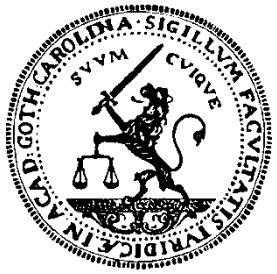

FACULTY OF LAW
Lund University

Linnea Hogland

Copyright and Single Dance Moves

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Contents

Summary

This thesis is about the copyright protection for single dance moves. The purpose of this thesis is to come to a conclusion as to whether single dance moves could be protected by copyright in Europe and if it should be protected. These questions originate from the United State lawsuits against the gaming company Epic Games and their use and sales of allegedly copyright protected dances.

The first research question is if single dance moves can be protected by copyright law. It is answered by examining the requirements for copyright protection. All authorial works are protected under EU law and dances are such subject matter that is protected according to Article 2 of the Berne convention. The key concept in European copyright law to determine whether or not a work is protectable by copyright is originality. A work has to be an author's own intellectual creation in order to be protected. There are two important decisions from CJEU on this matter and it is the *Infopaq* decision and the *Painer* decision. These decisions explain the details of the originality requirements.

A single dance move is not as complex as a full dance routine and therefore has less creative freedom for the author. Depending on whether one considers both the technical aspects such as the movement of the body, and the artistic aspect such as the combination with music and setting, a single dance move could be considered meeting the originality requirement. It does however seem like the interpretation of the originality requirement makes it difficult to consider single dance moves containing enough creative freedom for the authors, but it is impossible to establish what CJEU would rule in such circumstances since it has never been decided in Europe before. It is also important to keep in mind that the scope and meaning of the originality requirement is not completely harmonized in EU and is decided on a case-by-case basis, which means that single dance moves could be protected in one Member State and not protected in another.

The second research question is if the Fortnite emotes are an infringement of the potentially copyright protected work. To answer this question the rights that copyright confer to the authors and the requirements for infringement of those are analysed and also if any exception or limitation to those rights are applicable. The conclusion is that the emotes would infringe the reproduction right, the adaption right, maybe the distribution right, but not

the communication right if single dance moves would be protected by copyright. It would also infringe the moral rights.

The third and final research question is if single dance moves *should* be protected by copyright. This is answered by examining the purpose and justification of copyright in general. An important concept discussed regarding this is that of a fair balance between fundamental rights and interests and also the general EU principle of proportion. Different rights and interests of parties affected by a potential protection of single dance moves are discussed in the light of these concepts and the conclusion is that single dance moves should not be protected by copyright since the interest of the authors does not outweigh the negative impacts it would have on the creativity of others.

Abbreviations

CFR	Charter of Fundamental Rights of the European Union
CJEU	European Court of Justice
EU	European Union
ECHR	European Convention of Human Rights
InfoSoc	Directive 2001/29
The Charter	Charter of Fundamental Rights of the European Union
The Convention	Berne Convention for the Protection of Literary and Artistic works
The Term directive	Directive 2006/116/EC
The Database Directive	Directive 96/9/EC
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdoms
US	United States

1 Introduction

In this digitalized era of rapid and widespread information, choreographers are provided with a greater possibility to share their creativity, but are also constantly reminded of the increased exposure of their creative intellect and the importance of protecting their works through copyright and related rights.

In 2018 the company Epic Games was sued by three celebrities for the reproduction in their video game Fortnite of what the claimants argue to be their copyright protected dance moves. Fortnite is one of the most popular and profitable video games in history and all its profits comes from in-game purchases of non-essential optional virtual goods such as dance emotes. The subject of copyright and dance have been discussed since the lawsuits, especially in the US. The 2019 US Supreme Court decision in *Fourth Estate Public Benefit Corp v Wall-street LLC* raised questions about whether single dance moves such as the allegedly copied ones in the Epic Games lawsuits could be protected by copyright and if so, the act of using and selling them as animated emotes in a video game such as Fortnite would be an infringement of that copyright.

The lack of case law on the subject has left choreographers and performers with inadequate guidance on the legislation. There have been no decisions in Europe regarding the protection of single dance moves and very few decisions on copyright and dance. Copyright in EU is also not completely harmonized which makes it even more difficult to find guidance as to whether single dance moves are protectable or not and if they *should* be protected.

This thesis will analyse the problems related to copyright and single dance moves and examine if it is possible to protect such dance moves and if the act of using and selling emotes in video games in the same manner as Epic Games does would be an infringing of that potential copyright. It will also examine whether or not single dance moves should be protected by copyright regarding different competing rights and interests of affected parties.

1.1 Purpose

The main purpose of this thesis is to examine whether Epic Games use of emotes that are based on single dance moves created by others is an act of infringement according to copyright law in Europe. Another aim of the thesis is to come to a conclusion as to whether single dance moves should be protected by copyright law based on the different objectives of copyright and the different interest of parties.

1.2 Research questions

1. Can single dance moves be protected by copyright law?
    - What are the requirements for copyright protection in Europe?
    - What does copyright protect?

2. Are the Fortnite emotes an infringement of copyright protected works?

3. Should single dance moves be protected by copyright law?
    - What is the purpose of copyright?
    - What is the purpose of the exceptions and limitations to copyright and related rights?
    - What rights and interests needs to be considered?

1.3 Limitation

Epic Games' act of selling the emotes have been a discussion in US and there are more cases about copyright and dance from the US as well. I have chosen not to investigate the US legislation thorough since that would have been too much to cover in this thesis. A comparison could have been made between European legislation and US legislation, but that would have been a subject for a whole different thesis. To keep this thesis consistent, I chose to only briefly cover some of the US rules to give a background to the lawsuits against Epic Games.

The main issue of the thesis have been to establish if copyright subsist in single dance moves and confers rights to the author. I have therefore not analysed the performers rights too much, but I did still feel like it was necessary to cover it very briefly since it is connected to the author's rights when it comes to dance. It is mostly analysed in relation to the question of who the author of a dance move is and as will be shown, in the cases of single dance moves it is usually the performer that is the author anyway.

I could have limited the thesis to not include a discussion of whether single dance moves should be protected or not, but I felt that this is a relevant question to the subject and wanted to discuss it more. This is a very subjective area which could be discussed from a lot of perspectives, but is limited in this thesis to include only the interests and rights that are directly connected to the protection of single dance moves.

1.4 Method and material

The doctrinal legal research method is mainly applied in this thesis to research the question if the Fortnite emotes are an infringing act. Research is conducted into legal doctrine to understand the rules and provisions that applies too a specific legal field, in this case intellectual property law and specifically copyright law. A problem area is chosen and then the scope of the research is narrowed down to the specific research questions that deserve specific attention. Data from the legal doctrine that is relevant is then collected and analysed in order to answer the research question and then those findings are put forward and discussed.[1]

The relevant legal doctrine in this thesis have been EU legislation and specifically the Treaties and Directives relevant to copyright. The Berne Convention have been of much importance since that is the oldest international convention covering works such as dances. Case law have also been important to analyse since it gives an understanding of how to interpret the provisions in the applicable legislation. Of special importance have been the *Infopaq*[2] case and the three cases regarding the purpose of exceptions, *Pelham*[3], *Spiegel Online*[4] and *Funke Medien*.[5]

To determine if single dance moves *should* be protected by copyright I have used a *Lex ferenda* approach. This is an approach that considers law to be normatively preferable when the existing rule of law causes an unclear or undesirable result. *Lex ferenda* is a proposed law or proposed interpretation of law, i.e. how the law ought to be.[6] To research how the copyright law

[1] P. Ishawara Bhat, *Idea and Methods of Legal Research*, (Oxford University Press, 2019), p. 145-161.
[2] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU.
[3] Case C-476/17 *Pelham* [2019].
[4] Case C-516/17 *Spiegel Online* [2019],
[5] Case C-469/17 *Funke Medien* [2019].
[6] A. X. Fellmeth and M. Horwitz, *Guide to Latin in International Law*, (Oxford University Press, 2009), p. 224.

should approach the question of protecting single dance moves I have analysed the purpose of copyright in general and the purpose of the exceptions and limitations to copyright and related rights. I have also analysed the different fundamental rights and interests between parties.

I have encountered difficulties finding trustworthy sources about copyright in choreographies and single dance moves in Europe. There is no case law regarding this matter from the CJEU and there has been little discussion about the area in literature. There have been cases in the United States and therefore I found a lot more sources that covered the issue from a US perspective. Another difficulty in finding good sources has been the fact that the copyright protection in EU is not completely harmonized and is governed by individual Member States. This means that the laws are not the same in every country and that any discussion about the area that I have found has mainly been from a perspective of the specific Member States' legislative sources, especially British laws. My main focus has been to examine this issue from a general EU perspective and therefore I have tried to use sources that discuss the issue in relation to EU law.

Another difficulty I had when I started writing this thesis was my lack of knowledge about dances and the dance community in general. I had to do a lot of research on basic knowledge about dances before I could start. This is also why I chose to focus more on the legal aspect of the subject, i.e. copyright and not too much on dance itself, but of course some parts had to focus on the aspect of dance since the thesis is about copyright protection for dances.

2 Dance, Fortnite and US lawsuits

2.1 Dance

There are debates among dance professionals as to what constitutes a dance and many of these focus on a personal view of the quality of the work. Some talk about performance and choreographs that are spontaneous and not based on any school of dancing and so cannot be taught and therefore is not an art, as for example work by Isadora Duncan.[7] Others discuss the difficulties in identifying the work in postmodern dance because its structure and form challenge the traditional and are prone to have many identities.[8]

Dance can be seen in an artistic aspect as a medium of human expression and interaction. Dance includes both technical attributes in the form of the actual movement and footwork and also artistic interactions between the movements and music to give the desired effect to the observer. Dances are unlike paintings and sculptures not things that can be touched or moved, but are in some historical and cultural context created, appreciated and analysed as art works embodying ideas and meaning.[9]

When creating a work, choreographers establish the types of action of which their work is to be composed by organising those actions into a specific pattern or structure.[10] The choreographer shows the performer what action is to be performed and how to perform it. The performer can then interpret those actions and perform it in his or her personal way. Sometimes both the performer and the choreographer have input on the creative choices and the individual contributions can be hard to distinguish.[11] The range of these actions are wide and include, but are not limited to, steps from codified vocabulary that can be extended through experimentation with underlying principles or supplemented by pantomimic gestures to create narratives.

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[7] Isadora Duncan is known as the "Mother of Modern Dance" and was a self-styled revolutionary in the dance community.
[8] G. B. Dinwoodie, *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Edward Elgar Publishing, Cheltenham, UK, 2015), p. 231.
[9] A. Pakes, *Choreography Invisible: The Disappearing Work of Dance*, (Oxford Scholarship Online, 2020), p. 1.
[10] J. Van Camp, *Creating works of art from works of art: The problem of derivative works*, Journal of Arts Management, Law & Society, 1994, Vol. 24, Issue 3, p. 209.
[11] A. Brown and C. Waelde, *Research handbook on Intellectual Property and Creative Industries*, p. 205.

They can also be developed by the choreographers themselves over time.[12] Worth mentioning is that dances are usually not considered created without influence. Choreographers are usually much inspired by other works that they have been exposed to during their lifetimes and therefore it can be a problem to distinguish between works that are new and those that are merely derivative.[13]

Choreographic actions are not only bodily movement but can also be the dramatization of a story in relation to music or action in a particular place and time. Music, scenography, site and other things are as important to the context when creating a dance as the movement of the body.[14]

Single dance moves as mentioned in the following of the thesis are dance moves in a simple routine that only consist of single moves that are not combined into a fully choreographed dance. An example of this is the famous 'Moonwalk' or 'The Twist'.

Dance as an expression and practice of relations of power and protest, resistance and complicity has been the subject of historical and ethnographic analyses. Studies of the politics of dance and the relations between culture, body and movement were a popular subject in the 1980s. Dance studies have even contributed to discussions in colonialism and culture. In Europe, the importance of dance under colonial rule is shown by the suppression, prohibition and regulation of indigenous dances under the colonial rule. Colonial administrations often saw indigenous practices as a political and moral threat. Local dances were often viewed as too erotic and the dances were often banned or reformed.[15] In some colonized areas, dance practices was a real threat of political resistance and rebellion. The dance practice contributed to a sense of unity and power, potentially spawning uprisings against colonial rulers.[16]

Since at least the 19th century, dance and music have been potent symbols of identity for ethnic groups and nations world-wide. Dance is a powerful tool in shaping nationalist ideology and in the creation of national subjects. Political ideologies play a significant role in the selection of national

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[12] A. Pakes, *Choreography Invisible: The Disappearing Work of Dance*, (Oxford Scholarship Online, 2020), p. 121-122.
[13] J. Van Camp, *Creating works of art from works of art: The problem of derivative works*, Journal of Arts Management, Law & Society, 1994, Vol. 24, Issue 3, p. 209.
[14] A. Pakes, *Choreography Invisible: The Disappearing Work of Dance*, (Oxford Scholarship Online, 2020), p. 123.
[15] J. Comaroff, *Body of Power, Sprit of Resistance: Culture and History of a South African People*, (Chicago, Chicago University Press, 1985), p 276.
[16] S. Reed, *Politics and Poetics of Dance*, Annual Reviews of Anthropology, vol. 27, (1998), p. 503-532.

dances. For example, the ideological reasons for the adoption of ballet during China's Cultural Revolution are likely to be the ballet's narrative possibilities, movement vocabularies that stresses strength and action and its flexibility in expressing gender equality.[17]

Regarding dance and copyright, some argue that dance can never be absolutely reproduced because of its dependence on a particular body. Capturing and preserving the dance would open it up to the possibility of commodification and this reinforce the view that dances should 'die' with the choreographer since the dance cannot retain its integrity without the supervision of the choreographer. Another view is that dance needs to be preserved so that others can learn from them. They should be revived with choreographers bringing their own stagecraft and creativity to the process.[18]

There are few court cases in national jurisdictions over copyright and dance, and those there are, have tended to focus on questions of ownership.[19] One controversial event in the dance world was when Beyoncé used in her video for her single 'Countdown' some movements from the Belgian choreographer Anne Teresa de Keersmaeker and her dances 'Rosas danst Rosas' from 1983 and 'Achterland' from 1990. This case was however not taken to court and therefore no precedent was made from this.[20]

2.2 Fortnite and Epic Games

Fortnite is a video game that has become one of the most popular and profitable games in history in a relatively short period of time. It was released in July 2017 by Epic Games and had around 125 million of registered players only a year after the release. The amount of players has since then increased and the latest official number that Epic Games revealed was 250 million in March 2019.[21] Fortnite has three distinct game mode versions which are Fortnite Battle Royale, Fortnite: Save the world and Fortnite Creative. All three are available for Windows, macOS, PlayStation 4 and Xbox One. Fortnite Battle Royale and Fortnite Creative is in addition

[17] S. Reed, *Politics and Poetics of Dance*, Annual Reviews of Antropology, vol. 27, (1998), p. 503-532.
[18] P. Torremans, *Research Handbook on Copyright Law: Second Edition*, (Edward Elgar Publishing, Cheltenham, UK, 2017), p. 472.
[19] For example, *Martha Graham v Martha Graham CTR of Contemporary Dance, Inc.*, 380 F.3d 624, [2005], US Court of Appeal, Second Circuit.
[20] P. Torremans, *Research Handbook on Copyright Law: Second Edition*, (Edward Elgar Publishing, Cheltenham, UK, 2017), p. 489.
[21] https://www.businessinsider.com/how-many-people-play-fortnite-2018-11?r=US&IR=T Accessed 2020-03-10.

to those platforms also available on Nintendo Switch, iOS and Android devices.[22]

Fortnite Battle Royale is the most popular one of the three versions and is a free-to-play battle royale type of game. It is a player-versus-player game for up to 100 players in each lobby. It allows one to play alone, in a duo or in a squad consisting of three or four players. Players drop down from a "Battle bus" and choose their landing spots on the map where they must scavenge for weapons, items and resources while they are trying to stay alive and eliminate other players. The safe area of the map where a player does not lose any health points is shrinking in size by a toxic storm as the time passes in a round. If a player stays in the toxic storm, they will eventually lose their health points and be eliminated. The aim of the game is to be the last player or team remaining.[23]

As mentioned above, Fortnite Battle Royale is a free-to-play mode. This is a relatively new approach that video game companies have taken in all forms of online multiplayer games. Subscriptions where you regularly pay to get access to play the game for a certain period of time have been dropped in favour of a download of a game that you can immediately start playing. Once people are playing the game, the company that owns it can get a feed of money from players that purchase customisations.[24]

Epic game's revenue comes from providing the players the option to buy virtual goods with micropayments. These goods are only cosmetical and does not affect the gameplay in any way. The virtual goods that are available to buy are such as character skins and emotes. The emotes that Epic games offer are usually a short sequence of some type of animated avatar movement that could be described as a dance move. Some of the dance moves that Epic games offer are very distinct and easily recognizable as dance moves previously used and created by others.

Epic game also offers players to buy the so called Battle Pass for the Battle Royale mode. The Battle Pass is a system that rewards players for playing during an established length of time, which is known as a Season. The player levels up and is rewarded more items the more they play and level

[22] https://www.epicgames.com/fortnite/en-US/faq
Accessed 2020-03-10.
[23] https://en.wikipedia.org/wiki/Fortnite/ Accessed 2020-04-10.
[24] I. Hughes, *Video Game Currency: Clever or Corrupting?*, ITNOW, vol. 61, issue 4, 2019, p. 60-63.

up. Fortnite made 2.4 billion dollars in 2018 from players that made in-game purchases.[25]

2.3 US lawsuits against Epic Games

In December 2018, the Brooklyn rapper Terrence "2 Milly" Ferguson, former "The Fresh Prince of Bel-Air" star Alfonso Ribeiro and Instagram's Russel "Backpack Kid" Horning all filed suits against Epic Games, saying that Epic Games copied each of their trademark dance moves and used them as emotes and sold them to millions of players without permission.[26] The name of the emotes are Swipe it (Terrence Ferguson), Fresh (Alfonso Ribeiro) and Floss (Russel Horning).[27] All three dance moves are very simple and consist only of a few movements.

The US Supreme Court recently ruled that a copyright owner must first obtain a copyright registration from the Copyright Office prior to filing a complaint for infringement of that work.[28] After this ruling, all of the above lawsuits were withdrawn in order to refile in accordance with *Fourth Estate*, since none of them had a copyright registration on their dances prior to this ruling. The US Copyright Office has repeatedly refused to register the copyright of the dance moves and stated that simple or routine dance movements made up of social dance steps do not constitute a work of choreography that can be protected by copyright.[29]

The US Copyright Office states that individual movements or dance steps by themselves are not copyrightable and gives the example of a basic waltz step, the hustle step, the grapevine of the second position in classical ballet. It also states that it 'cannot register short dance routines consisting of only a few movements or steps with minor or linear spatial variations, even if a routine is novel or distinctive'. Social dances are also something that is not

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[25] I. Hughes, *Video Game Currency: Clever or Corrupting?*, ITNOW, vol. 61, issue 4, 2019, p. 60-63.
[26] Case 2:18-cv-10110-CJC-RAO, *Terrence Ferguson v Epic Games Inc*, District Court, C.D. California and Case 2:18-cv-10444-R-MAA, *Anita Redd v Epic Games Inc*, District Court, C.D. California and Case 2:18-cv-10412-CJC.-RAO, *Alfonso Ribeiro v Epic Games Inc*, District Court, C.D. California.
[27] https://fortnitetracker.com/shop
Accessed 2020-03-12.
[28] *Fourth Estate Public Benefit Corp. v. Wall-Street.com LLC et al.*, Case number 17-571. 586 U.S. [2019].
[29] A. Robinson and A. Tuner, *Embracing New Technology vs Litigation: If you can't beat them, join them*, Brooks Kushman PC, 2019.
https://www.lexology.com/library/detail.aspx?g=eda399a3-0163-4204-91d9-7d84d436c421
Accessed 2020-05-10.

copyrightable in the US. The US Copyright Office says that choreographic works are a subset of dance and are not synonymous with dance. Choreographic works does not include social dance steps such as ballroom dances, folk dances, line dances, square dances and swing dances or any simple routines. This is because registrable choreographic works are 'typically intended to be executed by skilled performers before an audience'.

Derivative choreographic works can be protectable according to the US Copyright Office. A derivative work is based on or derived from one or more preexisting works and is typically a new version of a preexisting choreographic work or an entirely new work. To be registrable and protectable the new material that the choreographer contributed to the work must however be independently created and contain a sufficient amount of creativity.[30]

[30] U.S. Copyright Office, *Copyright Registration of Choreography and Pantomime*, Circular 52, 2017.

3 Copyright

3.1 Introduction

Copyright and related rights is a field of law that is protected under national laws of individual states in EU, but has also been subject to extensive legal regulation through EU.[31] They are a limited-term exclusionary rights that automatically subsist in and protect authorial works, such as paintings, books and dance compositions as well as other certain categories of expressive subject matter such as films, broadcasts and performances. EU law requires the protection by copyright of all authorial works which includes among others, original computer programs, photographs and databases. This protection is recognized as a fundamental right under Article 17(2) CFR and is also consistent with Article 1 of Protocol 1 ECHR. The copyright rules require that copyright in a work last until 70 years after the author's death and that the protection takes effect during that time according to the laws of the individual Member States. In addition to copyright, EU law also requires the protection and recognition by Member States of related rights in respect of a closed list of non-authorial expressive subject matter. This includes for example broadcasts, phonograms and performances and are on terms similar to those that governs copyright.[32]

Copyright and related rights throughout Europe subsist and are enforceable without any application or assertion by anyone who claims protection. There is also no need for any registration of other formal action by the protecting state. This differs a lot from the other IP rights such as patents and trademarks that both requires registration for the protection to subsist in the subject matter. A consequence of the absent of a registration requirement is that there is no official register of the rights or the rights holders from whom permission is needed in order for the protected work or subject matter to be lawfully reproduced or communicated to the public.[33]

The regulations that facilitates the copyright and related rights protection are grounded in treaty norms. It exists a large number of harmonizing EU directives in the field and associated judicial decisions that the domestic

[31] P. B**.** Hugenholtz*, Copyright and Freedom of Expression in Europe*, (Oxford, Oxford University Press, 2000), p. 3.
[32] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 221-222.
[33] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 224.

systems of the EU member states are required to comply with within certain limits.[34]

The Berne Convention for the Protection of Literary and Artistic Works was first signed in 1886 and is one of the oldest treaties on copyright protection. It establishes a "Union for the protection of rights of authors in their literary and artistic works" and it creates a foundation of several concepts of international copyright law. It provides creators such as authors, poets and choreograaphers with means to control how their works are used, by whom and on what terms.[35]

Of special importance among the EU copyright and related rights directives and to this thesis is the Information Society Directive. This directive establishes the basic obligations of Member States regarding copyright and related rights. This directive is based on the obligations imposed by Berne and Rome conventions and also implements the further requirements of the WIPO Copyright Treaties of 1996.[36] The InfoSoc Directive represents the closest thing that currently exists to a complete regulation of the European copyright and related rights. It applies ('without any prejudice to any acts concluded rights acquired before 22 December 2002') to all of the works and subject matter that on the date were protected by Member States' copyright and related rights legislation or met the protection criteria of the Directive or the provisions referred to in Article 1(2).[37]

3.2 Requirements for protection

3.2.1 Subject Matter

Copyright and related rights subsist in any subject matter that is of protectable type, is sufficiently connected to the territory of the protecting state and satisfies any applicable formalities. All European states need to ensure copyright and moral rights protection for authorial works and of special importance in this regard is the Berne Convention.[38]

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[34] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 36.
[35] P. B. Hugenholtz, *Copyright and Freedom of Expression in Europe*, (Oxford, Oxford University Press, 2000), p. 3.
[36] P. B. Hugenholtz, *Copyright and Freedom of Expression in Europe*, (Oxford, Oxford University Press, 2000), p. 3.
[37] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 225.
[38] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 250.

Important for this thesis will be to determine whether dances, and in particular single dance moves, are such protected subject matter.
Article 2 of the Berne Convention contains a list of 'protected works' that the Berne Union states are required to recognize and protect. The article specifically states that 'literary and artistic works' that are protected by copyright include choreographic works.

3.2.1.1 Distinction between copyright and related rights subject matter

An important distinction that must be understood in order to understand copyright in dances is the one between copyright works and related rights subject matter. It reflects a substantively different nature of each type of subject matter and the rights they attract. Generally, one can say that authorial works are intangible expressions of a person that has the title 'author'. This is for example the case with poems, dances, books and musical tunes. Related subject matter on the other hand are recording or communications of such expressive content that is produced or in another way brought into existence by someone other than the author. The copyright protection gives more protection than the related rights protection in the sense that copyright gives the right to prevent non-mechanical and non-literal reproduction of it while related rights holders usually gets the rights to prevent reproduction and other unauthorised uses of the recording or communication comprising the protected subject matter. It does not extend to the actual content that those subject matter record or communicate.[39]

3.2.2 Originality

A key concept in copyright law is "originality". For a work to be protected by copyright it is required that it is original. This is a rather vague term and its practical implications are not certain, but there are sources of law where this concept and requirement is mentioned and the CJEU has also made decisions on the matter that clarifies the threshold of originality. The Berne convention establishes basic minimum requirements for copyright protection but does not contain anything regarding originality other than that a copyright holder generally maintains rights in his original work.

[39] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 249.

The scope of the principle of originality has been harmonized in very little extent in EU. The requirement has traditionally been used in different ways between Member States and especially between continental Member States and the UK. The UK has used the principle as a loose notion referring to sufficient skill, labour and effort, while the continental Member States has had a much stricter meaning of originality in its copyright laws. Originality has been harmonized in relation to computer programs, databases and photographs and is there interpreted as 'the author's own intellectual creation'. This is the standard meaning of the requirement that is adopted in continental Member States.[40]

Originality is difficult to define in a theoretical fashion since the concept itself is vague and the scope of it is uncertain. It exists four families of standards in legal terms of the concept today. These are the EU standard of an 'author's own intellectual creation', the US standard of a 'minimal degree of creativity' after a decision of the US Supreme Court in *Feist,*[41] Canada's CHH[42] standard of 'non-mechanical and non-trivial exercise of skill and judgment' and the UK's 'skill and labour' standard.[43] This section will examine the originality requirement from a European perspective.

The 2004 Commission Staff Working Paper on the Review of the EC legal framework in the field of copyright and related rights[44] was aimed at assessing whether any inconsistencies on definitions or rules on exceptions and limitations between different Directives hampered the operation of the *acquis communautaire* or had a harmful impact on the fair balance of right and other interests. It had a final section dedicated to the assessment of issues outside the current *acquis*, for example originality. The Working paper acknowledged that the notion of originality had not been addressed in Community legislation in a systematic manner and had only been referred to in three Directives where the Community legislator had considered it necessary to take account of the special features or the special technical nature of the category of work in question. Aside from these cases, the Working Paper acknowledge the different meanings and scopes assigned to originality in different Member States' legislation.[45]

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[40] E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, (Cheltenham, Edward Elgar Publishing Limited, 2013), p. 3-6.
[41] *Feist Publications, Inc, v Rural Telephone Service Co*, 499 US 340 (1991), Section II, §1.
[42] CHH *Canadian Ltd v Law Soc'y of Upper Can,* (2004) 1 SCR 339, Section 15.
[43] E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, (Cheltenham, Edward Elgar Publishing Limited, 2013), p. 60.
[44] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, 19 July 20044, SEC (2004), 995.
[45] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, 19 July 20044, SEC (2004), 995, para. 3.1.

In EU, the originality requirement is in fact referred to only in Directive 2009/24/EC on the legal protection of computer programs (the Software Directive), Directive 2006/116/EC on the term protection of copyright and certain related rights (the Term Directive) with regard to photographs and Directive 96/9/EC on the legal protection of databases (the Database Directive). The Software Directive provides in Article 1(3) that 'a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to its eligibility for protection.' The Term Directive has a similar statement in Article 6 which says that 'photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs'. Article 3(1) of the Database Directive states that 'in accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.'

From the abovementioned Articles it is apparent that the originality requirement, when harmonized, was intended as 'the authors own intellectual creation'. That means that the requirement of originality for certain categories of work follows the continental model when harmonized and thus the notion of originality implicitly embraced in the Berne Convention and later incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, the degree of originality that is required for protection under the Berne Convention varies widely amongst the contracting parties even if the copyright subject-matter has to be the result of the individual's own intellectual efforts.[46]

In assessing the originality or lack of originality in a subject matter, French courts have sometimes used a similar language to that of trademark law. This highlights the difficulties in having an independent understanding of the notion originality in copyright law and also shows that it has often relied on the concept of novelty in patent law or distinctive character in trademark law, at least in French courts. In countries other than France, some courts have employed a comparative approach similar to the novelty test in patent law and assessed whether the work in question could be regarded as unique.[47] Advocate General Trstenjak makes a reference to originality as

[46] E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, (Cheltenham, Edward Elgar Publishing Limited, 2013), p. 62.
[47] E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, (Cheltenham, Edward Elgar Publishing Limited, 2013), p. 72.

containing an assessment of distinctiveness in his opinion on the *Infopaq* case. He says that the interpretation of the notion 'reproduction in part' must 'strike a balance between technically inspired interpretation and the fact that the reproduction in part must also have a content, a distinctive character and – as part of a given work – a certain intellectual value' to be protected by copyright.[48]

3.2.2.1 Infopac

As mentioned above, the originality requirement is only referred to in Artictle 1(3) of the Software Directive, Article 6 of the Term Directive and Article 3(1) of the Database Directive. As said in the Commission Staff Working Paper of 2004, it was harmonized to take account of the special features or the special technical nature of the category of work in question.[49] However, the decision from CJEU in *Infopaq International A/S v Danske Dagblades Forening*[50] (from now on *Infopaq*) has now harmonized the originality requirement at the EU level.

Infopaq operated a media monitoring and analysis business that primarily used summaries of selected articles from Danish daily newspapers and other periodicals. The articles was selected on basis of certain subject criteria agreed with customers and the selection was made by means of a 'data capture process'. The summaries were then sent to customers by email. Danske Dagblades Forening (DDF) was a professional association of Danish daily newspaper publishers who assisted its members with copyright issues. In 2005 they became aware that Infopaq scanned newspaper articles for commercial purposes without authorisation from the right holders. They complained to Infopaq about this procedure. Infopaq disputed the claim that the procedure required consent from the right holders and brought action against DDF before the Østre Landsret (Eastern Regioinal Court) and claimed that DDF should be ordered to acknowledge that Infopaq did not need consent for this procedure. Østre Landsret dismissed the action and Infopaq then brought an appeal before the referring court. The disagreement between the parties was as to whether there was reproduction as contemplated in Article 2 of Directive 2001/29 (InfoSoc Directive) and also whether, if there is reproduction, the acts in question are covered by the exemption from the right of reproduction in Article 5(1) of the same Directive.[51]

[48] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009], Opinion of Advocate General Verica Trstenjak, delivered on 12 February 2009, para. 58.
[49] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, 19 July 20044, SEC (2004), 995, para. 3.1.
[50] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU.
[51] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU.

This is where the referring court decided to stay its proceedings and referred questions to the Court of Justice. One of the questions was whether the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, could be regarded as acts of reproduction. The Court answered that as a preliminary observation it should be noted that where provisions of Community law doesn't make any express reference to the law of Member States for the purpose of determining their meaning and scope, they must normally be given an autonomous and uniform interpretation throughout the Community. Article 2 of the InfoSoc Directive is such a provision.[52]

CJEU made clear that the InfoSoc Directive does not provide a definition of the concept 'reproduction' or 'reproduction in part'. These concepts therefore 'must be defined having regard to the wording and context of Article 2 of the InfoSoc Directive, where the reference to them is to be found and in the light of both the overall objectives of that directive and international law'.[53] The court also held that it is apparent from the general scheme of the Berne Convention that protection of certain subject matters as artistic or literary works presupposes that they are intellectual creations.[54] To be noted regarding this is that Member States can extend protection to works that may not be considered original in the sense that they are intellectual creations since the Berne Convention only sets a minimum standard of protection.[55] As a final step, the court held that in establishing a harmonized legal framework for copyright, the InfoSoc Directive is based on the same principles as the Software Directive, the Term Directive and the Database Directive which all contains the originality requirement. Therefore, 'copyright within the meaning of Article 2 (a) of the InfoSoc Directive is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation'. The Court found that the 11 word extract was a reproduction in part because the words reproduced were the expression of the intellectual creation of the author.[56] This is how the originality requirement was harmonized by CJEU on EU level.

[52] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU.
[53] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009], para. 32, CJEU.
[54] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009], para. 32, CJEU.
[55] E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, (Cheltenham, Edward Elgar Publishing Limited, 2013), p. 106.
[56] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU, para 37.

3.2.2.2 Painer

Another decision from the CJEU that follows the *Infopaq* decision and further clarifies the originality requirement is that of *Painer*.[57] The facts in the main proceedings are related to an abduction of an Austrian girl named Natascha Kampusc. Freelance photographer Eva-Marie Painer had taken photographs of Natascha. She had designed the background, decided the position and facial expression of Natascha and produced and developed these photographs. Ms Painer labelled all her produced photos with her name and the name of her business. Some copies of her works had been sold but she did not grant third parties any rights to the photos or consent to their publication. After the abduction of Natascha, the security authorities launched a search appeal and used the contested photos. Seven years later when Natascha managed to escape from her abductor, the defendants in the main proceedings (news paper and magazine publishers) published the photos that Ms Painer had taken and did not indicate the name of the photographer. Several of the defendants had also published a portrait created by computer (a photo-fit) from the photographs that Ms Painer had taken.

In 2007, Ms Painer sought an order that the defendants immediately cease the reproduction and/or distribution, without her consent and without indicating her as author, of the contested photographs and the photo-fit. The referring Court decided to stay the proceedings and seek clarification from the CJEU regarding the correct interpretation of Article 6(1) of Council Regulation (EC)) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as Brussels I), and Articles 1(1), 5(3)(d) and (e) and (5) of the InfoSoc Directive. The question that is relevant regarding originality is question four that reads as follows:

> [Is] Article 1(1) of [the InfoSoc] Directive… in conjunction with Article 5(5) thereof and Article 12 of the Berne Convention…, particularly in the light of Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] and Article 17 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that photographic works and/or photographs, particularly portrait photos, are afforded "weaker" copyright protection or no copyright protection at all against adaptions because, in the view of their "realistic image", the degree of formative freedom is too minor?[58]

[57] Case C-145/10 *Eva-Marie Painer v Standard Verlags GmbH*, [2011] CJEU.
[58] Case C-145/10 *Eva-Marie Painer v Standard Verlags GmbH*, [2011], CJEU, para. 43.

CJEU pointed out that the referring Court raised this question in order to determine the correctness of the position which determined that the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit. This would imply that the scope of protection conferred on a portrait photograph was restricted or non-existent because of the minor degree of formative freedom. The referring court's question must in other words be understood as they sought clarification as the whether the originality standard for photographs, that can be found in Article 6 of the Term Directive, is such as to include portrait photographs. Article 6 of the Term Directive provides protection of photographs which are their 'author's own intellectual creation'. If the answer to this question is affirmative, the following question is whether the threshold for protection is higher for portrait photographs because of the allegedly minor degree of creative freedom.

As for the question if portrait photographs should enjoy a weaker copyright protection, CJEU recalls its previous decision in *Infopaq*[59] and points out that 'copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation'. It is stated in recital 17 of the Term Directive that an intellectual creation is an author's own if it reflects the author's personality. According to the Court, '[this] is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices…'[60] The Court continues and says that a photographer is able make free and creative choices in several ways and at various points when producing a portrait photograph and by making these various choices, the author of a portrait photograph can stamp the work created with his 'personal touch' and the degree of creative freedom is therefore not necessarily minor or non-existent. In the view of the foregoing, the Court states that,

> …a portrait photograph can, under Article 6 of [the Term Directive], be protected by copyright if, which it is for the national court to determine in each case, such a photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.[61]

The result of this decision is another step in the clarification of the EU-wide originality standard. The statement that a work is original if it shows an author's 'personal touch' is a notion that seems to differ a bit from that of an 'author's own intellectual creation' in *Infopaq*. One question that follows

[59] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU.
[60] Case C-145/10 *Eva-Marie Painer v Standard Verlags GmbH*, [2011], CJEU para 89.
[61] Case C-145/10 *Eva-Marie Painer v Standard Verlags GmbH* [2011], para. 94.

from this is if these definitions are synonyms or if the originality standards in the Software, Term and Database Directives differ from the one in the InfoSoc Directive. The answer and the construction of the judgement seems to indicate that they are to be seen as synonyms and the 'personal touch' requirement clarifies what is indented to be the 'author's personality' and with that, 'intellectual creation' which is the sole criterion for copyright protection.

By this decision, the CJEU followed a path of reasoning that suggests that a subject matter categorization might be out of sight in the CJEU interpretation of copyright architecture. The fact that the Court held that whenever the author of a work has been able to express his creative abilities in the production of the work by making free and creative choices, then that work is protected by copyright, seems to work in a direction of the continental copyright model in the sense that a work does not have to fall under one of the categories provided for by law to receive protection.[62]

3.2.3 Author

To determine what 'the auhor's own intellectual creation' means it is important to determine what an 'author' in this sense connote. The author is the central figure in when it comes to copyright laws since the whole framework is built around the author. The Berne Convention accords copyright protection, ownership and moral rights to a qualifying author for literary and artistic works including choreographic works.[63]

The Berne Convention does not specifically define the word 'author' and this is because national laws diverge widely on this point. Some recognize only natural persons as authors while others treat certain legal entities as copyright owners. Some impose conditions for the recognition of authorship which others do not accept.[64] Rules on authorship and ownership remain largely unharmonized at the international and European levels. Authorship usually implies initial ownership and the determination of the author of a work has immediate consequences for the allocation of moral rights.[65]

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[62] E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, (Cheltenham, Edward Elgar Publishing Limited, 2013), p. 154.
[63] G. Dinwoodie, *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?*, (Edward Elgar Publishing, Cheltenham, UK, 2015), p. 229.
[64] Guide to the Berne convention for the Protection of Literary and Artistic works (Paris Act, 1971), WIPO, Geneva (1978), p. 11.
[65] P. B. Hugenholtz, 'Chapter 17: The Wittem Group's European Copyright Code' in Synodinou, *Codification of Europeaan copyright law*, (Kluwer Law International, 2012), p. 344.

Article 7bis of the Convention mentions joint authorship where there are more than one author. European IP Helpdesk explains the requirements that need to be satisfied for a work to be considered as jointly created as the following:

- The work has to be produced through the process of collaboration.
- Each of the authors must contribute to the making of the work.
- The respective contribution of each author is not distinct from that of the other(s).[66]

According to the British standards on how to determine the author, it can be determined in a similar way in which the originality of a work is determined. In order for someone to be classified as an author of a work, it is necessary for them to have shown that their contribution to the work is of the type and amount that is protected by copyright. That means that the contribution would have to be sufficient to the originality requirement.[67]

[66] http://www.iprhelpdesk.eu/node/1842 , Accessed 2020-03-27.
[67] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 127.

4 Rights and exceptions

4.1 The Rights

Copyright and related rights are limited in duration and gives the right holder a range of exclusive rights. In most cases the right conferred is the rights to copy and communicate to the public protected work or subject matter but making and using protected work or subject matter is not an act that is reserved for the rights holder. There are no rules against the subsistence of copyright or related right in identical works either as long as they are independently created or produced.[68] These rights are also subject to a large number of exceptions that will be explained in more detail later on in this thesis.

The domestic laws of individual Member States define copyright and related rights as conferring a range of both economic and moral rights on authors and related rights holders to authorize or prohibit certain acts related to the protected work or subject matter. The most important ones are the right of reproduction, right of communication and right of distribution.[69] The nature and scope of these rights have been harmonized extensively by EU directives and with case law from the CJEU.

4.1.1 Right of reproduction

The right of reproduction can be found in Article 2 of the InfoSoc Directive and Article 9(2) of the Berne Convention and is a fundamental exclusive right. It can also be found in other directives such as the Software and Database Directives and the DSM Copyright Directive. At EU level it has been described as 'the core of copyright and related rights'.[70] It requires that EU member States provides for the 'exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part'. It applies with respect to all authorial works and performance fixations, phonograms, film fixations and copies thereof and broadcast fixations.

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[68] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 224.
[69] C. Seville, *EU Intellectual Property Law and Policy*, Paperback edition, (Edward Elgar Publishing Limited, Cheltenham UK, 2009), p. 51.
[70] Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final (19 July, 1995), 49.

The provisions where the right of reproduction can be found in are aimed at achieving close to full harmonization for the EU Member States and can therefore not be deviated from or treated as setting minimum standards of protection except to the extent that the Directives provide otherwise. The right of reproduction is also meant to be interpreted expansively, which is made clear by the recitals of the InfoSoc Directive and this is consistent with the definition of the reproduction right in Article 9 of the Berne Convention as well as the Software and Database Directives.[71]

The right of reproduction covers the reproduction of any part of a protected work or subject matter. There have been several preliminary referrals to the CJEU from the domestic courts of Member States about the issue of what constitutes such a part. According to the CJEU, elements of an authorial work will be considered a part of the work if the element itself express the intellectual creation of its author.[72] The phrase 'express the intellectual creation of its author' has already been explained in more detail in section 3.2.2. about originality. The question whether the copyright works have been reproduced in whole or in part is a matter of interpretation of Article 2 and not a matter of domestic law. This is because the InfoSoc Directive was intended to provide a 'harmonized legal framework on copyright and related rights, through increased legal certainty'[73] and to 'define the scope of the acts covered by the reproduction right'.[74] The wording in Article 2 also makes it clear that it was intended to exhaustively define the right of reproduction. Because of this, it would be in total contrary to these intentions if the aspects of the reproduction right were to be left to national law.[75]

An effect of the law on this area is that the copying of any non-authorial aspect of a work will be excluded from the scope of the copyright protection. The purpose of copyright protection is to protect authorial works and therefore it is in line with the intentions of copyright that the non-authorial aspects of a work is not protected.[76]

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[71] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 279.
[72] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 282 and Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009].
[73] Recital 4 of Directive 2001/29/EC.
[74] Recital 21 of Directive 2001/29/EC.
[75] T. Aplin, *'Reproduction' and 'Communication to the Public' Rights in EU Copyright Law: FAPL v QC* Leisure, 2011, vol. 22, no. 1, King's Law Journal, p. 211.
[76] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 282.

4.1.2 Right of communication and right of distribution

Article 3 of the InfoSoc Directive states that Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works. Corresponding rights can be found in Article 11 and 11bis of the Berne Convention that also gives the right of authorizing public performances. This includes making available to the public of their works in a way that gives the public access to the works from a place and at a time that is individually chosen by them. According to the same Article, Member state shall also provide for the exclusive right to authorise or prohibit the making available to the public for performers, of fixations of their performances. One criterion for the communication right is that although a communication may be to a public, it must be a 'new public'. A work that has already been communicated to a public cannot be considered infringed if the alleged unauthorized communication is made to the same public.[77]

The right to authorize or prohibit any form of distribution to the public 'by sale or otherwise' of the original or copies of the protected work is regulated in Article 4 of the InfoSoc Directive. These rights are consistent with the Berne and Rome Conventions. The WCT also contains rights of communication to the public in Article 8 and right to making available to the public (distribution right) in Article 6. Corresponding rights for performers can be found in WPPT that are based on Articles 7 and 13 of the Rome Convention.

4.1.3 Adaption right

In Europe, derivative works are protected through the Berne Convention for the Protection of Literary and Artistic Works although it uses other terms, namely that 'Translations, adaptions, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work'. The adaption right is not harmonised within the EU, but all copyright owners in the Member States benefit directly or indirectly from this right. It is defined as a distinct right or derived from the right of reproduction. Even if it is not harmonised,

[77] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 168

the protection of adaptions and derivative works are similar throughout Europe and could be described with two almost universal rules.[78]

The first one is that the right to exploit a derivative work is subject to the copyright in the original work. This means that it is necessary to have consent from the owner of the copyright in the pre-existing work to be able to make a derivative work without infringing the copyright in that work. According to Article 12 of the Berne Convention, authors enjoy the exclusive right of authorising adaptions, arrangements and other alterations of their work. The second rule is that the protection of adaptions does not prejudice or modify the rights in the adapted work. This means that the creation of a derivative work does not affect the scope, duration, ownership or subsistence of the copyright in the pre-existing work.[79]

4.1.4 Related rights

4.1.4.1 Article 7 Rental and Lending Rights Directive

The right of reproduction is complemented by a further right for performances and broadcasts under Article 7 Rental and Lending Rights Directive that gives the right holder the right to authorize or prohibit the fixation of performances and broadcasts. Article 8 of the Rental and Lending Rights Directive gives the performer the exclusive right to authorise and prohibit the broadcasting and the communication to the public of their performances.

4.1.4.2 Performance fixation

Another right worth mentioning is the performers right. This right was not included in the Berne Convention and was first recognized in the 1961 Rome Convention. It is now found in Article 2 (b) and 3(2)(a) of the InfoSoc Directive. It gives performers the right of reproduction and of communication to the public for performers, of fixations of their performances. When a recording has been made of the performance without the consent of a performer, their rights are infringed when this record is shown or played in public or communicated to the public. Protection is confined to dramatic performances including dance.[80]

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[78] P. Kamina, *Film Copyright in the European Union*, (Cambridge University Press, 2016), p. 258.
[79] P. Kamina, *Film Copyright in the European Union*, 2nd edition, (Cambridge University Press, 2016), p. 259.
[80] [80] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 360.

4.1.5 Moral rights

According to recital 19 of the InfoSoc Directive there are also moral rights of right holders that are outside the scope of the Directive. They should instead 'be exercised according to the legislation of the Member States and the provisions of the Berne convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty'.[81]

As well as financial reward for works, the Berne Convention acknowledge that creators desire and deserve the fame and acclaim that is gained through public recognition of the artistic and creative work. The Convention gives authors, including choreographers, a set of personal, artistic rights. These rights exist independently of any transfer of the copyrighted work or the economic rights that are derived from the work.[82] The right is given only to an individual person and only when there is also a subsistent copyright in the work. The parties of the Berne Convention have incorporated these moral rights to their domestic legislation.[83]

The moral rights are divided into two categories. These are the paternity rights and the integrity rights. The paternity rights include the right to be known publicly as the author of a work and the right to prevent someone else from claiming authorship of that work and the right to prevent one's own name to be associated with the work of a third party or with one's own work that has been altered or distorted without consent.[84] The right applies equally to adaptions of the work.[85]The paternity right is given to an individual person only when there is also a subsistent copyright in the work. It is however separated from the copyright protection and cannot be assigned to anyone else than the author. Therefore, copyright and paternity right can subsist in the same work but be owned by separate individuals.

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[81] Recital 19 of Directive 2001/29/EC.
[82] B. A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs The Custom of the Dance Community*, University of Miami Law Review, vol. 38, issue 2 (1984), p. 308.
[83] V. Irish, *Intellectual Property Rights for Engineers*, (The Institution of Engineering and Technology, London, UK, 2005), p. 15.
[84] B. A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs The Custom of the Dance Community*, University of Miami Law Review, vol. 38, issue 2 (1984), p. 308.
[85] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 291.

The paternity right lasts 70 years after the death of the author just as copyright does.[86]

The paternity rights are of obvious value to choreographers. A lot of the success of a choreographer's career highly depends on how the public perceives his or her work. Classic dances are often referred to by both title and creator, for example Pepitas "The Nutcracker" and Tudor's "Pillar of Fire". Therefore, choreographers are often eager to permanently attach their name to the works that they successfully present to the public. Also because choreographic works are so reflective of the individual choreographer's personality, it is important for the choreographer to have only the works that comes from his own creative process attributed to him and not any adaptions or derivatives of the work.[87]

The integrity rights are the right to prohibit or control alterations of one's works and the right to unilaterally withdraw the work from the public.[88] One of the principal concerns for choreographers and performers are the preservation of the integrity of dance works and the moral rights legislation can be the tool to exercise the necessary control to preserve the integrity and is therefore attractive to the dance community.[89] The integrity right may be seen not as an intellectual property doctrine, but from within the freedom of expression doctrine.[90] This is relevant to choreographers because in their creative work they are both authors and users. They participate in an on-going dialogue within the dance community and the broader culture and respond to works already created. They are much influenced by others in their community.[91]

There are nations which favour the economic approach to copyright over the *droit moral* approach and their successful lobby has generated legislation that serves to dilute and limit the rights of creative artists. This is very apparent in the Agreement on Trade Related Property Rights (TRIPS) which expressly excludes moral rights. Moral rights are however recognized in all

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[86] V. Irish, *Intellectual Property Rights for Engineers*, (The Institution of Engineering and Technology, London, UK, 2005), p. 15.
[87] B. A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs The Custom of the Dance Community*, University of Miami Law Review, vol. 38, issue 2 (1984), p. 306.
[88] B. A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs The Custom of the Dance Community*, University of Miami Law Review, vol. 38, issue 2 (1984), p. 310.
[89] F. Yeoh, *Choreographer's moral right of integrity*, Journal of Intellectual Property Law & Practice, vol. 8, Issue 1, (2013), p. 46.
[90] L. K. Treiger-Bar-Am, The Moral Right of Integrity: A Freedom of Expression in F. Macmillan *New Directions in Copyright Law* (Edward Elgar Publishing, 2006), p. 132.
[91] J. Van Camp, *Creating works of art from works of art: The problem of derivative works*, Journal of Arts Management, Law & Society, 1994, Vol. 24, Issue 3, p. 209.

Member States of the Berne Convention, but the approach to it differ, which creates a problem for choreographers.[92] In France, they focus almost entirely on the individual rights of the author and there is not much attempt to weight the interests of the public against the author's desire. Other countries in for example Central and Eastern Europe provide rigorous legislative protection for moral rights and for these countries, moral rights represent a means of prioritizing culture, creativity and innovation.[93]

Generally, choreographers are more concerned with the maintenance of the integrity of their works than by the entrepreneurial exploitation of their works. The choreographers that does participate in such exploitation are forced to have greater awareness of the complexity of copyright legislation. The major factor that determines the attitude towards copyright is the fact that the market for the choreographer's work is limited and traditionally they rely on the infrastructure of institution that employs them to support their works. Usually the dance community provides a safe haven for choreographers due to the good practices adopted that serves to protect the choreographer's interest. The desire to exercise ownership rights therefore has less priority. The exploitation of works through movies, television and internet have however extended the scope of the choreographer's market and forced them to be more aware of the protection that copyright and related rights might provide for their works.[94]

4.2 Exceptions

There are exceptions and limitations to the rights conferred by copyright and related rights and these are governed by domestic laws of individual states. If the conclusion of this thesis is that single dance moves can be protected by copyright or related rights, it might also be subject to the exceptions and limitations to those rights. The domestic laws of EU Member States regarding exceptions and limitations are also subject to regulation by EU law. In Article 10 and Article 10bis of the Berne Convention is a list of some exceptions and limitations to the rights. Article 10 states that there are certain free uses of works for quotations under certain circumstances. It was later also harmonized through Article 5 of the InfoSoc Directive and corresponding provisions of the Software and Database Directives. Even if

[92] F. Yeoh, *Choreographer's moral right of integrity*, Journal of Intellectual Property Law & Practice, vol. 8, Issue 1, (2013), p. 45.
[93] M. Sundara Rajan, *Moral Rights, Principles, Practice and New Technology*, (New York, Oxford University Press, 2011), p. 11.
[94] F. Yeoh, *Choreographer's moral right of integrity*, Journal of Intellectual Property Law & Practice, vol. 8, Issue 1, (2013), p. 44.

the desire were to harmonize exceptions and limitations as far as possible, the achievement is limited. There is only one exception from the reproduction right to be found in the InfoSoc Directive that is mandatory, which is made clear by the recitals of the Directive,[95] and it is the exception in Article 5(1) that covers temporary copying such as caching and browsing.

The InfoSoc Directive lays down an exhaustive list of 20 exceptions that are optional and free to enact by Member States. Article 5(2) provides optional exceptions and limitations to the reproduction right and Article 5(3) provides exceptions and limitations to both the reproduction and communication to the public right. Article 5(4) says that where Member States may provide for an exception or limitation to the reproduction right they can also provide for an exception and limitation to the right of distribution. Since it is an exhaustive list of exceptions and limitations the Member States cannot choose to implement any other exceptioins than those listed in the Directive. They are however free to enact as many of the listed exceptions as they want.[96]

4.2.1 Three-step-test

Article 5(5) of the InfoSoc Directive provides the three-step test. Corresponding provisions can be found in Article 9(2) of the Berne Convention, Article 13 TRIPS, Article 10(2) WCT and Article 16(2) WPPT. This is a test that any mandatory or non-mandatory exception that is recognized by the Member States must comply with. The three conditions set out in the articles that contain the three-step test are that the exceptions and limitations 'shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interest of the right holder'.[97] The three-step test is used to determine whether or not an exception or limitation is permissible according to international norms. Initially it only applied to the right of reproduction, but it has later been extended to all exclusive rights under international treaties. Article 13 of the TRIPS

[95] Recital 33 of Directive 2001/29/EC.
[96] R. Tryggvadottir, *European Libraries and the Internet: Copyright and Extended Collective Licences*, vol 2, (Intersentia KU Leuven Ventre for IT & IP Law Series, Cambridge, UK, 2018), p. 91.
[97] A. Kur and T. Dreier, *European Intellectual Property Law*, (Edward Elgar Publishing Limited, Cheltenham UK, 2013), p. 308.

agreement extended its scope to be obligatory for all exclusive rights. It now applies to all economic rights and not only to reproduction rights[98]

4.2.2 Quotation

The Fortnite dance emotes could be considered a form of quotation of works of dance, which is an exception to the rights conferred by copyright. To determine this, one first has to know what the exception for quotation covers.

Regarding quotations, Article 10 in the Berne Convention states that:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

This exception has been implemented in the InfoSoc Directive too and can be found as one of the optional exceptions in Article 5(3)(d). It is based on the freedom of expression. Member States are allowed to recognize an exception to the rights of reproduction, communication and making available by 'quotations for purposes such as criticism or review'. Article 5 of the InfoSoc Directive states basically the same requirement for a quotation as Article 10 in the Berne Convention does. The exception for a quotation is allowed provided that the work or subject matter that is being quoted has previously been lawfully made available to the public, that the source, including the author's name is indicated unless this turns out to be impossible and that their use is in accordance with fair practice and to the extent that is required by the specific purpose.[99]

The meaning of the notions 'criticism' and 'review' in this context is not explained further in the provision. It has been touched upon in three recent cases[100] from CJEU which will be covered in the following paragraphs of this essay. The notions demonstrate the types of use that could fall within the scope of the Article's exception but is not exhaustive in the sense that they are the only types that the exception is applicable on. In combination, they imply that there is a requirement for some form of critical engagement with a specific object, either the work or subject matter that is being quoted

[98] F.J. Cabrera Blazques, M, Capello, G. Fontaine and S. Valais, *Exceptions and Limitations to Copyright*, (IRIS Plus, European Audiovisual Observatory, Strasbourg, 2017), p. 10.
[99] Article 5, InfoSoc Directive.
[100] Case C-516/17 *Spiegel Online* [2019] CJEU and Case C-/469/17 *Funke Medien* [2019] CJEU and Case C-476/17 *Pelham* [2019] CJEU.

or something else. It does suggest that merely a reproduction of a work to, for example, enable consumers to decide whether to purchase it would not fall within the scope of the Article since there is no critical engagement. The requirement is instead a literal or near-literal reproduction of a work or related rights subject matter in a context that supports the user engagement required by acts of criticism and review.[101]

There exists only a limited amount of case law regarding the actual meaning of the exceptions proposed in the InfoSoc Directive, but the general principles that are applicable are relatively well established. The CJEU has emphasized the need to interpret various exceptions to copyright and related rights 'strictly' and the aim of copyright and related right in the EU is to ensure a high level of protection for right holders and to ensure legal certainty for the right holders.[102]

One of the few cases from the CJEU that has contributed to the clarification of the exception for quotation is the decision in *Pelham*[103].

The fourth question that the referring Court asks in this case gives a bit of clarification to the meaning of a 'quotation'. The referring Court asks whether the exception for quotation in Article 5(3)(d) of the InfoSoc Directive extends to a situation in which it is not possible to identify the work concerned by the quotation in question.[104] CJEU refers to the Advocate Generals opinion and considers that the wording in the Article that refers to 'a work or other subject-matter' indicates that the exception may apply to the use of a protected musical work, if the conditions provided for in the article are satisfied.[105] Advocate General Szpunar points out in his opinion[106] that the quotation exception has its origin and is mainly used in literary works, but in his opinion there is nothing that indicates that the quotation exception could not concern other categories of work. For the quotation to be considered lawful, it must however satisfy a number of conditions. The Court states that for the Article to apply, the use in question must be made 'in accordance with fair practice, and to the extent required by the specific purpose'. which means that the use for the purposes of quotation

[101] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 335.
[102] Case C-5/08 *Infopaq* [2009] CJEU.
[103] Case C-476/17 *Pelham* [2019] CJEU.
[104] Case C-476/17 *Pelham* [2019] CJEU, para., 66.
[105] Case C-476/17 *Pelham* [2019] CJEU, para, 68.
[106] Case C-476/17 *Pelham* [2019], Opinion of Advocate General Szpunar, delivered on 12 December 2018.

shall not be extended beyond what is necessary to achieve the informatory purpose of that particular quotation.[107]

The InfoSoc Directive does not give any definition of the term ‘quotation’ and therefor the meaning and scope of the term must be determined through its usual meaning in everyday language. The legal context on which it occurs also has to be considered as well as the purposes of the rules that it is part of. Article 5(3)(d) states that the quotation has to be ‘for purposes such as criticism or review’ for the Article to apply. As Advocate General Szpunar recalls in his opinion, the use of the words ‘such as’ indicates that it is not an exhaustive list of purposes of the quotation, but rather an illustration of examples. The Court found that there are some essential characteristics of quotation in accordance with the terms meaning in everyday language and refers to the Advocate Generals opinion. Those are the following as stated in paragraph 71 of the decision:

> […] use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work.[108]

The Advocate General says that many quotations, especially artistic quotations, pursue other objectives than the purpose of criticism or review. According to him, the wording in Article 5(3)(d) does however clearly indicate that the quotation must enter some kind of dialogue with the work quoted in order for the Article to apply on the use. Some type of interaction between the quoting work and the work quoted is necessary but does not necessarily have to be for the purpose of criticism and review. It could also be for example in confrontation or as a tribute to the work quoted.[109]

4.3 Infringement

The question of what amounts to copyright infringement has not been subject of much international attention, but it is anticipated that the CJEU will elaborate further guidance on infringement of copyright under various

[107] Case C-476/17 *Pelham* [2019] CJEU, para, 69.
[108] Case C-476/17 *Pelham* [2019] CJEU, para, 71.
[109] Case C-476/17 *Pelham* [2019], Opinion of Advocate General Szpunar, delivered on 12 December 2018, para., 64.

directives.[110] The provisions in the Software Directive, Database Directive and InfoSoc Directive all states that the owners of copyright in computer program, databases and authorial works have a right to control the reproduction of the work in whole or 'in part'.[111]

The main decision that explains what constitutes an infringement is the decision of *Infopaq* where the Court stated that various parts of a work enjoy protection as long as the part itself could be protected as original in the European sense (intellectual creation).[112] The *Infopaq* decision mainly explains what is considered an infringement when discrete parts or fragments of a work are copied. It gives little guidance as to what is considered reproduction when 'non-literal' parts of a work are reproduced. The approach to when a general structure of a work is reproduced is not clear based on the *Infopaq* decision. In Europe, the reproduction right and the adaption right are harmonized in relation to computer programs and databases. In the European legislation there is also an express provision in the Software Directive that states that copyright does not protect ideas. In contrast to this, only the reproduction right is harmonized in the InfoSoc Directive and it makes no explicit reference to non-protection of ideas. This might suggest that EU-harmonization applies to non-literal copying of computer programs and databases but not to other authorial works. The adaption right and the reproduction right does however frequently overlap in many European countries so that the reproduction right also covers many non-literal uses.[113]

[110] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 194.
[111] Article 4(1)(a) Software Directive, Article 5(a) Database Directive, Article 2 InfoSoc Directive.
[112] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 208.
[113] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 220.

5 Analysis of copyright in single dance moves

5.1 Can single dance moves be protected by copyright law?

The question of whether dance moves such as the ones that Fortnite uses in their emotes can be protected by copyright law needs to be answered by clarifying what subject matter that can be protected by copyright and related rights and if this includes works of dance and especially dance that only includes single dance moves. It will also be important to clarify if there are any requirements for this protection and in that case what those requirements are.

5.1.1 Subject matter

All authorial works are protected under EU law which is considered a fundamental right under Article 17 (2) CFR. The Berne Convention is the most important legislation regarding the protection of dances. The first question to answer is if dances are such subject matter that can be protected under copyright or related rights. As has been stated above in section 3.2.1, Article 2 of the Berne Convention specifically includes choreographic works as one type of work that is protected as literary and artistic works. It is therefore quite clear that choreographed dances can be protected under Article 2 as an authorial work which gives protection according to copyright and not related rights.

The person who performs a dance also have rights that protects their performances. The performance is considered a related subject matter and is protected by Article 7 and 8 of the Rental and Lending Rights Directive that gives the performer the right to authorize or prohibit the fixation of their performance and the right to authorize or prohibit the broadcasting and communication to the public of their performance.

These rights are not very relevant for the dancers that sued Epic Games. The performances were already fixed in recordings, it was not a live performance, so Article 7 is not applicable. Neither did the case against Epic

Games concern whether or not Epic Games had the right to broadcast or communicate to the public their performances, but more so if Epic Games had the right to reproduce and sell their dances as emotes. The performers rights will therefore not be discussed further when establishing if the emotes are considered infringing any rights.

A fixation of a performance is protected through Article 2 (b) and 3(2)(a) of the InfoSoc Directive. The fixation requirement could be fulfilled by recording a performance. The recordings of dances are considered related subject matter brought into existence by someone other than the author of the dance. Such recordings are protected by related rights which will not extend to the actual content of the record, but only the record itself. It gives the right to reproduction and of communication to the public of the fixation. This right is not relevant in the cases against Epic Games either since Epic Games did not use the fixations of the dances for reproduction or to communicate it to the public.

5.1.2 Originality

The key concept in European copyright law to determine whether or not a work is protectable by copyright is originality. This is not a concept in the US where the cases against Epic Games have taken place. The US Copyright Office stated that individual movements or dance steps by themselves are not copyrightable. Short dance routines consisting of only a few movements or steps are too simple to be considered works of choreography and achieve protection. The dances in question have applied for registration at the US Copyright Office and repeatedly been denied because they have been considered too simple. It seems like it is difficult for such dances to be granted protection in the US because of this.

In EU however, there is no such requirement for complexity for a work to be protected. Not all works that falls under the categories of protected works in the Berne convention are protectable just because they are the type of work that is covered. The main requirement for protection according to European copyright law is that the work is original instead of complex enough. There have not been any cases in CJEU that goes further into how short a dance sequence can be to be considered original, and there probably will never be such a decision that generally describes the required length of a dance since the originality requirement focuses on other things. The closest relevant decision regarding length of works is the decision of *Infopaq* where the Court ruled that 11 words was enough to be considered reproduction in part of a protected work since these words were the

expression of the intellectual creation of the author. This decision does tell us that a very short extract of a work can be considered reproduction in part, but more importantly it tells us that the main requirement is still that it shall be an intellectual creation of the author, i.e. the originality requirement.

The decision of *Infopaq* harmonized the originality requirement across Europe since the decisions of CJEU have to be followed by the Member States. This means that for dances to be protected in Europe, they have to pass the originality test. The decision made clear that the originality requirement means that a subject matter has to be original in the sense that it is its author's own intellectual creation to be protected by copyright. Exactly what this means was however not explained in the *Infopaq* decision and based on only this decision it is impossible to decide whether or not single dance moves can be protected.

The decision of *Painer* clarified the originality requirement and might give us a further clue to if the dances could be protectable under EU law. In this case the Court discussed the importance of the degree of individual formative freedom in the creation of a work. The Court emphasized that the degree of creative freedom depended on whether the author was able to make free and creative choices and to create the work with his 'personal touch'.

Choreographers of a full routine have various choices to make when creating the routine. The creation of a dance includes choices of music, developing movement ideas and combining movements to fit the purpose of the dance and to fit the music. There is a choice of rhythm, speed and syncopation of movement in combination with music to create the desirable effect. There is also a choice of energy, for example a ballet is usually soft and smooth while a tap dance is sharp and energetic. The space where dancer performs in is also an aspect of various choices for the choreographer and the number of people performing the dance. It is a choice of aesthetic concepts as well as technical attributes. The choreographer deals with anatomical movements as well as partner interactions and their association to each other and to the music. There are more elements to a choreography than these, but these are definitely enough for the choreographer to be considered to be able to make free and creative choices and to create work with his 'personal touch'. Each element alone could maybe even be considered enough since there are various choices to each one of them.

As has been stated, there are discussions and disagreements in the dance community as to what constitutes a dance, sometimes because it is difficult to identify the type of dance in for example postmodern dance and

sometimes because it is so spontaneous that it can hardly be considered a form of art, as is the case of the work by Duncan. Despite these discussions and disagreements in the dance community, it seems like it would not be a difficulty from the perspective of law to show the necessary intellectual creation for these to qualify as original works for the purposes of copyright.

The big question relevant for this thesis is however if a single dance move could be considered original and protected by copyright. The same requirements are applicable, i.e. author of the moves must have a certain degree of creative freedom and be able to make free and creative choices. A single dance move does not contain the same creative freedom as a full routine since there are no combination of moves to be made. Neither does the number of people performing the move matter as much as in a routine since all of the performers will perform the same move. There are no combinations of different moves that different performers can do at the same time to expand the creative freedom.

It is clear that single dance moves have less creative freedom than full routines. Having said that, there are still various choices for the author when creating a single dance move. The human body is a complex tool that can move in many different ways. The technical aspects of dance can be complex even in a simple move. Take for example the 'Moonwalk' move that was made famous by Michael Jackson. This is a typical example of what would be considered a single dance move. It is a fairly simple move, but it is still complex in the sense that the body has to move a certain way to perform the move.

When one thinks of dance it is usually the bodily movement of a performer that comes to mind and it is obvious that one of the main aspects an author to a single dance move can control is the technical aspect, i.e. the actual movement of the performer. Although there are also considerations to the move's association to music and to the artistic expression of the move. When creating a dance, the choreographer also has control over the dramatization of a story of the dance in relation to music, where the dance takes place and when. Partner interaction could also be a part of a single dance move if the move requires multiple performers, though this is not the case regarding the dances in question of this thesis. Regarding dance moves, a dramatization of a story might not exactly be in question, but even one single dance move could tell a story to the observer. It is a subjective matter and the choreographer's purpose when creating the move can still be a type of dramatization that an observer might appreciate. The setting, as in the place and time, that a dance move takes place in is also controlled by the

choreographer and can vary a lot which is also a factor that would increase the considered freedom of creativity of the choreographer.

In *Painer*, the Court emphasized that the intellectual creation of the author must have his 'personal touch' which they explained is reflecting his personality and expressing his free and creative choices in the production of the work. As I have mentioned above, even a single dance move gives the author various choices regarding both technical and maybe even more so artistic aspects. Depending on what aspects one takes into account, it can be argued that a single dance move gives the creator enough choices and possibilities to reflect his own personality.

If one only takes the technical aspect into account, in other words the bodily movement, it might not be enough to fulfil the originality requirement. There is still the argument that the body is complex and can perform many different types of moves which gives the author various creative choices and since there are no decisions from CJEU on this matter it is not possible to say if that argument would be enough to fulfil the originality requirement. This would also be an argument against the statement of the US Copyright Office that individual movements and dance steps by themselves are too simple to be protected by copyright.

Even if the body can move in many different ways, it is in fact a limited amount of significantly different moves that a body can do and since there is no possibility of various combination of moves, this is an argument that supports the statement that a dance move would not meet the requirement of originality.

If not only the technical aspect of a dance move is taken into account, but also its artistic aspects such as the music, scenography and time combined with the dance move, this gives the author more space for creative choices and to reflect his personality in the work.

5.1.3 Author

A question that is relevant regarding dances is who the actual author is. Is it the choreographer or the performer? What is the authorial input necessary to be considered an author for the purposes of copyright and the input that instead interprets a work in the nature of performance? It is a question of how much of the dance that should be considered personal to the dancer as opposed to fixed on the body of the choreographer or an interpretation of the

choreographer's intent. The question of authorship is therefore deeply connected to the originality requirement.

At a first glance it might seem obvious that it is the choreographer that is the author since he or she is the one that seems to be creating the dance. An analysis of the ways that dances are created does however make it more difficult to establish. A dance could be created in a way where the choreographer is the one making all the creative choices and the dancer then interpret these choices into their performance. In that case it seems like the dancer's input is not creative enough or has their personal touch to make it original enough for the dancer to be considered the author. The input of the dancer would instead be of interpretative nature and the dancer would be considered the performer and the choreographer the author.

By contrast, the dancer and the choreographer could both give input made of creative choices when creating a dance. It is possible that they both cooperate in the creative process and this could make it difficult to distinguish the individual input in the finished work. This could then mean that the work is considered jointly created and that both the dancer and the choreographer is considered authors and enjoy rights.

Regarding single dance moves the same reasoning applies, but regarding joint authorship it does seem unlikely that there is more than one person involved in creating just a single dance move. There does not seem to be enough room for creative choices to be made by several people and even if it did, for example by one person creating the technical aspect of the move and the other combining it with music, one of the requirements for joint authorship is that the respective contribution of each author is not distinct from that of others. It seems more likely that the dancer is also the author or that there is one person creating the dance move and a dancer performing it and thus making the dancer the performer.

5.2 Are the Fortnite emotes an infringement?

If single dance moves are considered original and thus enjoy the rights that comes with copyright, there is also the question if the dance moves that Epic Games uses in their emotes are considered infringing those rights if the act happened in Europe and the authors of the dances where nationals of an European country.

5.2.1 Economic rights

The rights that an author enjoys are the right of reproduction, right of communication, right of distribution and the adaption right.
The reproduction right covers the reproduction ‘by any means and in any form, in whole or in part’ of protected work or subject matter. As the Court stated in *Infopaq*, elements of an authorial work will be considered a part of the work if the element itself express the intellectual creation of its author. It is clear that Epic Games reproduced the technical aspects of the works since the emotes consist of identical movements of the dancers. If single dance moves are considered original, the movement will definitely be an element that expresses the intellectual creation of its author. Reproduction in part of a protected work is an infringing act. The bodily movement is part of the work. If the movement itself is considered by CJEU as an intellectual creation of the author this means that the reproduction of it is an infringing act.

The same reasoning would apply to the more artistic aspects of a dance, such as the setting and combination to music. If the setting where the dance move takes place in or the combination with music is regarded when examining if it fulfils the originality requirement then that implies that the setting itself or the combination to music itself would be considered an intellectual creation of the author. When determining whether a reproduction of the work have been made that is infringing the protected work, all aspects of the work that is original should be considered. This includes that setting or combination to music if that is also included when determining the originality in the work. This is however not relevant to the question if Epic Games infringed any rights that the authors had since they only copied the movements.

A question that arises regarding the reproduction right in relation to Epic Game’s emotes is if the reproduction right for authorial works also covers non-literal uses. The movement of the emotes are not performed directly by a human being but is instead incorporated in coded form into the game. This issue has not been discussed to very much extent in EU and what is considered a non-literal reproduction is not clear, but a discussion can be made in relation to the adaption right.

In the situation of Epic Games uses of dance as emotes, these emotes could be considered an adaption of work that is protected for literary, dramatic and musical works. When Epic Games convert the dance move into a computer

code that reproduce the dance emote as seen by the users, this act could be infringing the adaption right. The adaption right in itself according to the Berne Convention gives the right holder the right to exploit a derivative work of the protected original work. This means that it is necessary to have consent from the right holder in the pre-existing work in order to make a derivative work that is not infringing the copyright in the pre-existing work.

The adaption right is not harmonized throughout Europe regarding authorial works, but both the reproduction right and the adaption right is harmonized in relation to computer programs and databases. The fact that the Software Directive explicitly states that copyright does not protect ideas, while the InfoSoc makes no such explicit reference to non-protection of ideas might suggest, as Bentley and Sherman explains, that the EU-harmonization applies to non-literal copying of computer programs and databases but not to other authorial works. Since many European countries have a legislation that makes an overlap between the adaption right and the reproduction right so that the latter also includes the protection of non-literal uses, there is a possibility that the CJEU would interpret the reproduction right as covering non-literal copying as well. This interpretation would also mean that the impact of the different approaches in the different countries would be minimized which is one of the purposes of a harmonised framework.

The *Painer* decision supports the view that non-literal reproductions of works are protected in Europe. The photo-fit image of Natascha Kampusch that was made on a computer and based on a copyright protected portrait was suggested by Advocate-General Trstenjak to be considered a reproduction of the portrait if the personal intellectual creation is embodied in the photo-fit.[114] The facts in this case regarding the photo-fit is probably the closest to the case of Epic Games use of the dance moves. According to the reasoning in the *Painer* decision, the emotes would be considered an infringement of the reproduction right if the personal intellectual creation is embodied in the emotes, which brings us back to the discussion about originality in single dance moves above. If the bodily movement of the dance moves fulfils the requirement of originality then the emotes would also be an infringement of the right of reproduction.

Another question is if Epic Games infringe the distribution right by transferring the ownership by sale of a physical product incorporating the dances. They distribute the dances to the public by selling them as emotes in in-game transactions. The distribution right gives the owner the right to

[114] Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH*, CJEU [2011].Opinion of Advocate General Verica Trstenjak, delivered on 12 April 2011, para. 113.

issue copies of the work to the public. As opposed to the reproduction right, there is no case like *Infopaq* on the originality requirement when determining an infringement of the distribution right. The same discussion about originality would probably apply if CJEU made a decision on the matter to determine if the emotes would be considered copies of the dances. If the bodily movement is considered fulfilling the originality criteria, the emotes could be infringing the distribution right. The question is then if the dances have already been distributed before and thereby exhausted the distribution right, since this right only applies to the first issuing of a copy. It is not clear if the distribution right and the rule of exhaustion applies to digital copies of protected work and not only tangible copies and a further decision would be necessary before it is possible to be certain about the application of the right in cases like this.

The issue regarding the emotes alleged infringement of the communication right depends on firstly the originality criteria and the same discussion would be made as regarding the reproduction right and the distribution right. The second question would be if Epic Games communicated the dance to a 'new public'. A requirement for infringement of the communication right is that the act must be in a way that gives the public access to the works from a place and at a time that is individually chosen by them. Since Epic Games make the dances available to everyone that downloads their game, which is for free, this must be considered fulfilled. It shall however also be communicated to a 'new public'. The dancers that sued Epic Games all had already communicated their works on the internet and therefore the 'new public' criterion is not fulfilled, and Epic Games cannot be considered infringing the right of communication.

5.2.2 Moral rights

If the single dance moves are considered original and protected by copyright, they will also give the right holder moral rights to the works. Epic Games use of the dances as emotes could then be considered an infringement of these moral rights. The paternity right includes the right to prevent someone else from claiming authorship of the work, which means that if someone uses the work, the authors have the right to be identified as authors to that work. The right applies to adaptions of the work as well and not only copies. The emotes could be considered adaptions of the dances, as is discussed above, since Epic Games convert the dance move into a computer code that reproduce the dance emote. Epic Games did not identify the authors when they created and sold the emotes and that action could therefore be considered an infringement of the paternity right.

The integrity rights are the right to prohibit and control alterations of one's works and the right to unilaterally withdraw the work from the public. This is an important right for choreographers and performers since many often are more concerned about maintaining the integrity of their works rather than financial gain. The emotes would be considered an alteration of the dances since Epic Games performed a derogatory action in relation to the dances when they created the emotes and any derogatory action is infringing the right according to Article 6bis of the Berne Convention. Epic Games made the alterations of the work available to the public by selling them in in-game purchases which means that they infringed the dancer's integrity rights.

5.2.3 Exceptions

If the single dance moves are protected by copyright, the rights that they confer could also be subject to exceptions and limitations. Even if the act of creating and selling the emotes are infringing the rights of the protected works, the action could be permissible if any of the exceptions applies.

Some of the exceptions are obviously not applicable, but the exception in Article 10 of the Berne convention that states that it shall be permissible to make quotation of a work under certain circumstances could possibly be applicable. Advocate-general Szpunar notes in his opinion on *Pelham* that the quotation exception has its origin in literary works, but nothing indicates that it may not be applicable in categories of other works. From the decision in *Spiegel Online*, it seems like that if the purpose of a quotation of a work is justified, it should be permissible to quote a whole work.

The question whether a dance, or any other dramatic work, could be quoted in a way that falls under the exception is yet to be decided by CJEU. Since the wording in Article 5(3)(d) of the InfoSoc Directive does not indicate that the exception is only applicable to a certain category of works, there seems to be nothing that prevents it from being applicable even to dramatic works.

The dance moves that Epic Games reproduce in Fortnite seems to reproduce the whole dance, depending on what is considered fulfilling the originality requirement in the dance. The original dances are very short and have a limited amount of moves. The emotes in Fortnite repeat these same moves and it therefore seems like Epic Games reproduce the whole work. A question then is if it could be permissible to quote a whole work. As to what

the Court concludes in *Spiegel Online*, it seems like it could be permissible to quote a whole work if the purpose of the quotation is justified.

The purposes that justifies a quotation are of informatory character. The Court says in *Pelham* that it shall be for purposes such as criticism and review. The words 'such as' indicates that it is not an exhaustive list, but the Court states that the quotation must 'enter some kind of dialogue with the work quoted'. Interaction between the quoting work and the work quoted is necessary. The Fortnite quotations of the dances are difficult to consider as entering a dialogue with the original dances. The emotes could maybe be seen as a tribute to the dances, which is one of the examples that the Advocate General says is a justified interaction. Advocate General Szpunar notes in *Pelham* that many quotations and especially artistic quotations pursue other objectives than the purpose of criticism and review.

Another requirement for a quotation to be lawful is that the source is indicated unless it is not possible. Attribution seems to be possible on Fortnite, but not of the dancers have been attributed by Epic Games, which have failed to indicate the source.

The Berne Convention also contains a requirement that the quotation must be compatible with fair practice. Selling a quotation in the way that Epic Games does would probably not be considered fair practice. The authors of the dance and Epic Games are not competitors which would make the use of the quotation an alternative to purchase the original and could be considered fair practice. To sell a quotation in the way that Epic Games does, does not seem to be in fair practice with the original work.

5.3 Conclusion

All authorial works are protected under EU law and dances are clearly such subject matter that is protected under Article 2 of the Berne Convention. It explicitly includes choreographic works as literary and artistic works.
The rights for performers that is covered by Article 7 and 8 of the Rental and Lending Directive and the right of reproduction and communication to the public of fixations of the performances in Article 2 (b) and 3(2)(a) of the InfoSoc Directive are not applicable in the cases against Epic Games since Epic Games reproduced the original dances and not the records of it.

The main requirement for a work to be protected by copyright in Europe is the originality requirement. The most controversial question of this thesis is also if single dance moves can be considered original. Two important decisions regarding this question is the decision of *Infopaq* and that of *Painer*. They explain that the subject matter must be original in the sense that it is its author's own intellectual creation in order to be protected by copyright and that originality depends on the degree of creative freedom that the author had when creating the work. The work shall be created with the author's personal touch.

A single dance move could be considered original enough if all the aspects of the work is considered, the artistic ones included. Even if only the technical aspects, as in the bodily movements are taken into account, it could be considered as given the author enough creative freedom to meet the originality requirement. This seems more difficult though since there is in fact a limited amount of single moves that a body can do and with single dance moves there is no chance of combining those moves to increase the creative freedom.

It is important to keep in mind that the requirement of originality itself is harmonized in Europe through the *Infopaq* decision, but the meaning of it is not entirely harmonized and is still decided on case-by-case basis by the CJEU. This is not helpful as a matter of legal certainty. Since there has been no decision on the scope of the originality requirement regarding dances it is impossible to say for certain whether the type of single dance moves that is the subject of this thesis would be considered meeting the requirement in a decision by CJEU.

The lack of harmonization regarding the scope and meaning of the originality requirement also means that there are different approaches to the concept in different Member States. Even if the Berne Convention implicitly contains an originality standard, the Convention only sets a minimum standard to what Member States have to protect. Works that may not be considered original could still be protected under domestic laws if the protection is extended in that country. That means that single dance moves could in theory be protected in some countries through domestic laws and not protected in others. CJEU already stated in both *Infopaq* and *Painer* that it is up to the national court to determine in each case if the work in question could be regarded as an intellectual creation of the author and thus gain protection through copyright which means that it is already up to the national courts to determine whether or not the dances in question would fulfil the originality requirement and thus be protected by copyright.

The author of a dance could be either the choreographer or the performer or both, which the latter would be considered joint authorship. For single dance moves, it is most likely to be just one author and that is probably the performer.

The author is also the one that the copyrights confers to. The question whether Epic Games have infringed the authors rights are very much depending on the originality in the dances. The right of reproduction could be infringed if the elements reproduced are in themselves considered expressing the intellectual creation of its author. If the reproduction right also covers non-literal uses, the emotes are infringing this right. They would also infringe the adaption right since the act of converting the dance move into a computer code that reproduce the dance emote as seen by the users is considered an adaption of the work and infringing of the adaption right.

The infringement of the right of distribution depends on if the right and the exhaustion rule apply to digital copies of protected work. If it does, the act of selling the dances as emotes would probably be an act of distribution and therefore infringing the distribution right.

Epic Games communicated the dances to the public by selling the emotes on the internet and giving access to them to everyone that downloads their game for free. The dancers had however already communicated their works on the internet and the 'new public' criterion is not fulfilled so therefore the communication right cannot be infringed by Epic Game's act.

If the dances are protected by copyright they are also protected by the moral rights. Epic Games did not identify the authors when they created and sold the emotes and did hereby infringe the paternity right. The emotes could be considered adaptions of the work and this was not made with consent of the dancers and therefore would be considered infringing the integrity rights as well.

There are exceptions to the rights that an author of a work have and the one that is relevant in this case is the exception for quotations that can be found in Article 10 of the Berne Convention and Article 5(3)(d) of the InfoSoc Directive. This exception has been discussed in a few recent cases and the most important are the decisions in *Pelham* and *Spiegel Online.* There seems to be nothing preventing quotations of whole dances to be considered lawful, and the Fortnite dance emotes could be considered quotations in this sense. The purpose of the quotation must enter some kind of dialogue with the work quoted, which the emotes could be considered doing as tributes to the original dances. They do however seem to fail both the requirement of

attribution since Epic Games does not indicate the authors of the original dances and the requirement of fair practice by selling them in-game.

So to conclude this section, a single dance move could possibly be protected by copyright if it fulfils the originality requirement. It does however seem more likely that the CJEU would only take the technical aspects into account and rule that there is not enough creative freedom in a single dance move to meet the originality requirement. This is yet to be decided and as for now, it is up to the Member States to interpret the originality requirement when it comes to the protection of single dance moves. If single dance moves are protected then Epic Games dance emotes would probably be infringing the reproduction right, the adaption right and maybe the distribution right, but not the communication right. It may be difficult to prove that an act is infringing the work though and did not independently come up with it. Quotations of dances could be lawful, but in the case with Epic Games, it does not seem like the emotes fulfil the requirements of a lawful quotation.

6 Purpose of copyright

6.1 Introduction

The justification for intellectual property fall into two general categories. First, it is often called upon ethical and moral arguments. For example, that copyright is justified because the law recognizes authors' natural or human rights over the products of their labour. Secondly, there is often an instrumental justification that focus on the fact that copyright induces and encourages desirable activities.[115]

To examine whether or not single dance moves should be protected by copyright or related rights it is important to analyse the purpose of the rights. Why are certain types of works worth protection? Why is copyright important? To whom is it important? A good way to start is to find guidance in the legislative history.

The Berne Convention was concluded on September 9 and is the oldest of the international copyright treaties. It provides a high level of protection and gives authors a comprehensive set of rights. It ensures that works originating in one member country enjoy the same treatment in any other member country as those of nationals to that country. It also ensures that authors enjoy this treatment and the minimum rights set out in the convention completely automatic, without any need of formalities whatsoever. The Convention has been revised a number of times to improve to international system of protection. Changes has been made to recognize new right and to raise the level of protection and increase the uniformity of treatment between the Member States while also maintaining the elasticity that is needed to meet special cases and provide for a good administrative system.[116]

In a guide to the Berne Convention[117] Arpad Bogsch, Director General of WIPO at the time of the guide, explains that intellectual property is not

[115] L. Bentley and B. Sherman et. al., *Intellectual Property Law*, 5th ed., (Oxford, Oxford University Press, 2018), p. 4.
[116] Guide to the Berne convention for the Protection of Literary and Artistic works (Paris Act, 1971), WIPO, Geneva (1978), p. 5.
[117] Guide to the Berne convention for the Protection of Literary and Artistic works (Paris Act, 1971), WIPO, Geneva (1978).

merely a matter of exchanges of goods and services. It constitutes an essential element in the development process and according to WIPO, it is shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works.

The InfoSoc directive was created as a respond to the developments in the information society. The term "Information Society" was used in the Commission White Paper[118]. The Commission there concluded that 'We must …combine our efforts in Europe and make greater use of synergy in order to achieve as soon as possible objectives aimed at building an efficient European information infrastructure'. Following the conclusions of the White Paper, a working party drew up a report for the European Council meeting in Corfu in June 1994. The report said that 'Technological progress now enables us to process store, retrieve and communicate information in whatever form it may take' and intellectual property rights would have a specific role as a fundamental part of the regulatory system that was needed to establish the information society.[119]

The constitutional considerations underpin the development of all EU laws. These considerations are the internal market, fundamental rights and the general principles of EU law.[120]

6.2 Internal market

In 1995 a Green Paper on Copyright and Related Rights in the Information Society was produced. In the Green Paper, the Commission states that copyright and related rights are a fundamental concern of the community. It says that 'the protection of copyright and related rights is vital to the Internal Market, and has cultural, economic and social implications for the Community'.[121] The commission continues to explain that the question of the protection of intellectual property in the information society is primarily a matter of interest to the community because goods and services needs to be able to move freely and that producers and suppliers of copyright protected works must be able to treat the Community as one market to work

[118] Commission White paper Growth, Competitiveness, Employment – the Challenges and Ways Forward into the Twenty-first Century, COM (93) 700 final, (9 March, 1994).
[119] Commission *Report on Europe and the Global Information Society - Recommendations of the High-level Group on the Information Society to the Corfu European Council*, supp. No. 2/94, Brussels, 26 May 1994.
[120] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 12.
[121] Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final (19 July, 1995), p. 10.

in. The rules that governs the rights that gives the holder sole power to authorize or prohibit use of protected works must align from one country to another in order to access free movement of the goods and services involved. This is why the harmonization of the laws of the Member States are so important. Since the information society increases the circulation of works in non-material form, it is also important that the Community takes measures to also guarantee the freedom to provide services.[122]

The aim of achieving a functioning internal market is one of the central goals for EU and is mentioned in the objectives of many Directives on copyright in EU. [123] The Treaty of Rome establish a common market to promote harmonious economic development and expansion.[124] It included an implication of establishing the fundamental freedoms which are the free movement of goods, services, persons and capital. Intellectual property was largely unaffected by the development of the common market in the initial stages though, since the Treaty of Rome held that the establishment of the common market should not preclude prohibitions or restrictions on the protection of industrial or commercial property. Intellectual property was however directly addressed in the 1985 White Paper on 'Completing the Internal Market'. It was noted that the differences in legislation regarding intellectual property among the Member States had a 'direct and negative impact on intra-community trade and on the ability of enterprises to treat the common market as a single environment for their economic environment.[125] A Green Paper on 'Copyright and the Challenge of Technology' was produced and there it was stated that the main concern for the Community in relation to copyright was to ensure the proper functioning of the common market.[126] From this point the internal market has repeatedly been cited as a major reason for the harmonisation of copyright law.

The reason that the internal market consideration is such a driving force behind the pursuit of harmonisation in EU copyright law is that copyright works have a significant financial and cultural value. It is argued that failing to harmonise copyright legislation would end up in restrictions to the free movement of goods and services which would create a disincentive to invest in the production of copyright works. This would inhibit the development of

[122] Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final (19 July, 1995), p. 10.
[123] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 12.
[124] Article 2, Treaty of Rome.
[125] Commission White Paper on Completing the Internal Market, (White Paper COM (85) 310 final, 14.6.1985).
[126] Commission Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, COM (88) 7 June, 1988.

the information society. The ‘fifth freedom’ in the single market is an idea from the Commission about the free movement of knowledge and innovation.[127]

6.3 Fundamental rights

Human rights and fundamental rights arose from the European Convention on Human Rights (ECHR)[128] and the Charter of Fundamental Rights (hereby the Charter or CFR) and thus had no binding force in the EU. It was however largely accepted that human rights were part of the general principles that should be considered in decision-making. The Treaty of Lisbon 2009 clarified and elevated the status of fundamental rights and human rights. It made it expressly clear that human rights under ECHR were general principles of EU law. The Charter of Fundamental Rights was also elevated to the status of a constitutional consideration when it was decided that it has the same legal value as the foundational Treaties. This means that the human rights and fundamental rights must be considered by EU copyright law. It must however be reconciled with the internal market consideration since their subject focus differs. The internal market consideration focuses on ensuring free trade while the fundamental rights are more focused on broadly protecting substantive rights.[129]

The relationship of fundamental rights and EU copyright law is both internal and external since fundamental rights are taken into account in both the creation of copyright legislation and in the application and interpretation of that legislation. It has therefore been suggested that fundamental rights and human right are IP’s new frontier.[130] Fundamental rights can be seen as a justification for copyright law and in particular the right to property that can be found in Article 17 of the Charter. This article also explicitly states that intellectual property shall be protected.

To include intellectual property under the right to property adds legitimacy to the proprietary nature of intellectual property rights. Fundamental rights can also be seen as a tool of interpretation that assists the development of copyright law. It can act as a check and balance on the development of copyright law to prevent overregulation or unwarranted expansion. It is

[127] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 14.
[128] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
[129] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 16.
[130] L. Helfer, ‘*The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*’, Harvard International Law Journal vol. 49, (2008), pp. 1-52.

argued that fundamental rights in copyright law can lead to a more balanced framework since fundamental rights account for many interests that would not ordinarily fall withing the scope of copyright. This includes non-property and non-economic interests that are beneficial to the users such as access to work and the cultural and educational development of society.[131]

6.4 Stakeholder's Interests

Copyright is designed to accommodate different interests ranging from EU constitutional concerns to interests of users of the copyright content. The existing laws on copyright have struggled to balance the various interests of stakeholders and it is therefore important to discuss these interests.

Authors and right holders have always been primary focus of copyright law. Their interest lies both in the context of economic reasoning and romantic notion. Different types of authors have different needs and concerns. Some authors create works heavily based on financial remuneration while others only want their work to be seen and respected.[132]

The interests of content industries are also important to consider regarding copyright law. Content industries include record companies, publishers, movie studios, database companies and others. The content industries are often the ones that make the financial contributions when facilitating the creation of works and allowing the dissemination of the content to the public. Their motivation is primarily financial gain by earning profit through investments, which is the same interest that some authors have. They are usually the beneficiaries of copyright protection since they control the works of the authors and are the right holders.[133]

End users represent the consumers of copyright content and their 'right's depend on the scope of the authors exclusive rights and the exceptions and limitations to those rights. With economic reasoning and the digital revolution, the end users interests needs to be considered more than it has been traditionally. Their interest lies mainly in access to works for different reasons. It could be educational reasons or developing reasons. [134]

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[131] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 19.
[132] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 38.
[133] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 39
[134] J. Koo, *The Right of Communication to the Public in EU Copyright Law*, (Oxford, Hart Publishing, 2019), p. 40.

6.5 Cultural value

The Commission explains in the Green Paper that copyright and related rights have been seen as fundamental to European Community cultural policy. The information society and especially multimedia products have a cultural dimension in acting for improvement of knowledge and dissemination of culture and history of the European people and the aim of with the InfoSoc Directive was to fully take this into consideration. The information society also works as promotion of cultural exchanges and of artistic creativity and to recognize the value of the common cultural heritage. The European cultural heritage does not only have an intrinsic worth, it also has an economic value that makes it subject to market forces. The protection of this heritage is mainly ensured by copyright and related rights which are therefore fundamental to the development of cultural action by EU. [135]

The human rights law is rooted in values such as dignity, equality, fairness and respect and these are mostly recognised in the freedom of expression. Copyright have been long pursued as a tool to promote human cultural rights of which freedom of expression forms part. When copyright is used in this sense it becomes a means for the realisation of the human rights goals of cultural rights and of the right to culture. Culture is considered as a resource that has a wider range of values than only the economic emphasis than culture when its conceived only as an asset project. The other values that culture has include social cohesion, community autonomy, political recognition and concerns about inappropriate forms of cultural appropriation, misrepresentation and loss of languages and local knowledge.[136]

Cultural rights and the right of culture are among the least understood of the rights. Their definition and scope are unclear as is their relationship with each other and with other human rights. There are also discussions about the universality of human rights and the relativism of culture and cultural rights. This have led some to dismiss the legitimacy of cultural rights.[137]

[135] Commission Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final (19 July, 1995), p. 11.
[136] P. Torremans, *Research Handbook on Copyright Law: Second Edition*, (Edward Elgar Publishing, Cheltenham, UK, 2017), p. 490.
[137] P. Torremans, *Research Handbook on Copyright Law: Second Edition*, (Edward Elgar Publishing, Cheltenham, UK, 2017), p. 491.

6.6 Purpose of exceptions

To understand the purpose of copyright and related rights it is also important to understand the purpose of the exceptions to the rights concluded by copyright and related rights. The general principles applicable to the exceptions in the InfoSoc Directive are relatively well established and have been explained by the CJEU in several decisions.[138] The CJEU has always emphasized the need to interpret exceptions and limitations to copyright and related rights 'strictly'. The aim of copyright and related rights protection in EU is to ensure a high level of protection for right holders and to ensure legal certainty for right holders.[139] This explains the provision that can be found in recital 22 of the InfoSoc Directive that states that promoting learning and culture, including applying the exceptions in Article 5, 'must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works'.

6.6.1 Fair balance

A concept that can be found in recital 31 of the InfoSoc Directive and that has been subject in several decisions from the CJEU is the concept that there should be an emphasis on the purpose of the exceptions and limitations to ensure that EU copyright and related rights law achieve a fair balance of competing rights and interests generally. The exact words of the first sentence in recital 31 are: 'A fair balance of rights and interests between different categories of rightholders, as well as between different categories of rightholders and users of protected subject-matter must be safeguarded'. This concept is a supplement to the interpretive principles of ensuring a high level of IP protection. The most recent decisions from the CJEU where this has been discussed are the decisions of *Spiegel Online*[140], *Funke Medien*[141] and *Pelham.*[142]

In both *Speigel Online* and *Funke medien* the referring courts asks whether the fundamental rights of freedom of information and freedom of the press that are found in Article 11 of the Charter of Fundamental Rights of the European Union can justify a derogation from the author's exclusive rights of reproduction and of communication to the public. CJEU once again

[138] Case C-5/8 *Infopaq* [2009] CJEU, Case C-516/17 *Spiegel Online* [2019] CJEU, Case C-469/17 *Funke Medien* [2019] CJEU and Case C-476/17 *Pelham* [2019] CJEU.
[139] Case C-5/08 *Infopaq* [2009] CJEU.
[140] Case C-516/17 *Spiegel Online* [2019] CJEU.
[141] Case C-469/17 *Funke Medien* [2019] CJEU.
[142] Case C-476/17 *Pelham* [2019] CJEU.

emphasizes the importance of a fair balance between the interests of the rights holders and the protection of the interests and fundamental rights of users of the protected subject matter. In particular their freedom of expression and information that is guaranteed by Article 11 CFR is important to consider, as well as the public interest.[143]

The Court says that the InfoSoc Directive itself provides for those different rights and interests to be balanced since it contains provisions that gives the right holders exclusive rights to their works as well as Article 5 that provides exceptions and limitations to those rights. Some of the exceptions and limitations, in this case the exception for quotation and for reproduction by the press, are specifically aimed to favour the right to freedom of expression by the users of protected work and to freedom of the press over the interest of the author to have the right to prevent use of his or her work. At the same time, it still gives the author the right to have his or her name indicated when the work is used according to the exceptions. Article 5(5) of the Directive also contributes to this fair balance since it requires the exceptions and limitations to be applied 'only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder'.[144]

Since the provisions in the Directive already are aimed to ensure a fair balance between interests and also since Member States are required to apply the exceptions and limitations consistently, the Court's conclusion is that the Member states are not allowed to derogate from the author's exclusive rights of reproduction and of communication. According to the Court, the fundamental rights to freedom of expression and freedom of the press cannot justify such derogation.[145]

6.6.2 Discretion in transposition

In both *Spiegel Online* and *Funke Medien* the referring courts also asks whether the national courts have any discretion in the transposition of the exceptions in the InfoSoc Directive. CJEU explains that the level of protection of fundamental rights that are provided for in the Charter of

[143] Case C-516/17 *Spiegel Online* [2019] CJEU, para. 40-49, and Case C-469/17 *Funke Medien* [2019] CJEU, para., 55-64.
[144] Case C-516/17 *Spiegel Online* [2019] CJEU, para., 43 and Case C-469/17 *Funke Medien* [2019] CJEU, para., 58.
[145] Case C-516/17 *Spiegel Online* [2019] CJEU, para., 49 and Case C-469/17 *Funke Medien* [2019] CJEU, para., 64.

Fundamental Rights must be achieved in a transposition of the exceptions, irrespective of the Member States discretion in transposing the directive. However, in a situation where an action of the Member States is not entirely determined by EU law, it is possible for the national authorities and courts to apply national standards of protection of fundamental rights. The level of protection that is provided for by the Charter and the primacy, unity and effectiveness of the EU law must however not be compromised. Because of this, it is consistent with EU law to allow some discretion for national courts where there is not a full harmonisation of EU law. This is generally what applies when Member States are to implement EU law into national legislation.[146]

Regarding exceptions and limitation in the InfoSoc Directive, the Court says that the objective of the Directive is to harmonise only certain aspects of the law on copyright and related rights. A number of these provisions also disclose the intention to grant a degree of discretion to the member states in the implementation of the Directive. Article 2(a) and Article 3(1) of the Directive define a copyright holder's exclusive right of reproduction and making available to the public their work or subject matter and these provisions form a harmonised legal framework ensuring a high level of protection. They constitute measures of full harmonisation. The exceptions and limitations do however not always constitute full harmonisation. The scope of the Member States' discretion in transposition these provisions into national law must be determined on a case-by-case basis according to the wording of the provision. The exception for quotation in Article 5(3)(d) only contain an illustrative list of cases where quotations are permissible, which is clear from the use of the words 'for purposes such as criticism or review' and therefore this exception has some discretion in the implementation into national law, although this discretion is circumscribed in several regards. [147]

The Court makes it clear that the discretion that the Member States have in implementing the exceptions and limitations into national law must always be exercised within the limits imposed by EU law. They may only provide for exceptions and limitations that comply with the conditions laid down in any of the provisions in Article 5(2) and (3) of the Directive. The Member States are also required to comply with the general principles of EU law, including the principle of proportionality which means that the measures must be appropriate for attaining their objective and not go beyond what is

[146] Case C-516/17 *Spiegel Online* [2019] CJEU, para., 19-21 and Case C-469/17 *Funke Medien* [2019] CJEU, para., 30-32.
[147] Case C-516/17 *Spiegel Online* [2019] CJEU, para., 23-32 and Case C-469/17 *Funke Medien* [2019] CJEU, para., 37-47.

necessary to achieve it. It also has to comply with the objectives of the Directive which is, according to recitals 1 and 9, to ensure a high level of protection for authors and ensuring a proper functioning of the internal market.[148]

6.6.3 Conclusions of the Court's decisions

Lastly, the Court states in both *Spiegel Online* and in *Funke medien* that it is important for the Member States when implementing EU law to remember that the principles in the Charter applies. The Member States therefore have to ensure that they rely on an interpretation of the Directive that allows a fair balance between fundamental rights that are protected by the European Union legal order.[149]

The Court in the case *Pelham* comes to basically the same conclusion regarding the justification of a derogation of the author's rights of reproduction and communication. It also points out in this case that Article 5(5) already contributes to a fair balance and that an approval to a derogation of the rights beyond the exceptions and limitations would endanger the effectiveness of the harmonisation of copyright and related rights. It would also endanger the objective of legal certainty and that any differences that would exists in exceptions and limitations would have a direct negative effect on the functioning of the internal market of copyright and related rights.[150]

It is clear from the Court's decisions that freedom of expression and freedom of the press is fundamental rights of special importance regarding the function of the exceptions to balance different rights and interests. Other rights that are important to protect is the right to education in Article 14 of the Charter, the right to respect for one's private and family life, home and communications in Article 7, right to freedom of thought, conscience and religion in Article 10 and the right to freedom from constraint of the arts and scientific research in Article 13. Each of these fundamental rights can be seen to underpin one or more of the exceptions of Article 5(2) to (4) of the InfoSoc Directive.[151]

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[148] Case C-516/17 *Spiegel Online* [2019] CJEU, para.,33-34 and Case C-469/17 *Funke Medien* [2019] CJEU, para., 48-49.
[149] Case C-516/17 *Spiegel Online* [2019] CJEU, para., 38 and Case C-469/17 *Funke Medien* [2019] CJEU, para., 53.
[150] Case C-476/17 *Pelham* [2019] CJEU.
[151] J. Pila and P. Torremans, *European Intellectual Property Law*, 2nd edn., (Oxford, Oxford University Press, 2019), p. 318.

The protection of the functioning of the internal market is one of the most important aims of the harmonization of EU Member States laws. Article 114 in Treaty on the Functioning of the European Union (TFEU) specifically confers upon EU the competence to enact harmonisation of national rules regarding the establishment and functioning of the internal market. Promoting such harmonization and supporting the functioning of the internal market in general are therefore among one of the principles that applies to the interpretation of the exceptions to copyright and related rights. This is also made clear by recital 32 of the InfoSoc Directive that describes the list of exceptions as aiming to ensure a functioning internal market. By case law it is also made clear that the Member States must interpret the non-mandatory exceptions in the interest of the internal market.[152]

6.6.4 Proportionality

Another principle of special importance in the EU legislation is the EU principle of proportionality. This principle can be derived from two sources. There is firstly the concept of proportionality under general principles of EU law stated in Article 5(4) Treaty on European Union (TEU) that requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This is one of the central elements of EU law and all Union institutions must comply with this principle. [153] This allows the CJEU to measure the intensity of actions taken by the EU and regarding the exceptions it means that all the exceptions in Article 5 of the InfoSoc Directive only covers uses of work or subject matter that are proportionate in the sense that they do not exceed what is necessary to achieve the legitimate purpose that they serve. This restriction is explicit for the exceptions in Article 5(3)(a), (b), (c), (d) and (f) of the InfoSoc Directive.

There is also a principle of proportionality arising from the fundamental rights literature. There is some overlap between the use of proportionality in balancing competing fundamental or human rights and the general EU principle of proportionality but conflation should be avoided because proportionality can be used in both of these context in one single case. [154] In

[152] J. Pila and P. Torremans, *European Intellectual Property Law,* 2nd edn., (Oxford, Oxford University Press, 2019), p. 320.
[153] J. Koo, *The Right of Communication in the Public in EU Copyright Law*, (Oxford, Hart, 2019), p. 9.
[154] J. Koo, *The Right of Communication in the Public in EU Copyright Law*, (Oxford, Hart, 2019), p. 9.

for example the case *Scarlet Extended v SABAM*[155] the CJEU used the principle of proportionality to determine the suitability of court orders and remedies. In this case, there was a court order that required Scarlet Extended to block internet users from accessing particular websites. This court order was dismissed by the Court because it was in conflict with Article 15(1) of the E-Commerce Directive 2000, Article 3 of the Enforcement Directive 2004 and Article 16 of the Charter. The motivation to the dismissal was that it would have been disproportionate to require the Internet service provider Scarlet extended to actively monitor their customers for an unlimited period of time.[156] In *Nintendo v PC Box*, the CJEU agreed that finding infringement for the circumvention of technological protection measures must not negatively affect devices that have commercially significant purposes other than to circumvent the technological protection measures. This means that the court must consider if the TPMs are proportionate so that they do not have the effect of prohibiting devices that have other purposes or uses than the infringement of copyright.[157]

Regarding proportionality in the exceptions, the definition of the legitimate purpose of the exceptions may be difficult to determine. According to the express terms in the articles it seems like the legitimate purpose should not be determined in general, for example protecting freedom of expression but rather locally as in for example reporting a current event or to review or criticize something by means of a quotation. A local definition also supports the interpretative principle that states that an exception should be interpreted strictly to ensure a high level of IP protection, legal certainty and compliance with the three-step test.[158] This view does not however seem like the view that CJEU takes on the matter.

In the *Deckmyn* case[159], the Court states that when the domestic courts have established that a use of work or subject matter does not go beyond what is necessary regarding the purpose that it serves, the domestic courts must continue and having regard to all the facts of the case, consider whether the application of the exception on the use would ensure a fair balance of the competing rights and interests that the use engages. The courts must then also look beyond the general right or interest that underlies and motivates the exception to identify any other fundamental rights and interest engaged

[155] Case C-70/10 *Scarlet Extended v Société belge auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011].
[156] Case C-70/10 *Scarlet Extended v Société belge auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] CJEU.
[157] Case C-355/12 *Nintendo CO Ltd and others v PC Box Srl and another* [2013] CJEU.
[158] J. Pila and P. Torremans, *European Intellectual Property Law,* 2nd edn., (Oxford, Oxford University Press, 2019), p. 321.
[159] Case C-201/133 *Deckmyn and Vrijheidsfonds VZW v Vandersteen* [2014] CJEU.

by the use. Only when the domestic courts have done this it is possible for them to decide if the use in question would be consistent with the fair balance of fundamental rights that Article 5 requires.[160]

The findings in *Deckmyn* supports a three-stage test of proportionality. The case was about determining whether a parodic use of work could be permitted under a domestic exception that implements the exception in Article 5(3)(k) of the InfoSoc Directive that is based on the right to freedom of expression in Article 11 CFR. A national court must in this case consider whether the use has the effect of associating the work with a discriminatory message as to engage the non-discrimination Article 21 CFR and if it does, the court shall consider that on the side of the copyright owner when it decides if the parodic use is a fair balance of competing rights and interests.

[160] Case C-201/133 *Deckmyn and Vrijheidsfonds VZW v Vandersteen* [2014] CJEU.

7 Should single dance moves be protected by copyright?

To answer the question whether a single dance move *should* be protected or not, the most important aspect to examine is the purpose of the copyright protection. What is the reason for protecting certain works and why is copyright valuable?

The Berne Convention is the oldest of international copyright treaties and its purpose is to provide a high level of protection for authors and to ensure that all authors in the Member States enjoy the same treatment. It is made clear from the legislative history that copyright is important for several reasons. There are constitutional considerations that underpin all development of EU laws and among the most important is the internal market consideration.

7.1 Internal market

The aim of achieving a functioning internal market is a central goal in EU. Generally, copyright is very important to the internal market since it gives cultural, economic and social implications for the Community. The free movement of goods and services is important, and the copyright laws contribute to this. It has inevitably contributed to the shaping and development of EU copyright law, but its main purpose is only to ensure a harmonised the domestic copyright laws of the Member States and to ensure a consistent application and interpretation. It does however not offer any real guidance as to what the substance or scope of EU copyright law should be. It merely suggests that the Member States should apply and interpret the laws consistently with each other.

The internal market considerations should be balanced with other competing interests which becomes a difficult task since some of these interests are conflicting in some parts. It is therefore a complicated process to achieve a proper balance between the interests and there is currently no consistent approach to this even if that is the purpose of the internal market considerations. The balance is currently decided on a case-by-case basis instead which is not very transparent. The discussion about the importance of copyright to the internal market is mostly a discussion of harmonization of laws and about allowing the copyrighted goods to be protected and being able to move freely in the Community. It has less importance in the

discussion of whether what works should be protected or not and does not seem to give us any guidance specifically if single dance moves should be protected.

7.2 Fundamental rights

What seems to be more important for single dance moves are the human rights and fundamental rights under ECHR and CFR. The fundamental rights can be seen as a justification of copyright protection. The protection of intellectual property is one of the fundamental rights and can be found in Article 17 of the Charter, which shows that it is considered to be a valuable asset to protect in the Community.

To consider the fundamental rights when developing copyright law can lead to a more balanced framework since fundamental rights consider a wider range of interests that would normally not fall within the scope of copyright and includes non-economic interests such as access to work, cultural and educational development of society. Even if the economic interests are of great value to the Community, it should be balanced with other interests that are arguable equally or more important for a functioning society.

7.3 Fair balance

The balance of fundamental rights and between competing rights and interests generally is something that the Court has discussed in several recent cases regarding copyright. The high level of protection for authors and the fundamental rights of users as well as the public interest seems to be the most important to balance properly according to the Court. The Court also says that the copyright legislation itself provides a balance between those rights and interest since it contains provisions that gives the right holders exclusive right and also the exceptions and limitations to those rights. The three-step test contributes to the fair balance as well according to the Court. A critique to these statements is that the only mandatory exception in the InfoSoc Directive is that of temporary reproduction such as caching and browsing. In the Berne Convention it seems to be only quotations that are required to be a permissible exception to the exclusive rights. This means that the Member States could choose not to include any other exceptions in their legislation which would not be balanced regarding the interests of others than the author's.

Exactly what a fair balance is, is not defined in EU law and might seem to be subjective and here is where to principle of proportionality is assisting as a tool to decide the balance between different rights and interests. The principle of proportionality has been primarily used as an external balancing tool to ensure that the interpretation and transposition of Directives and finding of copyright infringement and its consequences do not produce unjustified or undesirable results that are unfair to defendants or compromise the objectives that are set out in the Treaties. The proportionality principles are important to the EU copyright legislation since it can largely influence the decisions that are made by CJEU and must be considered when analysing if single dance moves should be protected by copyright.

7.4 The balance of interests

Generally the author's interest is both to gain financial remuneration and to have their work seen and respected. For choreographers it is usually the latter that is the most important. Copyright and related rights confer rights to the author that satisfies both of these interests. Regarding the protection of single dance moves and specifically for the authors of the dances that was used in Fortnite, it is probably a lot of financial interests since Epic Games made a lot of money from selling the emotes to their players. Copyright could be said to be a legal expression of gratitude to an author for the effort in creating works and offering it to the public.

A critique to this justification of copyright is why a reward is deserved in the circumstances under which copyright protection is granted. For single dance moves it can be argued that the effort spent in creating only a single dance move is not enough to be deserving a reward in the form of exclusive rights to the work. The public does however get to decide the reward through copyright since the author is given a bigger reward the more popular among the public the author's work is. In the case of the Fortnite emotes it could be said that it is the work of Epic Games and the popularity of Fortnite in general that made the dance moves popular to such extent and that it is not a proportionate reward for the authors if they would get financial remuneration from all the sales of the emote, even if they created the dances.

Besides the economic rights that copyright confer, the integrity rights are also important for a choreographer to protect their creativity. The creative process of making a choreographed dance is often difficult and very time consuming. It is therefore important that the choreographer is able to control

the work and to be able to retain the freedom to revise or withdraw the work whenever it is needed, even after its been introduced to the public. Without supervision, a choreographer's work risks inappropriate performances and derogatory treatment.

The dance community provides a safe haven for choreographers because its good practices adopted to serve to protect the choreographer's interests. This might be the reason why there hasn't been a lot of cases on the subject in CJEU – the choreographers have solved their disagreements internally in the dance community instead of taking it to court since the custom has acted as a regulatory force within the field. However, the recent uses of single dance moves by Epic Games in Fortnite and the following lawsuits have showed that the increased interaction of dance works outside the dance community have exposed choreographers and performers to possibly a greater risk of infringement because people that are not involved in the dance community does not recognize its customs. This development has increased the need for choreographers to have the protection of copyright for their works. Even if a single dance move is considered simple and not worth financial reward, it can still be very important for the author to retain the respect and integrity of the work. In current legislation it is however not possible to confer moral rights to an author of a work that is not also protected by copyright.

Copyright is not only important for the individual author, but also for the society since it contributes greatly to the cultural heritage. Especially dance have historically been considered playing a big role in culture which suggests that it is important to protect dances in general. Without copyright protection for dances there would be less incentive to create dance since any competitor could reproduce it and sell it. This incentive argument suggests that if there was no legal protection for creative works, the dances would never be made, and the society would not obtain the valuable cultural contribution that dance provides.

Regarding single dance moves it could however be argued that they do not contribute as much to the cultural heritage as full routines does. Another argument that speaks against protecting single dance moves based on cultural heritage is that dance is important in many cultures to perform together spontaneously and to be a tool for creativity and if single dance moves would be protected by copyright it could hinder the use and the creativity of others. Single dance moves could be seen as basic moves that are building blocks when creating full routines and more complex dances and if single dance moves also were protected it would be impossible to use these without the consent of the author when creating works that are more

complex. This would inhibit the creativity and the cultural expression of others. It could therefore be in the interest of the society to not protect single dance moves in order to promote creativity.

The purpose of the exceptions to copyright are a good indicator of what reasons there are to deviate from the high level of protection that copyright aims to achieve for authors. Many exceptions are based on fundamental rights and especially the freedom of expression is important. The freedom of expression is important both for the author and for others and could be used as an argument both for an extensive copyright legislation, but also for a more restricted legislation. It is important for authors to be free to express themselves and to have a security that no one else will use their works in an undesirable way. It is however also important for others to be able to express themselves as well, and if works like single dance moves, that are arguable simple works, are already protected it could be difficult to create anything that would be considered new.

It is important to consider all competing rights and interests when deciding whether it is proportionate to protect single dance moves by copyright. The three-stage test that the Court presented in the *Deckmyn* case clarifies that after establishing that a use of work or subject matter does not go beyond what is necessary regarding the purpose of the exception, it is important to continue the evaluation by considering a fair balance of the competing rights and interests that the use engage. This applies to the use of exceptions but could also be used as guidance to establish the proportionate protection of copyright.

7.5 Conclusion

Copyright law prohibits unauthorized use of ‘copies’ of a work and therefore it also has the potential to inhibit the way people interact with and use cultural objects such as dance. It is therefore important that the justification of copyright is carefully reassessed and considered before including works under the protection.

The internal market consideration is important throughout EU, but it should be balanced with other competing interests. It is mostly a discussion of harmonization of laws and is not a very important aspect when deciding whether single dance moves should be protected.

What is more important is the different interests of authors and users and the society in general and the balance thereof. Without the authors there would

be no content to protect. It is therefore very important to take their interests into account in order to encourage the creation of woks that are beneficial to the society. It is important to understand that there are different types of authors with different types of needs and therefore a development of copyright law that promotes a one-size-fit-all policy is not desirable, given the different interests and concerns of various types of authors. The interest of authors of single dance moves are both financial and to have their work seen and respected. Both the economic rights and the moral rights are therefore important.

For the users of works it is important to be able to access and use the material, which copyright to some extent prevents. For the society one important aspect of copyright is to give authors a high level of protection since that is an incentive to create works which have a cultural value to the society. This argument does however work for the opposite as well, since copyright have the potential to prevent the creativity of others if works that are too simple are protected. Single dance moves are simple in the sense that they are short and consist of only a few moves. By protected such work it could hinder others from creating more complex dances.

The moral rights for authors of single dance moves seems more likely to be justified than the economical, but the current legislation does not allow moral rights to be conferred where there is no copyright.

Since the balance of fundamental rights and other interests have been decided on case-by-case basis it is an issue that there are very few cases on the balance of interests regarding dances. It is therefore difficult to conclude what the Court would think about protecting single dance moves and if it should be protected from a legislative point of view. It does however seem like there are more arguments that speaks against protecting single dance moves and the conclusion is therefore that single dance moves should not be protected by copyright or related rights since it would not be a proportionate and cannot be justified enough.

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