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Special Approach for Musical Works in Relation to the Idea-Expression Dichotomy in Copyright Law

JAMM05 Master Thesis

International Human Rights Law and Intellectual Property Law
30 higher education credits

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Term: Spring 2016

Table of Content

Abstract	3
Preface	4
Abbreviations	6
I. Introduction	7
1.1. Research Questions	10
1.2. Delimitations	10
1.3. Methodology and Materials	12
1.4. Structure	13
1.5. Current State of Research and Contribution to the Field	14
II. Definitions and General Background of the Idea-Expression Dichotomy: Musical Works as the Protected Subject Matter of Research	16
2.1. General Background on Copyright Law	16
2.2. Defining the Term ‘Expression’	17
2.3. Defining the Term ‘Idea’	19
2.4. Historical Background	21
2.5. Legal Framework	24
2.6. Musical Works as the Central Expressions of the Thesis	25
2.6.1. Musical Works and the Idea-Expression Dichotomy	27
2.7. Explaining the Issue	30
III. Justification Theories and the Idea-Expression Dichotomy as a Part of Copyright Law	34
3.1. Personality Theory and the Idea-Expression Dichotomy	35
3.2. Utilitarian Theory and the Idea-Expression Dichotomy	37
3.3. Application of Locke’s Philosophy on Copyright Law	40
3.3.1. Locke’s Philosophy and the Idea-Expression Dichotomy	42
IV. Alternative Approach to the Idea-Expression Dichotomy in Musical Works	44
4.1. Application of Locke’s Philosophy to the Idea-Expression Dichotomy in Relation to Musical Works	45

4.1.1.	Extension of the Term ‘Ideas’ in the Idea-Expression Dichotomy under the Lockean Philosophy.....	45
4.1.2.	Creator of Musical Works vs ‘Creative Genius’	46
4.1.3.	Creative Process and Building Blocks	48
4.1.4.	Alternative Approach to the Idea-Expression Dichotomy and Musical Works through the Locke’s Perspective	50
4.2.	<i>Marvin Gaye</i> Case in the Light of the Locke’s Theory.....	52
4.2.1.	Substantial Similarity Test vs the Alternative Idea-Expression Dichotomy Test.....	56
4.3.	Common Cases in the Music Industry.....	58
4.4.	Concluding Remarks on the Chapter.....	59
V.	Cultural Life and the Idea-Expression Dichotomy.....	61
5.1.	Human Rights and the Right of Everyone to Take Part in Cultural Life	61
5.1.1.	General Overview of ‘Culture’ and ‘Cultural Life’	63
5.1.2.	The Right to Take Part in Cultural Life	65
5.2.	On Human Rights and Copyright Law	67
5.2.1.	The Right to Cultural Life and the Idea-Expression Dichotomy	70
5.2.2.	The Right to Cultural Life and the Nature of Musical Works.....	72
5.3.	Expressions That Transfer Into Ideas	74
5.3.1.	Trademark Law as an Example of a Right Becoming ‘Generic’	75
5.3.2.	Generic Trademarks as the Main Example	76
5.3.3.	Generic Trademarks and ‘Generic Expressions’: Protected Expressions that Become ‘Generic Expressions’	77
5.3.4.	Procedural Aspect of the Argument	79
5.3.5.	The Case of the Song Happy Birthday to You as an Example of an Expression Becoming Part of Cultural Life.....	80
5.4.	Concluding Remarks on the Chapter.....	81
	Conclusions.....	83
	Bibliography.....	87

Abstract

This thesis discusses a rather contentious issue of how copyright law possesses musical works nowadays. It is essentially argued in the thesis that current copyright law appears to be too restrictive, leaving not enough space for creativity in the musical world. In this regard, the issue related to musical works are mainly analysed through the prism of the idea-expression dichotomy. One of the general points behind the thesis is that the idea-expression dichotomy can appear to be a helpful guiding principle in resolving uncertainties and drawbacks in copyright law in relation to musical works, especially in infringement cases when a musical work is at stake.

Apart from describing the idea-expression dichotomy as a general principle of copyright law, this thesis provides an assessment of musical works as they exist nowadays, as well as explains the nature of these expressions, and why such nature is important for copyright law and its interpretation of the idea-expression dichotomy in particular. It is one of the central arguments, that if the idea-expression dichotomy law took into account the nature of musical expressions and emphasised the creative process, copyright law would have a better accord with the realities of music. In this respect, the research provides with an alternative approach to the idea-expression dichotomy in relation to musical works, and tries to explain how it is possible to achieve, and why such changes are needed. Along the thesis explanations and justifications for the alternative approach to the dichotomy are provided from philosophical, moral, musical and human rights perspectives.

The findings and conclusions of the work result in theoretical explications behind the idea-expression dichotomy, rather than direct suggestions for legislators or courts. While the main aim of this research is to specify the problem in relation to musical works in copyright law, and to show how idea-expression dichotomy can regulate it.

Preface

The idea of writing a thesis on the topic of the idea-expression dichotomy has come to me, while I was following a US trial between Marvin Gaye's family and two popular hip-hop artists Pharrell Williams and Robin Thicke. In this case, which is deliberately studied later in the Thesis, Williams and Thicke were sued for a copyright infringement, of allegedly copying Marvin Gaye's parts of the song "Got to Give It Up." The trial ended with awarding Gaye's family around \$3,000,000 in damages. After I listened to two of the contested songs, I found that they might be similar in some ways but according to my understanding of music and music realities in general, I thought that the case looks like it was more about a way to gain some money for the Gaye family, rather than about creative wrongs, in the face of plagiarism. My first thought was: "Robin's Thicke music is rubbish, so he has deserved it!" However, my second thought was: "Hey, this whole situation is not right!" I immediately thought the copyright law as it exists now, works not in the way I wanted it to work and provide too strong monopoly rights for the rightholders, while leaving not enough space for the creativity for other musicians, which consequently would hamper development of music.

Having a musical background as well, I started to think what can be changed in law, or which principles we should concentrate on, in order to free the musician's hands a little bit, and support creative process. Then I decided, that the best way to change the thinking or at least to point out at things that should be changed, is by concentrating on general principles, instead of a one-off issue. That was the point in which I thought that one of the principles from where the wrong perception of musical world starts, is the idea-expression dichotomy. From this ground-breaking principle of copyright law, the whole understanding begins: ideas are free, expressions are protected. I thought what if we interpreted some of the protected musical expressions as idea, what would change then? From that point I have started my research and formed my argumentation.

After a year of thinking and trying, discovering new paths and failing, I finally have produced something what you are reading now, and I call a thesis. No matter how right or wrong I am, I truly believe in what I have written and argued. However, all this would not be possible without the support from my friends and family, mostly my friends though (Cap, Dirk, Teaboy and Coy), who shared the moments of happiness and let-downs here in Sweden and a few beers every now and then. Of course, this thesis would not be nearly as good as it is (although it is still a question if the Thesis is as good as I think), without the help from my supervisor Aurelija Lukoseviciene, who gave me the needed supervision, but most

importantly, encouragement and confidence in what I was doing. Lastly, a big and separate thank you is saved for the Swedish Institute that awarded me with the scholarship, without which I would not be able to experience education and life in Sweden.

Abbreviations

TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
WIPO Convention	Convention Establishing the World Intellectual Property Organization
CJEU or ECJ	Court of Justice of the European Union
UDHR	Universal Declaration of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
WIPO	World Intellectual Property Organisation
Art.	Article
Ch.	Chapter
e.g.	“For example” (from Latin - <i>exempli gratia</i>)
etc.	“And the other things” (from Latin - <i>et cetera</i>)
i.e.	“It is” (from Latin - <i>id est</i>)
Id.	Latin short for of <i>idem</i> , refers to another page in the previous citation
Ibid.	Latin, short for <i>ibidem</i> refers to the exact same location in the previous citation.
No.	Number
Para.	Paragraph
p.	Page
pp.	Pages
Vol.	Volume

“You can’t develop a better appreciation of the art merely by reading a book about it. If you want to understand music better, you can do nothing more important than listen to it.”

Aron Copland, from
What to Listen For In Music

I. Introduction

Before going into a substantive discussion of the matter, it is important to understand what the essence of the proposed research is. It is quite obvious that the purpose and aim of intellectual property rights and copyright in particular, is not only to protect the rightsholders, but also to promote and encourage dissemination of creative material.¹ As W.J. Gordon concluded in this respect: “to give ownership in such fundamentals would deprive future creators of a meaningful opportunity otherwise open to them.”² The topic of balance between private and public interests will always be relevant in the relation to intellectual property rights. In relation to copyright, such balance is normally achieved through the principles and notions of copyright law, like the idea-expression dichotomy, exceptions and limitations, limited term of copyright protection, etc. Even though it seems that all these instruments are there in the law already and there should be any problems, the society still faces cases, some of which are presented in this thesis, where the rightsholders try to abuse their exclusive rights provided by copyright and in doing so might hamper the creative process and dissemination of creative material.

This particular thesis is concentrated on one of the main principles of copyright law that ideas are not protected while only expressions are the subject to copyright protection. This principle is also commonly referred to as the ‘idea-expression dichotomy’. It is quite a common argument in the scholarship on copyright law that the idea-expression dichotomy as it exists nowadays does not serve its purposes as a functional legal standard.³ Indeed, looking at the case law, the dichotomy lacks practical application, while courts, at the same time, tend to

¹ This is a general logical statement that could be also derived from interpretation of national legislations in the field of copyright. E.g. the laws provide exceptions and limitations to copyright, for the purposes of access and dissemination of protected material.

² Wendy J. Gordon, “*A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*,” *The Yale Law Journal* 102 (7), 1993, at 1581.

³ Robert Yale Libott, “*Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*,” *UCLA Law Review*, Vol. 14, 1976, at 736.

skip examination of the genus of the subject matter before going into substantial issues of a case.⁴ As it is sometimes argued, the dichotomy as it functions now is a semantic and historic fallacy without meaningful application to the creative process which in some cases leads to judicial controversies.⁵ One of the main purposes of this research, however, is to show that the statement provided above, even if it had some grounds, is not entirely true, and the dichotomy can find its practical application. The research at hand, therefore, does not only discuss the issues behind the idea-expression dichotomy but also provides with suggestions for alternative interpretation.

As one of the main tasks of copyright law is to strike the balance between rightholders on the one side and users or the public on the other, the idea-expression dichotomy serves as the first step for such a balance. However, the absence of a litmus test for separating ideas from the expressions of ideas,⁶ together with almost no practical application of the dichotomy, make the principle rather “boneless” in cases of copyright infringement. In this regard, the purpose of the research is to bring a new life to the dichotomy and to examine whether some expressions can be treated as free ideas in the eyes of the dichotomy. In particular, this thesis as it is explained later is focused on musical works as the copyright protected matter. Due to the nature of the works and particular issues regarding the creative process behind, musical works should attain a separate attention. The nature of musical works is crucial, as these types of copyrighted expressions are very hard to explain with straight words of law. As it is concluded in the respective parts of the work, the so called ‘building blocks’ of musical expression are generally considered as unprotected ideas in the meaning of the dichotomy. However, because of a lack of musical background, courts frequently face the difficult task of determining “whether the defendant in a copyright infringement dispute has copied an unprotected idea or protected expression,”⁷ supposedly because of the lack of any clear and precise understanding of the idea-expression dichotomy in relation to musical expressions.

Therefore, as it is argued, the dichotomy has to take into consideration particularities around musical works; otherwise, the law would unreasonably strangle the needs of other musicians and the public to fully enjoy some of the important musical expressions. Considering the importance of the music industry for today’s society as one of the main source of entertainment, it is reasonable to suggest that the law should concentrate not only on the

⁴ Robert Libott, “*The Idea-Expression Fallacy in a Mass Communications World*,” 1967, at 738

⁵ *Id.*, at 736.

⁶ Patrick Masiyakurima, “*The Futility of the Idea/Expression Dichotomy in UK Copyright Law*,” *Int. Review of Intellectual Property and Competition Law*, 2007 at 549.

⁷ Emma Steel, “*Original Sin: reconciling Originality in Copyright with Music as an Evolutionary Art Form*,” *E.I.P.R.* 2015, 37(2), at 71.

interests of the rightholders, but also take into account the nature of expressions, creative processes of other musicians and the public interest in some of the musical works.

As it was well concluded by Justice Brennan in the dissenting opinion to the US Supreme Court decision, *Harper & Row v. Nation Enterprises*, any analysis of a copyrighted case cannot be properly conducted without paying attention to “copyright’s crucial distinction between protected literary form and unprotected information or ideas.”⁸ In cases where a musical work is at stake, a question of unauthorised copying arises quite often. Because the law is quite strict in this sense, courts usually take the plaintiff’s side and find infringements for borrowing copyrighted material. However, it should be remembered that nothing in this world has been created from nothing, meaning that while creating something the author uses some of his or her experience, knowledge, ideas from pre-existing works, and musical works are not an exception. In fact, many of the world’s greatest musical works have arguably borrowed from the pre-existing material.⁹ It is thus in the essence of creation of music to use pre-existing musical expression as ideas for the following works, and a prohibition of the most types of borrowing may hamper such creative process. In such cases, the idea-expression dichotomy could serve as a tool to help a judge or jury to decide when such use of pre-existing material could be justified..

It is sometimes argued in the legal scholarship that “some aspects of a work which could reasonably be called ‘ideas’ can nevertheless count as expression for the purposes of the ideas-expression dichotomy.”¹⁰ The assumption suggested in the thesis is conventionally different, and it is argued throughout the thesis that some expressions can be regarded as ideas for the purposes of the idea-expression dichotomy, and the alternative interpretation is meant to demonstrate that. If this approach is applied as the driving one, copyright law will automatically become less restrictive. It is therefore, I suggest that the dichotomy can be looked at from two different angles. First, as one of the cornerstone principles of copyright law on which legal understanding is based on, meaning that ‘ideas are free as air’ and that copyright law covers expressions only, in order to leave important ideas for the public to use. On the other hand, the dichotomy can be seen as a dynamic principle of law that should be used as a guiding test to decide in which cases expressions are wide enough or the use is common enough to be considered as unprotected ideas. For these purposes, I have examined

⁸ *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting).

⁹ See, e.g. Ronald Rosen, “*The Basic Elements of Musical Language and Ideas. The Copyright Perspective*,” Oxford University Press, 2008, pp. 159 – 162.

¹⁰ Timothy A.O. Endicott, Michael J. Spence, “*Vagueness in the Scope of Copyright*,” *Law Quarterly Review*, Vol. 121, 2005, at 671.

the historical background of the dichotomy, legal standards common to the principle, legal philosophies as well as human rights that are relevant to the issue at hand.

1.1. Research Questions

Even though this thesis is concentrated around the idea-expression dichotomy, as one of the main principles in copyright law, the research combines in itself a lot more than just “another” discussion of the principle. In the eyes of this thesis the dichotomy should rather be seen as one possible solution to the existing problems concerning musical works in the copyright sense. In this regard, there are two main questions which are equally important:

- how the idea-expression dichotomy could be applied in order to fit the realities of musical expressions?
- why the theoretical approach towards the idea-expression dichotomy in relation to musical works should enjoy an alternative interpretation?

These two questions immediately suggest that the current way of interpretation of the concept is somewhat not satisfying and that therefore the alternative approach will be proposed in the respective parts of the thesis. Since the current research provides not only a description of the legal problem evolving around the dichotomy, but also discusses some issues regarding the nature of musical works, one of the main challenges of the research is to identify which parts of musical expressions are the most important and relevant for answering the questions. The two main questions mentioned above can be traced throughout the whole work; however, in order to fully understand and answer the main research questions, some other complementary questions should be put on the table. Namely, why musical works should be paid a separate attention in relation to the idea-expression dichotomy? Which of the commonly acceptable property theories is the most suitable for a philosophical justification of the idea-expression dichotomy in general, and the proposed, alternative approach in particular? How would human rights regime be helpful for the alternative interpretation of the idea-expression dichotomy?

1.2. Delimitations

One of the main delimitations when it comes to copyright law that has to be made in every research is related to the rights covered in the research. Accordingly, it should be remembered from the start that this thesis does not touch upon the issue of neighbouring rights, e.g. performers rights, and mostly concentrates on the issue of the direct use of a protected

expression. Another important delimitation for the thesis is the central object of the idea-expression dichotomy in this analysis, which is musical works. Even though copyright law theoretically gives the same protection to all kind of works, it should be remembered that every work, whether it is a literary work or a musical work, has its own technicalities in the legal sense. Because the idea-expression dichotomy finds its roots in a work itself,¹¹ it is rather difficult to apply the dichotomy to all the works in the same way,¹² which is one of the main reasons why the research is limited to the musical works only. Another reason for discussing musical works is the unique nature and the technical issues behind creative process of such expressions, which differ from other copyright protected expressions. These and some other matters related to the nature of musical expression are discussed throughout the thesis.

As the thesis is of a more theoretical nature and is focused on rather theoretical notions behind the idea-expression dichotomy, there is no particular jurisdiction which is applied as a basis for the research. Since the idea-expression dichotomy is an internationally accepted concept, which is directly or indirectly implied in most countries, and since the research is of a theoretical nature, the same principles could be applied in other jurisdictions in an analogous manner. However, for the sake of clarity, the US legal system is mostly used as an example of existing tendencies in law and theory.

It is also worthwhile to mention that originality is an issue that is quite often brought up by the scholars when it comes to infringement cases.¹³ However, it is important to delimit that this thesis does not touch upon issues of originality, and concentrates on the divide between ideas and expressions instead. Also, fair use, fair dealing, or other kinds of exceptions and limitations provided in national copyright laws are outside of the scope of the present discussion, although a theoretical analysis of such issues can have its place. Lastly, in relation to musical works, this thesis avoids deliberate, technical analysis of musical expressions, leaving it to musicologists; however, some basic background and explanation of what a musical expression is and which components are important for the discourse, finds its place in the thesis.

¹¹ Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works*, Edward Elgar Publishing, 2011, at 132.

¹² See Aaron Keyt, *An Improved Framework For Music Plagiarism Litigation*; California Law Review, Volume 76, Issue 2, 1988, at 422: *“While the copyright system applies to many sorts of intellectual property, from music to industrial sculpture, the ideal balance may differ according to the expressive medium involved. Thus, to effectuate the balance, different rules and factual inquiries may be necessary depending on the type of creative work at issue.”*

¹³ See e.g. Emma Steel, *Original Sin: reconciling Originality in Copyright with Music*, 2015, pp. 66 – 80.

1.3. Methodology and Materials

In order to inquire into the analysis around the idea-expression dichotomy and answer the research questions, I have used traditional legal dogmatic method. The essence of the method applied in this research is to pick up questions from legal practise and analyse them in a general and theoretical manner.¹⁴ For this purpose, I have analysed respective scholarly and legal materials on the relative matters and have tried to apply them for the purposes of my own interpretation of the idea-expression dichotomy. As scholars mention sometimes, doctrinal research can be defined as a research which asks what the law is in a particular area.¹⁵ This thesis, on the contrary, does not deal with the question what the law is, in relation to the idea-expression dichotomy, but rather how and why this notion can be applied in cases when a musical work is at stake.

It is true that doctrinal methodology is sort of a “legal puzzle solving” in order to achieve pragmatic solutions.¹⁶ In this regard, for the purposes of presenting the general background I have conducted historical analysis of the idea-expression dichotomy, and presented a brief comparative analysis of the notion in the international context. At the same time, in order to answer the research questions I have analysed some of the most relevant existing philosophical theories, as well as the relevant scholarship, and copyright and human rights legal instruments. Throughout the thesis I have used expository methods as well, in order to present relevant legal and theoretical doctrines in relation to the idea-expression dichotomy. However, as the issue is rather problematic, my aim is not only to describe the body of law, but mainly to show where the drawbacks are in the existing approach and how such drawbacks can be attacked from alternative perspectives.

The materials that have been used to conduct the research and answer the research questions accordingly, consist of the scholarship from different fields of legal and social sphere. In order to provide general background on the idea-expression dichotomy and to provide a better understanding of the matter, I have used some national copyright laws and case law as the examples and the existing theoretical material on the matter. In this case the materials were used in a rather descriptive manner. In the later parts, where my alternative approach is proposed and most of the research questions are answered, the materials (books, articles, laws, case law, philosophies) are used in a more analytical way providing not only descriptive

¹⁴ Enrico Pattaro, “*A Treatise of Legal Philosophy and General Jurisprudence: Volume 4: Scientia Juris, Legal Doctrine as Knowledge of Law and as a Source of Law*,” Springer Science & Business Media, 2007, at 2.

¹⁵ Dawn Watkins, Mandy Burton, “*Research Methods in Law*”, Routledge, 2013, at 18-19.

¹⁶ *Id.*, at 13.

analysis but a new application of existing materials. Case law in this regard is used not as a precedent but rather as important quotations that may support the arguments at stake; existing property theories are applied to the idea-expression dichotomy, as it has not been tried before, while the relevant human rights instruments are applied to the idea-expression dichotomy in a new way as well.

1.4. Structure

The thesis is divided into four parts and its respective chapters. The first part provides the general background important to understand the historical, legal, and practical issue behind the idea-expression dichotomy and it also explains why it is relevant to talk about this principle at all. This part also explains why musical works have to be given a separate attention and why the nature of such works is important in relation to the idea-expression dichotomy. In the second part the discussion shifts to the philosophical spectrum. This part provides with a general overview of some of the main property theories (utilitarian, personality, natural theories) and the possible application of such theories to the idea-expression dichotomy. As some of the arguments in the research are of a philosophical nature, it is important to describe the connection between the theories and the dichotomy at first, and to show which of the theories justifies the principle best. Accordingly, part three deals with the alternative approach to the idea-expression dichotomy and partly gives an answer to the questions of how and why such an approach should be applied in relation to musical works. It is argued in this part that apart from the existing application of the dichotomy as a general principle of law, it could possibly serve as a guiding tool for justifying borrowing for pre-existing musical expressions. In this part, the findings and theories which are presented in Parts I and II help to support the argument towards the alternative approach to the idea-expression in musical works. Finally, the last part of the thesis provides arguments from the human rights perspective, and the right of everyone to take part in cultural life in particular. This part shows that when some musical expressions are regarded as a part of cultural life, the idea-expression dichotomy can be interpreted broadly so to justify some of the expressions as unprotected ideas for the purposes of the creative use. It is also argued in this part that some of musical expressions might become inevitable part of cultural life, by becoming 'generic' and thus should be left in public as ideas, in the meaning of the idea-expression dichotomy.

1.5. Current State of Research and Contribution to the Field

A few words have to be said about the current state of research in the field. It is quite apparent after a basic search on the topic of the idea-expression dichotomy that this notion has been discussed many times in the legal scholarship. Such legal scholars in copyright law as Robert Libott,¹⁷ Patrick Masiyakurima¹⁸ or Leslie Kurtz¹⁹ have provided enough research to point out general understanding and common drawbacks of the concept. In relation to more specific matters, in particular, related to musical works, some sort of legal discussion on music and copyright law has been done as well.²⁰ One example of such research discusses issues similar to those discussed in this thesis, but from the originality point of view. In particular, Emma Steel focuses, in her research,²¹ on the issues of the nature of musical works and the process of creation of musical works, while she also tries to discuss originality issues in the infringement cases where musical expressions are part of the dispute.

In relation to the philosophical justification of the idea-expression dichotomy, there are not so many scholarships that concentrate on the dichotomy in particular. It is usually included as a part of a bigger discussion of principles in copyright law.²² At the same time those materials where the dichotomy is singled out, do not provide a substantive analysis of the issue. In this regard, the analysis laid down in parts II and III of this thesis, provide an extended analysis of the idea-expression dichotomy from the philosophical point of view. In relation to the human rights analysis of the dichotomy, again, the dichotomy in itself has never been a separate subject to the interpretation under the human rights regime, but rather a part of a bigger discussion on other copyright issues, providing an example of a balancing tool in copyright law.²³

Most of such scholarship that cover the topic of infringements in relation to musical works and borrowing of the protected expressions, explain and discuss the existing problem, however, does not seem to provide a workable solution. This thesis, essentially, introduces a

¹⁷ Robert Yale Libott, "Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World," *UCLA Law Review*, Vol. 14, 1976, pp. 735 – 772.

¹⁸ Patrick Masiyakurima, "The Futility of the Idea/Expression Dichotomy in UK Copyright Law," pp. 548 – 572.

¹⁹ Leslie A. Kurtz, "Speaking to the Ghost: Idea and Expression in Copyright," *University of Miami Law Review*, Vol 47, N. 5, 1993, pp. 1221 – 1261.

²⁰ See e.g. Jamie Yu, "Now is That What I Call Music?: Post-Modern Classical Music and Copyright Law," *Marquette Intellectual Property Law Review*, Vol. 19, Issue 2, 2015, pp. 269 – 288; Andreas Rahmatian, "Music and creativity as perceived by copyright law," *Intellectual Property Quarterly*, 3, 2005, pp. 267 – 293; Emma Steel, "Original Sin: reconciling Originality in Copyright with Music," 2015, pp. 66 – 80.

²¹ Emma Steel, "Original Sin: reconciling Originality in Copyright with Music," 2015, pp. 66 – 80.

²² See e.g. Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown University Law Center and Georgetown Law Journal* December, 1988, 77 *Geo. L.J.* 287, 73 p.

²³ Torremans Paul, "Copyright and Human Rights. Freedom of Expression – Intellectual Property - Privacy," *Kluwer Law International*, 2004, see e.g., at 106.

new approach to the existing interpretation of the idea-expression dichotomy, according to which the dichotomy can be used as a guiding principle in infringement cases where musical works are at stake in order to justify borrowing from pre-existing expressions to some extent. Since such a way of argumentation has not been pursued before, the legal and constructive theoretical support is yet hard to find; therefore, this thesis, mainly justifies the position from a philosophical and human rights points of view, highlighting the reasons why and how the issue should be approached.

II. Definitions and General Background of the Idea-Expression Dichotomy: Musical Works as the Protected Subject Matter of Research

As it was stated in the Introduction, one of the groundbreaking principles of copyright law, the idea-expression dichotomy, provides that only expressions are protected by law, not ideas. Even though the notion of idea-expression has existed for a long time, there still are many unresolved and questionable issues around it. Before the substantial discussion of the matter, and in order to examine the topic fully, one should first introduce general background on intellectual property law, define the concept itself and its components separately, namely ‘idea’ and ‘expression.’ Apart from a general background on the dichotomy, this section discusses musical works and some specific issue regarding their nature, and it presents the legal framework and the issue which is of an interest for the research.

2.1. General Background on Copyright Law

As the research mainly deals with intellectual property, it is important to remember that this field of law protects and regulates creation, use and exploitation of intellectual or mental creations.²⁴ The Convention Establishing the World Intellectual Property Organization (hereinafter: “WIPO Convention”) defines intellectual property, in its text, as including “the rights relating to literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition.”²⁵ Consequently, intellectual property is also a collective name that encompasses copyright, patents, trademarks designs and some other rights related to intellectual creations. One general feature that is common for all these rights is that subject matter for these rights include immaterial or intangible character. The discussion in this research deals with the issues around copyright and its principles, as a part of the intellectual property rights.

Copyright law, in turn, is usually understood as the area of intellectual property law that protects literary and artistic creations, such as musical works, books, films, computer programmes, etc. Traditionally, copyright law collectively refers to the protected subject

²⁴ Lionel Bently, Brand Sherman, “*Intellectual Property Law*” Third Edition, Oxford University Press, 2008, at 1.

²⁵ Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979), Art. 2, para. Viii.

matter as “literary and artistic works” or just “works.”²⁶ Definitions and the list of protected subject matter can differ in jurisdictions, as the states are left with discretion in this regard. Some countries, civil law countries mostly,²⁷ leave it as an open list free to interpretation, while common law countries tend to define all possible artistic creations protected under the copyright law.²⁸ All in all, copyright law is sometimes regarded as one of the most national of all intellectual property rights, due to the fact that unlike patent or trademark laws,²⁹ there is no harmonisation on international or regional levels of registration or other technical issues. However, a number of international treaties in copyright law, such as the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: “Berne Convention”), or the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, “TRIPS Agreement”), provide with a certain harmonisation of the main principles of copyright law on the international level. Thus, according to international standards of copyright law, the rightholder is awarded with exclusive rights, which are further defined in the legislation, for the life of the author, plus no less than 50 years after creation of a work,³⁰ if a work qualified with requirements and formalities provided in the national law for the copyright protection.³¹ More specific issue in relation to the discussion at hand are presented in the respective parts of the following thesis.

2.2. Defining the Term ‘Expression’

In relation to the important terms, the term “expression” is quite straightforward and more or less clear in relation to the discussion at hand. In English dictionaries the term expression is defined as, “the act or an instance of expressing or setting forth in words, a particular word, phrase, or form of words, or the manner or form in which a thing is expressed in words; wording; phrasing;”³² or as “the way an idea is transformed into words.”³³ Behind a simple,

²⁶ See, e.g. Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

²⁷ See e.g. Swedish Act on Copyright in Literary and Artistic Works, (1960:729, as amended up to April 1, 2011), Article 1: “Anyone who has created a literary or artistic work shall have copyright in that work, regardless of whether it is

1. a fictional or descriptive representation in writing or speech [...] 7. a work expressed in some other manner.”

²⁸ See, e.g. The UK Copyright, Designs and Patents Act 1988, (c. 48), see Chapter I, where the legislator has provided with a closed list of protected subject matter.

²⁹ E.g., Registration of patents in the European Union, through the European Patent Office system; Madrid system for the international registration of trademarks.

³⁰ See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Marrakesh, Morocco on 15 April 1994, art. 12.

³¹ This requirements can be different depending on jurisdiction, however, this is not a subject to this Thesis.

³² “Webster’s Encyclopedic Unabridged Dictionary of the English Language”, Gramercy Books, New York/Avenel, 1994, at 503.

³³ Ed. Patrick Hanks, “The Collins English Dictionary”, Second Edition, Collins, London and Glasgow, 1990, at 537.

dictionary definition of a term there usually exists some philosophical explanation. Like many important and groundbreaking philosophical theories, the theory of expression was first set out by Plato and Aristotle in their works. As Aristotle stated:

*“Spoken words are the symbols of mental experience and written words are the symbols of spoken words. Just as all men have not the same writing, so all men have not the same speech sounds, but the mental experiences, which these directly symbolize, are the same for all, as are those things of which our experiences are the images.”*³⁴

Nowadays the perception of expression has expanded so it includes not only spoken words, to which this thesis can be applied, but also music, paintings, books, films, and other copyright protected works. Although, the term ‘expression’ can also be looked at from the linguistic point of view. In this regard, it is argued that an expression usually expresses an idea of some sort,³⁵ starting from a colour and finishing with more complex ideas, as in cases of writings or musical works. However, when an expression is examined in such a broad sense, there is a possibility that an expression would not resemble any idea.³⁶ This can be illustrated on an example of the expression ‘Ouch!’. Such an expression does not normally express any idea, but it is used to express a mental feeling, namely pain.³⁷ Copyright law normally uses the term expression in its typical sense,³⁸ meaning that an expression will always represent an idea in some fixed form. Understanding of how the law interprets the term expression can be well demonstrated on an example of the US Copyright Code, which in para. 102, defines subject matter of copyright and states:

*“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”*³⁹

In this clause the term “expression” is well defined, and means a fixed form from which the work can be perceived, reproduced or otherwise communicated to the public. It also corresponds with one of the main purposes of copyright law, which is to make intellectual endeavours communicated to the world, and it is only through expressions that such works can be communicated with certainty. In other jurisdictions, for example, copyright law usually does not provide such a precise definition of the term ‘expression,’ however, it is usually

³⁴ Aristotle, “*De Interpretatione*,” §§1–4, Cited from Wayne A. Davis, “*Meaning, Expression and Thought*,” Cambridge University Press, 2002, at 1.

³⁵ See e.g. *Id.*, pp. 131 – 134.

³⁶ *Id.*, at 134.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ An Act for the general revision of the Copyright Law, title 17 of the United States Code, Enacted by the 94th United States Congress, of January 1, 1978, para. 102

derived from the provisions on the subject matter of copyright law, providing that a work should be expressed in some manner (in some countries copyright laws provide with a list of examples.)⁴⁰ For the purposes of this thesis, the definition ‘expression’ implies forms in which the author’s thoughts and ideas are incorporated so that such can later be communicated to the public. Normally, such expressions in words of copyright law are: musical or dramatic works, computer programmes, fictional representation in writing or speech, photographic works, works of fine arts, etc.⁴¹ In this regard, copyright law understands an ‘expression’ as a fixation of ideas in some material form. In other words, when an author embodies his or her thoughts or ideas from the “mind” into a particular form (a writing, photograph, recording, etc.), this would qualify as an expression in the meaning of copyright law.

2.3. Defining the Term ‘Idea’

In relation to the current discussion, the term ‘ideas’ is more controversial. Apart from difficulties in general definitions, there is an uncertainty about what ideas mean in the copyright sense as well. Even the word by itself is hard to define in one clear sentence, as it encompasses many different meanings. Some general dictionaries, suggest that an idea “is a conception of a mind or a thought, which is a result of mental understanding, awareness, or activity,”⁴² it can also mean an “individual’s conception of something, or a mental representation of something.”⁴³ In linguistic sense, it is suggested that ideas should be considered not as meanings, but as “*meaning determiners* or *meaning elements*.”⁴⁴ The meaning of a particular word can be defined in terms of what it expresses in that language,⁴⁵ and therefore, ideas and expressions are interconnected, as without the second the first cannot be connected to the public, while at the same time, the first gives the meaning to the second.

Throughout history ‘ideas,’ as a philosophical term has been discussed by a large number of philosophers, from Socrates and Plato, to Locke, Descartes or Spinoza. Even though, understanding of the term could stand as a separate thesis on its own, in relation to the present

⁴⁰ E.g. Article 1 of the Swedish Act on Copyright in Literary and Artistic Works, SFS, 1960:729, as amended up to April 1, 2011): “*Anyone who has created a literary or artistic work shall have copyright in that work, regardless of whether it is 1. a fictional or descriptive representation in writing or speech, 2. a computer program, [...] 7. a work expressed in some other manner.*”; Article L112-1 of the French Intellectual Property Code, consolidated as of October 1, 2010: “*The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.*” Particular examples of protected expressions are provided in article 112-2 of the same Code.

⁴¹ Some examples are taken from article 1 of the Swedish Act on Copyright in Literary and Artistic Works.

⁴² “*Webster’s Encyclopedic Unabridged Dictionary of the English Language*,” 1994, at 706.

⁴³ Patrick Hanks, “*The Collins English Dictionary*,” 1990, at 759.

⁴⁴ Wayne A. Davis, “*Meaning, Expression and Thought*,” 2002, at 132.

⁴⁵ *Ibid.*

discussion, it is worthwhile to mention general approaches provided in the literature. The first philosopher to point out the importance of the concept of 'ideas' was again, a famous Greek philosopher, namely Plato. In his famous *Theory of Forms* (depending on the translation, 'forms' can be also referred to as 'ideas'), he provided that "everything in the empirical world is a manifestation of a pure idea, that exists in the abstract."⁴⁶ Thus, according to him, any external material object, like a table, book, etc., is just a manifestation of an abstract idea or form. In other words, an idea exists outside and independent of an actual manifestation of the object.⁴⁷

The term 'ideas,' in the modern sense, was introduced by the French philosopher Rene Descartes, who is claimed to have brought a new life to the term.⁴⁸ Before Descartes, philosophers had used the term 'ideas' to refer to archetypes in the divine intellect,⁴⁹ while the French philosopher started to use the term for the contents of a human mind.⁵⁰ The term 'idea' itself was understood by him as "the form of any given thought, immediate perception of which makes me aware of the thought."⁵¹ Descartes provided, in relation to ideas, the following three distinctions: (1) the formal versus the objective reality of ideas; (2) 'idea' in the formal sense versus 'idea' in the material sense; (3) 'idea' in the objective sense versus 'idea' in the material sense.⁵² For the discussion at hand, the most relevant is the division of ideas into formal and material senses. Descartes distinguished that ideas can subsist in formal, e.g., being modes of thoughts, or mental events, and that they can subsist in objective reality as their object or representational content.⁵³ Accordingly, an idea in the formal sense is perceived as representing something, while in the material sense, it is an actual thing, for example mental operation.⁵⁴ Even though most ideas are expressed in a material form (like books, music, etc.), ideas in the meaning of copyright law should be considered in the formal sense, as a formal representation of the author's thoughts. In this regard, Descartes himself

⁴⁶ B. R. Hergenhahn, Tracy Henley, "An Introduction to the History of Psychology," Cengage Learning, 2013, at 43.

⁴⁷ *Ibid.*

⁴⁸ Nicholas Jolley, "The Light of the Soul Theories of Ideas in Leibniz, Malebranche, and Descartes," Clarendon Press, 1998, at 12.

⁴⁹ *Id.*, at 29.

⁵⁰ *Id.*, at 12.

⁵¹ René Descartes, "Second Replies", AT vii. 160; CSM ii. 113, (cited from Nicholas Jolley, "The Light of the Soul Theories of Ideas," 1998, at 13.)

⁵² *Id.*, at 13;

"Idea' can be taken materially, as an operation of the intellect, in which case it cannot be said to be more perfect than me. Alternatively, it can be taken objectively, as the thing represented by that operation; and this thing, even if it is not regarded as existing outside the intellect, can still, in virtue of its essence, be more perfect than myself." René Descartes, Preface, "Meditations," AT vii. 8; CSM ii. 7., (copied from Nicholas Jolley, "The Light of the Soul Theories of Ideas," 1998, at 14.)

⁵³ Nicholas Jolley, "The Light of the Soul Theories of Ideas," 1998, at 13.

⁵⁴ *Id.*, at 14.

admits that the term ‘idea’ is ambiguous, as “it can be used to refer to, not the act or event, but the object of thought.”⁵⁵ John Locke, an English philosopher continued, in his works, on ideas with Descartes’s thinking in his *Essays Concerning Human Understanding*.⁵⁶ He defined ideas as “whatsoever is the object of the understanding when a man thinks ... whatever is meant by phantasm, notion, species, or whatever it is which the mind can be employed about in thinking.”⁵⁷ This understanding of ideas basically includes everything that is in a person’s mind.

It is especially important to define the term ‘idea’ when one is making a theoretical discussion on intellectual property. As some scholars mention, “a universal definition of intellectual property might begin by identifying it as nonphysical property, and whose value is based upon some idea or ideas.”⁵⁸ It is conventionally true, that the term idea can include a vast number of things, starting from everyday ideas, e.g. an idea to see a friend, cook a meal and ending with more literary ideas, like plots or certain patterns.⁵⁹ It is the second ideas which are usually important in relation to copyright law, as they are parts of creative processes and it is such ideas that usually resemble the author’s personality in a work. Concluding the arguments presented by Locke and Descartes, ideas, in copyright sense, can be referred to as operations of the author’s mind. Apart from such interpretation, it is also possible to refer to ideas as an external object, meaning something that was not necessarily implied by the author, but rather concluded by the user’s mind.

2.4. Historical Background

Speaking of the idea-expression dichotomy, the concept is relatively new in copyright law; however, roots of the dichotomy can be traced back a few centuries. For instance, as early as the 1st century, a Roman philosopher Seneca Annaeus, concluded, that “the best ideas are common property.”⁶⁰ As for the legal defining of the dichotomy, the Statute of Anne of 1710, which is regarded to be the first code in the field of copyright law, did not provide any direct

⁵⁵ *Id.*, at 17.

⁵⁶ John Lock’s theory on ideas, which is laid down in “*Essays Concerning Human Understanding*,” is discussed later in the Thesis.

⁵⁷ John Locke, “*An Essay Concerning Human Understanding*”, T. Tegg and Son, 1836, (cited from Leslie A. Kurtz, “*Speaking to the Ghost: Idea and Expression in Copyright*”, University of Miami Law Review, Vo. 47, N. 5, 1993, at 1243.)

⁵⁸ Justin Hughes, “*The Philosophy of Intellectual Property*,” 1988, at 4.

⁵⁹ *Id.*, at 6.

⁶⁰ Seneca, Lucius Annaeus, “*Ad Lucilium Epistulae Morales*,” With an English translation by Richard M. Gummere, London Heinemann, 1917, epistels XII., XIII., at 78: “[...]all persons who swear by the words of another, and put a value upon the speaker and not upon the thing spoken, may understand that the best ideas are common property.”

mentioning of the dichotomy. One of the possible reasons for that could be that the Statute itself was mainly concentrated on the issues regarding the rights of authors and publishers.⁶¹ However, the scope of the Statute in all its provisions referred to *books and other writings* as the only possible expression that was protected from copying, and not ideas in books.⁶² Accordingly, some understanding that only expressions should be the subject of protection, while ideas or abstract things should be free, was already present at that stage.

Although, it can be said that the concept has gained an international acceptance (as it is discussed in the next sub-chapter), it is indeed the common law countries where the idea-expression dichotomy was established and later developed into an important principle of copyright law. As for the UK experience, the courts have reached a more or less clear understanding of the dichotomy in the beginning of the 20th century, when in the *Hollinrake v. Truswell* case the court directly explained the dichotomy, stating that: "copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed."⁶³ However, it is also assumed that the phrase "ideas are free," which implied that ideas should be in the public domain – or rather free for all - was first adopted by the British courts,⁶⁴ a while ago before the *Hollinrake v. Truswell* case. In *Millar v. Taylor*, one of the early copyright cases in England, Justice Yaets in his dissenting opinion stated one of the most known conclusions regarding the idea/expression dichotomy: "Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion."⁶⁵ By this, Yaets meant that once such birds are free, an author cannot control them anymore as they are in the common domain.⁶⁶ William Blackstone, another famous English jurist of the 18th century, stated that a literary work is not a book itself as a physical copy, but rather the expression or the form that the author gives to his or her ideas in such a book.⁶⁷

"The identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition; and

⁶¹ Even though some public interest was included in the Statute, the Act was mainly concentrated on solving proprietary issues between authors and publishers at that time.

⁶² See e.g. "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned," (Statute of Anne), 1710: "... *The author of any book or books printed ... shall have the sole right and liberty of printing such book and books.*"

⁶³ *Hollinrake v. Truswell*, Court of Appeal, [1894] 3 Ch. 420, at 427.

⁶⁴ Robert Libott, "The Idea-Expression Fallacy in a Mass Communications World," 1967, at 738

⁶⁵ *Millar v Taylor* (1769), 4 Burr. 2303, 98 ER 201, at 2379.

⁶⁶ Eleonora Rosati, "Illusions Perdues The Idea/Expression Dichotomy at Crossroads," 2003, at 5 (available at <http://www.serci.org/2009/rosati.pdf>, last visited on 06.05.2016.)

⁶⁷ Rosemary J Coombe, "The Cultural Life of Intellectual Properties: Authorship, Appropriation and Law", Durham, Duke University Press, 1998, at 219.

*whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing [expression], in any number of copies, or at any period of time, it is always the identical work of the author, which is so conveyed; and no other man can have a right to exhibit it, especially for profit, without his consent.*⁶⁸

As to the US experience, until the late 1800's, when two important decisions by the Supreme Court of the US were concluded, the courts still did not have a constituency in deciding what falls under protection of copyright law. The cases *Baker v. Selden*⁶⁹ and *Holmes v. Hurst*⁷⁰ in legal literature are often referred to as the origin of the idea-expression dichotomy in the US. Although the courts did not explicitly define the dichotomy as such, it was at least pointed out that it is "the language employed by the author to convey his ideas"⁷¹ that was to be protected under the law. In *Holmes v. Hurst* the Court more explicitly stated that authors have "the right to that arrangement of words which the author has selected to express his ideas... The subject of property is the order of words in the author's composition; not the words themselves ... nor the ideas expressed by those words, which [are] not capable of appropriation."⁷² Even though some commentators emphasise that the Court failed to further explain the dichotomy itself,⁷³ the decisions are still of a big importance for the development of US copyright law. Finally, it was only in the 1920's, when the US Court of Appeals for the Second Circuit, defined the dichotomy in the case *Dymow v. Bolton*, and directly concluded that "[I]deas as such are not protected [T]he copyright law protects the means of expressing an idea..."⁷⁴ After the abovementioned case, the US courts have discussed and restated the issue of the idea-expression dichotomy,⁷⁵ however, particularly important in the development and understanding of the doctrine in the US, was the judgment of Learned Hand J. in the case *Nichols v Universal Pictures*,⁷⁶ which is also mentioned later in the work. In particular, Justice Hand stated that copyright protection cannot be extended to some abstract parts of a work (a play in that particular case), as the author then could prevent communication and the use of his or her ideas, "to which apart from their expression, his property is never extended."⁷⁷

⁶⁸ William Blackstone, "Commentaries on the Laws of England," 405-406 (1765-69), (cited from Rosemary J Coombe, "The Cultural Life of Intellectual Properties: Authorship, Appropriation and Law", 1998, at 219.)

⁶⁹ *Baker v. Selden*, 101 U.S. 99 (1879).

⁷⁰ *Holmes v. Hurst*, 174 U.S. 82 (1899).

⁷¹ *Baker v. Selden*, 101 U.S. 99 (1879), at 103.

⁷² *Holmes v. Hurst*, 174 U.S. 82 (1899), at 86 (cited from Richard H. Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law," Pace Law Review, Volume 10, Issue 3 Summer 1990, No. 3, at 556).

⁷³ Richard H. Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law", 1990, at 556.

⁷⁴ *Dymow v. Bolton*, Circuit Court of Appeals, Second Circuit. 11 F.2d 690 (2d Cir. 1926).

⁷⁵ See, e.g. *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985); *Designers Guild v. Russell Williams* [2000] 1 WLR 2416.

⁷⁶ *Nichols v Universal Pictures et al.*, 45 F.2d 119 (2d Cir. 1930), 121.

⁷⁷ *Nichols v Universal Pictures et al.*, 45 F.2d 119 (2d Cir. 1930).

However, even though the general understanding of the concept defined by English and American courts and jurists has not changed much for the last century, the courts still have not reached a consistency in a case-by-case application of the concept. After providing a short historical background on the idea-expression dichotomy, it is vitally important to introduce the legal framework of the thesis.

2.5. Legal Framework

In relation to the legal framework, it is foremost important to mention that the idea-expression dichotomy, even though, it is not usually directly stipulated in a national legislation, can be regarded as an internationally accepted principle of copyright law. On international level, the Berne Convention is the main instrument in copyright law. The Convention does not explicitly stipulate the dichotomy in its text, although, Article 2(2) states, that “[i]t shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”⁷⁸ According to the text, one can conclude that, even if not directly, the drafters still referred to the dichotomy, suggesting the national legislators that a work should not be protected unless it has been fixed in some material form, which basically refers to the idea-expression dichotomy. However, the first international treaty directly prescribing the dichotomy in its text was the TRIPS Agreement. Article 9 para. 2 of the Agreement reads as follows: “Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such.”⁷⁹ Since there are now 162 contracting parties to the Agreement, the dichotomy can be more or less regarded as an international accepted principle; although, the national legislators and courts are left with some discretion for its interpretation. Another example of an international (in this case it is regional) instrument that directly talks about the dichotomy is the European Union Software Directive, which explicitly says that ideas and principles incorporated in software are not protected, and implied that only the expressions in any form of a computer program can be the subject of protection.⁸⁰

As far as national copyright legislations are concerned, the idea-expression dichotomy is not directly prescribed in most jurisdictions, but it is usually either derived from the relevant provisions or further explained by the courts. As it was stated in the introductory chapters, the

⁷⁸ Berne Convention, Article 2(2).

⁷⁹ TRIPS Agreement, Article 9(2).

⁸⁰ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, art. 1(1).

US legal system is mainly used as an example in this thesis. In relation to the codification of the dichotomy, the US is one of a few countries, where the legislator decided to provide the dichotomy in the Copyright Act of 1976. Section 102 of the Act reads as follows:

“(a) Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression...

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁸¹

Commenting on the article, Sterling points out that there can be distinguished three aspects of the section 102 (b): 1) abstract aspects, such as ideas, concepts, principles; 2) technical aspects, such as procedures, process, system, method of operation; and 3) discovery.⁸² In most other, both, common and civil law countries, the principle is usually hidden in the legislation, where, for example, it can be provided that original works are protected if only they are expressed in some form,⁸³ which basically duplicates the formulation found in the Berne Convention. However, what is important is that the dichotomy is usually somehow prescribed or hidden in the legislation, which consequently allows to talk about the concept as an internationally accepted phenomenon.

2.6. Musical Works as the Central Expressions of the Thesis

Regarding the scope of the thesis, it is important to define and understand what kind of works and expressions are at stake first. As can be derived from the introductory chapters, musical works as the subject matter are in the centre of the discussion. It is mostly agreed that musical works in the meaning of the modern society have found their foundation around the 1800's along with popularisation of classical music among masses.⁸⁴ This does not mean that music had not existed before, but it shall rather mean that it has become more of a social phenomenon as it is known now. As a cultural phenomenon, from the 1800's onwards, music has started to form as a commercially important product for the society, and industrialisation of it has become more evident:⁸⁵ music sheets started to spread, and musical works became a

⁸¹ The US Copyright Act of 1976. Section 102.

⁸² J.A.L. Sterling, *“World Copyright Law,”* Second Edition, London, Sweet and Maxwell, 2003, at 220.

⁸³ See e.g. Article 3(2) of the UK Copyright, Design and Patents Act of 1988 (c. 48); Section 1 of the Finnish Copyright Act, (404/1961, amendments up to 307/2010 included); Article 1 of the Swedish Act on Copyright in Literary and Artistic Works, (Swedish Statute Book, SFS, 1960:729, as amended up to April 1, 2011); Article L112-1 of the French Intellectual Property Code (consolidated as of October 1, 2010).

⁸⁴ Ed. by Andreas Rahmatian, *“Concepts of Music and Copyright How Music Perceives Itself and How Copyright Perceives Music,”* Edward Elgar Publishing, 2015, see Chapter *“What is a 'musical work,’”* by John Butt.

⁸⁵ Andreas Rahmatian, *“Concepts of Music and Copyright,”* 2015, at 17.

vital part of operas and ballets, as well as the invention of the phonograph (also referred to as a gramophone) in 1877 made a big impact on the process.⁸⁶ It is also almost around the same time that the idea-expression dichotomy started to evolve as a self-standing copyright concept.

Definition wise, musical works as such have not found an internationally accepted legal definition. None of the main international instruments in copyright law (Berne Convention, TRIPS Agreement, WIPO World Copyright Treaty) has defined the term musical work, except for providing that musical works are the subject matter of copyright law.⁸⁷ Similarly, the relevant national legislation of some European states (France, Germany), does not provide a definition, which consequently means that this term is hard to define.⁸⁸ This is due to the fact that it is not necessary from the legislator's point of view to define this term but rather important to provide protection to such works.⁸⁹ It is therefore more important to understand its nature, and what exactly is protected, rather than simply finding a definition.

As it was mentioned in the introduction, due to the nature of the expression, the relation between musical works and the idea-expression dichotomy should be paid a separate attention. Because the idea-expression dichotomy finds its roots in a work itself,⁹⁰ it is rather difficult to apply the dichotomy to all the works in the same way.⁹¹ Consequently, the application of the idea-expression dichotomy to literary and musical works can differ in some respects. This is one of the reasons, why the research at hand is limited to only musical works as the subject matter. Another reason for musical works being singled out as the centre of the current research is the importance and the number of cases where such works are at stake. For several decades, it seems that the cases where musical works were contested have drastically increased.⁹² In such cases the rights holders try to use their copyright in order to prohibit unauthorised use of their material and, and in many of the cases, this hampers dissemination of creative material.

One important reason why musical works should be singled out is the nature of such works. While literary creations have letters and words as the basis of the expressions, in the musical

⁸⁶ See, *Id.*, chapter "What is a 'musical work,'" by John Butt.

⁸⁷ See, Berne Convention, Art. 2.

⁸⁸ Luke T. McDonagh, "Is the Creative Use of Musical Works Without a Licence Acceptable Under Copyright Law?," *International Review of Intellectual Property and Competition Law (IIC)* 4 (2012), at 408.

⁸⁹ *Ibid.*

⁹⁰ Andreas Rahmatian, "Copyright and Creativity," 2011, at 132.

⁹¹ See Aaron Keyt, "An Improved Framework For Music Plagiarism Litigation," at 422: "While the copyright system applies to many sorts of intellectual property, from music to industrial sculpture, the ideal balance may differ according to the expressive medium involved. Thus, to effectuate the balance, different rules and factual inquiries may be necessary depending on the type of creative work at issue."

⁹² For examples of successful and unsuccessful infringement cases where plagiarism in musical expression was contested see, https://en.wikipedia.org/wiki/Music_plagiarism#Cases.

world the basis for an expression can be notes, a whole musical phrase consisting of a few notes; at the same time such phrases and secureness of notes are subject to the rules of composition, such as the key, chord progression, etc.⁹³ In this regard, it is worthwhile to explain what a musical work usually consists of. The rules of musical composition are quite difficult for a person without musical background; however, the basic matters have to be presented. Similar to letters and words that constitute “raw materials” for literary works, three elements, such as melody, rhythm and harmony are referred to as the “trinity” (raw materials) of a musical composition.⁹⁴ Melody, in this respect is referred to as the combination of musical notes and the corresponding pitches and their duration;⁹⁵ rhythm usually means time values of sounds and silence, or timing when a musical note is produced,⁹⁶ while harmony means the combination of a few pitches (tones) to produce a chord.⁹⁷ It is usually, melody that is regarded as an original expression protected under copyright law, while rhythm and harmony are generally unprotected ideas.⁹⁸

Lastly, musical works should also be paid a separate attention because of the means and the way of delivering the expression to the audience. Unlike most of other forms of copyright protected expression, musical works depend more than any other form on its performance.⁹⁹ It is through performance not through reading music sheets or scores the music is mostly communicated to the public.

2.6.1. Musical Works and the Idea-Expression Dichotomy

In relation to the idea-expression dichotomy, it was stated in the *Nicholas v Universal Pictures* case, that the boundary between idea and expression is hard to define.¹⁰⁰ In this regard, it seems that most of the difficulties arise when defining the concept of ‘idea,’ or when one is trying to argue where an idea ends in relation to the protected expression.¹⁰¹ This situation occurs because most ideas are technically expressed in some way, so that consequently the question is not whether an idea is an expression, but rather whether an

⁹³ Similar argumentation can be found in Luke T. McDonagh, “*Is the Creative Use of Musical Works Without a Licence Acceptable?*” 2012, at 409 – 410, 421.

⁹⁴ See, Ronald Rosen, “*Music and Copyright*,” in chapter 3, “*The Basic Elements of Musical Language and Ideas. The Copyright Perspective*,” Oxford University Press, 2008; Emma Steel, “*Original Sin: reconciling Originality in Copyright with Music*,” 2015, at 67; Jamie M. Yu, “*Now is That What I Call Music?*” 2015, at 279.

⁹⁵ Ronald Rosen, “*The Basic Elements of Musical Language and Ideas. The Copyright Perspective*,” Oxford University Press, 2008, at 153.

⁹⁶ Ronald Rosen, “*The Basic Elements of Musical Language and Ideas*,” 2008, at 153; Emma Steel, “*Original Sin: reconciling Originality in Copyright with Music*,” 2015, at 67.

⁹⁷ Ronald Rosen, “*The Basic Elements of Musical Language and Ideas*,” 2008, at 153.

⁹⁸ Emma Steel, “*Original Sin: reconciling Originality in Copyright with Music*,” 2015, at 68.

⁹⁹ Carys J. Craig, Guillaume Laroche, “*Out of Tune: Why Copyright Law Needs Music Lessons*,” 2014, at 46.

¹⁰⁰ *Nichols v Universal Pictures et al.*, 45 F.2d 119 (2d Cir. 1930), at 121.

¹⁰¹ J.A.L. Sterling, “*World Copyright Law*,” 2003, at 220.

expression can be considered as an idea. It is therefore of a vital importance to have theoretical understanding of the matter. In copyright sense, one of the main copyright scholars of the past, Melville Nimmer, differed between ideas “which upon development would become literary property,”¹⁰² or ‘literary ideas,’ and ideas which would never be able to become the subject of copyright.¹⁰³ Thus, it is the first type of ideas which is of an interest for the present discussion, as it would include ideas for motion pictures, books, radio programs and musical works.¹⁰⁴ In this regard, Robert Libott suggested that the term “literary-artistic ideas” suits better, as such would also include works of visual arts.¹⁰⁵ As far as musical works are concerned, the situation is no different, and the main starting point is to figure out what idea and expression constitute for the musical works.

It is important for the sake of the research to establish what ideas mean in the context of musical works. It has been suggested that an idea, as a ‘literary-artistic idea’ can mean the ‘line’ or ‘spine,’ particularly when a dramatic or literary work is at stake.¹⁰⁶ However, sometimes it is not that easy to draw the line, as in some cases judges concluded that ideas which are of sufficient particularity can be regarded as expressions.¹⁰⁷ When it comes to artistic works, or mainly visual arts, it does not create difficulties to draw the line between an idea and an expression, as “it seems quite easy to distinguish between the real and the represented.”¹⁰⁸ To put it in context, the idea presented in the Mona Lisa painting would be a portrait of a lady with nature in the background, while the expression should be regarded the particular execution of the work. In relation to literary works, it seems that drawing the line is not hard as well. As it can be seen on an example from the Court of Justice of the European Union (hereinafter: ECJ) in the *Infopaq* case, even eleven words can constitute a protected expression, given it is an author’s own intellectual creation.¹⁰⁹ The Court has not set a direct threshold of eleven words for originality in the EU: less words can be regarded as a protected expression, and at the same time more words will not enjoy copyright protection if they do not comply with the originality requirement. However, the case is an indication that some quantitative measures are possible to draw when it comes to literary expressions.

When it comes to musical works, the case is different, as it is not that easy to draw the line between ideas and expressions. In theory there exist two types of ideas in music. One is so

¹⁰² Melville B. Nimmer, “*The Law of Ideas*,” 27 S. Cal. L. Rev. 119, 1954, at 123.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Robert Libott, “*Round the Prickly Pear: The Idea-Expression Fallacy*,” 1976, at 741.

¹⁰⁶ Robert Libott, “*Round the Prickly Pear: The Idea-Expression Fallacy*,” 1976, at 742.

¹⁰⁷ Timothy A.O. Endicott, Michael J. Spence, “*Vagueness in the Scope of Copyright*,” at 670.

¹⁰⁸ Robert Libott, “*Round the Prickly Pear: The Idea-Expression Fallacy*,” 1976, at 748.

¹⁰⁹ *Infopaq International A/S v Danske Dagblades Forening*, CJEU, C-5/08, at 51.

called, ‘musical ideas.’¹¹⁰ As Aaron Copland wrote in this regard, “every composer begins with a *musical* idea, not a mental, literary or extramusical idea.”¹¹¹ This can be understood as any idea in relation to the creation of a musical work: an idea to write a song about love, about war, friends, etc. In other words, some abstract thinking that an author has during the creation of a musical work. The second type is what may rise many questions, and constitute ‘ideas’ in the meaning of copyright law, as unprotected components that are free to use. Such can be, for instance, some raw materials or ‘building blocks,’¹¹² in other words, expressions that are not entitled to copyright protection. These musical components are of the importance for the present research. As referred in literature, ‘building blocks’ is something that the lawyers would name as ideas in relation to musical works.¹¹³ Such building blocks might contain harmonies, melodies, beats, rhythms, methods of instrumental arrangements, etc.¹¹⁴

It is thus the term ‘idea’ that can be interpreted broadly, and some types of expressions, like building blocks (certain guitar riffs, melodies, and beats from songs), may be regarded as unprotected ideas.¹¹⁵ For instance, as it was stated in the US case *Hirsch v. Paramount Pictures*, “similarity of tone [...] is inevitable in all musical compositions,”¹¹⁶ as availability of such is limited to a certain degree; therefore, such expression will stay on the ideas side of the coin. At the same time, when certain musical pattern, no matter if it is a melody, combination of chords or notes, a riff or a beat, constitute a significant, distinctive and original part of the musical work, the court will deem such as protected expressions.

However, there can be obvious issues in relation to musical works. On the one hand, some musical expressions are common enough to be considered as ideas: it is sometimes said that every pop song is based on four chords, which is also called as the ‘I–V–vi–IV progression.’¹¹⁷ Such chords, even though are expressions in conventional sense, will be considered as unprotected ideas to which nobody owns the rights. Expressions similar to the I–V–vi–IV progression, in the US legal system can be considered as *scenes a faire* (scenes which

¹¹⁰ See, Aaron Copland, “*What to Listen for in Music*,” Penguin, 2011.

¹¹¹ *Id.*, see Chapter 3, *The Creative Process in Music*.

¹¹² The substantive discussion around building blocks and raw materials is presented in chapter 4.1.3, 4.1.4 of this Thesis.

¹¹³ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 91-98.

¹¹⁴ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 111.

¹¹⁵ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 111.

¹¹⁶ *Hirsch v. Paramount Pictures*, 17 F. Supp. 816 (S.D. Cal. 1937).

¹¹⁷ An example of how many pop songs can fit to one progression was presented by an Australian comedy band “The Axis of Awesome” in their comedy bit called “Four Chords.” More information about it, see at https://en.wikipedia.org/wiki/The_Axis_of_Awesome#22Four_Chords.22.

Other example of a list of songs which are based on the I–V–vi–IV progression, see at https://en.wikipedia.org/wiki/List_of_songs_containing_the_I%E2%80%93V%E2%80%93vi%E2%80%93IV_progression

must be done), which prescribes that expressions that logically follow from the theme or premise on which the work is based,¹¹⁸ cannot be protected under copyright law.¹¹⁹ However, this particular doctrine and clear cases of unprotected ideas, such as I-V-vi-IV progression are outside of the scope of this research. It is rather the protected expressions, as perceived by the copyright law nowadays, which are of the interests in this thesis.

Drawing the line between ideas and expressions has always been a difficult exercise, and even though it can be seen as one of the important tasks of the research, it is impossible to draw a particular line right now. However, finding such a line also lies in the basis of this research. In this regard one can think of questions that are linked to the discussion at hand, such as: which parts of musical works can be considered as ideas: is it only the melody which is protected or even building blocks that qualify for copyright protection? Can the expression be somehow quantitatively limited to the amount of notes, similarly to the *Infopaq* example presented above, and if yes, then how short a chord progression should be? These are a few of many questions worthwhile to think about when musical works are at stake.

2.7. Explaining the Issue

First of all, it should be remembered that the purpose of this thesis is not a justification of the idea-expression dichotomy as such; in fact it has been justified by many scholars before and supported by numerous theories.¹²⁰ The main purpose is rather to provide a fresh look at the concept in the light of today's developments in copyright law. It has been well stated by Michael Keyes that "somewhere along the line, the law of music, copyright forgot to check in with the world of music."¹²¹ It is thus argued that copyright law nowadays does not adequately protect the nature of musical works when such are at stake in infringement cases,¹²² but a new interpretation of the idea-expression dichotomy might help to resolve this issue.

Speaking of the concept itself, it is obvious that the situation with the dichotomy would have been much more clear, if copyright protection covered only literal expression and thereof only literal copying of such expressions (as it used to be in the beginning of the copyright law era).

¹¹⁸ Ronald Rosen, "The Basic Elements of Musical Language and Ideas," 2008, at 167.

¹¹⁹ For the case law, see e.g. *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1945).

¹²⁰ See e.g. Deming Liu, "Copyright and the pursuit of justice: a Rawlsian analysis," Newcastle Law School, UK, Legal Studies, Vol. 32 No. 4, 2012; Ting Xu, Jean Allain, "Property and Human Rights in a Global Context," Oxford, Hart Publishing, 2015, at 148 – 151.

¹²¹ J. Michael Keyes, "Musical Musings: The Case for Rethinking Music Copyright Protection," Michigan Telecommunications and Technology Law Review, Volume 10, Issue 2, 2004, at 430.

¹²² Carys J. Craig, Guillaume Laroche, "Out of Tune: Why Copyright Law Needs Music Lessons," 2014, at 44.

However, the development of media, social life and creative process in general, makes it unfair and legally wrong to protect literal copying only. As it was stated by Judge Hand in the *Nichols v Universal Pictures* case: “it is of course essential to any protection of literary property, [...] that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”¹²³ If such use was not prohibited, making a play based on a novel, for instance, where the original expressions had been changed, it would technically not constitute an infringement. It is thus, the right for adaptation that is part of copyright, and important and significant parts of plots and spines of works fall under copyright protection as well. Accordingly, it can be argued that the dichotomy is rather used to point out protected and unprotected subject matter in works, or as Goldstein said: “idea and expression should not be taken literally, but rather as metaphors for a work's unprotected and protected elements.”¹²⁴

What is genuinely important to mention is that even though the musical world has changed a lot over the last 100 years, almost everything has become more accessible, the amount of music has increased, however, the legal standards, in relation to musical works, have stayed the same as they were 100 years ago.¹²⁵ It is exactly for these reasons that the idea-expression dichotomy should be examined from a different point of view, which the alternative approach provided in the thesis serves as a possible solution to the problem. It has been argued that copyright law as it exists and functions now, does not have an appropriate understanding of the nature of musical works in the form of art.¹²⁶ Even though some scholars tend¹²⁷ to agree and argue that the nature of musical works is important, that most lawyers disregard the artistic component of a musical work as an important part of the protection and therefore, attach legal standards to certain aspects of musical works without taking into consideration its nature.¹²⁸ This, in turn, does not allow to provide the desirable level of copyright protection for musical expressions, which would take into account artistic aspects and the nature of musical expressions. Or in other words, the level of protection which will protect the nature of musical works as well as the authors.

In this respect, one of the central issues in this thesis touches upon musical works as the protected subject matter and how the idea-expression dichotomy can be applied to such. In the past 20 - 30 years, the number of copyright cases where a rightholder tries to seek for an

¹²³ *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930).

¹²⁴ Paul Goldstein, “*Goldstein on Copyright*”, Aspen Publishers Online, 2005, s 2.3.1.

¹²⁵ Michael Keyes, “*Musical Musings: The Case for Rethinking Music Copyright Protection*,” 2004, at 425.

¹²⁶ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 78.

¹²⁷ See *Id.*

¹²⁸ *Id.*, at 78

unauthorized use of his or her copyrighted material has drastically increased.¹²⁹ Lawrence Lessig, a famous copyright activist and the creator of the Creative Commons, has pointed out in this regard, that except for important subject matter constraints imposed by the law, the law used to be (before the digital changes in the world) less restrictive in relation to the use of copyrighted works by someone else.¹³⁰ Changes in the society, in face of digitalisation, brought some technical changes in the way the works are produced and communicated to the public, and consequently, the number of cases, dealing with copyright infringement has grown. It is not only, slavish copying that is questioned by the rightholders, in fact such cases do not attract much of the attention, but cases, where a musician sues another musician for an alleged copying of the music part in the new creation. While borrowing of the pre-existing material has always been a significant part of the musical culture,¹³¹ copyright law in most cases prohibits authors from unauthorized borrowing of the pre-existing works, and hence this creates a large amount of infringement cases, that might step in the way of the creative process.

One of the latest examples of the kind of cases about which this thesis is talking, is the case involving Robin Thicke and Pharrell Williams with their international hit song “Blurred Lines.” The acclaimed pop-duo was sued by the Marvin Gaye estate for copying the 70’s Gaye’s hit “Got to Give it Up.” Marvin Gaye estate claimed that “Blurred Lines” infringed the copyright in “Got to Give It Up,” while the Plaintiffs disagreed, which created an actual and immediate controversy.¹³² All in all an infringement was found by the court and the jury awarded \$4,000,000 in actual damages to the Gaye Parties as a result of the infringement by the Thicke Parties,¹³³ which were reduced by the appeal court to around \$ 3,000,000.¹³⁴ If two songs were to be compared by a lay listener, some similarities in some parts could be found; however, in general the two songs are quite different in the melody and tempo, while the similarities between the two appear in short parts of the song. Despite the fact that the court and the law leaned towards an infringement in that case, it is argued in the thesis that such or similar use of a musical expression should not always be regarded as copying of the original expressions, but rather as a justified use of pre-existing material as building blocks or ideas for future creations.

¹²⁹ For the list of the cases and chronology, see https://en.wikipedia.org/wiki/Music_plagiarism.

¹³⁰ Lawrence Lessig, “*The Future of Ideas. The Fate of the Common in a Connected World*,” Random House, New York, 2001, at 8.

¹³¹ For more see Michael Keyes, “*Musical Musings*,” 2004.

¹³² *Pharrell Williams, et al. v. Bridgeport Music, Inc., et al.*, July 14, 2015, WL 4479500 (C.D.Cal.), at 2.

¹³³ *Ibid.*

¹³⁴ *Id.*, at 52.

Unfortunately, the reality of copyright law is that the understanding of the law has been somewhat distorted and the courts, in cases such as the Marvin Gay one, “reflect a belief that the work is the absolute, despotic dominion of the copyright owner.”¹³⁵ It should not be forgotten that one of the main tasks of the idea-expression dichotomy is to keep the balance between protected and unprotected works, but in practice, it is almost impossible to define “the boundary between the mere taking of general concepts and ideas on the one hand and copying in the copyright sense on the other.”¹³⁶ Some scholars continue such a line and state that “no clear principle is or could be laid down in order to tell whether what is sought to be protected is on the ideas side of the dividing line, or on the expression side.”¹³⁷ This basically suggests that there exists uncertainty and almost no consensus around the practical application of the dichotomy. However, one of the aims of the proposed research is to show a possible new practical application of the idea-expression dichotomy that will resemble the realities of the musical expressions. It is also for this purpose not the entire spectrum of copyright law is analysed, but a particular spectrum of works, namely musical expressions.

Most of the authors are of the opinion that the idea-expression dichotomy is crucial to cases of non-literal copying,¹³⁸ however, one of the main arguments that is followed throughout the thesis is that even in cases of literal copying of some expressions, the idea-expression dichotomy can play an important role. The new approach of treating the idea-expression dichotomy, presented below, can potentially be helpful in deciding infringement cases, such as the *Marvin Gaye* case. After this chapter has provided a certain insight on the issue at hand and basic understanding of the nature of musical expression, it is now important to understand the philosophical basis for the existence of the idea-expression dichotomy.

¹³⁵ Deming Liu, “*Copyright and the pursuit of justice: a Rawlsian analysis*,” 2012, at 605.

¹³⁶ *IPC Media Ltd v News Group Newspapers Ltd*, UK, [2005] EWHC 317, at 444.

¹³⁷ Deming Liu, “*Copyright and the pursuit of justice: a Rawlsian analysis*,” 2012, at 617.

¹³⁸ Timothy A.O. Endicott, Michael J. Spence, “*Vagueness in the Scope of Copyright*,” 2005, at 660.

III. Justification Theories and the Idea-Expression Dichotomy as a Part of Copyright Law

The discussion in this chapter is mainly around philosophical justifications of the idea-expression dichotomy. It is presented in the chapter that there exist a few justification theories for copyright, namely utilitarian and personality theories of property, and some of them indeed can justify the existence of the idea-expression dichotomy. However, Lockean theory as it is argued, including his famous “enough and as good” condition, explains the philosophical existence of the idea-expression dichotomy in the best way.

A theoretical discussion of any legal matter has its importance, as a justification theory can explain why a particular right exists and whether a particular notion has a reasonable theoretical explanation for the existence. It is not a novelty to apply legal philosophies in order to justify the existence of different intellectual property rights. In this respect, copyright, as a property right, is one of the rights that cannot be fully justified from one particular theory. Thus, from different angles copyright law can be justified from incentive, labour, utilitarian,¹³⁹ or economic theories of law.¹⁴⁰ For the full picture of the philosophical conclusions around the idea-expression dichotomy it is important to at least point out several takes on copyright and the dichotomy by different philosophies. For these purposes, this part briefly presents a few major theories that are commonly used when justifying intellectual property rights, such as personality and utilitarian theories of property, and their possible justification of the idea-expression dichotomy.¹⁴¹ However, as the thesis is limited in scope and space the main argumentation is based on the natural theory laid down by John Locke in his works, which is as well presented in the later chapters.

As the concrete application of property theories in relation to the idea-expression dichotomy has not been properly presented in the literature, it is important to provide a general overview of most common property theories first, and later to elaborate on why Locke’s natural theory of property suits for justification of the dichotomy the best.

¹³⁹ See e.g. Justin Hughes, “*The Philosophy of Intellectual Property*,” 1988; Lior Zemer, “*The Making of New Copyright Lockean*,” *Harvard Journal of Law & Public Policy*, Vol. 29, 2006, No. 3,

¹⁴⁰ See e.g. William M. Landes and Richard A. Posner, “*An Economic Analysis of Copyright Law*,” *The Journal of Legal Studies*, vol. 18, issue 2, 1989.

¹⁴¹ For more discussion on the particular theories, see e.g. Justin Hughes, “*The Philosophy of Intellectual Property*,” 1988; Peter Drahos, “*A Philosophy of Intellectual Property*,” Dartmouth, 2001; Edwin C. Hettinger, “*Justifying Intellectual Property*,” *Philosophy & Public Affairs*, Vol. 18, No. 1, 1989, pp. 31 – 52.

3.1. Personality Theory and the Idea-Expression Dichotomy

As for the personality theory, there have been a big number of scholars, who studied and examined personality theory linked to property rights in depth, like Wilhelm von Humboldt, Wilhelm Hegel, Immanuel Kant, and Margaret Radin. Therefore, it is hard to single out one approach common to all personality theory scholars; however, it is rather apparent that a person lies in the centre of the theory, and that property existence is necessary for the development of his or her personality.¹⁴² As an example of personality theory, I have chosen Hegel's personhood theory,¹⁴³ developed in his *magnum opus*, *Elements of the Philosophy of Right*. His personality theory that is sometimes taken as a contrast to the labour or utilitarian theories, arguably does not fit to all the intellectual property rights, however, it has its place when justifying the rights which may represent a certain level of the creator's personality,¹⁴⁴ therefore provides a strong protection to literary and artistic works, as parts of copyright law.¹⁴⁵ It is thus commonly argued that personality theory formed the basis of French and German copyright laws.¹⁴⁶

Speaking of Hegel's theory it is important to provide the main notions of the *Philosophy of Right*. The basic claims by Hegel for justifying private property is that a property is an expression of the self¹⁴⁷ and consequently that private property rights "are crucial to the satisfaction of some fundamental personal human needs."¹⁴⁸ In the centre of Hegel's philosophy lie the concepts of personality, human will and freedom, where the person's will stands at the core of any human existence.¹⁴⁹ Personality, according to his philosophy, is "the first, still wholly abstract, determination of the absolute and infinite will,"¹⁵⁰ at the same time, property is a reflection of a person's will, and consequently, property is the embodiment of personality.¹⁵¹ Since the creator's personality and will can be traced in some of the copyrighted expression, in legal scholarship it is sometimes argued in favour of the existing

¹⁴² Tom G. Palmer, "Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects," *Harvard Journal of Law & Public Policy*, Vol. 13, No. 3, 1990, at 819, 820.

¹⁴³ Although Kant's and Hegel's conclusions are pretty similar in their nature, for the sake of the example Hegel's personhood theory is taken as the basis.

¹⁴⁴ Peter Drahos, "A Philosophy of Intellectual Property," Dartmouth, 2001, at 74, 75.

¹⁴⁵ Tom G. Palmer, "Are Patents and Copyright Morally Justified?" 1990, at 839.

¹⁴⁶ *Id.*, at 820.

¹⁴⁷ Justin Hughes, "The Philosophy of Intellectual Property," 1988, at 28.

¹⁴⁸ William Fisher, "Theories of Intellectual Property," Originally published in Stephen Munzer, ed., "New Essays in the Legal and Political Theory of Property" Cambridge University Press, 2001, pp. 168 – 199.

¹⁴⁹ Justin Hughes, "The Philosophy of Intellectual Property," 1988, at 28.

¹⁵⁰ G.W.F. Hegel, "Philosophy of Right", 1820, translated by S.W Dyde Batoche, Books Kitchener 2001, para.

41.

¹⁵¹ *Id.*, para. 50.

link between Hegel's theory and artistic material.¹⁵² One more argument towards possible application of the theory to copyright is the direct mentioning of some works of art and artistic works in the *Philosophy of Right* itself.¹⁵³ Hence, there is enough scholarship on the relationship between personality theory and copyright;¹⁵⁴ however, in relation to the idea-expression dichotomy, the application of Hegel's theory is not that univocal.

On the one hand it seems that personality theory, at least in the way it is presented by Hegel, can fit the idea-expression dichotomy. Hegel recognises the possibility that a mental product can be externalised and directly transformed into another object,¹⁵⁵ which can be interpreted in line with the dichotomy, meaning that a person is allowed to take ideas from pre-existing works and transfer them into his or her own. Hegel considers it as good, rather than a problem,¹⁵⁶ supporting the idea that people should enjoy thoughts provided in works of others. This, in a way, resembles the idea-expression dichotomy, as the notion is trying to leave something for the public to use. However, in relation to this scenario, Hegel himself points out that it is not possible for the state to accurately establish by law how far new forms through repeated expressions are allowed, or in other words, in how far "a repetition of an author's work should be called a plagiarism."¹⁵⁷ To this problem Hegel finds no solution except by suggesting that plagiarism should be a question of honour.¹⁵⁸

On the other hand, even though the creator's personality can in some expressions hardly be denied, the problem appears when personal connection is tight not only to the expressions but rather to the ideas incorporated in such expressions. Even though a work was created by a particular author who invested his or her labour, time and creativity into the creation, it still has to enjoy its own objectivity,¹⁵⁹ meaning that the audience can always return and see it in the same form. In the light of the idea-expression dichotomy this means that once a work has been communicated to the public, the ideas of a work should stay there, free to use for everyone. However, according to Hegel's personality theory it seems that such ideas can still be claimed by the author, as if the author has personal connections to the ideas, such will technically be regarded his or her property. While the basic idea behind the dichotomy and copyright law in general is that the public (audience) should be able to objectively

¹⁵² Peter Drahos, "A Philosophy of Intellectual Property," Dartmouth, 2001, at 79.

¹⁵³ E.g. see, G.W.F. Hegel, "Philosophy of Right", 2001, para. 68, 69.

¹⁵⁴ E.g., Tom G. Palmer, "Are Patents and Copyright Morally Justified?" 1990, pp. 817 – 865; William Fisher, "Theories of Intellectual Property", 2001; Justin Hughes, "The Philosophy of Intellectual Property," 1988, at 73.

¹⁵⁵ G.W.F. Hegel, "Philosophy of Right", 2001, para. 68.

¹⁵⁶ Peter Drahos, "A Philosophy of Intellectual Property," 2001, at 82.

¹⁵⁷ G.W.F. Hegel, "Philosophy of Right", 2001, para. 69.

¹⁵⁸ *Ibid.*

¹⁵⁹ Tom G. Palmer, "Are Patents and Copyright Morally Justified?" 1990, at 844.

communicate with free ideas, to be able to mix it with the own experience, knowledge, thoughts, etc., and not be restrained by personal subjectivity of the artist.¹⁶⁰ In this regard Roman Ingarden further argues that if a work is associated with the subjective experience of the author, then “it would be impossible to have a direct intercourse with the work or to know it.”¹⁶¹

It also would not be entirely correct to argue that the author’s personality always lies in the core of a creative expression.¹⁶² Consequently, one of the potential problems with the idea-expression dichotomy and the personality theory, is that one (in this case the audience) does not always refer to ideas found in protected works as coming from the artist’s perspective, but may refer to some ideas from the perspective of the object (books, movies, songs, etc.), that the audience give to it. In these cases, as it was also previously stated, the ideas are not necessarily objectively the author’s thoughts, but rather appear as the audience’s own conclusions and understandings of what is incorporated in the expression. As it is well said, “concrete experience of the artist cannot be identical to the concrete experience of the audience.”¹⁶³ As it is not defined (and cannot be defined), whether the idea-expression dichotomy talks only about the ideas from the creator’s point of view, uncertainties concerning the relationship between the personality theory and the dichotomy cannot be denied. This is why it is argued that Hegel’s theory cannot fully and objectively fit to the idea-expression dichotomy and is therefore not the best property theory to be applied for the purposes of this research.¹⁶⁴

3.2. Utilitarian Theory and the Idea-Expression Dichotomy

The next theory, which is a commonly remembered one when it comes to justification of intellectual property rights, is the utilitarian theory. One of the basic concepts of a utilitarian theory is the ideal of “the greatest good of the greatest number,”¹⁶⁵ and the task of those who are trying to apply the theory to intellectual property is to translate this notion to the realities

¹⁶⁰ Similar thoughts to this one could be found in Tom G. Palmer, “*Are Patents and Copyright Morally Justified?*,” 1990, pp. 843 – 849.

¹⁶¹ Roman Ingarden, “*Literary Work of Art: An Investigation on the Borderlines of Ontology, Logic, and Theory of Literature*,” Northwestern University Press, 1974, at 13.

¹⁶² Hughes, for instance, argues that different artistic materials contain different level of the author’s personality. In this relation he compares artistic creation with software or maps. See, Justin Hughes, “*The Philosophy of Intellectual Property*”, 1988, pp. 34 – 37.

¹⁶³ Tom G. Palmer, “*Are Patents and Copyright Morally Justified?*” 1990, at 845.

¹⁶⁴ There is potential for a more deep and substantive analysis of the relationship between personality theory and the idea-expression dichotomy, however, it is out of the scope of this Thesis, as the main focus is devote to the Locke’s theory, which is separately presented later in the Thesis.

¹⁶⁵ William Fisher, “*Theories of Intellectual Property*,” 2001, at 177.

of the respective rights. It is sometimes argued that the utilitarian based approach is the strongest and the most widely applied in terms of justification of intellectual property rights.¹⁶⁶ At the same time, as it is shown below, the incentive based theory provides a good justification for copyright law in general, rather than for the idea-expression dichotomy as a separate.

What utilitarian theory is essentially trying to say is that the promotion of valuable intellectual creations requires from intellectual property to grant property rights in those works, as without copyright protection, adequate incentives for the creation of which would not exist or would be less strong.¹⁶⁷ Utilitarian theory is usually built around incentives. It basically argues, that without an incentive, which in the case of copyright is exclusive rights awarded by the law, the creator's would not invest time and labour in creating new material, fearing that his or her creations might be copied by the third parties.¹⁶⁸

In other words, utilitarian theories, as it is argued, are more concerned about maximizing benefits to society by providing proper incentive to creators,¹⁶⁹ while the incentive for creators is a strong copyright protection. This approach one could find similar to the idea-expression dichotomy. As was stated before, the idea-expression dichotomy can also be used for identification of protected and unprotected subject matters, and it seems that the utilitarian approach is trying to achieve the same end. What utilitarian theory is saying is that if people could simply copy from books, music, movies, etc., there would be no incentive for creators to spend time and effort on creating new material, therefore, copyright protection exists.¹⁷⁰ The dichotomy, is saying almost the same, providing that expressions should be protected under copyright law, in order to avoid destructiveness of the society and at the same time promote creative process, the dichotomy provides that some ideas should be left free for public to use. However, such an approach is a bit paradoxical, as it forgets to talk about something similar to 'ideas' as it stands in the dichotomy: it establishes a right to restrict the current availability and use of copyrighted products for the purpose of increasing the production and thus future availability and use of new intellectual products."¹⁷¹

¹⁶⁶ Edwin C. Hettinger, "Justifying Intellectual Property," 1989, at 47.

¹⁶⁷ *Id.*, at 47 - 48.

¹⁶⁸ Jeanne C. Fromer, "Expressive Incentives in Intellectual Property Law," *Virginia Law Review*, Vol. 98, 2012, at 1751.

¹⁶⁹ *Id.* at 1762.

¹⁷⁰ Edwin C. Hettinger, "Justifying Intellectual Property," 1989, at 48.

¹⁷¹ *Ibid.*

In this regard, the problematic issue in relation to the theory is not whether copyright provides incentives for the production of original works of authorship, as it certainly does.¹⁷² Rather, the question is whether copyright increases “*the availability and use of intellectual products more than they restrict this availability and use.*”¹⁷³ To date, no theorist has provided a clear answer to this question,¹⁷⁴ however, if the law does restrict availability and use of creative material, utilitarian theory seems to have no solution, similar to the idea-expression dichotomy, to suggest.

In relation to the economic side of a utilitarian theory, Landes and Posner put in the centre of their theory the ability of the creator to recoup their “cost of expression” (cost of creating a work, cost of time), which is usually compared with “cost of production.”¹⁷⁵ It seems that nowadays, the law works exactly as Landes and Posner wanted it to work, providing the creators possibility to recoup their cost of expression. However, similar to the argument presented above, it is arguable that the public have enough space to manoeuvre with the use of creative material. All in all, even if applied to justify the idea-expression dichotomy, it seems a valid conclusion to say that the utilitarian approach focuses more on expressions rather than ideas inside the dichotomy, which is not exactly what the current research is talking about. Moreover, in principle, copyright law, according to a utilitarian theory, should strike a balance between providing respective incentives for the creators, at the same time maintaining reasonable access to such works by public.¹⁷⁶ However, in relation to the dichotomy, providing access or availability of works, does not necessarily imply that some products of creations, namely ideas, would be free to use.

Lastly, the utilitarian approach envisages a serious economic discussion of the matter,¹⁷⁷ which is also beyond the scope of this thesis. In order to provide a proper research on the topic of justification of the idea-expression dichotomy from the utilitarian point of view, substantial empirical evidence from musical industry experience is needed. However, from a theoretical point of view and according to the abovementioned conclusions, I lean towards the position that utilitarian approach is not the best theory to justify and explain the idea-expression dichotomy.

¹⁷² *Id.*, at 49.

¹⁷³ *Ibid.*

¹⁷⁴ William Fisher, “*Theories of Intellectual Property*,” 2001, at 184.

¹⁷⁵ See, Landes and Posner, “*An Economic Analysis of Copyright Law*,” 1989, pp. 325-363.

¹⁷⁶ Guido Westkamp, “*Emerging Issues in Intellectual Property: Trade, Technology and Market Freedom : Essays in Honour of Herchel Smith*,” Edward Elgar Publishing, 2007, from an essay by Noam Chmetov, “*Circumventing the idea/expression dichotomy: The use of copyright, technology and contract to deny access to ideas*,” at 95.

¹⁷⁷ For more about intellectual property and utilitarian theory, see, e.g. Tom G. Palmer, “*Intellectual Property: A Non-Posnerian Law and Economics Approach*,” *Hamline Law Review*, vol. 12, 1989, pp. 261- 304.

3.3. Application of Locke's Philosophy on Copyright Law

After the brief analysis of the two property theories in relation to the idea-expression dichotomy, it is now important for the research to see how Locke's natural theory of property can be applied to the idea-expression dichotomy. When one is examining the scope of copyright law, balance of the rights appears to be one of the main issues for such a discussion. It is therefore important to pay attention to property theories laid down in Locke's works, as no-harm and no-waste provisions, which are in a way balancing tests, are in the basis of his philosophy.¹⁷⁸ It is especially important for the discussion around the idea-expression dichotomy, as this concept combines in itself proprietary interest in protected expression, at the same time, providing that some ideas are left free for public.

In this regard, it is firstly important to explain the application of his philosophy to copyright in general, before proceeding to examining the dichotomy itself. Even though the notions and principles that Locke concluded are around 300 years old, many modern scholars justify copyright law through the prism of Locke's natural right philosophy of property.¹⁷⁹ Most of Locke's philosophical conclusions could be found in his famous *Second Treatise of Government*¹⁸⁰ and his *An Essay Concerning Human Understanding*.¹⁸¹ It is rather obvious that Locke did not have intellectual property in his mind when he made his arguments, as most of his conclusions apply to physical objects rather than intangible and abstract ones.¹⁸² However, despite the fact that Locke did not directly address intangible property in his works it has been argued by some scholars that he implied it in the texts.¹⁸³ Such tendency, as it is argued, has emerged in the scholarship because of two aspects of Locke's theory that are topical for intellectual property in general and copyright in particular, namely the shift for strong property rights and the importance of the public domain as a balancing tool in copyright law.¹⁸⁴ Both of these conclusions can be apparent in the development of the modern copyright law.¹⁸⁵

¹⁷⁸ Ting Xu, Jean Allain, "Property and Human Rights in a Global Context," 2015, at 145.

¹⁷⁹ Justin Hughes, "The Philosophy of Intellectual Property," 1988; Lior Zemer, "The Making of New Copyright Lockean," 2006, at 893; Ting Xu, Jean Allain, "Property and Human Rights in a Global Context," 2015, at 142 – 160.

¹⁸⁰ See John Locke, "Second Treatise of Government," in Two Treatises on Government, 1690.

¹⁸¹ See John Locke "An Essay Concerning Human Understanding," The Pennsylvania State University, 1999.

¹⁸² Peter Drahos, "A Philosophy of Intellectual Property," 1996, at 47.

¹⁸³ See e.g., Edwin C. Hettinger, "Justifying Intellectual Property," 1989, pp. 31 – 52; Benjamin Damstedt, "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine," The Yale Law Journal, Vol. 112, No. 5, 2003, pp. 1179-1221; Lior Zemer, "The Making of New Copyright Lockean," 2006, pp. 892 – 947; Ting Xu, Jean Allain, "Property and Human Rights in a Global Context," 2015, at 352.

¹⁸⁴ Benjamin Damstedt, "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine," 2003, at 1180.

¹⁸⁵ As for the shift for the strong copyright protection, can be, for example, seen on the example of international instruments, such as TRIPS Agreement, and national legislations that extended the term of copyright protection

Discussing the relationship between Locke’s theory and copyright, supporters of the compatibility approach mention a few arguments in favour of such a conclusion. Firstly, Lior Zemer stated that Locke presents the importance for the copyright system as he balances private rights against public interest.¹⁸⁶ In particular, the public interest can be derived from his famous ‘enough and as good’ condition,¹⁸⁷ which requires to leave for the others (in public) as much and as enough after appropriation. At the same time, he stated that a property is appropriated by mixing a person’s labour with a thing.¹⁸⁸ These two notions can be found in the essence of copyright law as well. Copyright law, theoretically, aims to protect creative effort (labour) of the author and meanwhile makes sure that the endeavours are available to the public. Secondly, although it is often claimed that Chapter V of the *Second Treatise* addresses tangible property, some authors argue that it applies to intellectual property and copyright as well.¹⁸⁹ As was also stated by Zemer, general notions on property in the *Second Treatise* should be “read as general terms regulating ownership and control of different kinds of things that are not necessarily confined to the physical realm,”¹⁹⁰ which consequently would include copyright in the scope of the theory. Thirdly, Locke’s theory of knowledge in his *Essay Concerning Human Understanding* has a social constructionist dimension,¹⁹¹ and as copyright law can be seen as the one constructed in the social dimension as well, the argument that Locke’s philosophy has an implication on theoretical justification of copyright law has some grounds. Furthermore, it is sometimes even argued that Locke explicitly recognised intellectual property as part of his philosophy in the end of Chapter V of the *Second Treatise*, by referring to ‘arts and inventions.’¹⁹² John Locke stated that “man had in himself the great foundation for ownership—namely his being the master of himself and owner of his own person and of the actions or work done by it.”¹⁹³ According to the arguments presented above, it would be short-sighted to limit Locke’s philosophy to the tangible property only, as a person’s actions or work can result in intellectual creations, including copyright protected works.

(namely, life of the author + 70 years). Concerning the importance of the balancing of the rights, in the past 10 years there has been increasing scholarship on the relationship between copyright and human rights, where human rights serve as a tool for such balance. See, e.g. Paul Torremans, “*Copyright and Human Rights. Freedom of Expression – Intellectual Property - Privacy*,” Kluwer Law International, 2004, at 181.

¹⁸⁶ Lior Zemer, “*The Making of New Copyright Lockean*,” 2006, at 897.

¹⁸⁷ John Locke, “*Second Treatise of Government*,” 1690, para. 33.

¹⁸⁸ *Id.*, para. 27.

¹⁸⁹ Ting Xu, Jean Allain, “*Property and Human Rights in a Global Context*,” 2015, at 146, 147; Lior Zemer, “*The Making of New Copyright Lockean*,” 2006, at 897.

¹⁹⁰ Lior Zemer, “*The Making of New Copyright Lockean*,” 2006, at 908.

¹⁹¹ *Id.*, at 897.

¹⁹² Adam Mossoff, “*The Use and Abuse of IP at the Birth of the Administrative State*,” University of Pennsylvania Law Review, Vol. 157, 2001, at 2048.

¹⁹³ John Locke, “*Second Treatise of Government*,” 1690, para. 44.

3.3.1. Locke's Philosophy and the Idea-Expression Dichotomy

For the discussion at hand it is *An Essay Concerning Human Understanding* which is of importance, however, before a substantial discussion of this work is conducted, it is worthwhile to fully understand the relation of Locke's theory to the idea-expression dichotomy. Parallels between the idea-expression dichotomy and Locke's philosophy have been drawn before;¹⁹⁴ however, the previous research has not provided an extensive analysis of the relationship between the dichotomy and Locke's theory. One of the common assumptions to make is to suggest that a certain philosophical theory should be used as a justification rather than explanation for a certain doctrine.¹⁹⁵ In this respect I agree and argue that Locke's theory should rather be used as an explanation for the existence of the idea-expression dichotomy, or at best as both. Thus the theory that is applied (which in this case is Locke's theory) may help to understand some issue behind the concept and possibly help with its application. In this regard, this chapter is mainly dealing with the first, justifying and explaining the existence of the idea-expression dichotomy from a Lockean perspective.

According to Locke, "man has a property in his own person,"¹⁹⁶ which logically means that a person has a property in his or her own thoughts, actions as well as intellectual creations (protected expressions).¹⁹⁷ Referring to one of the main notions developed by Locke, a person is entitled to the products of their labour, if "there is enough and as good, left in common for others,"¹⁹⁸ which is also referred to as the 'non-waste condition.' This notion basically means that a person after applying the labour should leave after at least the same amount of things of the same quality of that, which had existed before. The idea-expression dichotomy, essentially, finds its basis in a similar conclusion. The main idea behind this copyright doctrine, except dividing protected from unprotected subject matter, is to make sure that important ideas are unprotected, so the public can enjoy and benefit from such. In the words of the Locke's 'as good and as enough' proviso, it means that an author must leave enough and as good of his or her ideas in the common. The proviso, once applied in the copyright realm would prohibit a creator from owning ideas because such private ownership could potentially harm later creators, as there are supposed to be as good and as enough materials in the commons.¹⁹⁹

¹⁹⁴ See, e.g. Ting Xu, Jean Allain, "Property and Human Rights in a Global Context," 2015, at 148.

¹⁹⁵ Peter Drahos, "A Philosophy of Intellectual Property," Dartmouth, 2001, at 80.

¹⁹⁶ John Locke, "Second Treatise of Government," 1690, para. 27.

¹⁹⁷ Ting Xu, Jean Allain, "Property and Human Rights in a Global Context," 2015, at 150.

¹⁹⁸ John Locke, "Second Treatise of Government," 1690, par. 33.

¹⁹⁹ Wendy Gordon, "A Property Right in Self-Expression," 1993, at 1581.

If to situate the idea-expression dichotomy in the realm of Locke's morals, then in Locke's words, the commons of copyright will be the public domain where unprotected ideas are situated, while property will be those protected expressions that appear through the author's labour.²⁰⁰ As it has been stated above, the very first way of appropriation of something according to Locke, is by mixing someone's labour with existing commons (which also can be regarded as 'ideas'). In the copyright sense that means exactly what the idea-expression dichotomy implies - a person can mix his or her creative labour with the ideas that are in public and create new works, which will consequently become his or her own possessions.

Contrary to the abovementioned utilitarian and personality theories, which both do not entirely fit the idea-expression dichotomy, Locke's natural philosophy, provided that the 'as good and as enough' proviso lies in the centre of the philosophy, suits as a theoretical justification of the existence and importance of the idea-expression dichotomy. It perfectly fits and explains the idea of leaving some materials in public (unprotected ideas), while it at the same time supports providing exclusive rights to the original expressions. For this reason I argue that Lock's natural theory explains the dichotomy in the best way. The discussion presented below goes around the idea-expression dichotomy in the musical realms. While it also provides with theoretical explanations of how it should be adjusted to such realms taking into consideration some of the arguments from Lockean perspective.

²⁰⁰ Ting Xu, Jean Allain, "*Property and Human Rights in a Global Context*," 2015, at 146.

IV. Alternative Approach to the Idea-Expression Dichotomy in Musical Works

It is quite commonly argued that the idea-expression dichotomy is a static or contextual concept, which usually does not help in cases of infringements, while judges almost never directly refer to the dichotomy in deciding the case.²⁰¹ The existing approach in relation to the dichotomy does not provide anything substantially helpful for infringement cases, as it basically states that expressions should be protected if they are original, in the meaning of copyright law, however, ideas that are incorporated in such expressions should stay in public. As one of the answers to the research question of ‘how’ the dichotomy can fit to the music realities, I suggest that the approach to the dichotomy could take a new turn and be seen from two different angles, meaning that it can exist as a double-sided principle of copyright law. On the one hand, it can be treated as one of the cornerstone principles of copyright law, on which legal understanding of copyright law rests, meaning that ‘ideas are free as air’ and that copyright law should protect expressions only (as it basically exists nowadays). On the other hand, the dichotomy can be seen as a guiding principle of law, which could be used in infringement cases when musical works are at stake, to test in which cases musical expressions are wide enough or common enough to be considered as ideas. It is the later part, which is the main focus for the thesis, and provides with an answer of how the dichotomy may fit the realities. As it was presented in Part II of the thesis²⁰² it seems that the law does not resemble on the nature of musical creations, and in order to fit the musical process, the boundaries, of the idea-expression dichotomy in particular, should be moved. However, in order to say how it can be changed, it is important to understand why it is important, and why the current approach should be changed. In this respect, the analysis presented in the present chapter is meant to provide theoretical and philosophical reasons why the boundaries of the idea-expression dichotomy should be moved.

This chapter will mainly focus on the question of ‘why’ the dichotomy should be used as a guiding test in copyright infringement cases, however, the arguments for the question ‘how’ are formed along the lines. In this regard, the guiding principle will be looked at not as a principle that limits the copyright of the rightholder, but rather as a principle that justifies creativeness of others. It is argued in this chapter, that during the creative process, some expressions can be used as “ideas” for creating new material. In particular, it is to argue that when the idea-expression dichotomy is to be applied as a guiding test, the judges will be able

²⁰¹ See, e.g. Robert Yale Libott, “*Round the Prickly Pear: The Idea-Expression Fallacy*,” 1976, at 736.

²⁰² For more, see chapters 2.5, 2.6 of this Thesis.

to examine whether and to which extent a particular musical expression was used as an idea, or “inspiration” for a future work. Based on such an analysis, it is to conclude that even if the expression was copied, it does not automatically provide grounds for finding an infringement, as in cases when musical expressions were used as ‘ideas’ for a new work, the use might be justified. In order to provide the reasons, why such an approach is appropriate, Locke’s philosophy comes in hand. One possible approach to the problems is not to see whether some particular expression is an idea or not, but whether a pre-existing expression is used as an idea for the new creation.

4.1. Application of Locke’s Philosophy to the Idea-Expression Dichotomy in Relation to Musical Works

In the following part the discussion shifts to the philosophical realm. It is shown why the nature of the musical works matters in infringement cases, and argued why Locke’s philosophical conclusions can be appropriate for the alternative approach to the idea-expression dichotomy.

4.1.1. Extension of the Term ‘Ideas’ in the Idea-Expression Dichotomy under the Lockean Philosophy

According to what has already been mentioned, one of the main theoretical points behind the research is to see, if an interpretation of the idea-expression dichotomy through a philosophical prism could broaden the creative public domain. One way of achieving this, is to broaden the scope of the term ‘idea’ in the idea-expression dichotomy. As it has been established in the previous part, Locke’s theories are applicable to copyright law in many ways and to the idea-expression dichotomy in particular. However, a concrete application of the dichotomy (to musical works) has not been done before.

As the link between the idea-expression dichotomy and Locke’s philosophy is rather apparent than not, his moral conclusions may help with the interpretation of the dichotomy in relation to musical works. In this regard, the Book II of *An Essay Concerning Human Understanding* is of particular importance, which is called “Of Ideas” and it is here, where Locke’s main thoughts on the topic of ideas could be found. As John Lock said, there are two sources of ideas: sensation and our own operation of minds.²⁰³ This statement can be helpful in understanding how a creative process goes. Interpreting this provision in the light of ideas and expressions, sensation could be understood as something where artists get their ideas from, including the pre-existing expressions; operation of the minds is how people interpret or use

²⁰³ John Locke “*An Essay Concerning Human Understanding*,” Book II, Ch. I, para. 2.

such materials. In his *Essay*, Locke provides two fountains where people get the knowledge and the thoughts from:

*“Our observation employed either, about external sensible objects, or about the internal operations of our minds perceived and reflected on by ourselves, is that which supplies our understandings with all the materials of thinking.”*²⁰⁴

The object of sensation serves as the first source of ideas, by conveying into the mind several distinct perceptions of things, like colours, shapes, tastes, and all other sensible qualities.²⁰⁵ It is the second fountain, namely the operations of the minds, which is of a particular interest for the present discussion. This notion covers understanding of ideas and operations of minds within us.²⁰⁶ Locke argues that people’s soul and the mind reflects on ideas that it already employs inside.²⁰⁷ Accordingly, in Locke’s terms, all the expressions are built upon the pre-existing experience or reflection. Among other things, such experience can obviously be gained through other expressions. Therefore, the scenario where a pre-existing expression has been incorporated as part of the author’s operation of the mind, which later resulted in the creation of a new work, could theoretically, fit into the second source of ideas. However, if such expressions would be treated as ideas, in the meaning of operations of the mind, then the scope of the term ‘idea’ in the idea-expression dichotomy should be somewhat extended.

4.1.2. Creator of Musical Works vs ‘Creative Genius’

Some copyright scholars argued that: “intellectual property is, after all, the only absolute possession in the world. The man who brings out of *nothingness* some child of his thought has rights therein which cannot belong to any other sort of property.”²⁰⁸ I disagree with such a statement and argue that it is conventionally wrong to say that something was created out of *nothingness*, as almost nothing in this world has been created from scratch. It is quite common that the creators of different intellectual properties base their inventions, novels, paintings, trademarks, etc., on pre-existing material. It is thus, John Locke stated that the sensations and operation of the minds “are the fountains of knowledge, from whence all the ideas we have, or can naturally have, do spring,”²⁰⁹ and the only original source for our ideas.²¹⁰ During the process of creation of a work, the author obviously relies on his or her past experience and pre-existing works can definitely be part of such experience. It also will be wrong to

²⁰⁴ *Ibid.*

²⁰⁵ *Id.*, para. 3.

²⁰⁶ *Id.*, para. 4.

²⁰⁷ *Ibid.*

²⁰⁸ Nathaniel S. Shaler, Harvard geologist, in 1878, quoted by Solberg, *Copyright Reform* (1939) 14 Note Dame Lawyer 343, 358 (copied from Zechariah Chafee, Jr., “*Reflections on the Law of Copyright: I*,” 1945, at 507).

²⁰⁹ John Locke “*An Essay Concerning Human Understanding*,” 1999, Book II, Ch. I, para. 2.

²¹⁰ *Id.*, para. 3.

approach the notion of an author from a ‘romantic’ point of view. Some authors believe that there are in society “those peculiar individuals who are awarded with ‘creative genius’ and who are, by virtue of unusual level of skill, spiritual insight, drive and so forth, capable of producing works that have enormous complexity, emotional depth, in other words protected expression, and it is therefore that they have to be protected.”²¹¹ It is in the same way wrong to conclude that a talent is awarded to an author by virtue of a lottery. The idea of the lottery was advocated by Rawls in his works, where he made a parallel with a lottery, claiming that some people are in the unequal position to another, as they are awarded with special skills and talents.²¹² Such conclusions do not have any objective grounds, while copyright law in itself attacks it as well, by providing a low threshold for the originality requirement, as an extent of originality prescribed in copyright law does not have to meet standards of a ‘genius.’

In the musical world, the situation is probably even more evident, as it is usually argued by musicologists, that music almost always “originated from something or somewhere else.”²¹³ Some particular thoughts could be taken from other musical works, or some established raw material sequences (that are common for a genre) can be borrowed. Therefore, it is rather hard to say that a certain musical piece would be completely original. Moreover, it has been argued that before copyright law existed, many famous classical composers, like Bach or Mozart, used to borrow musical expressions from each other.²¹⁴ Therefore, it would have been wrong to claim that there existed such “creative geniuses” who create something from nothing, as even real geniuses based their works on something that had existed before.

In this regard, it is very important to consider the pre-existing side while examining a musical work. Most of people’s creative expressions come from the operation of minds, as an author usually processes his or her pre-existing experience during the process of creation. It is now another question, if a person is allowed to use pre-existing expressions for the later creations.

As it is said in Locke’s *Second Treatise*:

*“God, who has given the world to men in common, has also given them reason to make use of it to the best advantage of life and convenience. The earth and everything in it is given to men for the support and comfort of their existence.”*²¹⁵

²¹¹ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 59.

²¹² See more, Deming Liu, “*Copyright and the pursuit of justice: a Rawlsian analysis*,” 2012.

²¹³ Emma Steel, “*Original Sin: reconciling Originality in Copyright with Music*,” 2015, at 66.

²¹⁴ Ronald Rosen, “*The Basic Elements of Musical Language and Ideas*,” 2008, pp. 159 – 162; See, e.g., *Id* at 161: “*Vivaldi in his infringement action against J.S. Bach would have been successful because Bach lifted virtually the entire contents of Vivaldi’s Concerto For Four Violins— note for note, rhythmically and essentially, harmonically the same, and used it in his Concerto for Four Keyboards.*”

²¹⁵ John Locke, “*Second Treatise of Government*”, 1690, para. 26.

While Locke talks here about commons given by God, and such commons cannot really be paralleled with copyrighted works, Locke emphasises that it is in the essence of the nature to take the best advantage of life, and thus of the pre-existing ideas. Locke's conclusion also goes in hand with the main aim of copyright law, namely to promote and disseminate creative material. However, what it more importantly suggests is that borrowing, in general, is in the nature of people's lives and it is a necessary prerequisite of it.

4.1.3. Creative Process and Building Blocks

As it is established that the concept of 'creative genius' is wrong it is vitally important to examine the creative process behind a musical work. Coming back to the main argument that the dichotomy should also be seen as a guiding principle, the conclusion in such a case will be that once a particular expression is used as an 'idea,' the use of it might be justified. It is through the prism of building blocks that such an approach is possible to look at.

It can be concluded that the creative process behind a musical work in the beginning of the century and nowadays does not differ very much, however, the rightsholders' perception from the legal point of view has changed.²¹⁶ As it has been mentioned before, Bach and Mozart plagiarised (in the meaning of modern copyright) and so did many blues or jazz musicians,²¹⁷ while nowadays such a use would have caused a lawsuit. The main difference, as it is argued is that in one case the expression, which is at stake, was in the public domain, while in the other case (nowadays) it is not.²¹⁸

It has been mentioned already in this thesis that musical works have their technicalities that are important in the copyright context. As referred to in literature, 'building blocks' is something that the lawyers would name as ideas in relation to musical works.²¹⁹ Such building blocks might contain harmonies, melodies, beats, rhythms, methods of instrumental arrangements, etc.²²⁰ Building blocks are generally regarded as unprotected subject matter, as they do not meet the standards of originality or are limited in availability.²²¹ Most of the progressions have to comply with harmony rules, and therefore, many harmonic structures in music are done in the similar way, such as, for instance, a 12-bar harmonic blues progression

²¹⁶ Luke T. McDonagh, "Is the Creative Use of Musical Works Without a Licence Acceptable?" 2012, at 402 – 407.

²¹⁷ *Id.*, at 404 – 405.

²¹⁸ *Id.*, at 407.

²¹⁹ Andreas Rahmatian, "Concepts of Music and Copyright," 2015, at 91-98.

²²⁰ Andreas Rahmatian, "Concepts of Music and Copyright," 2015, at 111.

²²¹ See e.g. Andreas Rahmatian, "Music and creativity as perceived by copyright law," 2005, at 272, 273; Emma Steel, "Original Sin: reconciling Originality in Copyright with Music," 2015, at 71.

is regarded as a building block and does not attain copyright protection.²²² Unlike literary works, in the musical world the artists are faced with more limits during their creative process, namely the rules of composition. If a novelist is strangled by grammar rules only (which can still be reduced in some cases), in the musical world the amount of such rules is way bigger. Basically, an author cannot create a song by just combining random chords, and even if he or she did, such would not sound melodic.²²³ Therefore, the number of musical patterns available to an artist, if one is talking about construction of melodies, is quite limited. Considering this, it is an inevitable reality of music that some parts of two songs could sound similar or even the same: the same way as certain consequences of words can repeat, was certain music phrases can be similar. It is thus that each of these similar works has to be examined separately.

In many cases it is rather hard to decide whether there is a copying of a protected expression present, or whether it is only building blocks that have been borrowed. Most of the scholarship in relation to these issues around infringements in musical industry look at originality and try to justify a use of pre-existing material from the originality point of view; however, this root of argumentation is outside of the scope in the thesis. It should be kept in mind that it is the sound, which is technically supposed to be protected by copyright law, not the scores.²²⁴ No matter, if that is one of the three raw materials (rhythm, harmony, melody) or building blocks, or combination of everything, it is the sound that is produced that will be protected under copyright law.

In this regard, the suggested approach proposes to treat some musical expressions as building blocks as, if such expressions were already part of the operation of mind, in the Lockean sense. From this point of view, it could be held that if some expressions, even if provided that they are original, could be regarded as building blocks for the new song, and that the use of such can possibly be justified based on Locke's philosophy. If borrowing of pre-existing material results in using the sounds as ideas for the new creation, such a use should not be punished by copyright law from Locke's perspective. The reasoning why this way of interpretation is justified is presented in the next chapter.

²²² *Ibid.*

²²³ See, e.g., *Id.*, at 68, 69.

²²⁴ Andreas Rahmatian, "Concepts of Music and Copyright," 2015, at 111.

4.1.4. Alternative Approach to the Idea-Expression Dichotomy and Musical Works through the Locke's Perspective

In relation to musical expressions, one possible argument in the light of the Lockean notions subsists in the assumption that if an expression went through the prism of the creator's mind, and its operation, such an expression could be considered as being an idea. According to such interpretation, the use of such expression should be allowed, in order to realise the author's own artistic ideas.

As has been stated above, when one is talking about the creative process, it is very important to remember that we get a certain amount of our ideas somewhere else and that in the case of copyrighted works, such a source would usually constitute other works, in the context of musical works, pre-existing musical compositions. According to Locke, such ideas can be in form of sensation or operation of minds. John Locke mentioned that our minds observe a great variety of modifications and from thence receives distinct ideas.²²⁵ A sensation as Locke puts it "is the actual entrance of any idea into the understanding by the senses."²²⁶ Using a pre-existing idea could be seen in many cases not just as a slavish copying, but it might also constitute a part of the creative thinking of an artist. Any idea, after entering the persons mind, can stay there forever, as part of thoughts, and at some point, such an idea may recur again without the operation of the like object on the external sensory,²²⁷ which is in Locke's words, is a part of remembrance. It is remembrance which can be apparent when a person is using somebody else's idea in his or her own creation, and the same can be applied to an expression. If to compare musical and literary works, it could be logically argued that unlike literary works where pre-existing ideas have more of an abstract meaning, like settings, general ideas behind the story, musician's ideas will always be limited to particular expression, e.g. a melody, certain musical progression, etc. According to this thinking, it can be argued that if an expression was operated in the creator's mind, in the Lockean sense, it sometimes becomes an idea, and therefore, the author is justified to use such an expression.

Yet, such an argument can be a subject to certain criticism. Such an approach basically allows almost any type of transformative use of the pre-existing works, including user's generated content, sampling, etc. The main drawback of the abovementioned assumption is that it can be applied too broadly, and in the end copyright law as such might lose its ability to protect an author's original expressions, as secondary users would always claim that they have used an expression as operations of their mind. However, for balancing purposes such an assumption

²²⁵ John Locke "An Essay Concerning Human Understanding," 1999, Book II, Ch. XIX, para 1.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

should be analysed in the light of another important Lockean notion, which is Locke's appropriation of property theory, which prescribes that people can appropriate things by "joining to it something that is his own; and in that way he makes it his property."²²⁸ This balancing, exercise, nonetheless, can make the alternative approach more pertinent.

When looked at the idea-expression dichotomy from the angle of Lockean notions laid down in the *Second Treatise* and the *Essay on Understanding* it can be argued that when a musical work is at stake, the dichotomy can have more meaning in relation to musical works. Since the line between an idea and an expression in musical works is blurred or unclear in many cases, from a philosophical point of view, when a certain part of a musical work (which can be an original expression) has operated in the author's mind, and later mixed with his or her own labour, a particular expression should be considered as an unprotected idea. It is almost impossible to draw one line of certainty for all musical works; therefore the dichotomy has to be applied in each particular case taking into consideration all the technical and musical points. The social dimension in this regard, is one more valid argument why this Lockean approach should at least be considered.

Apart from technical rules of composition, it is reasonably argued that cultural and social rules may directly affect the creative process²²⁹ and also indirectly the idea-expression dichotomy. In other words, there are also certain social rules for musical expressions. For instance, a person who wants to compose a lullaby will not use dissonance chords, loud or fast rhythms, but will rather compose a slow, mellow melody.²³⁰ Another example is a bit broader in copyright sense. Some of the music genres socially allow borrowing from the pre-existing material, in fact some of the whole genres are built on such an assumption. In hip-hop, jazz, folk and blues, it has been a social rule, to use pre-existing material in a way for the new creation.²³¹ In jazz and blues it is improvisation or a new performance of a pre-existing expression or a standard, in hip-hop it is sampling. Probably the most problematic, due to its popularity and public importance, is sampling in hip-hop, probably due to the popularity of the genre and the monetary aspect in the industry.²³² According to such philosophical analysis presented above, most of the sampling would be allowed, as the secondary author, in theory, does not slavishly copy pre-existing work, but rather processes it through his or her mind, mixing it with the own creative ideas which in the end lead to a new musical work. However,

²²⁸ John Locke, "*Second Treatise of Government*", 1690, para 27.

²²⁹ Emma Steel, "*Original Sin: reconciling Originality in Copyright with Music*," 2015, at 70.

²³⁰ Emma Steel, "*Original Sin: reconciling Originality in Copyright with Music*," 2015, at 70.

²³¹ See, Luke T. McDonagh, "*Is the Creative Use of Musical Works Without a Licence Acceptable?*" 2012, pp. 403 – 408.

²³² The question of sampling will also be briefly addressed in the later chapters.

as soon as pre-existing expression has passed through the operation of mind and as soon as the second creator added something creatively new or changed the context, the use of the pre-existing musical expression would be justified under Locke's theory.

Furthermore, if one again made a parallel between musical components (raw materials, building blocks) and words, then the context might be one more obstacle that has to be taken into consideration. As a linguist stated, "the meaning of the word does not exist apart from its context."²³³ Arguably, if the secondary use of pre-existing material changed the context of the expression, meaning put it into a context not implied by the original expression, such a change may achieve different interpretation.²³⁴ A musical expression would not change, if a person will played the same tune on a different instrument,²³⁵ that will be a slavish copying, however, it will be changed if the expression is altered in a way which presents the expression in a new light, for instance in a new tempo, next to different consequences of chords, or just a few things like a progression is taken. Usually, such changes appear through changing some of the building blocks. For instance, after a change in harmony, or providing a tune with a different rhythmic tempo, the same notes may sound quite similar,²³⁶ and as we concluded the musical expression definitely comes down to the sound not the notes, such secondary use may be justified. It is when pre-existing material goes through operation of the mind and finds a new context, the idea-expression dichotomy as a guiding tool can be in hand, as the expression transfers into an idea, and thus such a use may be justified.

One way to show how such a philosophical approach can be applied to the musical realities is by using a real case. In the next chapter, therefore, Locke's theories will be applied to the recent *Marvin Gaye* case.

4.2. Marvin Gaye Case in the Light of the Locke's Theory

The plaintiff in the case, which was Marvin Gaye's family, claimed that a hit song "Blurred Lines" infringed Marvin Gaye's copyright in the song "Got to Give It Up." Marvin Gaye, who was a famous American singer-songwriter, who was a very influential figure for the international popular music in the end of the 20th century and wrote and recorded the song "Got to Give It Up" in 1976, which was also registered in the United States Copyright

²³³ Hugo Cole, *The Changing Face of Music*, London: Victor Gollancz Ltd, 1978, at 10 (sited from Emma Steel, "Original Sin: reconciling Originality in Copyright with Music," 2015, at 70.

²³⁴ Emma Steel, "Original Sin: reconciling Originality in Copyright with Music," 2015, at 70.

²³⁵ Parallel of the same kind is presented in Andreas Rahmatian, "Music and creativity as perceived by copyright law," 2005, at 286.

²³⁶ Aaron Copland, "What to Listen for in Music," Penguin, 2011, see Chapter 3, *The Creative Process in Music*.

Office.²³⁷ The song also got good acclaim from the general public and became a big hit at the time. The defendants, Robin Thicke and Pharrell Williams, are the modern hip-hop musicians, who composed the song “Blurred Lines” in 2013. This song became an instant hit, and has sold more than six million digital copies while the music video for the song has been viewed around 450 million times on YouTube.²³⁸ As the two contested songs is not the example of a literal copying, the lawsuit tried parts of the two songs that are similar. The case was also not settled and brought a lot of attention at that time. However, the jury found that the defendant’s song infringed Marvin Gaye’s copyright in “Got to Give It Up” and awarded the plaintiff with around \$3,000,000 in damages. This case shows not only how copyright is interpreted broadly in order to protect the author’s on no means, but also that it is very risky to let a jury to decide on copyright infringement.

In terms of a case like the *Marvin Gaye* one, the defence side choses to build their defence line on the fact that there was no copying in “Blurred Lines” and consequently, no violation. However, in the light of the conclusions presented above the argument could have been built in a slightly different way. If grounded on the Locke’s theory and the approach suggested above, it could be argued that even if taken, the pre-existing expression (parts of “Got to Give It Up”) was still used as an idea of operation of the mind, which will not amount in infringement.

The facts of the case show that “Blurred Lines” did not copy the song by Marvin Gaye in its entirety, which consequently led the experts from both sides to testimony, in order to perform what is called “analytical dissection,” to see if there were substantial similarities between two contested expressions. In order to perform such dissection, the work was to be divided into constituent elements and those elements should be compared for proof of substantial similarities between the two works.²³⁹ In particular, the experts examined eight features: 1) signature phrase in main vocal melodies; 2) hooks; 3) hooks with backup vocals; 4) core theme; 5) backup hooks; 6) bass melodies; 7) keyboard parts; and 8) percussion choices.²⁴⁰ (Which also reminds of the building blocks, as mentioned above.) However, according to the submissions and discussion provided by the experts, none of the abovementioned features was identical in scales or lyrics.²⁴¹ According to the information provided in the copyright deposit

²³⁷ *Pharrell Williams, et al. v. Bridgeport Music, Inc., et al.*, 2015 WL 4479500 (C.D.Cal.).

²³⁸ *Ibid.*

²³⁹ *Pharrell Williams, et al. v. Bridgeport Music, Inc., et al.*, the US District Court of California, LC CV13-06004 JAK, Civil Minutes – General, October 30, 2014, at 7.

²⁴⁰ *Id.*, at 3

²⁴¹ *Pharrell Williams, et al. v. Bridgeport Music, Inc., et al.*, 2015 WL 4479500 (C.D.Cal.): “Thicke Parties contend they are dissimilar, are as follows: (i) the lyrics, because “there are not two words in a row in common

of the Marvin Gaye's song, "Blurred Lines" song did not copy the features of "Got to Give It Up", in its entirety, although in some cases both songs were quite similar. Therefore, the jury was asked to apply the so called test of "substantial similarities"²⁴² and base their decision on whether there were substantial similarities between the two contested songs.

During the court trial, Pharrell Williams, a defendant's side artist, told the jurors that Gaye's music was an important part of his youth, but at the same time, he claimed that they did not use any of it to create "Blurred Lines."²⁴³ It is true, as we established before that borrowing of some musical expressions has been a part of musical process. In some genres, like jazz, borrowing presents an important part of the creative process. Borrowing has been always a part of hip-hop as a genre as well, where using some melodies and progressions from other musicians has always been a normal state of things.²⁴⁴ Being a professional musician usually means that an author has a significant musical background, or at least music that he or she has grown on as an artist. In this regard, there is nothing weird in the fact that artists might use similar melodies, musical patterns to those musicians they admire, sometimes even unconsciously. However, in the *Marvin Gaye* case, a few obstacles should be taken into account if to look at the situation from the perspective as suggested above. Marvin Gaye as one of the most influential musicians in the hip-hop industry had contributed to the genre as much as one could imagine, while some of his works have become 'encyclopaedian' for the generation. Even though Gaye had left 'as good and as enough' in the commons, which complies with the Lockean non-waste condition, it would be ridiculous to deny that his music is groundbreaking for most of the hip-hop artists. Continuing this line, it could be argued that Pharrell Williams and Robin Thicke created their own song, using some of the Marvin Gaye's expressions as ideas, in the meaning of operation of the mind. As two songs are not similar in their entirety, the experts argued about one particular melody which could be seen as substantially similar. Considering that two parts are not identical, it could be concluded that through operation of the musicians' minds, Williams and Thicke used some of Gaye's

in both songs"; (ii) the signature phrases, which have only five pitches in common, with different rhythms and placements, among other differences; (iii) the "hooks," which are passages that are written to catch and maintain the interest of listeners, because the "Got to Give It Up" hook appears only twice in "Blurred Lines," has only three notes in common, and the rhythms and placement of these notes are different; (iv) the bass melody, only three "common notes" of which are the same in the 25-note bass part in "Blurred Lines" and the 21-note bass intro in "Got to Give It Up"; (v) the "word painting," which consisted of obvious methods applied to ordinary words; and (vi) the "rap v. parlando," the only claimed similarity in which was that sections of each song began at the same measure."

²⁴² See *Smith v. Michael Jackson* 84 F.3d 1213 (9th Cir. 1996): "Plaintiff may establish copying by showing that defendant had access to plaintiff's work and that the two works are "substantially similar" in idea and in expression of the idea."

²⁴³ <http://www.theguardian.com/music/2015/mar/10/blurred-lines-pharrell-robin-thicke-copied-marvin-gaye>

²⁴⁴ For examples, see e.g. Kembrew McLeod, "Freedom of Expression. Resistance and Repression in the Age of Intellectual Property," University of Minnesota Press, 2007, at 172-178.

expressions as building blocks, and after mixing these with their labour came up with their own musical expression. The context of the expression might also have been changed, as some of the components, like tempo, and rhythm are different as well. This new context of the pre-existing expression, together with the social rules of the genre, combining with the musicians' operation of the minds, allow to argue (from the Lockean philosophy point of view) that the contested expression, even if were borrowed, should be regarded as ideas. The idea-expression dichotomy, as a guiding principle can suggest that such a use might be allowed.

Furthermore, in one of the important articles on theory of copyright law, Zechariah Chafee came up with the six ideals of copyright law, where the fifth ideal states that "the protection given to the copyright-owner should not stifle independent creation by others."²⁴⁵ He later concluded that "some use of a work's contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating creativeness of others."²⁴⁶ It should therefore be acceptable to use some of the pre-existing materials for further creations. If the dichotomy as a principle of copyright law was applied as a notion that justifies creativeness of others, the use by Williams and Thicke should be justified, as the expressions even if they were borrowed, could be seen as ideas in the sense of an 'operation of the mind.'

From a simple logical point of view, just a slavish copying would never reach the same acclaim as the original. If two contested songs were so similar or identical, the later hit, "Blurred Lines" in this case, would have never gotten such acclaim. The public would recognise that such copying is slavish and would not award artists with the same popularity and consequently possible income. In this regard, Boswell, in his journal of *A tour to the Hebrides with Samuel Johnson*, mentioned Lord Monboddo's opinion, who stated:

"if a man could get a work by heart, he might print it, as by such an act the mind is exercised."

Johnson: *'No, sir; a man's repeating it no more makes it his property, than a man may sell a cow which he drives home.'*

I said, printing an abridgement of a work was allowed, which was only cutting the horns and tail off the cow.

Johnson. *'No, sir; 'tis making the cow have a calf.'*²⁴⁷

²⁴⁵ Zechariah Chafee, Jr., "*Reflections on Copyright Law: I*," 1945, at 511.

²⁴⁶ Zechariah Chafee, Jr., "*Reflections on Copyright Law: I*," 1945, at 511.

²⁴⁷ James Boswell, "*The Journal of a Tour to the Hebrides with Samuel Johnson*," LL.D., The Project Gutenberg EBook, 2004, at 32.

This statement by Johnson basically means that a copy would always be a copy, and can never become the same level of quality as the original, meaning that if the whole musical work has been slavishly copied, the song would never reach the highs and acclamation and consequently does not deserve justification. Creative borrowing of a pre-existing material, in the way it is discussed here, requires some skills and creative labour, which makes it original on its own, and also provides the reasons why the dichotomy could be applied as the justification for some creative use.

4.2.1. Substantial Similarity Test vs the Alternative Idea-Expression Dichotomy Test

One of the tests that has been mentioned above and which a jury usually has to apply in the US during copyright infringement proceedings is the ‘substantial similarity’ test. In short, the test, which has been widely applied in copyright infringement cases, and which asks the person who is comparing two works, to weigh the substantiality of the amount taken between the two works.²⁴⁸ According to this test, courts in the US look for substantial similarity between the protected parts of the allegedly infringed and infringing works.²⁴⁹ For this test, the court first has to establish whether the contested part of the infringed work is actually protected under the law and if this was to answer in the affirmative, to compare whether the alleged infringer has copied a substantial part from the protected expression.²⁵⁰

In such cases, including the *Marvin Gaye* case, intrinsic similarity would be found if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye Parties' work and the Thicke Parties' work are substantially similar.²⁵¹ The alternative approach to the idea-expressing dichotomy, which is suggested in this chapter, does not find its grounds in similarity arguments, similarity is rather perceived as a matter of course, as the works are allowed to be similar under this approach. It is the way the expression has been used or the extent that it is similar, which is of an importance in this case. In relation to musical works, a pre-existing state of the art constitutes an important part of the creative process, as it is usually where the artists get their inspiration from, so logically it should not be seen as a decisive criteria for finding an infringement. According to the Locke's theory, all our ideas and consequently expressions would be based on sensation or operation of our minds, that are affected by other things. Thus it can be argued that it is unreasonable to suggest that only because the work is based on another work the use will be qualified as an

²⁴⁸ Edward Samuels, “*The Idea-Expression Dichotomy in Copyright Law*,” *Tennessee Law Review*, 56, at 343.

²⁴⁹ Richard H. Jones, “*The Myth of the Idea/Expression Dichotomy in Copyright Law*,” 1990, at 580.

²⁵⁰ *Ibid.*

²⁵¹ *Pharrell Williams, et al. v. Bridgeport Music, Inc., et al.*, July 14, 2015, WL 4479500 (C.D.Cal.), at 18.

infringement. However, it is more reasonable to say, in the light of the Lockean philosophy that a borrowing should not immediately mean infringement, and thus guiding principle should help to establish, in which cases it is not.

If the substantial similarity test was still to be applied in infringement cases, it should have been rather applied not to compare similarities between two contested works, but to compare the use of similar parts itself. If such standard was applied in the *Marvin Gaye* case a jury thus had to see if allegedly copied musical expression from “Got to Give It Up” was used in the way as an idea or if it was slavishly copied. Meaning that the jury might be asked to which extent the use of a new expression was similar to the use of the same expression in the original song, thus comparing contexts of two expressions, for instance. This test could be performed based on different technical factors, including building blocks and composing elements of a song: testing whether the expression was used in the same key, or whether the notes were copied, or whether the rhythm was changed, as well as examining proportional ratio between contested songs.

Furthermore, it is sometimes argued in the literature, that a lay person who is comparing two songs is usually not musically educated.²⁵² In such cases, there exists a ‘psychological problem’ that once two tunes that are similar will be played over and over again the differences between the claimant’s and defendant’s expressions will be perceived immaterial.²⁵³ And once such an opinion is formed it hardly will change to the opposite.²⁵⁴ This situation, if it happened to be true, automatically ques the law and a jury against the defendant. However, if a jury or a judge knows that some similarities are acceptable the attitude might be different.

Justice Laddie in the US case *IPC Media Ltd v News Group Newspapers Ltd* pointed out a few problems regarding the idea-expression dichotomy and stated that “it is impossible to define the boundary between the mere taking of general concepts and ideas, on the one hand, and copying in the copyright sense, on the other.”²⁵⁵ Consequently, it is probably worthwhile to think that if that would not have been better and justified, it is acceptable that some parts of a work can be taken, or be substantially similar, but focus on the use instead. This would free the creators’ hands in terms of the creative process, as authors (musicians in particular) would be in the same position of using each other’s works. Borrowing of a pre-existing musical

²⁵² Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 111 – 112.

²⁵³ *Id.*, at 112.

²⁵⁴ *Ibid.*

²⁵⁵ Deming Liu, “*Copyright and the pursuit of justice: a Rawlsian analysis*,” 2012, at 617; *IPC Media Ltd v News Group Newspapers Ltd* [2005] EWHC 317 at 444.

expression does not necessarily diminish the importance and novelty of the original expression, and at the same time, enhances the creative process.

4.3. Common Cases in the Music Industry

It is also very important not to equate derivative works to what is talked about in the thesis. Namely, the discussion is concentrated not on the assumption that secondary works derive from the pre-existing ones, but rather that secondary works use the pre-existing expressions as ideas, with no permission from the original rightsholder. Again, some of the music genres are based on borrowing from pre-existing material, in hip-hop it is referred to as ‘sampling.’²⁵⁶ In some cases, a melody can even become a standard for a certain genre or for music in general. In jazz music, the notion of standards is one of the key musical concepts behind creative process. As it is pointed out, “one of the key compositional techniques that has been used in jazz is "interpolation", the process of borrowing pre-existing musical material and then improvising on it to create a new musical work.”²⁵⁷ Following this statement it can be concluded that a certain amount of creative musical expressions have been based on the pre-existing material, and in many cases without any litigation involved. However, the amount of cases like the *Marvin Gaye* one is quite big. Most of the cases like that did not get a proper public popularity as the artists that were sued were not popular enough, or the cases were settled by one of the parties. In any case, the issue is always relevant, as using pre-existing material seems to continue being an inevitable part of the creative process.

There are a number of cases that could be used as an illustration²⁵⁸ of the problem, however, due to the limits of the paper I decided to put down one more example that shows the moral and philosophical side of the issue. The case involves an iconic 70’s rock musician Cat Stevens and the 80’s-90’s psychedelic rock band The Flaming Lips. In particular the lawsuit was based on the similarities between Cat Steven’s hit “Father and Son” and the song by The Flaming Lips, “Fight Test.” The similarities between melodies of these two songs (although for only a few seconds) were quite substantial and resulted in the settlement, according to which Cat Stevens was entitled to seventy five percent of royalties from *Fight Test*.

In an interview with the Guardian the lead singer of The Flaming Lips, Wayne Coyne, openly admitted similarities between the songs, and also admitted that Cat Stevens has inspired him

²⁵⁶ Kembrew McLeod, “Freedom of Expression. Resistance and Repression in the Age of Intellectual Property,” 2007, University of Minnesota Press, 379 p.

²⁵⁷ J. Michael Keyes, “Musical Musings: The Case for Rethinking Music Copyright Protection,” 2004, at 428.

²⁵⁸ For the list of settled and unsettled cases, see https://en.wikipedia.org/wiki/Music_plagiarism.

as a musician. He also in general words defined problems and issues behind borrowing of a musical expression that could be important to understand:

“There was a time during the recording when we said, this has a similarity to "Father And Son". Then we purposefully changed those bits. But I do regret not contacting his record company and asking their opinion. Maybe we could have gone 50-50. As it is, Cat Stevens is now getting 75 per cent of royalties from "Fight Test." 'We could easily have changed the melody but we didn't. I am really sorry that Cat Stevens thinks I'm purposefully plagiarising his work. I am ashamed. There is obviously a fine line between being inspired and stealing. But if anyone wanted to borrow a part of a Flaming Lips song, I don't think I'd bother pursuing it. I've got better things to do. Anyway, Cat Stevens is never going to make much money out of us.’²⁵⁹

The frontman of the Flaming Lips well points out the main moral issues at stake, saying that a musician should have better things to do than pursuing another artist for stealing, implying that borrowing is part of the creative process. Such logic even though is neither based on Locke’s theory, nor has a legal support, highlights what has been described above, namely, that creating music is a difficult process, which can sometimes involve using pre-existing expressions as ideas for the new creations. Of course, musicians are still left with an option to just borrow and rely on luck that no one will notice similarities, or rely on an understanding from the fellow musicians, as have been done by some famous hip-hop artist.²⁶⁰ However, the more appealing option is to change perception of the idea-expression dichotomy, so to take into account some specifics regarding musical expressions.

4.4. Concluding Remarks on the Chapter

The analysis presented above, seeks to show that the idea-expression dichotomy could be given a fresh look, in the face of a somewhat alternative interpretation. This could possibly be achieved through application of the principle as a guiding tool (for judges, a jury) in the cases where the borrowing from a pre-existing musical expression is at stake.

Naturally, while the creative process goes, authors cannot help themselves, but base their new creations on the knowledge, experience and remembrance from the pre-existing material. Music-wise, if to dig deep enough, it is probably possible to find similar tunes to every song. As Keith Richards, a legendary guitarist of Rolling Stones once beautifully said: “There’s only one song [...] and Adam and Eve probably sung it [...] everything else is a variation on

²⁵⁹ <http://www.theguardian.com/music/2003/jun/29/artsfeatures.popandrock>.

²⁶⁰ In relation to the recent lawsuit against a hip-hop artist Kendrick Lamar, where the artist have allegedly copied a song by Bill Withers, Lamar admitted copying and justified his position as copying “with a thumb to the nose, catch me if you can attitude.” For more information, see <http://www.theguardian.com/music/2016/apr/15/kendrick-lamar-sued-for-allegedly-copying-bill-withers-song>.

it.”²⁶¹ The dichotomy potentially could resemble the realities of the modern music, if it takes into consideration the nature of a musical work. This leads to an answer for the main research question of ‘how.’ If the dichotomy was to be applied as a double-sided principle, where the second side is a more flexible test, which serves as a guiding tool, there could be more room for interpretation of each individual case. Namely, if the emphasis is made on the way the pre-existing expression is used, taking into consideration the nature of musical expressions and the creative process, the use could theoretically be justified.

As it is argued, sometimes, “the reduction of law and music to rules of patterns may also bring them both closer to mathematics,”²⁶² while music is still closer to arts than mathematics, a certain ‘mathematical’ take would be rather inappropriate. There are some patterns available to support the proposed argument, like social rules of the society or philosophical theories. In this regard, I have chosen Locke’s theory as the basis, and tried to show that if a certain expression went through the mind of the second person and mixed with the creative labour, such borrowing has the grounds to be justified in the eyes of the idea-expression dichotomy.

As any questionable theoretical discussion there are certain problematic issues as well. In the realm of legality the biggest issue is transformative use, and direct prohibition of such in most national jurisdictions. However, as this part is of a more theoretical nature, I have consequently focused on theoretical drawbacks as well. The two most apparent and obvious drawbacks of such an approach are: subjectivity and broadness. Regarding the first drawback, the situation is quite clear: the judge would have to apply the idea-expression dichotomy on a case by case basis, in order to see, if the expression was used as an idea or not, this means that he or she will base the decision on the personal perception of the matter. However, the law, when it comes to infringement cases is subjective in itself, and there is nothing that could be changed. This argument is rather the reality of the law than the downside of the approach.

Concerning the second point, there is also a question whether it is feasible to draw an objective line when deciding whether a pre-existing expression has been used as an idea or not in each case. However, the purpose of this chapter is not to provide an already established, working test that a judge or a jury can immediately apply in infringement cases, but rather to point out why the approach towards the dichotomy should be changed, and how it should be looked at from a philosophical or social point of view.

²⁶¹ Jessica Pallington West, *“What would Keith Richards do?: Daily Affirmations with a Rock and Roll Survivor,”* London: Bloomsbury Publishing, 2009, at 63.

²⁶² Andreas Rahmatian, *“Music and creativity as perceived by copyright law,”* 2005, at 281.

V. Cultural Life and the Idea-Expression Dichotomy

In this chapter the discussion goes around one possible legal instance how the idea-expression dichotomy could become a guiding principle. For this purposes, the analysis is concentrated on the human rights regime and the right to take part in cultural life in particular. The chapter also provides with solutions how the dichotomy and human rights can be applied together in practical issues.

As it was previously stated, the existing approach towards the idea-expression dichotomy provides more questions than answers, in terms of its practical implication in infringement cases. In this regard, it will be argued in the chapter, that the alternative approach to idea-expression dichotomy, presented in the chapter above, can have more practical implication, if applied in the light of human rights, particularly, the right of everyone to take part in cultural life. It is also argued below, that some of the musical expression can be considered as part of cultural life, even though their copyright protection has not expired. In such cases, important musical expression should be deemed as ideas, and left free for the public. The chapter will first present the general background of human rights, and the right to take part in cultural life in particular, before proceeding to display its relationship with copyright.

The interpretation of the idea-expression dichotomy as a guiding principle provided below, compares the dichotomy with the right to take part in cultural life and basically broadens the term ‘ideas’ as a part of the dichotomy so that in the end some use of protected expressions can be compared to those of ideas. Lastly, it is argued that some copyright expressions may lose their distinctiveness even during the term of copyright protection, that they as such become an inevitable part of cultural life, and that this consequently places them in the spectrum of unprotected ideas.

5.1. Human Rights and the Right of Everyone to Take Part in Cultural Life

Before stepping into a substantive discussion of the matter it seems logical and important to take a second to elaborate on human rights in general. There have been numerous books and articles written on the topic of human rights, and of course the purpose of the thesis is not to go into a deep analysis of the issue of human rights in general. However, it is important to show what human rights are and which human rights this research is dealing with in particular. As it is provided in the preamble of the Universal Declaration of Human Rights (hereinafter: UDHR), human rights are: “a common standard of achievement for all peoples

and all nations”²⁶³ Theoretically speaking, human rights can be regarded as internationally agreed rules and principles, regulating or standardizing the relationship between states with their citizens or non-citizens.²⁶⁴ Human rights as known in the legal world touch different spheres of human life (economic, social, political, cultural, etc.), and most of them are prescribed in the respective international treaties. The most basic and general human rights can be found in the UDHR²⁶⁵ and the two Covenants, on Economic Social and Cultural Rights (hereinafter: ICESCR)²⁶⁶ and Covenant on Civil and Political Rights (hereinafter: ICCPR)²⁶⁷ The rights prescribed in the treaties are aimed to ensure that the States that are parties to them will provide the required level of the rights on the national level, provided at the same time that all the rights, are universal, indivisible and interdependent, as was concluded in the Vienna Declaration and Programme of Action.²⁶⁸

For the discussion at hand the most relevant are cultural rights and the right of everyone to take part in cultural life in particular. Cultural rights, as the Committee on Economic, Social and Cultural Rights has pointed out, are “an integral part of human rights and, [...] full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.”²⁶⁹ In this chapter the right is first discussed as it is stipulated in the respective international instruments, where in the following chapters the discussion is constructed around theoretical implications of the right on the idea-expression dichotomy. However, before the legal discussion it is important to provide some definition and understanding of important terms.

²⁶³ See, Preamble of the Universal Declaration of Human Rights, Adopted by UN General Assembly Resolution 217 A(III) of 10 December 1948.

²⁶⁴ Peter R. Baehr, “*Human Rights. Universality in Practice*,” Palgrave, New York, 2001, at 1.

²⁶⁵ Universal Declaration of Human Rights, of 10 December 1948.

²⁶⁶ International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

²⁶⁷ International Covenant on Civil and Political Rights, adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

²⁶⁸ Vienna Declaration and Programme of Action; Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

²⁶⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 1.

5.1.1. General Overview of ‘Culture’ and ‘Cultural Life’

It is rather obvious that defining the term ‘culture’ in one single term is quite difficult; therefore, UN bodies suggest a collective definition which can be divided into three levels:²⁷⁰

- a) In material sense, as products of material heritage of particular groups of people, e.g. *artifacts*, historical objects;
- b) As process of artistic or scientific creations. In this sense culture is referred to as a personal creative process, e.g. intellectual creations;
- c) In anthropological sense, meaning culture as a way of life, as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that in addition to art and literature also encompasses, ways of living together, value systems, traditions and beliefs.²⁷¹

Within each of the three levels, everything that is normally understood under culture is included: high culture, like literature, kinds of theatre and low culture; popular culture, like cinema, sports; religious heritage or beliefs; music, food, or customs.²⁷² Regarding the definition of the terms, scholars, on the topic of culture like Clifford Geertz, provide different components of culture and cultural life. Clyde Kluckhohn, defined culture as:

“(1) "the total way of life of a people;" (2) "the social legacy the individual acquires from his group;" (3) "a way of thinking, feeling, and believing;" (4) "an abstraction from behaviour;" (5) a theory on the part of the anthropologist about the way in which a group of people in fact behave; (6) a "store-house of pooled learning;" (7) "a set of standardized orientations to recurrent problems;" (8) "learned behaviour;" (9) a mechanism for the normative regulation of behaviour; (10) "a set of techniques for adjusting both to the external environment and to other men;" (11) "a precipitate of history.”²⁷³

Consequently, culture can be seen of a somewhat eclectic nature, and rather as a collective name for different phenomenon in different fields of social life.

Abstracting from what international instruments in the field of human rights prescribe, notions of ‘culture’ and ‘cultural life’ differ in essence. Dictionaries at the same time provide a different meaning of culture, among which: inherited ideas, beliefs, values and knowledge, which constitutes the shared bases of social action; or the total range of activities and ideas of a group of people with shared traditions, which are transmitted by members of a group; or a

²⁷⁰ Division into three groups as proposed in the text, see Elsa Stamatopoulou, “*Cultural rights in international law: article 27 of the Universal Declaration of Human Rights and beyond*,” Martinus Nijhoff Publishers, 2007, at 108-109.

²⁷¹ UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November, 2001.

²⁷² Elsa Stamatopoulou, “*Cultural rights in international law*,” 2007, at 109-110.

²⁷³ Geertz Clifford, “*The Interpretation of Culture. Selected Essays by Clifford Geertz*”, Basic Books, Inc., Publishers, New York, 1973, at 25.

particular civilisation at a particular period of time,²⁷⁴ or something which is excellent in arts, manners, etc.²⁷⁵ Thus, the term culture may vary from cultural heritage to cultivating of land; from arts and other intellectual creations to social behaviour. In general, culture could be defined in two ways, as ‘Culture’ with a capital “C”, as the universe heritage of the human kind, or ‘culture’ in the plural, anthropological sense, where the term lays down to particular properties (arts or writings, for instance).²⁷⁶ In this regard, ‘culture’ in the plural sense is of an interest, as it specifically talks about works that generally fall under copyright law.

Traditionally, the scholarship regarding culture has focused solely on ‘rights relating to culture,’ or rights concerning creativity.²⁷⁷ Such can include different subjects, but they normally are the visual arts, literature, music, plays, or other expressions that represent highest intellectual and artistic achievements of the group.²⁷⁸ This is what is also referred to as the approach in Western society.²⁷⁹ There is another way of looking at cultural rights, which mostly focuses on general participation in cultural life and preservation and accessibility of culture.²⁸⁰ This approach is discussed by UNESCO in the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, where culture is defined as:

*“opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.”*²⁸¹

It is also important to distinguish between culture in its humanistic sense and its anthropological sense, notably as a way of life of a people or society.²⁸² Anthropological thinking has brought the meaning that culture should not be regarded as a static concept, but rather as an always changing state, and that it in no case should “fail to include social processes, interactions, relationships and innovations of individuals operating against a context of social constrains.”²⁸³ It is probably for this reason that the right as it is prescribed in the Covenant uses the formulation ‘cultural life,’ in the anthropological meaning. Although, if the anthropological understanding is taken as the central one, meaning that culture is a way of

²⁷⁴ Patrick Hanks, “*The Collins English Dictionary*”, Second Edition, 1990, at 379.

²⁷⁵ “Webster’s Encyclopedic Unabridged Dictionary of the English Language”, 1994, at 353.

²⁷⁶ Rosemary J Coombe, “*The Cultural Life of Intellectual Properties*,” 1998, at 220.

²⁷⁷ Audrey Chapman, Sage Russell, “*Core obligations : building framework for economic, social and cultural rights*,” Antwerpen : Intersentia , 2003, at 284.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It; Adopted on 26 Nov. 1976 by the General Conference of UNESCO at its 19th session held in Nairobi.

²⁸² World Commission of Culture and Development: Our Creative Diversity, Paris UNESCO, July, 1996.

²⁸³ Audrey Chapman, Sage Russell, “*Core obligations*,” 2003, at 285.

life, “it will be difficult to draw a line between essential and non-essential components of culture in the meaning of the human rights.²⁸⁴ Logically, the term ‘cultural life’ is different from what is meant by culture, however, if the term culture is not very defined by itself, the whole concept of ‘cultural life’ is vague as well. In general, ‘cultural life’ as such, is a broader term than ‘culture’, and usually means something related to artistic or social pursuits or events to be valued or enlightened; or related to a culture or civilisation.²⁸⁵ Consequently, ‘cultural life’ would logically mean a life of a particular subject of the society, related to artistic or social pursuits, or culture or civilisation in general.

In relation to the concept of the idea-expression dichotomy, it is most important to conclude and to keep in mind that musical expressions and ideas in musical works are definitely considered as part of culture and cultural life. Moreover, it is not only the creations that constitute part of cultural life, but also the way music is created, regardless falling be under this umbrella as well. As if, for instance, using jazz standards and improvising a new musical piece over it would be a part of cultural life of jazz musicians.

5.1.2. The Right to Take Part in Cultural Life

In theoretical terms, the right to culture, as it is suggested, should be understood broader than traditional Western perception, and it needs to conceptualise and broaden the meaning within the social, political, ethical and human rights contexts.²⁸⁶ On the international level the right to take part in cultural life is prescribed in two human rights instruments: the UDHR and the ICESCR. In particular, the discussion of this chapter deals with article 15(1) of the ICESCR, although a similar provision is stipulated in article 27(1) of the UDHR, which states that “*everyone has the right freely to participate in the cultural life of the community.*”²⁸⁷ Article 15(1) of the ICESCR reads as follows:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

*(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*²⁸⁸

As there is no collective name for the rights provided in the article, in the legal scholarship the rights are sometimes referred to as: a) cultural participation, b) access to science and culture,

²⁸⁴ Elsa Stamatopoulou, “*Cultural rights in international law*,” 2007, at 113.

²⁸⁵ Patrick Hanks, “*The Collins English Dictionary*”, Second Edition, 1990, at 379.

²⁸⁶ Audrey Chapman, Sage Russell, “*Core obligations*,” 2003, at 285.

²⁸⁷ UDHR, article 27(1).

²⁸⁸ ICESCR, article 15(1).

and c) protection of authorship.²⁸⁹ Some scholars propose in this respect that the right should be regarded as “a universal human right to science and culture.”²⁹⁰

In relation to the right to take part in cultural life, particularly relevant and important is the General Comment No. 21,²⁹¹ which issued in 2009 by the UN Committee on Economic, Social and Cultural Rights (hereinafter: the Committee), which deliberately examines some legal and non-legal matters of the right. As a starting point, the Committee takes a broad approach on the question of culture, and interprets it as an inclusive concept encompassing all manifestations of human existence.²⁹² Prior to the adoption of the General Comment No. 21 there was a discussion on the relevant topics, where culture was defined as: “the distinctive set of ideas, social behaviour, way of life and patterns of communication of a particular society or people,”²⁹³ which seems to be a collective definition to all definitions provided in general literature. However, the difficulties with the definition have been resolved by the General Comment, where the Committee stated that for the purpose of Article 15(1)(a), culture should be considered as a concept that “encompasses inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, [...]”²⁹⁴ Consequently, as it was already stated in the previous section, artistic expressions as protected under copyright laws, including musical expressions, would fall under the definition of culture life in the meaning of human rights.

In order to understand the right entirely, one needs to examine each of the components of the right, in particular the three components: “everyone,” “take part,” and “cultural life.”²⁹⁵ Before the abovementioned Comment was adopted, there had been debates on what is understood under the right; however the Committee has clarified almost all the problematic issues since.²⁹⁶ As it was already established, the term ‘cultural life,’ is quite general and overarching, as it can be different depending on people, place, time and circumstances. The Committee states that the expression ‘cultural life’ is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future,²⁹⁷ by which it basically refers to culture in the anthropological sense. Regarding the term ‘everyone,’ the Committee in the General Comment No. 21, related the term everyone to the

²⁸⁹ Lea Shaver, Caterina Sganga, “*The Right to Take Part in Cultural Life: On Copyright and Human Rights*,” *Wisconsin International Law Journal* 27 2010, at 641.

²⁹⁰ *Id.*, at 642.

²⁹¹ CESCR, General Comment No. 21.

²⁹² *Id.*, par. 11.

²⁹³ *Id.*, para. 2.

²⁹⁴ *Id.*, para 13.

²⁹⁵ *Id.*, para 8-15.

²⁹⁶ See, e.g., Elsa Stamatopoulou, “*Cultural rights in international law*,” 2007, 336 p.

²⁹⁷ Cited from, Lea Shaver, Caterina Sganga, “*The Right to Take Part in Cultural Life*,” 2010, at 642.

individuals as well as the collective subjects, which means that, cultural rights may be exercised by a person as an individual, or in association with others, or within a community or group, as such.²⁹⁸

In relation to the formulation ‘to take part’ the Committee explains that there are three components of the right to take part in cultural life, namely, participation, access and contribution.²⁹⁹ Participation, in the understanding of the right, means to be engaged in one’s own cultural practices; where contribution means to be involved in creating the spiritual, material, intellectual and emotional expressions of the community.³⁰⁰ However, the most relevant component for this thesis is the access part of the right, as it covers, among other things, the right of everyone, “[t]o follow a way of life associated with the use of cultural goods and resources [...] and to benefit from the cultural heritage and the creation of other individuals and communities.”³⁰¹ This part of the right shows that a person can not only passively enjoy culture but that they also could take an active role in the creation of cultural life, and also provides people with the right to use or benefit from culture. It is thus one can interpret this right as the one that permits the use of some pre-existing material if such materials constitute a part of cultural life, and if such a process of creation is part of cultural life as well.³⁰² However, this conclusion would have been clear if there were only human rights at stake and the author’s interests were not taken into consideration. In this regard, copyright law balances such public and private interests and provide artists with some level of protection, which prohibits free copying of the creative material without appropriate authorisation. It could be said that the idea-expression dichotomy is somewhere related to the right to culture, as one of the purposes of the concept, which leaves some parts of culture free for the public.

5.2. On Human Rights and Copyright Law

It has been already a well-established practice to consider some of the intellectual property rights as part of human rights. In legal scholarship there exist two basic approaches towards this issue: one looks at intellectual property and human rights as two conflicting set of rights that make negative impacts on each other; while the second one is a ‘compatibility’ model,

²⁹⁸ CESCR, General Comment No. 21, para 9.

²⁹⁹ See, *Id.*, para 8 – 15.

³⁰⁰ *Id.*, para 15.

³⁰¹ *Ibid.*

³⁰² See the discussion around different genres in the previous chapter.

which supports the idea that both set of rights protect the same fundamental equilibrium.³⁰³ It is also for this reasons, the argumentation in the thesis is placed in the second spectrum, meaning that human rights and intellectual property live together and in some cases human rights can be used to understand some of the intellectual property rights, and copyright in particular. It is beyond the discussion at hand to go into depth in the analysis of the relation between intellectual property rights and human rights, however, some general notions on human rights and intellectual property should be covered. The first international instrument that is usually referred to in relation to the coexistence of copyright and human rights is the UDHR. According to Article 27 of the UDHR:³⁰⁴

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

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

It is usually argued, by the advocates for the compatibility approach that the first paragraph of the article protects copyright protected works in general as parts of cultural life and scientific advancement, whereas the second paragraph, protects the same subject matter in the same way as it is talked about in copyright laws.³⁰⁵ Nonetheless, some commentators, like Paul Torremans, state that the second paragraph does not automatically mean that copyright is a human right, but it rather recognized the human rights status of copyright.³⁰⁶ The second important and more relevant international instrument in this regard is the ICESCR. In this regard, it is again Article 15(1), which is in many ways based on the UDHR that recognises the human rights status of copyright. The three parts of the right, provided in the article are interrelated, meaning that moral and material interests of an author should be considered as “essential preconditions for cultural freedom and for the participation and access to the benefits of scientific progress.”³⁰⁷ Consequently, the rights awarded to authors should not constrain but rather enhance and facilitate access to culture of the public.³⁰⁸ Commenting on the respective article, the Committee acknowledges in in the General Comment No. 17, the relation between intellectual property and the right prescribed in the Covenant, but at the same time emphasizes that it is important not to equate all intellectual property rights with the

³⁰³ Paul Torremans, “*Intellectual Property and Human Rights*,” Kluwer Law International, 2008, at 3.

³⁰⁴ UDHR, Article 27.

³⁰⁵ Paul Torremans, “*Intellectual Property and Human Rights*,” 2008, at 199-200.

³⁰⁶ *Id.*, at 200.

³⁰⁷ *Id.*, at 203.

³⁰⁸ *Ibid.*

human right recognized in Article 15.³⁰⁹ The logical interpretation of the Comment lead to two conclusions: 1) not all intellectual properties are human rights; 2) some intellectual property rights should be regarded as human rights.

What is of interest for the present discussion is whether copyright could be regarded as a human right. It should be remembered first that the legal regime in the 40's – 50's when the respective international instruments were drafted, was significantly different from the one today, and intellectual property rights did not have so much strength and enforcement, even in the western states.³¹⁰ However, in relation to copyright law, the argumentation in favour of human rights can be stronger and has more grounds, as Article 15 of the ICESCR talks about the similar bundle of rights, and in similar respect.

In the European aspect, for more than a decade the European Court of Human Rights (hereinafter: ECtHR) has issued a few important decisions in which it was concluded that patents, trademarks and copyrights are protected under the European Convention of Human Rights (hereinafter: ECHR), and in particular under the umbrella of right to property.³¹¹ Especially, Article 1 of Protocol 1 provides that “every natural or legal person is entitled to the peaceful enjoyment of his possessions,” and according to the Court, intellectual property falls under the peaceful enjoyment of a person's possession.

The most important and difficult issue when it comes to the relationship between copyright and human rights is the balancing of public and private rights and interests.³¹² It is for this reason, the right to cultural life is important for the present discussion. As it is pointed out by Audrey Chapman:

*“To be consistent with the full provisions of Article 15, the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level.”*³¹³

³⁰⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006, E/C.12/GC/17, para 1-5.

³¹⁰ Lea Shaver, “*The Right to Science and Culture*,” 2010, at 133.

³¹¹ *Dima v. Romania*, ECtHR, App. No. 58472/00 (copyrighted Works protected by Art. 1 of Protocol No. 1; *Melnychuk v. Ukraine*, ECtHR, App. No. 28743/03 (Article 1 of Protocol No. 1 is applicable to intellectual property); *Anheuser-Busch Inc. v. Portugal*, ECtHR, App. No. 73049/01 (registered trademarks are protected by Article 1 of Protocol 1.)

³¹² Paul Torremans, “*Intellectual Property and Human Rights*,” 2008, at 204.

³¹³ Audrey Chapman, “*Approaching intellectual property as a human right. Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)1*,” Copyright Bulletin, Volume XXXV No. 3, July–September 2001.

As it was already mentioned before, copyright law provides instruments for the balance of rights, somewhat similar to exceptions and limitations or the idea-expression dichotomy in copyright law, however, human rights in this case, ensure that such balancing acts work properly and effectively. For the idea-expression dichotomy, which has existed for a long time, it seems that the public interest is not the main focus, and therefore it needs a fresh look from the prospective of today's developments, and the right to take part in cultural life reflects such developments.

When it comes to the relation between copyright (and musical works in particular) and the right of everyone to take part in cultural life, the problematic moment does not subsist in defining culture in the meaning of the right and its scope (in this sense it is quite clear that musical expressions should be regarded as part of cultural life.) It is rather the question of how the right to take part in cultural life can be used in order to interpret and guide the application of the idea-expression dichotomy. It has been stated before that the right to culture life and intellectual property still need some conceptualization of the relationship,³¹⁴ it is for this purpose that the right to culture, copyright law and musical realities will be looked together in complex, in order to reflect today's realities.

5.2.1. The Right to Cultural Life and the Idea-Expression Dichotomy

What is essentially important to understand is that the purpose of this part is not to argue that all musical expressions, being part of cultural life should be in the public domain, and free to use, but rather that the application of the notion of 'cultural life' and the right to cultural life could be used as an important tool for an interpretation of the idea-expression dichotomy.

As Anna Maria Nawrot in her research suggests:

“if the human right to science and culture succeeds in finding its *'philosophical settlement'*, all human actions within it, associated with the significance of the role of a man and interpretation of the law [copyright law] in force will have no need to put on a mask or set other limits.”³¹⁵

Ideally, if a philosophical understanding of the concept of 'idea' was to be changed, or at least broadened up, so that it included some artistic expressions as well, as was suggested in the previous chapter, there would probably have been a fewer number of infringement cases, that have copying of copyrighted material at stake and contest exceptions and limitations in copyright law. For such philosophical changes, it is worthwhile to study the right to take part in cultural right in the idea-expression dichotomy context.

³¹⁴ Caterina Sganga, “*The Right to Take Part in Cultural Life*,” 2110, at 639.

³¹⁵ Anna Maria Andersen Nawrot, “*The Utopian Human Right to Science and Culture: Toward the Philosophy of Excendence in the Postmodern Society*”, Ashgate Publishing, Ltd., Sweden, 2014, at 3.

It already has been stated in the thesis that an author when creating a new expression, in many cases is led by his or her experience, knowledge, etc. In this regard, cultural life plays an important role, as a human brain is very dependent on cultural resources and such resources will be behind the mental process during an artistic creation.³¹⁶ When the debate on cultural life and copyright is at stake it is important to step back from the traditional approach in copyright law, which focuses on the author's 'work of authorship' as the sole of protection.³¹⁷ The focus instead should take a new light and a work of authorship should be seen in the context of the cultural and social patterns in which the rightholder and the public are actors in the same social and cultural environments.³¹⁸

It is hardly debatable that creative expressions constitute a part of cultural life, to which everyone is entitled. In most cases, the requirement of the right, as prescribed in the ICESCR, asks the member states to provide an adequate access to cultural life. This condition would usually be met by a state, as it is in the essence of copyright law to provide access to creative material. Although the author has the right to control the use of his or her work, copyright law does not technically restrict others from using the works, provided that the permission is given or a certain licensee fee is paid to the rightholder. In this regard, the Committee also provides the necessary conditions that a State should comply with for the full realisation of the right of everyone to take part in cultural life: availability, accessibility, acceptability, adaptability and appropriateness.³¹⁹ One of the main conditions is *availability*,³²⁰ which means that the cultural goods should be available to public through various public means, e.g. museums, exhibitions, concert halls, etc. This condition is usually satisfied by the states.

On the other hand, it could still be argued that some cultural goods should be available to the public in order to benefit from them. In this context, it is argued, that some expressions should be regarded as part of cultural life, and thus, free to use for everyone, and treated in the same way as ideas under the idea-expression dichotomy. Moreover, it is not only the expression itself, but the way pre-existing material which is used, that can be considered as part of cultural life. And in this case, the focus should be on the use of the expression again.

³¹⁶ Geertz Clifford, "*The Interpretation of Culture*", 1973, at 76.

³¹⁷ Michael J. Madison, "*A Pattern-Oriented Approach to Fair Use*," William & Mary Law Review, Volume 45, Issue 4, 2004, at 1587-1588.

³¹⁸ *Ibid.*

³¹⁹ CESCR, General Comment No. 21, para 16.

³²⁰ *Ibid.*

5.2.2. The Right to Cultural Life and the Nature of Musical Works

As it was also stated in the previous chapters, when musical works are taken as an example, some technical issues around the nature of the expressions cannot be fully and clearly explained by the law. For example, it can be traced that many music phrases in rock, pop songs end with a ‘cadence.’³²¹ Therefore, in many cases a layperson not educated in music, (a judge or a jury), might find two music phrases similar to each other just because both phrases end with the same harmonic pattern.³²² Especially, if such extra components like tempo, musical instruments and genre of music in two contested songs are similar. This might lead the person who examines two works to the conclusion that such similarities would constitute copying. This, as was well concluded by Carys Craig and Guillaume Laroche, “would be a reasonable conclusion for the average listener to draw, given her knowledge, but it would be dreadfully wrong in music — as wrong as concluding that one fairy tale is copied from another because both end with “happily ever after.”³²³ The nature of musical works, also mentioned in the previous sections, including the rules of composition, the rules around building blocks, etc., have to be taken into consideration, in the light of cultural life. Arguably, such technical issues of music constitute part cultural life for some genres, and thus should not attain any protection in the human rights sense.

As is stated in a number of scholarships on copyright law,³²⁴ apart from protection of the author’s right, the main aim and purpose of copyright law is, first of all, stimulation of artistic creativity and enriching the public good.³²⁵ In this relation copyright law seems to have similar aims as the human rights regime, which perceives culture and cultural life as public good that stimulates creativity. One of the main problems regarding this approach and copyright protection (in relation to musical works especially), subsists in the argument that during the period of protection, which is normally the life of the author plus seventy years, a musical work is seen as a static entity in the eyes of the law.³²⁶ Some copyright law scholars - also in the light of what has been stated before - concluded that in musical culture, borrowing from other musical creations or ideas is what can drive innovation, while copyright, by

³²¹ Carys J. Craig, Guillaume Laroche, “*Out of Tune: Why Copyright Law Needs Music Lessons*,” 2014, at 60: “A common concluding function in rock music sees the chord of IV move to the chord of I in a certain metric disposition (that is, the relationship of strongly and weakly stressed beats).”

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ See, e.g. J. Michael Keyes, “*Musical Musings*,” 2004, at 420.

³²⁵ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975): “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good”).

³²⁶ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 90.

prohibiting almost any type of borrowing, hampers creative process³²⁷ and consequently can go against musical cultural life in the human rights sense.

In respect to the suggested approach that aims to examine whether an expression is used as an idea, in the sense that such is part of cultural life a case-by-case analysis is an inevitable part, therefore a certain level of subjectivity on the side of a judge or a jury is inevitable. In this respect judge Hand in the US case *Nichols v Universal Pictures* stated next:

*“copyright law did not cover everything that might be drawn from a play,[as] its content went to some extent into the public domain. We have to decide how much, and while we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.”*³²⁸

The conclusion by Judge Hand is also important as he emphasised again that any decision of similar nature will be considered as being arbitrary, however, unless this step will be taken, the precedent will not be established, and consequently the situation will not be changed.

Where an expression is used as an idea or not, can be tested according to the notion of taking part in cultural life, by testing if a particular musical expression was used as an inspiration for the new work. The suggested approach is something similar to the *scenes a fair* doctrine, mentioned before, however, the expressions in this case are normally regarded as copyright protected by law. For instance, where a music melody from a song is taken as an inspiration for an author, and he or she later mixes it with his or her ideas which develops it into the new song, an expression even if fixed should be considered as an idea. Mere copying of some piece of a work should obviously not be considered as a justified use of the work, but where such melody is taken as a basis for the future development there should be nothing to restrict the use. It is the use of cultural material, not slavish copying, which can be protected under human rights. This argument comes down to the same issue of transformative use, as mentioned in the end of Part IV of the thesis, and places the way the expression is used in the centre of the test. However, in this case, the balance between slavish copying, and actual creative application of the pre-existing material can be exercised applying the right to take part in cultural life.

It is apparent that a human brain is fully dependent upon cultural resources, and such resources are parts of mental process during creation.³²⁹ As Clifford Geertz stated in his work, “human intellection, depends upon the manipulation of certain kinds of cultural resources in

³²⁷ For more, e.g., Carys J. Craig, Guillaume Laroche, “*Out of Tune: Why Copyright Law Needs Music Lessons*,” 2014, at 63; Anne Barron, “*Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice*,” London School of Economics, Social Legal Studies, vol. 15 no. 1, 2006, 25 – 51.

³²⁸ *Nichols v Universal Pictures et al.*, 45 F.2d 119 (2d Cir. 1930).

³²⁹ Geertz Clifford, “*The Interpretation of Culture*,” 1973, at 76.

such a manner as to produce (discover, select) environmental stimuli needed,³³⁰ for the creation of a new material, for example. Even though the human brain is a unique creation, with complicated processes which are hard to explain in a thesis (thinking for example),³³¹ it is quite obvious that a human mind needs something to develop and build upon. As Levinas stated, “it is usually something, which influences us from outside that opens for us the knowledge of objects which could satisfy our need.”³³² Therefore, by not providing a person at least some freedom in using parts of cultural life is unreasonable from the human rights point of view and also can be considered as against a person’s physicality.

As one can conclude, the idea-expression dichotomy is usually perceived from the rightholder’s point of view, or rather from the work’s point of view. It is not usually seen as a tool of the public at the first place. However, once the human rights approach is presented, the “burden of proof” leans towards the rightholder’s side and the musical works are, first of all, looked at as products of cultural life and heritage. This makes it possible to argue that some expressions that are protected under copyright law can be seen as ideas, in the sense of the idea-expression dichotomy.

5.3. Expressions That Transfer Into Ideas

It was concluded above that some parts of musical expressions, namely most of the building blocks are too ‘generic’ to be regarded as a ‘substantial part’ of the expression in order to comply with the originality requirement.³³³ But what if the whole song becomes ‘generic’? In this regard, another type of works that has to be mentioned in the thesis, are those creations, that by some reason have become so important, famous or common for the public that could be deemed as ideas even while the copyright protection is still in force. It has been reminded not once in the legal scholarship on the similar matters that the nature of time should not be forgotten when one is analysing musical works,³³⁴ as music and culture change over a quite short period of time, and that the state of things in musical cultural life can change in a decade or so. In this regard, the thesis suggests that during the time of protection provided in copyright law the situation might change, and some of the expressions, might lose its protection, by becoming ideas in the meaning of the idea-expression dichotomy. This

³³⁰ *Id.*, at 79.

³³¹ *Ibid.*

³³² Anna Maria Andersen Nawrot, “*The Utopian Human Right to Science and Culture*,” 2014, at 33.

³³³ Luke T. McDonagh, “*Is the Creative Use of Musical Works Without a Licence Acceptable?*” 2012, at 411.

³³⁴ Andreas Rahmatian, “*Concepts of Music and Copyright*,” 2015, at 85 – 91; Carys J. Craig, Guillaume Laroche, “*Out of Tune: Why Copyright Law Needs Music Lessons*,” 2014; J. Michael Keyes, “*Musical Musings: The Case for Rethinking Music Copyright Protection*,” 2004.

argument foots on the assumption that once an expression becomes an inevitable part of cultural life (musical cultural life or cultural life of a group of people), prohibiting the use of such an expression would be unreasonable and against human rights, and that thus such expressions should transfer to the realm of ideas. This way of argumentation, essentially looks at the dichotomy not as one possible justification of the secondary use, but rather focuses on cases where an expression should be deemed as an idea in the general sense.

5.3.1. Trademark Law as an Example of a Right Becoming ‘Generic’

It is argued in this thesis, that even though some expressions gained their copyright protection in the first place, it is possible for them, over a period of time, to become considered as unprotected ideas. In this regard a parallel can be drawn between such expressions and generic trademarks: similarly to trademarks that become generic, expressions become generic in the meaning of cultural life. In the human rights context, the right to take part in cultural life is important, as if this argument was to be applied, and an expression that become a part of cultural life could be deemed as an unprotected idea, the parallel could be drawn with the situation when a registered trademark is deemed to be generic mark, and thus the right being revoked. For these purposes, it is needed to mention a few introductory words about trademarks in general and the revocation of it on the grounds that a trademark became generic, in particular.

Main international treaties in the field of trademark law, such as the Paris Convention on Protection of Industrial Property and the TRIPS Agreement do not provide a concise definition of a trademark. Therefore, member states are left with the discretion to provide a definition on their national level. In the EU, both the Trademark Directive and the Community Trademark Regulation provide the same definition of the term trademark, and provide:

*A trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.*³³⁵

In the US, the Trademark Act defines a trademark as such that “includes any word, name, symbol, or device, or any combination thereof [...] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate

³³⁵ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, Article 2.; Council Regulation (EC) No. 207/2009 of February 26, 2009, on the Community trade mark (codified version), Article 4.

the source of the goods, even if that source is unknown.”³³⁶ As it can be concluded from both definitions, a trademark is a rather broad concept, which provides a rightholder with a negative right to exclude everyone from using his or her trademark in connection to the same or sometimes similar goods and services. Intellectual property rights in general have always been considered as negative rights, except for some particular cases, where a positive aspect of the right may be disputed. Trademark in turn is considered as a negative right as well, and commonly this right does not provide the rightholder with a positive right over the registered mark,³³⁷ meaning that the rightholder enjoys only the right to prevent others from using the trademark without his or her permission.³³⁸ The EU Trademark Directive provides that the “rightholder has exclusive rights to prevent all third parties not having his consent from using in the course of trade.”³³⁹ This provision directly suggests that the right awarded is negative by its nature. Similar to the EU jurisdiction, the Lanham Act in the US provides only negative rights in the case of infringement of a registered trademark³⁴⁰ and does not give the rightholder any positive right to use the trademark.

5.3.2. Generic Trademarks as the Main Example

In relation to the discussion at stake, generic trademarks are of a particular interest. ‘Genericness’ as it is also called in the literature³⁴¹ is generally considered to be one of the absolute grounds for a refusal of a trademark registration;³⁴² it is, at the same time, one of the reasons why a trademark may be revoked after the registration has been granted.³⁴³ Usually trademarks that have become generic are the words that have become part of the common culture over a period of time. In this regard, the US Lanham Act, for instance, provides that the federal registration of a trademark can be subject to cancellation, if “at any time the registered mark becomes the generic name for the goods or services.”³⁴⁴ In trademark law, when a name becomes a necessary term for the industry, it is considered that such a trademark

³³⁶ The Lanham (Trademark) Act (Pub.L. 79–489, 60 Stat. 427, enacted July 5, 1946, codified at 15 U.S.C. § 1051 et seq. (15 U.S.C. ch. 22), para. 1127.

³³⁷ It is still debated whether a trademark should provide the rightholder with a right to use the trademark. It is especially topical in relation to the plain packaging disputes. In that case, the right holder in face of a tobacco company argues that the trademark entitles them the right to use it in the course of trade, and prohibition of such a right (plain packaging means that no brand is visible on a package), interferes with it.

³³⁸ “*Resource Book on TRIPS and Development*,” Cambridge University Press, 2005, at 236.

³³⁹ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, Article 5.

³⁴⁰ See, The Lanham Act, para. §1114 (1).

³⁴¹ Mohammad Amin Naser, “*Revisiting the Philosophical Foundations of Trademarks in the US and UK*,” Cambridge Scholars Publishing, 2009, at 165.

³⁴² *Id.*, at 163; Hector L. MacQueen, Charlotte Waelde, Graeme T. Laurie, “*Contemporary Intellectual Property: Law and Policy*,” Oxford University Press, 2007, at 578.

³⁴³ Lionel Bently, Brand Sherman, “*Intellectual Property Law*,” 2008, at 908.

³⁴⁴ The Lanham Act, para. §1064 (3).

has lost its distinctiveness and therefore its registration may be revoked and finish the protection.³⁴⁵ The most notable examples of marks that have become generic are: "aspirin,"³⁴⁶ "thermos,"³⁴⁷ "yo-yo,"³⁴⁸ or "escalator."³⁴⁹

As for the term generic itself, the Webster's Dictionary defines it as a term referring to all the members of a group, class or kind,³⁵⁰ however, this definition does not suit here. In the meaning of trademark law, trademarks become generic when their "primary significance in the minds of potential buyers is the identification of a product category rather than a producer's brand name,"³⁵¹ or when the public start to "associate the mark with the whole class of goods and/or services, rather than associating the mark with the goods and/or services of the undertaking."³⁵² One factor that also effects 'genericness' of a mark is the availability of alternative names for similar goods and services on the market. Which means that if a certain name is always associated with certain goods or services disregarding the actual producer, and when no name other than the trademarked word is available to the public or competitors to indicate the type or class of product, such a trademark will be considered to be a generic one and it would not be permitted to use in the course of trade any longer.³⁵³

5.3.3. Generic Trademarks and 'Generic Expressions': Protected Expressions that Become 'Generic Expressions'

It was argued before, that in the same way, as trademarks that lose their distinctive character fall into the public domain by becoming part of the common vocabulary,³⁵⁴ some expressions, in particular music expressions may become part of cultural life, and thus constitute unprotected ideas, or in other words, become 'generic expressions.' Even though in the trademark world, such cases are not a common practice, and there exist only a few cases, when the name was held to be generic after it had been registered, the existence of such procedure provides with an example that a monopoly can be taken away due to the cultural or social demands. It is thus not that hard to imagine that such situations may occur in relation to copyrighted musical expressions, and some expressions in some cases could be deemed as

³⁴⁵ Nuno Pires de Carvalho, "The TRIPS Regime of Trademarks and Designs," Kluwer Law International, 2011, at 36.

³⁴⁶ *Aspirin Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

³⁴⁷ *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 321 F.2d 577, 579, 138 USPQ 349 (CA 2 1963).

³⁴⁸ *Donald F. Duncan, Inc. v. Royal Tops Mfg. Co.*, 343 F.2d 669 (7th Cir. 1965).

³⁴⁹ *Haughton Elevator Co. v. Seeberger*, 85 USPQ 80, 81 (Comr Pats 1950); Ralph H. Folsom, and Larry L. Teply, "Trademarked Generic Words," 70 Trademark Rep., 1980, at 207.

³⁵⁰ "Webster's Encyclopedic Unabridged Dictionary of the English Language", at 590.

³⁵¹ Ralph H. Folsom, and Larry L. Teply, "Trademarked Generic Words," 1980, at 211.

³⁵² Mohammad Amin Naser, "Revisiting the Philosophical Foundations of Trademarks," 2009, at 165.

³⁵³ Ralph H. Folsom, and Larry L. Teply, "Trademarked Generic Words," 1980, at 212.

³⁵⁴ Nuno Pires de Carvalho, "The TRIPS Regime of Trademarks and Designs," 2011, at 36.

‘generic’ or common for public. In such cases, providing exclusive rights over such expression should be considered unreasonable.

The way a trademark may become generic is quite close to the notion of cultural life. It is said that while “the arguments for the revocation of generic trademarks may not have been articulated well,”³⁵⁵ looking at this process through the prism of cultural life is one way to articulate such argumentation: once a trademark becomes an inevitable part of cultural life of the society, it is reasonable to revoke the monopoly on such a mark. Another argument which is usually mentioned, prescribes that consumers and competitors would be harmed, if generic marks were allowed to exist, mainly because a mark, if it became generic, loses its capacity to distinguish one goods or services from those of another.³⁵⁶ As there exist many different economic, social and legal arguments in favour of cancelling a trademark on the basis that it has become generic, some of the most relevant are: (1) the public has an inherent "right" to call a product by its name; (2) exclusive appropriation of a generic word would be "unfair" to competitors; and (3) such an appropriation would create or prolong a "monopoly."³⁵⁷ In relation to these examples, the same way three arguments can be provided in order to deem a musical expression as an idea, if it became generic. In this regard the arguments could look like this:

1. the public should have the right to use a certain expression, if it became common for the society (similar to a trademark becoming generic), as part of the right to take part in cultural life;
2. second parties, like musicians, should have a right to use such expressions as well, as that will be unfair to prohibit them from using such expressions that are inevitable for using in the later works, and
3. this can create cases of overprotective and long monopoly for the expressions that have become generic a long time ago, like in the case of the song “Happy Birthday to You.”

If thus looked at the arguments from the human rights point of view, one would see that such argumentation does not seem groundless. In this regard General Comment No. 21 can support the argumentation:

The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This

³⁵⁵ Lionel Bently, Brand Sherman, “*Intellectual Property Law*,” 2008, at 907.

³⁵⁶ *Ibid.*

³⁵⁷ Ralph H. Folsom, and Larry L. Teply, “*Trademarked Generic Words*,” 1980, at 217.

*concept takes account of the individuality and otherness of culture as the creation and product of society.*³⁵⁸

Such a statement can be interpreted in the way to support the idea that some musical expressions can in time and due to a common use in the society become an inevitable part of cultural life. In this case expressions cannot be seen as ‘isolated manifestations,’ and therefore, should be examined considering the realities of cultural life. In the case when the realities suggest that a particular expression, a musical expression in our case, becomes an inevitable part of musical culture, the use of such expressions should not be prohibited, otherwise it might be against the right to take part in cultural life. Consequently, it could be argued that the idea-expression dichotomy, as a guiding test should be interpreted broadly, so to include some expressions under the definition of ideas, in order to comply with the human rights regime.

5.3.4. Procedural Aspect of the Argument

The most problematic issue in this regard, is the absence of any workable procedural option for a ‘revocation’ of such copyright. However, at least some understanding of possible procedure can be borrowed from the procedure as it is in trademark law. It is important in this regard to see which standards are used in examining whether a trademark has become generic, and for this it is important to look how such cases are dealt with in practice. For instance, the text of the UK Trade Mark Act of 1994, in Article 46(1)(c) suggests that for a revocation the name must have become common in *trade*, instead of using the *public*.³⁵⁹ The history of generic trademarks proves, that even in cases when a mark has become generic among the public, the owners can still ensure traders to continue to appreciate the trademark (as it happened in cases of aspirin or gramophone).³⁶⁰ However, the ECJ concluded in the *Bjornkulla v. Procordia* case that in determining whether that the trademark has become the common name in trade for the product in question that comprise the views of all consumers and end users should be taken into consideration.³⁶¹ Consequently, the Court indicated that perception of consumers on the trademark rather than those in trade will play a decisive role in such cases.³⁶²

The procedure of revocation of a trademark usually differs in different jurisdictions; however, it is not the subject of the thesis, therefore, it will not be paid attention to this issue. In relation to a potential procedure through which an expression can be deemed as an idea, the

³⁵⁸ CESCR, General Comment No. 21, para 12.

³⁵⁹ The UK Trade Mark Act of 1994, (c.24).

³⁶⁰ Lionel Bently, Brand Sherman, “*Intellectual Property Law*,” 2008, at 908.

³⁶¹ *Björnekulla Fruktindustrier AB and Procordia Food AB*, CJEU, Case C-371/02, [2004], para. 26.

³⁶² *Id.*, para. 24.

model can be borrowed from the US system. As it is common for the US practice in such cases, the disputes always involve litigation between private parties,³⁶³ and proceedings to challenge the validity of a trademark on the grounds of ‘genericness,’ which have historically been initiated by competitors.³⁶⁴ In these cases, as it is mentioned in the scholarship, the courts “have assumed that granting or maintaining exclusive rights to generic words would unfairly and injuriously deprive competing manufacturers, consumers, and the public of the right to call an article by its name.”³⁶⁵ In similar fashion the courts can assume that by continuing the granting of a monopoly on a particular musical expression, which has become ‘generic’ in the sense of cultural life, copyright law would hamper further development of intellectual creations, and might deprive people from enjoying their right to cultural life.

5.3.5. The Case of the Song Happy Birthday to You as an Example of an Expression Becoming Part of Cultural Life

For the sake of answering the question of how this argumentation could be applied, it might be helpful to apply the theoretical conclusions to a real case. In this regard, I have decided to demonstrate this on the example of the song “Happy Birthday to You.” Even though the song has become probably one of the most recognisable melodies in the world, for around one hundred years Warner Brother until very recently had owned the copyright to this song, and would prohibit any use and any kind of commercial use of it respectively. Just recently a US court has ended the monopoly over this song, and the song became part of the public domain. Talking about the *Happy Birthday to You* case, the problem during the proceedings did not relate to the question of the idea-expression dichotomy, although, there are issues behind the whole situation that one can relate to the dichotomy. The outcome of the case can be found in the summary judgment by the District Court of California, which concluded that, the plaintiff, Summy Co., who claimed the rights of the lyrics to the song, does not own a valid copyright in the “Happy Birthday to You” lyrics as it had never acquired the rights in the first place. In short, the court found that the plaintiff did not comply with the registration requirements in the US copyright law that existed at that time.³⁶⁶

In it now the cultural life argument comes in place. In around one hundred years this particular melody has become an international “anthem” for people throughout the world celebrating their birthdays. After this the melody and its simple lyrics could easily be considered as part of ‘cultural life’ for many generations, in the meaning of the right to take

³⁶³ Ralph H. Folsom, and Larry L. Teply, “*Trademarked Generic Words*,” 1980, at 207, 213.

³⁶⁴ *Id.*, at 213.

³⁶⁵ *Id.*, at 207.

³⁶⁶ For more see, *Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp. 3d 975 (C.D. Cal. 2015).

part in cultural life as it was described above. From this point of view, giving a strong monopoly over the expression would be contradictory to the right of an individual to take part in cultural life, in the first place. Even though the outcome of the case is satisfactory for the society, during almost one century, the melody, which is so much accustomed in the society, had been restricted in use, and the alleged rightholder could still collect royalties, if the melody was used by third parties.

Furthermore, even the question of ‘genericness’ or ‘distinctiveness’ of the particular expression was not examined, during the trial the statement by Patty Hill the original author of the lyrics to the song might be interesting for the case here. It was mentioned in the case that she abandoned her copyright in the lyrics, because of the “fact that her ditty had become common property of the nation.”³⁶⁷ In this case, although in relation to the lyrics, still the rightholder decided to abandon the copyrights as the expression became too ‘generic’ for the society and an inevitable part of cultural life. This also reminds of the situation with the generic trademarks. While awarding a monopoly right over a song that was appropriate upon its creation, after a certain period of time, the musical expression has become an inevitable part of cultural life of the society. It would consequently be unreasonable to hamper the right of everyone to have access and enjoy the ‘generic’ expressions, if such became parts of cultural life. However, when the rightholder does not want to make such a decision by him or herself, the verdict has to be reached by the court. Thus, the procedure similar to the one which is used in relation to generic trademarks can be applied here by analogy. The right to cultural life can be considered as a legal principle to be applied when deciding whether a particular musical expression is considered as an idea, within the idea-expression dichotomy.

5.4. Concluding Remarks on the Chapter

The relationship between human rights and copyright law is a very important matter, which should be paid a separate attention when the question of balancing the rights is at stake. In relation to the present discussion, it has been mentioned a few times in the thesis, that the idea-expression dichotomy appears to be one of the tools that meant to balance public interests and the interests of the rightholders in copyright law. It is still rather questionable, if the approach in relation to musical works in copyright law will be overlooked, however, practices in trademark law, together with the human rights regime provide some silver linings.

³⁶⁷ *Ibid.*

In this chapter the idea-expression dichotomy has been examined from two sides. First, the idea-expression dichotomy was analysed as a guiding principle. It has been argued that the dichotomy, potentially can justify the secondary use of musical works in infringement cases, through the prism of the right to cultural life. This approach is similar to the one presented in Part IV, which relies on the subjective interpretation of the particular case by a judge or jury. However, the reasoning has shifted from philosophical to human rights paradigm. The nature of musical works, and the creative process was mentioned again, and it was argued, in particular that if borrowing a certain musical expressions, especially in the meaning of building blocks for the later creations, constituted the cultural life in itself, authors could claim their right to use pre-existing matters as part of cultural life. This also could stand as one more reason for arguing why the application of the dichotomy as a guiding principle in infringement cases - when musical works are at stake - should be considered.

The second approach in this chapter is more of a general disposition. It is argued, that similar to the situation in trademark law, in which a trademark can be revoked once it became generic, some expressions (musical expression) that are still protected under copyright law, can become 'generic' or lose their 'distinctive' character if they became an inevitable part of the cultural life for the society. It is argued that those expressions that over a long period of time and common use, can be considered as parts of cultural life, should be regarded as ideas in the sense of the idea-expression dichotomy, as the public has the right to freely use and enjoy such generic expressions.

Conclusions

The current research presents the idea-expression dichotomy in relation to musical works. According to this principle, copyright protection applies to expressions only, leaving ideas unprotected. As it has been concluded in the thesis, the idea-expression dichotomy as it is stipulated and perceived by the law and the courts nowadays, does not have an appropriate practical implication in infringement cases. This dichotomy has rather been a general principle of law that indicated the intention of copyright law of balancing of the rights.

The thesis at hand has discussed rather philosophical and, at the same time, very technical issues of musical works and copyright infringements where such expressions are at stake. It has been argued throughout the thesis that copyright law as it is now, does not take into account the nature of musical expression and particular creative processes inherent in musical expressions. In spite of the history of creative use in various musical cultures, as it was presented above,³⁶⁸ the courts and the law tend to reflect very little sympathy for plagiarists and usually interpret it in order to protect interests of the rightholders instead.³⁶⁹ Even though the creative use does play an important part in a number of musical cultures, like hip-hop and jazz, it has been shown that cases contesting plagiarism arise all the time,³⁷⁰ of which the *Marvin Gaye* case discussed above is one of the examples. The courts, therefore, quite often have to deal with the question whether a creative use, which is basically borrowing from the pre-existing material for the new expression, constitutes an infringement or not.³⁷¹ Nevertheless, it seems that in most of the cases an infringement will be found. As it is said, “a presumption of originality allows rightholders to arbitrarily enforce copyright against similar expressions that may not be appropriate in every case.”³⁷² This inappropriateness can be apparent from infringement cases in musical industry, when musicians sue each other for plagiarism, thereby slowing down the creative process of fellow musicians.

Logically, we tend to believe that if two notions do not match each other’s standards, the consensus should be found either through accepting one side right, or reducing both arguments to some acceptable level. In this case, if the idea-expression dichotomy did not fit the realities or if it was regarded as a ‘boneless’ concept, then it maybe would be worthwhile trying to reconsider the approach towards it. And if it is argued that the law concentrates more on the copyright holders than secondary users, it is probably logical to pay attention to the

³⁶⁸ See, Part IV, for the discussion about creative process in different genres.

³⁶⁹ David I. Bainbridge, “*Intellectual Property*,” Pearson Education, 2006, at 35.

³⁷⁰ See, chapter 2.6. of this thesis.

³⁷¹ Luke T. McDonagh, “*Is the Creative Use of Musical Works Without a Licence Acceptable*,” 2012, at 418.

³⁷² Emma Steel, “*Original Sin*,” 2015, at 78.

latest group instead. The idea-expression dichotomy should be also looked at like a principle that justifies creativeness of others instead of hindering it. In this regard, the analysis presented above, seeks to show that the idea-expression dichotomy could be given a fresh look, in the face of a somewhat alternative interpretation.

In this regard, there are particularly two questions that are important for the present research, namely: how the idea-expression dichotomy could be applied in order to fit the realities of musical expressions? And why a theoretical approach towards the idea-expression dichotomy in relation to musical works should enjoy an alternative interpretation?

There can be a few possible answers for these questions, more general and more specific one, which have been proposed in different parts of this thesis. The most general answer to the questions is that in order to fit the realities of musical culture, copyright law and the idea-expression dichotomy should, first of all, take into consideration the nature and creative process of musical expressions. The unique nature of such works, together with a unique character of the creative process, differ musical expression from other copyrighted works, and therefore it is better to pay separate attention to them in the light of the idea-expression dichotomy. As the dichotomy seems to be a static concept, it does fail to reflect on all the technicalities of musical works. Because musical expression, have their own rules of composition, which an author has to have in mind while creating a work, as well as certain building blocks, without which creating a work would not be possible, the law has to take into consideration this while examining an expression. Some of the building blocks and other similar components, due to the generic nature or limited availability have to be regarded as unprotected ideas. It seems that the law and the courts try to achieve such results, however, in my opinion, they have failed to do so.

Consequently, the current research proposes an essentially new approach to the idea-expression dichotomy, which suggests that the dichotomy should be regarded as a double-sided principle. On the one hand it should still remain functioning as one of the groundbreaking principles of copyright law, which provides that expressions are protected, while ideas should be free for everyone to use. On the other hand, and this is what this thesis partly contributes to the field, the idea-expression dichotomy can be used as a guiding principle (tool) for infringement cases, when musical works are at stake.

For answering ‘how’ such an approach can be applied, one has to examine the nature of the work, and how pre-existing material has been used for the creation of a new musical work. Naturally, it is an inevitable part of the creative process for the authors to base their new

creations on the knowledge, experience and remembrance from the pre-existing material. Music-wise, if one digged deep enough, it would not be so hard to find a similar melody to almost every song. Once again, as Keith Richards said on this point: “There’s only one song [...] and Adam and Eve probably sung it [...] everything else is a variation on it.”³⁷³ If that is the reality of the music nowadays, then why not to allow some sort of borrowing from pre-existing works? In the thesis I tried to show that the idea-expression dichotomy could potentially resemble the realities of modern music, if it took into consideration the nature of musical works, and focused on the way the pre-existing expressions are used, rather than just prohibiting most cases of borrowing. To give an answer to the question how the dichotomy can be applied, I argue that if parts of the pre-existing expression could be regarded as building blocks (even if they were original in the copyright sense) and the second creator has used such building blocks in a new context or applied them in a different manner from the original source, such expressions can be regarded as ideas, and the use, might be justified. Moreover, if the dichotomy were applied as a guiding principle, there could be more room for interpretation in each individual case.

The problem is that the current copyright law does not try to justify such a use, but mostly punishes it. In order to justify ‘why’ such an approach is appropriate I have decided to go with two ways: the philosophical justification based on Locke’s natural theory, and human right approach, in the face of the right of everyone to take part in cultural right.

In relation to the first line of justification, it has been argued that because of the Lockean theoretical conclusions, including the “as enough and as good” proviso, such property theory explains the existence of the dichotomy in the best way. However, apart from the natural law justification, Locke’s other notions may appear to be important for the application of the dichotomy as a guiding principle. Locke argued there are two sources of ideas: sensations, which in this context can be interpreted as pre-existing musical expressions, and the operation of our own minds, the way how sensations are interpreted or applied by ourselves. In this regard, I argued that once a pre-existing expression has passed through another musician’s mind, as part of the creative process, such a transformative use can be justified. This means that if a pre-expression was used as a ‘building block’ for the new musical expression such a use can be justified, as in this way the sensation becomes an idea in the Lockean sense.

The second line of justification rests in human rights law and the right to take part in cultural life in particular. In general, all musical expressions are to be considered as cultural life, and

³⁷³ Jessica Pallington West, “*What would Keith Richards do?*”, 2009, at 63.

to such endeavours the public usually has access (e.g. record stores, Spotify). But if one concentrated on the use of the pre-existing material again, an interesting argumentation would be worthwhile to consider. What if borrowing of the pre-existing material by itself constituted a part of cultural life? If this were the case, the idea-expression dichotomy should be interpreted in the light of the right to cultural life. As it has been said, for some genres, like jazz, folk or hip-hop, arguably rock also, borrowing from other artists has been a normal part of the creative process. Therefore, where borrowing of the pre-existing material can be regarded as a part of the musical culture, and the secondary use is not just a slavish copying but rather a use of it as building blocks (ideas), it is argued, that in such cases musicians have some grounds to claim their right to cultural life.

Lastly, it has been suggested in the thesis that some of the expressions, during the time of copyright protection, by becoming too 'generic' for the society, might lose their 'distinctiveness' and transfer into unprotected expressions. Arguably, some of the musical expressions have become so 'generic' for particular society, that awarding a monopoly over such expression would be unreasonable in relation to the society. One of such examples, provided in the thesis is the famous song *Happy Birthday to You*. It is thus continuing protection for such expressions might be seen as being against the right of everyone to take part in cultural life. Similar to the reasons why the generic trademarks get revoked, 'generic' expressions should be considered as unprotected ideas.

One can argue that the proposed 'special' approach to the idea-expression dichotomy in relation to musical expressions might be too arbitrary or subjective, as a lot in the end depends on the interpretation by a judge or jury. However, the main purpose of the research was essentially to point out the problematic issues revolving around the idea-expression dichotomy, and to provide the grounds for rethinking the approach in relation to musical works, which might serve as a foundation for a future debate.

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