed no other venues. Since the protest artist's right to freedom of expression would thus be to promote and to protect in such cases, the enactment of a positive obligation of the state would be to consider in this context to secure that such expressions are allowed and protected.

⁵²⁹ Recital 31 of Directive 2001/29/EC, read in conjunction with Art.5 of Directive 2001/29/EC;

⁵³⁰ Cf.: Art.5 (3) (k) of Directive 2001/29/EC;

Hence, if one thus returned to the questions of whether the interfering measure struck a fair balance, whether it was proportionate *stricto sensu* and whether and to which extent the state has a right to limit the protest artist's right to free expression, one could thus dependent on the view held provide different answers: (1) If one followed the opinion that copyright always outweighs freedom of expression whenever copyrighted materials are used, one would find that the state has the unrestricted right to limit freedom of expression to the benefit of the copyright holder's right to copyright protection and that, consequently, the EU's "prevention" was proportionate *stricto sensu*. (2) If one pursued the other extreme, namely the view that freedom of expression surpasses the right to copyright protection, if and whenever an expression reaching the level of protection afforded to political expression and debate was at hand, one would be able to hold that the EU's infringing framework is disproportionate and that the EU/state has only the restricted right to limit the protest artist's right to freedom of expression in regard to expressions not reaching the level of protection afforded to political expression and debate. (3) If one however followed the intermediary approach, one would consider the EU's "prevention" disproportionate and grant the EU/state the right to limit freedom of expression except for those particular cases, in which the displayed situation existed.

It is therefore eventually to conclude that, if one applied the CJEU's proportionality test to the EU's "prevention" of 'borrowing' uses in *political protest art*, one would find that (a) the interfering framework could be understood as being appropriate, (b) that, while an equally effective and less restrictive means exists, no definite answer could be given in terms of necessity or the criterion's sub-principle of subsidiarity⁵³¹ due to the possibility that both rights could prevail over the other and (c) that it could neither be excluded that the EU's existing framework is proportionate, nor that it is disproportionate. An answer concerning the "prevention's" compliance can thus not be given.

4.1.2.3 The ECtHR's Approach: Is the Interference 'Necessary in a Democratic Society'?

The ECtHR's approach to the criterion 'necessary in a democratic society', on the other hand, demands, influenced by the margin of appreciation, that "[...] *the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" [...]*"⁵³².

Proceeding therefore to the application of the ECtHR's approach, it could initially be accepted that a pressing social need to protect copyright exists. Real life as well as the Court's precedent cases in *Ashby Donald and Others v France* and *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden* clearly indicate that the copyright holder's right to peacefully enjoy his possessions would be infringed on a daily basis and, thus, in effect be rendered empty, if a sufficient and effective protection of copyright was

⁵³¹ Cf.: *Thouvenin, Jean-Marc*, European Governance 2: The Principle of proportionality, B -The ECJ's Proportionality Review, b.) Necessity and subsidiarity, paras.7,8;

⁵³² ECtHR, *Silver and Others v the United Kingdom*, App.-Nos.: 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75, Judgment of 25 March 1983, para.97 (c);

not provided. Besides that, the implementation of the EU's "prevention" could additionally be regarded as corresponding to the need to protect the right of the copyright holder.

However, it is to note that the question of 'whether an interfering implementation of the EU's copyright and enforcement framework would be proportionate to the legitimate aim pursued' cannot be answered conclusively. Addressing the proportionality, the Court demands that the interfering measure must show at least some degree of effectiveness to be suitable⁵³³ and that it strikes a fair balance between the rights involved⁵³⁴, whereas the application of the least onerous means is - contrary to the CJEU's approach - not required⁵³⁵ due to the subsidiarity of the ECtHR's review and other reasons⁵³⁶, that were pointed out by *Christoffersen*. In its *Hatton* case⁵³⁷, the ECtHR held in this respect that:

"Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged by virtue of [the Convention], it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance."⁵³⁸

Nonetheless, since, while a sufficient degree of effectiveness and, thus, the fulfilment of the criterion 'suitable' is to assume, (a) the relation between the rights is not clarified yet in terms of expressions reaching the level of protection afforded to political expression/debate, (b) since both extreme views could legitimately be held in this context and (c) since, on this basis, an approximation of potential findings concerning the relation between the rights as well as regarding a fair balance between them is not possible, it is to conclude that, also under the ECtHR's proportionality approach, a final answer to the questions of 'whether an infringing implementation of the EU's copyright and enforcement framework strikes a fair balance', 'whether it is 'necessary in a democratic society' and, thus, to the question of 'whether the EU's framework is compliant with the rights' relation' cannot be given.

4.1.2.4 Intermediary Result

Hence, it is conclusively to hold that, due to the uncertainties revolving around the rights' relation, it is not possible to answer the questions of whether the EU's "prevention" of 'borrowing' uses in *political protest art* is 'proportionate' or 'necessary in a democratic society' with certainty. While the EU's "prevention" would be to regard as being appropriate and suitable, one has to note that neither in terms of the CJEU's strict necessity test, nor in terms of the interfering measure's proportionality *stricto sensu* (ECtHR: fair balance- test) a definite answer can be given.

⁵³³ Cf.: *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, pp.28,29;

⁵³⁴ Cf.: *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, pp.35,36;

⁵³⁵ Cf.: *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, pp.21-25;

⁵³⁶ *Christoffersen, Jonas*, Human rights and balancing: The principle of proportionality, pp.23-25;

⁵³⁷ ECtHR, *Hatton and Others v the United Kingdom*, App.-No.: 36022/97, Judgment of 8 July 2003;

⁵³⁸ ECtHR, *Hatton and Others v the United Kingdom*, App.-No.: 36022/97, Judgment of 8 July 2003, para.123;

4.1.3 Intermediary Result

Therefore, while the substantial margin of appreciation is narrowed, the Courts' intensity of review increased, the Courts' review rendered a stricter one, the public authorities' range of discretion reduced and, thus, a different outcome to expect since *political protest art* was found to be able to reach the level of protection afforded to political expression and debate, it cannot conclusively be answered whether the EU's copyright and enforcement framework is 'proportionate' or 'necessary in a democratic society' and, thus, whether the EU's framework is compliant with the relation between the rights under human rights law. Whereas the framework could be regarded as being compliant with the extreme view that copyright trumps freedom of expression in terms of 'borrowing' *political protest art* reaching the said level of protection whenever copyrighted materials are used, it is to adhere that also other views could legitimately be held, which consider the EU's framework non-compliant. Since thus an unclear situation is at hand, in which at least the antagonistic extreme views could be held, and since it cannot be excluded that both rights could trump or yield to the other, it is to ask what a human rights compliant protection of 'borrowing' *political protest art* in the current situation is and what it requires.

4.2 The Human Rights Compliant Protection of 'Borrowing' *Political Protest Art* - A Fair Balance Between the Rights to Freedom of Expression and Copyright and the Obligations Deriving Therefrom

But, what is a human rights compliant protection of 'borrowing' *political protest art* reaching the level of protection afforded? And what does it require? If one considered all the findings made⁵³⁹ and took a moral standpoint in this regard, one would primarily come to the conclusion that both possibilities - the possibility that freedom of expression could trump copyright as well as the possibility that copyright could outweigh and surpass freedom of expression - must be adequately and coherently protected since it is neither to exclude that freedom of expression, nor that copyright would prevail over the other, if the Court was concerned with their relation. If one therefore took a legal approach to the issue, one would observe that moral and legal standpoint do not differ in this respect. The Strasbourg Court frequently repeated that the Convention is intended to guarantee "[...] *rights which are practical*

⁵³⁹ It was previously found that (a) *political protest art* would reach the necessary level of protection, if the expression was made in the context of a debate and if the impact of its form was neither dangerous, nor limited in reach, (b) that the substantial margin would be narrowed, if *political protest art* reached the necessary level of protection, (c) that the final margin would be rendered narrow or narrower, the Court's review be stricter and the respondent state's discretion be limited, if the substantial margin was a narrow one, (d) that on the basis of the ECtHR's case law two extreme views can be held, (e) that, in general, the call for an absolute protection of copyright appears just and reasonable, (f) that there are however situations, in which the absolute protection of copyright and its implicit "ban" of 'borrowing' *political protest art* expressions seem unjust, contrary to the ECtHR's explicit exclusion of expressions reaching the level of protection afforded to political expression and debate, and as not striking a balance at all, let alone a fair one, and (g) that an intermediary approach could be held that would allow 'borrowing' *political protest art* - under due consideration of the adverse effects on copyright - in situations, in which (1) expressions reaching the level of protection afforded to political expression and debate were at hand, (2) in which the copyright holder's economic rights and reputation were not harmed by the artist's non-authorized use and (3) in which the copyrighted material presented a culturally accepted icon, saying, etc., which due to its conciseness, reference and meaning would not allow other venues for expression, that would be equally effective, memorable and precise to convey the message, by reconciling both extreme views held.

*and effective as opposed to theoretical and illusory [...]*⁵⁴⁰. Since none of the possibilities is excluded, the Court requires therefore that both, the protest artist's freedom of expression as well as the copyright holder's right to peaceful enjoyment of his possessions, must be effective and practical, which means that the greatest possible freedom would be to grant - *de facto* as well as *de jure*, if there was no need to limit the right or, as in our case, no clear basis for limiting it. Since the public authorities of the EU⁵⁴¹ and the Member States would therefore be required to give effect to both rights equally since both extreme views can be held and since none of the possibilities can be ruled out until the Court delivers his final ruling on the rights' intersection, it is evident that an absolute protection of copyright or rather an implicit ban on 'borrowing' *political protest art* and, thus, on freedom of expression cannot be regarded as being compliant with the Court's demand. Instead a regulatory framework should be put in place, which would allow to actually strike a fair balance in the particular circumstances, giving effect to both rights for example by means of an US-like "fair use"-clause.

But, if one demanded a fair balance to give effect to the rights, one would have to answer the question of what a fair balance between the rights is first. In this respect, it is initially to reiterate that, while the call for an absolute protection of copyright appears just and reasonable in general, it was found that exactly this absolute protection would seem unjust, especially against the background that freedom of political debate constitutes one of the core foundations of the Convention,⁵⁴² as not striking a fair balance and as being contrary to the ECtHR's explicit exclusion of expressions reaching the necessary level of protection, if one was confronted with the particular situation that (a) expressions reaching the required level of protection were at hand and (b) that neither the copyright holder's economic rights, nor the author's or the work's reputation were harmed by the artist's use. It is further to recall that, on the other hand, a general allowance of uses of copyrighted materials for the purposes of expressions reaching the level afforded to political expression and debate could and surely would get out of hand, be abused and, consequently, significantly harm the copyright holder's rights. Since, thus, none of the extreme views is fully persuading, the author of this thesis is of the opinion that the previously introduced intermediary approach offers the only practicable way of dealing with the issue. Only the intermediary approach duly considers the potential adverse effects on the respective rights adequately and reacts in an appropriate manner to the Court's demand that both rights have to be effectively and practically granted. While allowing 'borrowing' uses, on the one hand, and, thus, giving effect to freedom of expression, the intermediary approach restricts these uses for the benefit of copyright to those particular cases in which (a) expressions reaching the level of protection afforded to political expression and debate would be at hand and (b) in which the copyright holder's economic rights and reputation

⁵⁴⁰ See e.g.: ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, App.-No.: 47848/08, Judgment of 17 July 2014, para.105; See also: ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, App.-No.: 38433/09, Judgment of 7 June 2012, para.138;

⁵⁴¹ Here, it should be reiterated that the EU is solely bound by the ECFR. Nonetheless, since corresponding rights are at hand, it is possible to conclude that meaning scope as well as the obligations under the the ECFR's rights is the same as the rights conceptualisation under the ECtHR. For this reason, the EU is not separately discussed.

⁵⁴² ECtHR, *Lingens v Austria*, App.-No.: 9815/82, Judgment of 8 July 1986, para.42;

would not be harmed. In terms of *protest art*, it would further allow to restrict the uses by additionally taking into account (c) whether the copyrighted material presents a culturally recognised and accepted icon, saying, etc., which due to its conciseness, reference or meaning would not allow other venues for the particular expression and only permit the use, if this was the case. Hence, while the current legal situation clearly allows deviating views, the intermediary approach appears - at least in the author's opinion - as being the only approach striking a fair balance between the rights. For this reason, the author argues that the intermediary approach gives most effect to both of the rights and that the approach is therefore the only approach that could be applied in accordance with the ECtHR's demand of effectiveness and practicability.

Since the intermediary approach should thus be regarded as constituting the indicator of a human rights compliant protection of 'borrowing' *political protest art*, the public authorities would have to comply with this standard.

Since the EU's copyright and enforcement framework is clearly not compliant with the intermediary approach's standard and since the national judicative practice mirrors a *legal positivistic* adherence to copyright law based on the EU's declaration that the copyright framework would already strike a fair balance between the rights, it is however to observe that the authorities do not comply with their obligation to grant both rights in an effective manner. Since the enjoyment of freedom of expression, including *political protest art* reaching the level of protection afforded, is thus absolutely excluded, where it should not be excluded, and since the Strasbourg Court held in such situations that "[g]enuine, effective exercise of certain freedoms does not depend merely on the State's duty not to interfere, but may require positive measures of protection even in the sphere of relations between individuals [...]"⁵⁴³, I would conclusively argue for the assumption of a positive obligation in this regard, which ensures that both rights are effectively granted. Since this would however be my own opinion, it remains to be seen how the Courts will deal with the rights' relation in the future.

It is therefore to conclude that while being obliged to give effect to both rights equally and thus to guarantee the rights with the greatest possible freedom where there is no clear basis as to the relation of the rights, the EU and its Member States practice the opposite, while still applying a legally valid and adoptable approach. Since in my opinion however, the intermediary approach is the only approach that complies with the ECtHR's demand of effectiveness and practicability, I have to conclude that its standard prescribes the human rights protection of 'borrowing' *political protest art* according to the current state of human rights law and that thus 'borrowing' *political protest art* should be allowed, albeit restricted to situations in which (a) an expression reaching the level of protection afforded to

⁵⁴³ Council of Europe/European Court of Human Rights, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

political expression and debate is at hand and (b) in which the copyright holder's economic rights and reputation are not harmed.

4.3 Intermediary Result

A human rights compliant protection, which intends to grant the greatest possible freedom where no clear basis as to the relation of the rights is given, would thus necessitate that the 'borrowing' uses of proprietary contents in *political protest art* expressions reaching the level of protection afforded to political expression and debate are allowed, even if the allowance should be restricted to the situations described. Since it is not containing such an allowance, the EU's copyright and enforcement framework should be regarded as non-compliant with Art.11 and 13 ECFR as well as Art.10 ECHR - at least until the ECtHR ruled out the possibility that free expression could outweigh copyright in such circumstances. For this reason, (a) an adequate regulation of copyright should be put in place, which allows for the protection of 'borrowing' *political protest art* expressions reaching the level of protection afforded to political expression and debate and (b) freedom of expression as well as the Courts' related case law be observed, if and whenever copyright was to enforce in the relation to 'borrowing' *political protest art*.

5. Conclusions and Recommendations

This thesis has thus explored and elaborated upon the relation between 'borrowing' *political protest art* and copyright from a human rights perspective. However, since it is not only intended to assess whether European copyright law and its enforcement are human rights compliant, but also to show which implications a human rights compliant protection of 'borrowing' *political protest art* and the protest artist's rights to freedom of (artistic) expression would or should have for European copyright law and its enforcement, this concluding chapter initially points out the findings made in this thesis, proceeds then to answering the main research question, before it eventually concludes with making some suggestions to enable the implementation of the thesis' findings.

Starting with the display of the findings made, it can thus be recapitulated that this thesis found:

1. That, due to the lack of a permitting exception to copyright for the purposes of *protest art* in the EU's harmonising copyright framework⁵⁴⁴, *political protest art* and *copyright* conflict with each other whenever a situation is given in which, on the one hand, the protest artwork 'borrows' or makes use of copyrighted materials and, on the other hand, the copyright holder asserts and enforces his right.⁵⁴⁵ [Subquestion 1, Part 1⁵⁴⁶, asking whether 'borrowing' *political protest art* and copyright conflict with each other, can thus be answered with 'yes, they do'.]
2. That, due to the lack of such a permitting exception to copyright, *copyright* constitutes a limitation on 'borrowing' *political protest art* that is not only directly, but also indirectly impacting on *political protest art* and its creation.⁵⁴⁷ [Subquestion 1, Part 2⁵⁴⁸, asking how *political protest art* and copyright conflict with each other, can thus be answered by adhering that copyright protection and its enforcement would directly prohibit and sanction non-authorised 'borrowing' *political protest art*, if the copyright holder asserted his right, and that they indirectly impede *protest art's* creation by means of the enforcement's deterring effect.]
3. That European human rights law protects *political protest art* as an expression of ideas and information⁵⁴⁹ within the limits set by Articles 10 (2) and 17 of the Convention with the result that the protest artist's rights to freedom of expression⁵⁵⁰ and freedom of the arts⁵⁵¹ are concerned.⁵⁵² [Subquestion 2⁵⁵³, asking whether and under which conditions protest artist's could

⁵⁴⁴ Especially in Art. 5 of Directive 2001/29/EC;

⁵⁴⁵ See Chapter 2 and there especially 2.3.1. General Depiction of Copyright as a Limitation on 'Borrowing' *Protest Art*;

⁵⁴⁶ See Chapter 1.2 Research Questions, Subquestion (1);

⁵⁴⁷ See Chapter 2 and there especially 2.3.1. General Depiction of Copyright as a Limitation on 'Borrowing' *Protest Art*;

⁵⁴⁸ See Chapter 1.2 Research Questions, Subquestion (1);

⁵⁴⁹ Protected under Art. 10 ECHR and Art.11 and 13 ECFR;

⁵⁵⁰ Art. 10 ECHR (encompassing Freedom of artistic expression); Art.11 ECFR;

⁵⁵¹ Art. 13 ECFR;

⁵⁵² See Chapter 3.2 The European Human Rights Protection of Protest Artists - The Fundamental Rights to Freedom of Expression and Freedom of the Arts;

⁵⁵³ See Chapter 1.2 Research Questions, Subquestion (2);

claim human rights on the basis of *political protest art*, can thus be answered with 'yes they can, provided that the limits set by Art.10 (2) and 17 ECHR do not apply'.]

4. That, although the copyright holder's rights to copyright protection⁵⁵⁴ and to peaceful enjoyment of his possessions⁵⁵⁵ are concerned, an exception to copyright for the purposes of *protest art* could - even contrary to Recital 32's declaration of exhaustiveness of the InfoSoc Directive's list of exceptions - lawfully be enacted under Art.17(2) ECFR and Art.1 of Protocol No.1 ECHR, if the interference was proportional to the aim pursued and a state deemed it necessary.⁵⁵⁶ [Subquestion 3⁵⁵⁷, asking whether and under which conditions an exception to copyright for the purposes of political protest art could be anchored in accordance with the copyright holder's human rights, can thus be answered with 'yes it could lawfully be anchored, provided that the interfering measure is proportional and deemed necessary by a state'.]
5. That the ECtHR's case law presents that, on the one hand, expressions, which do not reach the level of protection afforded to political expression and debate, may rightfully be limited in the pursuit to protect the copyright holder's human rights, whereby a particularly wide margin of appreciation is granted to the states with regard to both, the pressing social need and the proportionality of a potential interfering measure.⁵⁵⁸
6. That, however, the relation between expressions reaching the level of protection afforded to political expression and debate and the copyright holder's rights and, thus, the relation between freedom of expression and the rights to copyright protection as well as to peaceful enjoyment of one's possessions are not finally clarified yet.⁵⁵⁹ [On the basis of the findings No.5 and 6, subquestion 4⁵⁶⁰, asking how the human rights of the relevant actors involved interrelate according to the European Court's case law, can thus be answered by stating that, while it is accepted that copyright trumps freedom of expression in terms of expressions not reaching the said level of protection, the relation of freedom of expression and copyright is not determined in regard to expressions reaching the level of protection afforded to political expression and debate.]
7. That, due to this remaining uncertainty concerning the relation between the rights, two extreme views can be legitimately held, namely, on the one hand, that copyright would trump freedom of expression, if and whenever copyrighted materials were used, as well as, on the

⁵⁵⁴ Cf.: Article 17(2) ECFR;

⁵⁵⁵ Cf. Article 1 of the First Protocol to the European Convention of Human Rights;

⁵⁵⁶ See Chapter 3.3 Copyright as a Fundamental Right;

⁵⁵⁷ See Chapter 1.2 Research Questions, Subquestion (3);

⁵⁵⁸ See Chapter 3.4.2 The ECtHR's Approach;

⁵⁵⁹ See Chapter 3.4.3 Critical Observations regarding the European Courts' Approaches and Case Law; See also: 4.1.2.2. The CJEU's Approach: Is the Ban on 'Borrowing' *Protest Art* Uses Proportional?; Chapter 4.2 The Human Rights Compliant Protection of Protest Art - A Fair Balance Between the Rights to Free Expression and Copyright and the Obligations Deriving Therefrom;

⁵⁶⁰ See Chapter 1.2 Research Questions, Subquestion (3);

other hand, that freedom of expression would outweigh copyright whenever expressions reaching the level of protection afforded to political expression and debate were at hand.⁵⁶¹

8. That *political protest art* could constitute an expression reaching the high level of protection afforded to political expression and debate and that, thus, a distinct outcome, compared to the one in the ECtHR's recent case law on the interface, can legitimately be expected.⁵⁶²

9. That the current European regulation of copyright could be found disproportionate - as not presenting the required least onerous means under the CJEU's proportionality approach - and, thus, as constituting an unlawful violation of Art.11 and 13 ECFR

(a) since the *InfoSoc* Directive's exhaustive catalogue of exceptions to copyright⁵⁶³ does neither provide the possibility to further weigh the rights than it was already conducted in the Directive, nor to be compliant with the potential, future finding of the ECtHR that freedom of expression should prevail in the rights' relation whenever expressions reaching the level of protection afforded to political expression and debate were at hand; and

(b) since, simultaneously, flexible exceptions like a US-like 'fair use'-clause could easily be anchored, which would permit the balancing of the rights involved, would allow to be compliant with both potential future findings of the ECtHR and which, therefore, would be less intrusive and less restrictive.⁵⁶⁴

[On the basis of the findings No.7, 8 and 9, subquestion 5⁵⁶⁵, asking whether the EU's harmonising copyright law framework is proportionate and compliant with the relation between the rights, cannot be answered with certainty. While the EU's framework would be disproportionate and non-compliant with Art.10 ECHR, Art.11 and 13 ECFR in the case of a ruling in favor of freedom of expression in the relation between expressions reaching the level of protection afforded to political expression and debate and the copyright holder's rights, it is to observe that in the event of a ruling in favor of copyright the opposite would be the case. An answer can thus not be given.]

10. That, while both extreme views can legitimately be held and applied,⁵⁶⁶ only an application of the intermediary approach would comply with and constitute a human rights compliant protection in the situation at hand⁵⁶⁷,

⁵⁶¹ See Chapter 3.4.3 Critical Observations regarding the European Courts' Approaches and Case Law; See also: 4.1.2.2 The CJEU's Approach: Is the Ban on 'Borrowing' *Protest Art* Uses Proportional?; Chapter 4.2 The Human Rights Compliant Protection of Protest Art - A Fair Balance Between the Rights to Free Expression and Copyright and the Obligations Deriving Therefrom;

⁵⁶² See Chapter 4.1.1 The Intensity of the Courts' Proportionality Review and the Question of Whether *Political Protest Art* Reaches the Required Level of Protection; See also Chapter 3.2.4.1.2 The Doctrine of the 'Margin of Appreciation'; and Chapter 3.2.4.1.3 Application of the Court's Interpretation of the 'Triple Test' Criteria;

⁵⁶³ Cf.: Recital 31 read in conjunction with Art.5 of Directive 2001/29/EC;

⁵⁶⁴ See Chapter 4.1.2.2 The CJEU's Approach: Is the Ban on 'Borrowing' *Protest Art* Uses Proportional?;

⁵⁶⁵ See Chapter 1.2 Research Questions, Subquestion (5);

⁵⁶⁶ See Finding No.7;

- (a) since a human rights compliant protection is defined by the ECtHR's demand that *practical and effective rights are to guarantee*,
- (b) since, thus, in such an unclear situation, greatest possible freedom is equally to grant to both of the rights concerned, and
- (c) since an application of the extreme views would, contrary to the reconciling intermediary approach's marginal adverse effects on the respective rights, lead to the *de facto* elimination of the respective other right, which, in my opinion, cannot be regarded as being compliant with the Court's demand of effectiveness and practicability of both rights.⁵⁶⁸

11. And eventually, that, on the basis of the precedent finding, a positive obligation to protect freedom of expression should at least be considered

- (a) since the European copyright framework and especially Directive 2001/29/EC are clearly not complying with the intermediary approach's standard,
- (b) since the national judicative practice mirrors a *legal positivistic* adherence to the copyright framework without or only marginally addressing free expression, and
- (c) since the Court held in comparable situations that "[g]enuine, *effective exercise of certain freedoms* [...] may require positive measures of protection even in the sphere of relations between individuals [...]"^{569, 570} [On the basis of the findings No.6,7,8,10 and 11, Subquestion 6⁵⁷¹, asking what a human rights compliant protection of 'borrowing' political protest art is and what it requires, can thus be answered by holding that, in the current legal situation, a human rights compliant protection is to equate with the guarantee of effective and practical rights, that it would require the states to grant the rights with greatest possible freedom and to apply the intermediary approach, while, due to the current exclusion of freedom of expression in the EU's framework and in national judicative practice, a positive obligation to protect freedom of expression in terms of expressions reaching the necessary level of protection could also exist.]

On the basis of these findings, an answer to the main research question posed in the introduction can easily be given: The implications of a human rights compliant protection of *political protest art* for European copyright law and its enforcement are that an adequate regulation of copyright should be put in place, which allows for the protection of 'borrowing' *political protest art* expressions reaching the level of protection afforded to political expression and debate - at least until the Euro-

⁵⁶⁷ Situation, in which it cannot be ruled out that either freedom of expression, or copyright would trump the other whenever expressions reaching the level of protection afforded to political expression and debate were at hand.

⁵⁶⁸ See Chapter 4.2 The Human Rights Compliant Protection of Protest Art - A Fair Balance Between the Rights to Free Expression and Copyright and the Obligations Deriving Therefrom;

⁵⁶⁹ *Council of Europe/European Court of Human Rights*, Research Report, Positive obligations on member States under Article 10 to protect journalists and to prevent impunity, 2011, p.4;

⁵⁷⁰ See Chapter 4.2 The Human Rights Compliant Protection of Protest Art - A Fair Balance Between the Rights to Free Expression and Copyright and the Obligations Deriving Therefrom;

⁵⁷¹ See Chapter 1.2 Research Questions, Subquestion (6);

pean Courts rule out the possibility that such expressions could outweigh copyright - and that freedom of expression as well as the Courts' case law should be considered and applied as guiding principles whenever copyright is to enforce.

Since, however, such a general answer or conclusion is not helpful without an indication of how the change could be brought forth, I would like to end this thesis with some recommendations, which appear necessary, implementable and beneficial to me and which should be adopted by the EU and its Member States to comply with their (potential) obligations under Article 10 ECHR as well as Art.11 and 13 of the Charter:

1. Firstly, instead of or in addition to the exhaustive and restrictive catalogue of exceptions to copyright enshrined in Art.5 of Directive 2001/29/EC, a flexible exception should be adopted, which would allow to weigh and balance the rights to free expression and copyright in the particular circumstances. The adoption of a US-like 'fair use'-clause could, as for example *Voorhoof* already suggested,⁵⁷² provide such a potential solution in this context.⁵⁷³
2. Following *Voorhoof's* demand⁵⁷⁴, I further recommend that all existing optional exceptions set out by Art.5 (2) - (4) of Directive 2001/29/EC, that directly or indirectly relate to freedom of expression, should be rendered mandatory in the EU's framework and, thus, be obligatorily anchored in the national frameworks since protest artists as well as their art could benefit from the increased latitude in terms of lawful uses of proprietary materials.
3. Moreover, the Information Society Directive's '*three-step test*'⁵⁷⁵ should be interpreted and applied in line with Art.10 ECHR and Art.11,13 ECFR to enable, on the one hand, the enactment of the previously recommended flexible exception to copyright for the purposes of freedom of expression, including 'borrowing' *political protest art* expressions, and, on the other hand, the obligatory anchorage of the currently still optional exceptions of Art.5 (2)-(4) of Directive 2001/29/EC. In this respect, it could be a good starting point to understand and apply the '*three-step test's*' vage and undefined legal terms "special", "normal" and "unreasonably" as possibilities to read the human rights situation into the test, but also other interesting and expedient solutions were proposed in this respect.⁵⁷⁶
4. Furthermore, in the national adjudication of disputes between protest artists and copyright holders, the courts should apply the intermediary approach described in Chapter 4 to ensure that both rights - freedom of expression as well as copyright - are equally valued, equally

⁵⁷² Cf.: *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.351;

⁵⁷³ While not opting for the US-like 'fair use' clause also other observers require more flexible solutions. See: *Hargreaves, Ian/ Hugenholtz, Bernt*, Copyright Reform for Growth and Jobs, Modernising the European Copyright Framework, p.7,8;

⁵⁷⁴ *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, p.351;

⁵⁷⁵ Enshrined in Article 5 (5) of Directive 2001/29/EC;

⁵⁷⁶ See for instance the ATRIP Conference's Proposal: Declaration, A Balanced Interpretation Of The "Three-Step Test" In Copyright Law, published on 01.09.2008 at the ATRIP Conference in Munich, available at: http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf (13.05.2016); *Geiger, Christophe/ Gervais, Daniel J./ Senftleben, Martin*, The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law, *American University International Law Review*, Vol. 29 , Issue 3, pp.597-611;

effective, fairly reconciled and equally protected until the ECtHR delivers a final ruling on the uncertain parts of the relation between them.

5. And eventually, I strongly suggest that, regarding copyright enforcement in the context of 'borrowing' *political protest art*, the ECtHR should return to its previous approach not to accept imprisonment, prison sentences or disproportionate amounts of damages whenever the degree of the expression's antisocial character is not to equate with the one of incitement to hatred and/or violence, other hate speech or discrimination⁵⁷⁷.⁵⁷⁸ The restriction of such sanctions to the priorly invoked 'exceptional circumstances' should be regarded as being necessary and justified since their chilling effect on future expression, especially when it comes to opposing, disturbing or provoking expressions like *political protest art*, would be a massive one and since 'borrowing' *political protest art* can -at least in my opinion - not be understood as being of the same antisocial character as the contents that were found to be contrary to Art.17 ECHR. It should here further be noted that, if the ECtHR returned to its prior approach, also the national enforcement of copyright would need adjustment.

Hence, if these changes were made in the EU's harmonising copyright framework and in terms of its enforcement, it would be possible not only to grant the greatest possible freedom under both conflicting rights to the individuals affected, but also, from a societal perspective, to enjoy the benefits of both - political as well as economic progress. Therefore, I strongly recommend to pursue and follow this path in the future - at least until the Courts deliver their final ruling on the interface.

⁵⁷⁷ Only expressions that were found to abuse the rights of the convention contrary to Art.17 ECHR were previously accepted as justifiedly punishing with these drastic sanctions. (Cf.: Chapter 3.4.3 Critical Observations regarding the European Courts' Approaches and Case Law);

⁵⁷⁸ See also: *Voorhoof, Dirk*, Freedom of expression and the right to information: Implications for Copyright, pp.352,353;

Annex I: Illustrating Scenario "Aylan Kurdi"

(a) Original Photograph



Photographer:	Nilufer Demir
Source:	DHA, Dogan Haber Ajansi
Credit:	Associated Press
Creation Date:	02.09.2015
Location:	Bodrum, Turkey
Usage Note:	This content is intended for editorial use only. Other uses require additional clearances.
Reference:	" <i>Nilufer Demir/DHA via AP</i> "
Copyright:	The lack of information about the particular contents of the contractual arrangements between Miss Nilufer Demir and her employer DHA respectively between her employer and Associated Press prevented the final determination. For the purposes of this thesis and for reasons of simplicity, it is therefore assumed that Nilufer Demir still constitutes the copyright owner.
Photo/ Information available at:	http://www.apimages.com/metadata/Index/Turkey-Migrants Hardening/082a2a1fc46645b7b730e910c04ad80d/15/0 (Visited on 15.04.2016)

(b) Artistic Expression



Illustration © picture-alliance/dpa

Artists:	Becker, Justus/ Sen, Oguz
Name of the work:	Europa tot - Der Tod und das Geld (" <i>Europe dead - Death and Money</i> ")
Genre:	Political Protest Art, Street Art, Graffiti
Location:	East Harbour, Frankfurt, Germany Confronting the The European Central Bank, ECB
Date of Finalisation:	Mid of March 2016
Direct Content:	Death of Aylan Kurdi; A little migrant boy is lying dead in the shore.
Intended message of the Artists:	<ul style="list-style-type: none">- Expression of protest against and critique regarding the European approach to the migrant crisis.- Call for change to avoid further tragedies.- Call for human dignity.- Call for a human rights compliant solution.- Call for empathy and help.- Confrontation of society with the events happening in Turkey and Greece to raise awareness.- Provision of a counter to upcoming misanthropy and right wing tendencies in Germany.- Appeal to humanity.
Source Illustration:	http://hessenschau.de/panorama/toter-fluechtlingsjunge-bewegt-noch-einmal-die-welt,streetart-aylan-medienecho-100.html (Visited on 15.04.2016)
Source Information:	http://hessenschau.de/kultur/riesen-graffiti-in-frankfurt-zeigt-toten-fluechtlingsjungen,aylan-graffiti-102.html (Visited on 15.04.2016)

Annex II: Application and Illustration

Turning towards the illustrating scenario of "Aylan Kurdi"⁵⁷⁹, which was introduced in Chapter 2.3, one is confronted with an artistic expression in the form of a graffiti painting, which conveys the implied message of political protest against the failing European migration policy and the EU's poor reaction to the migrant crisis by unauthorisedly using the crucial aspect of Nilufer Demir's copyrighted material.

If one thus applied the Court's general principles, one would note that *Becker/Sen's* work "*Europa tod. Der Tod und das Geld*" constitutes a *political artistic expression* since it instrumentalises art and since it - at least by means of interpretation and its context⁵⁸⁰ - demonstrates the contentual reference to politics. A high level of protection would thus be the starting point. While this level of protection would surely remain a high one, if one considered the form's potential of danger, since the painting cannot be regarded as being as dangerous as audio-visual media or even print media, the level could potentially be lowered by the form's reach. Concerning conventional paintings, one had to hold that they appeal only to a narrow audience since they usually decorate apartments, since they are displayed inside of galleries - on opening hours only - and since they are presented solely to paying visitors in museums. However, *Becker/Sen* - as many protest artists nowadays⁵⁸¹ - conquered the public space to gain more attention for the message conveyed. Contrary to conventional art, the painting is displayed outside and in an exposed position. The work faces and confronts not only the EU's institution ECB and the whole 'Banken Viertel', but it also overlooks the public and crowded leisure and working areas of the East Harbour of Frankfurt in an accessible, unrestricted manner. Since, additionally, many newspaper and television reports were brought about *Becker/Sens* work - starting already in the creation phase - and since pictures of the work went viral on Social Media, it is questionable whether one should opt for the conventional understanding that a painting's form is limited in its reach or whether the actual reach and impact of the work should constitute the basis for the determination with the result that an enormous audience would be to assume, which would even be to equate with the one of mass media. Due to the fact that the ECtHR's underlying general principle focuses in this regard primarily on the actual impact and the audience reached and only secondarily on the mere form of the expression, the author of this thesis is of the opinion that, while other views could also be held, one should opt for the actual impact of the exposed work with the consequence that also in terms

⁵⁷⁹ Annex II - Illustrating Scenario Chapter 2.3 'Copyright As a Limitation on Protest Art'

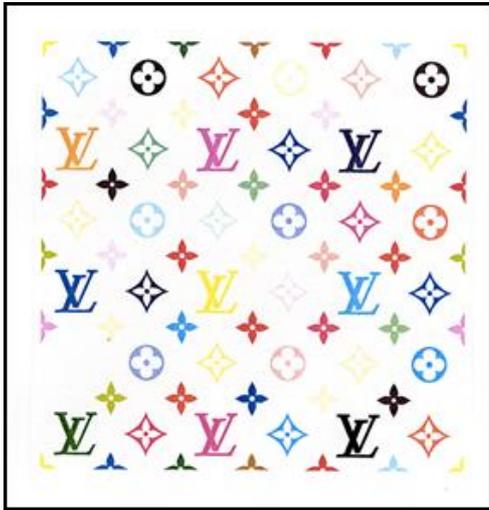
⁵⁸⁰ The work's context showed that the work was created while frequent European Council meetings with the agenda of solving the migrant crisis took place; while frequent use was made of Nilufer Demir's photograph in the German newspapers and in the Internet, which rendered the photograph and Aylan Kurdi to the migrants crisis' icons; Additionally, the picture was frequently used on television and at pro-refugee demonstrations; Everyone new it, and every journalist, that wanted to criticise the government or the EU, used it. Thus, the context presents that, at that time, already the use of this photo of Aylan Kurdi constituted critique - critique in regard to the EU's failure to solve the European migrant crisis in a humane way.

⁵⁸¹ See for example Banksy: (1) *BBC News Channel*, Council orders Banksy art removal, available at: http://news.bbc.co.uk/2/hi/uk_news/england/london/7688251.stm (Visited on 26.03.2016); or Banksy's official website: <http://banksy.co.uk/out.asp> (Visited on 26.03.2016);

of the expression's reach no limitation can be found. Since, thus, no limitation can be found as to the impact of the form, one could argue that *Becker/Sen's* expression kept its high level of protection. Since the artists additionally made their expression in the context of a heated political debate and since they stimulated and fueled the debate by clearly taking the stance of the political camp arguing for an immediate and humane solution of the migration crisis by means of their work, also the last criterion, demanding a debate, must be regarded as fulfilled. Since *Becker/Sen's* political protest artwork thus - at least in the opinion of the author- satisfies the general principles set out by the ECtHR, it can be concluded that - also in real life - *political protest art* is able to reach the level of protection afforded to political expression and debate.

Annex III: "Nadja Plesner v Louis Vuitton"

(a) Originals: "Multicolor Canvas Design" and "Audra" bag



Design Protection:

Name of design:	"Multicolor Canvas Design"
Holder of the Community designs registration:	Louis Vuitton Malletier SA, Registered Office in Paris, France
Community designs registration No.:	000084223-0001
Filing date:	06.10.2003
Publication of registration:	24.02.2004
The "Audra" bag, which is sold by Louis Vuitton since April 2005, has the 'Multicolor Canvas Design' used on it.	

Copyright Protection of the 'Fabric Design'⁵⁸²:

Copyright holder of the original fabric design:	Louis Vuitton Malletier SA, Registered Office in Paris, France
--	---

* Source of Illustration: http://www.rechtundgerechtigkeit.de/2-4-gesellschaft-sanktionen/berichte/vuitton-darfurnica/belege/Court_Order_Louis_Vuitton_vs_Plesner.pdf (Visited on 15.04.2016).

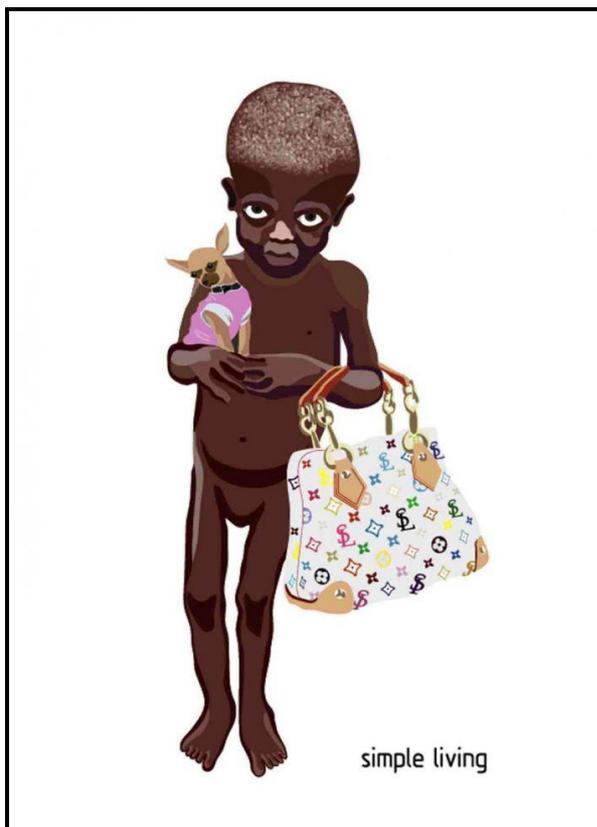
⁵⁸² "Fabric designs are the patterns used on the article of clothing, such as the floral design repeated on a blouse, and are copyrightable. ((*Id.* citing *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959); *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 487 (2d Cir. 1960); *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960); *Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp. 1486 (N.D. Cal. 1987).))" - quote from: <http://www.cardozoajl.com/2014/09/19/protecting-fashion-a-comparative-analysis-of-fashion-design-copyright-protection-in-the-u-s-and-europe/>

(b) Artistic Expressions:

(aa.) *Illustration "Darfurnica":*



(bb.) *Illustration "Simple Living":*



Artist:	Nadja Plesner Joensen
Name of the works:	Darfurnica & Simple Living
Date of Finalisation:	Darfurnica, 2010 Simple Living, 2007
Genre:	Protest Art, Social Criticism
Intended message:	Darfurnica, Simple Living <ul style="list-style-type: none"> - Protest against the silence of our society, mass media and reporting in regard to the situation in Darfur, Sudan respectively against our simultaneous, overarching focus on luxury and celebrities. - Awareness raising for the situation in Sudan by including luxury and celebrities in the situation in Sudan.
Source of Illustrations and Information:	http://www.nadiaplesner.com/simple-living--darfurnica1 (Visited on 15.04.2016)

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