PROTECTING MUSIC BY COPYRIGHT IN THE EU

What is music and to what extent can it be protected by EU copyright law?

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Abstract

Before the Internet era began, the method that most consumers used to exploit copyrighted musical works such as CDs was based on the physical location of the entity that distributed them. Nowadays, they can be found on different online platforms. The aim of this thesis is to find out what music is, why it should be protected and to what extent it can be protected according to the EU copyright law. The method used to answer the research questions in this thesi is a legal dogmatic method. The thesis considers that, the most common definition for music is organized sound that has the elements rhythm, pitch and dynamics in it. It is protected because the original authors of music deserve to get financially compensated and recognized for their original work. The analysis demonstrates that copyright is protected to a certain extent through Directives, neighbouring rights, and international treaties such as the Bern Convention and the WPPT. Furthermore, the exceptions to copyright protection are highlighted in Article 5 of InfoSoc Directive, therefore the available forms of protection of music by copyright are suitable to balance the interests of rights holders.

Key words: Music, copyright law, intellectual property right, neighbouring rights

Foreword

This thesis was written during the Master's Programme in European and International Tax Law. I want to express my sincere gratitude to Lund University, to the School of Economics and Management, and to the Department of Business Law that welcomed me into this new cycle of my life by directly admitting me into the law program. I dedicate my thesis to my late grandfathers and grandmother, to all of my 200+ cousins that did not have an opportunity to grow up in the Nordic Europe and get the top-level education at every institution they attended, to my loving and supporting godparents and last but not least, to all the women in my family by becoming the first person ever in the existence our family to hold a masters. I would also like to express my gratitude to my family, to my living grandparent and most importantly to my mother, who made sure I was able to focus on my studies.

I would like to thank the program coordinators, who helped me throughout the program and gave me the assistance I needed in the beginning of my studies during the fall of 2021. I would like to express my utmost gratitude to the professors Johan Axhamn, Jörgen Hettne, Jonas Ledendal and all of the other lecturers and guest lecturers I had in the program for guiding me towards personal and academic growth. Finally, I want to thank my supervisor, professor Kacper Szkalej for introducing more depth secrets of IPRs and especially copyright law. In addition to this, I thank my supervisor for the fruitful discussions on my thesis topic, the support and help I received through my research time.

Linda Akili

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Abbreviations

BHG	Bundesgerichtshof (Federal Court of Justice in Germany)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court in Germany)
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
DDF	Danske Dagblades Forening
EEC	European Economic Community
ECJ	European Court of Justice
EU	European Union
EU Charter	The Charter of fundamental rights in the European Union
IPRs	Intellectual property rights
MS	Member States
WCT	WIPO Copyright Treaty
WIPO	The World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
TRIPS	Trade-Related Aspects of Intellectual Property Rights

1. INTRODUCTION

1.1 Introduction

One thing about progress in terms of copyright protection is that it is a phenomenon that will keep occurring. There has been an undeniable increase in the digital consumption of both printed and physical goods. More and more goods such as movies, music and even books can be found in a digital form. Before the Internet era began, the method that most consumers used to exploit copyrighted works was based on the physical location of the distributing entity. To illustrate, the customers would borrow DVDs, CDs and books from libraries and video rental shops in the city that they were located in. These were seen as the tangible medium between copyright owners and copyright users. Nowadays, the form of the goods is not restricted to a physical form anymore, one can effortlessly stream music or movies that earlier on could only be found in a physical form at a physical distribution centre on different online platforms such as social media platforms (Tiktok, Instagram), HBO, Apple and Hulu. As a consequence of the development of digital technology, social needs of the consumers have followed the very same direction. Furthermore, instead of storing illustrations, designs and manuscripts that are in a paper form inside a safe, one can change their form through using a device such as a scanner to save them to a cloud or another online storage platform.

In the European Union (EU), the copyright owners, creators, are conferred exclusive rights by copyright law over works that they create. This implies that the copyright owners have exclusive right to their creations and therefore the right to prevent others from taking specific measures when allowing the people to use their copyrighted works. The nature of exclusivity means that the person who holds the rights to a work decides how the rights can be exploited and therefore that permission has to be obtained from the right holder. Additionally, some available sanctions try to preserve this exclusivity by letting rights holders prevent others from utilising the rights without permission.[1]

[1] See case *Hütter v. Pelham*

This thesis focuses on copyright protection on music in the European Union (EU).In order to understand how music is protected by copyright, one must first understand what exactly is music. There are numerous explanations that begin to explain what is meant by music. The most common definition for music starts with the notion of music as organised sound.[2] These definitions also acknowledge that there are other forms of organised sound such as sound found in nature, like the sound of a running river or the sound of human speech, that are not defined as music.[3] Furthermore music is defined as "the art of combining vocal or instrumental sounds (or both) to produce beauty of form, harmony, and expression of emotion" in the The Concise Oxford Dictionary.[4] Music can be owned by one person or multiple people that are a part of the creation process. Furthermore, the copyrights to music can also be owned by a company such as a recording label or a movie production company. To answer the rest of the questions presented above, a deeper definition for music is presented later in this paper.

1.2 Research questions

The main aim is to find out to what extent music can be protected under the EU copyright law. In order to reach the aim of this thesis the author defines what music is and why it is protected by the EU copyright law. Lastly the author will analyze if the available forms of protection of music by copyright are suitable to balance the interests of rights holders. Within this thesis, the following questions that are going to be the subject:

1. *What is music?*
2. *Why is it protected by the EU copyright law?*
3. *To what extent can music be protected under the EU copyright law?*
4. *Are the available forms of protection of music by copyright suitable to balance the interests of rights holders?*

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[2] Jerrold Levinson, “What a Musical Work Is.” The Journal of Philosophy, vol. 77, no. 1, 1980, pp. 5–28, https://doi.org/10.2307/2025596. Accessed 9 May 2022.
[3] Houghton Mifflin Harcourt Publishing Company, "The American Heritage Dictionary entry: Music”, Ahdictionary.com; Oxford dictionary.
[4] The Concise Oxford Dictionary 1992.

1.3. Method and materials

In order to address and clarify the presented questions and aim of the work, the used legal method will be the legal dogmatic method. This method will be used in the thesis to answer the main research questions. This thesis relies on doctrinal research with a focus on legislation and jurisprudence (case law). Furthermore, the method is used to define and systematize the applicable law by highlighting important legal framework and case law that is applicable to different forms of protection for music in the EU.

The Unions legal order is often divided into primary legislation which consists of the Treaties[5] and general legal principles set by the CJEU, the secondary legislation which is based on the Treaties has to comply with primary legislation.[6] Lastly, there is supplementary law that consists of the EU case law that is derived from the decisions of the CJEU and the Court of First Instance (CFI). In regards to copyright law in the EU, the international copyright law is taken into account when the court is implementing case law when making the judgement.

In this paper the author will approach the problem regarding the copyright protection of music in the EU from the perspective of EU law, in particular what is increasingly known as EU copyright law.[7] As far as EU copyright law is concerned, the thesis will focus primarily on the Information Society Directive (InfoSoc Directive). The law in the EU is largely independent of national law, because the Union in itself is a source of law. [8] The doctrinal legal research consists of legal publications, textbooks and judgements of national courts and the Court of Justice of the European Union (CJEU) case law. The author does not have a major focus on national law because a sufficient amount of law has been harmonized at the EU level. Legal sources used in this thesis include regional legislation and international law. The framework of this thesis is firstly, international conventions related to copyright that are relevant for presented research

[5] TEU, TFEU, EU Charter.
[6] Kacper Szkalej, *Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*, 2022, p. 48.
[7] Kacper Szkalej, *Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*, 2022, p. 47.
[8] Kacper Szkalej, *Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*, 2022, p. 48.

questions, which are Berne Convention, the WIPO Copyright Treaty (WCT),WIPO Performances and Phonograms Treaty (WPPT) and Rome Convention. TRIPS agreement will be mentioned briefly in regards to neighbouring (related) rights.

1.4. Delimitations

The scope of this paper is limited to a discussion of the application of copyright law on the protection of music in the EU only. Countries outside of the EU will not be largely mentioned in this paper. Directives, such as the Directive on Copyright in the Digital Single Market (2019), the Database Directive (1996), and Rental Directive (1992) will not be discussed largely in this paper, because they will not play a major part in clarifying and satisfying the purpose and the research questions of the thesis. The Database Directive will not be discussed largely because this thesis does not have a focus on the data bases, even though one could consider that database protection with regards to specific products, such as a "best-of" music album that is a compilation of songs selected by the original creator could be applied. The subject of database protection will remain outside of the thesis because the author prefers to focus on the more “conventional” forms of protection of music.

1.5. Structure

Besides the Introduction, the remainder of the thesis is divided into three chapters. The second chapter focuses on defining what is copyright and exclusive rights, relevant neighbouring rights and the legal framework of the thesis. The third chapter focuses on defining the different components that go into making music and classifies what musical works are and how copyright can be protected in the EU. Fourth chapter focuses on the challenges of protecting a copyright in music and within the EU through relevant case law and the interpretation provided by the CJEU and national courts in central Europe. Lastly, the final chapter consists of a summary that summarises the main findings and concludes the thesis.

2. COPYRIGHT IN THE EU

2.1 Introduction

This chapter gives an overview of copyright protection internationally and in the EU by starting with the general background of copyright law. The second topic in this chapter is the neighbouring rights and the last topic concerns the legal framework of existing EU copyright legislation. These topics are discussed to lay out the fundamentals for copyright protection in music.

2.1.1General background of copyright law

Intellectual property rights (IPRs) is a legal body of rules that include copyright law. Other laws that IPRs cover are design law, patent law, trademark law and lastly copyright law.[9] Copyright is a limited-term right that allows authors or creators to have exclusive rights to their creations. This means that the creators are able to exclude others from exploiting their works such as lyrics, musical tunes and compositions without permission.[10] Copyright protects against copying and dealing in illegal copies.[11] Moreover, IPRs allows the authors and firms to have the exclusive rights to economic exploitation of the works and other copyright-protected material.[12] To illustrate, an author can be a composer of a melody and a firm can be Sony Music Entertainment, these two entities are permitted to have an economical gain from the works that they have copyrighted. Furthermore, in this thesis the people who create new compositions such new melodies (music), are called composers and the composers of predominantly songs are usually called songwriters and the the people who write the lyrics for a song are the lyricists.[13]

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[9] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 5-7.
[10] Justine Pila, Paul Torremans, *European intellectual property law*, 2019, New York: Oxford University Press. p. 221.
[11] Simon Stokes, *Digital copyright*, 2018, 5th ed. Law and practise.
[12] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 1.
[13] Oxford dictionary.

In order to understand copyright law, the purpose of a copyright must be understood. The intent behind copyright is to protect the original expression of an idea in the physical form of a creative work, but not the idea itself.[14] Fundamentally, copyright law confers the copyright protection to two things: original literary and artistic works.[15] Often copyrights last through the author's whole life and 70 years [16]after they have died.[17] In the Bern Convention it is mentioned that the protection of copyright granted lasts throughout the life of the author and 50 years after his death.[18]

Copyright has always shared two similar features with other intellectual property rights: its territoriality possibly creating conflicts with the free movement of goods and service and the exclusivity rules that contribute to safeguarding, potentially leading to the weakened freedom of competition.[19] It is said that copyright protection is limited to territoriality because an artistic work that has received a copyright protection in Germany, may not have the same copyright protection in France.[20] Furthermore, instead of there being a set of rules to protect all copyrights across the world and inside the EU similarly, the copyright is protected separately in every country.[21] Nevertheless, within the EU, the copyright law is largely harmonised despite the fact that there may occur differences in national laws in the MS of the EU.[22]

Copyrights protect works that are in intangible form.[23] By the intangible form it is meant that a work that is not physically touchable such as a CD can receive copyright protection. For

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[14] Rich Stim, *"Copyright Basics FAQ"*. The Centre for Internet and Society Fair Use Project. Stanford University. Retrieved 21 July 2019; *See also* Article 2 of WCT

[15] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.2.

[16] Directive 2011/77/EU

[17] Justine Pila, Paul Torremans, *European intellectual property law*, 2019, New York: Oxford University Press, p. 223

[18] Bern convention, Article 7 (1)

[19] Irini Stamatoudi, Paul Torremans, *EU Copyright Law: A Commentary*, (Edward Elgar Publishing 2021) p. 7

[20] Prof. P. Bernt Hugenholtz, *Harmonizing European Copyright Law,* p. 308 https://www.ivir.nl/publicaties/download/710.pdf

[21] Justine Pila, Paul Torremans, *European intellectual property law*, 2019, New York: Oxford University Press, p. 222.

[22] Justine Pila, Paul Torremans, *European intellectual property law*, 2019, New York: Oxford University Press, p. 222; Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 2.

[23] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.2.

example, the composer can get copyright protection for a melody. This results in the author being able to prohibit other composers from their melody without permission and giving credit to the original composer. Copyright protection provides incentives for creators that allows them to create art such as music or paintings that can add to a cultural and a social interest of a country. The protection is granted whether the creation has a considerable economic value or whether the creation is useful.[24] This is done, because it is understood that the lack of copyright protection would lead to creators not investing time and energy in making new creations or bettering their already existing creations. A good example of this is artists making remixes of their original songs that sometimes do considerably better than the original songs.

2.2. Neighbouring rights and the copyright law in the EU

Copyright protection is extended to potential concepts of (live) performances of artists even when they may not be defined as protected works, but are deemed to require copyright protection.[25] Rights connected to performances of performing are called the *neighbouring rights,* that are also known as the *related rights.[26]* Neighbouring rights protect the legitimate interests of persons and bodies who either play a part in the making available of works to the public; or produces material which, although not "works" in the copyright systems of all countries, expresses creativity or technical and organisational skills sufficient to justify the recognition of a proprietary right such as copyright.[27] Neighbouring rights refer to additional creations which do not need to be original, an example of this is a recording of a live performance. For that reason neighbouring rights have been granted to three categories of beneficiaries: producers of sound recordings (phonograms), performers and broadcasting organisations.[28] These rights only started to be harmonized at the European level when the majority of MS had finally signed up to the

[24] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 1.
[25] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.2.
[26] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 2, Directive 2006/116/EC.
[27] Directive 2006/116/EC (17)
[28] Understanding Copyright and Related Rights - WIPO, p. 27.

Rome Convention of 1961.[29] The adoption of the Rental Right Directive harmonized, for some MS, rights of commercial rental and lending. This Directive established a horizontal harmonized framework for the protection by neighbouring ('related') rights of performers, phonogram producers, broadcasting organizations, and film producers at levels that exceeded the minimum rules set in the Rome Convention.[30]

In the EU, the neighbouring rights and authorinal rights are nearly identical. The difference is that these rights are granted to different beneficiaries and they may be applied on some products that are put on the market.[31] To illustrate this, the author will continue with the example she gave above: an artist, in our case the composer of the music is entitled to have authorial rights protection to their compositions where as the permanent attachment form, such as an album, which consists of sound recordings, is what the producers at Sony Music Entertainment hold copyrights to. The distinction between the authorial rights and neighbouring rights is brought up by describing that the first mentioned is based on protection on content and the second one is based on protection of the signal.[32] Furthermore, the protection of copyright for neighbouring rights is mentioned in the Rome Convention, WPPT, and some parts of TRIPS. Nevertheless, there are open-ended provisions regarding limitations to neighbouring rights that can be found in Article 10(2) of the Rental Right Directive. These provisions are meant to ensure that neighbouring rights holders are not treated more favourably than copyright owners in respect to their works.[33]

The evolution of copyright law as we know it today in the EU was dependent both on political and technological changes that have been taking place since the creation of the European Economic Community (EEC) established by the Treaty of Rome 1957. In 1886 an international agreement regarding copyright was introduced in the city of Bern in Switzerland. This agreement is known as the Berne Convention for the Protection of Literary and Artistic Works, often known

[29] P. Bernt Hugenholtz, "Harmonizing European Copyright Law", https://www.ivir.nl/publicaties/download/710.pdf.
[30] ibid.
[31]Kacper Szkalej, *Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*, 2022, p. 70.
[32] Kacper Szkalej, *Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*, 2022, p. 70.
[33] Hugenholtz P. B, Harmonizing European Copyright Law, https://www.ivir.nl/publicaties/download/710.pdf, see also Rome statue of criminal court (RC), Article 15(2).

as the Berne Convention. The convention formed several aspects of modern copyright law: the concept of copyright existing the moment a work is “fixed” was introduced, rather than requiring registration. Furthermore, it also enforced a requirement that countries that are a part of the convention recognize copyrights held by the citizens of all other parties to the convention.

Another international instrument that plays a part in shaping copyright law within the Union as we know it today is the The World Intellectual Property Organization Copyright Treaty also known as the WIPO Copyright Treaty (WCT). This treaty was seen as a protocol to the Berne Convention.[34] Later the WCT was conceptualised as an additional treaty which supplemented the Berne Convention because, as any amendment to the Berne Convention required unanimous consent of all parties that were involved.[35] The treaty is important because it focuses attention on the stimulant nature of copyright protection. By this it is meant that people will be more creative when they are entitled to protection of their work and they will invest more time in creating perfect work.[36] Hence the treaty claims its importance to creators' creative efforts. Furthermore, the WIPO Performances and Phonograms Treaty (WPPT) was adopted by the members of WIPO at the end of 1996. The aim of this treaty was to develop and maintain the protection of the rights of performers and producers of phonograms in the most efficient and consistent way possible.[37] This treaty provides similar obligations for performers and producers of phonograms to contracting states as provided under Articles 11 and 12 of the WCT in its Articles 18 and 19.

2.3. Legal framework of existing EU copyright legislation

EU copyright framework is made up from the following legal instruments: the Information Society Directive[38], the Term Directive[39], the Database Directive[40], the SatCab Directive[41], the

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[34] Susan A. Mort, “The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights” (1997–98), 8 Fordham Intell Prop Media & Ent LJ 173.
[35] ibid.
[36] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.1.
[37] WIPO.
[38] Directive 2001/29/EC (The Information Society Directive); Morten Rosenmeier, Kacper Szkalej, Sanna Wol, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.6.
[39] Directive 2006/116/EC.
[40] Directive 96/9/EC.
[41] Directive 93/83/EEC on satellite broadcasting and cable retransmission.

Rental and Lending rights Directive[42], the Enforcement Directive[43], Resale rights Directive[44], Computer programs Directive[45], Orphan works Directive[46] and CRM Directive.[47] Only the important Directives in regards to the aim of this thesis have been listed above. This is to say that there are other Directives and Regulations that are relevant in terms of copyright protection that have not been mentioned above.

Although, internationally there is not a particular legal framework regarding unitary copyright system, there are international legal instruments that create obligations that the MS practising copyright law have to comply with.[48] To give an example, the EU is a member in the international treaties like the WCT and WPPT, therefore the EU has to comply with the regulations regarding copyright that is in these treaties. Consequently the capacity of MS in the EU practising copyright law is limited due to them having to comply with obligations under the international instruments.[49] Some of these instruments, that are relevant in this thesis, are listed below:

- Berne Convention for the Protection of Literary and Artistic Works[50]
- WIPO copyright treaty[51]

Regarding the neighbouring right the important conventions are:

- WIPO Performances and Phonograms Treaty (WPPT)[52]
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations[53]

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[42] Directive 92/100/EEC.
[43] Directive 2004/48/EC.
[44] Directive 2001/84/EC.
[45] Directive 2009/24/EC.
[46] Directive 2012/28/EU.
[47] Directive 2014/26/EU: on copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
[48] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.2.
[49] Art. 5 Protocol 28 EEA Agreement, Art 1(4) WCT; sections 1.3.2 and 2.5.2.3
[50] Bern Convention, 1886.
[51] WCT, 1996.
[52] WPPT, 1996.
[53] Rome Convention on the law applicable to contractual obligations (consolidated version), 1980.

The most relevant Directive is the InfoSoc Directive in regards to the aim of this thesis. Furthermore, it is the one of most important Directives regarding copyrights, because it harmonises the norms on the meaning of having a copyright protection, the exceptions[54] and exceptions to copyright protection (such as private use).[55] According to this Directive the it *concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.*[56] Furthermore, *member states shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*[57]

The rights provided concerns authorial rights and neighbouring rights. According to the EU law[58], the following rights are protected:

- right of reproduction for authors, performers, producers of phonograms and films and broadcasting organisations[59]
- right of fixation for performers and broadcasting organisations[60]
- right of computer program reproduction, distribution and rental for authors[61]
- right of communication to the public for authors, performers, producers of phonograms and films and broadcasting organisations[62]
- right of communication to the public by satellite and cable for authors, performers, producers of phonograms and broadcasting organisations[63]

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[54] Directive 2001/29/EC (The Information Society Directive), Article 5
[55] Morten, R. Szkalej, K. Wolk, S. 2018. EU Copyright Law: Subsistence, Exploitation and Protection of Right, p.7; Directive 2006/115/EC (Rental and Lending Directive).
[56] Directive 2001/29/EC (The Information Society Directive).
[57] Directive 2001/29/EC (The Information Society Directive).
[58] Bern convention, Article 2(1)
[59] Directive 2001/29/EC (Information Society Directive) Article 2, WPPT Articles 7 and 11; aslo TRIPS Article 14.
[60] Rental Directive Article 6; also WPPT Article 6 and TRIPS Article 14.
[61] Computer Programs Directive Article 4; also TRIPS Article 11.
[62] Directive 2001/29/EC (The Information Society Directive), Article 3; also Articles 6, 10, 14 of WPPT; Article 10 of TRIPS; Article 8 of WCT.
[63] Satellite and Cable Directive, Articles 2 and 4.

- right of distribution for authors and for performers, producers of phonograms and films and broadcasting organisations[64]
- right of rental and/or lending for authors, performers, producers of phonograms and films,[65] with an associated right of equitable remuneration for lending and/or rental for authors and performers[66]
- right of broadcasting for performers, producers of phonograms and broadcasting organisations[67]

Furthermore, the Bern convention the Contracting Parties which are all Member States of the EU, must lay out the copyright protection for *literary and artistic works.* They include:

> *"every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science".*[68]

Moreover, Under the Rome Convention (Art. 7), performers have the right to prevent:

- the broadcast or communication to the public of their performance, unless this is made from a legally published recording of the performance;
- the fixation (recording) of their performance;

[64] Directive 2001/29/EC (Information Society Directive) ,Article 4; Rental Directive, Article 9; also WCT, Article 6, WPPT, Articles 8 and 12; TRIPS, Article 10.
[65] Rental Directive, Article 2; also WPPT, Articles 9 and 13, WCT, Article 7, TRIPS, Article 11; See Case C-200/96.
[66] Rental Directive, Article 4.
[67]WPPT, Article 6; Rental Directive , Article 8.
[68] Berne Convention, Art. 2 (1.

- the reproduction of a recording of their performance.

The WPPT has extended these rights to include the right to licence:

- the distribution of recordings of their performance, for sale or other transfer of ownership[69]
- the rental of recordings of their performances, unless there is a compulsory licence scheme in operation[70]
- the "making available to the public" of their performances [71], in effect their publication on the internet.

Lastly the InfoSoc Directive includes a static and a firm list of permitted exceptions, which any new or digital exception has to comply with. In accordance to the the Article 5 (2) of the Infosoc Directive:

MS may provide for exceptions or limitations to the reproduction right provided for in Article 2 of the same Directive (i.e. reproduction right) in the following cases:

- *"(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;"*
- *"(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;"*

Furthermore, MS may provide for exceptions or limitations to the rights provided for in Articles 2 (i.e. reproduction) and 3 (i.e. communicating works to the public) in the following cases:

[69] WPPT, Article 8.
[70] WPPT, Article 9.
[71] WPPT, Article 10.

- *"(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved"*
- *"(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability"*
- *"(d) quotations for purposes such as criticism or review*[72]*, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;"*
- *"(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;"*

There is not a specific list that is expressed regarding the copyright protection.[73] Instead the above-mentioned framework harmonises what specific creations have to be protected by copyright to a limited extent.[74] So far many countries have national legislation that allows certain exclusive rights to performers in audiovisual works such as the right to remuneration.[75] By this it is meant that the performers should be paid when their works are copied, distributed or broadcasted (this is of the neighbouring rights of copyright).[76] Furthermore, the MS in the union have to comply with the rules set by the CJEU.[77] The international treaty that gives performers control over how and when their work can be used abroad has not been made yet.[78] This leads to

[72] Also mentioned in Article 17(7a) of Directive on Copyright in the Digital Single Market 2019.
[73] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 32.
[74]Ibid; Article 5 of Directive 2001/29/EC (The Information Society Directive).
[75] Directive 2006/115/EC (Rental right and Lending Directive) recital 3.
[76] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 32.
[77] ibid.
[78] ibid.

there not being a legal right for payment for artists when their works are used abroad.[79] To illustrate this, an artist who created a record of a sound-only CD-album might get paid whenever that album is broadcasted or sold in a country that is party to the WPPT. The same performance on a music video does not carry the same entitlement to payment, because the artist can not choose the distribution of the music video (when and where the music video is played).

The Charter of fundamental rights in the European Union (EU Charter), which is a part of the treaties, has become an interpretative tool of harmonisation of the limitations in copyright law in the EU.[80] Moreover, a copyright can be subject to limitations based on public interest considerations, for example consumers can copy works protected by copyright from one device to another without infringing copyright.[81] An example of this is a person downloading their own Spotify playlist so they can play music offline on their Ipad and then later send the list via a different application to their Iphone as well.

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[79] Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p. 32.
[80] Kacper Szkalej, "*Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*", 2022. p. 48.
[81] Private Copying and Fair Compensation: An empirical study of copyright levies in Europe, by Professor Martin Kretschmer, 2011, available at: http://www.ipo.gov.uk/ipresearch-faircomp-full-201110.pdf, See Case C-435/12.

3. PROTECTION OF MUSIC UNDER THE EU COPYRIGHT LAW

3.1 Introduction

In this chapter, the author will present a deeper definition of what music is and its different components. Furthermore, the musical works are defined. This definition helps to highlight how in the process of making one musical work, it is possible for the author to receive copyright protection for two separate works that are protected separately by copyright. Furthermore, this chapter ends with an explanation of how music is protected by copyright law in the EU and hence highlights to what extent music is protected in the EU.

3.1.1 Defining music

The general definitions of music have common elements, such as rhythm, pitch and dynamics. The definition for rhythm states that “generally rhythm means a "movement marked by the regulated succession of strong and weak elements, or of opposite or different conditions".[82] Furthermore, this can be interpreted as rhythm often involving an interrelationship between one highlighted strong beat and either one or two unaccented weaker beats. [83] By pitch in music it is meant a perceptual property of sounds that enables the ordering of the sounds on a frequency-related scale.[84] In other words, pitch is the standard that makes it possible to judge sounds as "higher" and "lower" when it comes to musical melodies. Lastly, in music, by dynamics it meant the variation in loudness between notes or phrases.[85] There are different styles (genres) of music that may omit, emphasise or de-emphasize or omit some of these elements. The performance of music is carried out through using a vast range of instruments, such as

[82] Anon. *The Compact Edition of the Oxford English Dictionary II.* Oxford and New York: Oxford University Press, 1971.
[83] ibid.
[84] Anssi Klapuri, "Introduction to Music Transcription", in *Signal Processing Methods for Music Transcription,* edited by Anssi Klapuri and Manuel Davy, 1–20 (New York: Springer, 2006): p. 8.
[85] Vines, Bradley W. et al. "Analyzing Temporal Dynamics In Music". *Music Perception*, vol 23, no. 2, 2005, pp. 137-152. *University Of California Press*, https://doi.org/10.1525/mp.2005.23.2.137.

pianos, drums and guitars, and vocal techniques ranging from rapping to singing. There can also be solely instrumental pieces, solely vocal pieces, such as songs without instrumental accompaniment (acapellas) and pieces that combine singing and instruments.[86]

Defining music gets complex when the culture of a country is taken into account in regard to how culture influences music. For example in one country something can be considered as music whilst in another it can be considered as commotion. This is supported by the fact that there are different genres in music. Some music genres, such as noise music, challenge the idea of music "being the art of combining vocal or instrumental sounds (or both) to produce beauty of form, harmony, and expression of emotion" by using sounds that are not often seen as musical, beautiful or harmonious.[87] A great example of such sounds is the randomly produced sounds that are produced using compositional processes that use ambiguity such as noise speech, cacophony, electronic distortion and static.[88] Furthermore, the original melody created by the author inside his head is heard by others when the combination of sounds in the music is played to the ear. These musical sounds, such as melodies, are not yet in a form that can be protected through copyright law.

3.2 Musical Works

In the copyright system, musical works refer to musical compositions, which are seen as the original piece or work of music.[89] One of the definitions for a musical work states that "*a musical work is defined as the song's underlying composition along with any lyrics that go with the composition.*"[90] Whilst another definition states: *"a musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with music."*[91]

[86] David J. Elliott "Musical Understanding, Musical Works, and Emotional Expression: Implications for education, Educational Philosophy and Theory", 2005, 37:1, 93-103, DOI: 10.1111/j.1469-5812.2005.00100.x.
[87] Paul Hegarty, "*Noise/Music: A History.*" Continuum International Publishing Group, 2007 London: p. 3-19.
[88] Paul Hegarty, "*Noise/Music: A History.*" Continuum International Publishing Group, 2007 London: p. 3-19.
[89] David J. Elliott "Musical Understanding, Musical Works, and Emotional Expression: Implications for education, Educational Philosophy and Theory", 2005, 37:1, 93-103, DOI: 10.1111/j.1469-5812.2005.00100.x.
[90] Alexander Nill, Andreas Geipel, Jr, "*Sharing and Owning of Musical Works: Copyright Protection from a Societal Perspective*" Journal of Macromarketing. 2010;30(1):33-49. doi:10.1177/0276146709352217.
[91] Definition from Law insider, https://www.lawinsider.com/dictionary/musical-work.

Musical works can have one single author or multiple authors and they involve a composed or improvised musical design or structure.[92] Furthermore, they can be either vocal or instrumental, the structure of a musical piece or to the process of creating or writing a new piece of music.[93] There are many cultures where the act of composing often includes the creation of music notation, such as sheet music.[94] The sheet music can be copyrighted under the EU copyright law.[95] Later, the musical notes that have been put on the sheet are then performed by the composer or by another musician.

Musical works are usually created by a songwriter or composer, and sometimes the performer. In popular music and traditional music, the songwriting process often involves the creation of a basic outline of the song that is called the lead sheet. This outline sets out the melody, lyrics and chord development. A good example of this is when in classical music, the process of choosing the instruments of a large music ensemble such as an orchestra (orchestration) which will play the different parts of music is typically done by the composer. The orchestration includes different parts of the orchestra playing the melody, accompaniment, countermelody, bassline, ect. There is a difference between musical theatre and pop music. The process of orchestration may be done by the songwriters through hiring an arranger to do the orchestration.

The composition of music is a spiritual creation that first exists in the mind of the composer as an idea; he may play it for the first time on an instrument such as a guitar or a piano. This played melody cannot be copied until it is set to a format that others can see and read such as musical notes. The current copyright law in the EU provides for the making and filing of a material thing (a music sheet or a sound recording) against publication and reproduction.[96] For example a writer can ask for copyright protection for the manuscript of his upcoming book, just as a lyricist can ask for copyright protection to their lyrics or a producer such as a DJ can ask for copyright protection to the beat he has recorded and turned into a musical file.

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[92] ibid.
[93] Ibid.
[94] Paul Hegarty, "*Noise/Music: A History.*" Continuum International Publishing Group, 2007, London: p. 3-19.
[95] Directive 2001/29/EC, (The Information Society Directive), Art 5. 2(a).
[96] See Article 4 of Directive 2001/29/EC (Information Society Directive).

Authors of original works such as musical works are conferred economic rights and moral rights. Authors' "moral rights" is an element of copyright that receives protection. Moral rights protect the author with respect to his intellectual and personal ties to the work.[97] Most continental European jurisdictions grant a moral right.[98] The indicated right means that others should not present someone else's authorial works as their own, hence one must give recognition to the original work and to recognize the original creator.[99] Furthermore, the MS in the EU may provide the limitations to neighbouring rights in respect of private use, use of short excerpts or certain other uses.[100] This is the case as long as the limitations comply with the primary law in the EU

3.3 Protection of music under the EU copyright law

Copyright protection in music exists at the moment of the expression of music, because copyright protection exists at the moment of creation.[101] The moment an artist's original work is "attached" to a concrete medium such as a music sheet[102] copyright protection exists based on evidence. By this it is meant that, the attachment occurs when a song is recorded in a form of an audio file or when a musical work is put down in sheet music or turned into a digital file[103] it can be proven in the court that one created the musical work. Therefore, the musical work cannot be protected as an idea existing inside the head of the creator.[104] Moreover, music copyrights transfer the legal ownership of a musical work or sound recording. The ownership usually consists of exclusive rights to distribute and reproduce a work, as well as licensing rights that allow the copyright holder to earn royalties and exclude others from exploiting their work

[97] Copyright and related rights act, Art. 16.
[98] Alexander Nill, Andreas Geipel, Jr, "*Sharing and Owning of Musical Works: Copyright Protection from a Societal Perspective.* Journal of Macromarketing" 2010;30(1):33-49. doi:10.1177/0276146709352217.
[99] Alexander Nill, Andreas Geipel, Jr, "*Sharing and Owning of Musical Works: Copyright Protection from a Societal Perspective."* Journal of Macromarketing. 2010;30(1):33-49. doi:10.1177/0276146709352217.
[100] Directive 2006/115/EC (Rental and Lending Directive).
[101] Copyright, https://europa.eu/youreurope/business/running-business/intellectual-property/copyright/index_en.htm; also see Copyright, Designs and Patents Act 1988, .
[102] Ian S. Blackshaw, *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects,* 2011, Springer Science & Business Media.
[103] What Musicians Should Know about Copyright,https://www.copyright.gov/engage/musicians/ U.S. CopyrightOffice.
[104] See case *Baker v. Selden.*

without permission. This is done to protect the work of an artist and to ensure their economic gain from the work they have created.

A musical work can be a phonogram/phonorecord which is also known as sound recording such as an audiotape is protected by neighbouring rights. It comprises a series of musical, spoken, or other sounds that can be recorded into a digital form, such as a CD or digital file. Often sound recordings are created by the performer and the producer of the recording. A sound recording and the music, lyrics, words and other content that is included in the recording are works that are separately protected by copyrights. Often these works are possibly affected by different rules due to copyright territoriality. [105] This plays a part in why all of them are frequently owned and licensed separately. As seen in the definitions of a musical work; in the process of recording a song, one may be creating two works that are protected separately by copyright. To illustrate this, one copyright may be obtained for the lyrics of the song and another one for the melody.

Owning a copyright to a certain musical work gives the owner of the musical work the right to make and sell copies, distribute those copies, make new works, and publicly perform the work. The performers can also prevent others from:

- broadcasting or communicating to the public of their performance, unless this is made from a legally published recording of the performance;[106]
- the fixating (recording) of their performance;[107]
- the reproduction of a recording of their performance.[108]

Furthermore, the MS "*may provide that right holders shall have a right to obtain an adequate remuneration for the rental or lending of that objec*t"[109], if others use their creations without permission.

The WPPT has extended these rights to include the right to licence:

[105] P. Bernt Hugenholtz, *Harmonizing European Copyright Law*, https://www.ivir.nl/publicaties/download/710.pdf.
[106] Rental Directive, Articles 7 and 13.
[107] Rental Directive, Articles 2 and 13.
[108] Rental Directive, Article 7.
[109] Rental Directive, Articles 2 and 13 (3).

- the distribution of recordings of their performance, for sale or other transfer of ownership[110]
- the rental of recordings of their performances, unless there is a compulsory licence scheme in operation[111]
- the "making available to the public" of their performances [112] (on different internet platforms).

Neighbouring rights are independent of any authors' rights and this is made clear in the various treaties.[113] For example in regards to neighbouring rights, a currently existing sound recording of a song is eligible to be simultaneously protected by four copyright rights:

- Performers' rights of the singer and musicians[114]
- Authors' rights of the lyricist[115]
- Producers' rights of the person or corporation that made the recording[116]
- Authors' rights of the composer of the music[117]

The minimum term for the protection for performers' rights is twenty years from the end of the year in which the performance was made.[118] Furthermore, the TRIPS Agreement has extended this to fifty years.[119] In the EU, performers' rights last for fifty years from the end of the year of the performance.[120] This is the case unless a recording of the performance was published in which case they last for fifty years from the end of the year of publication. [121]

[110] WPPT, Article 8.
[111] WPPT, Article 9.
[112] WPPT, Article 10.
[113] Rome Convention, Article 1;WPPT, Article 1.2. and Geneva Phonograms Convention, Article 7.1.
[114]TRIPS agreement, Article 14.2: Rome Convention, Article 7.
[115] TRIPS agreement, Article 14.1.
[116] WPPT, Article 8.
[117] Rome Convention, Article 7.
[118] Rome Convention, Article 14.
[119] TRIPS, Article 14.5.
[120] TRIPS, Article 14.5.
[121] ibid.

In Europe, when it comes to ownership in copyright protection, EU law requires it for all the authorial works such as musical works.[122] Authorial works are defined as the original expression of ideas, also known as the *author* of a *work*.[123] Comprehensively, this is the core of copyright protection. In other words one must own the work that they have the copyrights for. Authorial works or rights are protected by the Berne Convention, WCT, and some parts of TRIPS.

The InfoSoc Directive concerns neighbouring rights and authorial works, because it relates to both authors and to producers of phonograms.[124] The Directive did not harmonise exceptions to copyright across the European union particularly well.[125] Comparatively, it perpetuated differences in MS' copyright laws because each country can decide which exception to implement, and how to implement it due to territoriality of a copyright.[126] As stated above in the Article 5 of InfoSoc Directive, the minimum requirements in the exceptions include: attribution and use for a non-commercial purpose such as private use. To illustrate this, one can buy an album online and move it from one device to another for private use purposes. As long as they are copying the music in an attempt to get some kind of economic benefit, they are not infringing a copyright. From this one can deduct that the copyright protection is provided for musical works, because it gives the right holders of a copyright the right to exclude others from using his copyrighted work in order to get economic gain.

Through the exceptions in Article 5 of InfoSoc Directive, we are able to see that as long as the owner or the original author of the work is credited, they are not entitled to get any compensation.[127] On the one hand, the consumer can copy musical works such as sound recordings, and the author, the performer of the work and the producer of phonogram are entitled to receive equitable reimbursement for the use, if the person copying is going to have an economic gain.[128] Private use of musical works is often compensated to rights holders through a

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[122] CFR, Art. 17 (2); Art. 1 Protocol 1of ECHR.
[123] Kacper Szkalej, *Copyright in the Age of Access to Legal Digital Content : A study of EU copyright law in the context of consumptive use of protected content*, 2022, p. 69.
[124] InfoSoc Directive, Article 2.
[125] Limitations and Exceptions in EU Copyright Law for Libraries, Educational and Research Establishments: A Basic Guide, p. 3.
[126] See the judgement in the Infopaq case in Sweden and Infopaq case in Denmark.
[127] Directive 2001/29/EC (The Information Society Directive), Article 5, para 3 (d).
[128] Rental Directive, Article 2 and 4; also WPPT, Articles 9 and 13, WCT Article 7,TRIPS Article 11.

plan in which a special fee (a levy) is added to storage media and recording devices.[129] A good example of this is streaming services paying royalties to the original performers and producers of the songs because rights holders (authors) are entitled to receive compensation for the photocopying of their works. This concludes the extent that music receives protection by copyright law in the EU.

[129] Directive 2001/29 EC (The Information Society Directive) recitals 38 and 39.

4. CASE LAW

4.1 Introduction

This chapter considers the case law of the CJEU and the case law of the national courts of different MS in the EU. Moreover, it will look into selected national cases demonstrating how courts of the MS reason in copyright cases regarding infringement of the original work of an author. The cases which will be explored will give an insight into why some entities bring claims to the court once they realise that their copyright is being infringed. Furthermore, they will help assess the research questions regarding the extent of copyright protection for music in the EU and whether existing copyright protection for music is suitable to balance the interests of rights holders. The chosen cases help highlight how parts of music are protected in accordance with the EU copyright law. As stated before in this thesis, copyright infringement in music occurs when someone uses the works protected by copyright without permission for a usage where such permission is required, hence infringing certain exclusive rights granted to the copyright holder. The cases that are going to be explored largely take place in Denmark, Germany, and France between the late 1990s and 2020. Secondly, this chapter ends with an analysis of the rulings in these cases.

4.1.1 Case C-5/08: Infopaq International A/S v Danske Dagblades Forening

The case Infopaq International A/S v Danske Dagblades Forening took place in Denmark in 2008. Infopaq is a media monitoring company that offers a service to many customers. The service consisted mainly of compiled summaries of selected articles from Danish daily newspapers and other magazines. This was done using an automated process. That is to say, Infopaq made the articles available through a data collection process. Furthermore, it also scanned newspapers. Even though they only sent a total of 11 words: 5 before the keyword, the keyword itself, and then 5 words after that. Danske Dagblades Forening (DDF) , which is a professional association of Danish daily newspaper publishers, found out that Infopaq was scanning newspaper articles for commercial purposes without authorization from the Danish

daily newspapers and other magazines. The DDF complained to Infopac about this, because the problem was whether the acts of reproduction of 11 words violated the copyright of the Danish daily newspapers and other magazines. Moreover, the DDF claimed that Infopaq needed permission from the rightsholder in order to scan the pieces from these newspapers.

Infopaq denied DDF's claim about the data capturing procedure requiring consent from the rights holders in Denmark and therefore brought an action against DDF before the Eastern Regional Court (Østre Landsret). It claimed that DDF should be ordered to acknowledge that Infopaq is entitled to apply the data capturing procedure without the consent of DDF or of its members. This was dismissed by the Eastern Regional Court. Therefore Infopaq brought an appeal before Denmark's highest court (Højesteret). The DDF and Infopaq disagreed on firstly, whether there was reproduction as contemplated by Article 2 of the InfoSoc Directive[130], and secondly, whether there is reproduction in terms of the acts in question which were covered by the exemption from the right of reproduction provided for in Article 5(1) of that Directive.

The highest court in Denmark then referred 13 questions to the European Court of Justice (ECJ). The first question 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 seen as an act of reproduction protected under Article 2 of Infosoc Directive.[131] Questions 2 to 12 concerned whether the act of reproduction taking place during the data collection process fulfils the conditions laid down in Article 5 (1) of the above mentioned Directive and therefore the act does not require the right holder's consent.[132] To illustrate this, by the conditions it is meant that the act is temporary or incidental; is an essential and integral part of the technological process; online transfer or lawful use of the work or protected subject matter, and the act has no independent economic significance. The thirteenth question concerned whether that data collection process could be regarded as constituting a special case that did not conflict with the normal exploitation of newspaper articles and did not unreasonably prejudice the legitimate interests of the rights holder as defined in Article 5 (5) of InfoSoc Directive.

[130] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* (10).
[131] Ibid. (11).
[132] Ibid. (52).

The ECJ ruled that the printing is not transient in nature and that Infopaq needs consent to use the publication. In the answer to the first question, an 11-word extract from a protected work is a reproduction in a part within the meaning of Article 2 of the InfoSoc Directive if the repeated words are expressions of the author's original, intellectual creation. Furthermore, the court stated that it is for the national courts of the EU countries to decide when such reproduction is an expression of the author's intellectual creation. Moreover, in answer to Questions 2 to 12, the printing of an extract of 11 words during the data collection process does not satisfy the temporary condition laid down in Article 5 (1) of the InfoSoc Directive therefore, the process can not be carried out without the consent of the rights holders.[133] The answers to questions 2 to 12 were clear enough and therefore it was not necessary for the ECJ to address question 13. On the basis of this anwer the Court handed down its final ruling in favour of DDF. The court argued that the process of data capture occasionally involves abstracts of texts that are protected by copyright. Since the printing of 11 words does not fulfil the requirement of transience, the data capture process is not an action covered by the exemption in Article 5(1) of the Infosoc Directive.

As it is mentioned above, the ECJ stated that national courts of the EU countries are to decide when a form of reproduction is an expression of the author's intellectual creation. Inlight of this the author would like to simply mention that there was a similar case in Sweden. In that dispute the Stockholm District Court ruled in favour of Infopaq in 2008.[134]

4.1.2 C-476/17: Hütter v. Pelham,

The *Hütter v. Pelham* case is the longest copyright dispute presented in this paper. It takes over 20 years before the judgement is reached. In Germany, German music producers Moses Pelham and Mr Haas produced a song called “Nur Mir" for the German artist Sabrina Setlur. The song was released on phonograms recorded by Pelham GmbH in 1997. In the production process Pelham used a two-second-long sample from the song by a German band Kraftwerk called “Metall auf Metall". The Kraftwerk band members, Mr Hutter and MrSchneider-Esleben

[133] Case C-5/08 (74).
[134] Denmark: Infopaq-case finally decided after eight years, Kluwer Copyright Blog http://copyrightblog.kluweriplaw.com/2013/05/17/denmark-infopaq-case-finally-decided-after-eight-years/.

produced and published their song in 1977, nearly 20 years before Pelhams produced his song. The band alleged an infringement of their right in the sound recording of the song "Nur Mir" because Mr. Pelham sampled their piece. Therefore they took legal action and brought their case before the Regional Court in Hamburg, Germany. They were seeking damages, a prohibitory injunction, the provision of information and the producer of "Nur Mir " to give away the phonograms for the purposes of their destruction.

The Regional Court in Hamburg ruled in the favour of Mr. Hutter. This led to Mr. Pelham appealing before the Higher Regional Court in Hamburg, Germany (*Oberlandesgericht Hamburg*). The appeal was dismissed. Pelham then brought an appeal on a point of law (*revision)* before the Federal Court of Justice in Germany *(Bundesgerichtshof also known as BHG)*, which led to the judgement of the Higher Regional Court in Hamburg being overturned and the case being referred back to that court for re-examination. Pelham's appeal on a point of law was dismissed for a second time at the end of 2012.[135] Later on, the judgement was overturned by the Federal Constitutional Court, Germany (*Bundesverfassungsgericht also known as BVerfG*). This court referred the case back to the referring court, the Federal Court of Justice.

After these rounds of back and forth the Federal Constitutional court took note on the fact that the outcome of the revision proceedings before the Federal Court turned on the interpretation of

- *"weather by using Hütter and another's sound recording in the production of its own phonogram, Pelham encroached on the exclusive right of Hütter to reproduce and distribute the phonogram featuring the song 'Metall auf Metall', as laid down in Paragraph 85(1) of the UrhG[136], which transposes Article 2(c) of Directive 2001/29 and Article 9 of Directive 2006/115."*

- *"whether such an infringement can be found where, as in the present case, 2 seconds of a rhythm sequence are taken from a phonogram then transferred to another phonogram,*

[135] The referring court notes that the outcome of the *Revision* proceedings turns on the interpretation of Article 2(c) and Article 5(3)(d) of Directive 2001/29 and of Article 9(1)(b) and Article 10(2) of Directive 2006/115.; See C‑476/17 (20).
[136] Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG).

and whether that amounts to a copy of another phonogram within the meaning of Article 9(1)(b) of Directive 2006/115."

In this light the Federal Court of Justice in Germany decided to stay the proceedings and to refer six questions to the CJEU for a preliminary ruling. First and second question regarding phonograms and whether there was an infringement in the meaning of the Article 2(a) of the InfoSoc Directive and Article 9(1)(b) of Directive 2006/115. Third question was whether "MS could enact a provision which inherently limited the scope of protection of the phonogram producer's exclusive right to reproduce[137] and to distribute [138] its phonogram in such a way that an independent work created in free use of its phonogram may be exploited without the phonogram producer's consent". In the fourth question it was asked "if it is not evident that another person's work or another person's subject matter is being used, could be said that a work or other subject matter is being used for quotation purposes within the meaning of Article 5(3)(d) of Directive 2001/29?". The fifth question was about whether the provisions of EU law on the reproduction right and the distribution right of the phonogram producer[139] and the exceptions or limitations to those rights[140] allowed any latitude in terms of implementation in national law. Lastly, the final question concerned the fundamental rights that are set out in the Charter, should be taken into account when stating the scope of protection of the exclusive right of the phonogram producer to reproduce its phonogram and the scope of the exceptions or limitations to those rights.

The most important question raised in this dispute relates to the legality of sampling. Pelham argued that he should be allowed, without prior authorization, to use a two-second rhythm sequence he had taken from Kraftwerk's "Metall auf Metall" while Hütter had argued that unauthorised sampling would infringe their rights as producers of the phonogram from which the sample had been extracted from. The Federal court of Germany (BHG) ruled that "t*he user of a sample violates the exclusive right of phonogram producers under Section 85(1), first case, first sentence UrhG[141] if he takes a sample which he could have recorded himself*." The Federal court

[137] Directive 2001/29, Article 2(c).
[138] Directive 2006/115, Article 9(1)(b).
[139] Directive 2001/29, Article 2(c) and Directive 2006/115, Article 9(1)(b).
[140] Directive 2001/29, Article 5(2) and (3) and the first paragraph of Article 10(2) of Directive 2006/115.
[141] Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG).

of Germany came to this conclusion by reading Section 85 in connection with the 'free use' defence of Section 24 UrhG. According to this court, the application of the phonograms by analogy in section Section 24, represents a limitation to the scope of the exclusive right of phonogram producers. After the judgement of the Federal Constitutional Court in 2016, The Federal court of Germany had to depart from this interpretation because the constitutional court had decided that such a reading would not sufficiently take the right to artistic freedom of Article 5(3) of the German Basic Law into account.

The InfoSoc Directive harmonised exceptions and limitations in its Article 5, which does not include an exception that permits the creation of an independent work "in the free use of the work of another person". Even when Section 24 UrhG is also applicable by analogy to phonograms, the absence of an equivalent exception in Article 5 of InfoSoc Directive indicates that a user cannot rely on Section 24 UrhG, if they want to justify the unauthorised use of a sample. Article 5 harmonises the exceptions and limitations exhaustively. Furthermore, the MS are not allowed to maintain other exceptions or limitations in their national laws. In order to connect the "free use" mechanisms with the rules of the Infosoc Directive, the Federal court of Germany saw in its decision an inherent restriction of Article 2 (c) of the Information Society Directive on the criterion of copying "in a modified form unrecognisable to the ear".

The ruling of CJEU in 2019 stated that there was an infringement of copyright. Furthermore, it emphasised that EU MS are not permitted to make any exception to the Infosoc directive restriction with regard to the rights of the phonogram producer. This was relatively important for this case, because Art. 2 (c) of the Infosoc Directive allows phonogram producers to "*authorise or prohibit, in whole or in part, direct or indirect, temporary or permanent reproduction by any means and in any form"*. Thus the exclusive reproduction right of phonogram producers in the EU is clearly established. Furthermore, *"such an interpretation would allow the phonogram producer to prevent another person from taking a sound sample, even if very short, from his or her phonogram for the purposes of artistic creation in such a case, despite the fact that such sampling would not interfere with the opportunity which the producer has of realising*

satisfactory returns on his or her investment".[142] In the case of "fair use" the court considered that if the part is recognizable, it is immaterial whether it is only 2 seconds long, it would still be an infringement.

4.1.3 Case 3: Bouffard v. Ministère Public

The *Bouffard v. Ministère Public*[143] case takes place in France in the late 1990s early 2000s. In the end of the 1990s Bouffard, et al. organised a number of "Rave" parties that were attended by up to 2500 people. These events were often held in remote areas, and without authorization by the owners of their venues. The music played at the raves was produced by a DJ who at the same time played recordings of more than one popular song. The songs that the DJ had mixed together were within the collection of the French performing rights organisation that licences performances of these works on behalf of their authors which is called SACEM. Problem arose when it was discovered that Bouffard, et al. had not obtained permission from, or paid royalties to, SACEM for mixing and playing these musical works at the raves. This led to the plaintiff, SACEM, claiming a copyright infringement.

In 1999 the Court of First Instance (CFI) of Albi (Tribunale de grande instance d'Albi) found the defendants guilty of various offences, such as disturbance of the peace, illegal sale of alcohol, etc., but not of copyright infringement. The defendants, Bouffard et al., appealed to the regional Court of appeal in Toulouse, which confirmed in large part the CFI of Albi court's decision, including its finding that the defendants did not indeed infringe the performance copyright of the songs managed by SACEM. Like the lower court, the Court of Appeal found that the "mashups" played at the raves were "a new and different music". By this it was meant the court meant that the songs in the "mashups" were different from the original SACEM songs in such a way that the original works were no longer recognizable to the average listener. According to the court, if the average listeners did not associate what they heard at the rave with already works, the mashup itself could not be considered infringement of them.

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[142] C-476/17 (38).
[143] Cour d'appel [Regional Court of Appeal] Toulouse (French) 2000, https://blogs.law.gwu.edu/mcir/case/bouffard-v-ministere-public/.

Not everyone agreed with the decision because some legal scholars such as Pierre-Yves Gautier, have criticised this decision. In his view, the remix was *“oeuvre dérivée”*. The term *“oeuvre dérivée”* means that the author wants to use an old work of art to make a new one and therefore *“Oeuvre dérivée”* requires the author's permission. In other words, according to this legal scholar the DJ should have asked SACEM for permission to use the songs in their catalogue to make the mashup.

4.1.4 Case 4: Weh v. Universal Music Publishing

The case *Weh v. Universal Music Publishing*[144] takes place in Germany, at the end of 2002. Everything began when Walter Weh first became aware of an unauthorised takeover of parts of his work "Heartbeat" by an artist named Sophie Ellis-Bextor in October of 2002. She published a song named "“Get Over You” trough Universal Music publishing. The plaintiff, Weh, stated that the misplaced track "Get Over You" is an illegal takeover of the song "Heart Beat". The plaintiff is the composer of the song "Heart Beat", which he wrote in August 1987 under the title "Love Song" with a total playing time of 6 minutes. In Ellis-Bextor song there was a two-bar phrase that could be found at the beginning of the plaintive refrain, with the three-note descent with secondary tones, the even rhythmization in quarters which could be interpreted as a heartbeat, as well as the lead effect of the second bar already embody the individual, creative peculiarity. This made up the core of the chorus, which happened to be identical in terms of melody and rhythm in the beginning of the chorus of "Get Over You". The plaintiff stated that it was irrelevant that the original was moved from C minor to A minor and that the harmonisation also differed from his work “Heartbeat.” Furthermore, he stated that “the protectability of the chorus part at issue does not fail because the phrase, as a mere descending pentatonic scale, belongs to the musical common property”. According to the plaintiff the happened “because the piece “Heart Beat" does not use the pentatonic scale, but is held in modal (so-called “natural”) C minor and minor keys and pentatonic scales were mutually exclusive and therefore, the use of the phrase in the challenged title had therefore required the plaintiff's consent, its publication would have been

[144] Weh v. Universal Music Publishing LG [State Court] Munich Nov. 7, 2002, 7 O 19257/02 (Germany) https://blogs.law.gwu.edu/mcir/case/weh-v-universal-music-publishing-2/.

found to be in breach of copyright and anti-competitive.” This statement contradicted the opinion of the expert brought in by the defendant.

The defendant requested to reject the application that the plaintiff suggested as a copyright infringement. The justification for this was already stated in her protective pamphlet where she believed that the correspondence between the two pieces in the first two bars of the chorus only relates to a phrase that was inaccessible to copyright. Furthermore, her expert explained in his report that “the pentatonic minor scale used in the unrhythmic descending tone sequence was a common musical asset, which had become a common design element, particularly in the second half of the 20th century.” For this reason, the accusation that the defendant had changed or moved the melody also failed because the two beats, which were accused of being unanimous, did not represent an independent set of tones and thus not a melody in a legal sense. Furthermore the defendant argued that Wehs work was not familiar to the people at the time of making the song.

The State Court of Munich (LG) decided to reject the application for a temporary injunction of the song "Get Over You" that would affect the economic gain that the defendant gets from the song. The court suspects that There is no dispute between the parties that the two opposing titles in the stanzas show no similarities. Only the first two clear measures of the older work "HeartBeat", namely or in the repetition can be found in the attacked song. Furthermore, the court stated that “because both phrases were not only metrised in four-quarter time, but the tone sequences also initially descend over an octave in the same intervals (cbgf-es-c for "Heart Beat" or agedca for "Get Over You"), to then circle around the lower note of the octave in a “lookup” (bc-es-c or gaca).” In this way the court noted that this parallel alone permits the establishment of an unauthorised exploitation of the plaintiff's piece "Heart Beat". However, it does not happen in this case because from a copyright point of view, such a match would only be, if either the two titles were equally shaped by the contested phrase, so that the challenged piece could be seen as a work that copies to certain extent the previously known work.

In this case, had the two-bar opening phrase of the chorus of “HeartBeat” been the borrowed part, it would have qualified as a musical work from the point of view of the protection of

melodies in accordance with Section 24 Paragraph 2 UrhG. The court continued by stating that, "*if, on the other hand, parts of the work do not represent a personal intellectual creation, their use is permitted under copyright law*."[145] Lastly the Court stated that in the opinion of the board, the conditions under which the presented evidence would argue for the plaintiff benefit are not credible enough. In 2009 the case was revisited by the Higher State Court in Berlin (KG). This court agreed with the final decision made in the court in Munich.

4.1.5 Case 5: Eight Mile Style, the Eminem v. Audi GmbH

In the case *Eminem v. Audi GmbH*[146] Eminem, whose real name is Marshall Mathers, owns an American company Eight Mile Style LLC. This company is the publisher that handles Eminem's copyrights. In June of 2011 the company filed a lawsuit against Audi AG, a german car manufacturer, in Germany's Hamburg Regional Court for making an unauthorised use of his smash "Lose Yourself" in its new 2012 Audi A6 Avant commercial and using elements similar to Eminem's Chrysler 200 advertisement. Eminem's representatives at Eight Mile Style stated that "We believe Audi not only used 'Lose Yourself' to sell their product without permission, but their spot actually feels inspired by elements of Chrysler's commercial campaign,". By August of the same year, Audi settled with Eminem, admitting using a composition that's remarkably similar to Eminem's song *Lose Yourself*. Moreover, the details of the case and the amount of the settlement were not made available to the public. Eight Mile Style stated that it was satisfied with the result.

4.1.6 Case 6: Johnson v. Goldman

The *Johnson v. Goldman*[147] case is about the composer of the song "Forever", Mr. Johnson, who sued the singer and composer, Mr. Goldman, for the "Aicha" song in 2015 in France. According to Johnson, the song infringed his copyright in such a way that the similarity between the two works from his point of view is constituted by the resumption of the same melody over sixteen

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[145] see evidence of case law at Schricker / Loewenheim, UrhG, 2nd edition, § 2 No. 66.
[146] Eight Mile Style [Marshall Mathers, aka "Eminem"] v. Audi GmbH
https://blogs.law.gwu.edu/mcir/case/inplay-eight-mile-style-marshall-mathers-aka-eminem-v-audi-gmbh/.
[147] Cour de cassation [supreme court for judicial matters] (French) 2015,
https://blogs.law.gwu.edu/mcir/case/johnson-v-goldman/.

measures. The same similarity is accentuated by the harmonic similarities and the same rhythm and since Johnson's work was established to be the original and entitled to copyright protection by the court, he wanted to be compensated for the financial damage the infringement caused him. However, two expert reports showed a prior art search that opposed Johnson's statement. The musical experts, both underlined, that the sequence of 4 notes DO #- RE-DO #- SI presents in "For Ever", which is also found in a different key in Aïcha, is extremely frequent and banal. They added that the work did not include a melody and that the possible impression of it being a melody was resulting only from the upper notes of the chords. Furthermore they argued that the formula harmonic can be found in the same way in many musical works and that if "Aïcha" and "For Ever" are in binary mode, the tempo is different.

In this case, the composer of the song "Forever" sued only one of the authors of the song "Aicha" and did not sue the other coauthor of the lyrics. The premise is that the authors of the song "Aicha" copied "Forever". The judges of the Court of appeal (*Cour d'Appel*) had considered that the element that the claim of infringement was based on in the copied song in this case, was not original. The Court of Appeal expressed that "Forever" and "Aicha" stood out differently in regards to the rhythm and therefore these songs do not have the same impression in terms of sound despite the fact that there is repetition of the same chords. In spite of that, the form of the structures of the songs globally, musically and lyrically are different works that are noticeable to the average listener. In other words the court stated that "the 4 consecutive musical notes present in the two songs were not original. This led to there not being an infringement of copyright. The case was later on revisited by the Supreme Court for Judicial Matters.

In the final decision of this case, the judges of the Supreme Court for Judicial Matters (*Cour de cassation*) held that the judge of the Court of appeal did not respect an important copyright principle: when an artist wants to sue another artist for Copyright infringement, he or she needs to sue all of the the authors of the song according to the French national jurisdiction. This is because most of the time, a song is created by several people. It is called collaborative work "Oeuvre de collaboration" in copyright law. Nevertheless, the judges at the Supreme Court for Judicial Matters held that the lower court did a mistake because the judges should have taken the "Forever" song as a whole musical work, not only the 4 consecutive music notes when they were

evaluating the originality of the song. In other words, the lower court did not verify if the whole song was an original creation, which it should have done. In case the whole song was an original then, the song should have been protected by copyright law.

4.2 Analysis

As it is seen in the cases and the conventions presented in the chapters above, the national laws must comply with the EU law because of harmonisation of the laws between the MS. Next the protection of copyright in music is a complex topic, because in most cases it depends on how the presented case is interpreted both at the national level and the EU level. Interpretations in different national courts differ and therefore the same case in one court can have a different ruling in another MS court.[148] Furthermore, inside the country courts can add final decisions to other court decisions as seen in the case of *Johnson v. Goldman* when the ruling does not comply with the primary law. Whilst the Supreme Court did not disagree with the judgement of the Court of Appeal, it did find violations in the way the Court of appeal decided to proceed with the case. Johnson did not sue all of the composers of the song, which was a requirement in this type of case, therefore decisions in that the Court of Appeal made was criticised by the Supreme Court for Judicial Matters in France. According to the Supreme court the Court of Appeal relied of its own motion on the plea alleging the absence of an obligation to question of all the co-creators of an alleged collaborative work "Aicha" infringing "Forever" by the plaintiff in the action for infringement, and thus violated Article 16 of the Code civil procedure in France. In terms of lyrics the case *Infopaq International A/S v Danske Dagblades Forening* highlights how they can be infringed in Denmark but not in Sweden. The case highlights how copying 11-word extracts from lyrics without authors permission can lead to an infringement of a copyright.

In the case *Weh v. Universal Music Publishing* in Germany, the The State Court of Munich had a similar ruling and justification as the Court of Appeal in the *Johnson v. Goldman* in France when it came to infringement. The only difference is that in this case the principle of suing co-creators

[148] See the judgement in the Infopaq case in Sweden and Infopaq case in Denmark.

of a song was followed and therefore there was no need for the Federal Court of Justice in Germany to revisit the case.

Evidently, when looking at the conventions and case law presented in this paper, we can conclude that it is evident that from the perspective of European copyright law, extracted pieces of sound recordings or phrases of a lyric can lead to an infringement of neighbouring rights of phonogram producers and other relevant right holders.[149] Some national laws may allow a degree of authorial self-copying as a limitation to copyright claims against sampling.[150] To illustrate this we rely on the case *Bouffard v. Ministère Public*. In this case one can make a mashup playlist of famous songs for personal use and play them at a party. The condition here is that, as long as the songs on the mashup are unrecognisable to the ear and can be differentiated from the original songs, they do not infringe copyright in France. Following the reasoning of the court in this case, one can say that the music is protected only if the original creator has not been credited and the infringing version of a be can not be differentiated from the original version. On this note one can deduct that infringement in music happens when above mentioned conditions are not met. Furthermore, from case law presented in this paper we are able to tell that the sampling in terms of copying directly a part, no matter how long it is, is forbidden according to the copyright law of Germany.

The case *Hütter v. Pelham* on the other hand highlights how easily copyright can be infringed by using a two-second-long sample that is taken directly from another song. Nevertheless, at EU level there is a specified list of exceptions in Article 5 of the InfoSoc Directive which does not include a notion in regards to sampling. Furthermore, nowhere in EU law is it possible to find a uniform definition of sampling or concrete guidance on how to carry out this practice without infringing a copyright, while enabling artists' freedom of creative expression. Therefore it is up for national courts to decide if an infringement has occurred.[151] This same case may have had a different outcome in a different country due to the differences in court interpretations in the MS of the Union. Furthermore, the exception, laid down in Art. 24 of the German Copyright Act regarding a "right to free use" which is not a derogation, but rather an inherent limitation to the

[149] the German concept of 'free use' (freie Benutzung), codified in Article 24 of the German Copyright Act.
[150] See case Bouffard v. Ministère Public.
[151] See case C 516/17, Spiegel Online GmbH v Volker Beck.

protective scope of copyright according to the German court. The justification for this inherent limitation is the idea that "it is not possible to conceive of a cultural creation without that creation building upon the previous work of other authors".[152]

In the case of *Eminem v. Audi GmbH* it was very clear that Audi had infringed the artist Eminem's copyright protected song "Lose yourself" because they agreed to make a settlement. Since Eminem's team was satisfied with the settlement it is assumed that they received an acceptable compensation for the unauthorised use of his song. Furthermore, this case highlights how, because there is not a particular legal framework regarding unitary copyright system, the Court is not always needed for both parties to reach an agreement that satisfies them. The case was settled for an unknown amount. Since Eminen is a worldwide hip hop star and taking into account that Audi is a large car manufacturer with a lot of assets, it can only be assumed that the sum Eminem's company would settle for has to be a large one.

Copyright in music is protected by the InfoSoc directive and neighbouring rights. As the case law has illustrated, copyright in music can be protected under the InfoSoc directive and neighbouring rights if certain conditions are met. First the condition of originality has to be met: the creation has to be the authors' original work.[153] The neighbouring rights protect the legitimate interests of persons and bodies who play a part in the making available of works to the public by ensuring that producers and composers of music, performers of music and distributors (record labels) are compensated for the exploitation of their copyright. Furthermore, the exceptions stated in the InfoSoc Directive concern the public interest for the purpose of education and teaching, because the Directive seeks to promote learning and culture.[154] On this note, this author argues that available forms of protection of music by copyright are suitable to balance the interests of rights holders. In the case there is an infringement of copyright the right holders are compensated.[155]

[152] Case C-467/17 Pelham, para. 56.
[153] Infopaq case C-5/08; Morten Rosenmeier, Kacper Szkalej, Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights*, 2018, p.2.
[154] Infosoc Directive, recital 14.
[155] Infosoc Directive, recital Article 2(a), C-476/17, Case 5: Eight Mile Style, the Eminem v. Audi GmbH.

The extent of protection by copyright for music in the EU does not extend to attribution and use for a non-commercial purpose such as private use, because those are minimum requirements in the exceptions included in Article 5 of InfoSoc directive. Furthermore the Directive has an exhaustive list of limitations that copyright protection is not extended to. For as long as a private user is not trying to have an economic gain using silar extracts from someone else's music they are not infringing a copyright. If they do want to use extracts from others' music for economic gain, they must have permission from the right holders and the right holders are entitled for a reimbursement.[156]

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[156] Rental Directive, Article 4.

5. SUMMARY AND CONCLUSION

To summarise in this thesis the author discusses the different forms of copyright protection for music on the basis of the EU copyright jurisdiction and the CJEU case law both on the union level and national level. The aim was to define what music is and why it is protected by the EU copyright law. Furthermore, to find out to what extent music can be protected under the EU copyright law and lastly to analyze if the available forms of protection of music by copyright that are suitable to balance the interests of rights holders. The first chapter was the introduction to the topic. Second chapter consisted of an overview of copyright protection internationally and in the EU, the neighbouring rights and the legal framework of existing EU copyright legislation. Third chapter focused on explaining what is music, musical works and how they are protected by copyright in the EU. Final chapter consisted of the case law and analysis.

The most common definition for music is organized sound that has the elements rhythm, pitch and dynamics in it. It is protected because the original authors of music deserve to get financially compensated and recognized for their original work. Moreover, musical works are defined as "a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with music". Musical works can contain vocal elements such as singing or instrumental elements melodies written on the sheet (sheet music). Both sheet music and vocal music can be protected separately by copyright. Musical works are protected in the EU because the ownership of musical work usually consists of exclusive rights to distribute and reproduce a work, as well as licensing rights that allow the copyright holder to exclude others from exploiting their work without permission. Furthermore, it allows copyright owners to have economic gain from their original works. A demonstration of this is seen in the case *Eminem v. Audi GmbH*.

The second question focuses on exploring to what extent music can be copyright protected in the EU. The musical work can exist in a tangible form such as a digital file of a song or an intangible form as a melody for it to receive copyright protection in the EU. EU legislation

shows that musical works receive protection to the point where they are released to the public through third parties. Private persons can use the songs to make mashups that will not infringe a copyright. To illustrate, in the case *Bouffard v. Ministère Public* the court ruled that there was no infringement because mashups of popular songs were considered to be "new music". Furthermore they were considered different from the original songs. The limitations are brought up in the Article 5 of the Infosoc Directive, which the national law has to comply with, as seen in case *Hütter v. Pelham.*

As seen in the cases presented in this thesis, the CJEU has distinguished between the existence of copyright and other intellectual property rights by stating that copyright is an issue that can be dealt with by using national law. This is the case as long as the exercise of copyright law complies with the EU law. Last research question concerned whether available forms of protection are suitable for the interest of the right holder, this author argued by saying "yes, the available forms of protection are suitable because, the right holders rights are listed in various treaties and Directives, and in case there is an infringement of copyright the right holders are eligible to get compensated".

Copyright can be protected to a certain extent through Directives, neighbouring rights, and international treaties and the exceptions to copyright protection are highlighted in Article 5 of InfoSoc Directive. As of now, there is not an international treaty that gives performers control over how and when their work can be used abroad. The author wishes to see how the CJEU will manage international cases such as *Eminem v. Audi GmbH,* when it comes to performers who are not from the EU are dealing with infringement of their copyrights in Europe. Regarding sampling at the EU level, there is a specified list of exceptions in Article 5 of the InfoSoc Directive which does not include a notion of sampling. Nowhere in EU law is it possible to find a uniform definition of sampling or concrete guidance on how to carry out the practice without infringing a copyright, while allowing artists' freedom of creative expression. Therefore this author would like to see a change in this set of circumstances. To conclude, when it comes to copyright protection in music is a complex topic, because in most cases it depends on how the presented case is interpreted in the court at the national level. As long as the decision and

reasoning of the court complies with the Treaties and main EU legislation the rulings are binding.

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CFR

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