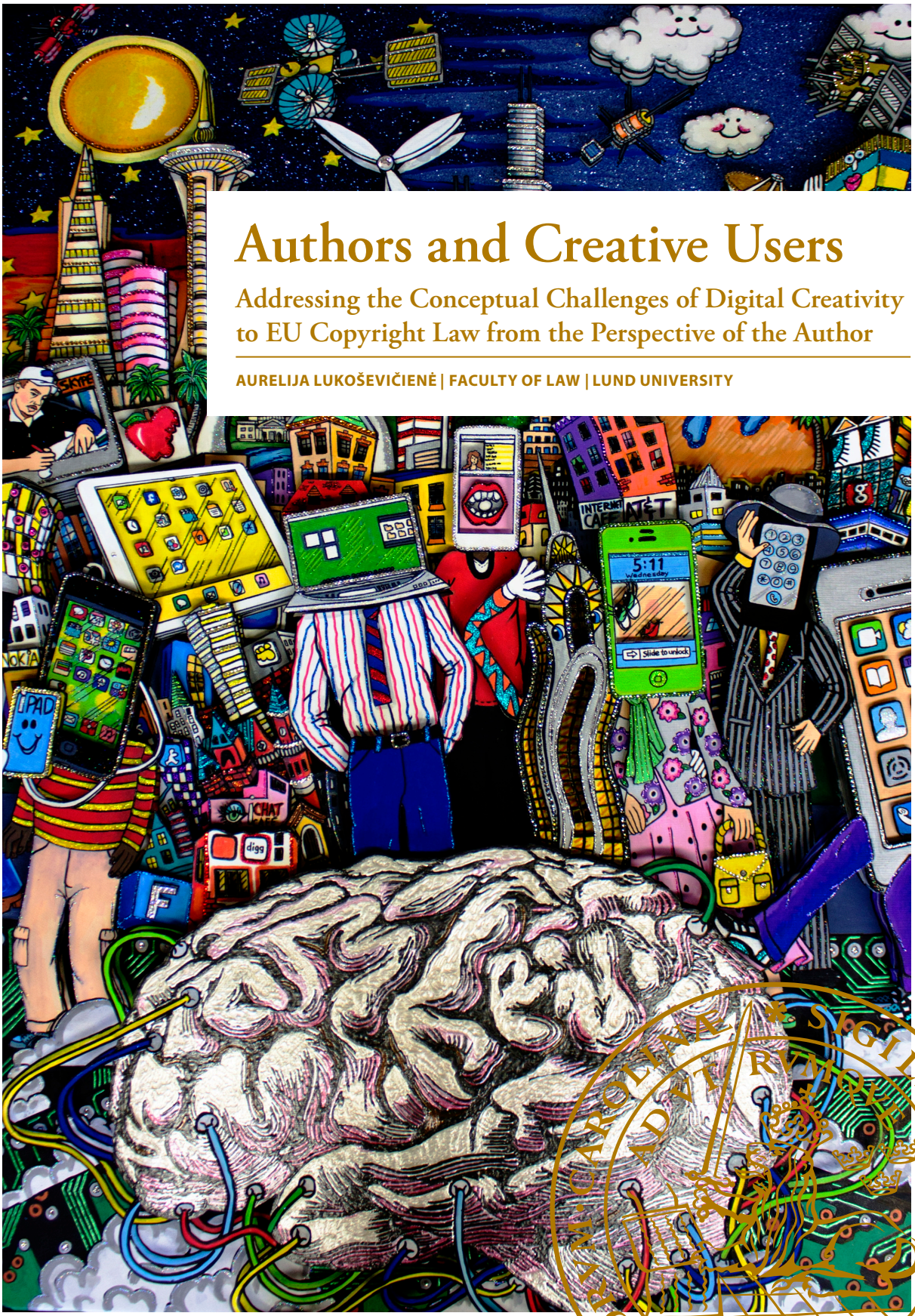
Authors and Creative Users

Addressing the Conceptual Challenges of Digital Creativity to EU Copyright Law from the Perspective of the Author

Lukoseviciene, Aurelija



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AURELIJA LUKOŠEVIČIENĖ | FACULTY OF LAW | LUND UNIVERSITY

To be an "author" might mean many different things, depending on the context in which the word is used. This thesis explores the EU copyright's concept of author and how it relates to the everyday digital creativity on the Internet. It invites to consider what EU copyright law might look like if the digital creators which this thesis calls Creative Users were included in the legal system as "authors".

For this purpose, the thesis analyses the concept of author in EU copyright law through its history and theory and several conceptualisations that can be seen to characterise what "author" is in the European copyright tradition are identified. These conceptualisations are then used to deepen the understanding of the current EU copyright law and to reflect on two examples of Creative User activities: the collective knowledge production of Wikipedia and the transformative cultural communication of Internet memes. This thesis proposes that to integrate potential new forms of authorship, a compromise could be found between the different ways of conceptualising the author. It is suggested that if the author that is presently guaranteed a high level of protection under EU copyright law were to be treated as a flexible and more inclusive concept and allowed to evolve together with cultural and technological change, it should influence how copyright protection and exploitation are approached as well.

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Aurelija Lukoševičienė

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Abstract:

To be an "author" might mean many different things, depending on the context in which the word is used. This thesis explores the EU copyright's concept of author and how it relates to the everyday digital creativity on the Internet. It invites to consider what EU copyright law might look like if the digital creators which this thesis calls Creative Users were included in the legal system as "authors".

For this purpose, the thesis employs a certain form of conceptual analysis, where concepts are studied as part of a multi-layered legal system in accordance with K. Tuori's theory of critical legal positivism. Namely, the concept of author in EU copyright law is analysed through its history and theory and several conceptualisations that can be seen to characterise what "author" is in the European copyright tradition are identified. These can be called genius, craftsman, servant/steward, owner, entrepreneur, resource, and authority. This "family" of conceptualisations is then used to deepen the understanding of the current EU copyright law from the perspective of the author, analysing its criteria for protection and the structure and limits of the right of reproduction. The thesis finds that the way the author is conceptualised while assessing a work's suitability for protection may differ significantly from how this subject is conceptualised when constructing the exclusive right of reproduction.

The last part of the thesis analyses two examples of Creative User activities: the collective knowledge production of Wikipedia and the transformative cultural communication of Internet memes. The EU copyright's conceptualisations of author are compared with the authorship practices in these digital communities, identifying some new conceptualisations – of sharer and collective as well as communicating author. Whereas the EU copyright norms would look nothing like their current versions if imagined from the perspective of digital authors – especially the norms on reproduction – this thesis proposes that to integrate potential new forms of authorship, a compromise could be found between the different ways of conceptualising the author. It is suggested that if the author that is presently guaranteed a high level of protection under EU copyright law were to be treated as a flexible and more inclusive concept and allowed to evolve together with cultural and technological change, it might influence how copyright protection and exploitation are approached as well. This could in turn bring more trust and contribute to an increased perception of legitimacy in the whole EU copyright system.

Key words: copyright, authorship, concept of author, User Generated Content, Wikipedia, Internet memes, originality, right of reproduction, web 2.0

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MADE IN SWEDEN

To Džiugas, Agota, and Girius

Table of Contents

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Abbreviations

CJEU	Court of Justice of the European Union
CFR	European Union Charter of Fundamental Rights
TFEU	Treaty on the Functioning of the European Union
TEEC	Treaty Establishing the European Economic Community (The Treaty of Rome)
TEU	Treaty on European Union
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
EC	European Community
EEC	European Economic Community

Chapter 1: Problem and Method

1.1. Introduction: authors, users, creators

1.1.1. From consumption to participation

Before the Internet, computers were tools for performing pre-programmed tasks. Even after the Internet was invented and personal computers became a reality, the pattern of passive consumption of information typical of the culture of books, newspapers, radio and television persisted – computer and Internet users were expected to watch and listen, but if they wished to speak, they had to communicate through private channels. Anyone could be a user but only some could become creators.

And the Internet was big. In truth, it had no limits if one had enough money to buy powerful servers and hire smart programmers. One could build palaces, lecture theatres, huge shops, beautiful galleries, and many other marvellous things to visit, enjoy and spend money in. Investors crowded to finance these projects so full of promise, with such potential for lucrative profits. But the more these new Internet spaces multiplied, the less the users who came to see them stayed – there was no place for them in these empty amusement parks devoid of life.[1]

After the money ran out during the period called the "dotcom bubble", the big empty spaces disappeared and the companies and schemes which survived paved the way for a new approach to the Internet, or as it came to be called, the Web 2.0.[2] The Internet and websites were no longer mere "gift-wrapped" products to pay for and look at: they became platforms and seamless intermediaries for a variety of experiences and services. Where before users were able to communicate and contribute only in a few isolated corners of the Web, now larger and larger parts were turned into a playground for anyone to visit and actively participate in.

This increasing departure from the passive consumption model and the seemingly unlimited growth of the Internet that followed created many challenges in different

[1] See Steven Hetcher, 'User-Generated Content and the Future of Copyright: Part One - Investiture of Ownership' (2008) 10 Vanderbit Journal of Entertainment & Technology Law, pp. 880-881.

[2] See Chapter 6 of this thesis.

spheres of life. Quite expectedly, it quickly called into question some of the main premises of copyright law.

F. Gurry[3] once remarked[4] that this most recent development in technology has not been neutral in its impact on the different interests balanced in copyright law. In his opinion, it is the users who have gained the upper hand in copyright's traditional production/distribution/consumption structure.[5] Indeed, one can agree that people today can choose whether to remain traditional end-users and just consume creative works (e.g., through buying CDs, listening to Spotify, watching shows on Netflix), or whether to use the existing technology in other ways.

One of these other ways, of course, is piracy or simply using technology to engage in something that was traditionally a sphere of control and a source of income for copyright holders.[6] Another alternative that has become available to the user, however, is to contribute to the cultural fabric of the internet in her own right, i.e., to become a creator without the need to invest in acquiring skills or expensive tools. This group of users who choose to become creators (or what this thesis will call *Creative Users*) will be the focus of this study.

Indeed, giving individuals ordinarily categorised as "users" – namely, those without formal training, without contracts with publishing houses or record labels, and owning no professional-grade production technology – the ability to create and publicly share their creations is a significant shift. It has been celebrated as a return to "RW" (read and write) culture, as opposed to "RO" (read only) culture, giving a voice back to ordinary people.[7] It has also been hailed as the dawn of a new "networked information economy" which is independent from traditional

[3] Director General of WIPO 2008-2020, https://www.wipo.int/about-wipo/en/dgo/ (accessed 2 February 2021).

[4] As reported by Jane Ginsburg, 'Copyright in the Digital Environment: Restoring the Balance: 24th Annual Horace S. Manges Lecture, April 6, 2011' (2011) 35 Columbia Journal of Law & the Arts, pp. 3-4.

[5] The same approach can also be found elsewhere, see, e.g., Mira T. Sundara Rajan, *Moral Rights. Principles, Practice and New Technology* (Oxford University Press 2013), p. 6.

[6] On the problem of piracy in the context of the EU, its scope and effects see, e.g., the recently published report of the European Commission, "Estimating displacement rates of copyrighted content in the EU. Final Report", May 2015, available at: https://publications.europa.eu/en/publication-detail/-/publication/59ea4ec1-a19b-11e7-b92d-01aa75ed71a1/language-en (accessed 29 January, 2019). But see e.g., Cynthia Chris and David A. Gerstner, *Media Authorship* (Routledge 2013), pp. 37-53, describing unfairly aggressive tactics of copyright enforcement for minor copyright violations.

[7] Lawrence Lessig, *Remix* (Bloomsbury Academic 2008), pp. 28-30, or see Julien Cabay and Maxime Lambrecht, 'Remix prohibited: how rigid EU copyright laws inhibit creativity' (2015) 10 Journal of Intellectual Property Law and Practice 359, p. 2, where it is suggested that "new technological tools create the opportunity for a transition to a more active culture".

proprietary strategies and where human cooperation is the real "wealth of networks". [8]

But from the perspective of copyright law, the fact that new possibilities have opened for users does not necessarily mean that the balance of interests has now shifted in their favour as well. Almost everything a user actively does on the Internet is now copyright-relevant. Comments, pictures, drawings, text or other contributions are subject to full copyright protection, and any use, even unintentional or creative, of materials already copyrighted is either an outright violation or a legal grey area. Some argue that, in effect, private users are now covered by copyright norms that were never intended to have effect outside the professional circle,[9] or that when it comes to the actions of users and digital creativity modern copyright law is more restrictive than ever before.[10]

In practical terms and in the context of EU copyright law, legal scholars have repeatedly problematised user creativity, especially its derivative nature. Firstly, and most obviously, the fact that Creative Users often use the works of others creates tension in the conventional "exclusive rights" copyright landscape. Under the traditional model, a license would be required for each such use, or alternatively an exception allowing it without the permission of the author or rightholder. However, for a non-professional actor obtaining a license is an unrealistic expectation considering the expense and the need to contact all those whose work is being used.[11] The existing exceptions and limitations in the current EU copyright law do not fully cover transformative creativity either. Moreover, their boundaries remain unclear, especially in the light of the different implementations adopted in the Member States.[12] Further, the collaborative nature of many online projects and the

[8] Yochai Benkler, *The Wealth of Networks. How Social Production Transforms Markets and Freedom* (Yale University Press 2006); Yochai Benkler, *The Penguin and the Leviathan: The Trumph of Cooperation over Self Interest* (Crown Business 2011).

[9] See, e.g., Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11 Vanderbilt Journal of Entertainment and Technology Law 841, pp. 847-848, Martin Skladany, *Big Copyright Versus The People. How Major Content Providers Are Destroying Creativity and How to Stop Them* (Cambridge University Press 2018) pp. 2 and 115.

[10] See, e.g., James Boyle, *The Public Domain. Enclosing the Commons of the Mind* (Caravan books 2008); Lawrence Lessig, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press 2004), p. 13; Florence Le Borgne-Bachschmidt and others, *User-Created-Content: Supporting a Participative Information Society* (Final report for the European Commision prepared by IDate, TNO and IViR TNO, 2008), p. 187.

[11] Christophe Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combinaition?' (2018) 8 UC Irvine Law Review 413, pp. 416-417; Edward Lee, 'Warming Up to User-Generated Content' [2008] University of Illinois Law Review 1459, p. 1461.

[12] Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combinaition?', pp. 432-433; Le Borgne-Bachschmidt and others, *User-Created-Content: Supporting a Participative Information Society*, p. 510; Bernd Justin Jutte, 'The EU's Trouble with Mashups: From Disabling to

large number of contributors involved in them have struck some as potentially incompatible with the current principles of copyright law.[13] Lastly, the copyright protection that users receive for their works (when they qualify for it) has been found to be insufficient[14] or is often seemingly irrelevant and is discarded or modified through social norms or contracts.[15] These issues will be explored in more depth later in this thesis.

At the same time, though the creativity of users and their interaction with "professional" culture is not something unique or unheard of, even outside the digital environment,[16] the scope of these activities and their importance for cultural and other aspects of people's lives gives rise to more fundamental questions about copyright. It has been pointed out that user creativity destabilises the traditional dichotomies, such as between producer and consumer, labour and leisure, economic value and social value, market motivation and non-market motivation, which are embedded deep in modern copyright law.[17] To build and regulate their communities, these users are said to employ social norms that are rooted in an understanding of

Enabling a Digital Art Form' (2014) 5 JIPITEC 172, pp. 183-184; Cabay and Lambrecht, 'Remix prohibited: how rigid EU copyright laws inhibit creativity', pp. 35-36.

[13] Jeremy Phillips, 'Authorship, ownership, wikiship: copyright in the 21st century' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), pp. 788-798.

[14] See Elizabeth J. Tao, 'A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media' (2017) 24 Indiana Journal of Global Legal Studies, p. 618; Edina Harbinija, 'Virtual worlds players - consumers or citizens?' (2014) 3 Internet Policy Review 1, p. 8.

[15] As evidenced by the existence and rhetoric of such public licensing schemes as Creative Commons and such movements as Copyleft, Open Source and Open Access.

[16] There are many accounts of similar active involvement on the part of users (to the extent the technology of the day allowed it) even before the Internet. See, e.g., Marta Iljadica, 'User generated content and its authors' in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020), p. 165; Elena Cooper, 'Copyright and mass social authorship: A case study of the making of the Oxford English dictionary' (2015) 24 Social and Legal Studies, pp. 344-365; Ana Alacovska, 'The history of participatory practices: rethinking media genres in the history of user-generated content in 19th-century travel guidebooks' (2017) 39 Media, Culture & Society, pp. 661-679. Even before digital technology, there were authors who were dissatisfied with the over-extensive protection allotted them, see Stig Strömholm, 'Droit Moral - The International and Comparative Scene from a Scandinavian Viewpoint' (2002) 42 Scandinavian Studies in Law, pp. 217-218.

[17] Michael B. McNally and others, 'User-generated online content 2: Policy Implications' (2012) 17 First Monday, p. 20; Debora Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights' (2009) 11 Vanderbilt Journal of Entertainment and Technology Law 921, p. 924.

"private and public" or "allowed and prohibited" that, with its emphasis on sharing and openness,[18] is very different from traditional copyright.[19]

The current lack of visibility of Creative Users in the normative layer of EU (and European) copyright law and the seeming mismatch between the premises of traditional copyright and the reality of digital creativity has allowed some to observe that user participation is challenging key concepts of copyright law, including that of authorship.[20] There have been calls for a "new balance" to be found within copyright law, specifically to address the lack of recognition for Creative Users as authors in the copyright system.[21] It has also been suggested that especially with respect to users' derivative creativity there exists a "tension"[22] within the copyright system itself. This thesis will investigate these statements deeper and will follow the line of reasoning that not only practical obstacles and uncertainties around Creative Users but also the more fundamental challenges they pose to copyright law need to be addressed. Before going into the analysis of these different issues, it is worth examining them in some more detail.

1.1.2. User creativity and EU copyright law

1.1.2.1. The uneasy situation

Indeed, "tension" is perhaps the most appropriate way to define this situation, as it seems to be impossible to pinpoint a specific fundamental "problem", and the practical challenges of user creativity have so far been mostly handled by relying on the passivity of rightholders[23] and so-called "private ordering" tools[24] employed by

[18] Jose van Dijck, 'Users like you? Theorising agency in user-generated content' (2009) 31 Media, Culture & Society 41, p. 45.

[19] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content', p. 855.

[20] Daniel Gervais, 'Authors, Online' (2015) 38 Columbia Journal of Law & the Arts 385, p. 391; McNally and others, 'User-generated online content 2: Policy Implications', p. 2; Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' in Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship Textual Appropriation in Law and Literature* (Duke University Press 1994), p. 26.

[21] See, e.g., Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights', p. 923.

[22] Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content', p. 843.

[23] Jean-Paul Triaille and others, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "InfoSoc Directive")' [2013], p. 510, concluding that rightholders have largely adopted a "wait and see" strategy.

[24] Namely different public licenses, such as the Creative Commons. For more on private ordering see Niva Elkin-Koren, 'Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks' in M. Brousseau, M. Marzouki and Cecile Meadel (eds), *Governance,*

users themselves. Yet at the time of writing of this thesis, many forms of user creativity have been "out there on the Internet" for more than a decade and are now considered a normal part of cultural interaction on social media platforms and elsewhere in the digital sphere. The "tensions", on the other hand, have not been directly addressed, including in EU copyright, where user creativity is arguably more problematic than in many other systems.[25]

At the same time, the EU copyright system has taken significant steps to reflect other realities of digital technology, especially through the case law of the CJEU. Moreover, the EU has a strong commitment to the "Europe's digital future" [26] having recently finished work on several major initiatives started under the earlier "Digital Single Market Strategy".[27] Unfortunately, the topic of user creativity is largely absent from these initiatives, at least in the sense of conceiving of Creative Users as anything more than passive consumers or "generators" of value.[28] Previous EU projects on this issue have also been largely unsuccessful.[29]

Regulations and Powers on the Internet (Available at SSRN: https://ssrn.com/abstract=1321164 2009).

[25] Having in mind that the closed system of exceptions and limitations and the restrictive interpretation of the three-step test makes the legal climate of EU copyright especially cumbersome for user creativity. For analysis in this respect see Cabay and Lambrecht, 'Remix prohibited: how rigid EU copyright laws inhibit creativity' and Martin Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test' [2020], available at SSRN: https://ssrncom/abstract=3576019.

[26] https://ec.europa.eu/digital-single-market/en/shaping-digital-single-market (accessed 9 February 2021).

[27] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192.

[28] The major accomplishments in the sphere of copyright law under the Digital Single Market agenda have so far been the "Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market", concerning access to content for end-users, and the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (the DSM Directive), addressing user creativity in terms of a "value gap" between rightholders and Online Content Sharing Service Providers (Art. 17 of the Directive).

[29] Even though some aspects of derivative creativity have been touched upon by the CJEU in some of its most recent cases. This will be discussed further in this section. For more about the failed initiatives in respect to User Generated Content in the EU see Andrea Giulia Monteleone, 'User-Generated-Content and Copyright: The European Union Approach' (2016) WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection - 2015-2016, available at SSRN: https://ssrncom/abstract=2922225, pp. 1-2.

1.1.2.2. Legal problems and their solutions

As already touched upon, the EU copyright system has been criticised for not meeting the needs of derivative creators and other Creative Users. One way legal scholars approach their critique in this regard is to frame the problems and their solutions in terms of the traditional user/author dichotomy of copyright law. Seen from this perspective, the issue essentially boils down to the Creative User's lack of access to the works of others. The problematisation and the proposed solutions then rely on the traditional mechanisms of copyright in the form of exclusive rights for authors and exceptions to these rights where the public interest demands it.[30] Thus, the tensions related to Creative Users are addressed through exceptions to allow them use of works of authorship. In the same way, the exclusive rights as such are seen as a "normal" consequence of creativity that satisfies the criteria of protectability and go largely unquestioned, beyond the issue of who should receive them.

In the matter of transformative creativity, one solution that has been suggested for accommodating Creative Users is to introduce a special "User Generated Content exception", where derivative works created by amateur authors and used for non-commercial purposes would not require authorisation from the author or the rightholder.[31] Canada is a notable example of a country that has already implemented such an exception.[32] However, even there, the solution has been criticised for being useful only in a handful of situations and for not solving the problem either practically or conceptually.[33]

The EU explored the possibility of including an exception along similar lines in the Copyright in the Digital Single Market reform but dismissed it due to lack of consensus. A number of proposals were offered for the possible wording of the new exception, but none of them was broad enough to adequately cover UGC creativity.[34] Moreover, the CJEU has recently ruled that the list of exceptions and limitations provided by EU copyright law is exhaustive and that the InfoSoc

[30] The list of the most important exceptions and limitations in the EU copyright system can be found in Article 5 of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive).

[31] See, e.g., Martin Senftleben, 'User generated content: towards a new use priviledge in EU copyright law' in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020), pp. 136-162.

[32] McNally and others, 'User-generated online content 2: Policy Implications'.

[33] James Meese, 'User production and law reform: a socio-legal critique of user creativity' (2015) 37 Media, Culture & Society 753, pp. 762-763; also Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 152.

[34] Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', pp. 139-143.

Directive already contains the necessary mechanisms to balance different rights and interests in the electronic environment.[35] Thus, to make such an exception viable in current EU copyright law, one would have to find strong grounds to argue that the existing balancing mechanisms are not effective in the digital environment after all. Furthermore, the three-step test would almost certainly need to be reinterpreted to allow this to happen.[36]

Another solution put forward in the same conceptual framework is to broaden the existing exceptions and limitations in EU copyright law. For instance, the quotation exception enshrined in Art. 5(3)(d) of the InfoSoc Directive could possibly cover cases where copyright-protected works are used creatively, given that the main requirement to use this exception is that the use have a purpose, such as criticism or review, and that the extent of use is *necessary* for this purpose.[37] In the recent *Pelham*[38] case, where the possibility of applying this exception to the sampling of musical works was discussed, it was stated that, to benefit from the quotation exception, the user should have the aim of entering into a dialogue with the work quoted while illustrating assertions, defending an opinion or drawing an intellectual comparison with own work.[39] A similar proposal has been made in respect to the parody exception, which includes "pastiche" in its formulation.[40] It was suggested that this might be interpreted to encompass works that are not necessarily aimed at mockery, having in mind that pastiche can simply mean the assemblage of pre-existing works to make new works.[41] As mentioned before, proposals have been made to introduce a general broad, fair-use-like exception into EU copyright law as well.[42]

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[35] Case C-476/17, Pelham GmbH and Others v Ralf Hutter and Florian Schneider-Esleben, ECLI:EU:C:2019:624 (*Pelham),* paras. 58-60.

[36] This would be applicable to both the test in Art. 5(5) of the InfoSoc Directive and Art. 13 of the TRIPS Agreement. Even though M. Senftleben is optimistic about the possibility to create a new exception that is compatible with the TRIPS three-step test, there are many specific requirements of this test that must be considered, and even then, doubts would remain about the possible outcome of scrutiny of such provision by the WTO dispute resolution panel: Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 144-154. For more see Section 5.3.4.3 of this thesis.

[37] Art. 5(3)(d) of the InfoSoc Directive.

[38] Case C-476/17, Pelham GmbH and Others v Ralf Hutter and Florian Schneider-Esleben, ECLI:EU:C:2019:624 (*Pelham).*

[39] *Pelham,* para. 71.

[40] InfoSoc Directive Art. 5(2)(k), which provides an exception for the reproduction right in case of "use for the purpose of caricature, parody or pastiche".

[41] Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 158.

[42] Christophe Geiger, '"Fair Use" Through Fundamental Rights in Europe: When Freedom of Artistic Expression Allows Creative Appropriations and Opens up Statutory Copyright Limitations' [2020]

Even if the new approach to the quotation exception seems promising, if it is not interpreted broadly enough, many Creative User works might fall short of its threshold if the works of others are used to enrich one's own creation[43] or as "raw materials" for one's own creative effort, as is often the case with mashups and similar remix works.[44] Moreover, the issue of transformation of the quoted work is left unaddressed by the quotation exception. To date, neither the CJEU nor any Member State has provided such a broad interpretation of the quotation or caricature exceptions. Moreover, such an expansion of the existing exceptions and limitations or the introduction of a "fair use" provision favouring the rights of users seem additionally problematic given the CJEU's tendency to interpret exceptions and limitations strictly,[45] the limits imposed by the three-step test and the stated aim of EU copyright law to balance the fundamental rights of all the different subjects within its current scope.[46] As before, in order to make these solutions a reality for a substantial proportion of Creative Users, there needs to be a will to recognise that a comprehensive rebalancing of interests is needed.

When it comes to the question of transformative creativity and its remediation outside the system of exceptions and limitations, the CJEU has shown sensitivity, going so far as to recognise it as part of the exercise of "freedom of the arts" enshrined in Art. 13 of the Charter of Fundamental Rights, and agreeing to review the limits of the reproduction right of neighbouring rights holders (phonogram producers).[47] However, aside from not being directly in the field of copyright law, the Court's decision is only applicable to instances of sampling where a part of phonogram is reproduced but then changed to make the original work

Centre for International Intellectual Property Studies (CEIPI) Research Paper No 2020-06; or Bernt Hugenholtz, 'Flexible Copyright. Can the EU Author's Rights Accomodate Fair Use?' in Ruth Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge 2017), suggesting that a flexible exception could be introduced alongside the current list of exceptions and limitations.

[43] Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 156.

[44] See Section 6.2.3.1 for more on the remix phenomenon.

[45] See Jutte, 'The EU's Trouble with Mashups: From Disabling to Enabling a Digital Art Form', p. 181, even if there are signs that this approach might be shifting with the assurance that the exception must also be "effective": Triaille and others, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "InfoSoc Directive")', pp. 488-489. For more on the "effective" interpretations of exceptions and limitations in the most recent CJEU case law, see Section 5.3.4. of this thesis.

[46] *Pelham*, paras. 58-60; Case C-496/17 Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623 (*Funke Medien*), paras. 58-61; Case C-516/17, Spiegel Online GmbH v Volker Beck, ECLI:EU:C:2019:625 (*Spiegel Online*), paras. 43-46.

[47] See especially paras. 31-39. See also Section 5.3.3.3 for a critique of this approach.

unrecognisable to the ear.[48] Thus, the usefulness of this interpretation for Creative Users' transformative works remains uncertain and limited.

When it comes to Creative Users who do not engage in transformative activity, the situation might seem rather straightforward, as, in essence, their creations are subject to the same protectability requirements as any other work.[49] However, one of the issues with such Creative Users can be the collaborative nature of their activities, often observed online. Already in the context of non-digital collaborations, such as in theatre and popular music,[50] or scientific research,[51] it has been pointed out that the threshold of copyright protection might not be completely suitable for protecting the contributions of all the different participants,[52] or, conversely, that it can lead to a clash between multiple rightholders.[53] It has been suggested that similar problems exist in the mass-collaborations in Creative User projects.[54] Having in mind the special nature of Creative User creativity touched upon above, it is likely that such purely digital collaborations as Wikipedia might have an even more complicated relationship with the protection requirements of copyright law.

Even though the EU copyright system does not yet contain much with respect to the allocation of authorship in co-authorship situations,[55] it has effectively harmonised the requirements for authorship for all subject matter.[56] Meanwhile, there has been little in-depth research on the challenges these requirements might pose for

[48] *Pelham,* paras. 26-39.

[49] Meaning the requirements of "originality" and "expression", see Case C-310/17, Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899 (*Levola*).

[50] See Jostein Gripsrud, 'Creativity and the sense of collective ownership in theatre and popular music' in Mireille van Echoud (ed), *The Work of Authorship* (Amsterdam University Press 2014), pp. 233-234, describing how the importance of contributors is determined by the internal norms of the sector and that there is little concern about copyright.

[51] Lionel Bently and Laura Biron, 'Discontinuities between legal conceptions of authorship and social practices' in Mireille van Echoud (ed), *The Work of Authorship* (Amsterdam University Press 2014), pp. 239-243.

[52] Björn Heile, 'Who wrote Duke Ellington's music? Authorship and collective creativity in "Mood Indigo"' in Andreas Rahmatian (ed), *Concepts of Music and Copyright* (Edward Elgar 2015), pp. 136-138.

[53] Bently and Biron, 'Discontinuities between legal conceptions of authorship and social practices', p. 260.

[54] See Phillips, 'Authorship, ownership, wikiship: copyright in the 21st century', pp. 794-795, and Daniela Simone, *Copyright and Collective Authorship. Locating the Authors of Collaborative Work* (Cambridge University Press 2019), pp. 72-99, for a review of some possible problems of authorship in the Wikipedia context.

[55] Except for special provisions on film authorship. See Section 2.3.3 of this thesis.

[56] By harmonising the requirements of protectability. For more see Section 5.2.

collaborative Creative User projects. Some researchers have attributed the general lack of attention paid to collaborative works to the inherent purpose of copyright to regulate the relationship between the owner of exclusive rights and those who want to use the work[57] but not necessarily any other relationships. The same seems to be true of EU copyright law and its standards.

Protectability and collaboration aside, the bundle of exclusive rights that is a customary consequence of becoming an author in the traditional copyright setting does not seem to be a good match for the needs of most Creative Users either. This can be deduced from the variety of self-declared "copyleft" movements that have sprung up in the years since Internet 2.0 made user contributions possible.[58] These public licensing systems have been described both as a "rebellion" against the expansive tendencies and exclusivity of copyright,[59] and as an attempt to show the world what a "reasonable copyright law" could look like.[60]

Some commentators conclude that the adjustments Creative Users make to their exclusive rights are not problematic and testify to the flexibility of copyright law.[61] Indeed, from the perspective of concrete legal problems, the licenses are a solution that allows Creative Users to manage their rights. Even here, however, there are dangers and pitfalls, not least in the disparities in national treatment of such licenses, possible difficulties in enforcement,[62] and their incompatibility.[63]

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[57] Rochelle C. Dreyfuss, 'Collaborative Research: Conflicts on Authorship, Ownership, and Accountability' (2000) 53 Vanderbit Law Review 1161, p. 1164.

[58] See e.g., the Open Source Initiative, https://opensource.org/ (last accessed 17 August 2021), Creative Commons, https://creativecommons.org/ (last accessed 17 August 2021).

[59] Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 George Mason Law Review 271, p. 273.

[60] Lawrence Lessig, 'The Creative Commons' (2004) 65 Montana Law Review 1, p. 11.

[61] See e.g., Thomas Riis, 'User generated law: re-constructing intellectual property law in a knowledge society' in Thomas Riis (ed), *User Generated Law: Re-constructing Intellectual Property in a Knowledge Society* (Edward Elgar 2016), pp. 1-3.

[62] See Andres Guadamuz Gonzalez, 'Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licenses' (2004) 26 European Intellectual Property Review, pp. 331-339, raising the possibility that even if the "copyleft" seems enforceable in principle, some questions might still remain unanswered. See also Andres Guadamuz, 'The License/Contract Dichotomy in Open Licenses: A Comparative Analysis' (2009) 30 University of La Verne Law Review 101, pp. 101-116, concluding that open licenses could be treated differently in different jurisdictions and analysing how this might affect their enforceability.

[63] See Zachary Katz, 'Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing' (2006) 46 IDEA: The Intellectual Property Law Review 391, pp. 391-414, analysing how the incompatibility of certain Creative Commons licenses can lead to an environment restrictive for derivative creativity in the long run.

Along with all these larger or smaller practical issues, and perhaps more importantly, there is a larger picture in which the challenge is not merely the inconvenience or tension of the relationship between Creative Users and copyright law, but the legitimacy and justifiability of the EU copyright system itself. This "higher order" problem might be more pressing than the ones already discussed.

1.1.2.3. "Legitimacy crisis"

The lack of direct attention, in current EU copyright law, to a group of creators who are responsible for a large part of digital culture, even if mostly amateur and often in conflict with the rights of other copyright holders, potentially risks making legal norms increasingly irrelevant for creators on the Internet. Indeed, some warn that with technological change, modern copyright has ended up "in crisis"[64] or even that we are facing the "death of copyright".[65] In general terms, the growing disconnect between social practices, including those in the digital sphere, and the requirements of copyright law, might pose a challenge to the legitimacy of the whole system.[66]

Moreover, there is a clear one-sidedness in approach where copyright law demands that Creative Users respect the exclusive rights of others but leaves Creative User's cultural activities in a legal vacuum, to be handled by private contracts. When a group of creators is left to solve their problems entirely on their own, they become critical of the law and may lose faith in it.[67] Indeed, whether the flaws of the "traditional model of copyright" are real or just perceived, the views of those who claim the need to "rebel" against copyright and those who accuse copyright law of betraying the very values it was created to protect cannot all be disregarded. It has been pointed out that the failure to recognise all forms of creativity and make copyright more accommodating might even be feeding a perception of a lack of respect for fundamental rights, especially freedom of expression.[68] In the same way,

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[64] Christophe Geiger, 'Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12 Vanderbilt Journal of Entertainment and Technology Law 515, pp. 516-517.

[65] E.g., Niva Elkin-Koren, 'Tailoring Copyright to Social Production' (2011) 12 Theoretical Inquiries in Law 309, p. 310.

[66] See, e.g., Bently and Biron, 'Discontinuities between legal conceptions of authorship and social practices', p. 263, (even though not explicitly applying these conclusions for the digital issues). Susan Corbett, 'Creative Commons Licenses, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?' (2011) 74 The Modern Law Review 503, p. 507, concludes that the fact that the disconnection between legal and social reality in the sphere of copyright is more evident in the digital environment is a symptom of the "failure of the copyright system itself in an online environment".

[67] Severine Dusollier, 'The Master's Tools v. The Master's House: Creative Commons V. Copyright' (2006) 29 Columbia Journal of Law & the Arts, p. 272.

[68] Geiger, '"Fair Use" Through Fundamental Rights in Europe: When Freedom of Artistic Expression Allows Creative Appropriations and Opens up Statutory Copyright Limitations', p. 30; Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 149.

the concern voiced by some that copyright has lost its author-centeredness and become fixated on the interests of economic subjects[69] is only bound to grow. The lack of legitimacy and relevance of copyright in the digital sphere has been linked to the problem of piracy in general.[70]

The solution of private ordering or open licenses resorted to by Creative Users for the management of their rights does not challenge the inherent balance of interests embedded in the broader copyright system. This, in its turn, not only threatens the trustworthiness of copyright law, but also contributes to passivity with respect to possible legislative measures, as the need for rebalancing is perceived as non-existent.

S. Dusollier has identified some key problems that private initiatives may pose for the future of copyright. She contends that responsibility for protecting public interests in this way is left to the parties themselves, while public policy is moving toward expanding the exclusivity of copyright.[71] Private ordering, she maintains, cannot be the "go to" solution for all problems of copyright in the digital environment, and the legislator must find other ways to introduce the ethos of inclusivity and sharing into the core of the copyright system.[72] Other authors have warned that the open licensing regimes might strengthen the exclusionary nature of copyright law as such.[73] At the same time, it can be hoped that the increasing popularity of open licenses and similar schemes signals a shift in the way people think about creativity and authorship, and that this will ultimately create an opportunity to remake copyright law and give it new meaning.[74]

Various strategies have been suggested to deal with these more fundamental questions of legitimacy and the changing roles of subjects as well. Some have theorised that copyright law could be flipped to put the user first. For instance, N.

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[69] Jessica Litman, 'What we don't see when we see copyright as property' (2018) 77 Cambridge Law Journal, pp.537-539; Jane C. Ginsburg, 'The Role of the Author in Copyright' in Ruth Okediji (ed), *Copyright in the Age of Limitations and Exceptions* (Cambridge University Press 2017), pp. 60-66; Corbett, 'Creative Commons Licenses, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?', p. 505.

[70] Ginsburg, 'The Role of the Author in Copyright', p. 62.

[71] Severine Dusollier, 'Sharing Access to Intellectual Property through Private Ordering' (2007) 82 Chicago-Kent Law Review 1391, p. 1394.

[72] Ibid, p. 1435.

[73] Niva Elkin-Koren, 'What Contracts Can't Do: The Limits of Private Ordering in Facilitating Creative Commons' (2005) 74 Fordham Law Review, p. 398; Niva Elkin-Koren, 'Exploring Creative commons: A Sceptical View of a Worthy Pursuit' in Bernt Hugenholtz and Lucie Guibault (eds), *The Future of the Public Domain* (Kluwer Law International 2006), available at SSRN: https://ssrn.com/abstract=885466, p. 20; Corbett, 'Creative Commons Licenses, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?', p. 511.

[74] Dusollier, 'The Master's Tools v. The Master's House: Creative Commons V. Copyright', p. 286.

Elkin-Koren stresses that through the current exception and limitation prism, the "user" can only be seen as a "parasite" attaching to the possessions of others.[75] To avoid this way of thinking, she suggests that the permitted uses should be treated as user rights – something that has also now been formally recognised by the CJEU, albeit with little actual change to the system.[76]

Another interesting suggestion for how to cope with the challenge of technology in this respect is a return of formalities in copyright protection. S. van Gompel, for instance, considers that the historical arguments for abolishing formalities are no longer as compelling in the Internet age.[77] He concludes that, on the contrary, digital technology creates favourable conditions for captioning images of the works to be registered and enabling online registration and coordination of national databases at international level.[78]

One more idea, which challenges the fundamental premises of copyright, is to split protection into two sets of rights: one suitable for the protection of works from the proprietary sphere, namely, creative industries of different kinds, and the other for amateur or personal creativity.[79] This suggestion comes from the insight that the distributor's customary role as the intermediary between author and public has changed dramatically as a result of new technology. If there is no need for intermediaries and the creator can participate in the market on her own accord (at least in some cases), it stands to reason that copyright law should differentiate between this and the "traditional" market model.

There have even been legislative initiatives to challenge EU copyright law in more substantial ways. For instance, a new EU copyright code[80] has been proposed, giving significant attention to the conceptual distinction between authorship and ownership, moral rights, etc. Another initiative was a plea for a single EU copyright

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[75] Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in Ruth Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge 2017), p.132.

[76] *Pelham*, *Funke Medien*, and *Spiegel Online*, have all reiterated this assurance. On the other hand, these cases also illustrate the shortcoming of this approach, because even if user's exceptions are seen as rights, the task is then to balance these different rights. The Court did this in a way that effectively left the existing limits of the exceptions and limitations unchanged. See section 5.3.4. of the thesis for more about the exceptions and limitations and their interpretation.

[77] Stef Van Gompel, 'Formalities in the Digital Era: An Obstacle or Opportunity' in Lionel Bently, Uma Suthersanden and Paul Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010); and Stef Van Gompel, *Formalities in Copyright Law. An Analysis of Their History, Rationales and Possible Future* (Wolters Kluwer 2011).

[78] Van Gompel, 'Formalities in the Digital Era: An Obstacle or Opportunity', pp. 20-24.

[79] Marco Ricolfi, 'Consume and Share: making copyright fit for the digital agenda' in Christophe Geiger (ed), *Constructing European Intellectual Property* (Edward Elgar 2013), p. 319.

[80] The Wittem Group, 'European Copyright Code' (2010) 1 JIPITEC, pp. 123-128.

title, where different kinds of concepts could be better defined and a clearer internal logic established.[81] However, for various practical reasons this never came to fruition.

Finally, there are those who advocate systematic practical strategies. G. Frosio, for example, has systematised a detailed list of strategies into a "temple" of action.[82] The first pillar, he says, entails bringing the user back to copyright law,[83] the second pillar is introducing the politics of access, the third is to mainstream the politics of the public domain, and the fourth is the politics of inclusivity.[84] These are all areas slowly encroached by copyright law and which do not figure as separate protectable objects in the modern legal copyright landscape. Lastly, Frosio suggests that these strategies should be sustained by "user patronage", meaning that users should develop an unmediated relationship with creators and the creative process through crowdfunding and similar schemes.[85]

This thesis suggests that in order to deal with the challenges brought by Creative Users and copyright's seeming lack of relevance in their digital creative communities, one needs to adopt a deeper theoretical approach with respect to the *author* in copyright law. It is namely not enough to see creativity on the Internet as just another way to "use" the works of others, services, technology, and so forth. There must be consistency in the treatment of creators and good reasons to justify any differences in treatment. The EU copyright law, at the forefront of adapting to the digital environment, while at the same time having to negotiate between two major copyright traditions, is an especially interesting object for such a study.

This is not to say that the different solutions briefly reviewed above are flawed or inadequate. They have their own strengths and challenges. However, if the creator, the author, is to remain firmly in the copyright system, giving it legitimacy and relevance, one needs to ask what the *author* in current EU copyright law actually is, and what makes the Creative User different from this figure. And if the Creative User were, after all, "accepted" as one of the creators EU copyright law is supposed to provide with a "high level of protection",[86] how would that affect the current legal norms and, indeed, the legitimacy of the whole EU copyright system? Such an

[81] Letter by European Copyright Society: https://www.create.ac.uk/wp-content/uploads/2015/01/78.pdf (last accessed 17 August 2021).

[82] Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity. The Third Paradigm* (Edward Elgar 2018) pp. 331-374.

[83] By ensuring participation of users in the law and in policy making, ensuring the effects on consumer welfare are taken into consideration, and placing the user at the foundation of copyright by introducing creative "inclusive rights", instead of exclusive rights: ibid pp. 341-343.

[84] Ibid., pp. 339-365.

[85] Ibid., pp. 365-371.

[86] See Section 2.3.2.3 of this thesis.

inquiry would thus not only address some of the fundamental challenges to the copyright system presented above, but would also lend another perspective and, perhaps, additional support to the remedies already suggested by others. It would also pinpoint the exact interests that may need to be rebalanced because of changing social and technological circumstances.

However, before beginning the conversation about the Creative User as an author who might need to be better integrated into EU copyright law, it should be noted that a large portion of the literature on user creativity (including many authors presented in this and previous sections) approaches the question through the notion of "User Generated Content" (UGC). The position of this thesis regarding this concept is provided in the next section.

1.1.3. Defining user creativity

1.1.3.1. What is User Generated Content?

So far, both in terms of possible normative developments and policy considerations, Creative User activities have most often been addressed in terms of "User Generated Content" (UGC). The above-mentioned shift towards new technology and user participation is said to lie at the core of UGC,[87] and it has been called "perhaps the most significant development in the field of digital content creation" in recent years.[88] However, in the context of seeking a more harmonious place for Creative Users in the framework of EU copyright law, it appears that UGC is not a reliable concept.

Generally speaking, UGC is a broad category which includes all creative outputs by users on online platforms and online games (Facebook, YouTube, Twitter, World of Warcraft, etc.), content on blogs, remixes, mashups, sampling, fan fiction, and so on. The emergence of UGC as a notion can be traced back to 1995,[89] but the phenomenon first gained momentum around 10 years later, with 2005 widely held to mark the beginning of explosive growth in the amount of content generated by users and the rise of large and successful social platforms.[90]

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[87] Greg Lastowka, 'The Player-Authors Project' [2013], available at SSRN: https://ssrncom/abstract=2361758 or http://dxdoiorg/102139/ssrn2361758, p. 6.

[88] McNally and others, 'User-generated online content 2: Policy Implications', p. 2.

[89] Debora Halbert, *The State of Copyright: the Complex Relationships of Cultural Creation in a Globalised World* (Routledge 2014), p. 183.

[90] Peggy Valcke and Marieke Lenaerts, 'Who's Author, Editor and Publisher in User-Generated Content? Applying Traditional Media Concepts to UGC Providers' (2010) 24 International Review of Law, Computers & Technology, pp. 119-120.

A discussion of UGC will typically involve some aspect of amateur decentralised production of culture on the Internet and often have to do with the borrowing and transformation of existing creative works. Ultimately, however, there is no single agreed definition of the phenomenon: in terms of the theoretical approach of this thesis, UGC might also be called a "family resemblance" concept.[91] One of the more comprehensive and still most referenced definitions was suggested in a 2006 report by the OECD's Directorate for Science, Technology and Industry. The authors of the report distinguish three features of what they call "user-created content" (UCC):[92]

1. The work has to be published

Works intended for a private audience, such as emails and SMS messages, as well as other private communication and sharing on social media platforms and other service providers, should not be included in the UCC/UGC definition.[93]

2. Creative effort

The mere copying and pasting/publishing of existing work should not be considered User-*Created* Content (UCC). Certain input must be present, either in the form of completely original work or in the form of original combination and alteration of other works. This is also the main distinction (if one wishes to draw one) between UGC and UCC: User-Generated Content (UGC) does not have to be created by the user.[94] On the other hand, as the report also points out, even for UCC the exact degree of creative input remains hard to determine.[95]

3. Creation of work has to happen outside of "professional routines and practices"

UGC or UCC has from the very beginning been understood as *amateur* activity, and the notion does not apply to professional artists creating online.

Other authors dealing with the UGC phenomenon usually define it in similar terms, emphasising such additional aspects as the non-commercial nature of the effort and

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[91] See Section 1.3.3.3 below.

[92] Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications Policy report to the Working Party on the Information Economy DSTI/ICCP/IE(2006)7, p. 8.

[93] For a comprehensive review of the different possible audiences for publication, i.e. "private", "limited public", and "public" see Claudia Wyrwoll, *Social Media: Fundamentals, Models, and Rankings of User-Generated Content* (Springer 2014), pp. 13-16.

[94] Valcke and Lenaerts, 'Who's Author, Editor and Publisher in User-Generated Content? Applying Traditional Media Concepts to UGC Providers', p. 119.

[95] Sacha Wunsch-Vincent and Graham Vickery, *Participative Web: User-Created Content* (2006), p. 8.

the unique motivations for producing UGC works.[96] For many, UGC is not necessarily about creative activities, and some in the literature go as far as to include mere social presence or metadata related to the user as well.[97]

1.1.3.2. UGC: a broad and changing category

Nevertheless, the notion of UGC is problematic in several ways. For one thing, the grouping of so many different forms of creativity under one rubric makes it less likely that a single policy direction can be found to accommodate it. Although suggestions have been made for a clearer taxonomy of the different kinds of creators covered by the notion,[98] UGC remains an open concept that evolves in step with technology.

Moreover, this notion seems to be changing not only in terms of the creators/users covered, but also with respect to what is seen as its most valuable aspect. A simple Google news search on "User-Generated Content" for the years 2016[99] and 2019[100] reveals an overwhelming prevalence of items on UGC and marketing – i.e., how to engage consumers, increase sales or the value of a brand, etc. In contrast, the same search for the year 2011[101] yields a much more diverse debate on the nature and

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[96] For instance, Halbert, *The State of Copyright: the Complex Relationships of Cultural Creation in a Globalised World*, pp. 182-183; or McNally and others, 'User-generated online content 2: Policy Implications'.

[97] Greg Lastowka, 'User-Generated Content and Virtual Worlds' (2008) 10 Vanderbit Journal of Entertainment & Technology, p. 3.

[98] E.g., Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content', pp. 858-860, where he divides the UGC into "User-Authored Content", "User-Derived Content", and "User-Copied Content", pp. 857-868.

[99]You can access the customised search for news between 01/01/2016 and 31/12/2016 following this link: https://www.google.com/search?q=user+generated+content&espv=2&biw=1366&bih=705&sxsrf=ALeKk00sIJOT6taVNcLxVdO1TBnDZrTJPw%3A1599051330519&source=lnt&tbs=cdr%3A1%2Ccd_min%3A1%2F1%2F2016%2Ccd_max%3A12%2F31%2F2016&tbm=nws (accessed 18 August 2021).

[100] You can access the customised search for news between 01/01/2019 and 31/12/2019 following this link: https://www.google.com/search?q=user+generated+content&espv=2&tbs=cdr:1,cd_min:1/1/2019,cd_max:12/31/2019&tbm=nws&sxsrf=ALeKk01MzMd0MUv2i_q3w6QtF_XIZg61SA:1599051505161&ei=8ZZPX-CvCcacsAeHhK2wAg&start=0&sa=N&ved=0ahUKEwig7MSHw8rrAhVGDuwKHQdCCyY4ChDy0wMIfg&biw=1920&bih=1057&dpr=1 (accessed 18 August 2021).

[101]You can access the customised search for news between 01/01/2011 and 12/31/2011 following this link: https://www.google.com/search?q=%22user+generated+content%22&espv=2&biw=1366&bih=705&source=lnt&tbs=cdr%3A1%2Ccd_min%3A1%2F1%2F2011%2Ccd_max%3A12%2F31%2F2011

qualities of UGC in games and on media platforms, its legal status, its competitiveness in relation to traditional models of knowledge production, etc. It is, of course, not surprising that discussions change over time: some topics are exhausted, and others are taken up. Even so, the shift in public discourse from the creative to the economic aspects of UGC means more emphasis is placed on the "content" and less on its creators. Moreover, the shift in focus is likely to extend the notion of UGC to less creative outcomes of user participation. Having in mind that "User-Generated Content" has yet to be "officially" defined, this could be an indication of how the concept may evolve in the future.

1.1.3.3. UGC: author vs. user

The very notion of "User-Generated Content" has some ideological implications that may, again, be a hindrance to how the copyright system interacts with the creators falling under its rubric.[102] It has been demonstrated that the distinction between authors and users in the Web 2.0 environment can be sensitive to ideological context and, possibly intentionally, employed to diminish the status and rights of online creators.[103] Looking at the UGC definition (and especially the UCC definition), it is clear that in many respects "user" in UGC is akin to "author" in the copyright law sense, not least because many UGC works can be protected by copyright law – and yet "user" conventionally has a diametrically opposite meaning. Nonetheless, the notion of *User-Generated* Content (or, as mentioned, *User-Created* Content) is now overwhelmingly employed to describe the phenomenon outlined above. While UGC can refer to works that are merely reposted, or possibly even things like a mere social presence on a platform, the notion of UCC specifically stresses *creative* input;[104] yet the creations are still officially presented as produced by "users" and not "authors".[105] It has been suggested that maintaining this "lower

&tbm=#q=%22user+generated+content%22&tbs=cdr:1,cd_min:1/1/2011,cd_max:12/31/2011&tbm=nws (accessed 18 August 2021).

[102] See Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights', pp. 927-933, stressing the unacceptability of the usage of "UGC" in this respect.

[103] Kristofer Erickson, 'User illusion: ideological construction of 'user-generated content' in the EC consultation on copyright' (2014) 3 Internet Policy Review, pp. 1-16.

[104] And then there are those who do not make the UGC and UCC distinction and conclude that all UGC works need creative input, e.g., Hetcher, 'User-Generated Content and the Future of Copyright: Part One - Investiture of Ownership', pp. 863-892.

[105] The author of this thesis is fully aware that even the title of "Creative User" which is used by default here also includes the word "user", allowing the same presumptions as those which are criticised in this thesis. As will be explained, however, the European copyright law tradition only has one way to refer to the subject of copyright protection and that is through the notion of "author". This thesis is suggesting that the Creative User should be seen as one more *author*. Thus, the "Creative User" is used here to give emphasis to the shift that has happened with subjects who were formerly simply "users" and to enable analysis of the new types of creators from the perspective of "author". It is not meant to be used in legal texts or policy discussions.

value" definition might be politically advantageous for economically oriented stakeholders.[106]

One of the explanations given for the presence of "user" in the notion of UGC is the technological dimension of its creativity. S. Hetcher, for instance, notes that the "user" here means "computer user" and relates to content created by amateurs.[107] Another, related, explanation concerns the context in which UGC emerged and continues to operate, namely, that different kinds of intermediaries are usually *used* to produce and distribute UGC. As G. Lastowka explains, the "user" here alludes to the dichotomy between those who make technology and those who use it.[108] Some technology owners have less influence over the content and merely provide a platform for publicising and sharing, while others supply their users with building blocks from which the creative works are made. One could also say that UGC is something that is generated as a by-product of the act of usage itself, something that enhances the experience of consumption but does not amount to production of independent work.[109]

Moreover, "user" becomes a way to distinguish between professional and amateur because, while there is always an intermediary when the Internet is involved, professional artists often rely on traditional intermediaries – publishing houses, record labels, etc. – to handle their works (including their online presence). Alternatively, they might prefer to use less creatively restrictive intermediaries such as blog platforms or personal website hosting services. The intermediary is then only responsible for hosting and does not interfere with the content itself. The "user" of UGC, in the meantime, *uses* the services provided by the intermediary, more often signing contracts giving up rights or directly using the tools provided by the intermediary, such as in online gaming platforms or virtual worlds. Here, too, the implication is that "users" lack the skill and training of professionals and must rely more on intermediaries and technology to compensate. There is seemingly no place for an "author" in this service-oriented relationship.

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[106] As shown in Erickson, 'User illusion: ideological construction of 'user-generated content' in the EC consultation on copyright', pp. 1-3, UGC is a vague term that is used for different purposes by different interest groups. See also Soren Mork Petersen, 'Loser Generated Content: From Participation to Exploitation' (2008) 13 First Monday.

[107] Hetcher, 'User-Generated Content and the Future of Copyright: Part One - Investiture of Ownership', p. 871, also in Lastowka, 'The Player-Authors Project', p. 5.

[108] Lastowka, 'User-Generated Content and Virtual Worlds', p. 5.

[109] Myshkin Ingawale and others, 'Network analysis of user generated content quality in Wikipedia' (2012) 37 Online Information Review, p. 603.

Even when alternative terms such as prosumers[110] or mini-creators[111] are used in scholarly texts and public debate, the distinction that lies at the heart of UGC is between professional and amateur, suggesting, again, an image of "high" and "low" culture, separating people who "know what they're doing" from those who are just "playing" at art. This distinction recalls another old and well-known division in the cultural sphere – that between "arts" and "crafts", marking the narrative of "real art" versus non-original, non-artistic domestic activity.[112] In reality, many UGC authors are anonymous, making any attempt to classify content as UGC based on the author's level of training almost meaningless. The distinction with regard to intermediaries is also unconvincing, as many platforms like YouTube or Flickr contain content created by both professional and amateur authors.[113] Consequently, the presumption of "lower level" and "amateur" creativity, even if perhaps accurate in many cases, serves no purpose other than to establish a certain narrative about the creative consumer that limits the legal alternatives available to integrate her into the copyright law system. As D. Halbert observes, what the term effectively indicates is the distinction between valuable "cultural producers" and non-original "cultural consumers".[114] Or, as J. Meese concludes, the UGC formulation of user is often employed to reinforce "existing corporate power structures within law".[115]

Even the word *generated* has connotations similar to those of "user". Despite the fact that many distinguish between UGC and UCC specifically on the point of "generated" being any, even copy-paste, activity and "created" being something that asks for creative effort, UGC is favoured as a blanket term for the phenomenon in

[110] George Ritzer, Paul Dean and Nathan Jurgenson, 'The Coming of Age of the Prosumer' (2012) 56 American Behavioral Scientist 379 for defining the phenomenon. See also Axel Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage* (Peter Lang 2006), pp. 81-83 using the same term for UGC creators.

[111] Nobuko Kawashima, 'The rise of 'user creativity' - Web 2.0 and a new challenge for copyright law and cultural policy' (2010) 16 International Journal of Cultural Policy, pp. 337-353.

[112] See: Debora Halbert, 'Feminist Interpretations of Intellectual property' (2006) 14 Journal of Gender, Social Policy and the Law, pp. 438-447, analysing the history of quilting and knitting as traditionally female crafts which were not recognised as "art" even when made for completely decorative purposes. It was only with the commodification of patterns that they started to gain status as original works.

[113] Even though in derivative works amateurs tend to be overrepresented, see Triaille and others, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "InfoSoc Directive")', p. 454.

[114] Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights', pp. 924, 928-929.

[115] Meese, 'User production and law reform: a socio-legal critique of user creativity', p. 756.

social media,[116] public debate and even in official EU documents.[117] In everyday language, however, "generated" is most often associated with a technical process that occurs with minimal or no effort and is a by-product of some other activity. Describing online creative activities as "generated" by "users" conveys precisely that UGC is merely a semi-intentional by-product of someone "ordinary" using a computer for the purpose of consumption.

The problem here is less the use of words (even this thesis uses the notion of "Creative User" to highlight the shift that occurred as a result of digital technology and the Internet) than the propagation of a discourse which puts a group of creators in a position of dependence on intermediaries comparable to the place of "user" in the user/author dichotomy of copyright law. This thesis takes the position that to define these creators as simply "users" is to approach online creativity from the standpoint of either the traditional author or rightholder, or the platforms where creativity takes place. It is from the perspective of these subjects that the digital creator is a *"user"* – of technology, of a platform, of the works of others. The proposal put forward by this thesis is to approach the Creative User as one more creator in the family of *authors*. After all, as mentioned above, many individual works by Creative Users are protectable by copyright law, and they are, technically, "authors", even if their needs and expectations in relation to copyright law might diverge. What would the basic norms of copyright look like if these creators, their methods and their relationship to their works and to others were incorporated into EU copyright law alongside the authors who presently enjoy its "high level of protection"?

1.1.3.4. Summing up UGC

Thus, the notion of User Generated Content is by no means redundant. It has helped to identify the phenomenon of a large quantity of works suddenly reaching audiences via non-traditional channels of production and distribution. The pre-digital and pre-web 2.0 copyright law system was based on the traditional production and distribution model consisting of an artist (creator), the intermediary (the publisher, record producer, etc.), and the user. Indeed, both authors and intermediaries were essential to ensure that a work reached its audience. The entities that did not contribute creatively but made possible the existence of physical copies of the work were deemed to be so important that they not only expected transfer of copyright from the authors, but even obtained independent neighbouring rights for

[116] Google Trends has a tool that shows the relative popularity of searches for "user generated content" and "user created content". Internet users search for the former term far more often the latter https://www.google.com/trends/explore#q=%22user%20generated%20content%22%2C%20%22user%20created%20content%22&cmpt=q&tz=Etc%2FGMT-2 (accessed 18 August 2021).

[117] For instance, the public consultation of the EU Commission "On the review of EU copyright rules" issued in 2013, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60518 (accessed 18 August 2021)

the investment and effort expended.[118] Furthermore, these entities essentially served as gatekeepers, predicting the demand of certain works, selecting the high-quality from the mediocre, etc.

The UGC thus became a way to articulate and address (including legally) the situation where Creative Users found themselves without the need for the traditional intermediaries.[119] From the perspective of the traditional model of production and dissemination, the manner in which users' works were now produced might indeed have resembled some sort of "generation" of content, as so many works of little commercial or artistic value started appearing, seemingly out of nowhere. However, these works are not worthless: they even have economic value, especially as a phenomenon, and are an expression of the creativity and free communication of Creative Users.

The simplification and depersonalisation of Creative Users through the notion of UGC seems only to be confirmed in the EU context by the newest legislative act in the field of EU copyright law, the DSM Directive,[120] which approaches the issue from the perspective of a "value gap" created by the exploitation of user creativity by large "Online Content-Sharing Service Providers" (OCSSPs).[121] The solution suggested in Art. 17 of the Directive is for OCSSPs to share the value "generated" by users by obtaining a license from the rightholder, or alternatively by employing their best efforts to disable access to specific protected works.[122] Whereas in the event of a successful license negotiation with rightholders Art. 17 might provide a practical solution for Creative Users posting content on large online platforms, failure to obtain the license would, on the contrary, lead to a limitation of the de facto freedom currently available due to low interest on the part of rightholders to enforce their rights on an individual basis.[123] It has been suggested that this system,

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[118] See, e.g., Bernt Hugenholtz, 'Neighbouring Rights are Obsolete' (2019) 50 IIC-International Review of Intellectual Property and Competition Law 1006, pp. 1006-1007.

[119] There are now new kinds of intermediaries, most notably the different platforms that have entered the game as UGC has become such a widespread phenomenon, see, e.g., Gervais, 'Authors, Online', pp. 386-390.

[120] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (DSM Directive).

[121] Art. 2(6) of the DSM Directive.

[122] Art. 17, DSM Directive.

[123] Overall, the DSM Directive, and Art. 17 especially, has been widely criticised as likely to lead to a greater restriction of users' freedom on the Internet due to the unlikelihood that the OCSSPs will actually succeed to obtain licenses to cover all actions of users. Whereas Art. 14 in the E-commerce Directive allowed all information society service providers to avoid liability by being passive in relation to users' activities and only taking action when information about violation was received, Art. 17 of the DSM Directive will likely lead to a more active policing of users' content and thus restrict the de facto freedom Creative Users previously enjoyed.

which will soon be in place across the EU Member States, will cause an "erosion" of web 2.0 practices.[124] The situation has also been likened to private censorship of certain forms of creativity, as these are now made dependent on the permission of third parties.[125]

Clearly, this outcome is also just an example of a solution designed from a perspective external to Creative Users. Consequently, their interests and needs are sidelined and their future freedom to create and share their work becomes contingent on the various "best practices" that other subjects will or will not employ. And thus, the critique of UGC is tied to the "higher order" critique of copyright law presented in the previous section. The possible online legitimacy crisis of the EU copyright system (and other systems around the world) is, at least in part, a crisis of new forms of creativity challenging the current legal concept of author. As mentioned above, when forms of creativity that have established themselves in the digital environment are not recognised as having the same value as "traditional" creative efforts, it leads one to ask how copyright law conceptualises the author it is protecting and why one model is chosen over others.

1.1.4. Creative Users as authors

Therefore, this thesis will concentrate on what is the most prominent feature of the Web 2.0 shift, namely the ability of users to become creators. These users will be referred to simply as *Creative Users* in order to clearly distinguish them in the UGC debate, but the thesis will address them as a group of *authors.* In so doing it will seek to clarify what Creative Users have in common with EU copyright's "author", as well as what changes in law might follow if they were integrated as authors in that system.

The works created by the Creative Users themselves, the videos, pictures, texts and software, etc.,[126] are not different from the "traditional" subject matter of copyright. The way in which the works are produced and the way their creators arrange their relationship with the works and those who surround them – this was not present to

[124] Martin Senftleben, 'Bermuda Triangle - Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 41 European Intellectual Property Review 480, pp. 4-5.

[125] See Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combinaition?', p. 417 for problematisation of the private censorship aspect in user creativity.

[126] A large portion of the content on platforms like YouTube, Facebook, TikTok or similar are created by their users, for example, fan analyses of favourite movies, explaining their details (e.g., https://www.youtube.com/watch?v=Fjvkg700fYs), cat video compilations (https://www.youtube.com/watch?v=hY7m5jjJ9mM), or such works as the famous "Bernie Sanders" meme https://knowyourmeme.com/memes/bernie-sanders-wearing-mittens-sitting-in-a-chair. (All sources accessed 8 February 2021.)

the same extent before the Internet and digital technology. In other words, the way that the works are *authored* is different, and so their *authors* (the Creative Users) are presumably also different from the traditional authors that copyright law (including EU copyright law) was designed to protect. This thesis will analyse and address such differences, but it will also seek to show similarities, thereby contributing to the discussion about the future of EU copyright law in the digital world.

1.2. Problem and research question

1.2.1. Summing up: problem and suggested approach

Thus, the starting point of this thesis is the problematisation of this relatively new and loosely defined phenomenon of User Generated Content and, more specifically, the Creative Users who are part of it. As has already been shown above, it appears that the EU copyright legal system has not yet fully come to terms with this group of creators, and the different solutions that have been suggested or attempted so far have not led to significant change in law or in practice. There are some possible points in the current EU copyright legal framework through which Creative Users can gain entry: their works can become subject to copyright protection and their expectations can be managed with the help of private contracts. Moreover, their creative actions sometimes fall under the existing exceptions and limitations in Union law, and new exceptions have been considered. At the same time, from the perspective of copyright law, as illustrated with the example of the DSM Directive, Creative Users are seen more as an opportunity for generating and sharing "value" than an independent group of authors. This reluctance to fully integrate creators who can be seen as a relatively well-established version of authorship in the digital environment might be a factor in the legitimacy crisis confronting copyright law (including EU law) in recent decades.

The aim of this thesis is not to review solutions proposed by others, but to present a perspective that, arguably, has not yet been fully explored in relation to the phenomenon of Creative Users in the context of EU copyright law. This perspective will theorise the Creative User as an *author*.

Along with the "high level of protection" and interpretation according to the "objectives pursued by the legislation at issue", the principle of "fair balance of different rights and interests" is one of the main methods guiding the CJEU's interpretation of EU copyright law.[127] The commitment to the balance of interests is

[127] Eleonora Rosati and Carlo Maria Rosati, 'Data-Based Case Law Applied to EU Copyright (1998-2018): A Quantitative Assessment' [2019] Intellectual Property Quarterly, available at SSRN: https://ssrncom/abstract=, p. 10.

expressed in the preamble to one of the most extensive harmonising instruments in EU copyright law to date, namely, the InfoSoc Directive.[128] In order to be balanced, interests have to be defined in some way and weighed against each other. If one included Creative Users among the *authors* when weighing those interests, as opposed to seeing them as a category of *users*, how would the possible legal solutions we are now considering change? After all, copyright law has already been accused of harbouring an outdated and romanticised model of authorship[129] and serving interests other than the author's; that it is in need of "re-balancing" in the face of the new digital technologies is also widely contended.[130] This thesis will address these concerns while also touching on the specific practical legal problems outlined above.

There are notable contributions in the literature where this specific perspective – positioning the Creative Users and their creativity as "authors" and "authorship" in the sense of copyright law – has already been addressed to some extent.[131] But if one is to realise the full potential of such an exercise, a thorough analysis of what constitutes the "author" in a given copyright system is also necessary. Only when it is clear who this author is (in this case in EU copyright law) and how the Creative User differs from this figure can comprehensive conclusions and suggestions be made as to the future development of this legal system.

Therefore, this thesis in its analysis will give close attention to the system of EU copyright law itself, the legal system chosen as the object of this study. The EU concept of author will be formulated through an examination of fundamental elements of protectability and exclusive rights in Union law, then compared with the way that authors and the authoring of works is perceived in selected examples of user creativity. Lastly, some ideas for the future development of EU copyright law will be suggested.

1.2.2. The research question

With the previous considerations in mind, the research question I will be pursuing in this thesis is:

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[128] InfoSoc Directive, recital 31 of the preamble.

[129] See, e.g., Lior Zemer, *The Idea of Authorship in copyright* (Ashgate 2007), Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'' (1984) 17 Eighteenth-Century Studies.

[130] See Section 1.1.1 of this thesis.

[131] E.g., Iljadica, 'User generated content and its authors'; Stacey M. Lantagne, 'Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges' (2018) 17 Virginia Sports and Entertainment Law Journal; Gervais, 'Authors, Online', pp. 385-396; Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights', p. 924.

What is the concept of author that the current system of EU copyright law is built on, how is it challenged by Creative Users, and how could EU copyright law address these challenges?

In other words, as stated above, the thesis will attempt to define the meaning of the author in EU copyright law following a methodology for concept analysis explained in the "method" section of this chapter and will compare it with several manifestations of Creative Users. Among other things, it will explain how "author" is one of the main organising concepts of EU copyright law and why challenging it necessitates a rethinking of copyright's normative content as well. The thesis will demonstrate that the "author" that EU copyright law is intended to protect is not a uniform or fully consistent concept, and that this offers possibilities for the future development of this legal system, especially in the light of the challenges brought by the new forms of authorship of Creative Users. Lastly, the thesis will conclude with some general suggestions as to the possible routes EU copyright law could take in order to address the Creative User as an author and keep its author concept consistent and attuned to changing social realities.

1.2.3. Delimitations

The thesis will analyse EU copyright law and will refer to the legal orders of individual Member States only where this is necessary. It will not attempt to provide a comparative legal study. Accordingly, the thesis will focus solely on copyright law and generally exclude neighbouring rights such as the rights of record producers, publishers, performers, database rights and others; though again, these may be mentioned to illustrate and support the main analysis of EU copyright law.

It should also be noted here that the protection of intellectual property even in the EU remains national law: there is no such thing as "international" or EU-wide[132] copyright law. However, though EU copyright law may not have absolute harmonising power,[133] it is still a system of law with its own rules, logic and principles. This legal system is the object of research of this thesis; consequently, its precise impact on national copyright laws will not be explored. For the same reason, the copyright laws not yet harmonised at the EU level (for instance, moral rights) will only be discussed where relevant, and in the most general terms.

[132] Even though EU copyright law now has two regulations in its system (Regulation implementing the Marrakesh Treaty, and the Portability Regulation), they are very specialised and provide little substantial harmonisation.

[133] See, e.g., Simone Schroff, 'The (Non) Converence of Copyright Policies - a Quantative Appraoch to Convergence in Copyright' (2013) 10 Scripted, pp. 411-434, on how harmonisation of EU copyright laws might not always work as planned.

Even though the thesis sets out to explore the concept of author in EU copyright law and its possible inclusion of the Creative User, it has no ambition to offer a complete picture of this concept or to conduct an exhaustive study of all its elements. Given the approach of this thesis, such an undertaking would by far exceed its time and space constraints. The thesis will be limited to a few of the most fundamental provisions of EU copyright law insofar as they relate to situations in which Creative Users typically encounter challenges. The choice of legal provisions and practical situations will be explained in the respective chapters.

The research will *not* confine itself to any particular type of subject matter. There are obvious dangers in making general statements about all subject matter covered by copyright law, but since EU copyright law affords the same treatment to all creative works once they satisfy the criteria of originality and expression,[134] this thesis will analyse the author concept that the law applies to all creative works as well.

The thesis does not intend to be a sociological or cultural study, even though it will engage with legal-sociological literature and some literature normally attributed to the fields of sociology and cultural studies. As such, the focus is primarily legal, with EU copyright law at its core, even if the understanding of what law is, and hence what the object of the study is, might be quite broad.[135] The examples of the different digital environments relied on in this thesis are used as "case studies", namely, examples to demonstrate scenarios where the law's conceptualisation of author may exclude certain groups of creators and to explore how they cope with this situation. The non-legal sources used to research such situations are tools to illustrate, rather than exhaustively analyse, a given digital environment or community.

Lastly, it should perhaps be mentioned here that this thesis will not address the question of non-human authorship. Even though it has been a popular topic in recent years, the focus of this thesis is different. Nevertheless, one could argue that the research presented below is also a contribution the question of "AI authorship" precisely because it examines the place of the *human* author in the European copyright legal tradition and in EU copyright law. And of course, a discussion about incorporating non-human creators into copyright law would be incomplete without a proper understanding of the human author's role.

[134] See section 5.2.2 of this thesis for analysis of protectability criteria.

[135] Explained in Section 1.3 below.

A few ideas presented in this thesis have been published in their early stage in a separate article.[136] The final thesis, however, significantly expands them and develops them further.

1.3. Method

1.3.1. General remarks

The thesis is about a non-homogenous group of creators (Creative Users) who are at least in some respects different from the traditional author but also in many ways similar to this subject of copyright law. Hence, finding a place for these creators in the statutory copyright law without relying solely on the flexibility of private ordering or exceptions and limitations presents a legal challenge. To address this challenge, this thesis asks what constitutes an "author" in the eyes of EU copyright law and how this conceptualisation is challenged by the presence of the Creative User.

To begin with, the distinction between "author" and "authorship" in this thesis has to be clarified. There is a body of legal research where these two notions are used in ways that are not necessarily consistent. The analysis of the concept of "author" in this thesis will entail an analysis of *what* the author is. This means that I will consider not only how one becomes an author, or what precise rights or obligations arise from the legal fact of being an author, but I will also look at the full picture drawn by different legal norms of the *subject* that is the author (this will be explained further in the methodology section).[137] In contrast, the concept of "authorship" in the context of this thesis (and, as a rule, in copyright law) merely refers to the qualifications for becoming an author and the legal status itself. To analyse a*uthorship* would thus be to answer the question of "who" the author is or can be. In this sense, the notion of authorship is narrower: it is a status that one acquires, and as such is just one of the constituting parts of the whole concept of author.[138] There are, however, those who do use the "concept of authorship" to discuss the

[136] Aurelija Lukoseviciene, 'On Author, Copyright and Originality: Does the Unified EU Originality Standard Correspond to the Digital Reality in Wikipedia?' (2017) 11 Masaryk University Journal of Law and Technology, pp. 215-242.

[137] There are several examples where this concept is used to perform this kind of broad analysis, e.g., Michael Foucault, 'What is an Author?' (1979) 20 Screen 13, pp. 205-222.

[138] There are many examples in the literature which analyse the concept of "authorship" in this way and talk mostly about the conditions for becoming an author. See Daniela Simone, 'Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations' (2013) 26 Intellectual Property Journal, pp. 111-135; Bently and Biron, 'Discontinuities between legal conceptions of authorship and social practices', pp. 237-277.

question of "what the author is" as well, i.e., to elaborate on the overall picture of the author and its different manifestations and configurations within certain questions of copyright law.[139] But this is not the case in this thesis.

Another point to consider is how the legal system in question is defined while analysing principles of copyright law. This thesis uses two different concepts, "EU copyright law" and "European copyright law", which do not have the same meaning. The EU copyright law is the currently valid system of law at the EU level, comprising different directives, regulations, and the decisions of the CJEU.[140] The concepts of "European copyright law" or "European copyright tradition", on the other hand, refer to a broader context which includes the Berne Convention and other international legal documents that are part of the Berne system,[141] the general principles of modern copyright that have their roots in the legal developments of 18th- and 19th-century Europe, as well as the copyright systems of the EU Member States.

Lastly, even though the purpose of this thesis is to analyse the *concept* of author in EU copyright law, following the methodology presented below, this concept is not seen as homogenous but rather as comprised of a whole network of different meanings combined and recombined in different legal contexts. Therefore, the word *conceptualisation* will also sometimes be used in the text to refer to one of the manifestations of the "concept" of author, indicating that a conceptualisation does not exhaust the full content of a concept, but is a part of it.

1.3.2. Showing the layers in the EU copyright law: K. Tuori

When speaking of the "concept of author" in copyright law in general and EU law in particular, however, it is important to explain the premises of this thesis in regard to legal concepts. Before proceeding, it is first necessary to establish the boundaries for the analysis of legal concepts and the relevance of such analysis for the problem at hand, i.e., exploring a solution for Creative Users in copyright law.

This thesis suggests that any kind of law, and in this case EU copyright law, is not only a selection of conditions for the protection of creative works and certain rights (and their exceptions) which the creator of the said works receives, but also an embodiment of a certain discourse of creation, dissemination and use of creative works. This discourse, or simply a set of implicit presumptions, principles and presuppositions, is, in a sense, a part of the legal system and is decisive in the

[139] E.g., Zemer, *The Idea of Authorship in copyright*; Jane Ginsburg, 'The concept of authorship in comparative copyright law' [2003] De Paul Law Review, pp. 1063-1092.

[140] See Section 5.2. of this thesis for an explanation of what constitutes EU copyright law.

[141] Namely, international documents analysed in Section 2.2 (even though this does not exhaust the list).

creation and interpretation of legal norms. Accordingly, "discourse" here should be understood in the way theorised by M. Foucault, namely as a means of construction of reality that excludes other ways of defining the same phenomena.[142] Thus, a certain way of understanding "author" and the constitutive elements of this concept as they relate to the creativity and various relationships and needs of this subject forms a part, and perhaps even a central axis, of EU copyright law. Furthermore, these different presumptions are, at least in part, "hidden", that is, they are not explicitly explained or codified, yet still give content and legitimacy to the whole EU copyright system.

K. Tuori, using Foucault's ideas as a stepping stone to his own theory,[143] elaborates on the multi-layeredness of law and focuses on how the different discourses, presumptions, and other elements function within the legal system itself. Tuori's theory outlines three layers of law:[144] the surface layer, and two sub-surface layers of legal culture and deep structure of law. Besides formulating an intriguing theory of law, Tuori is concerned with providing tools for its internal normative critique which do not rely on arguments based on natural law or social science, yet still do justice to the relationship law has to moral, political, and other social systems.[145]

According to Tuori's critical version of legal positivism, the most visible and immediate manifestation of law is its surface level, which consists of "linguistically formulated norms and norm fragments".[146] This is the layer where one finds statutes, laws, court decisions and statements of legal doctrine (Tuori considers legal doctrine to be one of the legal practices). The second layer is the "legal culture", which is the culture shared by the community of professional lawyers and is comprised of the knowledge and memories this group possesses as a consequence of legal education and professional legal practice. This layer is familiar to legal professionals as "practical knowledge" (or "instinctive knowledge") regarding norms, concepts and methods of law and is a result of what Tuori calls "sedimentation" from the surface level into the deeper levels over time.[147] As such, the source of this knowledge is

[142] Gerald Turkel, 'Michel Foucault: Law, Power and Knowledge' (1990) 17 Journal of Law and Society, pp. 176-177.

[143] Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002), pp. 53-75, where he mentions (the Foucault student) Francois Ewald's theory of law as one of the departure points for his own thinking. See also p. 174, where Tuori contends that the layer of legal culture and legal concepts in it reinforce a "specific way of conceiving the social world", and p. 187, where he equates his method of reconstruction of the sub-surface layers with Foucauldian archaeology and genealogy of knowledge.

[144] Even though Tuori himself confirmed on many occasions that the distinction of three layers is arbitrary, that the lines between them are blurred, and that a different number of layers can be identified in certain cases. Ibid, p. 154.

[145] Ibid., p. 28.

[146] Ibid., p. 154.

[147] Ibid., pp. 161-163.

not a direct result of the positive "valid law" but has a historical dimension. Examples of such sub-surface legal principles can include rules concerning the collision of norms, rules for the interpretation of legal norms, patterns of legal argumentation, fundamental concepts like contract, intent, basic right, and principles like *pacta sunt servanda*.[148] In European copyright law, as will be shown in the course of this thesis, such elements as the traditional justifications of copyright law could be seen as part of the European legal culture shared by copyright lawyers.

The third layer, then, is the deep structure of law, which contains the most basic legal categories that open up the very possibility of legal thinking.[149] According to Tuori, this layer, too, contains normative, conceptual and methodological elements, but these are so deeply sedimented into the legal professional culture that lawyers are unaware of them. Moreover, these elements are common to all modern systems of law, and legal professionals participate in this part of legal culture as "legal subjects of modern society".[150] Examples of such deep-structure entities could be the legal subjectivity of humans (but not animals or nature), the idea of contract as such, the principles of the rule of law, etc.[151] Even justifications for legal systems as such and specific legal norms in the "modern law", such as the principles of democracy and human rights, could be seen as sedimented into the deep structure of law.[152] As will be shown later, for European copyright law such deep sediments could be the need for the subjectivity of the "author" or control and exclusivity as the defining features of copyright law.

When it comes to the time dimension, the surface level is the part of law which changes the most and the changes in the deeper levels are much slower. The deep structure of law contains elements that might be thousands of years old. However, both of the sub-surface layers still have their origin in positive law, even though the relationship between the layers is never direct and perfect – only some elements of positive law get sedimented into the deeper levels and only a portion of the elements from the sub-surface levels find expression in positive law.[153] At the same time, no layer is free from "horizontal" influences, namely those that come from political, moral and other social realities. These get incorporated into the law through legal practices.

According to Tuori, all three of these layers are connected through legal practices of law-making, adjudication and legal doctrine. These practices rely on law, not only

[148] Ibid., pp. 167, 174, 177.

[149] Ibid., p. 186.

[150] Ibid., pp. 196, 185.

[151] Ibid., pp. 187-188, 190.

[152] Ibid., pp. 263, 277, 280.

[153] Ibid., pp. 200, 213.

on its surface layer (the actual norms), but also on other limitations, or what Tuori calls a "reservoir" of general legal concepts, principles, theories and doctrines, and patterns of argumentation,[154] that lie in the sub-surface layers of law. Thus, in their practices, legal professionals produce the surface layer of law and reproduce its sub-surface layers.[155] In this way, the internalised practical knowledge of legal professionals becomes expressed (to some extent at least) in the normative positive law. In other words, all three layers are always present at the same time and the positivity of law in K. Tuori's theory is extended to the sub-surface layers.

The sub-surface layers of law, then, are a reservoir for the surface layer to draw upon, but also a limiting factor for the content of the surface layer.[156] The reservoir is also a source for what Tuori calls "substantive" *validity* of legal norms, that is, the perceived validity (by the legal community or a population as a whole) of the content of the legal norms vis-à-vis the morally and ethically laden principles residing in the sub-surface layer of a legal system.[157] Further, both the surface- and the sub-surface layers are seen as socially constructed, meaning that their interaction, even if partly automatic and unconscious, is not impossible to affect and make choices about.

To uncover the subsurface layers, Tuori proposes a method that he calls "rational reconstruction".[158] This is a method he borrows from Habermas and adapts to the analysis of legal systems. In brief, Habermas devised this method of analysis of social phenomena in order to provide an alternative to both objectivist and subjectivist social sciences paradigms[159] and uses it to reconstruct "competent subjects' intuitive knowledge".[160] Tuori contends that in the case of law, such rational reconstruction can only access the sub-surface layers through the surface layer, namely the visible products of legal practices: legal texts, decisions and reasoning of courts and legal doctrine. When it comes to reconstructing the sub-surface levels, however, Tuori warns against attempting to draw clear boundaries between law and non-law, as they (and especially the deep structure of law) rest on

[154] Kaarlo Tuori, 'Whose voluntas, what ratio? Law in the state tradition' (2019) 16 ICON 1164, pp. 1167-1168.

[155] Tuori, *Critical Legal Positivism*, p. 197.

[156] Ibid., p. 245.

[157] Ibid., p. 276.

[158] Ibid., p. 30.

[159] Where the objectivist paradigm means the modelling of social scientific analysis of natural sciences and subsuming the role of an objective spectator and the subjectivist paradigm is only interested in the subjective experiences of social actors. In Jorgen Pedersen, 'Habermas' Method: Rational Reconstruction' (2008) 38 Philosophy of the Social Sciencies 457, pp. 3-19.

[160] Ibid.

the general cultural structures of our society.[161] He also emphasises the need to acknowledge a legal system's lack of coherence and recognise its contradictions in terms of discontinuities within the different layers of law and between the layers.[162] Lastly, K. Tuori concludes his work by formulating a critical legal positivistic programme for legal science, suggesting that the work of the critical legal positivist should lie in unmasking the discontinuities, (consciously) using them to critique the legal system, and suggesting constructive solutions to increase its consistency. [163]

What this thesis takes from Tuori methodologically is the recognition of the sub-surface levels of law and their influence on the normative content of the surface level – and, from the opposite perspective, the acknowledgement that any legal norm is accompanied by sub-surface "baggage". Of course, as Tuori himself remarks, the relationship between the layers is not necessarily direct and might not be easy to track. Still, the understanding of law as a multi-layered structure is a way to expand analysis into the less certain but no less important or powerful realm of sub-surface concepts, legal principles, and deep structures of EU copyright law.[164] Without such insight into a legal system, it can be easy to overlook that concepts are also decisive parts of it, as important if not more important than legal rules.[165] In other words, this thesis sides with the view that the concepts in law have a crucial importance to the legal rules, and the legal rules address reality as conceptualised by law. The model of law proposed by K. Tuori suggests that *both* norms and concepts influence each other and support each other, building, through such "mirroring", the validity of the whole legal system.

This thesis will analyse the concept of "author" in EU copyright law by exploring the sub-surface layers of this legal system. This will be done through an investigation of the legal historical development of the concept and through analysis of how modern copyright law became structured around it in the European copyright tradition. In addition, the legal doctrinal justifications of European copyright law as a separate manifestation of the sub-surface structures of the whole system will be reviewed. Lastly, the thesis will look at the judicial reasoning and policy arguments around several central EU copyright institutes and how the "author" is framed

[161] Tuori, *Critical Legal Positivism*, p. 194.

[162] Ibid., pp. 315-317.

[163] Ibid., pp. 319-322.

[164] Such an approach is often implied to a certain extent by other legal researchers when engaging in historical analysis of law. In the words of C. Sganga, such deeper historical analysis has the power to shed light on the reasons for adopting certain laws, the degrees of influence of certain theories and political forces; it explains interpretative patterns and why similar definitions might yield diverging results, etc. Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities* (Edward Elgar 2018), p. 46.

[165] Dietmar von der Pfordten, 'About Concepts in Law' in Jaap C. Haage and Dietmar von der Pfordten (eds), *Concepts in Law* (Springer 2009), pp. 17-18.

there.[166] This reconstruction will not only serve to uncover the inevitable conceptual inconsistencies, but also to start a conversation about what challenges this conceptual construction of "author" faces from the Creative User.

So, what is implicit in EU copyright law, what principles, concepts and presumptions "are there" and are accepted as part of legal reasoning when making and interpreting the law? Here, the emerging legal system of EU copyright has another benefit in that there is unusually abundant content in the legal culture layer to draw on, having in mind that EU copyright law is (or can be) a combination of different legal traditions and legal systems. Moreover, the idea of critical legal positivism as formulated by K. Tuori is essentially about the sources of legitimacy of law and legal practices that reside not only in the surface layer of law, but also in the sub-surface layers. Unmasking the discontinuities in the sub-surface layer of EU copyright law and using their critique to build more robust legal tools is another aim of this thesis.

At the same time, in order to attempt this ambitious reconstruction, some more practical tools for formulating concepts are needed. The ones used in this thesis will be described in the next sub-chapter.

1.3.3. What are concepts?

1.3.3.1. General remarks on concepts

The critical legal positivism of K. Tuori describes sub-surface structures of law and the different mechanisms which operate there, one of them specifically being legal concepts. Foucault's notion of discourses is broader, potentially encompassing many concepts and forming a narrative about reality. However, Tuori's legal concepts, much like the Foucauldian discourses, have censoring effects and an a priori nature in all layers of law and in all legal practices.[167] "When legal problems are formulated and placed in their normative context through legal concepts, these also impose limitations on the solutions that the problems can receive,"[168] Tuori explains.

In the broadest sense, a concept is a mental representation of something that usually has a corresponding sign (indicator) in language. Concepts are referred to with words or word combinations, like cat, book, Sweden, love, United Nations, author, etc. Signs – pictures, expressions, gestures, certain sounds – can also refer to concepts, for instance, a drawing of a table, the STOP sign in traffic, a smile, or the sound of an ambulance siren. Without concepts we would not have abstract thought

[166] This will be carried out in Chapters 2, 3, 4, and 5 of the thesis.

[167] Tuori, *Critical Legal Positivism*, pp. 174 -175, 187, 218, 220, 290.

[168] Ibid., p. 290.

or reasoning, as they allow us to group objects and experiences, assess their differences and similarities and predict the consequences of our actions. Moreover, concepts allow us to communicate meaning to other people, at least those who live in similar circumstances to ours.

Concepts are studied in a variety of scholarly disciplines for a variety of reasons, yet there is still no universally accepted theory on how we humans and our societies shape and use them, or why certain concepts change quickly while others stay stable. Until quite recently, philosophers as well as representatives of other disciplines predominantly used the "classical theory" of concepts, which held that concepts can be expressed through definitions.[169] In this view, the definition should be such as to include all specimens that belong to the category and exclude all that do not, without anything in between. This theory, however, was heavily criticised and largely dismissed by leading scholars in the 1960s and 1970s, not least because it could not account for empirical findings in the developing fields of cognitive sciences and psychology.[170]

There are today many more approaches to concepts that do not necessarily rely on any sufficient and necessary conditions or abstractions. For instance, in philosophy, it is usually held that having a concept means being able to hold propositional attitudes (beliefs, desires, etc.) about objects.[171] In other words, to be able to say, "I like cats", a person must have a concept of what "cat" is. For that, she might have in her head a definition of the object (the classical theory), but it could also be enough simply to be able to discriminate between different objects in some way, or just have a very abstract idea or sense of what the cat is (Fregean sense).[172]

Another example is from psychology and cognitive sciences, which view concepts as bodies of knowledge used by default in our higher cognitive processes.[173] Here, concepts are typically considered to be "mental representations" of some sort. The questions are then mainly about how these categories are formed, how they function and what kind of structure they have, rather than how one can have attitudes towards them. The prevailing theories in cognitive sciences and psychology describe concepts as either summary representations – prototypes – of a given category of real-life objects or phenomena (prototype theory), or sets of representations of all

[169] Gregory L. Murphy, *The Big Book of Concepts* (MIT Press 2002), pp. 15-16.

[170] Ibid., pp. 16-24, 38-39.

[171] Edouard Machery, *Doing Without Concepts* (Oxford Scholarship Online 2009), "Concepts in Philosophy".

[172] Stanford Encyclopaedia of Philosophy, "Concepts", http://plato.stanford.edu/entries/concepts/ (last visited 18 August 2021). The last two approaches were developed as a direct critique of the first (mental representations) theory specifically because there may be situations where someone can hold beliefs about things they only have a vague and abstract notion of.

[173] Machery, *Doing Without Concepts*, "Concepts in Psychology", p. 7.

specimens of a relevant category ever encountered by the individual possessing a concept (exemplar theory).[174] In other words, the theories suggest that we may have a general image of what "a cat" is, constituted from different elements such as tail, four legs, whiskers, etc., and then judge whether something is a cat by comparing this prototype to the real-life specimen at hand. Or we might have mental representations (images) stored in our brain of all cats we have ever encountered and judge an object's "catness" by the number of items from our mental storage that are similar to the specimen we are facing. Empirical evidence supports both of these theories.[175]

Although there are differences in approach, it is noteworthy that all theories agree that concepts are constituent elements of thoughts in some way and are used not only to categorise real world phenomena and separate them from one another, but also to make judgements, decisions or have other attitudes towards these objects. Moreover, it is also usually accepted that no single theory can account for all the ways we formulate and use concepts.[176] It is likely that each of us does it in several different ways depending on circumstances and the concept in question.

Law and legal systems, on the other hand, at least intuitively, would seem to be a special case, where concept formation, structuring and use can differ significantly from what happens elsewhere. This legal context should therefore be examined separately.

1.3.3.2. Legal concepts

When we speak about law and the concepts there, the fact that law is comprised of concepts, among other things, is self-evident. However, at least at first glance, there are differences between concepts in law and concepts in natural language or in someone's mind. Whereas in social life a concept can be understood in different ways and its content can vary dramatically depending on the geographical, economic, or thematic circumstances, legal concepts are supposed to have a more determined structure and limits.[177]

The discussion on what distinguishes legal and non-legal concepts and how the former transform into the latter is well known in legal jurisprudence. After all, without a theory on this matter, it is virtually impossible to establish what "law"

[174] Murphy, *The Big Book of Concepts*, pp. 49-51.

[175] Ibid. pp. 64-65.

[176] Ibid., p. 65.

[177] The principle of the rule of law itself requires that laws (and so legal norms) be applied the same way to everyone under the same circumstances; in other words, legal predictability is a key feature of a democratic legal system. Hence, it stands to reason that legal concepts, too, must be more predictable and better defined than natural language concepts.

is[178] and what sets it apart from other social phenomena. Moreover, the distinction between legal and non-legal concepts is critical in situations where the legal system interacts with non-legal scientific facts and expert opinions.[179] After all, it is quite common for legal and non-legal concepts to share the same signifier (be indicated by the same word) but have different meanings and implications.

Legal concepts can also be perceived in different ways depending on how the concept of law itself is understood. A strict realistic attitude might be exemplified by the famous approach A. Ross demonstrated in his still much quoted article "Tû-Tû",[180] where he, with a dose of colonial superiority, had set out to prove that legal concepts are just meaningless dummies which can always be replaced by a list of conditions and consequences for when the conditions are met.[181] A similar approach, as defined by M. Bajcic, could be to view legal concepts in a broader legal context as the sum of all legal rules related to a given situation.[182] However, seen in terms of the understanding of legal systems defined above, such a view of legal concepts only takes into consideration the "surface" level of the law – legal norms and their connections to each other. Furthermore, even if one only looks at the surface level, it is quite undisputable that legal concepts and legal texts still have their fair share of vagueness, ambiguity, polysemy, and, in some cases, can be intentionally conceived so as to allow circumstantial interpretation.[183] Thus, it is doubtful that legal concepts can be easily defined solely with reference to the conditions and consequences enshrined in law.

Of course, if law is understood as a multi-layered structure, legal concepts exist in all layers of law and have more content than just the visible normative one. According to Tuori, concepts have their discursive expression in the surface layer either through definitions or through legal norms; but they exist mostly in the legal culture layer where they are not expressed explicitly but still provide a specific way

[178] See R. Poscher's overview of the different treatment of concepts by inclusive and exclusive positivists in Ralf Poscher, 'The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate' in Jaap C. Haage and Dietmar von der Pfordten (eds), *Concepts in Law* (Springer 2009). Here the author also presents an approach declaring neither of these camps to be correct, but concluding that law always "legalises" the real-world concepts it engages with.

[179] See, e.g., Lena Wahlberg, 'Legal Ontology, Scientific Expertise and The Factual World' (2017) 3 Journal of Social Ontology, pp. 49-65.

[180] Alf Ross, 'Tû-Tû' (1957) 70 Harvard Law Review, pp. 812-825.

[181] Giovanni Sartor, 'Understanding and Applying Legal Concepts: An Inquiry of Inferential Meaning' in Jaap C. Haage and Dietmar von der Pfordten (eds), *Concepts in Law* (Springer 2009), pp. 37-42.

[182] Martina Bajcic, *New Insights into the Semantics of Legal Concepts and the Legal Dictionary* (John Benjamins Publishing Company 2017).

[183] Ibid., pp. 41-46.

of systematising and conceiving reality.[184] Some fundamental legal concepts can be found in the deep structure of law, too: such concepts as legal subjectivity and the basic understanding of a possibility of contract as of a category of social interaction form the basis of all modern legal systems.[185]

Continuing the conversation about concepts, and paraphrasing Tuori, it can be held that legal concepts are part of any legal system and are multi-layered themselves. Another important point here is that all of these layers influence each other, and a concept may be analysed not only by looking at its surface expression (in legal norms), but also through the different elements that have likely sedimented into the deeper structures over time. Even if the presence of the deeper structures is not readily apparent in the norms themselves, the general argumentation of judges, the preambles and preparatory works of legal acts, and doctrinal arguments and considerations, can all show the deeper content of the concepts in question.[186]

As mentioned, however, as one delves further into the sub-surface layers of law, the structure of concepts becomes less certain. The deeper level concepts are part of the instinctual or practical knowledge of legal professionals, and so are even less amenable to definition. Moreover, as Tuori himself has remarked, the sub-surface levels in particular are characterised by contradictions and lack of coherence. Be that as it may, in order to compare the concept of author in EU copyright law to anything, it must first be *identified*. In addition, though Tuori considers it a task of the critical legal positivist to bring coherence to a legal system, the first step in such an endeavour is to unmask the underlying contradictions. Another complication with the concept of author in the framework of this thesis is that it is also a concept that is much used and analysed in other, non-legal disciplines.[187] Thus, "horizontal influences" on the legal system or simply a blurring of borders between legal and non-legal concepts are unavoidable.

Against this background, the task of finding and identifying the different sediments of the "author" in the sub-surface layers of EU copyright law might seem to be a daunting challenge. What is more, how can one systematise the possibly incoherent elements of "author" into a single concept? To accomplish this, and to further underline the "natural state" of EU copyright law as a system where different versions of reality compete and are reproduced in various legal practices, this thesis

[184] Tuori, *Critical Legal Positivism*, p. 174.

[185] Ibid., p. 218.

[186] This is also how Tuori theorised the methods for uncovering the sub-surface structures of law in ibid., p. 194.

[187] See Andrew Bennett, *The Author* (Routledge 2005), for an excellent overview of the different attention given to this concept.

will use the theory of concepts derived from the philosophical investigations of L. Wittgenstein.

1.3.3.3. The internal structure of concepts

One of the most fundamental beliefs of L. Wittgenstein (in his late works) was that most of the problems of philosophy lie in language, more precisely in the misunderstandings of the logic and use of our language.[188] Indeed, this problem is not unique to the field of philosophy, but arises wherever answers to complex social questions are sought through the "theoretical approach" – the scientific way of finding definitions or systemic explanations of phenomena.[189] When asking questions like "what is language?" or "what is justice?" and expecting to get definite answers, we fail to reflect that these words can be used to define many rather different things depending on the context. The "answers" we receive then only lead us deeper and deeper into confrontation and confusion.[190]

Wittgenstein theorises that often one cannot simply give a definition, but rather must accept that different phenomena are bound into one concept through a connection he calls "family resemblance". The best definition we can give is then based on the similarities of the different objects categorised under it. He uses the famous example of "game" as a concept that easily eludes all attempts at definition. Because of the eloquence with which Wittgenstein makes his point in this matter, it is worth quoting in full an extract from his "Philosophical Investigations":

> 66. *Consider, for example, the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? – Don't say: "There must be something common, or they would not be called 'games'" – but look and see whether there is anything common to all. – For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look! – Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we*

[188] Marie McGinn, *Routledge Philosophy Guidebook to Wittgenstein and the Philosophical Investigations* (Routledge 1997), pp. 12-13, 21-22. See also Ludwig Wittgenstein, *Philosophical Investigations* (4th edn, Wiley-Blackwell 2009), Note 93.

[189] McGinn, *Routledge Philosophy Guidebook to Wittgenstein and the Philosophical Investigations*, pp. 18-21; also Wittgenstein, *Philosophical Investigations*, Note 89. Wittgenstein himself refers to this theoretical approach as a problem in philosophy in general, but he also deals with concrete questions more from the field of psychology and cognitive science about language and the working of the human mind, such as "what is understanding?"

[190] McGinn, *Routledge Philosophy Guidebook to Wittgenstein and the Philosophical Investigations*, p. 17.

pass next to ball-games, much that is common is retained, but much is lost. – Are they all "amusing"? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the elements of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; can see how similarities crop up and disappear.

And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.

67. I can think of no better expression to characterise these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way. – And I shall say: "games" form a family.[191]

For Wittgenstein, a concept is not some kind of fixed or intellectually constructed definition, but a whole group of different phenomena without any clear theoretical limits ("*don't think, but look*!" – he exhorts in note 67 above[192]). A boundary can be drawn (a definition can be provided), if one so chooses, but this is not needed to use the concept in language and it can only grasp a part of a concept.[193] Under the idea of *family resemblance*, similarity is the key for grouping different phenomena together. All things that we mean when we say "game" are similar in some way, not in the sense that everything is similar to everything else, but rather that many different similarities run through the different members of a concept category.

Hence, Wittgenstein's "family" is a web of similarity ties, or a network of meaning of some sort. This network can be imagined as having a central region where members are well connected to others through different features of similarity, and the members that share less common qualities branch out from the centre to form regions of less and less typical forms of "games" with fewer connections to the central region.[194] The less connected nodes in this network could belong to other

[191] Wittgenstein, *Philosophical Investigations*, notes 66-67.

[192] He also rephrases this imperative to "we must do away with all explanation and description alone must take its place" in note 109.

[193] Ibid., notes 68-71.

[194] Even though Wittgenstein himself never went as far as to suggest that there are any "more central" or "less central" meanings, and some believe that this is specifically why Wittgenstein is not directly compatible with the prototype theory, where this is one of the key premises. See Jaap Van Brakel and

networks as well, for example some examples of "games" may fit even better into the network of the concept of "exercise" or "dance". At the same time, different concepts are often part of each other, with some regions overlapping and others not. Moreover, the concept behind a word is described through other concepts which have their own networks, and so on.[195]

As for the question of how we form such concepts, Wittgenstein concludes that we do so through "language games"[196] – the use of a word in certain circumstances and the different explanations we are given throughout our lifetimes. To uncover the network of meaning behind a word, one needs to reconstruct the language games that gave rise to it. The formation of concepts, therefore, is always dependent on the outside world and our relationships with others.

Indeed, this understanding of concepts fits well with K. Tuori's theory of law. Not only is Wittgenstein's idea of contextual language games similar to the "sedimentation" which happens from the surface layer of law into the sub-surface layers, but his description of understanding affirms that it is useless to look for consistency in a concept, perhaps especially in the case of a legal system like EU copyright law. For Wittgenstein, exposing this complexity of meaning is, among other things, a therapeutical exercise.[197] However, what his approach adds to Tuori's proclaimed complexity of legal systems is the idea that even in complexity there is a certain order that permits the different versions of the same concept to be bound together into one family.

Thus, when it comes to the author in EU copyright law, to describe (unmask) the complexity of the concept, one needs to look at the legal "language games" – i.e., the instances where "author" is formulated, defined, explained and analysed by the members of the legal culture. This must be done not only by examining current legal practices (legislation, doctrine, decisions of courts), but also by considering the concept's historical development and the language games (or sediments) which moulded it in the past and formed legal sediments which give shape to the surface layer of the current EU copyright law. Such an analysis, carried out below, will show that, rather than a single concept of author, there can be many different ones that are similar in some ways and different in others, and their family is, as predicted, not always very consistent.

Lin Ma, 'Extension of Family Resemblance Concepts as a Necessary Condition of Interpretation across Traditions' (2015) 14 DAO: a Journal of Comparative Philosophy.

[195] Wittgenstein, *Philosophical Investigations*, note 87.

[196] Ibid., note 77: "How did we *learn* the meaning of this word ("good" for instance)? From what sort of examples? In what language games? Then it will be easier for you to see that the word must have a family of meanings."

[197] Ibid., pp. 23-27.

1.4. Outline

To answer the research questions using the methodology outlined in the previous sections, Chapter 2 starts with several observations regarding the place of the author as a legal subject in European copyright law, including in the main international instruments and the EU copyright system in general. Here, the importance of the author subject will be shown, together with some key characteristics of the concept, such as the idea that the author is inherently human. Chapter 3 then continues the research into the composition of the concept of author in EU copyright law. It zooms in on five historical periods (called "shifts") when different elements of this concept were established and likely "sedimented" into the legal culture from which EU copyright law draws its content and legitimacy. Chapter 4 performs a similar analysis of the classical theoretical justifications of copyright law, as well as the research on the functions and nature of the "author" in the European copyright tradition. This exercise in Chapters 1 to 4 provides a review of a variety of different conceptualisations, or versions, that the concept of "author" can take in different circumstances, and analyses how the different conceptualisations affect the legal rules related to them. This also gives a "toolbox" of ways the "author" can be formulated to justify new and old copyright norms and judicial decisions. Chapter 5 then moves to the analysis of some of the most fundamental norms in EU copyright (and, indeed, any other copyright system), namely those related to protectability and reproduction. The analysis in this chapter allows us to see what specific conceptualisations of author the current norms and their interpretations are most likely built upon, and thus to discover the inner logic of the EU copyright system regarding the author, as well as its inconsistencies. Chapter 6 presents case studies of two Creative User communities, namely those of collaborative Wikipedia and the transformative creative environment of Internet meme culture. The main features of the Creative User communities discussed in the case studies are compared with the conceptualisations of author identified in the preceding EU copyright analysis, finding several key challenges that Creative Users as authors present to the EU copyright system, as well as the similarities they share with legal "authors". Finally, Chapter 7 sums up the conceptualisations of author that have been suggested to characterise the main normative structures of the EU copyright system and the challenge these conceptualisations are exposed to through the "Creative User as author" perspective, and concludes by suggesting ideas on how these challenges could be addressed.

Chapter 2: "Author" in the European Copyright System

2.1. General remarks

As stated in Chapter 1, this thesis uses the perspective of author to address the Creative User's challenge to EU copyright law. To this end, it will attempt a reconstruction of the author concept through an analysis of the surface and the sub-surface levels of the EU copyright system. However, before proceeding, the author of this thesis believes that the "authorial perspective" through which the Creative User problem is to be approached needs further justification and explanation.

In one sense, connecting the Creative User to authorship is a methodological choice – something that fills a niche in the research literature and has the potential to shift the normalising discourse of the Creative User as merely "user" but not "author" in the creator hierarchy of copyright law (as explained more in Chapter 1 above). Further, as also explained in the previous chapter, this specific approach is capable of addressing the aforementioned fundamental challenges of digital technology and digital creativity, as well as concerns over justifiability and legitimacy, by examining a concrete legal system, namely the copyright law of the European Union. On the other hand, "authors" are arguably the main subjects of the European copyright tradition, without whose perspective no copyright-related conversation could happen at all. As a result, the author perspective may be regarded as the best choice for a thesis addressing Creative Users.

What follows in this chapter is thus the first inquiry into the sub-surface layer of the European copyright system through an exercise of "tracking" the "author" in the main legal instruments of current valid EU and international copyright law. Closer analysis of the concept will follow in the upcoming chapters, but here only the most basic premise will be examined, namely that the "author" is central to the European copyright system. It is important to note from the start, however, that the idea of authorial "centrality" does not necessarily mean that the interests of authors are considered paramount in all aspects of European copyright law. Rather, it means that the subject of the author receives special treatment in the European copyright

tradition. Without "authors" in the sense of human creators of works, European copyright law would have to be reconsidered.[1]

At the same time, and this is another contribution of this chapter to answering the research question of the thesis, although central, the "author" is treated somewhat differently in the framework of each legal instrument analysed. In other words, in line with the methodology of this thesis, even if just scratching the surface of the concept in EU copyright law, this chapter shows that what can be theorised as a single concept of author has the characteristics of a *family resemblance* concept, i.e., it connects several ways of understanding "author" that are similar to, but not necessarily consistent with each other in the way that might be expected following the "unity of law" principle.

2.2. International Treaties

2.2.1. Berne Convention

2.2.1.1. Background

The Berne Convention[2] is a natural place to start this search for the author, as it is still considered one of the most important sources of copyright law in the world. Adopted (in its first version) in 1886, the Berne Convention is also the oldest international copyright law instrument. With its current 179 members[3] the Convention sets a global standard for copyright protection that can be said not only to place obligations on its member states, but also to form part of European copyright legal culture, that is, part of the sub-surface layers of EU copyright law in the sense of K. Tuori's theory of law presented in Chapter 1. This means that the general principles and patterns of addressing the author found in this international document are likely to be implicitly presumed in such legal practices as adjudication, law making, or even the development of doctrinal statements.[4]

[1] See Jane Ginsburg, 'The Concept of Authorship in Comparative Copyright Law, p. 1064.

[2] Berne Convention for the Protection of Literary and Artistic Works, 1886 (Berne Convention). The analysis from here on refers to the last version of this convention as adopted by the Paris Act of July 24, 1971, if not otherwise indicated in the text.

[3] See https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15, (visited September 10 2020).

[4] See Section 1.3.2 of this thesis.

The initiator and originator of the Berne Convention[5] was the International Literary and Artistic Association (ALAI), to this day the largest and most well-known organisation of creators worldwide.[6] This creates an expectation that the author as creator will have a special position in the legal norms established by the Convention. The name of the Convention – the "Berne Convention for the Protection of Literary and Artistic Works" – can seem to contradict the importance of "authors", referring as it does to *works* instead. However, already the first paragraphs of the preamble ascertain that the protection is provided for "*authors* in their literary and artistic works"[7] (emphasis added).

It should be clarified here that even with this assurance, the central purpose of the Berne Convention is to make sure that authors receive rights to their works outside their country of origin;[8] it places no obligation on member states to protect national authors. On the other hand, because states are unlikely to choose a lower degree of protection for their own authors, and because other international instruments later incorporated the Berne Convention's rules, it effectively establishes a universal minimum level of copyright protection for *all* authors, even if not providing explicitly what "author" means.[9]

In fact, the Berne Convention mentions no other subject of protection, with the exception of "successors in title" in Article 2(6).[10] Here too, the choice of defining

[5] For a detailed description of this process see Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, vol I (Oxford University Press 2006), pp. 49-58.

[6] See at www.alai.org and also Gunnar W. G. Karnell, 'ALAI – Initiator and Berne Copyright Convention Watch-dog – Viewed from a Personal and Slightly Nordic Perspective' [2016] Available at: http://www.alai.org/en/assets/files/article-g-karnell.pdf.

[7] The preamble of the Berne Convention, Paris Act of 1971; also Art. 1.

[8] Christina Angelopoulos and others, *Concise European Copyright Law* (2nd edn, Wolters Kluwer 2016), p. 11.

[9] According to the WIPO Guide to the Berne Convention, this is because the notion of author was too varied in the different contracting states to give one definition. In: WIPO, *Guide to the Berne Convention for Protection of Literary and Artistic works (Paris Act, 1971)* (WIPO 1978), p. 11; Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 358-363. However, other commentators have concluded that, on the contrary, this might be because the understanding of "author" in the contracting states was very similar and there was no need for a separate provision: Sam Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship' (1992) 16 Columbia - VLA Journal of Law & the Arts, p. 8.

[10] In fact, the very first edition of the Berne Convention in 1886, also mentioned "publishers" as the ones to whom the protection of the Convention applied when the work of an author from outside the Union was published within the Union for the first time. This reference was, however, deleted in the first Revision Conference (Paris) in 1896 and from then on, it was the authors themselves who acquired the rights upon publication even if they were not nationals of a Union state. See: Ricketson and

what is now usually referred to as "rightholders" demonstrates an "authorial" perspective: it is in relation to an author that a rightholder is a "successor". Moreover, even this secondary position for economic exploiters was a contested issue in the Berne Convention. Originally present, the mention of "successors in title" was deleted from the text of the Convention during the Berlin Revision in 1908 as superfluous and obvious.[11] In 1948, the revision of Brussels returned to the original formulation because of the declared need to prevent a possible interpretation that the rights are exclusively personal to the author.[12] However, as the WIPO Guidelines to the Berne Convention are quick to ascertain, the successors in title still stand "in the shoes of the author".[13] Thus, the author, at least ideologically, remains the "original subject" of protection provided by the Convention.

2.2.1.2. Requirements of protection

Turning now to review the legal norms enshrined in the Berne Convention, we find that, consistent with its purpose to protect foreign authors, the Convention bases the applicability of its norms upon the legal status of the author in question. Article 3 provides the so-called "points of attachment" for application of the Convention, and the first point, in Art. 3(1)(a), is the nationality of the author, followed by Art. 3(2), referring to authors who have habitual residence in one of the Union states. Only when none of these conditions are met, i.e., when the author is neither a habitual resident nor a national, does the criterion of the place of first publication of the work become applicable (Art. 3(1)(b)). As a result, the Convention primarily protects works of authors who are nationals of one of the Berne Union states, whether published or unpublished and regardless of place of publication.

The third option – that of protecting authors who first published their works in a country of the Union – is available only where the other two criteria do not apply. In the first draft of the Convention, the possibility to protect non-nationals was provided through the protection of national publishers who published the foreign work.[14] However, including "publishers" as subjects of protection was soon deemed inconsistent with the fundamental principles of the Berne Convention, and they

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Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 88.

[11] See the interpretation of the latest version of Article 2(6) in the WIPO, *Guide to the Berne Convention for Protection of Literary and Artistic works (Paris Act, 1971)*, p. 21.

[12] See the interpretation of the latest version of Article 2(6) in ibid., p. 21.

[13] Ibid., p. 21.

[14] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 247-248.

were stricken from the text officially keeping the third point of attachment, because the Berne Union should be open to *all authors*.[15]

Another important point brought to the international arena by the Berne Convention was the requirement that protection (and exercise of rights) must not be conditional upon any formalities and may extend to any literary or artistic work.[16] The "no formalities" rule in the original Berne Convention was presumably meant to ensure that the members of the Berne Union would not use failure to satisfy any formal requirement as a pretext to deny foreign authors protection of their rights. It ended up, however, establishing a global principle that copyright protection is automatic if a certain creator (nationality requirement) has created a "literary" or "artistic" work. Moreover, because the "literary and artistic works" are formulated as a non-exhaustive list, in Art. 2 of the Berne Convention,[17] the Berne system can be said to lean towards protection based on a work's "originality". [18]

Still, from the perspective of Berne, the requirement of originality is mainly implied and can take different forms in the different member states. The WIPO Guide to the Berne Convention (which has no legal power and presents only recommended interpretation) provides that in the context of the Convention, originality means that the work has to possess creativity and reflect the personality of its maker.[19] This, however, is only one interpretation of the standard and does not hold true for Convention parties from the common law tradition who take the "sweat of the brow"

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[15] Ibid., p. 88.

[16] Art. 2 which provides only an exemplary list of what can constitute a "literary and artistic work", and explicit prohibition in Art. 5(2) of the Berne Convention. For more analysis of what formalities are prohibited and what requirements would not amount to formalities (for instance the requirement of authors' citizenship or domicile, the requirement to pay court fees in order to enforce the rights, etc.) see ibid., pp. 323-329. The introduction of the provision of no formalities for protection in the Berne Convention and then in the later international documents is consistent with the person-oriented justifications of copyright protection which became increasingly popular in Europe in the 19th century. See: Van Gompel, *Formalities in Copyright Law. An Analysis of Their History, Rationales and Possible Future*, pp. 87-90.

[17] This is why common law countries, which traditionally relied on formalities or closed categories of protected works, had troubles with joining the Berne Convention, with the US joining only in 1989 and the UK ignoring the concerns of other member states. Moreover, some provisions in the US and UK are still considered to be in conflict with the Berne Convention: Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 326.

[18] WIPO, *Guide to the Berne Convention for Protection of Literary and Artistic works (Paris Act, 1971)*, p. 17; Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship', p.10. The text of the Convention refers to "original" works in several other of its articles, namely arts. 2(3), 8, 11, 14bis and others.

[19] WIPO, *Guide to the Berne Convention for Protection of Literary and Artistic works (Paris Act, 1971)*, p. 17.

approach to the originality of copyrighted works.[20] The latter approach bases protection on "labour, skill and judgement",[21] and even something that is not creative may be considered original under such a system.[22] The question whether the common law originality standard is in compliance with the Berne Convention can be disputed in principle,[23] but the fact that there is no direct definition of "originality" in the Convention itself means that any standard is possible.[24]

And yet the course towards attaching protection requirements primarily to the author is already set in the Berne Convention. Namely, absent other formalities, whichever way originality is formulated, it centres on the process of creation (production) and certain features that the creator allegedly possesses and exercises (skill, effort, creativity). As will be shown later, this author-centred approach to protectability remains the backbone of the EU copyright system as well.[25]

2.2.1.3. The rights awarded to authors

Another clear sign of the author-centeredness of the Berne Convention is, of course, its commitment to moral rights. Article 6bis, added after the Diplomatic Conference of 1928 in Rome, introduces two: the right to paternity (right to be identified as author) and the right of integrity (right to object to certain treatment of work).

The late inclusion of moral rights in the Convention can be explained by the fact that, while their main principles were already present in the countries of the Union towards the end of the 19th century, they were not yet consolidated into a single

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[20] See Christian Handig, 'The 'sweat of the brow' is not enough! - more than a blueprint of the European copyright term 'work'' (2013) 35 European Intellectual Property Review, F. Elizabeth Judge and Daniel Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law' 27 Cardozo Arts & Enterntainment.

[21] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford Univerity Press Inc. 2014), p. 93.

[22] In the UK, prior to harmonisation, one of the famous cases was Walter and Another (on behalf of Themselves and All other Proprietors of the Business of Publishing and Carrying on the Times Newspaper) Appellants; v Lane Respondent, [1900] A.C. 539, where a verbatim reproduction in writing of an oral public speech was recognised as original and protectable by copyright.

[23] Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship', p. 10.

[24] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 404-405. Another question is whether the common law approach which provides protection for a limited categories of works is actually compliant with the Berne Convention, see Eleonora Rosati, 'Closed subject-matter systems are no longer compatible with EU copyright' (2014) 14 GRUR Int; or Bently and Sherman, *Intellectual Property Law*, pp. 60-63. Even though there are no certain answers to this question either. Even despite the clear non-exhaustive nature of the list of subject matter in Art. 2, the UK, for instance, always considered itself in compliance with the Berne Convention.

[25] See section 5.2.2 of the thesis.

category.[26] There seemed to be an agreement, however, that the core ideas of moral rights were already implied in the Berne Convention at the time of its drafting and that expressly stating them was a natural next step.[27] As a result, in 1928, moral rights finally received a full article, which remains the basis of protection of non-pecuniary interests of authors around the world.

Beyond this minimum standard, many Berne member states provide additional moral rights in their national copyright systems.[28] All such rights are traditionally seen as protecting the special personal relationship the author has with her work, as well as the author's personality as expressed in the work.[29] As a general rule, they are also considered personal to the human author and non-transferable.[30] That the rights were included in the Berne Convention specifically to ensure protection for these personal aspects of authorship has been confirmed by other researchers.[31]

When it comes to other exclusive rights provided by the Convention (rights of reproduction, translation, public performance, broadcasting, communication to the public, adaptation), even though they are clearly of a less personal nature, the Convention names the *author* as the subject to whom the rights are given. As written, there is no expectation that the economic rights will remain with the author as is the case with the moral rights. However, while the "successors in title" are also mentioned as subjects able to hold rights, it is the "author" who is the first owner of the rights and who, according to the Berne Convention, is granted them automatically and without any formalities. For the other subjects, additional transfer arrangements are required.

In relation to exclusive rights, the question of duration of protection can be briefly touched upon. The general standard for protection of economic rights of authors that

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[26] See Cyrill P. Rigamonti, 'The Conceptual Transformation of Moral rights' (2007) 55 The American Journal of Comparative Law 67 on the beginnings of the moral rights, and Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I,* p. 590.

[27] See the memorandum of the Italian delegation in WIPO, *1886-1986 Berne Convention Centenary* (1986) Pp. 162-164. The other member states, with the exception of the UK, sided enthusiastically with the Italian approach. Ibid., pp. 165, 169-172.

[28] See Marjut Salokannel, Alain Strowel and Estelle Derclaye, 'Study contract concerning moral rights in the context of the exploitation of works through digital technology' Commissioned by European Commission's Internal Markets Directorate General, 2000.

[29] Gillian Davies and Kevin Garnett, *Moral Rights* (Thomson Reuters 2010), pp. 3-5.

[30] Rajan, *Moral Rights. Principles, Practice and New Technology*, p. 16.

[31] Elizabeth Adeney, *The Moral Rights of Authors and Performers. An International and Comparative Analysis* (Oxford University Press 2006), pp. 106-109. The author states that the inclusion of the moral rights in the Berne Convention was specifically for the purpose of counteracting the perceived threat of economic materialism. See also Davies and Garnett, *Moral Rights*, pp. 41-47, describing the reasons for the proposals to include moral rights in the Rome revision and the negotiations which followed.

the Berne Convention sets forth is 50 years after the author's death.[32] Even though calculating the term of protection on the basis of the life of the author was hardly a novel concept at the time of the Convention's adoption, different countries had different rules.[33] The Convention thus not only harmonised the minimum length of the protection itself, but also firmly tied it to the human author. This is significant for this inquiry as another indication of commitment to protecting human authors. According to Art. 6bis (2), the moral rights of authors, which, as previously noted, cement the special connection between author and work, are to be protected for "at least" as long as the economic rights, thereby allowing the possibility of eternal protection, as is, for instance, the case in France.[34] Moreover, the use of the wording "at least" indicates that perpetual protection is, in fact, a desirable state, demonstrating yet again the strong commitment to protect authors personally.

2.2.1.4. Berne Convention and authors

The key elements indicating the centrality of the author in the Berne Convention are outlined above. In the literature it has been suggested that in this respect the Convention has taken its basis in the philosophy of human rights and protects the rights of authors.[35] Of course, the Convention contains other elements, such as exceptions from the main rules for certain types of works[36] and from the exclusive rights of authors.[37] Still, as explained earlier, the author's central position, especially in the Berne Convention, lies in the fact that the author is presented as the main subject, while other parties seem only to be given as much space as is necessary to fulfil a certain purpose.

The drafters of the Convention not only managed to prepare an international document reflecting the perspective of the author, but also to mainstream a continental understanding of the issue. According to Ricketson, the question of how this was accomplished and negotiated, having in mind the different approach of the

[32] Art. 7 of the Berne Convention.

[33] See Sam Ricketson, 'The Birth of the Berne Union' (1986) 11 Columbia - VLA Journal of Law & the Arts 9, p. 11.

[34] Maria Mercedes Frabboni, 'France' in Gillian Davies and Kevin Garnett (eds), *Moral Rights* (2010), p. 390.

[35] Gunnar W. G. Karnell, 'The Berne Convention Between Authors' Rights and Copyright Economics - An International Dilemma' (1995) 193 International Review of Intellectual Property and Competition Law, p. 202.

[36] For example, attachment of protection to the *maker* of a cinematographic work in Art. 4(a), or permission for a shorter term of protection for photographic and cinematographic works and calculation of their protection from the date of the making of the work (or its communication to the public for cinematographic works) in Arts. 7(2) and 7(4).

[37] See Arts. 10 and 10(bis) of the Convention.

common law countries, remains for legal historians to solve.[38] Even though the Berne Convention is arguably the most author-centred of all major international copyright documents, the way the author is positioned here continues to shine through in the later international initiatives discussed below.

This is, in part, also due to the fact that the Berne Convention was the first in the field, and (to this day) so widely accepted and ratified. It left the international and regional systems which followed it little choice but to use the Convention as a template. Article 20 of the Convention provides that future agreements between signatories are permitted only if they give stronger protection to *authors* and do not adopt rules which are contrary to the provisions of Berne. This sets the tone for any future copyright initiatives.[39]

2.2.2. The TRIPS Agreement

2.2.2.1. Background

The TRIPS Agreement,[40] which came into existence in 1994 under the auspices of the World Trade Organisation (WTO), is the next major international copyright document. It changed the international copyright system in several respects.[41] Most notably, it introduced an effective enforcement mechanism through the WTO dispute resolution system, with real sanctions for non-compliance. Furthermore, as the name indicates, it is an agreement on "*Trade-Related* Aspects of Intellectual Property Law", setting an expectation that the rules it contains have a direct connection to trade and must be interpreted in this light.

Thus, TRIPS is a convention under a different international regime, namely that of international trade. This inevitably means that it its purpose differs from that of the Berne system and WIPO, and can be broadly defined as fostering creativity and innovation for the benefit of all.[42] This is significant because the differences in the

[38] Sam Ricketson, 'The public international law of copyright and related rights' in Isabella Alexander and Thomas H. Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016), p. 307.

[39] Ruth L. Okediji, 'Copyright in TRIPS and beyond: the WIPO Internet Treaties' in Carlos M. Correa (ed), *Research Handbook on the Protection of Intellectual Property under WTO Rules* (Edward Elgar 2010), p. 354-355.

[40] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (TRIPS Agreement).

[41] For a review of these changes see, e.g., Graeme Dinwoodie, 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?' (2007) 57 The Case Western Reserve Law Review, pp. 751-766.

[42] See the mission of WIPO at https://www.wipo.int/about-wipo/en/.

goals of the conventions are the determining factor for the differences in their structure.[43] It has been suggested that the differences in TRIPS go so far as to amount to a reconceptualisation of the nature of intellectual property itself.[44] After all, the Vienna Convention on the Law of Treaties specifically provides that treaties are to be interpreted in the light of their object and purpose.[45] Hence, even the rules that are simply incorporated into the TRIPS Agreement from the Berne Convention, or rules whose formulation might seem similar to those of other international instruments, have to be interpreted in the context of the aims of the WTO and TRIPS, which are reflected in the treaty's preamble as "reduction of distortions and impediments to international trade" and "effective and adequate protection of intellectual property rights".[46] Furthermore, unlike the Berne Convention, TRIPS does not solely deal with copyright but includes other types of intellectual property. Having in mind that the other branches of intellectual property do not necessarily pay as much attention to the person behind the object of property,[47] copyright provisions are likely to be formulated differently. With the TRIPS Agreement, the norms of Berne were introduced into the WTO framework, giving European copyright law one more perspective atop the already established presumptions.

At the same time, as might be expected, the general principle that the author is central to copyright protection is retained. In fact, Art. 9 of the TRIPS Agreement clearly obliges WTO members to comply with the Berne Convention as regards its minimum standards of protection, with the exception of moral rights. In this way, even states which are not party to the Berne Convention effectively become members of the Berne system. To be precise, the author remains central and necessary for copyright to exist even in the context of TRIPS, but the role of other subjects in relation to the author, especially those responsible for exploitation of

[43] Jane Ginsburg and Eduard Treppoz, *International Copyright Law. U.S. and E.U. Perspectives* (Edward Elgar 2015), p. 21; Karnell, 'The Berne Convention Between Authors' Rights and Copyright Economics - An International Dilemma', pp. 207-208.

[44] Rochelle Cooper Dreyfuss, 'In Prase of an Incentive-Based Theory of Intellectual Property Proteciton' in Rochelle Cooper Dreyfuss and Elizabeth Siew-Kuan Ng (eds), *Framing Intellectual Property Law in the 21st Century Integrating Incentives, Trade, Development, Culture, and Human Rights* (Cambridge University Press 2018), p. 2. Where the author talks about a reconceptualisation from private rights as an incentive to produce public goods to intellectual property as a commodity.

[45] Art. 31(1) of Vienna Convention on the Law of Treaties, 1969, United Nations.

[46] Similar principles can be found in Art. 7, which outlines the objective of the TRIPS agreement thus: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[47] There is generally little regard for the persona of the trademark owner or patent owner, for instance, and even if inventors and creators of designs have a slightly more pronounced role, it would not be possible to claim that they are as important to patent or design law as authors are to copyright.

works, changes slightly. Some of the features of the concept of author which were secondary in the Berne Convention become more pronounced at the level of international copyright law.

2.2.2.2. The traces of the author as the central subject

It has been suggested that TRIPS, both ideologically and practically, marked a shift away from the dominance of authorial interests and towards more trade-related and economic considerations.[48] Nevertheless, even in the context of the WTO system, the author still seems to be at the core of copyright protection. For one thing, as has already been noted, it is impossible (nor was it attempted) to significantly alter the Berne system which was incorporated into the TRIPS Agreement. The Berne Convention, being the first in the international arena, is considered the reference point for describing the norms introduced by TRIPS as well. Accordingly, in the legal literature, the various TRIPS provisions (and the positions taken during the negotiation of the TRIPS Agreement) are often referred to as "Berne-plus" or "Berne-minus" depending on whether they afford greater or less protection than required by the Berne Convention.[49] In other words, the Berne Convention is the benchmark for international copyright protection, and the changes introduced by TRIPS do not, for the most part, challenge its ideological position.

When it comes to moral rights, for instance, the picture is more complex than simply saying that TRIPS excludes them. In fact, Art. 9.1. of TRIPS, which excludes moral rights in its second sentence, in its first sentence provides that member states shall *comply* with all of Berne's Articles from 1 to 21. A conclusion can be made that the requirement of compliance does not exclude Article 6bis of the Berne Convention; rather, TRIPS members have *no rights or obligations* stemming from that article. This could be interpreted as imposing at least a moral duty of compliance with the moral rights provisions in the Berne Convention, while leaving them outside the scope of the TRIPS enforcement mechanism.[50] Moreover, not all of Berne's moral rights are, in fact, contained in Art. 6bis. For instance, the right of divulgation and some attribution rights can be inferred from Articles 10 and 10bis of the Berne

[48] See, e.g., Karnell, 'The Berne Convention Between Authors' Rights and Copyright Economics - An International Dilemma', pp. 203-210. Or Jane C. Ginsburg, 'The author's place in copyright after TRIPs and the WIPO treaties' (2008) 39 International Review of Intellectual Property and Competition Law, pp. 1-4.

[49] Even though, generally, Art. 20 of the Berne Convention does not allow future agreements providing lower standards of copyright protection, there are some aspects of TRIPS which are seen as Berne-minus. See Bryan Garner, *Garner's dictionary of legal usage* (3rd. edn, Oxford University Press 2011), p. 108.

[50] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 617.

Convention and so are not excluded by the TRIPS Agreement.[51] Thus, it could be argued that despite the official stance of TRIPS showing a reduced commitment to protecting authors' interests, no WTO member can avoid providing at least minimal protection for authors' moral rights. At the same time, because TRIPS does not include them among enforceable rights, their presence is mostly ideological.

With respect to economic rights, the TRIPS Agreement formally follows the model of the Berne Convention, even where new rights or the extension of rights enshrined in the Berne Convention are concerned. For example, consider the new "rental right" in Art. 11. Here, the "authors" and "their successors in title" are explicitly named as the subjects to whom the right is to be awarded. This formulation is directly based on the way the exclusive rights are constructed in the Berne Convention. Another example is TRIPS' articulation of computer programs and compilations of data as protectable subject matter.[52] Article 10 provides that *computer programs* are to be protected "as literary works under the Berne Convention". This express reference to the Berne Convention can be interpreted as meaning that all other rights and principles for the protection of literary and artistic works in the Convention are to be applied to this new subject matter as well. Indeed, the inclusion of the provision in the first place can be seen as merely a clarification of Art. 2 of Berne.[53] In the case of compilations of data, TRIPS does not refer directly to the Berne Convention but introduces a higher level of protection (protecting all compilations) than the protection for collections of literary and artistic works provided in Berne.[54] On the other hand, protection of such compilations still requires that they be an "intellectual creation", which is taken, again, from Art. 2.5. of the Berne Convention.[55] This is especially notable in light of the fact that the protection of data compilations was an issue attracting considerable attention at the time from the database industry, which advocated introducing *sui generis* protection detached from any requirement of creativity (and thus from the Berne understanding of "author").[56]

Leaving aside the obvious convenience of referring to another, well-established, international document, one has to recognise in the decision to follow the clearly

[51] Ibid.

[52] Even though this introduction was not without controversy, having in mind that the TRIPS enforcement mechanism made differences regarding this matter among the contracting states impossible. See ibid, p. 516.

[53] Angelopoulos and others, *Concise European Copyright Law*, p. 226.

[54] Art. 2.5. of the Berne Convention.

[55] Even though the Berne Convention asks for the collection to be "intellectual creation" by reason of selection *and* arrangement, and the TRIPS only requires "intellectual creation" with respect to selection *or* arrangement.

[56] See Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement* (Oxford 2007), pp. 126-127.

author-centred structure of the Berne Convention a striving for continuity and legitimacy. As with the Berne Convention, the legitimacy of many of the new norms expanding copyright within the WTO framework is grounded, though indirectly, in the protection of creativity, intellectual creation and authorship. Of course, the connection to the Berne Convention is far from the only source of legitimacy for the copyright provisions of TRIPS. The Agreement is, after all, deeply rooted in a commitment to effectively and adequately protect intellectual property and to make sure that it does not become a barrier to legitimate trade.[57] Trade interests and the needs of member states' economies for effective protection are obviously driving forces, as is a commitment to balance those interests against other public needs and against the needs of developing countries.[58] Effective protection of authors and intellectual creations is an additional justification that was found prudent to use in extending the scope of copyright protection.

2.2.2.3. The differences introduced by TRIPS to the international copyright system

On the other hand, TRIPS has introduced norms and principles which are new in the framework of international copyright law. For instance, in what can be seen as a clearer step away from the personal protection of authors, TRIPS excludes moral rights from its scope.[59] The US, opposing the inclusion of moral rights, has argued that providing for personal incentives of authors is incompatible with an agreement meant to encourage and facilitate trade.[60] In other words, as already noted, the purpose of TRIPS is not effective protection of authors, but effective protection of intellectual property.[61]

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[57] The preamble of the TRIPS Agreement.

[58] See the formulations in Arts. 7 and 8, which can also be seen as general statements legitimising the Convention: Johan Rochel, 'Intellectual property and its foundations: Using Art. 7 and 8 to address the legitimacy of the TRIPS' (2020) 23 The Journal of World Intellectual Property 21, p. 26; as well as in the preamble of TRIPS, e.g., referring to "special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations […]".

[59] TRIPS Agreement, Art. 9(1).

[60] Even though it is theorised that the true reason was its fear of making the obligation to give a certain standard of moral rights internationally enforceable: Elizabeth Schere, 'Where is the Morality? Moral Rights in International Intellectual Property and Trade Law' (2018) 41 Fordham International Law Journal, pp. 778-779. Even though the U.S. was even recognised as generally compliant with the Berne requirements in Art. 6bis: Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 613-614.

[61] For a more detailed description of what the principle of "adequate and effective protection" entails see Hans Ullrich, 'TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy' (1995) 4 Pacific Rim Law and Policy Journal, pp. 178-183.

However, the biggest challenge to Berne's treatment of authors is arguably the new TRIPS three-step-test.[62] In general, when it comes to international agreements on intellectual property, the three-step-test is a tool which, in the "all rights reserved" framework, determines the degree of flexibility to balance different interests. Under the Berne Convention this offered contracting parties a way to introduce certain limitations and exceptions to the right of reproduction in order to satisfy various public interests. In TRIPS, this test is, in a way, broader as it applies to all exclusive rights, not just the reproduction right[63] and has been called a Berne-minus provision.[64] More importantly, however, although the wording of Art. 13 of TRIPS is similar to that of Art. 9(2) of the Berne Convention, it does not mention authors, but uses the term "rights holder" to refer to the group whose interests are to be balanced with those of beneficiaries of limitations or exceptions.

This change of subject is perhaps unsurprising: the fact that copyright law has become a matter of trade policy and is now governed by TRIPS is a clear sign of the cultural industries' increasing significance and inclusion.[65] However, the new formulation attaches the extent of exceptions and limitations to the interests of those exploiting creative works, potentially rendering certain exceptions that would have been permitted under Berne, such as those which are uncompensated, irreconcilable with the TRIPS Agreement.[66] Since the economic interests of the rightholder are typically stronger than the author's, the scope of some exceptions might need to be reassessed.[67] The question of whether the moral interests of authors should be taken into account when applying the three-step test in TRIPS has also been identified as a problematic issue.[68] Given the context in which the provision must be interpreted, it is unlikely to be answered in the affirmative.

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[62] Art. 13 of the TRIPS Agreement.

[63] Angelopoulos and others, *Concise European Copyright Law*, p. 231.

[64] Correa, *Trade Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement*, p. 136.

[65] Rasmus Fleischer, 'Protecting the musicians and/or the record industry? On the history of 'neighbouring rights' and the role of Fascist Italy' (2015) 5 Queen Mary Journal of Intellectual Property 327. Christophe Geiger, 'From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test' (2007) 29 European Intellectual Property Review, p. 2, also agrees that this inclusion of "rightholder" signifies a move from the protection of the author to the protection of exploiter.

[66] Bernt Hugenholtz, 'Limits, limitations and exceptions to copyright under the TRIPS Agreement' in Carlos M. Correa (ed), *Research Handbook on the Protection of Intellectual Property Under WTO Rules* (Edward Elgar 2010), p. 338.

[67] Jonathan Griffiths, 'The "Three-Step Test" in European Copyright Law - Problems and Solutions' (2009) 4 Intellectual Property Quarterly 428, p. 17.

[68] Ibid.

At the same time, some argue that the use of the term "rights holder" in the TRIPS three-step test might simply be a matter of legal context. After all, the Berne Convention (and later the WCT) was solely concerned with copyright law, specifically author's rights. In TRIPS, on the other hand, the section on "copyright" also includes "related rights", i.e. the rights which are given to performers, producers of phonograms and broadcasting organisations.[69] As a result, it has been suggested that Art. 13 could also apply to neighbouring rights,[70] and that the interests of the "rights holders" which have to be balanced against in the case of an exception could also simply mean the interests of authors *and* the owners of neighbouring rights. This interpretation is not widely recognised, however, and it is generally agreed that the limitations and exceptions to the neighbouring rights enshrined in TRIPS are solely dealt with in Art. 14.6, which refers to the Rome Convention.[71] In any case, regardless of whether the "rights holders" in Art. 13 originally described authors as well as holders of neighbouring rights, interpreters of this provision, especially in the context of the international trade system, are likely to give greatest weight to the economic interests of rights exploiters.

Looking at this situation from the perspective of the concept of "author", it can be argued that in the TRIPS sense of exploitation of works the author is still the first owner of exclusive rights, but not a subject who can dictate their scope. Such an author, then, is an originator, but one unlikely to engage in the economic interactions of distribution. In other words, the Agreement sets out specifically to address national trade interests, and in its treatment of tariffs and taxes and mutual protection of the interests of member states, the author might merely have the role of a "resource", something to be encouraged and sustained, but also managed for maximum economic efficiency.[72]

[69] Art. 14 TRIPS Agreement.

[70] Correa, *Trade Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement*, p. 167.

[71] This interpretation is given in, e.g., Daniel Gervais, *The TRIPS Agreement. Drafting History and Analysis* (Sweet & Maxwell 2012), pp. 308-309; Angelopoulos and others, *Concise European Copyright Law*, p. 236; Correa, *Trade Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement*, p. 167.

[72] See Karnell, 'The Berne Convention Between Authors' Rights and Copyright Economics - An International Dilemma', pp. 193-199, for a discussion about the effects of "copyright economics" on the copyright law system.

2.2.3. WIPO Copyright Treaty (WCT)

2.2.3.1. Background

The WIPO Copyright Treaty (WCT)[73] is the third of the major international copyright treaties and another special agreement under the Berne Convention. The Treaty's close association with Berne is explicitly presented in the text of the Treaty itself. In fact, the whole of Article 1 is devoted to explaining the WCT's relationship with the Berne Convention (and other international treaties); and, in addition to identifying the WCT as a special agreement under Art. 20 of the Berne Convention, Art. 1(4) requires all contracting parties to comply with the Berne Convention as well. Thus, the main purpose of this special agreement, as provided in the preamble, is not to change the Berne system but to adapt copyright to the digital environment and the challenges brought by technological, economic and social developments.[74] To this end, the Convention introduces some new exclusive rights, gives guidance on technical protection measures, provides new exceptions and limitations, and so forth.

The aspiration to address technological challenges might lead to the expectation that new conceptual solutions would be incorporated into the international copyright system. For instance, where the preamble of the Berne Convention mainly proclaimed protection for authors, the WCT also explicitly lays out the need to balance interests and centres on incentive-based justifications for copyright.[75] This overt commitment to balance marked a paradigm change in the international copyright system at the time, when the common presumption was that balance was a matter for domestic law.[76] At the same time, however, the WCT, even more than the TRIPS Agreement, follows the model of protection, or in the terms of this thesis, concept of author, provided in the Berne Convention. [77]

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[73] WIPO Copyright Treaty, Dec. 20, 1996 (WCT).

[74] See especially statements 2 and 3 in the preamble of the WCT.

[75] Preamble recitals 3 and 4 of the WCT. It should be noted, though, that when referring to the balance of interests, the preamble provides that even though not explicitly expressed, the balance of interests, in fact, exists in the Berne Convention and WCT is only there to "maintain" it. See: Mihaly Ficsor, *The Law of Copyright and the Internet. The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford University Press 2002), pp. 416-417.

[76] Dinwoodie, 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?', pp. 754-758.

[77]Okediji, 'Copyright in TRIPS and beyond: the WIPO Internet Treaties', pp. 357-358. In general, this is an unsurprising conclusion also because art. 1 WCT clearly provides that WCT is only an extension of the Berne Convention and all WCT members must comply with the substantial provisions of the Berne Convention. This, then, also means that it cannot derive from the standards of protection enshrined therein, which leaves little space to change the fundamental justifications for this protection as well.

2.2.3.2. WCT and the centrality of the author

The proclaimed connection between the Berne Convention and the WCT is not merely declarative. Even in its wording, WCT brings back the "author" as the main subject of protection. Already in the preamble, the need to maintain and develop the protection of the rights of *authors* is put forward as one of the main aims of the treaty.[78]

Further on in the text, the WCT in fact dispenses with the phrase "authors and their successors in title" when identifying the subject of the newly introduced rights, which include the right of first publication, a rental right for certain types of creative works and communication to the public.[79] Instead, the WCT simply uses "author" and makes no explicit reference to any other subjects. As explained earlier, in the Berne Convention the successors in title were included to avoid any misunderstanding about exclusive rights being transferable to other subjects. Clearly, by the time the WCT arrived, this clarification was unnecessary and there was no risk of confusion. At the same time, a conscious "purification" and simplification of the text to mention only "authors" also reflects an ideological stance, aimed at remaining faithful to the tradition of author-centeredness in international copyright law. Consistent with this approach, even the new rights the WCT introduces for authors, especially the new communication to the public, have been said to already show a tendency toward a broad interpretation of rights.[80]

When it comes to concrete legal norms, Art. 3 of the WCT provides that the basis of protection must be determined using the system of the Berne Convention. This, among other things, means that provisions tying the copyright to the "author", such as the establishment of the author's country of residence or the fact that no formalities can be demanded with the exception of the originality requirement, etc., are at the heart of this international document as well.[81] In addition, even though the TRIPS Agreement has had some effect on the WCT,[82] the latter's version of the three-step test does not share its emphasis on the "rights holder" when assessing the interests to be balanced, but brings back the "legitimate interests" of the *author*. Here as well, the WCT, seemingly on purpose, defies the reality that copyright is most often transferred to third parties (rightholders), and that the interests of these

[78] Paragraph 1 of the preamble of the WCT.

[79] Arts. 6, 7, 8 WCT. The "authors and successors in title" was used as a subject of the rental right provided in Art. 11 of the TRIPS Agreement.

[80] Angelopoulos and others, *Concise European Copyright Law*, p. 116.

[81] Ibid., p. 102.

[82] Ficsor, *The Law of Copyright and the Internet. The 1996 WIPO Treaties, their Interpretation and Implementation*, p. 419.

subjects can diverge.[83] Whereas TRIPS, as mentioned, provides a more "market reality"-oriented approach and emphasises the exploitation of works, the WCT goes back to where protection is seen as an incentive for literary an artistic creation.[84]

For instance, under the WCT it may be relevant to consider not only the material, but also the moral interests of authors when assessing the acceptability of a limitation or exception.[85] This is significant because, in accordance with the declared purpose of the WCT in its preamble, the Agreed Statement on Article 10 of the WCT explains that the article's purpose is to allow the contracting parties to extend the exceptions and limitations acceptable under the Berne Convention into the digital networked environment.[86] Having in mind that the TRIPS Agreement was silent in this regard and was primarily intended to address the aspects of copyright relating to international trade, the fact that Art. 10 of the WCT shifts the attention back to "authors" can be interpreted as a specific adaptation of the three-step test to the "digital networked environment". Even if not, it could be interpreted as at least a general recognition that the author-centred international regime established by Berne can be adapted to the digital environment on the same conceptual basis, even with the realities of exploitation by other subjects happening there.

"Technological measures" are another update in the WCT prompted by the need to adapt copyright to the digital environment, and Art. 11 sets out the obligations of the WCT member states in this regard. Here, too, the "author" is provided as the subject who is supposedly employing such measures.[87] Again, this is interesting because one of the controversies surrounding the inclusion of such a rule in an international copyright instrument was concern about using technological measures to enforce the interests of rightholders without fully respecting the flexibilities (exceptions and limitations, term of protection, presence of uncopyrightable elements, etc.)[88] provided by law, with "rightholders" implicitly taken to mean

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[83] Christie Wright, 'A Comparative Analysis of the Three-Step Tests in International Treaties' (2014) 409 IIC, pp. 429-430.

[84] As also clearly visible from postulates provided in the WCT preamble.

[85] For a discussion on what kind of interests of authors WCT intended to include, see Thomas Heide, 'The Berne three-step test and the proposed Copyright Directive' (1999) 21 European Intellectual Property Review 105, pp. 106-107.

[86] Agreed Statements Concerning the WIPO Copyright Treaty: https://www.wipo.int/treaties/en/text.jsp?file_id=295456 (accessed 16 September 2020), point 10.

[87] Measures such as technologically placed restrictions that prevent electronic devices from making copies of a CD or copying text from a website, and copy protection for digital books and audio files.

[88] If the wording of Article 11 WCT is followed closely, however, the duty to prevent circumvention is only applicable to the rights which fall within the scope of WCT and the Berne Convention, and hence a user can circumvent the technological measures when the author has no legal claim for protection, e.g., when the term of protection has lapsed. The situation in the case of an existing

economic entities or representatives of industry rather than authors.[89] Indeed, it is rarely the authors who exploit the works themselves and who themselves are responsible for implementing technological protection measures. It seems that the WCT, as noted before, intended to stress the author's position in copyright *despite* the economic reality, perhaps even as a counterbalance to it.[90]

As a result, looking at the most basic structure of the WCT, it becomes clear that the Treaty follows in the footsteps of the Berne Convention; but, though foregrounding the author, it introduces the interests of other groups such as users or the general public, and issues a call for balance.[91] However, in contrast to TRIPS, the "rightholders" are not mentioned at all. The preamble of the WCT emphasises that copyright protection is an incentive for literary and artistic creation,[92] mentions the "use" of works, but says nothing of their "exploitation". A call for balance, not for economic purposes but for "education, research and access to information",[93] was to a certain extent present in the Berne Convention,[94] but the explicit commitment that the WCT demonstrates is new. The author hinted at here is not the centre of all things, or a resource, but rather someone who perhaps might be seen in a stewardship role, i.e., an individual who has reciprocal duties towards the rest of society.

2.2.4. Three international documents together

This inquiry shows that the "author" is presented as the central figure in the most important international treaties. However, much like the relation between the surface and the sub-surface levels of law in the realm of international law, the

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exception or limitation is not that clear, however, see Angelopoulos and others, *Concise European Copyright Law*, p. 131.

[89] See, e.g., Severine Dusollier, 'Electrifying the fence: the legal protection of technological measures for protecting copyright' (1999) 21 European Intellectual Property Review, p. 285.

[90] This observation is consisted with the fact that one of the reasons for adopting the WCT is likely to have been apprehension regarding the shift of international law-making of copyright from the Berne system and WIPO to the WTO. See Jorg Reinbothe and Silke Von Lewinski, 'The WIPO Treaties 1996: ready to come into force' (2002) 24 European Intellectual Property Review, p. 9.

[91] Something that was considered a great success in the sense that different voices were successfully reconciled in the diplomatic conferences leading to its adoption. Ibid., Thomas C. Vinje, 'The new WIPO Copyright Treaty: a happy result in Geneva' (1997) 19 European Intellectual Property Review.

[92] Preamble WCT paragraph 3. For more information on this aspect see Okediji, 'Copyright in TRIPS and beyond: the WIPO Internet Treaties', p. 344.

[93] Preamble WCT paragraph 5.

[94] In the form of making certain exceptions and limitations permissible under domestic copyright law of the member state, e.g., for public speeches and addresses in Art. 2bis, for the purposes of quotation and teaching in Art. 10.

relation between national law and international treaties is mutual. Consequently, not everything in international treaties reflects the legal traditions of the states parties, and not everything in international treaties will be transferred to national legal systems. A sort of negotiation takes place between the concepts and principles at the national and international levels until a balanced compromise is reached.

Hence, it is not entirely uncontroversial to say that the fact that the author is central in the most important international treaties means the same is true in the laws of the member states. It is, however, likely that in all parties to Berne, WCT and TRIPS,[95] the author is positioned as one of the most important subjects, with lesser or greater roles given to other actors.

Moreover, what is also important to note at this point is that the "author" in the main instruments of international copyright law is not a homogenous subject. Different perspectives on this figure are provided in different international legal instruments; and one may say that, depending on the situation at hand, these understandings, or conceptualisations, can be used to defend or delegitimise other (for instance, national) legal norms. In other words, in the methodological perspective of this thesis, the meaning of "author" in international copyright law is not defined in the surface layer (the norms) to any great extent, while in the sub-surface layer, namely, the "logic" behind the structuring of norms, the concept can be better comprehended as a "family" of meanings. Some of these ways to conceptualise the author seem to keep the author as the central, most important figure, akin to the Romantic genius; others portray the author as a resource or a servant/steward of the public interest.[96] The picture of author as a family resemblance concept will be analysed further in the upcoming chapters of this thesis.

It may seem unusual that this thesis places such a strong focus on the differences between these international legal instruments and looks for inconsistencies in what is usually considered to be a single layer of international copyright law. After all, as has already been noted, each of the treaties is part of the Berne Convention system and is binding on its member states, many of which are parties to all three instruments. However, it should be recalled here that one of the purposes of this section is to show that even where the international instruments' approaches depart from each other due to the context and times of their adoption, and even if they

[95] And this means most countries of the world, as at this moment (February 2019), only Afghanistan, Eritrea, Ethiopia, Iran, Iraq, Kosovo, Marshall Islands, Nauru, North Korea, Palau, San Marino, Sao Tome and Principe, Somalia, South Sudan, Taiwan, Timor-Leste, Turkmenistan, and Tuvalu are not parties to any of these treaties. See the list of the members of the Berne Convention at https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15, The members of the WCT: https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16, and members of the WTO/TRIPS: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[96] See section 4.3.2 of this thesis.

portray the author differently, the author as a subject is portrayed to have a central role in each of them.

Furthermore, pointing out inconsistencies in their approach to the author is not to say that, for the purpose of establishing the obligations of member states, the three international treaties are impossible to interpret together. In fact, there are good arguments that at least the Berne Convention and the WCT should be treated as forming a single normative system.[97] Divergence in how the author is conceptualised and positioned in the sub-surface layer of the international copyright law system is a reflection of the limits of interpreting international norms in general and the difficulties of adapting them to national systems. To see it another way, the different contexts and patterns of conceptualising the author found in different instruments can be drawn upon to support different justifications in national systems and potential future international instruments. Thus, in future law-making or adjudication, legal actors might choose to justify norms through economic arguments and emphasise the importance of incentives for creative industries; they might rely on the protection of authors' rights or evoke a necessity of balance of interests. While it is unlikely that a decision could be made entirely without regard to one or several of these contexts of international copyright, there is certainly space to assign different weight and significance to the various justifications, particularly given that only one of the three fundamental documents in international copyright law has an effective enforcement and interpretation mechanism.

These different ways of conceptualising author to build and justify legal norms thus offer a small glimpse into the sub-surface content of the European copyright tradition. Their deeper analysis will be left for the upcoming chapters.

2.3. EU Copyright Law

2.3.1. General

Even though EU copyright law is the main object of study, only a few of its most fundamental elements, namely the requirements for protection and the right of reproduction, will be studied in depth with regard to the concept of author embedded in the EU copyright system. This section, however, continues with a general overview of the author's implied position in the structure of European copyright law. Having reviewed the main international documents, a brief outline of the EU copyright system follows below. As can be expected, the conclusion here too is that,

[97] See Ruth Okediji, 'The Regulation of Creativity Under the WIPO Internet Treaties' (2009) 77 Fordham Law Review 2379, pp. 2393-2395.

despite certain exceptions, the figure of the author is at least formally maintained as one of the central organising concepts of the whole system.

Similar to the international documents reviewed above, EU copyright law does not provide an explicit definition of "author", even though the notion is used extensively in legislative acts and the decisions of the CJEU. In the case of EU law, this should mean that the term is not harmonised and that it is for the Member States to provide its meaning in their national laws. On the other hand, and this is in line with the way this thesis theorises concepts, despite the absence of a direct definition (and thus harmonisation at EU-level), the EU copyright system, through harmonising the criteria for authorship as well as the consequences of having that status, has already provided contours to the picture (or "concept") of author. There are still some notable details missing from this picture.[98] Nevertheless, it can be argued that, as far as the "author" is concerned, the process of harmonising different legal rules not only increasingly harmonises the surface level of this concept but also draws on and makes visible the various building blocks of its sub-surface layers.

2.3.2. EU copyright as a right centred on the author

2.3.2.1. EU in the context of international copyright treaties

At the moment of writing, all EU Member States are members of the Berne Convention of 1886, members of WTO and therefore the TRIPS Agreement, and members of WIPO and the WCT. Moreover, the EU itself is a member of both the WCT, which it signed in 1996 and ratified in 2009[99] and the WTO, since 1995.[100] Lastly, the Treaty of the Functioning of the European Union (TFEU), insofar as it sets standards for copyright protection in the EU, can itself also be seen as a "special agreement" in the meaning of Art. 20 of the Berne Convention, and therefore invested in the continuation of the main principles enshrined there.[101] In other words, EU copyright law is based on European copyright tradition and its international legal sources, both as regards statutory duties and obligations and in terms of the sub-surface content of presumptions, principles and concepts that

[98] Like moral rights as one of the consequences of being an author, even though de facto lack of harmonisation becomes significantly less pronounced having in mind the fact that the EU is a member of the WCT, which incorporates the Berne Convention, including Article 6bis on moral rights. Another issue that is still not harmonised is the rules of allocation of authorship, with an exception in the case of audiovisual works and some harmonisation of the authorship of databases and computer software.

[99] See https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16 (visited 4 August 2021).

[100] See https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (visited 22 February 2021).

[101] Angelopoulos and others, *Concise European Copyright Law*, pp. 79-80.

provide their rationale and justification. At the same time, since EU copyright law is more comprehensive and shaped by specific regional circumstances, interpretations of these international principles in EU law are inevitable.

2.3.2.2. Requirements for protection

When statutory harmonisation of copyright law began in the EU, the only clear requirements for what was to be protected were set out in relation to computer programs, databases and photographs. In this respect, the harmonising directives enshrined a principle very similar to the one in the Berne Convention, namely, that protection is to be given to software, databases and photographs which are the "author's own intellectual creation".[102] Eligibility for protection was not to be dependent on quality, merit, aesthetics, or similar criteria,[103] which also followed the logic of the Berne Convention.[104] In assuring the protectability of these three types of subject matter, the respective directives also referred back to the notion of "literary and artistic works", meaning, among other things, as explained previously, that the "no formalities" requirement of Art. 5(2) of the Berne Convention must be observed as well.[105]

The criteria for protecting other subject matter, on the other hand, were less clear cut – they were not even mentioned in the first instrument of extensive horizontal harmonisation, the InfoSoc Directive. However, the CJEU's interpretation of the said directive has extended the same principles of protection to all creative works, confirming that the object of protection is an "expression" of the "author's own intellectual creation", accomplished by making free and creative choices and stamping the work with the author's "personal touch".[106] No other criteria were

[102] Database Directive, recital 16 of the preamble and Art. 3; Term of Protection Directive, Art. 6; Computer Programs Directive, Art. 1. the Software Directive and Term of Protection Directive when dealing with photographs.

[103] Michel M. Walter and Silke von Lewinski, *European Copyright Law. A Commentary* (Oxford Univeristy Press 2010), pp. 94, 587, 707.

[104] Even though such assurance is not stated in the text of the Convention directly, it can be deduced from the preparatory works and the discussions in the Diplomatic Revision Conferences. See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 403-404.

[105] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 99. The authors recognise that this must be the case for computer programs. Regarding photographic works, the same conclusion can be made from the formulation of Art. 6 of the Term of Protection Directive, where original photographs are said to be protected in the meaning of Art. 1 of the Directive. Art. 1 provides that "the rights of an author of a literary and artistic work *within the meaning of art. 2 of the Berne Convention* shall run for the life of the author and for 70 years after his death." (emphasis added). Such a reference presumably establishes that photographic works are to be protected as literary and artistic works in the Berne Convention.

[106] *Levola*, paras. 35-37.

deemed relevant, and the "expression" was not seen as requiring any permanence or special form.[107]

As a result, the requirements for protection in the EU copyright system are tied directly to the author and the author's own intellectual creative activity. P. Jaszi has remarked that publishers and other acquirers of copyright have historically strengthened their position by strengthening the concept of the "work".[108] Where there is a well-formulated object to be bought and sold, the rights of persons other than the author to that work become more defendable, even to the point where the author can lose rights to the "work" and be excluded.[109] What we see at the EU level, however, is a clear disinclination to give more substance to the "work" at the expense of the author. Consequently, the author is so firmly anchored to the object of protection that the object cannot exist without reference to the author. A more detailed analysis of these features of EU copyright law will follow later in the thesis.

2.3.2.3. The principle of the high level of protection

When the fact of protection is established (but perhaps even before that) and there is a need to determine what exactly this protection will entail, one of the most mentioned principles in EU copyright law has been that of ensuring a "high level of protection". Perhaps the most important instance of its use is the preamble to the InfoSoc Directive (recitals 4 and 9), but the principle can also be found in the preambles to the Term of Protection Directive (recital 12), the Enforcement Directive (recital 10), the Orphan Works Directive (recital 14), the Directive Implementing the Marrakesh Treaty (recital 1), and the Content Portability Regulation (recital 12). Recent research shows that the "high level of protection" is the second most common principle guiding the CJEU's interpretation of EU copyright law, surpassed only by interpretation based on the "objectives pursued by the legislation at issue".[110]

When elaborating on the principle, the CJEU has routinely proclaimed it to mean a "high level of protection" of "authors in particular"[111] or, in some cases, simply a

[107] A detailed analysis of the cases on protectability will follow in chapter 5.2 of the thesis.

[108] Peter Jaszi, 'Toward a Theory of Copyright: the Metamopthoses of "Authorship"' (1991) 40 Duke Law Journal, p. 478.

[109] Ibid.

[110] Rosati and Rosati, 'Data-Based Case Law Applied to EU Copyright (1998-2018): A Quantitative Assessment', pp. 196-223.

[111] Case C-5/08, Infopaq International A/S v Danske Dagblades Forening, ECLI:EU:C:2009:465 (*Infopaq*), para. 40; Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECLI:EU:C:2013:138 (*Painer*), para 107; Case C-419/13, Art & Allposters International BV v Stichting Pictoright, ECLI:EU:C:2015:27 (*Allposters*), para. 47; Case C-393/09, Bezpečnostní

"high level of protection of authors",[112] and has concluded that this is the InfoSoc Directive's main purpose.[113] Furthermore, the Court has indicated in one of its judgements that the aim of guaranteeing authors a high level of protection is the reason why intellectual property was "recognised as an integral part of property" in the first place.[114] Even though at times the CJEU has also spoken of a high level of protection of "rights" and, on several occasions, of "rightholders", in the overwhelming majority of cases, the *author* is the main subject of the high level of protection.[115]

The content of this principle is not entirely clear. A quick analysis shows that it is rarely invoked in cases where the outcome restricts or prohibits an expansion of copyright in some way. For instance, there is no mention of the principle in *Levola* (where the CJEU refused to grant copyright protection to the taste of cheese); *Football Dataco* (where copyright protection was refused for non-original databases); *UsedSoft* (where the principle of exhaustion was applied to computer software procured in digital form, thereby weakening the control of the rightholders); *Del Corso* (where playing the radio in a dental clinic was found not to violate the exclusive right of communication to the public), and others.[116]

At the same time, in the preamble of the InfoSoc Directive, for example, the "high level of protection" is explained as a tool to "ensure the maintenance and

softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury, ECLI:EU:C:2010:816 (*BSA*), para. 54.

[112] Joined Cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd., ECLI:EU:C:2011:631 (*Football Association Premier League*), para. 186; Case C-277/10, Martin Luksan v Petrus van der Let, ECLI:EU:C:2012:65 (*Luksan*), para. 66; Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634 (*Renckhoff*), para. 18; Case C-527/15, Stichting Brein v Jack Frederik Wullems, ECLI:EU:C:2017:300 (*Filmspeler*), para. 27; Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:644 (*GS Media*), paras. 30 and 53; Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:456 (*Ziggo*), para. 22.

[113] *Football Association Premier League,* para. 186; *Renckhoff,* para. 18; *Filmspeler,* para. 27; *Painer,* para. 107; *Ziggo,* para. 22.

[114] *Luksan,* para. 66. Meaning the fundamental right to property expressed in Art. 17 of the Charter of Fundamental Rights.

[115] Rosati and Rosati, 'Data-Based Case Law Applied to EU Copyright (1998-2018): A Quantitative Assessment', pp. 10-11.

[116] E.g., not in the most recent cases of C-683/17, Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721 (*Cofemel*) and C-833/18, SI and Brompton Bicycle Ltd v Chedech / Get2Get, ECLI:EU:C:2020:461 (*Brompton*) where limits of protectability for aesthetically pleasing and purely functional items were introduced. Even though, of course, there are exceptions. Even though rights of the authors were restricted, the principle of the high level of protection was still mentioned in Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76 (*Svensson*).

development of creativity"[117] and as "crucial for intellectual creation".[118] Through this prism, the "high level of protection" should mean "optimal protection", where different interests are balanced against each other to ensure the maximum output of creativity.[119] The fact that the "high level of protection" is most often reserved for authors and hardly ever used in cases where different interests are actually balanced shows that the CJEU is holding to an interpretation that it is through the lens of the author's protection that the level of protection is to be balanced. Presumably, even if protection cannot be absolute – for the author, as the CJEU conceptualises it – it must be the highest possible and the exceptions, where necessary, must be interpreted narrowly.[120]

Because of this, the principle has been criticised for being more a policy instrument than an actual legal principle[121] or for its repetition almost as an "incantation".[122] Nevertheless, as it stands now, it seems that the CJEU is using the principle to assert a strong connection between the author and the EU copyright system as a whole, allowing to imply that it is only by protecting the author that the other aims of copyright and the interests of other groups can be assured.

On the other hand, the recently adopted Directive on Copyright in the Digital Single Market (DSM Directive), though noting the principle of a "high level of protection", alters it to a "high level of protection for rightholders" in recital 2 of the preamble and, perhaps following the InfoSoc Directive, to a "high level of protection of copyright" in recitals 3 and 62.[123] For now, it is unclear whether this emphasis on "rightholders" and lack of mention of "authors", even having in mind the DSM Directive's provision of new contractual protection measures, signals a shift in approach and whether this would influence the CJEU's statements about the purpose of copyright protection in the EU.

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[117] Recital 9 of the preamble of the InfoSoc Directive.

[118] Ibid.

[119] Joao Pedro Quintais, *Copyright in the Age of Online Access. Alternative Compensation Systems in EU Law* (Wolters Kluwer 2017) Section 5.3.3.5

[120] See Section 5.3.4 of the thesis for more about the presumed exclusivity and control and the exceptions from it.

[121] For a critique of this approach see, e.g., Bernt Hugenholtz, 'The dynamics of harmonization of copyright at the European level' in Christophe Geiger (ed), *Constructing European Intellectual Property Achievements and New Perspectives* (Edward Elgar 2013).

[122] Irini A. Stamatoudi and Paul Torremans, *EU Copyright Law. A Commentary* (Edward Elgar 2014), p. 16.

[123] The InfoSoc Directive just provided for a "high level of protection" and "high level of protection of intellectual property" in its text.

2.3.2.4. Author as the owner and the main beneficiary of exclusive rights

Whereas in the Berne Convention, WCT and TRIPS, it was (more or less) apparent that the first recipient of exclusive rights and at least formally also the primary beneficiary of them was the author, the picture becomes more complicated when looking at EU law.

As mentioned before, EU copyright is in many ways an extension of the international system, with, at least in theory, the author-centred Berne Convention at the top of the pyramid. However, the EU is a legal system with its own ideals and purposes, where the interests of a well-functioning internal market and sound competition are among the main justifications for any legislative provision.[124] With this in mind, it could be almost expected that when it comes to the rights allotted through copyright, the emphasis would not be on creativity or the personality of the author, but on the realities surrounding the exploitation of works in the internal market.

One of the issues complicating the picture of the "beneficiary of rights" in EU copyright law is that the majority of legislative acts (directives) also address the neighbouring or related rights of performers, phonograph producers and others, not always adequately distinguishing between the different interests involved.[125] The result is that it can be hard to grasp which actors and interests the norms are protecting and why. Moreover, despite quite extensive harmonisation, the overall normative landscape of EU copyright remains uneven and the different directives cannot be said to form a unified whole.[126] To make matters more confusing, some directives go beyond their main purpose and harmonise certain side-issues, as with the harmonisation of the authorship rules for cinematographic works or the protection requirements for photographs in the Term of Protection Directive. To add to that, the legislation which forms the valid law on copyright in the EU covers a

[124] A large part of the preambles of all the directives is given over to elaborating about why the divergent national laws are a problem and how intellectual property is becoming increasingly important to the internal market. See Chapter 5 for more elaboration on the basis in EU constitutional law for copyright harmonisation.

[125] Whereas this lack of distinction does not go so far as to make the copyright and the neighbouring rights one system of protection, as in the common law countries (See William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (6th. edn, Sweet & Maxwell 2007), pp. 415-416), and the EU copyright system treats these two groups as two separate domains, the gap between them seems to be diminishing, not least because of legislative solutions where both groups of rights are regulated by the same articles making no conceptual distinction between them – e.g., the fact that the right to "reproduction" is granted to neighbouring rightsholders as well as authors might make it necessary to interpret the act of reproduction in the same way in both cases, even though the object of protection is different.

[126] Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 15.

span of 28 years,[127] which inevitably leads to a patchwork of approaches to similar questions in the different directives. The CJEU has recently been active in addressing new challenges and discrepancies in the copyright system, but this will not necessarily lead to more consistency in the field.

With this in mind, EU copyright law can still be said to adhere to the general principle that the author is presented as the central subject of the exclusive rights. This can be illustrated, first of all, by the fact that in the texts of the relevant directives, all substantial rights in EU copyright (i.e. not the neighbouring rights) are indicated as belonging to the "author". The InfoSoc Directive is a clear example, where the right of reproduction, right of communication to the public, right of making works available to the public, as well as the right to distribution are provided for "authors".[128] The same can be said for the Rental and Lending Rights Directive,[129] which grants the author the right to prohibit or permit rental and lending of her work; and, of course, the Resale Rights Directive,[130] which has as its subject the rights of authors in such fields as painting, sculpture and similar. The Database Directive, to the extent that it speaks about copyright protection for databases, is also very consistent in referring to the author as the subject of the rights provided.[131]

Not only is this tendency in line with the international copyright law norms presented above, it is also a reflection of the "*creator doctrine*", which has long been an important principle of copyright law in the continental legal tradition. According to this doctrine, the "author" of a work is its creator, and the exclusive rights are awarded to the author upon creation of the work.[132] A study of national copyright norms applicable to intellectual property contracts in the EU, performed by the IVIR in 2002, found that the creator doctrine was a prevalent ideology in the copyright

[127] If calculated from the 1991 Computer Programs Directive and to 2019, when the DSM Directive was adopted.

[128] Articles 2, 3 and 4 of the InfoSoc Directive.

[129] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, original version 92/100/EEC (Rental and Lending Rights Directive).

[130] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (Resale Rights Directive). It is interesting that the Directive does not say that the resale right will belong to the author, but rather stipulates that the Member States will provide the right "for the benefit of the author". This formulation is likely due to the author's lack of control over the right itself, including the fact that the right is also inalienable and cannot be waived (Art. 1).

[131] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive).

[132] Jacqueline Seignette, *Challenges to he Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creaive Works in the Netherlands, Gremany and the United States* (Kluwer Law and Taxation Publishers 1994), p. 1.

legal culture of the Member States.[133] Of course, numerous counterexamples can be found to this general rule.[134] Currently, in the Member States, such exceptions from the general rule are most notably evident in connection with collective works and works made for hire.[135] In some countries, the exceptions even go as far as to give the moral rights to the party who ordered the work or organised its production.[136]

There is flexibility to deviate from the creator doctrine even at the EU level. For instance, the Computer Programs Directive,[137] which is the source for the legal protection of computer software under EU copyright law, provides that the "author" of software can also be a "rightholder" (i.e., not the actual creator) where the national legislation permits,[138] or that exclusive rights are to be given to the "rightholder" as the first owner.[139] The Directive also contains the only provision in EU law harmonising the approach to works for hire.[140] This states that, unless otherwise agreed, it is the employer who is entitled to "exclusively exercise all economic rights".[141] These derogations from the creator doctrine could result from the specificities of software as protectable subject matter. [142]

On the other hand, though Member States are allowed a certain flexibility in naming the rightholder as a subject of rights, the general position in the Computer Programs Directive is still that the "author" has *first* ownership of rights. This can be inferred

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[133] Amsterdam Institute of Information Law, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union* (2002), pp. 23-24.

[134] Seignette, *Challenges to he Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creaive Works in the Netherlands, Gremany and the United States*, pp. 2-3.

[135] Jean-Paul Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "InfoSoc Directive")* (2013), p. 101.

[136]Antoon Quaedvlieg, 'Authorship and Ownership: Authors, Entrepreneurs and Rights' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives* (Kluwer Law International 2012), p. 203.

[137] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Computer Programs Directive).

[138] Article 2.1 of the Computer Programs Directive

[139] Article 4 of the Directive. The rightholder is also mentioned in arts. 5, 6 – where certain actions can be carried out without the authorisation of the *rightholder*.

[140] Of course, only in the context of computer programs.

[141] This then may explain why the subject of the exclusive rights provided with regard to computer programs in the Directive is a "rightholder" – original ownership of those rights are not always vested in the "author".

[142] John Bing, 'Copyright Protection of Computer Programs' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), p. 409, pointing out that software is different from any other literary creation in terms of organisation, freedom to act, number of creators, the expectations regarding the final product, and the need for its maintenance.

from recitals 13 and 15 of the preamble, and from Articles 2 (especially 2(2) and 2(3), where the question of authors' ownership of rights is discussed).[143] Moreover, as provided in Art. 2 of the Directive, the "author" being a natural person (or a group of natural persons) is also the main rule when allocating authorship. Such an interpretation is also consistent with the information provided in the initial proposal for the Directive.[144] Similarly, when it comes to works for hire, the presumption provided in Art. 2(3) does not stipulate that the employer is the owner of those rights; only the exercise of economic rights is presumed for the employer of the author (and the presumption is rebuttable).[145] Similar provisions on authorship can be found in the Database Directive, where the Member States have some latitude in allocating authorship even to legal persons, but the creator doctrine is kept intact and the initial subject of rights remains the "author".[146]

On the question of who benefits from the exclusive rights (in the meaning of whose interests are to be protected), the three-step test, a version of which can be found in most international copyright acts, can give a certain perspective, as the analysis of the Berne Convention, WCT and TRIPS demonstrates above. Overall, in EU copyright law, the three-step test emerges as a tool to ensure that existing exceptions and limitations are applied narrowly, as opposed to the three-step test in the international regime, which is a tool for limiting the scope of new exceptions potentially introduced by Member States.[147] This already implies a certain attitude and a commitment to the high level of protection discussed above. That the exceptions and limitations in Art. 5 must be interpreted narrowly has also been confirmed by the CJEU.[148]

Moreover, closer analysis of the third step of the test allows us to speculate whose interests are to be balanced against those of the general public in cases where exceptions to the exclusive rights are deemed necessary. Whereas in the Berne Convention and the WCT the different exceptions and limitations are not meant to contradict the legitimate interests of the author, the TRIPS Agreement has changed the norm to include the interests of the rightholder, which might not be identical,

[143] Angelopoulos and others, *Concise European Copyright Law*, p. 218.

[144] Walter and Lewinski, *European Copyright Law. A Commentary*, pp. 110-112.

[145] Angelopoulos and others, *Concise European Copyright Law*, p. 219; also Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 108.

[146] Arts. 4 and 5 of Database Directive.

[147] Angelopoulos and others, *Concise European Copyright Law*, p. 124.

[148] Even though the CJEU has also shown an inclination to employ the principle of effectiveness of exceptions and limitations, see Triaille and others, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "InfoSoc Directive")', pp. 488-489. See also Section 5.3.4 of this thesis.

leading to diverging treatment of the same limitations and exceptions.[149] In the EU copyright acquis, too, all versions of the three-step test refer to the rightholder, not the author.

The InfoSoc Directive is the legal act where the three-step test is potentially most consequential,[150] and so one must ask, why does its three-step test specifically refer to the rightholder rather than the author and what are the implications of such wording?[151] According to one interpretation, the answer must be that not only the interests of authors, but also those of other possible rightholders, such as different licensees, must be taken into account when balancing interests through the three-step test.[152] Were this the case, it would be a clear indication that more attention is being paid to other economic actors besides the author and that the "author" is not seen as the main beneficiary of the rights, at least as regards their exploitation.

Another explanation for the reference to "rightholders" might be that this notion is intended to include both authors and the holders of neighbouring rights. As mentioned above, even where there is no obvious reason, EU legislative acts in the field of copyright typically include provisions on neighbouring rights, often even in the same article.[153] In the case of the three-step test and all exceptions and limitations provided in Art. 5, it must be pointed out that the exceptions and limitations are to be implemented with regard to the rights of reproduction and communication to the public as such, without distinction as to whether these rights belong to the author or performer, phonogram producer or other owner of the neighbouring rights.[154] Thus, it surely follows that the three-step test should also be applicable to all possible variations of the exceptions and limitations and that there might be a need to take into consideration the interests of the author as well as the owners of neighbouring rights in specific cases.[155] Consequently, "rightholder" might simply be a term to

[149] For more discussion on this matter see Section 2.2.2. above.

[150] Primarily because of the general nature of the Directive and its applicability to a great number of possible exceptions and limitations provided in Art. 5. Moreover, the CJEU used it already in its case law.

[151] The preparatory documents for the InfoSoc Directive give no indication why this specific formulation of the three-step test was chosen: Heide, 'The Berne three-step test and the proposed Copyright Directive', p. 107.

[152] Angelopoulos and others, *Concise European Copyright Law* p. 382. Also Griffiths, 'The "Three-Step Test" in European Copyright Law - Problems and Solutions', p. 17.

[153] See, e.g., arts. 2 and 3 of the InfoSoc Directive.

[154] See Art. 2(a), 2(b), 2(c), etc. As such, the InfoSoc Directive provides partial harmonisation also for the neighbouring rights; this commenced with the Rental and Lending Rights Directive, where the related rights of fixation, broadcasting and communication to the public and distribution rights were harmonised.

[155] A good example would be, for instance, compensation to be paid in the case of private use reproductions of cinematographic works – see the *Luksan* case and Section 2.3.3 below.

describe the subject for whose benefit the three-step test exists.[156] This might also be true of Chapters III and IV of the Directive, where the provisions on protection of technological measures, sanctions, and similar relate not only to the rights of authors, but also to neighbouring rights, and where "rightholder" is also used to define the beneficiary of the provisions.

On the other hand, the same cannot be said of the Database Directive, which, in its own version of the three-step test for copyright-protected databases, asks for consideration of the *rightholder's* legitimate interests, not the author's. This Directive is an interesting example because, with its two different regimes of protection, one might expect that extra care was taken to ensure consistent formulation of the subject for each of them. When it comes to the copyright protection for databases in Chapter I of the Directive, the designated subject of the exclusive rights is "the author".[157] Yet when the Directive turns to the provisions of the *sui generis* protection, the main subject becomes the "maker of the database".[158] The confusing part comes in the two versions of the three-step test, which state that limitations to the rights of the author and maker of the database are only permissible if not prejudicial to the legitimate interests of the *rightholder* (Art. 6) and the *maker of the database* (Art. 7). The difference in wording is hard to explain, especially since the *sui generis* right is motivated by economic investment and only becomes relevant when a database is not creative enough to attract protection as the author's own intellectual creation. It is unclear, then, why the three-step test seems to ask for consideration of a broader group of economic interests in the case of author's rights than it does in the case of the *sui generis* protection. Even if the most likely explanation is that the Database Directive borrows text from the earlier Computer Programs Directive,[159] as noted above, the differences in wording can have significant repercussions now that the three-step test has become a standard against which exceptions and limitations can be directly measured.

Despite these exceptions, it can be generally concluded that the insistence that authors are the first owners of exclusive rights in the works they create is an EU

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[156] Eleonora Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?' (2016) 47 International Review of Intellectual Property and Competition Law 569, pp. 582-583.

[157] See, e.g., Art. 5 of the Directive.

[158] What exactly the difference is between these two subjects is not made explicit in the Directive. Presumably, it lies in the requirements of protection – the "author's own intellectual creation" in the first case and "quantitatively or qualitatively substantial investment" in the second case. See articles 3 and 7 of the Database Directive.

[159] See Walter and Lewinski, *European Copyright Law. A Commentary*, pp. 709, 714, 726, stating that Articles 4-6 of the Database Directive were essentially based on the Computer Programs Directive, but also on the similarities between the creation and exploitation of software and databases: ibid., p. 709.

copyright standard. Although the three-step test requires taking into account interests other than the author's, this does not, in principle, change the fact that the author is presented as the central subject. What it does show, however, are the EU legislator's assumptions about how creative works are exploited. This differing approach to the author and the interests she has at each stage of the creative work's life cycle provides some insights into the different conceptions of author that meet in and shape the normative system of copyright law. These insights will be explored further in Chapters 5 and 7 of the thesis.

2.3.2.5. Term of protection

In line with the globally established principle in the Berne Convention, the EU copyright system bases the term of protection of a copyrighted work on the life of the natural person who has created it (the author). While the Berne standard expressed in Article 7 of the Convention sets out a minimum term of fifty years after the death of the author (or in the case of a collective work, after the death of the last living author), the EU Term of Protection Directive has extended this protection to seventy years after the death of the author.[160] According to recital 5 of the preamble to the original Term of Protection Directive, the rule was specifically designed to protect the interests of the author and give protection to the first two generations of her descendants. Recital 5 also explains that whereas this meant fifty years after the death of the author at the time of the Berne Convention's drafting, the increase in life expectancy in the intervening period warrants extending the term of protection to seventy years. Furthermore, the Directive concludes that this extension of the term of protection contributes to attaining the high level of protection that is necessary for the maintenance and development of creativity.[161]

The Term of Protection Directive of 2006 refers exclusively to the "author" as the central subject where the term of protection of copyright is concerned. On the other hand, the Directive also gives Member States some flexibility, stating in Article 1(4) that where national laws hold a legal person or other entity (in the case of collective works) to be the initial rightholder, the term of protection shall be calculated according to the rules for anonymous works.[162] Still, the same article clarifies that this is only applicable when the natural person's name is not given, which means

[160] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (Term of Protection Directive), Art. 1, later amended by Directive 2006/116/EC and Directive 2011/77/EU (where the duration of protection for authors remains the same).

[161] Recitals 10 and 11 of the original Term of Protection Directive (Directive 93/98/EEC)

[162] Art. 1(4) of the Directive 2006/116/EC. That means not based on the life of the author (as the author is unknown in the case of anonymous works) but based on the date of first publication.

that this exception for the benefit of Member States can be cast aside if a creator is named in connection with the work.

Similarly, in Article 2, the Directive explicitly harmonises the rules of authorship allocation for cinematographic works and provides a list of creators whose lives shall be used to establish the term of protection, regardless of who the national law designates as author.[163] In addition, the Directive provides that photographic works shall be protected in the same way and for the same period as any other creative works if they are original in the sense that they are the author's own intellectual creation.[164] Lastly, when the Term of Protection Directive was amended by Directive 2011/77/EU, in 2011, the additional Article 1(7) established that the term of protection of a musical composition with words is to be calculated based on the death of the composer of the music and the author of the lyrics (depending on who dies last), even if neither are recognised as co-authors in national law.[165]

These provisions send a clear message that, at least for the purposes of the term of protection, the work is connected to certain natural persons who created it, and that EU copyright law is thus embedded in a certain logic around the term of protection, despite what Member States might provide in their national laws. Moreover, the protection is calculated in this specific way due to the creative agency of the author. Having in mind that EU copyright law does not provide any rules on moral rights and their calculation, this consistent assertion of the special connection between author and the duration of exclusive rights is with respect to economic rights only.

2.3.2.6. Moral rights

EU copyright law has not yet incorporated moral rights into its legal framework – quite the opposite: in numerous instances of the EU copyright *acquis* one can find statements to the effect that EU copyright law does not harmonise and has no effect on the protection of the moral rights of the author in the Member States.[166] Accordingly, for the time being, Member States can legislate in this area as they see fit. However, leaving aside the fact that all EU members are also members of the Berne Convention, which establishes a certain minimum standard for moral rights

[163] Art. 2.1 of the Directive provides that the principal director shall be considered its author or one of its authors and Art. 2.2 enshrines that the term of protection is to be calculated based on the death of the last among the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work, depending on who dies the last.

[164] Article 6 of the Directive 2006/116/EC.

[165] Art. 1(1) of the Directive 2011/77/EU.

[166] E.g., recital 19 of the preamble of the InfoSoc Directive; recital 20 of the preamble and Art. 9 of the Term of Protection Directive; recital 28 of the preamble of the Database Directive.

in Art. 6bis,[167] the EU copyright *acquis* also contains indirect references to moral rights that arguably amount to a certain level of harmonisation.

For instance, traces of moral rights can be found even in the legislation pertaining to software, a subject-matter rather different from other creative works. According to Art. 1 of the Computer Programs Directive,[168] software is to be protected as literary works within the meaning of the Berne Convention. This supposedly means that not only are computer programs, as subject matter, covered by copyright, but also that such protection must be on the same terms as literary works under Berne. This should then include all the rights set out as belonging to the authors of literary works in the Berne Convention, including moral rights, even though the Computer Programs Directive does not further harmonise their content. [169]

Other examples include the Database and InfoSoc Directives, which imply the moral right of attribution by requiring the name of the author to be mentioned when exceptions and limitations are used (Art. 6(2)(b) of the Database Directive and Articles 5 (3)(a), (c), (d) and (f) of the Information Society Directive).[170] In addition, the quotation exception provided in Art. 5(3)(d) of the InfoSoc Directive, is only allowed if the work in question has been lawfully made available to the public, which could be interpreted as a reference to the moral right of divulgation.[171] Further, the inalienable resale right (*droit de suite*) that has been harmonised for the benefit of authors by the Resale Right Directive, can be seen as a clear step towards harmonisation of moral rights[172] and the inclusion in EU copyright law of the perspective that the author has a special personal connection to her work. Even if they do not constitute harmonisation measures per se, all of these instances may be seen as indications of a deeply sedimented presumption in European copyright legal culture of a special personal connection between the author and her work. Moreover, these fragments and passing mentions, in legal acts, of moral rights give the CJEU competence to interpret them in the future and to initiate full harmonisation.[173]

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[167] Not to mention that from the beginning there was a strong ideology of author centrality in the Berne Convention as well.

[168] Computer Programs Directive (Directive 2009/24/EC), but the same also applies to the earlier version of the directive, namely, 91/250/EEC.

[169] Angelopoulos and others, *Concise European Copyright Law*, p. 216.

[170] Walter and Lewinski, *European Copyright Law. A Commentary*, pp. 1472-1473.

[171] Marie-Christine Janssens, 'Invitation for a 'Europeanification' of moral rights' in Paul Torremans (ed), *Research Handbook on Copyright Law* (Edward Elgar 2017), p. 216.

[172] Irma Sirvinskaite, 'Toward Copyright "Europeanification": European Union Moral Rights' 3 Journal of International Entertainment & Media Law 263, pp. 285-287.

[173] Janssens, 'Invitation for a 'Europeanification' of moral rights', p. 216.

There are other signs that moral rights are seldom far from the surface level of EU copyright. For instance, already in the Green Paper of 1991 the Commission explicitly recognised that moral rights of authors are a part of copyright and that they are a potential dividing agent for the Common Market. Moreover, the Commission stressed that as new technologies emerge, the need to harmonise moral rights will only increase. "With the arrival of the information society the question of moral rights is becoming more urgent than it was. Digital technology is making it easier to modify works,"[174] the Commission concluded. In its early cases on copyright, the CJEU (then ECJ), established that moral rights are part of the *specific subject matter* of copyright.[175] Consequently, there are those who argue that harmonisation of moral rights in EU copyright law is unavoidable.[176] Others, in contrast, claim that harmonisation is practically impossible, owing to the large differences in the field of moral rights between the different Member States.[177]

In conclusion, though the importance of moral rights in the European tradition is beyond dispute, it is still impossible to claim that EU copyright law has an explicit commitment to moral rights; thus this cannot be catalogued as a signifier of author-centeredness in the system. At the same time, it can be expected that moral rights, which are likely to be an integral part of the sub-surface level of EU copyright law, will assert themselves in the future.[178]

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[174] The Commission, Green Paper of 19 July 1995 on Copyright and Related Rights in the Information Society, COM(95) 382 final, p. 67.

[175] Meaning at that time that that they are related to the essence of copyright protection to such an extent that they can, according to the then valid Articles 36 and 222 TEEC be the basis for setting aside the prohibition of qualitative and quantitative restrictions of trade and free movement enshrined in the EU constitutional treaties. See Joined cases C-92/92 and C-326/92, Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH, ECLI:EU:C:1993:847, (Phil Collins) and Section 3.5 of this thesis for deeper analysis of this issue.

[176] Sirvinskaite, 'Toward Copyright "Europeanification": European Union Moral Rights'; Ioannis Kikkis, 'Moral Rights' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives* (Kluwer Law International 2012) pp. 1473-1474; also Janssens, 'Invitation for a 'Europeanification' of moral rights', pp. 211-214.

[177] See Walter and Lewinski, *European Copyright Law. A Commentary*, who say that the differences among the Member States are too great for harmonisation.

[178] Even if perhaps indirectly, as has happened in the CJEU Case C-201/13, Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, ECLI:EU:C:2014:2132 (*Deckmyn*), where the interests of authors not to be associated with use of their work violating the fundamental principles of EU law have been recognised.

2.3.3. Clarifying the subject of EU copyright law: author or rightholder?

2.3.3.1. Competing subjects

Throughout the analysis above, even though many strands of EU copyright law seem to converge in the "author", a competing point of intersection has been the concept of *rightholder*. The presence of this figure is in no way unexpected: even if the author is the first owner of rights, they are assignable to other subjects. At the same time, failure to meet the needs of authors and increasing emphasis (explicit or implicit) on the interests of different kinds of rightholders is one of the fronts on which copyright law faces criticism in Europe and other parts of the world.[179] With this in mind, a discussion about the centrality of the author in EU copyright law would be incomplete without a more thorough analysis of the relationship between these two subjects in this legal system.

As seen above, the subjects of "author" and "rightholder" do come into tension, for instance, when one considers that the scope of the exclusive rights and the exceptions and limitations in Article 5.5 of the InfoSoc Directive is to be tailored to the interests of the *rightholders*. Even if "rightholder" here may simply be meant as shorthand for both the author and the holders of neighbouring rights, it cannot be denied that the use of the term invites the conclusion that in many cases it is not the author of a work who is central, but rather the subject who is exploiting it.

As will be demonstrated, several safeguards are now available to the author in EU law to make sure that her interests during the exploitation stage of her work are not overlooked. One line of protection for authors can be found in the norms provided in certain special cases to regulate the relationship between authors and neighbouring rights holders of the same work where, presumably, both parties were involved in the work's creation and fixation. Another is a set of norms defending authors' interests against any kind of "rightholder" to whom their rights were transferred or licensed, irrespective of the role of this subject. Sometimes these subjects overlap, as rightholders who acquire their own neighbouring rights most often have authors' rights transferred to them too; but sometimes they do not. Both groups of rightholders could be seen as "competing for attention" with authors in the copyright system, and both represent the negatively regarded "industry".[180]

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[179] See, e.g., Ginsburg, 'The Role of the Author in Copyright', p. 60; Richard Stallman, 'Copyright, Copyleft and Patents' in Joshua Gay (ed), *Free Software, Free Society: Selected Essays of Richard M Stallman* (GNU Press 2002), pp. 79-80; Jessica Litman, 'The Public Domain' (1990) 39 Emory Law Journal, pp. 965-1023; Jessica Litman, 'Mickey Mouse Emeritus: Character protection and the Public Domain' (1994) 11 University of Miami Entertainment And Sports Law Review, pp. 429-435.

[180] The InfoSoc Directive also provides for neighbouring rights for performers, but because they do not fall in the same group of neighbouring rights holders who are also intermediaries and commercial exploiters of creative works of authors, they will not be covered in this sub-chapter. Several academics

When it comes to the relationship between authors and rightholders, there is, however, little harmonisation to speak of in EU copyright law. Thus, only the very basic structure that EU copyright law gives to the relationship of these two subjects will be reviewed below. Despite the limitations of this thesis with regard to neighbouring rights, a brief description of them will be necessary in this section.

2.3.2.1. The holders of neighbouring rights

The first group are the holders of neighbouring rights or those who *also* hold neighbouring rights while commercially exploiting authors' rights (as is usually the case with different kinds of holders of entrepreneurial neighbouring rights). These are phonogram producers and producers of first fixations of films, according to the InfoSoc Directive, and broadcasting organisations, as set out in the Satellite and Cable Directive.[181] They were recently joined by publishers of press publications, thanks to the Copyright in the Digital Single Market Directive (DSM Directive).[182]

These rightholders are the traditional intermediaries whom the author would employ to provide the technological means, the know-how, and the financial assets to make the first fixation of a work (a recording in the case of phonograms and films, and, presumably, a newspaper in the case of the most recent publisher right). They were also the ones who would have the role of disseminating the final result at their own financial risk.[183] Moreover, they are also generally those whose subsequent rights

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have, in fact, called for a clearer distinction between entrepreneurial neighbouring rights and creative neighbouring rights, as well as for giving performers rights akin to copyright as they share more similarities with authors than with other related rights owners. See, e.g., Eidsvold Tøien, 'Creative, Performing Artists – Copyright for Performers?' (2017) 86 NIR : Nordiskt immateriellt rättsskydd. At the same time, since the InfoSoc Directive (Articles 2,3 and others) provides for a special neighbouring right for performers for the *fixation* of their performances, in the opinion of this author there is nothing to preclude the performers from also benefitting from the protection of copyright to their performance where the harmonised conditions of "author's own intellectual creation" and "expression" are satisfied.

[181] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Satellite and Cable Directive), new consolidated version Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, Art. 2.

[182] Arts. 15-16 of the DSM Directive, but the right in question is very narrow, only pertaining to online uses and only when done by information society service providers.

[183] Even though there are also other reasons why the category of "neighbouring rights" has been adopted in many Member States, e.g., the fact that even production of phonograms is not completely a mechanical activity but also asks for technical and creative decisions: Pascal Kamina, 'Towards new forms of neighbouring rights within the European Union?' in David Vaver and Lionel Bently (eds), *Intellectual Property in the New Millenium Essays in Honour of William R Cornish* (Cambridge University Press 2009), p. 282.

are based on and derived from the works created by authors, and so their rights are "neighbouring" or "related" to the rights of the author.[184]

These two subjects – the authors and holders of neighbouring rights – can be seen as working on the same "product" together; thus, the problems that arise and are (to some extent) addressed by EU copyright law are specific to the relationship and not common in other kinds of commercial exploitation of works where a license from an author might still be needed.[185]

In the EU copyright system, the rights of authors and those of neighbouring right holders are closely related. In fact, in the majority of EU copyright directives, copyright and neighbouring rights are discussed together, to the extent that they can even appear in the same article.[186] This is not to suggest that the EU copyright system also includes neighbouring rights, as in the common law tradition; but all too often, neighbouring rights and copyright are lumped together under a single umbrella of general principles, as is the case, for instance, in the right of reproduction in Art. 2 or the exceptions and limitations in Art. 5(2) of the InfoSoc Directive.

On the other hand, the protection requirements and scope of these rights (even though often referred to in the same language in both instances) are different. A film, for example, contains a copyright-protected *work* to the extent that is exists as the author's own intellectual creation and to the extent that the author's free and creative choices were exercised when making it.[187] At the same time, film also has (is) its fixation, which is, without any additional conditions, protected by neighbouring rights by virtue of the investment which went into making it. Hence, it is the neighbouring rights which protect the "subject matter", and they exist

[184] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights. The Berne Convention and Beyond. Volume II* (Oxford University Press 2006), p. 1206.

[185] E.g., in the case of streaming services, digital databases, social media and others, which participate in dissemination of a "product" but are not inevitable to its coming to existence.

[186] See, e.g., the right to reproduction (Art. 2), the right of communication to the public (Art. 3), and other rights in the InfoSoc Directive. Meanwhile, there are two separate sets of basic treaties at the international level: the Berne Convention and WCT for authors, and the Rome Convention and WPPT for neighbouring rights holders, with TRIPS being an exception and combining (parts of) both sorts of rights.

[187] See Section 5.2.2 for more elaboration on this criterion.

because of the material fixation.[188] The copyright, on the other hand, connects the protection to the author and her activities.[189]

Thus, being distinct but in reality often attached to the same creative output, as well as involving subjects of different economic power, these rights need to be balanced. Some attempts to reach that balance can be glimpsed in EU copyright legislation. For instance, the Rental and Lending Directive and the Term of Protection Directive clearly establish that the author (or one of the authors) of a cinematographic work is its principal director.[190] The provision was added to the Rental and Lending Directive specifically to protect authors who were disadvantaged in mostly common law countries, where instead of the person who made the creative choices, the producer of the film would hold all rights and be considered "author".[191] As a consequence, the Directive now reaffirms the creator doctrine in this situation of uncertainty for economically disadvantaged authors and requires that the author becomes the first owner of copyright. As later explained by the CJEU in *Luksan*, after being granted the status of author, the person in question cannot be deprived of her first ownership by national law, as this would amount to deprivation of lawfully acquired possessions under Art. 17(1) of the Charter of Fundamental Rights.[192]

At the same time, Articles 3(4), 3(5), and 3(6) of the Rental and Lending Rights Directive provide that when the author and producer of a film enter into a production agreement, the right to rent the work is presumed to be transferred to the producer unless the contract stipulates otherwise. Later, in *Luksan*, the CJEU concluded that the Member States are free to introduce into their national laws the same presumption of transfer for other rights to cinematographic works as well.[193] This, however, can only happen by contractual agreement and the presumption of transfer

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[188] For a more detailed analysis of the provisions of the Rental and Lending Rights Directive and other Directives on this matter see Pascal Kamina, 'The Subject-matter for film protection in Europe' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), pp. 95-96; and Fleischer, 'Protecting the musicians and/or the record industry? On the history of 'neighbouring rights' and the role of Fascist Italy', pp. 332-334.

[189] Even with the additional criterion in *Levola*, which speaks about expression in the sense of the idea/expression dichotomy but does not demand fixation. This is also illustrated by the CJEU's speculation about new technology in the future making it possible to perceive taste more accurately. For more see Section 5.2.4 of the thesis.

[190] Art. 2 of the Term of Protection Directive and Art. 2.2 of the Rental and Lending Directive.

[191] Walter and Lewinski, *European Copyright Law. A Commentary*, pp. 271-272; Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 165.

[192] *Luksan*, para. 68.

[193] *Luksan*, paras. 86-87, as regards the rights of satellite broadcasting right, reproduction right and any other right of communication to the public through making available to the public. This, however, does not extend beyond the scope of cinematographic works.

is rebuttable. The first ownership of rights derived from copyright still vests with the author of the film.

In the same vein, even after transfer of economic rights, the author keeps a statutory entitlement to compensation for certain uses. For instance, according to Art. 5(2) of the Rental and Lending Directive, when the rental right is transferred, the authors of films and phonograms retain an unwaivable right to remuneration for the renting.[194] Furthermore, in *Luksan* again, the CJEU, if only in an explanation of fair compensation for private copying in the case of cinematographic works, proclaimed that the right to this fair compensation cannot be waived. According to the Court, the InfoSoc Directive does not envisage such a possibility, and permitting the waiver in national law would go against the obligation of the states to achieve the result of fair compensation provided in the InfoSoc Directive.[195] This prohibition might be argued to extend to other instances where compensation is required in the context of exceptions provided in Art. 5 of the InfoSoc Directive.[196]

The combination of these provisions, some applicable only to cinematographic works, and some that apply to any other author-rightholder relationship, paints a picture of an aspiration to reach equilibrium between these actors. The CJEU has explained this balance by drawing on the internal logic of Art. 3(4) and 3(5) of the Rental and Lending Directive and extrapolating it to the transfer of other economic rights. In *Luksan,* the Court's justification for balance was namely that the author needs adequate income to facilitate further artistic work,[197] while the producer of the film, as the party who takes on the risk of making the film and investing in it, is in need of recouping this investment.[198] The Court assures that the presumption of transfer of rental and other rights (such as reproduction, communication to the public by making available, or adaptation) after signing a contract is necessary to satisfy the interests of the producer but in no way contradicts the fact that the rights are originally the author's, and gives her the possibility to change this presumption by contract.[199]

At the same time, the interests of authors supposedly relating to the "income" to be received for use of their work which is allowed by an exception or limitation are

[194] Even though the unwaivable rights to remuneration can supposedly be signed away for a payment (so not waived, but reassigned) see Raquel Xalabarder, *International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of their Works* (2018), pp. 58-59.

[195] *Luksan*, paras. 105-106.

[196] Even though the Court explicitly states that it is only interpreting the private copying exception in paras. 89, 99.

[197] *Luksan*, para. 77.

[198] Ibid., paras. 77-79.

[199] Ibid., paras. 80, 87.

also to be remunerated or compensated; this right cannot be waived, ensuring that the compensation is, indeed, received. In the *Reprobel* case,[200] the CJEU further elaborated that significantly reducing the amount of compensation payable to the author by redirecting a part of the compensation to other subjects who have no statutory right to it is not permitted under the InfoSoc Directive.[201] Holders of neighbouring rights might also be entitled to compensation for an exception or limitation, but only by the virtue of their own neighbouring right to a fixation of a work, which is also exempted in the cases of private copying and reprographic reproduction addressed in *Luksan* and *Reprobel*.[202]

In practice, this system of separation of subjects and balancing of their rights in relation to their needs still does not guarantee that the author is able to get fair compensation for all uses of her work or for all exceptions and limitations when the rights are transferred to the rightholder.[203] A presumption of transfer of exclusive rights, might be, on the contrary, a step towards a conceptual weakening of the protection to the author.[204]

It is noteworthy in this regard that the CJEU formulates the author's monetary/economic interest as "need for income", rather than profit, return on investment, or similar. Moreover, only the producer's investment risks are raised, with no consideration for the author's risks or investment of time, education, and so on. This sharpens the contrast between, on one hand, copyright as a right of the author, relating solely to the protection of creativity, and on the other hand, neighbouring rights as a mechanism for investment and returns, giving the impression that copyright in the sense of the Berne system and therefore EU law should really be called "authors' rights". A similar reflection on the relationship of neighbouring rights and copyright can be found, for example, in the preamble of the InfoSoc Directive, where recital 10 also specifically defines the two interest groups through interest in "reward", on the part of authors (and performers), and "return of investment", on the part of the holders of neighbouring rights.

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[200] Case C-572/13, Hewlett-Packard Belgium SPRL v Reprobel, EU:C:2015:750 (*Reprobel*).

[201] *Reprobel,* paras. 48-49.

[202] *Luksan,* para. 92; *Reprobel,* paras. 46-48.

[203] See Xalabarder, *International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of their Works*, where the author reviews the situation of authors of audiovisual works and concludes that these are the rightholders who anyway end up controlling all of the exclusive rights and receiving the major part of compensation for use of the work.

[204] See Florence-Marie Piriou, 'The Author's Right to Intellectual Property' (2002) 49 Diogenes; and Caterina Sganga, 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots' in R. Caso and F. Giovanella (eds), *Balancing Copyright Law in the Digital Age* (Springer 2015) on the question of how property logic is traditionally an ideological step back in the discourse of the high level of protection of the *droit d'auteur* traditions.

The recent Copyright in the Digital Single Market Directive, however, casts some doubt on whether this balance that has been hinted at can be preserved. Article 16 introduces a provision that, in essence, merely grants press publishers, who now have a neighbouring right of their own,[205] a share of the compensation to be received for the exceptions and limitations in relation to news articles. Yet, instead of adhering to the logic that holders of neighbouring rights are as such entitled to compensation, the Directive allows Member States to provide that press publishers are entitled to a share of compensation for the rights of authors licensed to them by virtue of contract. Such provision is in direct contradiction to the *Reprobel* judgement, but also the *Luksan* judgement, which assures that the right of remuneration, for at least the private copying exception, is unwaivable.[206] It remains to be seen how this provision will be interpreted in the future, not least by the CJEU itself.

2.3.2.2. Contractual protection of authors

This mechanism for regulating the relationship between authors and rightholders merits separate consideration for several reasons. As already noted, the contractual protection measures cover contracts between authors and producers of fixations of works, but they also apply to any other exploitation relationship that the author enters into, some of which are unrelated to production (for instance, licenses to digital platforms). Moreover, this mechanism for protecting authors' interests is one of the most recent additions to the EU copyright system, having been brought in by the DSM Directive. Here, the EU copyright legislation introduces several protective measures that already existed in various forms in the Member States.[207]

In Chapter 3 (Articles 18-23) of the DSM Directive one can find the principle of "appropriate and proportionate remuneration", the transparency obligation, a contract adjustment mechanism for when remuneration turns out to be disproportionately low, and the possibility of revocation.[208] These duties mean, among other things, that rightholders (publishers, record labels, other licensees, etc.) must not only pay authors according to the principles of fairness, but also inform them about the amount of revenue generated by the exploitation of their work. If applicable, this information should be obtained from sub-licensors as well. Finally,

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[205] It has even been asked if this in itself is not contradictory to the InfoSoc Directive, as the *Reprobel* judgement has arguably established that the Directive does not include publishers as owners of neighbouring rights. See Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?' pp. 582-583, 585.

[206] *Luksan,* para. 108.

[207] Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 14; Severine Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' (2018) 41 Columbia Journal of Law & the Arts, pp. 437-441.

[208] Articles 18,19,20, 22 of the DSM Directive.

if the remuneration initially agreed upon becomes disproportionate, Article 20 provides that additional remuneration can be asked for. Article 22 introduces another important right, that of revocation of the contract when the rightholder does not exploit the licensed work. The Directive also sets out that the rightholders' duties of transparency and the possibility of contract revision are inalienable.[209]

The fact that these provisions are specifically included for the benefit of authors (and performers) is also clearly articulated in recitals 72-81 of the preamble to the Directive. Here, the wording of "authors and performers" is used exclusively to define the beneficiaries of the new legal rules. It must be admitted that the new provisions are comprehensive, covering the most pressing issues in the author-rightholder relationship where the author, as also noted in the preamble, has less bargaining power (a weaker contractual position).[210] Nevertheless, it remains to be seen how such general requirements as "appropriate and proportionate remuneration" will be interpreted. According to the preamble, what is appropriate and proportionate shall be assessed based on the author's contribution to the overall work, and such circumstances as market practices and the actual exploitation of the work.[211] Perhaps the transparency obligations will bring clarity and fairness to market practices in the different sectors,[212] but it should be noted that Article 19 only provides the duty of transparency with regard to the author and does not make it obligatory to also disclose the information to third parties.

Already, a number of scholars have suggested that the provisions protecting authors in contractual relationships have little impact on the authors' actual remuneration.[213] This is mostly due to the author's continued lack of bargaining power, as well as the above-mentioned situation of routine (and presumed) reassignment of exclusive rights to rightholders and other contractual practices in the different industries.[214] On the other hand, it cannot be denied that the measures are at least an attempt to reaffirm that authors are the subjects of copyright law, and that even in the case of

[209] Art. 23 of the DSM Directive.

[210] Recital 72. For empirical studies on this issue, see also Lucie Guibault and Bernt Hugenholtz, *Study on the conditions applicable to contracts relating to intellectual property in the European Union* (Institute for Information Law (IViR) 2002); and Lucie Guibault, Olivia Salamanca and Stef Van Gompel, *Remuneration of authors and performers for the use of their works and the fixations of their performances* (2015), p. 111-116.

[211] Recital 73 of the DSM Directive.

[212] As for now, publishing contracts are often subject to non-disclosure provisions.

[213] Guibault, Salamanca and Van Gompel, *Remuneration of authors and performers for the use of their works and the fixations of their performances*, p. 51; also Lucie Guibault and Olivia Salamanca, *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (2017).

[214] Xalabarder, *International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of their Works*, pp. 23-24.

rights exploitation and contractual transfer to other rightholders, certain interests of the author which are the focus of copyright protection should be observed. Moreover, the contractual protection measures can help achieve the usability of authors' unwaivable remuneration rights discussed previously. As a result, the author is more likely to receive "income" to enable further creative endeavours, as provided in the preamble of the InfoSoc Directive and underlined by the CJEU.[215]

2.3.2.3. Are authors and rightholders fairly balanced?

The above review demonstrates that the EU copyright system's tendency to favour "rightholders" may be cause for concern. Even from this first glance, there seems to be a certain light-handedness in presuming transfer of all rights to the producer of a film or allowing part of the remuneration for exceptions to authors' rights to be simply transferred to the subject responsible for exploitation of the work (even though that subject already receives income through the exploitation itself). Furthermore, the new contractual protection measures, while showing concern for the author and the income she should receive, simply leave too much uncertainty surrounding their implementation.

At the same time, from what is visible at the surface level of the EU copyright law system discussed above, it is clear that the author is presented as the key figure in the protection of copyright law. For instance, in a scenario discussed above, even if in practice the presumption of assignment of rights in a film production relationship is effectively the same as vesting the rights with the producer from the very beginning, explicitly adopting such a rule would be incompatible with the main principles (and so the sub-surface structures) of EU copyright law. Moreover, the author, as creator, has certain unwaivable[216] personal rights to ensure, even if not profit or revenues, at least *income* or proportionate *remuneration* to the rights that have been transferred. With this in mind, whether the balance that is enshrined in this legal system is "fair" is open to debate.

Furthermore, in terms of the methodology of this thesis, it can be observed that even where the EU copyright system is not complete and consistent in its treatment of the author and her interests in different kinds of relationships with "rightholders", the image of the author as originator of work is evoked even in the economic context. The author is someone who has rights to remuneration and must be informed about the economic exploitation of her work in order to ensure the remuneration is proportionate and that the work is actively exploited to realise its economic potential. In other words, the importance of the author and her presumed meriting

[215] See the previous sub-section.

[216] Articles 19-21 of the DSM Directive are unwaivable and the revocation right provided in Art. 22 is possible to make waivable only through collective agreement, see arts. 23 and Art.22(5) of the DSM Directive. In addition, at least the statutory right of compensation for private use exception according to CJEU in *Luksan*, paras. 105-107.

of income during the exploitation of her work suggests another way of seeing the author: as an entrepreneurial figure or an owner who allows others to exploit her property economically, while retaining certain control over how it is exploited.

2.3.3. Conclusions on the place of the author in EU copyright law

Considering all the features of harmonised EU copyright law presented above, one can conclude that this legal system, in fact, has a multifaceted nature. One aspect that shines through wherever one looks is that it the author is positioned as its central subject. Indeed, even if this might not make much economic or "Internal Market" sense, copyright law in the EU is still mainly based on initial authorial ownership of rights: the term of protection is linked to the life of the author, originality is dependent on the author's creative choices, there are special mechanisms to ensure fair remuneration and income for authors, and so on.

The second tier of this scheme, however, comprises the economic, technological, market, and other realities, which have been called the post-humanistic[217] approach (or stage) in the development of copyright law. They have their role in EU copyright too; but, rather surprisingly, they do not always seem to have the appeal that one would expect in an economically oriented community like the EU. This seems especially to be the case in the decisions of the CJEU and especially with respect to the protectability of works, as will be shown in the following chapters. Also belonging to this second tier are the various tolerances that are left in the *acquis* to accommodate differences between Member States (such as surrounding the possibility for the first acquirer of the rights to be a legal person). This flexibility is thus a reflection of political realities and difficulties in reaching agreement between the Member States.

K. Sganga has suggested that this picture can also be explained by another duality in EU copyright law, that of justifications and actual legal solutions. She concludes that EU copyright grounds itself in market and utilitarian rationales due to the EU's lack of competence in the field of copyright and the need to justify all regulatory acts with the necessity of removing obstacles to the internal market.[218] The actual normative content of the rules, she suggests, seems to mostly follow the principles of the continental legal tradition and does not retain the utilitarian sentiments that are portrayed as the norm's intent. Hence, the final result, which is a synthesis of the two, departs from the traditions and justifications of the Member States.[219] An illustration of this could be the declaration of utilitarian justifications for protection

[217] Piriou, 'The Author's Right to Intellectual Property', pp. 101-102.

[218] Sganga, 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots', pp. 6-7.

[219] Ibid., p. 7.

in the preamble of the InfoSoc Directive, followed by the CJEU's interpretation of the same Directive proclaiming a "high level of protection of the author".

As with the main international copyright instruments presented in the previous section, looking from this wide perspective, the "author" is positioned as a central concept in EU copyright law. However, the multifaceted nature of the system at both its surface and sub-surface levels also inevitably leads to different conceptualisations, which compete and can be used in a variety of ways to solve a legal problem at hand. Thus, the "author" also has, in terms of the Wittgensteinian approach to concepts, a family of meanings. This very general inquiry into the basic structure of EU copyright law reveals some of them. For instance, one approach is more in keeping with the Romantic notion of the human author, to whom all rights belong by virtue of her creativity. The author is also regarded, if only formally, as the owner of the rights, allowing her to dispose of them as she pleases and even retain control in respect to their economic exploitation. According to another perspective, the author is set aside and her work treated as a resource, the use of which is determined by the interests of economic exploiters. At the same time, an examination of the author's relationship to other rightholders reveals a line of argument about the author as someone who is (only) interested in earning a living from the creative activity she is engaged in so as to continue producing works, making authorship look like some sort of craft activity, ignoring any creative struggle, risks or other uncertainties. The following chapters will delve further into the surface and sub-surface layers of EU copyright law to explore these different concepts and what those differences mean to EU copyright law and to the Creative Users.

2.4. The author in the European copyright system: essential but not unified

The review of some of the most fundamental premises of the European copyright system above paints a complex picture of general rules and exceptions, different interpretations, and flexibility for national implementation.[220] The purpose of this section was to show that European copyright is inseparably bound up with the idea of the centrality of the author. Even if this centrality in many respects seems to be

[220] It needs saying that this conclusion is made here solely with regard to copyright law and does not take into consideration the fact that EU copyright law is accompanied by a complex system of neighbouring rights and *sui generis* protection of databases. The invention of the latter regime has been linked to the general trend of propertisation of intellectual property as such, see Jerome H. Reichman, 'Reframing Intellectual Property Rights with Fewer Distortions of the Trade Paradigm' in Rochelle Cooper Dreyfuss and Elizabeth Siew-Kuan Ng (eds), *Framing Intellectual Property Law in the 21st Century* (Cambridge University Press 2018), p. 67.

more formal and ideological, any discussion about the place of new creative technology or new forms of creativity within the copyright system is inconceivable without first analysing the author and how this subject is conceptualised.

In the broadest perspective, authorship is what makes copyright law relevant in the first place. Without a creator (originator) who, in the normal course of things, becomes an author when other conditions of copyright law are met, there would be nothing for copyright to protect. Thus, the author is a necessary element for creativity and creative works to manifest. Other conditions or requirements may also be necessary, but in all other strands of European copyright, the presence of the author establishes itself time and again. The legal conditions change, but the subject called "author" is invoked throughout the copyright life cycle. Many agree that in the modern copyright tradition, the author is central to protection.[221] As M. Ijadica has put it, authorship can be seen as "one of the, if not *the,* central organising concepts in the law of copyright".[222]

This thesis centres on the EU copyright system, which has high ambitions with respect to copyright and its adaptation to the digital reality. This legal framework, is, however, inevitably embedded in the wider European copyright tradition. The EU as a political structure is younger than the fundamental principles that have been "sedimenting" into the European copyright system (the copyright laws of the Member States and the norms at the international level) over the years since the invention of the printing press and in response to challenges brought by shifting social, economic, political, and technological realities. Superimposed on these are new elements, reflecting more recent needs and developments. Both aspects coexist and give rise to a single legal system (albeit one that is still incomplete and patchy), whose discrepancies are for the lawyers, legislators and most importantly, for the CJEU to resolve. Where consistency is sought, where there is uncertainty about the meaning of norms, or where new norms are to be adopted, the sedimented legal principles and concepts resurface and serve not only as a limiting and legitimising factor, but also as a "reservoir" of possible choices and justifications. In a system with such a rich reservoir as EU copyright law, this choice is especially meaningful. The reconstruction of the options available with respect to conceptualisations of the author will continue in the upcoming chapters.

[221] This idea has also been expressed in, e.g., Ginsburg, 'The concept of authorship in comparative copyright law', Carys J. Craig, 'Reconstructing the Author-Self: Some Femminist Lessons for Copyright Law' (2007) 15 Journal of Gender, Social Policy and the Law, p. 209.

[222] Iljadica, 'User generated content and its authors', p. 163.

Chapter 3: The "Author" and the History of Copyright Law

3.1. Introduction: concepts of author in historical perspective

The centrality of the author figure and its necessity for copyright can itself be regarded as one of the major building blocks in the sub-surface layers of the European copyright system.[1] On the other hand, the position and importance given to the concept varies significantly by context. The aim of this thesis is to explore this concept in EU copyright law and to demonstrate how it has been challenged by Creative Users. Where the previous chapter has shown the "author" to be an organising concept around which some of the main premises of copyright protection are, at least formally, positioned around, this chapter will further attempt to reconstruct the main building blocks of the "author" in the European and EU copyright traditions. As has already been noted, European copyright is a notion broader than EU copyright, but the latter is the part of the former and it is the European copyright legal tradition that EU copyright law draws upon when developing its own norms. Even where new norms are created in EU copyright law, they do not come from "nowhere", but are rooted, at least in part, in the concepts, patterns and general logic of European copyright law.

Therefore, in order to delve deeper into the concept of author in EU copyright law and attempt to reconstruct it, one must first research the European copyright tradition and its history. As K. Tuori theorises, the content of a legal system's sub-surface layers is nothing more than previous legal norms that have "sedimented" into the legal culture through historical changes and shifts, reflecting law's temporal continuity. Being from the very beginning a response to technological challenges, European copyright law has many such historical developments marked into it by changes in its normative content, either through new legislation or through reinterpretation of the existing laws.

[1] Something P. Goldstein calls "the moral impulse to protect authors", which, according to him is much older than copyright law: Paul Goldstein, *Copyright's Highway: From Guttenberg to the Celestial Jukebox* (Hill and Wang 1994), p. 39.

This chapter will suggest five such "shifts" that are likely to be behind some of the most fundamental elements in the way "author" is conceptualised in current EU copyright law. Each of these moments in the formation of European copyright prompted a reassessment of its subjects, a look at them from a new perspective, and, in many cases, a restructuring of the normative content. During each of these shifts (none of which occurred quickly) specific historical circumstances and social interactions generated new ways to manage the "author" in the normative layer of copyright law. For the most part, English and French copyright will be used to exemplify the legal developments that occurred during each of these shifts, as prominent representatives of the two legal traditions of copyright (common law and Continental law), whose legal solutions continue to influence the EU copyright system today.

The *shifts* described here are moments of sedimentation and redistribution of existing sediments. They are times when old and new are combined and reconciled. The old is reused as a tool for interpretation and legitimisation of new solutions and the new is used for the repurposing of old structures. Analysing those shifts not only adds to understanding of the "toolbox" of the modern legal concept of author in EU copyright (or the family of concepts behind the modern "author"), but also shows that change and adaptation of the legal understanding of what an author is, what she does, expects and needs, is natural and not unusual.

The five shifts selected are not an exhaustive list of the challenges European copyright law has faced in its history, nor is the analysis of the changes that each shift brought exhaustive. As K. Tuori warns, reconstructing the sub-surface layers of any legal system is an uncertain activity. Moreover, the reconstruction in this section is based essentially on other legal scholars' accounts of key historical developments in European copyright law, and as such risks being non-objective and not completely accurate.[2] On the other hand, in line with the methodological perspective of this thesis, legal scholars are a group of legal professionals whose acts of doctrinal analysis reproduce the sub-surface layers of the law in an attempt to give consistency to the legal system. The ambition of this chapter is not to give an undisputed account of the content of the authorial concept in EU copyright law, but to suggest elements which are likely to be its main building blocks. The historical research of other copyright scholars is therefore of particular interest: their disagreements over different historical periods as well as their differences in emphasis is but one more confirmation of the variety of choice that exists in the sub-surface layers of European copyright. To appropriate the metaphor used by J.

[2] See Kathy Bowrey, 'Who's writing copyright history' (1996) 18 European Intellectual Property Review 322, pp. 322-329, for a review of the differences and shortcomings of some of the most well-known research of copyright history.

Bengoetxea when interpreting the approach of K. Tuori,[3] legal researchers explore the legal culture of European copyright and find there many potential fragments and legal sediments which they each combine into a slightly different picture, or as suggested in the metaphor – a slightly different vase.

A related point to acknowledge here is that many other legal scholars have been interested in the history of copyright and the background of the "author", some of whom have explicitly recognised that modern copyright law is full of legal structures formed in different historical periods, hinting at the inconsistency of copyright's theoretical foundations. L. Zemer stands out in this respect, tracking elements of Romantic authorship in modern US copyright law,[4] together with O. Bracha, who conducts related research on other elements of authorship in US law.[5] M Woodmansee and P. Jaszi merit special attention,[6] as do many others whose works are referenced in the coming pages. This chapter, thus, builds on the works of others and aims to give a broad overview of what may be the main structural legal sediments underpinning the concept of the author in EU copyright law.

3.2. Shift No. 1: establishing control and exclusivity

3.2.1. Historical background

The first significant shift in the conceptualisation of author in the framework of the European copyright tradition can be said to have occurred in the 15th century, with the invention of the printing press.[7] This historical moment was recognised early on

[3] Joxerramon Bengoetxea, 'Fragments and sediments, system and tradition. A Venetian tribute to Kaarlo Tuori' (2008) 5 An Interdisciplinary Journal of Law and Justice 145, pp. 155-157.

[4] See Lior Zemer, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' [1991] Duke Law Journal 455.

[5] Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright ' (2008) 118 The Yale Law Journal 186, pp. 186-271.

[6] See, e.g., Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'' and Peter Jaszi, 'On the Author effect: Contemporary Copyright and Collective Creativity' in Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship Textual Appropriation in Law and Literature* (Duke University Press 1994).

[7] The invention of a specific model of printing press is attributed to J. Guttenberg and dates from around the year 1454 when he printed his first bible. There are, however, many factors which led to this invention, not least the previous printing technologies that existed long before the European invention: Bill Kovarik, *Revolutions in Communication. Media History from Gutenberg to the Digital Age* (Bloomsbury 2011), pp. 17-19; Paul Edward Geller, 'Copyright History and the Future: What's Culture Got to Do with It?' (2000) 47 Journal of Copyright Society of the USA, p. 214.

by renowned legal scholars as the starting point of modern copyright.[8] Indeed, it was a watershed moment in European copyright (or rather in the idea of copyright as such, since at that time there was no law regulating reproduction and distribution of creative works). The printing press made the written word accessible to broader audiences and the same book could be multiplied almost endlessly. The impact this had on medieval European society in terms of new possibilities of fixation and transfer of information cannot be overstated.

Even though the actual printing of books and the demand for them were slow to pick up,[9] with more accessible texts came increasing literacy. Accordingly, faced with the free(er) spread of information, the power structures of the day were threatened but also intrigued by the possibilities this new technology introduced. With the invention of the printing press, text ceased to be limited by its original physical form. A legal fiction became necessary to control the new "immaterial" qualities of the written word.

The legal system of the period, challenged by the revolutionary technology of the printing press, had no sub-surface structures of copyright law to draw upon. However, other legal and social norms could be reused and recalibrated to create what we now recognise as the very beginning of modern copyright. The first legal tool employed was censorship, which was used to control opinions and information that the state or church deemed heretical or seditious.[10] Another tool was the "privilege", a special protection or favourable exception granted by the monarch and used for a variety of purposes.[11] In consequence, in most of Europe, copyright started its journey as a system of permissions and monopolies closely intertwined with the institution of censorship.

From the perspective of the author – who, as will be shown in further detail, was largely overlooked by this new system of managing printed works – the legal developments had little impact on the social perceptions of authorship prevailing at the time. It has been suggested that the pre-copyright author in the European tradition was generally a secondary figure to the production of books and

[8] See, e.g., Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968), pp. 20-27; Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press 1967), pp. 2-4.

[9] Ken Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property' 41 Hong Kong Law Journal, p. 738.

[10] This system had been in place in European monarchies even before the invention of the press. See, e.g., Patterson, *Copyright in Historical Perspective*, p. 23, on the censorship in England.

[11] Elizabeth Armstrong, *The French Book Privilege System 1498-1526* (Cambridge University Press 1990), p. 1.

preservation of knowledge.[12] According to M. Woodmansee, this was due to two main conceptualisations of author prevalent in the late medieval period – the author as craftsman and as inspired (e.g. by God).[13] In other words, prior to the printing press, the author could be seen as someone who worked in accordance with professional practices and following certain standards, sometimes rising above mere craftsmanship through the intervention of godly inspiration.[14] This pre-copyright author had virtually no authority or control over the meaning or copying (rewriting) of her text – a literary work could be seen as the contribution of many "authors", with changes added with every rewriting of the text.[15] Furthermore, this author was usually anonymous.[16]

Although notions of the author as an authority and of the author's name as a necessary attribute of "serious" literary works became more pronounced towards the end of the Middle Ages and the arrival of the printing press,[17] the social and legal processes used to create the first copy-control regime in the European copyright tradition had little in common with the copyright law of today.

3.2.2. The first roles of subjects of copyright

3.2.2.1. Sovereign (Monarch)

As suggested above, the first legal response to the printing press and the shattering of the unity of the book, which suddenly acquired an "immaterial" dimension, came from the monarchs of the most developed European countries of the time. The reaction was swift, and already in 1469 the first recorded privilege was granted to a

[12] James D.A. Boyle, 'The Search for an Author: Shakespeare and the Framers' (1988) 37 The American University Law Review, p. 631.

[13] See Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', pp. 426-427; Woodmansee, 'On the Author Effect: Recovering Collectivity', pp. 15-16; also Sean Burke, *Authorship: From Plato to the Postmodern. A Reader* (Edinburgh University Press 2006), p. xviii where S. Burke calls the God-inspired author narrative the "inspirational model".

[14] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', p. 427.

[15] Anthony Bale, 'From Translator to Laureate: Imagining the Medieval Author' (2008) 5 Literature Compass 918, p. 919.

[16] Virginia Greene (ed) *The Medieval Author in Medieval French Literature* (Palgrave Macmillan 2006), p. 3.

[17] Bale, 'From Translator to Laureate: Imagining the Medieval Author', pp. 931-932.

printer in Venice.[18] Soon afterward, privileges began to be issued in continental Europe; England followed suit, with the first privileges appearing in 1518 and an official incorporation granted to control them in 1557.[19] In France, privileges had reportedly become a "familiar element" of publishing practices by the 1520s.[20]

As already mentioned, royal privileges served as both an instrument of censorship and as a means to encourage printing and the spread of printing presses, by giving exclusivity (monopoly) to certain subjects[21] Especially in the early days they were not merely about the control of reproductions; for instance, it has been found that privileges were specifically issued to attract qualified printers to certain regions.[22] In some countries (notably, France) the early privileges were not compulsory and were more of an assurance in the event of dispute than a system of censorship.[23] Some commentators suggest that the concept of "book privilege" was in its essence an exception or grant of monopoly rights, meant to defend its owner from free riding.[24]

In any case, in the 17th century, the privilege mechanism in major European countries can be seen as firmly intertwined with the system of censorship: certain texts were allowed to be printed and others were not; permission was granted to certain printers and not to others.[25] In England, all works published were soon required to have a royal privilege or face heavy fines.[26] The French model, though more liberal at first, became arguably even more controlling over time, specifically because the granting of privileges was not entrusted into the hands of a private body

[18] Even though in this case the government of Venice likely wanted to "secure" the services of a printer since it was not a common luxury at that time: Armstrong, *The French Book Privilege System 1498-1526*, p. 2.

[19] Mark Rose, *Authors and Owners. The Invention of Copyright* (Harvard University Press 1993), p. 12.

[20] David Saunders, *Authorship and Copyright* (Routledge 1992), p. 80.

[21] L. R. Patterson, for instance, concludes that in England the regulation changed in time from encouragement to censorship: Patterson, *Copyright in Historical Perspective*, pp. 21-24.

[22] Armstrong, *The French Book Privilege System 1498-1526*, pp. 2-4.

[23] Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', p. 744.

[24] Maurizio Borghi, 'A Venetian Experiment on Perpetual Copyright' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property Essays on the History of Copyright* (Cambridge OpenBook Publishers 2010), pp. 140-141.

[25] Pamela Samuelson, 'Copyright and Freedom of Expression in Historical Perspective' 10 J Intell Prop L, pp. 323-324, Saunders, *Authorship and Copyright*, p. 81.

[26] Rose, *Authors and Owners. The Invention of Copyright*, p. 11.

but remained the prerogative of the state.[27] The French monarch and his administration were reportedly seen as the representatives of God, entrusted to determine who was privileged to reveal God's knowledge.[28] Strict censorship of the Parisian Community of Book Sellers and Printers remained in place almost until the French Revolution,[29] even though for different reasons its effectiveness could be questioned.[30] Nevertheless, it stood in contrast, for instance, to the system in Germany, which was weak and unpopular due to the region's fragmentation in more than three hundred territorial units where privileges had to be issued separately.[31] Thus, the regime of censorship was more lenient in some areas than others.[32]

However, neither aspect of the royal privileges was yet linked to private rights or ownership. When a book was still a manageable object, there was no need for a special kind of subject to control it. It could be owned like any other object of craftsmanship – like a chair or a table. When the book acquired a new dimension – the ability to be copied and disseminated to a number of people at the same time – it entered into the realm that in medieval Europe was under the control of special subjects: the monarch and the Church (notably, the Roman Catholic Church).[33] Whereas the monarch had political authority over all prospective readers of the written word (could allow or prohibit certain information), the Church was the source of religious authority. Whereas the authority of the monarch was territorial

[27] For instance, already in 1686 even the number of publishers in the Paris Commune was set to 36 by the Crown and new "members" could join only after the death of an existing one: Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', p. 744; also Laurent Pfister, 'Author and Work in the French Print Privileges System: Some Milestones' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property Essays on the History of Copyright* (Cambridge OpenBooks Publishers 2010), p. 119.

[28] Carla Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793' (1990) Representations 109, p. 111.

[29] Seignette, *Challenges to the Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creaive Works in the Netherlands, Gremany and the United States*, p. 13.

[30] Thomas Munck, *Conflict and Enlightenment: Print and Political Culture in Europe, 1635-1795* (Cambridge University Press 2019), p. 236.

[31] Martha Woodmansee, *The Author, Art, and the Market. Rereading the History of Aesthetics* (Columbia University Press 1994), p. 46.

[32] Friedemann Kawohl, 'The Berlin Publisher Friedrich Nicolai and the Reprinting Sections of the Prussian Statute Book of 1794' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property Essays on the History of Copyright* (2010), pp. 208-209.

[33] Jane Ginsburg, 'Proto-property in literary and artistic works: Sixteenth century papal printing priviledges' in Isabella Alexander and Thomas H. Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016), pp. 246-267.

in nature and the royal privileges were only valid within the borders of a single country, the authority of the Church could also be multiterritorial.[34]

Indeed, the first right to copy, when it became a topic of public life, was thus effectively the right of the ruler. The monarch and the Church could be considered the primary subjects of "copy-right" and it was up to them to allow or prohibit further reproduction of works. The fact that works could be licensed by different authorities (political and religious) in the same territory and that the licenses could sometimes be cancelled[35] shows that the main affiliation of the various works ultimately was not with the territory, the subjects who created the work (authors), or the printing press (or the printer). Even if not all works were obliged to obtain a privilege, and not in all countries, it was only through the grant of a privilege that a work could become a candidate for the "copy-right" at all. That is to say, without a privilege, the work could be freely reproduced by anyone. From this it can be concluded that a privilege holder's right (if any) to prohibit reprinting derived solely from the monarch's copy-right.[36]

It was, of course, true that the physical manuscript was initially in the hands of the person who wrote it and that this person could choose to reveal or hide it. However, this "ownership" amounted to little more than possession of the paper on which the words were written (and, to certain extent, a right of attribution, which will be covered later). The right to reproduce the manuscript belonged to the sovereign and could be licensed to other subjects, or not – if so decided.

3.2.2.2. Publishers

In England, before the invention of print, "stationers" was a general term referring to all craftsmen responsible for turning the texts written by authors into finished books through rewriting, binding, gilding, etc.[37] When the new technology arrived, the stationers' guild soon became dominated by printers. These subjects still called themselves stationers, but they were a new kind, with those who owned the printing presses becoming central figures in the guild. The guild became a *de facto* subject

[34] For instance, the Roman Catholic Pope could issue licenses for religious texts in any Catholic European country: Ginsburg and Treppoz, *International Copyright Law. U.S. and E.U. Perspectives*, p. 5.

[35] See, e.g., Munck, *Conflict and Enlightenment: Print and Political Culture in Europe, 1635-1795*, p. 234, footnote 7.

[36] Even though there are those who suggest that especially at the beginning of the regime of royal privileges, there were situations when privilege was not an extension of the power of the monarch, but merely a bureaucratic tool to enable business interactions. See Ian Gadd, 'The Stationers' Company in England before 1710' in Isabella Alexander and Thomas H. Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016), pp. 83-84.

[37] W. S. Holdsworth, 'Press Control and Copyright in the 16th and 17th Centuries' (1920) 29 Yale Law Journal, pp. 841-842.

of copy-right in 16th century England, not long after the practice of privileges was established.[38] Through a royal charter of 1557, the "Stationer's Company" was charged with administering the Crown's censorship system,[39] and soon held a monopoly on almost all English printing. Under this new system, the guild distributed to its members the right to publish licensed works. The right to print a manuscript had to be established by an entry in the Stationers' registry. Whereas the Crown was the initial "owner" of the copy-right, the printers became the administrators of these rights. Slowly, the control aspect – the negative power to prohibit others from publishing and copying books which belonged to the sovereign – gained substance as a personal right in the hands of the printers.

Even though the Stationers' Company had a whole set of specific transfer, inheritance and other rules in place to regulate the circulation of manuscripts, as well as the official mandate to do so, the rights awarded could not be called "property" in the classic legal or economic sense. It appears that the privilege to print a work could be, in essence, revoked or transferred against the "owner's" will.[40] Many scholars have concluded that legally the Stationers were primarily agents of state censorship and not "owners" of rights.[41] This is illustrated by the de facto existence of two parallel systems of press regulation in early modern England: even after the Stationers were given management of the Crown's rights, the Crown was still free to issue separate "printing patents" outside of those granted through the Stationers' guild.[42]

However, the Stationers were the administrators of the right and evidently engaged in its proprietisation, as indicated by the company practice of entering a particular book title into the registry as *belonging* to a particular guild member.[43] According to J. Feather, such behaviour might have been a way of stating that a copy and the

[38] Samuelson, 'Copyright and Freedom of Expression in Historical Perspective', pp. 841-842.

[39] The purpose of granting a monopoly of printing to the registered members of the guild was, according to the Stationers' Company Charter, "to enhance a more effective censorship against seditious and heretical books, rhymes and treatises": Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', p. 738.

[40] Rose, *Authors and Owners. The Invention of Copyright*, p. 12.

[41] Mark Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Books Publishers 2010), p. 77. See also the "Ordinance of the Regulation of Printing" of 1643, establishing the regime for censorship of books with the Stationers' Guild at its centre.

[42] Rose, *Authors and Owners. The Invention of Copyright*, p. 12; Holdsworth, 'Press Control and Copyright in the 16th and 17th Centuries', pp. 847-855; Geller, 'Copyright History and the Future: What's Culture Got to Do with It?', p. 216.

[43] Rose, *Authors and Owners. The Invention of Copyright*, p. 14.

right to print it should be considered unique – the exclusive preserve of an exceptional group of publishers and under strict rules[44] – and no longer a public issue regulated by the Crown. Another account, by M. Rose, vividly describes the formalities and ceremonies that Stationers routinely employed to emphasise their role as the "proprietors" of literary works. [45]

In France, without a private body equivalent to the Stationers' Company, and reflecting the different historical role of the country's government in the development of legal norms,[46] the system of royal privileges was controlled directly by the state. At the same time, it proved more resilient than its English counterpart: French royal privileges managed to survive until the revolution in 1789, almost 80 years after the Statute of Anne in England.[47]

However, elements of a proprietisation of privileges into a private right similar to those observed in England found their way into the French system as well. The restrictiveness of the privileges, especially the strict limits on the number of publishers, gave rise to a group of advantaged businessmen[48] who enjoyed exclusive and de facto perpetual[49] rights to reproduce texts. According to most accounts, the start of the 18th century marked the first active and direct attempts to deny the nature of royal privileges as the act of a king, and to insist instead that the privileged printer owns a property right to the text on the basis of the relationship between the writer and the printer.[50] There was a similar trend in other countries.[51]

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[44] John Feather, 'From Rights in Copies to Copyright: The Recognition of Author's Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries' in Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship Textual Appropriation in Law and Literature* (Duke University Press 1994), p. 208.

[45] Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne', pp. 78-80.

[46] Saunders, *Authorship and Copyright*, pp. 75-76.

[47] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', pp. 111-117.

[48] They were selective in what was printed based on their own quality standards as well as their monopoly right for printing: Seignette, *Challenges to the Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creative Works in the Netherlands, Gremany and the United States*, p. 17.

[49] The privileges were in nature not perpetual, but in practice were automatically renewed: Saunders, *Authorship and Copyright*, p. 85.

[50] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', p. 112, Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', p. 744, Saunders, *Authorship and Copyright*, p. 85.

[51] There are accounts that, for instance, in the German part of Europe, where the privilege system was not very strong and not centralised to begin with, acts giving automatic copy-right to the printers (without the need for the sovereign to express their will) appeared very early on in some lands:

3.2.2.3. Authors

The role of authors under the royal privilege regime was similar to their role in the pre-print world: they were either a producer of text or the servant of divine inspiration. However, whereas previously the author could communicate with the audience (more or less) directly, now a new complex system of rights management came into existence that took over the production of the work and its dissemination, leaving the author important only at the stage of writing the manuscript. In other words, while the author, as creator, was not completely absent from the system of privileges (for instance, the attribution of authors was generally observed[52]), this shift did not bring any "rights" to authors, perhaps even the opposite. The author was seen as someone to be merely "sustained", controlled, honoured, and sometimes, thanked.

An author could, in principle, become the exploiter of the work if she so wished, and the grant of privileges for authors was not prohibited. Even though the printers, as subjects capable of physically reproducing the text, received the majority of the royal privileges, there are accounts of authors becoming part of this system as well.[53] It has been suggested, however, that this simply took place on the same terms as anyone else, i.e., if the conditions of the privilege were satisfied, and did not make authors "special".[54]

For instance, historians have found that, especially in the early years, privileges were mostly awarded to authors when their work was seen as requiring a high level of skill and monetary investment, and later became, in general, rare.[55] It has also been suggested that the grant of privileges to authors was part of the system of patronage – i.e., in line with any other gifts and sustenance the patron might give the author.[56] Even in the case of the papal privileges, the majority of which were granted to authors, there is little evidence of any consideration of the author as having "rights" on the basis of being originator.[57] Overall, in the words of D.

Seignette, *Challenges to the Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creaive Works in the Netherlands, Gremany and the United States*, p. 13.

[52] For instance, attribution for the purposes of censorship as indicated in Patterson, *Copyright in Historical Perspective*, p. 25.

[53] See Rose, *Authors and Owners. The Invention of Copyright*, p. 10.

[54] Pfister, 'Author and Work in the French Print Privileges System: Some Milestones', p. 122.

[55] Feather, 'From Rights in Copies to Copyright: The Recognition of Author's Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries ', p. 193, or Armstrong, *The French Book Privilege System 1498-1526*, p. 4.

[56] Rose, *Authors and Owners. The Invention of Copyright*, p. 17.

[57] Ginsburg, 'Proto-property in literary and artistic works: Sixteenth century papal printing priviledges', p. 238. However, here Ginsburg says there may be some space to "cautiously" suggest that authorship could have been grounds for the exclusive rights following the privilege.

Saunders, the author was not the "magnetic pole to which all earlier legal arrangements were pointed".[58] Token payment for a manuscript was usually the most an author could expect.[59] This was true for both the common law and continental legal systems – personality theories and authors' rights had not entered the stage at this point in history.[60] Even in France during this early period, it appears the author was seen at best as a "peripheral figure".[61] Some have suggested that the French privilege system did not allow privileges for authors at all: all that was available, to a few, was patronage.[62]

Thus, for authors of the day, their relationship with their works was mostly manifested through ownership of the manuscript, in the sense of selling it to the publisher (or not). In fact, some authors openly despised publishing and the publicity related to it, and receiving money directly for literary work was considered unbecoming of a gentleman.[63] A more acceptable relationship not directly dependent on creative output was the patronage of publishers and booksellers or other rich citizens of the state. As M. Woodmansee points out, the defining characteristics of author-publisher relationships were gratitude and honour.[64] Authors were considered to be honourable people and publishers were grateful for their work, but legal duties or responsibilities did not enter into the relationship.

It is more plausible that authors had some "moral rights" to their works, since notions like fame, integrity of work and plagiarism were known already in antiquity.[65] In both the English and French system of privileges there was already a requirement to put the name of the author and the publisher on every printed work.[66]

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[58] Saunders, *Authorship and Copyright*, p. 35.

[59] Ibid., pp. 78-79.

[60] For instance, M. Woodmansee describes the approach to the author in 1753 in Germany, as reflected in a publication of that time, as a craftsman among many others: "Many people work on this ware before it is complete and becomes an actual book in this sense. The scholar and the writer, the papermaker, the typefounder, the typesetter and the printer, the proofreader, the publisher and the bookbinder, sometimes even the gilder and the brass worker, etc. Thus many mouths are fed by this branch of manufacture." In Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' (1991) 10 Cardozo Arts & Enterntainment, p. 280.

[61] Pfister, 'Author and Work in the French Print Privileges System: Some Milestones', p. 120.

[62] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', pp. 111-112.

[63] Brean S. Hammond, *Professional Imaginative Writing in England, 1670–1740: 'Hackney for Bread'* (Oxford Scholarship Online 2011), pp. 23-28.

[64] Woodmansee, *The Author, Art, and the Market. Rereading the History of Aesthetics*, pp. 42-43.

[65] Rajan, *Moral Rights. Principles, Practice and New Technology*, p. 40.

[66] Saunders, *Authorship and Copyright*, p. 50; Holdsworth, 'Press Control and Copyright in the 16th and 17th Centuries', p. 851.

However, the phenomenon can be seen not as a protection of authors so much as the opposite – a policing of the press and a guarantee that the author of blasphemous, indecent or otherwise unacceptable texts would not remain unpunished.[67] Ultimately, there was no mechanism, in 15th and 17th century England, by which authors could obtain redress for any rights they might have had, and the notion of "author" was quite underdeveloped. It has been observed that if writers ever used the term "authors" in describing themselves, it was meant in the sense of "storytellers" or "originators", with no suggestion of originality or any kind of property.[68]

3.2.3. Conclusion

Consequently, in 17th century Europe, gaps were opening between the different subjects in the system of royal privileges. The ability to copy and the need to control this process were firmly established as the prerogative of the monarch, even as the subjects owning the technology to multiply works were turning the right to copy into a private right in practice. From the perspective of the author, however, the advent of printing technology did not signify a change in her status. As mentioned, the system of royal privileges had no clear place for the author and did not suggest any new legal conceptualisation for this actor. In a way, the shift described above took the existing conceptualisations of craftsman and the god-inspired servant and worked with them, leaving the author to create the manuscript while introducing additional legal dimensions to the phase of its exploitation. It was usual for authors to regard the business of exploitation as not only inaccessible to them due to the investment it required, but also as something "authors don't do".

Nevertheless, this historical period, this "Shift No. 1", was the first time that the immaterial qualities of a "work" were addressed by a legal system. As was shown, the approach taken was one of control and exclusivity. The monarch or the church, who were the first subjects of the right to copy, controlled the extent of dissemination and, through the connection of the royal privileges with censorship, the content of texts as well. This control over copies and their content was what defined the "right" that publishers were given to exercise, serving the dual purpose of incentivising investment and censoring the printed word.

From today's perspective, it is hard to say whether the ability to reproduce works of the mind could have been managed in any other way or, perhaps, left entirely unregulated. It is harder still to imagine how a different solution might have affected today's copyright law. At the same time, viewed through the lens of *legal sediments*, the similarity between present day copyright and the system of royal privileges of

[67] Saunders, *Authorship and Copyright*, p. 50.

[68] Rose, *Authors and Owners. The Invention of Copyright*, pp. 25-27.

the 16th and 17th centuries is clear. The subjects, technology, politics, rights and many other things may be very different, but control and exclusivity are still at the heart of the system.

In K. Tuori's model, the sediments in a legal system are those principles and presumptions which are seen as "natural" and accepted by the average legal professional as parts of the legal culture. One such sediment in the sub-surface structure of EU copyright law that is crucial to how the author is conceptualised there is the idea of exclusive control over the immaterial dimension of creative outputs. This immaterial dimension, namely the ability to be multiplied or to easily manifest in physical reality in an unlimited number of exemplars, is today covered by many private exclusive rights.

The subsequent history of European copyright added further structures to the sub-surface layers of this legal system. With the strengthening of the copyright as a private right during Shift No. 1 and the change in attitude towards the system of governmental censorship, another shift became inevitable.

3.3. Shift No. 2: author becomes owner

3.3.1. Introduction

The next shift starts where the previous historical account left off, namely with the imminent collapse of the system of royal privileges and the search for a new subject to take over the newly established ability to allow and prohibit copying. Perhaps the best known and best researched legal manifestation of what here is called Shift No. 2 is the adoption of the Statute of Anne in England in 1710.

The shift in this country started in the 17th century, with increasing political tension between the Crown, the House of Commons and different social and religious groups, and the realisation by all sides that the printed word was a means to gain political influence and censor opponents. When the last legal basis for the crown's printing privileges and the Stationers' Company's formal power expired in 1695,[69] the House of Commons began searching for possible solutions, aiming to prevent a return to the old order.[70] It is hard to say which factors or groups were the principle

[69] Meaning the expiration of the Printing Act of 1662 which was already the subject of heated debates every time it had to be renewed: Gadd, 'The Stationers' Company in England before 1710', p. 93.

[70] Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', p. 740.

cause of the changes in law that followed.[71] In any case, the old censorship-based system had accumulated so much negative attention that when the decision was eventually made to introduce a new copyright law, the shift of focus was significant: the publishers, as the self-proclaimed "owners" under the previous system, were formally set aside for the benefit of the more neutral figure of the author. Indeed, the first time that authors were awarded copyright, in the 1710 Statute of Anne, was paradigm shifting. It has been suggested that, at least formally, the author became the "functional and moral centre" of the whole system of protection.[72]

Albeit somewhat later than in England, the same change of subject with respect to the right to copy was accomplished in France as well, placing the author at the centre of the system and setting the stage for further developments in European copyright culture.

3.3.2. The tension between subjects

The Stationers' de facto possession of the right to control copying was so powerful that by the end of the 17th century it was criticised for being too rigid and complicated. Other publishers, most of whom were not members of the Stationers' guild, started to demand less governmentalised and more private ways to regulate publishing rights, which in turn strengthened the discourse in the public arena around literary works/manuscripts as objects of property.[73] Hence, when the system of state privileges finally expired in England, there was a vigorous debate about how to replace it (even though the Stationers' copyright system was still operational).

Another state-based system of control was clearly undesirable, and granting a private right to the Stationers' Company or private stationers who were a part of that same system of rigid control was also out of the question. With a rising middle class and increased literacy, concomitant with the spread of Protestantism, there was increasing demand for books at different price points. The business of printing began to look less like a risky occupation of a few and promised quick profits for those who engaged in it.[74] The idea of choosing a third party – the author – made its way into the public debate.

Most scholars conclude that the stationers and publishers themselves were one of the driving political forces behind the choice of author as the subject of the right to

[71] For instance, K. Shao suggests that it could be the political tension between the Crown and the House of Commons as well as the discourse of natural property rights that became popular in Europe around that time: ibid., pp. 739-740.

[72] Ginsburg, 'The author's place in copyright after TRIPs and the WIPO treaties', p. 1.

[73] Rose, *Authors and Owners. The Invention of Copyright*, p 16.

[74] Saunders, *Authorship and Copyright*, p. 39.

copy.[75] Placing a powerless author in the foreground and retaining factual control over exploitation did not seem so significant a departure from their traditional business model. The initiatives of the stationers, manifested in various petitions to the Parliament and in the rhetoric of "author's right", are also mentioned in English court proceedings years prior to the Statute of Anne.[76] K. Shao suggests that the publishers took up the discourse of the author's natural right to property as a way to join the "winning side" and ensure that the new statute corresponded to their needs.[77] Many scholars who have studied this historical moment agree that the stationers' use of the "author" was a shrewd strategic move and the main reason why the resulting Statue was formulated the way it was.[78]

The Statute of Anne was an achievement when it finally came into force in 1710, most notably because for the first time *anyone* was allowed to hold personal rights to literary works.[79] It named the author as the initial owner of the text, but the delegitimisation of the Stationers' monopoly meant that even non-members of the Guild could have copyright. With the primary goal of liberalising publishing and abolishing censorship, and as yet lacking deeper consideration of the nature and value of creativity, the Statute was a tool to take the power that previously belonged to the monarch and to bestow it on another subject, one moreover that was justifiable through the emerging philosophy of natural property.[80]

Similar tensions proved to be the catalyst for the shift from state monopoly to the rights of the author in France, albeit significantly later than in England. Substantial changes to the copyright rules came already in the last years of the absolutist regime, with two royal decrees in 1777 and 1778 revising the system of royal privileges to include both printers and authors.[81] The reasons for the initial changes were as complex, as they were in England. It has been suggested that some of the main causes were the restrictiveness of the system, the unfavourable position of

[75] For instance: Gadd, 'The Stationers' Company in England before 1710', pp. 94-95.

[76] Case: The Stationers v. The Patentees about the printing of Rolle's Abridgment (1666) Cart. 89.,

[77] Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', p. 740.

[78] Simon Newman, 'The Development of Copyright and Moral Rights in the European Legal Systems' 3 European Intellectual Property Review 677 681; Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968), pp. 12-14, Rose, *Authors and Owners. The Invention of Copyright*, pp. 43-44.

[79] Saunders, *Authorship and Copyright*, p. 10; Ronan Deazley, *On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Hart Publishing 2004), p. 42; Patterson, *Copyright in Historical Perspective*, p. 145.

[80] Namely the philosophy of J. Locke, see Section 4.2.3 of the thesis.

[81] Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review, p. 997.

provincial printers, and their pleas to remedy it.[82] The monarch's wish to convince the dissatisfied French people that the absolutist state could reform itself in the face of the Enlightenment might also explain the transformation in approach.[83]

The two new royal decrees on publishing privileges made the author's privilege perpetual and limited the printer's to the lifetime of the author. Despite this distinction, the grant of such a privilege in France did not mean the recognition of a personal right: the decrees specifically reaffirmed that the privilege derived from the grace of the monarch.[84] The difference between the perpetual privilege of authors and the limited privilege of printers might, however, be described as a first step in the emergent status of the author,[85] even if the origin of this status was the political needs of the absolutist state and even if the discourse of "authorial right", when used at all in those early days, was reported to have been a tool of printers and publishers in the same way as it was in England.[86]

The legislation that is considered to be the real model for modern copyright in France came a few years later – with the revolutionary aspiration to replace all laws adopted under the absolutist regime. In 1789 the old system of privileges (even in its updated form) was abolished and all guilds were shortly afterwards dismantled.[87] A publishing market with no regulation whatsoever, though revolutionary in spirit, was opposed by publishers and authors who had only just acquired some rights they could use. This resulted in petitions to the revolutionary government requesting new regulation. In 1793, a new copyright law, the "Declaration of the Rights of the Genius",[88] took effect, marking a significant departure from the previous system of privileges and completing the system's transformation into one similar to the English model. Article 7 of this act explicitly stated that *"Authors of writings of any kind, composers of music, painters and draughtsmen who shall cause paintings and drawings to be engraved, shall throughout their entire life enjoy the exclusive right to sell, authorize for sale and distribute their works in the territory of the Republic,*

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[82] Raymond Birn, 'The Profits of Ideas: *Privileges en librarie* in Eighteenth-Century France' 4 Eighteenth-Century Studies, pp. 158-161, Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', p. 114.

[83] Saunders, *Authorship and Copyright*, pp. 83-84.

[84] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', p. 113.

[85] Saunders, *Authorship and Copyright*, p. 89.

[86] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', p. 113.

[87] Katie Scott, 'Art and Industry. A Contradictory Union: Authors, Rights and Copyrights During the Consulate' 13 Journal of Design History.

[88] French Literary and Artistic Property Act, Paris (1793), Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org.

and to transfer that property in full or in part",[89] thus leaving little doubt about the author's status as the owner of this immaterial "property" that results from her genius.

3.3.3. The role of authors

The Statute of Anne from 1710 is the first legal act to introduce the conceptualisation of the author as (initial) *owner* (i.e., the subject who controls the work in the economic sense). This was the first time the author was officially allocated a formal right to control copying of her works. At the same time, due to the actual social status of authors and their practical inability to copy works on their own, it was evident from the start that this right would be transferred to another subject capable of publishing and disseminating the work. In other words, the exclusivity and control that defined the right of the monarch in the preceding historical period was not in itself developed further; only the initial point of attachment was changed. As before, the real administration of the right to copy was left to its economic exploiters.

Unlike the previous shift, this shift was not driven by technological innovation, but rather by political and cultural developments that had little to do with the creators of works. According to D. Saunders, there was little to no consideration of the "author" when the text of the Statute of Anne was conceived – it was a specific legal construction addressing the challenges of the new technology of printing, not a conscious development of the role of authors.[90] The political movement to reinvent the right to copy was, in both England and France, not so much about proposing something qualitatively new as it was about abolishing the old.[91]

Indirectly, however, this second shift advanced the perception that the immaterial dimension of a written work represented an object of property. As noted above, the end of the period described in this thesis as Shift No. 1 was marked by increasing proprietisation of the right to copy by printers and publishers as a logical result of their monopolistic position under the regime of royal privileges. "Shift No. 2" shows that they were largely successful in this endeavour. Even in the French Act of the Rights of Genius the idea of private "property" in the immaterial aspect of works is

[89] Ibid.

[90] According to D. Saunders, "Such legislation cannot be explained in terms of the movement of history towards its rendezvous with authorial consciousness; on the contrary, it represents a specific legal construction of certain legal-cultural attributes occasioned by a new communications technology and expanding demand for certain types of reading." In Saunders, *Authorship and Copyright*, p. 55.

[91] But see Deazley, *On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)*, p. 46, suggesting that the act was principally driven by public interest and need to encourage continuous production of books.

included seemingly without much concern as to the consequences. Thus, the right to copy is given an *owner* who, for the convenience for other parties, is the author.[92]

A further reason why the author's new status was in name only is that the sub-surface layers of the copyright system in the 18th century lacked any content for the concept of the author (the creator of works) as owner. In England this is confirmed by the fact that for many years following the adoption of the Statute of Anne, the court cases based on it featured only booksellers and publishers as parties, never an author.[93] In the words of R. Patterson, the author's copyright that we have in modern copyright systems "was not created by the Statute of Anne".[94] Similarly, in France, several commentators have concluded that even after the revolutionary act of the "Rights of Genius" and its language of property, the focus was still on the public interest.[95] Nevertheless, the legal investiture of the author at the top of the construction that was hitherto grounded in the sovereignty of a monarch would prove to be consequential for the concept's later evolution.

At the same time, the author's inclusion as at least the attachment point of the newly formulated private right was not completely unexpected. As mentioned before, the Lockean theory of property served as a legitimising element, allowing the author to be compared, at least formally, to those who owned the fruits of their labour.[96] Moreover, while economic rights were generally not deemed "proper" for an author in the English context, there were some authors in all countries who had always considered themselves part of a special group, even seeking publicity[97] or actively engaging in exploitation of works and pursuing royal privileges themselves.[98] When publishing became a reasonably profitable occupation in the richest Continental European countries, authors there also became more inclined to defend their monetary interests. The difference from a modern perspective, however, was that

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[92] Patterson, *Copyright in Historical Perspective*, p. 146, where the author argues that it was also a question of legal technique – "the stationer's copyright was probably the only copyright familiar to Parliament", he concludes.

[93] Saunders, *Authorship and Copyright* and Rose, *Authors and Owners. The Invention of Copyright*, p. 5, describing the situation before the Statute of Anne, and p. 51.

[94] Patterson, *Copyright in Historical Perspective*, p. 144.

[95] See Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', pp. 125-131; Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', pp. 1007-1011.

[96] The Two Treatises of Government came out in 1689, see also Seignette, *Challenges to the Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creaive Works in the Netherlands, Gremany and the United States*, p. 15.

[97] Geoffrey Turnovsky, 'Authorial Modesty and Its Readers: Mondanite and Modernity in Seventeen-Century France' 12 Modern Language Quarterly.

[98] See, e.g., Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (The University of Chicago Press 2002), pp. 94-95.

creativity and authorial autonomy (and even creative skill and effort) had no real bearing on the "ownership" that authors sought prior to the Statute of Anne and which they were given with its enactment. Nor is there any reference in the case law or the Statute to originality of works, moral rights of authors or the like. In other words, the conceptualisation of owner was placed onto the author, but justification of why this should be the case was evolving more slowly.

Following the passage of the first statute to give rights to authors, and with the rise of the middle class and their interest in literature, individual authors began to be able to survive from their writing alone, making it possible to pursue as a full-time occupation.[99] Eventually, at the beginning of the 19th century, something M. Woodmansee calls a "Romantic shift" occurred also in the rhetoric of copyright.[100] The author remained an owner, but the reasons for that ownership and hence its conditions and consequences had begun to transform.[101] This will be the topic of the next sub-section.

In contrast, when the author took centre stage in continental Europe at the end of the 18th century, the ideas of the Enlightenment and the sacredness of property were intertwined with this process. Even though in France the author first became the subject of the right to copy on the basis of the monarch's sovereignty,[102] this regime did not last long. The revolutionary changes were aimed at transferring the sovereignty over creativity and its outputs from the monarch to another subject, and the author proved to be the natural choice in this regard. Already in the title of the French copyright act of 1793 – "The Declaration of the Rights of the Genius" – it is clear that the rights given to the author there are founded not only on political or economic considerations, but also on Enlightenment ideology. Indeed, a portion of the petitions that led to the adoption of the act of 1793 apparently used the discourse of "unrestricted liberty of art" (particularly in opposition to the absolutist regime of control, monopoly and censorship), "genius", "talent", and so on.[103] It has been suggested that this, together with the principles of the newly adopted Declaration of the Rights of Man[104] and its emphasis on natural rights, including property rights,

[99] Woodmansee, *The Author, Art, and the Market. Rereading the History of Aesthetics*, p. 22.

[100] Martha Woodmansee, 'The 'romantic' author' in Isabella Alexander and Thomas H. Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016).

[101] For instance, the term of protection was increasing with each act in the United Kingdom; new rights were being introduced and with the use of new rhetoric.

[102] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', pp. 113-114.

[103] Scott, 'Art and Industry. A Contradictory Union: Authors, Rights and Copyrights During the Consulate', pp. 6-9.

[104] Declaration of the Rights of Man and Citizen, Approved by the National Assembly of France, August 26, 1789.

as opposed to a regime in which rights are granted by a king, shaped the specific content of the Act of the Rights of Genius.[105]

On the other hand, even though the law itself was short and straightforward, allowing for different interpretations, the historical account of its adoption reveals that it lacked the real connection between ownership and the author as creator that it would later acquire. There may have been sentiment for the personal right to property[106] or an attempt to "recompense for author's service as an agent of enlightenment",[107] but the source of the right to copy was, arguably, society, and its limits were dictated by the public interest.[108] It has been concluded that the new regime portrayed the author as a "model citizen" producing common goods,[109] and did not concern itself with subjectivity or the expression of authorial personality.

The "unstable legal synthesis"[110] in French revolutionary copyright of the rights of the "genius" and the public interest is reflected in the shortening of the term of protection from the eternal authorial privilege, under the 1777 regime, to the life of the author plus ten years, in the act of 1793. This had the potential to bring a large number of important works into the public domain and make them accessible to more citizens. In the case law following the new act, J. Ginsburg points to further evidence of the broader public interest, including the possibility of becoming an "author" merely by virtue of investment rather than through an act of creation, and the requirement that works be deposited to the national library in order to receive copyright protection.[111]

Thus, in both the systems discussed here, the "author" became the legal owner of a creative work's immaterial dimension. In both cases, however, the new legal regime was primarily concerned with switching subjects (from the monarch to the author) and only slowly reforming the legal mechanisms of control and exclusivity long

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[105] Carla Hesse, 'Reading Signatures: Female Authorship and Revolutionary Law in France, 1750-1850' 22 Eighteenth-Century Studies, p. 496.

[106] Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', p. 1014.

[107] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', p. 129.

[108] See: Saunders, *Authorship and Copyright*, pp. 91-94.

[109] Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (University of California Press 1991), pp. 123-124. Also J. C. Ginsburg, for example, claims that the revolutionary ideas of natural rights and freedom from control and monopoly were in the first place used to promote rights and freedoms of the public.

[110] A term used by C. Hesse in Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793'

[111] Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', pp. 1020-1022.

embedded in the respective copyright systems and privately administered by exploiters. This new approach to the author as owner was soon followed by other European countries.[112]

3.3.4. Conclusion

Of the legal sediments that formed in the culture of European copyright law during this shift, the construction of the author as the first owner of exclusive rights is the most important. The actual content of the legal concept of author, however, appears to have remained substantially unchanged at this juncture, its inclusion in the new copyright systems being largely a political decision. As a result, it was incumbent upon the courts and legal scholars as well as the legislator to find general principles and arguments to decide copyright cases and address challenges in the following years. While the Lockean theory of labour and the right to property might have served as a guiding principle, and was arguably already partly "adopted" into the sub-surface layers of European copyright law during this shift, more was needed to make copyright the system it is today. Even the French "genius" at this stage of development was closer in meaning to the servant of God of the Middle Ages, being seen as an "agent of enlightenment" and the trustee for the "property right", expected to return that right to the public when the time came.

Notions like author creativity, originality, free choices, personal touch, skill, judgement and others were yet to find their way into the European copyright legal system to form the value-laden presumptions in the sub-surface layers of European copyright law that we recognise today. The next section and the next "shift" will explore the period during which these developments in the concept were likely to have occurred. The conceptualisation of the author as a "Romantic genius" that current copyright law is often accused of[113] is at the centre of what this thesis calls Shift No. 3.

[112] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 7.

[113] For instance, according to M. Woodmansee, this conceptualisation has been the basis of both the common law and the continental copyright systems: Woodmansee, 'On the Author Effect: Recovering Collectivity', p. 27.

3.4. Shift No. 3: the "Romantic Shift"

3.4.1. Introduction

Shift No. 3 is less distinct than the ones discussed above, and potentially extends over an even longer period. Whereas the first two shifts were marked by more or less concrete events that led to changes in the legal system of the emerging copyright, the "Romantic shift" is connected to a cultural phenomenon that spanned almost a century and was not even organised enough to be called a "movement". Moreover, the "Romantic period" and its influence on copyright law, specifically the concept of author, is a contested topic among legal scholars.[114]

For some, the Romantic ideas of autonomy, originality and personal touch fit the current structure of European copyright law so well that it can hardly be a coincidence.[115] These scholars identify the Romantic author as a "genius" – a special individual, who in herself is a source of talent and inspiration and the sole originator of creative works – and insist that it is this figure who has shaped modern copyright law.[116] For them, the changes that happen to the concept of author during the romantic period may be as significant as those that accompany technological or other revolutions.[117] Other scholars argue that Romanticism's actual influence on current legal formulations is hard to verify, and present evidence that other factors might have played a more prominent role.[118]

Nevertheless, as indicated previously, the idea of the author as "owner", introduced in the 18th century, did not yet have the justifying legal structures that it would

[114] See e.g., Erlend Lavik, 'Romantic authorship in copyright law and the uses of esthetics' in Mireille van Echoud (ed), *The Work of Authorship* (Amsterdam University Press 2014), pp. 46-49.

[115] This trend has been especially evident in the 1990s, with such scholars as M Woodmansee and P. Jaszi leading the critique of the Romantic author in the US copyright system. See Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'; Jaszi, 'Toward a Theory of Copyright: the Metamopthoses of "Authorship"', p. 456; James Boyle, *Shamans, Software and Spleens: law and the construction of the information society* (1996), p. 58. But also Jessica Millen, 'Romantic Creativity and the Ideal of Originality' (2010) 6 Cross-sections, pp. 101-102; Margaret Chon, 'The Romantic Collective Author' (2012) 14 Vanderbilt Journal of Enterntainment and Technology Law 829, pp. 830-831.

[116] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', p. 427.

[117] Sören Hammerschmidt, 'Between Geniuses and Brain-Suckers. Problematic Professionalism in Eighteenth-Century Authorship' (2015) 4 Authorship, p. 1.

[118] See, e.g., Lionel Bently, 'R. V the Author: From Death Penalty to Community Service. 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007' (2008) 32 Columbia Journal of Law & the Arts, p. 9; Trevor Ross, 'Copyright and the Invention of Tradition' (1992) 26 Eighteenth-Century Studies, p. 3.

eventually develop – they must have come in later centuries, even if the exact process of their adoption is impossible to trace. This section will analyse the "Romantic period" in terms of possible sediments in European copyright legal culture that relate to the author concept, having in mind that in the framework of critical legal positivism the sediments pertain not so much to cultural movements or social influences, as to valid law and legal practice – that is, the extent to which those social aspects were allowed to penetrate into the normative layer of the law in a given historical period. These former norms, then, even if later modified, are the source of the general principles, patterns of argumentation, and other structures that can be "found" in the sub-surface layers of a legal system. They are thus the source of the principles and structures that present-day legal professionals use to interpret and justify the normative content of law.[119] This section will therefore explore the Romantic period in art and literature as a development that might have helped to shape the concept of author in the European copyright tradition, even if its exact influence remains elusive.

3.4.2. Romanticism in art and literature

The "Romantic era" in arts and literature is considered to have started in the middle of the 18th century in England,[120] and by the early 19th century had spread throughout Europe. It might be hard to call Romanticism a "movement" or say with certainty when it began, when it ended and who belonged to it,[121] but its most defining feature was the emphasis on individual thoughts and feelings.[122] Constructing itself as the opposite of the detachment and "cold" rationality of the preceding cultural movements of Enlightenment and Classicism, Romanticism encouraged the cultivation of natural human impulses and spontaneity.[123] At the same time, it advocated a critical approach to the surrounding world and recognition of its

[119] It should be recalled here, however, that some of the content of the sub-surface layers of a legal system, according to K. Tuori, may also come through what he calls "horizontal influences", i.e., some structures or principles that were never part of valid law are nevertheless "accepted" as part of the logic of a legal system by legal professionals, see Section 1.3.2 of the thesis.

[120] Arnold Hauser and Jonathan Harris, *Social History of Art, Volume 3 : Rococo, Classicism and Romanticism* (Routlege 1994), p. 33.

[121] There are those who suggest that the notion of a "Romantic Period" is romanticised in itself: Antony J. Harding, 'Authorship, Genre, and Copyright in the Romantic Period: Introduction' (2012) 38 ESC: English Studies in Canada 25, pp. 25-26. Still others have suggested that "Romanticism" is a family resemblance concept: Michael Ferber, *Romanticism: A Very Short Introduction* (Oxford University Press 2010), p. 9.

[122] Encyclopaedia Britannica, "English Literature. Romantic Period", https://www.britannica.com/art/English-literature (accessed 6th of October 2020).

[123] Ferber, *Romanticism: A Very Short Introduction*, pp. 15-17.

subjectivity, as well as one's capacity to act formatively towards it.[124] Romanticism treated authors, especially poets, as special, as akin to heroes or even gods, even though not necessarily appreciated as such by the rest of society.[125]

J. Millen provides three main reasons for the successful growth of Romanticism in Europe: 1) the technological development of industrialisation and its characteristic mass production and devaluation of human labour; 2) the "struggle of the human soul" in a society made uniform by machines and urbanisation; and 3) the advent of mass-culture with the emergence of a literate middle class.[126] It is not hard to see how this combination of circumstances and context might lead to a cultural movement concerned with originality, resentful of mere mechanical repetition, and repulsed by a grey, machine-like existence in cities and factories which seemed like the end of intellectual and spiritual autonomy.

In literature and art during the period, the individuality of the author was emphasised and originality became the most important attribute of creativity among artists.[127] The literary originality of the Romantic author-genius can be described as having a two-fold nature: on the one hand, it meant the divine or otherwise mystical inspiration for which the author is a vessel, and on the other, it was creativity from within, the author's inner talent and unique capacity to access and contain the external mystical inspiration.[128] However, even originality in terms of "hard work" and reuse of earlier materials, though not very appealing from the Romantic standpoint, was accepted with the caveat that it was not deliberate or conscious and that the ability to create something valuable in this way was reserved only for a select few.[129] What started as self-positioning and a certain style of writing (also painting and music) of a group of artists, gradually spread among the reading members of society (users of art and literature) too. By the beginning of the 19th century, readers of books were becoming increasingly interested in the personality of the author, her biography and context. Text came to be seen as a recording of the author's personality, and readers actively searched for the imprint of this personality in the author's works.[130]

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[124] See Douglas Moggach, 'Romantic Political Thought' in Paul Hamilton (ed), *Oxford Handbook of European Romanticism* (Oxford University Press 2016), pp. 662-664, where the author explains these specific features to be a transformed element of the Enlightenment.

[125] Ferber, *Romanticism: A Very Short Introduction*, pp. 32-33.

[126] Millen, 'Romantic Creativity and the Ideal of Originality', pp. 93-95.

[127] Thomas McFarland, 'The Originality Paradox' (1974) 5 History and Criticism, pp. 499-450.

[128] Millen, 'Romantic Creativity and the Ideal of Originality', pp. 97-98.

[129] Ibid., p. 101.

[130] Rose, *Authors and Owners. The Invention of Copyright*, p. 121.

However, as E. Lavik observes, while it might be tempting to assume that Romantic models of authorship from the artistic and literary domains are an integral part of today's copyright regime, this could be an overstatement.[131] Despite the movement's prominence in literature and art, and its embodiment of the abovementioned elements of authorial originality and autonomy that are instinctively at least somewhat familiar to any copyright lawyer, the copyright law of the mid-18th and early 19th centuries, when the movement was at its height, did not necessarily share the same sentiments.

3.4.3. Law and the "Romantic author"

As the accounts of the previous "shifts" testify, true change in the sub-surface layers of a legal system is a slow process and the change is never completely "new". It is common for earlier conceptual structures to be reused, recombined in a different way or approached from a different angle, reinforcing the idea of a legal system as possessing continuity and inner logic. Thus, as with the process of "romanticising" the author, the development of the conceptualisation of the author in law was rooted in concepts that predated the 18th century. For one thing, as described above, the legal construct of the author as the "owner" of the right to copy was already present at the beginning of the "Romantic era", and the need remained to develop conceptual structures to connect this ownership with authorship. For another, at the beginning of the 18th century, in both the French and English systems there was already a budding line of legal reasoning that a person's labour links her to its fruits in some way; there were also attempts to describe authors as special, more valuable than "mere mortals", or having a special connection with their work.[132]

On the other hand, European copyright law took a long time to "catch up" once the Romantic period in art and literature began, and some of the key tenets of Romanticism were never incorporated. In 18th-century England, ideas about authors having a special personal connection to their work were sometimes seen in the rhetoric used by publishers and booksellers in pursuit of more rights, but not in the legal system itself. This was illustrated by the litigation that followed the enactment of the Statute of Anne in the period between 1710 and 1774, known sometimes as the "Battle of the Booksellers". In a string of cases, publishers and booksellers, as the initiators and only parties of the proceedings and without any real authors anywhere in sight, relied in part on the rhetoric of authors' rights and their perpetuity under the common law.[133] The term of protection was an especially popular question

[131] Lavik, 'Romantic authorship in copyright law and the uses of esthetics', p. 49.

[132] See, e.g., Jaszi, 'On the Author effect: Contemporary Copyright and Collective Creativity', p. 31.

[133] Rose, *Authors and Owners. The Invention of Copyright*, pp. 67-69

in these cases, fuelled by the discourse of the absoluteness of authors' rights.[134] To get longer terms of protection than provided in the Statute of Anne, English booksellers fell back on the narrative of protecting the author and, as D. Saunders writes, "invented the theme that there has always been author's copyright in the common law".[135] They claimed that authors have always had a perpetual right to their own manuscripts and the publisher, as the trustee of this subject, must have a perpetual common law right to prohibit reprinting of the works assigned to him. The arguments used by litigators and lawyers in support of perpetual copyright, or at least rights broader than those provided in the Statute of Anne, were also based on notions of the unity of authorial work[136] and its qualification as the "true" property of the author.[137] The perspective of the author as a special creator emerged in the parties' arguments just as the Romantic shift was getting underway in England, and may have benefited from this social movement. Nevertheless, it did not have an immediate effect on the actual legal norms.

The matter of the term of protection was finally decided in the famous *Donaldson v. Beckett*[138] case in the House of Lords in 1774, when the Lords dismissed the notion of any common law copyright and declared that the Statute of Anne was the sole authority in such matters.[139] Effectively, such a conclusion reaffirmed public policy (or political) reasons for bestowing the rights upon the author, rather than recognising any special status this figure may have had "by tradition" and dismissing the Romantic arguments of the publishers. Quite the opposite: there are those who argue that the 1774 decision was about reaffirming the public interest and that it "subordinated concerns of authors to the needs of readers", dismissing the previous ideas of labour and property.[140]

Analysing copyright in 18th-century England, S. Stern also points out that the protection of works without regard to the level of creativity expended on them and the exclusion of many types of works raise doubts about the influence of the

[134] Patterson, *Copyright in Historical Perspective*, p. 15.

[135] Saunders, *Authorship and Copyright*, p. 57.

[136] See, e.g., an account of Blackstone's description of intellectual property in the mid-18th century in Ross, 'Copyright and the Invention of Tradition', p. 6.

[137] E.g., the well-known proclamation of Justice Aston in *Millar v Taylor:* "I confess, I do not know, nor can I comprehend any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works", quoted in Rose, *Authors and Owners. The Invention of Copyright*, p. 114.

[138] Donaldson v Beckett (1774) 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257.

[139] Rose, *Authors and Owners. The Invention of Copyright*, p. 3.

[140] Ross, 'Copyright and the Invention of Tradition', p. 3.

Romantic model of authorship there.[141] The question of originality, so important to Romanticism, was virtually invisible in the legal copyright debates of the time: the commentary of W. Blackstone on copyright law from the middle of the 18th century merely provided that a work must not be copied from somewhere else to be an "original work".[142]

It may be recalled here that in the French legal system at around the same time, authors received their first and perpetual rights in the form of royal privileges, only to see them reformed a decade later by the revolutionary copyright regime and its complex mixture of different interests,[143] with a drastic reduction of the term of protection to favour the needs of the public.[144] Although the author was placed at the centre of the act of the "Rights of Genius", the legal conceptual basis for this had not been fully developed and lacked the content we now associate with modern French copyright law.[145] However, if both the English and French copyright systems entered the Romantic period largely oriented towards the reader or the exploiter, with the author conceived as a servant to the public interest or a source of useful objects, how then did the Romantic discourse of originality, creative autonomy and the high level of author protection find its way into modern European and EU copyright law?

Of *Donaldson v Beckett,* M. Rose writes that "although the struggle concluded with a rejection of the London booksellers' claim that copyright was perpetual, it by no means concluded with a rejection of the powerful representation of authorship on which that claim was based".[146] In other words, the author might not have been conceptualised as anything more than a formal "attachment point"[147] for the exclusive right to copy, but this figure was nonetheless central. As the 19th century progressed, legal developments that seemed to be more in tune with the ideas of the Romantic movement began to accumulate in both England and France.

First of all, in England, the ruling in *Donaldson v Beckett* did not put a stop to the social critique of copyright law from the perspective of authors' rights. It has been

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[141] Simon Stern, 'Copyright, Originality, and the Public Domain in Eighteenth-Century England' in Reginald McGinnis (ed), *Originality and Intellectual Property in the French and English Enlightenment* (Routledge 2008), p. 69.

[142] W. Blackstone as quoted in ibid., p. 70.

[143] Hesse, 'Enlightenment, Epistemology and the Laws of Authorship in Revolutionary France 1777-1793', p. 130.

[144] Rajan, *Moral Rights. Principles, Practice and New Technology*, pp. 55-57.

[145] See Section 3.3 of the thesis.

[146] Rose, *Authors and Owners. The Invention of Copyright*, p. 107.

[147] See Lionel Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 Modern Law Review, p. 980.

suggested that this rhetoric had at least an indirect influence on the further expansion of English copyright law.[148] Notably, the 19th century saw the term of copyright extended to 28 years or the life of author, whichever was longer, in 1814; and 42 years or the lifetime of the author plus 7 years, whichever was longer, in 1836. This legal development has been attributed to the increasing professionalisation of authorship and the ability and willingness of authors to see themselves as autonomous subjects and economic actors,[149] as well as the direct influence of Romantic ideas of authorship circulating in wider society.[150]

Further, in England during the 19th century, other types of authorship outside the protection of printed text started to enter the fold of legal regulation, and copyright law enlarged its scope, often using the rhetoric of the author's true ownership and related notions.[151] In 1814, the Sculpture Act was adopted, albeit giving the "sole property" of a sculpture both to the person who makes it and the person who commissions it.[152] In 1833, the Dramatic Copyright Act provided the first rights to "dramatic authors", in the form of copyright for published plays for 28 years and perpetual rights for unpublished plays. In 1835, rights with certain exceptions were provided for authors of public lectures. In the following decades, the idea of protectability of works based on authorship became widely established, and by 1862, painting was protected as "aesthetically equivalent to literature".[153]

While a direct link to Romanticism is not necessarily demonstrable in each of these examples and other influences may have been more important,[154] some aspects of copyright's development, especially in the interpretations of the English courts, can be seen as more author-oriented.

For instance, the debate about the existence of common law copyright continued into the 19th century, and while subsequent rulings generally confirmed the

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[148] See, for instance, Ross, 'Copyright and the Invention of Tradition', pp. 18-19.

[149]Alexis Easley, 'The Nineteenth Century. Intellectual Property Rights and "Literary Larceny"' in Ingo Berensmeyer, Gert Buelens and Marysa Demoor (eds), *The Cambridge Handbook of Literary Authorship* (Cambridge University Press 2019), p. 147; Hammerschmidt, 'Between Geniuses and Brain-Suckers. Problematic Professionalism in Eighteenth-Century Authorship', p. 1.

[150] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing 2010), pp. 55-56.

[151] Ibid., pp. 81-92.

[152] Sculpture Copyright Act, London (1814), Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org (visited 7 October 2020).

[153] Elena Cooper, *Art and Modern Copyright. The Contested Image* (Cambridge University Press 2018), p. 12.

[154] Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright ', p. 186; Bently, 'R. V the Author: From Death Penalty to Community Service. 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007', p. 9.

commercial right to copy as stemming from statutory law, a right of first publication was singled out in the case law of the period as something inherently belonging to the author and not limited by statute.[155] Even if ultimately rendered irrelevant and unenforceable by statutory law, this was in some ways a sign that English courts recognised a more personal relationship between the author and her work. Similarly, the requirement of originality, which had received little legal attention in the 18th century, entered the picture, first in the 1814 Sculpture Act's insistence that protected sculptures be "new and original", and then as a universal requirement in the Copyright Act of 1862.[156] It has been observed that through 19th-century case law, the English interpretation of originality itself, though starting at mere skill and effort, was gradually made more reliant on the logic of transformation of raw materials into a work,[157] and began to place emphasis on the author's subjective judgement.[158]

L. Bently highlights another change of approach in the English courts in the mid-19th century that might also be attributable to Romantic influences: focus turned from what the defendant had produced to what the defendant had taken from another work.[159] I. Alexander clarifies that around this time, the English courts stopped applying the "fair abridgement" principle, which allowed new works to be made without the permission of the previous rightholder if labour had been applied to the reproduced material.[160] Thus, the increasing recognition, in the period's case law, of reproduction in part as a violation of the right to copy, and the increasing tendency to interpret the "substantial part" criterion in qualitative rather than quantitative terms[161] could be further evidence of the shift towards protection of "valuable" features of the work in question. Such value, of course, could be connected to the development of the originality requirement for copyright protection, expressed through the labour and judgement of the author.

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[155] See Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Eward Elgar 2006), pp. 57-97, discussing the complicated history of this "right" in the English courts before its formal integration into the statutory copyright in 1911, however, as he writes "only so that the legislature could deny its relevancy" (p. 94).

[156] Deazley, R. (2008) 'Commentary on Fine Arts Copyright Act 1862', in Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org, section 10.

[157] Stina Teilmann-Lock, *British and French Copyright. A Historical Study of Aesthetic Implications* (DJOF Publishing Copenhagen 2009), p. 124.

[158] Saunders, *Authorship and Copyright*, p. 148.

[159] Bently, 'Copyright and the Death of the Author in Literature and Law', p. 979.

[160] Isabella Alexander, 'Determining infringement in the eighteen and nineteen centuries in Britain: 'A ticklish job'' in Isabella Alexander and Thomas H. Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016), pp. 179-180.

[161] Teilmann-Lock, *British and French Copyright. A Historical Study of Aesthetic Implications*, pp. 99-104.

From its revolutionary beginnings (in the 1791 and 1793 acts), French copyright law had a wide scope, covering virtually any work of authorship[162] and implying protection for any effort of creative genius. Even though, as explained earlier, the emphasis of the revolutionary copyright might have been on the public interest, further development of the concept of author in French law allowed for the cultivation of more content regarding the personal connection between an author and her work.

Even the revolutionary copyright laws contained an ideological seed of this "special connection" of the creator to her work as property. The reports of Le Chapelier and Lakanal, made to the revolutionary parliament when preparing the copyright acts of 1791 and 1793, are often cited as examples of such an approach. For instance, Le Chapelier speaks of the choice authors should have with respect to who represents them, and the nature of literary property as the most personal of properties, even if essentially meant to be given away to the public.[163] Lakanal, two years later, urges protection of the property of "genius" as one of "the most incontestable" forms of property,[164] albeit while still referring to the interests of the genius as mostly economic. This is supported by the opinions of legal scholars and the case law in the French courts of the time.[165] Towards the second half of the 19th century, the attitude towards the author-work connection and the author's interests in this respect underwent further changes.

One example of this is the institution of moral rights, which emerged in the first half of the 19th century exclusively through case law in the French courts. Perhaps through what K. Tuori would call a "horizontal influence",[166] the judges in these cases were evidently looking for values that the law was intended to protect in respect to the author's newly acquired status. These values were used as guiding principles in legally complicated or socially sensitive cases.

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[162] Jane C. Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' (2006) 63 Cambridge Law Journal, p. 19.

[163] Le Chapelier's report, Paris (1791), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org, pp. 5 and 16.

[164] French Literary and Artistic Property Act, Paris (1793), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, p. 868.

[165] Calvin D. Peeler, 'From the Providence of Kings to Copyrighted Things (and French Moral Rights)' (1999) 9 Indiana International and Comparative Law Reiview 423, pp. 430-431.

[166] See section 1.3.2. of the thesis. In 19th century France, too, the influence of Romanticism and the discourse of the special place of the author were indeed popular and actively discussed by prominent social figures and legal theorists alike, see Saunders, *Authorship and Copyright*, pp. 96-97; moreover, the influences of the German personality theories on the decisions of French courts in this respect is stressed by S. Strömholm and J. Kohler: Daniel Burkitt, 'Copyrighting culture - the history and cultural specificity of the Western model of copyright' (2001) 2 Intellectual Property Quarterly 146, pp. 167-168, Saunders, *Authorship and Copyright*, p. 120.

It has been claimed that many court decisions prior to the codification of moral rights in the French copyright act of 1957 were grounded in natural rights ideology.[167] Indeed, this natural rights thinking was given expression by the increasing body of cases where the author was given the right to control the work's fate and attach her name to it. However, such decisions were not immediately related to creativity, but to various "natural" interests that the author or other subjects might have.

Worthy of mention in this context is a contribution by S. Teilman-Lock, who analyses a large number of landmark decisions related to moral rights in France from the 19th century up to 1957, and outlines the arguments used by the courts to justify them.[168] She finds that the arguments for extended authorial control (even after the expiration or transfer of material rights) in the early cases are strongly connected to the responsibility of the author (or interest not to be associated with works for which one could be held legally responsible) and the public interest in literary works (not to be deceived).[169] For other forms of artistic works in the same period, the primary justification for moral rights was protection of "reputation" in terms of economic interests and capability to monetise future works.[170] D. Saunders, in his work, also gives examples of how general civil law principles were used to justify the extended control of authors in the incipient "moral rights" jurisprudence in the 19th century.[171] It was only towards the very end of the century that the French courts explicitly recognised the special relationship of the author with her work as the basis for moral rights protection, and the protection of this special connection in its modern form of justification took hold in the first half of the 20th century[172] – more than 100 years after the proclamation of the author as "genius" owner.

Another development reflected in the new French copyright act of 1957 was that the protectability requirements had also become linked to authorial creativity. The first article of this act provides that the author enjoys a property right by the "mere fact of creation", which has been interpreted as making the act of creation the deciding factor for copyright protection.[173] Whether this was a direct outcome of the slow

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[167] Robert C. Hauhart, 'Natural Law Basis for the Copyright Doctrine of Droit Moral' (1985) 30 Catholic Lawyer 53, p. 64.

[168] Teilmann-Lock, *British and French Copyright. A Historical Study of Aesthetic Implications*, pp. 134-144 and pp.159-180.

[169] Ibid., pp. 155-159.

[170] Ibid., pp. 198-199.

[171] Saunders, *Authorship and Copyright*, pp. 102-104.

[172] Teilmann-Lock, *British and French Copyright. A Historical Study of Aesthetic Implications*., p. 212.

[173] Burkitt, 'Copyrighting culture - the history and cultural specificity of the Western model of copyright', p. 159.

adaptation of the French copyright system to ideas of the "Romantic author" is hard to say; it is clear, for instance, that the protection criteria were also affected by the technological developments discussed in the next section. Nevertheless: while perhaps a little later than might have been expected, and with some detours along the way, French law, too, integrated the author as subjective creator into its system.

3.4.4. Internationalisation and the "Romantic author"

A discussion on the topic of the "romanticisation" of the author in the European copyright tradition would be incomplete without a brief examination of the Berne Convention, which was adopted in the middle of the period under consideration, namely in 1886. After all, as established in Chapter 2 of this thesis, Berne is one of the cornerstones of the European copyright system and the most author-centred of the existing international treaties.[174] It introduced the moral rights of authors already in the 1928 revision, years before the same rights were explicitly included in the French copyright act. It also mandates copyright protection without formalities, sets out an (in principle) open list of protectable subject matter and links the protection, even if indirectly, to authorial originality.[175] Of course, the Convention contains many different norms and encompasses a great variety of interests and purposes;[176] and yet, its emphasis on the author is unusually strong.

S. Ricketson writes that the question of how the Berne Convention came to rely so heavily on the continental legal tradition is for future historians to ponder.[177] Indeed, the review of the document's main author-centred elements in Chapter 2 of this thesis only strengthens the conclusion that representatives from the continental countries had a strong say in what essential premises should underpin this first copyright convention.[178] Moreover, the research of other scholars also confirms the emphasis, in different parts of the Convention, on the author as a creative human subject. For instance, E. Adeney suggests that the inclusion of moral rights was a response to a perceived threat of economic materialism.[179] S. van Gompel explains that Berne's prohibition of formalities was closely related to the rise of the "person-

[174] See Section 2.2.1 of the thesis.

[175] See, e.g., Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', pp. 399-402.

[176] One of the main ones was the interest to prevent "piracy" of works from one country to another.

[177] Sam Ricketson, 'The public international law of copyright and related rights' in Isabella Alexander and Thomas H. Gomez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016), p. 307.

[178] See Section 2.2.1 of the thesis.

[179] Adeney, *The Moral Rights of Authors and Performers. An International and Comparative Analysis*, pp. 106-109.

oriented nature" of copyright law in continental Europe.[180] S. Ricketson and J. Ginsburg themselves conclude that the Berne Convention, even if offering value to diverse interests, is the "stronghold" of the creative human author.[181]

It is beyond the scope of this historical overview to examine all of the different discussions and accommodations that shaped the wording of the Berne Convention and the manner of its adoption and influenced the development of its legal norms in the decades that followed. There is a substantial literature on these matters already.[182] In a way, however, the Berne Convention and the negotiations which led to its adoption can be seen as another agent in the "romanticisation" of copyright, forging a strong link between copyright protection and the subjectivity of the author, not only in the form of international obligations, but also through internationalising a certain logic of copyright law that may be considered part of the sub-surface layers of the European copyright tradition.

3.4.5. Conclusion

Thus, "Shift No. 3" is not truly a shift but more a tendency, or direction, of change that appeared during the 19th and early 20th centuries. The time span discussed is long and the influences outside of the Romantic movement are many. Indeed, the next sub-chapter will specifically investigate how technologies which were invented around the same period further influenced the development of the concept of author in copyright law. One can then return to the same question: did the Romantic movement really have much influence at all on the conceptualisation of author in the European copyright tradition?

L. Bently argues convincingly that the Romantic conception of authorship has been a tool of other (mostly economic) interests and is poorly reflected in copyright law itself.[183] In the methodology used by this thesis, however, the reasons behind the

[180] See Stef van Gompel, 'Les formalités sont mortes, vive les formalités! Copyright Formalities and the reasons for their decline in nineteenth Century Europe' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property Essays on the History of Copyright* (Cambridge Open Books Publishers 2010), pp. 181-185.

[181] See, e.g., Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship', or Jane Ginsburg, 'People Not Machines: Authorship and What It Means in the Berne Convention' (2018) 49 International Review of Intellectual Property and Competition Law 131. The same is confirmed by A. Dietz, also pointing out the exceptions from this attitude in the cases of cinematographic works: Adolf Dietz, 'The Concept of Author Under the Berne Convention' (1993) 155 Revue Internationale Du Droit D'Auteur.

[182] Notably Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*; Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008).

[183] Bently, 'R. V the Author: From Death Penalty to Community Service. 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007', pp. 21-26.

structural changes in European copyright law during the period studied are of secondary importance; what merits attention and analysis is the reflection of their influence in the normative content of the law and the manner in which they were introduced. Potentially, these normative constructs are the sediments which the European copyright tradition sustains as a reservoir of general principles or "internal logic" and a toolbox for justification, irrespective of the potentially different purpose of their introduction.

With this in mind, it can be argued that the Romantic period brought an important structural element to the European copyright tradition in the form of a narrative of connection between the ownership of exclusive rights and the author. This connection, most likely due to the influence of Romantic ideas on the judges and, to a lesser extent, on the legislative bodies in the countries discussed, mainly found expression through the requirements of protectability, which intertwined with the subjectivity of the author and its value. In the French case, this subjective agency of author in the legal system was attached to creativity and inspiration, and in the English case, labour and judgement were emphasised. In both systems, however, there still appeared to be a movement away from the Lockean ideas of property as the outcome of *labour* that partially legitimised the decision to give exclusive rights to authors in the 18th century. Human *judgement* and *skill,* or *creativity* and *personality,* became connected to the exclusivity and control of copyright. With this development, the work of authorship gained more legitimacy as an object of property.

Even if the expansion of rights and lengthening of the term of protection, especially in the English system, can be attributed to a variety of pressures, it was not the expansion itself that left a lasting imprint on the entire European copyright system; it was the development of a specific logic of protectability. In both the cultural and legal spheres, the attention was moving away from the text and towards the subjective individual who creates it, namely the author.[184] Originality gradually became a justification for ownership. The Berne Convention, becoming a global copyright standard precisely in the middle of this process, cemented what could be called an early version of the "high level of protection of authors" logic.

Meanwhile, the history of England and France following the first proclamation of the author as owner shows new concepts of author emerging in the European tradition. As has already been mentioned, prior to the Statute of Anne and the legal developments in France at the end of the 18th century, "author" was largely a social concept corresponding to the image of either a craftsman or a God-inspired servant. However, the abrupt legal introduction of author as owner gave rise to other conceptualisations. The new concepts, of course, had to fit into the emerging

[184] April M. Hathcock, 'Confining Cultural Expression: How the Historical Principles Behind Modern Copyright Law Perpetuate Cultural Exclusion' (2017) 25 American University Journal of Gender, Social Policy and the Law 239, p. 243.

internal structure of copyright, that is, had to be compatible with the exclusivity and control and ownership that copyright provided. In this way, the author as craftsman could be said to have found its way, at least into English copyright law, through ideas of labour and effort as a basis for property. The French Revolution and the natural rights of man advanced the concept of the author as a steward of the work, granted certain rights by society, which is ultimately the main beneficiary. The reality of economic exploitation of the said rights prompted the development of an approach to the author as entrepreneur or, at least, a resource to be sustained and encouraged. Lastly, Romantic ideas brought forward the author "genius", or at least a subdued legal version of this figure, with a subjective attachment to the work and thus exclusive rights justifiable through creativity, or skill and judgement. Just as in the Wittgensteinian theory of family resemblance concepts, all these conceptualisations might be said to have existed and, with some further developments, still exist in the European copyright tradition. Furthermore, this whole "family" is part of the sub-surface layers of copyright law, and their combination is what reflects the normative content of law.

This story of sediments and of the concept of author growing on the frame which they are building, however, would not be complete without at least a brief account of the rapid technological change which started with the Industrial Revolution, and its effects on copyright law. After all, the copy-right was only created as a result of a technological revolution, so it is only natural that new technologies would challenge it significantly.

3.5. Shift(s) No. 4: technological challenges

3.5.1. Introduction

The previous shift covered the interaction of copyright law with the cultural context of 19th and 20th century Europe and discussed the possible influence of the Romantic movement on structures in the sub-surface of the European copyright tradition. During the same period, however, technological innovations were exerting their own pressures on the copyright systems in major European countries. As mentioned, rapid technological change and industrialisation may have been one of the leading causes for Romanticism's rise in the first place. The confluence of technology and changing social values created a unique set of circumstances for further "personalisation" of copyright.[185] At the same time, new technology presented a threat to the exclusivity and control of copyright, as well as opportunities for

[185] Namely, forging of a bond between the work and the subjectivity of author.

economic gain and investment, all of which played a significant role in the structuring of European copyright.

This section will single out two important technological developments and examine their effects on the concept of author and on the structure of European copyright law. Each of the two selected technologies could be said to form its own small shift; therefore, to introduce this subsection as describing a single event might be misleading. Moreover, far from all technological developments affecting the development of copyright law and its conception of author will be discussed. The two examples below, namely of photography and computer software, are chosen for their ability to exemplify copyright law's expansion to new kinds of authors and the challenges this brought. Even if these limited examples are more like "samples" of the earliest and most recent developments in modern technology to have brought copyright law into question, they can nevertheless be used to discuss the evolution of copyright law towards its current form.

As previously noted, one of these innovations occurred exactly during the same period as the "Romanticisation" described above. Topics introduced in the previous sub-section will be revisited as needed.

3.5.2. Photographs

3.5.2.1. Invention of new technology

The history of the invention of photography and its legal recognition can be directly approached as a story about the inclusion of new authors in copyright law. After all, in themselves, photographs were hardly conceptually novel subject matter for copyright protection; they were, essentially, pictures. What was new, however, were the tools and the process of their creation, which departed from the "traditional" methods of authoring works.

The technology of photography made its first "official" appearance in 1839, when Louis Daguerre, instead of patenting it, disclosed the technology to the French Academy of Sciences, thereby making it "free to the world".[186] The idea of using light to produce pictures on paper or other material was not completely new; there are accounts of this general concept being used much earlier, including for painting.[187] However, the method of "capturing" light through a chemical process and fixing it permanently in a physical medium revolutionised the production of images. In the beginning, a photograph of any object seemed a marvel, and the

[186] Kovarik, *Revolutions in Communication. Media History from Gutenberg to the Digital Age*, p. 118.

[187] Thomas B. Maddrey, 'Photography, Creators, and the Changing Needs of Copyright Law' (2013) 16 Science and Technology Law Review, p. 506.

creation of photographic images was beyond the understanding of most people.[188] The first applications of photography were, therefore, mostly documentary in nature; only later, when the process became easier and more accessible, was it used to produce "art".[189] However, in the artistic context, photography was not at first seen as equal to other forms of creativity.

The first problem of photography in this respect was the automatic nature of the creative process. Before photography, the production of pictures required a lot of skill, especially if one wanted to paint or draw something that was close to reality. The photo camera, on the other hand, captured reality better than any drawing or painting, even in the hands of an amateur.[190] It was not surprising, then, that the question was raised whether photographic works were created by humans or by machines. Since photography merely required the pressing of a button, it was not considered creative.[191] Photographers were seen as mere technicians lacking any understanding of art or creativity.[192]

Besides, the photographic image was a perfect depiction of the original object, person or scene, and so, essentially, an objective representation of the external world.[193] This was contrary to the Romantic ideas of subjectivity and originality already present in artistic circles at the time.[194] As an attempt to make photography more "artistic", a movement known as Pictorialism emerged towards the end of the 19th century in the US and Europe. Its adherents employed a variety of techniques to make their photographs less realistic and more like other kinds of visual art.[195] Later, however, in the early 20th century, a "straight photography" movement, led by the American photographer A. Stieglitz, made it a special point to demonstrate

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[188] Terry S. Kogan, 'The Enigma of Photography, Depiction, and Copyright Originality' (2015) 25 Fordham Intellectual Property Media and Entertainment Law Review, p. 873.

[189] Maddrey, 'Photography, Creators, and the Changing Needs of Copyright Law', p. 508.

[190] Teresa M. Bruce, 'In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography' (2012) 115 West Virginia Law Review, p. 101.

[191] Justin Hughes, 'The Photographer's Copyright - Photograph as Art, Photograph as Database' (2012) 25 Harvard Journal of Law & Technology, p. 351.

[192] Jordan G. Teicher, 'When Photography Wasn't Art' JSTOR Daily <https://daily.jstor.org/when-photography-was-not-art/> accessed 14 October 2020.

[193] Kogan, 'The Enigma of Photography, Depiction, and Copyright Originality', pp. 881-882.

[194] Ibid., p. 883, setting out the critique of photography as not being able to express the soul and personality of the author.

[195] Bruce, 'In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography', pp. 102-104; Kovarik, *Revolutions in Communication. Media History from Gutenberg to the Digital Age*, pp. 123-124. They manipulated the scenes before photographing them, setting them up to tell stories and using costumes and props; they employed different development techniques, even painting on the finished photograph, to make pictures less focused, give them texture, create artistic effects, etc.

how the subjective choices and personal style of every photographer can characterise even completely unretouched and unembellished ("straight") photographs.[196] During the 20th century, photography gained recognition as an "art" in itself.

3.5.2.2. Inclusion of photographs into copyright law

The "acceptance" of photography by the legal systems of England and France was not completely straightforward either. This new challenge prompted a crystallisation of the meaning and importance of human agency for the structure of copyright protection and, along with the social movement of Romanticism, was a spur for further elaboration of protectability criteria and the scope of the exclusive rights.

In England, where the copyright system has traditionally relied on fixed categories of protected subject matter, photographs were not subject to copyright protection until explicitly listed in the national law. They were included with the 1862 Bill to amend the Law relating to Copyright in Works of Fine Art,[197] which recognised photographs as protectable in the same way as "fine art" drawings and paintings. This meant that the author[198] of a photograph received full rights (though they were not very extensive at that time[199]) and the full term of protection (life plus seven years).[200] This first inclusion, however, did not imply that photographs should be seen as "artistic" or creative. Creative effort or even "judgement" on the part of the author was not yet a basis for protectability, and copyright centred on investment.[201] Even though the text of the law did not clarify authorship of photographs, the national courts have interpreted the provision to mean that the author is the person

[196] Bruce, 'In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography', pp. 104-108.

[197] Ronan Deazley, 'Struggling with Authority: The Photograph in British Legal History' (2003) 27 History of Photography, p. 236.

[198] Even though it was not yet clear at the time who exactly should be considered as the author of the photograph.

[199] In essence, even a reproduction of another work, if it required skill, effort and special knowledge, was enough to satisfy the standard of originality at that time in the UK, as exemplified by the famous *Walter v Lane* case, and *Graves,* a similar case specifically on photographs. See Kevin Garnett, 'Copyright in photographs' (2000) 22 European Intellectual Property Review 229.

[200] See Fine Art Copyright Bill (27 Feb.), London (1862), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

[201] The extent of investment was used to argue for the inclusion of photographs into the Copyright Act during the process of its adoption: Deazley, 'Struggling with Authority: The Photograph in British Legal History', p. 237; Cooper, *Art and Modern Copyright. The Contested Image*, pp. 39-48.

who "originates" the picture.[202] *Nottage and Kennard v. Jackson*, heard in 1883, clarified that origination means general control over the expression of the picture, being the cause of its existence, or "making", "originating" or "producing" it.[203] The same approach was confirmed in subsequent cases in the 19th and early 20th centuries.[204]

While the courts were building case law that at least in part corresponded to the social developments of the age and the influence of Romanticism, petitions leading to the new Copyright Act in 1911 advocated a refocusing of protectability towards investment instead; they asked that the author of a photograph be defined as the person who pays for or owns the tools of its production; or, failing that, that the protection for photographs be reduced because of their mechanical nature.[205] In line with what was called the "investment protection" nature of English copyright,[206] but also due to strong lobbying by the industry,[207] the 1911 Act concluded that the author of a photograph is the person who owns the original negative.[208]

It was not until the UK Copyright, Designs and Patents Act of 1988 that photography regained its previous standing, and copyright protection on the basis of originality now gives the same rights and level of protection to all works.[209] In the meaning of the 1988 Act, the photograph's author is the person who creates it, which was generally interpreted as "the person who takes it".[210] Accordingly, the term of protection of photographs was extended, and they were otherwise placed on the same footing as any other creative works.[211]

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[202] Kevin Garnett and Alistair Abbott, 'Who is the "author" of a photograph?' (1998) 20 European Intellectual Property Review 204, p. 204.

[203] Suzanne C. Bettink Byrne, 'Photography and the Law of Copyright' (1989) 37 IIC, p. 45.

[204] See Garnett and Abbott, 'Who is the "author" of a photograph?', pp. 4-6, or Kathy Bowrey, ''The Word Daguerreotyped: What a Spectacle!' Copyright Law, Photography and the Economic Mission of Empire' in Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Wolters Kluwer 2012), pp. 26-27 for analysis of several landmark cases from that period.

[205] Deazley, 'Struggling with Authority: The Photograph in British Legal History', pp. 238-241; Cooper, *Art and Modern Copyright. The Contested Image*, pp. 239-241.

[206] Keith Lupton, 'Photographs and the Concept of Originality in Copyright Law' (1988) 10 European Intellectual Property Review 257, p. 258.

[207] Anne Barron, 'The Legal Properties of Film' (2004) 67 The Modern Law Review 177, p. 191.

[208] See Copyright Act 1911, http://www.legislation.gov.uk/ukpga/Geo5/1-2/46/enacted, Sections. 1, 21, 35. Also Garnett and Abbott, 'Who is the "author" of a photograph?', p. 205.

[209] CDPA, S. 4(1)(a). See: Bently and Sherman, *Intellectual Property Law*, p. 73.

[210] Deazley, 'Struggling with Authority: The Photograph in British Legal History', pp. 242-244.

[211] Garnett, 'Copyright in photographs', p. 229.

To look from another perspective, this short history of photographs in English copyright law describes a search for an answer to the question, "What makes someone an author whose work is worthy of protection?" Many different interests had to be combined to answer it, and the copyright history of photography shows that the respective influence of these interests waxed and waned. On the other hand, the pressure in the English courts to "find" an author worthy of protection in the context of certain social and legal values encouraged an interpretation of "origination" that was more personalised than the "originality" test of merely "not being copied" and minimal skill and effort that was generally applied in England at the time. K. Bowrey concludes that this search for "author" was necessary to support the commodification of photographic labour and made possible the transfer of the copyright to another subject in the 1911 Act.[212] Indeed, photographs became objects of investment from 1911 to 1988, when they were again accepted as works of authorship by the English law in the new CDPA. Following this last step, the same "higher", or more personality-oriented, standard of authorship developed before 1911 was once more seen as a suitable basis for originality in photographs.[213] In this test, attention was again given to judgement and control, not just to skill and labour.[214]

In situations like this one, the inclusion of new creators into copyright, a tension between different ways of conceptualising "author" is visible: is the author of a photograph a kind of "genius" or a "mastermind"[215], a craftsman with technical skill and knowledge, or an investor of some sort? The photographer's eventual inclusion on a near equal footing with any other creator, and the assessment of her subjective relationship with the final work, show a direction of attention, even in English and British copyright law, to the subjectivity of the creator and the personal input to the raw materials she manipulates. The new technology introduced creators whose works required minimal "labour" to produce and not enough to build the personal connection that was usually presumed of paintings, writing or other creative works. With further technological advances and cheaper photo cameras, the investment aspect also became negligible.

It is hard to assess how the addition of the new subject matter has affected the overall development of, among others, the standard of originality in the English copyright

[212] Bowrey, ''The Word Daguerreotyped: What a Spectacle!' Copyright Law, Photography and the Economic Mission of Empire', p. 27.

[213] See Garnett and Abbott, 'Who is the "author" of a photograph?', p. 7; also the opinions in that effect discussed in Deming Liu, 'Of Originality: originality in English copyright law: past and present' (2014) 36 European Intellectual Property Review, p. 7.

[214] This was, of course, further developed thorough harmonisation at the EU level, as discussed in Chapter 5 of this thesis.

[215] Notion suggested by one of the justices in *Nottage v Jackson*, as reported in Bettink Byrne, 'Photography and the Law of Copyright', p. 44.

tradition. Perhaps there was no effect at all, as the English tradition seems to allow for contextualised assessment of originality.[216] Or, as E. Cooper suggests, there could have been some connection given that the questions of the protectability of photographs and originality as a universal requirement in copyright were discussed at around the same time.[217] Although one cannot say with certainty that the content of the English originality concept was encouraged by the technological challenge of photographs, photography may have been a starting point for discussions that led to the standard of originality developed in the UK just before EU harmonisation, according to which mere skill and labour was generally not enough.[218]

The history of the inclusion of photographs in French copyright likewise involves a process of development and interpretation of law in national courts, with the most relevant cases adjudicated between 1861 and 1863.[219] Since there was no clarity as to whether photographs were covered at all by the 1793 Act of the Rights of Genius, the decisions reached by courts at this stage were unpredictable, with many dismissing photographs as purely technical exercises. Several attempts to secure protection in national courts were refused on the grounds that photographic works lacked the necessary "spirit" and "imagination".[220] The first case to grant protection was the landmark *Betbéder et Schwalbé C. Mayer et Pierson* (1862).[221] The court concluded that even photographers could produce artistic works through "choice of point of view, the combination of effects of light and shadow and, in portraits, the pose of the subject, the distribution of the costume and accessories".[222] This, according to the Cour de Paris, would allow the author to imprint his personality on the work.[223] Similar rhetoric was used, if not always successfully, in later cases in an attempt to portray the photo camera as one of the many tools for the expression

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[216] Liu, 'Of Originality: originality in English copyright law: past and present', pp. 3-4.

[217] Elena Cooper, 'We are experienced! Jimi Hendrix in historical perspective' (2016) 38 European Intellectual Property Review 196, pp. 197-198.

[218] See more in Section 5.2.3.3 of the thesis, also: Ramón Casas Vallés, 'The Requirement of Originality' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), pp. 110-111.

[219] Anne Mccauley, ''Merely Mechanical': on the Origins of Photographic Copyright in France and Great Britain' (2008) 31 Art History 57, p. 64.

[220] Ibid., pp. 64-65.

[221] Betbéder et Schwalbé C. Mayer et Pierson, Court de Cassation. Du 21 nov. 1862.

[222] Mccauley, ''Merely Mechanical': on the Origins of Photographic Copyright in France and Great Britain', p. 65.

[223] As reported in Frederic Rideau, 'Commentary on the Court of Cassation on photography (1862)' (2008) <www.copyrighthistory.org> .

for artistic creativity.[224] Later, the Cour de Cassation, too, essentially confirmed that, even in the absence of explicit legal provision, and despite being of technical nature, photography can become an expression of the author's genius in special cases.[225]

However, photography only became explicitly protected in France via the revision of copyright law in 1957, when both artistic and documentary photographs received the same level of protection.[226] The French system, based as it was largely on protecting the "genius" of authors in the tradition of the revolutionary copyright, clarified the situation with the copyright act revision of 1985, where the current model reserving protection for original works (so not all kinds of photographs) was established.[227] Even though much less dramatic than in England, this shifting between approaches to the protection of photographs shows a similar lack of clear theoretical basis for the copyrightability of purely abstract and subjective creativity and judgement, which are now seen as foundational to the originality of photographs. Whereas England turned back the legislative clock, reverting for a time, to the model of the author as owner or investor, French law, with the development of the author-genius argumentation for protection, briefly saw sweeping inclusion of any kind of photograph, seemingly presuming that all of them needed authorial subjectivity to be created.

Much like English copyright law and its reaction to the new kind of author, the French system was pushed to clarify what makes the superficially automatic process of taking photographs fit the core values of the copyright system. Having in mind that the first signs of moral rights appeared in French courts in 1845, it is not very surprising that the requirement of originality for photographs that was used in 1862 already expected personal subjectivity and creativity of the author. As before, it is hard for the author of this thesis to assess whether and how the formation of protectability criteria for photographs affected the overall development of the French approach to originality. If the personality-oriented character of French law emerged before the legal question of photography was raised, it can perhaps be suggested that the case law on the protectability of photography consolidated subjectivity as one of the main building blocks of copyright. It is possible that at least the criterion of the author's personal touch was formulated specifically through interaction with the technology, as it was consistent with the Romantic valorisation of the individual over the mechanical. The "personal touch" was proof that the

[224] Ibid.

[225] Ibid., Hughes, 'The Photographer's Copyright - Photograph as Art, Photograph as Database', p. 364.

[226] Hughes, 'The Photographer's Copyright - Photograph as Art, Photograph as Database', p. 395.

[227] Ibid., p. 396.

images by different authors can have different styles, thus expressing the author's personality.[228]

Although interesting from the perspective of this thesis, the topic of the scope of protection of photographs is also difficult to address in such a historical analysis. Most historical accounts centre on the question of protectability, and the consequence of this protectability naturally was the right of reproduction (and distribution), even if its scope was different from that of modern copyright law. In the English copyright system, for instance, it might be recalled that before the second half of the 19th century, the "fair abridgement" principle was still largely applicable and new works were allowed on the basis of protected works if their production involved skill, labour and judgement.[229] However, around the time of the inclusion of photographs, the interpretation of the right of reproduction slowly became reflexive in relation to the means of copying as well as the extent to which the new fixation competed with the original work.[230] The right of reproduction therefore grew more restrictive, and though the reasons for this trend are hard to assess, it is in line with the increasing value being placed on works of subjective authorship and the ideas of the Romantic movement discussed above, but also in line with the ideas of awarding exclusivity and control for works because of the potential of their economic exploitation.

3.5.2.3. Photographs in international and EU copyright

The legal arguments and solutions developed in the countries discussed were later adopted elsewhere, especially in countries whose legal systems were directly influenced by the French and British models.[231] Thus, with time, photographs gained a place in copyright in Europe and beyond, even if the level of protection varied by jurisdiction, with some granting neighbouring rights protection instead of copyright.[232] This process of adapting to the idea of photographs is also well illustrated by its further development in the international arena and EU copyright law.

The Berne Convention arrived in 1886, just as Kodak was preparing to market the first personal camera with celluloid film and photography was becoming

[228] Mccauley, ''Merely Mechanical': on the Origins of Photographic Copyright in France and Great Britain', p. 67.

[229] Alexander, 'Determining infringement in the eighteen and nineteen centuries in Britain: 'A ticklish job'', pp. 179-181.

[230] Ibid., pp. 181-182.

[231] Mccauley, ''Merely Mechanical': on the Origins of Photographic Copyright in France and Great Britain', p. 58.

[232] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 520.

increasingly popular.[233] However, despite the fact that several countries already had laws and case law on photographic copyright, photographs were not explicitly included in the list of protected subject matter in the Convention's first draft. This is said to be due to the objections of Germany, whose protection regime for photographs (neighbouring rights only) was incompatible with the proposed inclusion of these works in the list in Art. 2.[234] On the other hand, the Final Protocol of the Berne Convention of 1886 expressed a commitment of the contracting parties to agree on special protection conditions for photographs in the future.[235]

Another reason for the slow introduction of this subject matter to the Berne Convention was differences between countries in the scope of protection for photographs, or perhaps one might say, in the pace and progress of the discussion about photographs' compatibility with national copyright principles. The Additional Act of 1896 amended the Final Protocol to declare that photographs are to benefit from the protection in each country of the Berne Union to the extent that the country's laws allow it,[236] and the revision of 1908 included this statement under Article 3 of the Convention, thus making the principle of national treatment and other basic principles applicable to photographic works, but not harmonising the conditions or scope of their protection.[237] Only in the 1948 revision did photographs finally join the list of protected subject matter in Art. 2,[238] and even then their term of protection was governed in a separate section (Art. 7) together with cinematographic works and works of applied art and was for the members of the Union to determine, thus falling short of the term of other "traditional" works (50 years after the death of the author since the first revision of the Berne Convention in 1908).[239]

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[233] Kovarik, *Revolutions in Communication. Media History from Gutenberg to the Digital Age*, pp. 124-125.

[234] See WIPO, *1886 -1986 Berne Convention Centenary*, p. 95; also Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 66.

[235] Final Protocol to the Berne Convention point 4. For the full text of the protocol see WIPO, *1886-1986 Berne Convention Centenary*, p. 103.

[236] 1896 Additional Act Amending Articles 2, 3, 5, 7, 12, and 20, of the Convention of September 9, 1886, and Numbers 1 and 4 of the Final Protocol Annexed Thereto, Art. 2.

[237] 1908 Berlin Act: Revised Berne Convention for the Protection of Literary and Artistic Works, Art. 3. In addition, Art. 7 of the revised Convention also provided that the term of protection of photographic works shall also be calculated based on the national rules; however, the duration cannot be longer than that in the country of origin.

[238] 1948 Brussels Act: Revised International Convention for the Protection of Literary and Artistic Works.

[239] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 450-451.

It was not until the WCT of 1996 that photographs achieved the full protection that was granted internationally to other creative works, with their term finally extended to fifty years after the death of the author.[240] Still, the provision of protection for photographs in the current text of the Berne Convention "so far as they are protected as artistic works" is set at a minimum term of 25 years.[241] Thus, to this day photographs have remained a "strange" object of protection in many countries.[242]

At the EU level, however, even before the WCT was adopted in 1996, the Term of Protection Directive of 1993 provided that photographs which were original in the sense of being "the author's own intellectual creation reflecting his personality" were to be protected for the same period as any other creative work, namely, 70 years after the death of their author.[243] Still, it should be noted that at the time, this requirement of originality was seen as ambiguous and harmonised only with respect to photographs, with Member States free to apply other criteria to other works.[244]

Some years later, in the *Painer* case, the CJEU, using arguments that would not have seemed out of place in a 19th-century French or English courtroom, confirmed that original photographic images must have the same scope of protection as any other creative work.[245] The Court assured that a photograph can be its author's own intellectual creation and imprinted with its author's personal touch because, "In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software."[246]

3.5.2.4. Conclusions

The invention of photography made it possible to produce superior results with little (physical) skill and effort. And yet it soon became impossible to ignore the fact that photographs were valuable in both economic and artistic terms. However, to be incorporated into copyright law, photography had to find its author and the subjectivity and originality this author possesses.

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[240] von Lewinski, *International Copyright Law and Policy*, p. 470; Hughes, 'The Photographer's Copyright - Photograph as Art, Photograph as Database', p. 342.

[241] Art. 7 of the Berne Convention.

[242] Hughes, 'The Photographer's Copyright - Photograph as Art, Photograph as Database', p. 342.

[243] Art. 6 and recital 17 of the preamble of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

[244] Casas Vallés, 'The Requirement of Originality', pp. 124-127.

[245] *Painer,* paras. 88-89.

[246] *Painer,* para. 91.

The legal and non-legal arguments for photographic originality discussed above, along with the need for subjectivity and certain subjective choices, reveal a stark contrast between the author and the tool of creation. Indeed, to certify that photography is merely a technique used by authors for genuine artistic expression, English courts turned to the idea of control over this expression, and continental countries (notably France) to the idea of "personal touch". Even though both are clearly asking for the agency that only a natural person can exert, the latter idea, especially, can be translated as an assurance that works produced by humans are capable of being distinguished from one another: they all have something personal in them. This is in marked contrast to a machine, which is a mechanical entity capable only of automation and sameness.[247]

With this technological challenge, even in common law England (and later the UK), the conceptualisations of the author as craftsman or servant had to be partially set aside and the genius-author (even if the forms of its expression vary) became a pressure for a more technology-neutral understanding of originality and protectability. By way of the photography cases, the French signature emphasis on the personality of the author found clear expression as part of the protectability requirements as well. The "human, not machine" principle in the face of this specific problem of machine-assisted creativity became embedded in the understanding of authorial originality. The distinction between human and machine was slowly becoming, in other words, part of the deepest sub-surface layers of European copyright law – as the present day debate on the creativity of artificial intelligence can only confirm.[248]

Moreover, with the technology of photography, the question of collaborative authorship also emerged in the European context. Differently from paintings, sculptures and even texts, making photographs typically involved many people (at least in the early cases).[249] As mentioned above, however, a personal connection between the author and her work was sought, dismissing considerations of technical

[247] See Mccauley, ''Merely Mechanical': on the Origins of Photographic Copyright in France and Great Britain', pp. 66-67, for how this argument found its way into the French case law on copyright and photographs. See also Bruce, 'In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography', p. 106, who describes how representatives of the US "straight-photography" school used this difference between styles in photographs to prove to the audience the worth of their works.

[248] See, e.g., Andres Guadamuz, 'Do androids dream of electric copyright? Comparative analysis of originality in artificial intelligence generated works' (2017) 2 Intellectual Property Quarterly 169; Victor M. Palace, 'What if Artificial Intelligence Wrote This? Artificial Intelligence and Copyright Law' (2019) 71 Florida Law Review 217; Julia Dickenson, Alex Morgan and Birgit Clark, 'Creative Machines: Ownership of Copyright in Content Created by Artificial Intelligence Applications' (2017) 39 European Intellectual Property Review, and others.

[249] See Kathy Bowrey, 'Copyright, Photography and Computer Works - the Fiction of an Original Expression' (1995) 18 UNSW Law Yournal 278, p. 283.

skill and assistance; and when this proved unconvincing, protection for the investment was provided instead. Even when many people contributed, the copyright system was seeking to find the "mastermind".[250]

Finally, while the pace of these developments has been slow in the international arena, EU copyright law has embraced this shift, particularly since the CJEU ruling in *Painer*, making the criterion of originality for photographs applicable to all creative works. EU copyright can thereby be said to be inevitably connected with the premise that creativity is more important than its expression and the author is more important than the technology she operates.[251]

3.5.3. Software

3.5.3.1. Introduction and the new technology described

One of the most recent major expansions of protected subject matter in the European copyright system has been the inclusion of computer programs in the scheme. As with photographs, the expression (at least, one of the expressions) of this new "work" in the form of text (even if functional) was not new to copyright. What made software unusual as subject matter, however, was its nature and purpose. As with previous historical encounters with new technology, this one compelled the European copyright system to reassess its core principles and to find the flexibility to accept a further type of creative work.[252] It was necessary to find new authors. Not only that, but the limits of exclusivity conferred on the author as the first owner had to be reconsidered.

The first commercial computers appeared in the early 1950s, and the technology has been rapidly evolving and expanding ever since.[253] Whereas in the early days of computers, the instructions/programs that controlled them (software) were not seen

[250] Similar observations have been made by M. Salokannel with respect to the legal adaptations of copyright to the invention of cinema and the emergence of the cinematographic industry: Marjut Salokannel, 'Film Authorship in the Changing Audiovisual Environment' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins Essays on Copyright Law* (Clarendon Press 1994).

[251] The same conclusion, however, might not be possible for any other copyright system outside the EU. As mentioned before, in many countries, photography is still treated as a special kind of activity which is not necessarily capable of giving rise to authorship and protection. Even in the EU, the Term of Protection Directive leaves space for the Member States to award protection to non-original photographs, recognising the special (or especially controversial) status of this subject matter.

[252] Though it is arguable whether computer programs were included in the system of protection for their creativity.

[253] Madeleine de Cock Buning, 'The History of Copyright Protection of Computer Software. The Emancipation of a Work of Technology Toward a Work of Authorship' in Karl de Leeuw and Jan Bergstra (eds), *The History of Information Security: A Comprehensive Handbook* (Elsevier 2007), p. 122.

as having their own commercial potential or value, this began to change in the late 1960s, and software became something to exploit economically in its own right.[254] Consequently, pressure grew to find a legal solution to ensure its protection.

From the very beginning of the legal discussions, which started in earnest in the 1960s and 1970s, the suitability of copyright or other intellectual property protection for computer programs was a controversial issue. Even while it was recognised that this new subject matter was a prime candidate for protection due to its value and, at least theoretically, its vulnerability to free riding,[255] there were strong doubts about the economic sense of providing exclusive rights for computer programs.[256] Tensions between computer programs and the main principles of copyright also arose from their functionality (because of the lack of a clear distinction between the idea and its expression) as well as their technical nature, which made them intelligible to humans.[257] In other words, software was essentially a text, but one addressed to a machine and written in a special human language (source code) only to be immediately translated into a machine language (the object code) inaccessible to humans. Of course, the ultimate purpose of this "work" was to make a machine useful, but the work itself could not be directly enjoyed by the broader public.

P. Samuelson observes that despite the initial scepticism at the end of the 1970s, the momentum shifted towards copyright being, after all, the most suitable legal protection for computer programs.[258] She attributes this to the US decision to legally designate copyright as appropriate for protection and the subsequent political and competitive pressure this choice exerted in the international arena. However, the shift can also be linked to the resolution of other questions surrounding copyright and digitalisation. According to P. Samuelson, the US national commission that made the ultimate proposal for copyright to be extended towards computer programs was also tasked with settling the status of various forms of "machine reproduction", all of which it eventually declared to be copyright-relevant.[259] Thus, it appears that the "acceptance" of computer programs as protectable by copyright was one of the

[254] Ibid., p. 123.

[255] Casas Vallés, 'The Requirement of Originality', p. 120; Manfred Kindermann, 'Special Protection Systems for Computer Programs - A Comparative Study' [1976] IIC 301, p. 304.

[256] See especially Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 Harvard Law Review 281, pp. 340-351.

[257] Pamela Samuelson, 'A Square Peg in a Round Hole? Copyright Protection for Computer Programs' in Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Wolters Kluwer 2012), p. 253. See also de Cock Buning, 'The History of Copyright Protection of Computer Software. The Emancipation of a Work of Technology Toward a Work of Authorship', p. 128 and pp. 131-132, describing the same problems in the framework of copyright law raised in Germany and the Netherlands.

[258] Samuelson, 'A Square Peg in a Round Hole? Copyright Protection for Computer Programs', p. 251.

[259] Ibid., pp. 255-258.

steps towards making copyright sense of digital technology in general. The inclusion of software came after a deeper analysis of how exactly programs are made and computers work, looking for points of analogy with what was seen as "traditional" creative process and the acceptable extent of authorial control.

3.5.3.2. Reduced originality and "invisible copies"

Like with photographs, the possibility of protecting computer software challenged the idea/expression dichotomy in copyright law. Whereas the photographic image was a faithful representation of the world, and its author's contribution was hard to conceptualise without a more abstract standard of originality, computer programs were direct embodiments of ideas and practical solutions to problems. Moreover, they had a functional purpose different from traditional "works", which by this time were accepted in copyright as expressions of human subjectivity or skill and judgement, and therefore an end in themselves. In order to recognise computer programs as "works of authorship", the legal concept of the author would have to be expanded further and reach more clarity as to the value of each protected form of creativity.

In the UK, even though the Act of 1956 did not have a category of protected subject matter directly mentioning computer programs, a special legislative committee (the Whitford Committee) concluded in 1977 that the legal notion of literary works was, in principle, broad enough to encompass them.[260] This conclusion went somewhat against the usual conservative attitude towards the categories of protectable works, especially as, at the time, literary works were only seen as protectable if fixed on paper.[261] It was, however, in line with the approach to copyright taken by the Whitford Committee, which, in the midst of a disorganised British copyright system, had attempted to recreate the core principles of protection and concluded that the economic rationale of protecting the investment of skill and labour was the most important.[262] From this perspective, computer programs were worthy of protection and easily met the British originality requirement.

In 1981 the same encouragement to explicitly recognise computer programs as "literary works" was repeated in the "Green Paper" published by the British government.[263] According to the literature, there was no UK case law on the

[260] Nancy F. DuCharme and Robert F. Kemp, 'Copyright Protection for Computer Software in Great Britain and the United States: a Comparative Analysis' (1987) 3 Santa Clara Hight Technlology Law Journal 257, p. 261.

[261] Ibid., p. 261.

[262] Gerald Dworkin, 'The Whitford Committee Report on Copyright and Designs Law' (1977) 40 The Modern Law Review 685, pp. 685-686.

[263] June M. Stover, 'Copyright Protection for Computer Programs in the United Kingdom, West Germany and Italy: A Comparative Overview ' (1984) 7 Loyola of Los Angeles International and Comparative Law Review 279, p. 288.

protectability of computer programs at this stage,[264] but the US had already set an example with the first legislation in the world recognising software as protectable by copyright.[265] It is thus likely that the British initiative was grounded in economic and competitive considerations as well. The court cases that followed in the 1980s confirmed that computer programs could be protected as literary works.[266] The Act of 1988, when adopted, explicitly included them as a category of literary works to be protected under Section 3(1)(b).

In the French system, which by this time had developed a connection between the work and the personality of its author, computer software's functionality and lack of the author's personal touch were seen as hurdles to its acceptance as copyrightable subject matter. As will be shown in the upcoming chapters of this thesis, even though the French originality requirement prior to EU harmonisation had exceptions and a certain scope for flexibility,[267] the intent to grant copyrightability to computer programs was said to "challenge the very foundation" of French copyright.[268] Nevertheless, the new Copyright Act of 1985 identified computer programs as protectable alongside all other creative works, leaving the courts to find a "doctrinal basis" for this protection,[269] namely to revaluate the core elements of the copyright system and find parallels between software and other creative works, as well as justification for the exclusivity awarded its authors. The issue was settled in the famous *Pachot* ruling[270] in 1986, and later in the *Isermatic* ruling[271] in 1991, where the Cour de Cassation applied a lower originality standard, asking only for intellectual contribution and personalised contribution, in the form

[264] Ibid., p. 288.

[265] Samuelson, 'A Square Peg in a Round Hole? Copyright Protection for Computer Programs', pp. 257-258.

[266] See DuCharme and Kemp, 'Copyright Protection for Computer Software in Great Britain and the United States: a Comparative Analysis', pp. 268-269.

[267] The French courts have recognised protectability of such works as calendars and telephone directories even before the issue of computer programs arose: Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', p. 380. See also Section 5.3.3.3 of this thesis.

[268] Andre Lucas, 'The Council Directive of 14 May 1991 Concerning Legal Protection of Computer Programs and its Implications in French Law' (1992) 14 European Intellectual Property Review 28, p. 29.

[269] Sunimal Mendis, *A Copyright Gambit: On the Need for Exclusive Rights in Digitised Versions of Public Domain Textual Materials in Europe* (Springer 2019), pp. 184-185.

[270] Babolat Maillot Witt v. Jean Pachot, Cour de Cassation, 7 March 1986, RIDA no. 129 (1986), 130-131.

[271] Isermatic France, Cour de Cassation, 16 April 1991.

of creative choices,[272] but not the personal touch that was usual before.[273] Following these cases, the French courts often employed a similar approach for other functional works, including, but not limited to, computer programs.[274] Later, the EU standard for software set in the Computer Programs Directive was arguably even lower, thus further challenging the continental understanding of originality.[275]

The scope of the author's rights was another matter that raised much controversy. Already in the UK, the Whitford Report proposed that any use of a computer program in terms of loading or storing it should be seen as a restricted act.[276] Naturally, this suited the needs of the software industry and its wish to prevent programs from being run on multiple machines and by multiple users simultaneously, which would jeopardise its business model. On the other hand, the proposal drew criticism from legal commentators for going against the fundamental principles of the British copyright system, not least the idea/expression dichotomy. Authorial exclusivity over "use" of computer programs was likened to the ability to prohibit following out any written instruction, such as cooking from a cookbook.[277]

In this light, it is difficult to pinpoint what influenced the shift in legal scholars' views towards copyright as the most suitable form of protection. As mentioned above, the reasons might have been political and economic, seeking competitive advantage in the newly emerging market. However, as indicated, another factor was the growing interest in the technical processes taking place inside a computer and the search for analogies with other restricted forms of reproduction. It was suggested that any computer operation creates an "invisible copy" derived from the original program.[278] This was not, at least in the beginning, the universally accepted approach to computer programs. Some argued that adaptation or translation rights were a better match for the computer's internal processes, since every time a

[272] Mendis, *A Copyright Gambit: On the Need for Exclusive Rights in Digitised Versions of Public Domain Textual Materials in Europe*, pp. 184-185.

[273] See Casas Vallés, 'The Requirement of Originality', pp. 120-121; also Lucas, 'The Council Directive of 14 May 1991 Concerning Legal Protection of Computer Programs and its Implications in French Law', p. 29.

[274] Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', pp. 379-384.

[275] Andreas Rahmatian, 'Originality in UK Copyright law: the Old "Skill and Labour" Doctrine Under Pressure' 44 International Review of Intellectual Property and Competition Law, p. 21.

[276] DuCharme and Kemp, 'Copyright Protection for Computer Software in Great Britain and the United States: a Comparative Analysis', pp. 261-262.

[277] Dworkin, 'The Whitford Committee Report on Copyright and Designs Law', p. 699.

[278] A term used in Stover, 'Copyright Protection for Computer Programs in the United Kingdom, West Germany and Italy: A Comparative Overview ', p. 290, but other have used similar analogies, even without explicitly calling the digital fixations of work "invisible copies", see: Eugen Ulmer and Gert Kolle, 'Copyright Protection of Computer Programs' [1983] IIC 159, pp. 185-186.

program is loaded, it is "translated" from a human-readable language to a machine language.[279] However, by the middle of the 20th century, the right of "reproduction" in international discussions had largely come to mean exclusive control over the manifestation of a work through any technology. S. Depreeuw, in her thorough analysis, demonstrates how, with each new technological development, the Berne Union and its member states looked to authorial exclusivity as the basis for control of the technology, finally settling on a single "reproduction right" in the 1967 Stockholm revision of the Convention.[280] Thus, in the light of the problems raised by computer software, the recognition of all digital copies as copyright-relevant was a natural next step.

In the same way, in France, by the time computer programs became a legal problem, the country's general right of reproduction was already broad and interpreted as encompassing any mode of reproduction, based on the 1793 Copyright Act.[281] On the other hand, from the beginning of modern French copyright in 1793[282] until the internationalisation of a single standard through the Berne Convention in 1967, the French right of reproduction was tied to the actual economic harm that the author would suffer, and reproductions with no commercial significance were not seen as a violation.[283] Following the introduction of computer programs into the system, with the Act of 1985, the reproduction right for software indicated that the making of "any copy" was prohibited.[284] Though the legal doctrine at the time generally agreed that making a back-up copy and any reproduction necessary for the use of the program in line with its intended purpose was not a copyright violation,[285] the right of reproduction became the broad general principle that we know today.

The situation was similar in the UK. As described by Gervais, prior to Berne's unified standard of reproduction and adaptation, the British system allowed broad adaptation possibilities for foreign works, emphasising the effort, skill and

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[279] See an account of different opinions on this matter by British academics in Stover, 'Copyright Protection for Computer Programs in the United Kingdom, West Germany and Italy: A Comparative Overview ', pp. 289-291.

[280] Sari Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright* (Bernt Hugenholtz ed, Wolters Kluwer 2014), pp. 57-60.

[281] Ibid., p. 6.

[282] See Peeler, 'From the Providence of Kings to Copyrighted Things (and French Moral Rights)', pp. 430-431.

[283]Daniel Gervais, 'The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs' (2013) 15 Vanderbilt Journal of Enterntainment and Technology Law 785, pp. 812-813; also Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, pp. 6-7.

[284] Emmannuel Michau, 'France' in Herald D. J. Jongen and Alfred P. Mejboom (eds), *Copyright Software Protection in the EC* (Kluwer 1993), pp. 63-64.

[285] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 127.

judgement put into the adaptation, making it worthy of protection in its own right.[286] It need only be recalled that for other works, the "substantial part" test, in use until the harmonisation of the reproduction right at EU level, was applicable, and that the substantial part was often decided on the basis of the prejudice caused to the interests of the author by the reproduction in question.[287]

The acceptance of computer programs into the list of protectable subject matter adds another touch to the universal technology-neutral interpretation of the right of reproduction, further limiting the possibilities in European countries for a flexible approach. If the Berne Convention started the process of accommodating to digital technology, the final outline of the protection for computer programs in Europe came via EU harmonisation and the TRIPS Agreement. The inclusion of computer programs in this context involved not just the inclusion of new, less personally and creatively involved authors, but also an adjustment of what the protection of such authors should consist of. The fact that the extension of the right of reproduction in this case was almost exclusively driven by considerations other than authorial interests was even greater challenge to the European copyright system.

3.5.3.3. International and EU law

Because computer programs are not mentioned in the Berne Convention, their status in international copyright law was unclear until 1994, when the TRIPS Agreement explicitly included them as protectable subject matter in both source and object code form.[288] It has been pointed out that the articulation of the idea/expression dichotomy in Article 9(2) of TRIPS was added specifically to counterbalance the introduction of functional works.[289] On the other hand, as already noted, the 1967 revision of the Berne Convention, which added a broad reproduction right, was deemed especially favourable for computer programs because it could, in principle, cover all uses of a program as well as be applied to works that are unintelligible to humans.[290] The explicit inclusion of this subject matter in TRIPS can be seen as a clarification of Berne's already open-ended list.

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[286] Gervais, 'The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs', pp. 814-815.

[287] See Sections 3.4 and 3.5.2 above.

[288] Article 10(1) of the TRIPS Agreement. See also Section 2.2.2 of this thesis.

[289] Richard Arnold, 'Copyright in Software: Functionality' in Tanya Aplin (ed), *Intellectual Property and Digital Technologies* (Edward Elgar 2020), p. 27.

[290] Stover, 'Copyright Protection for Computer Programs in the United Kingdom, West Germany and Italy: A Comparative Overview ', p. 286.

Still, before the EU-level harmonisation, the approaches of the Member States to this new kind of subject matter varied greatly.[291] Currently, the EU asks Member States to protect computer programs, in line with TRIPS and WCT, "as literary works" in the meaning of the Berne Convention but does so through a separate Computer Programs Directive rather than through general harmonisation provisions in the InfoSoc Directive. Even though there have been discussions over the years about different forms of protection,[292] and even a proposal for a Software Patent Directive, in 2002, software seems to be here to stay as part of the general copyright protection system. This is even more the case after the decisions of the CJEU in *BSA* and *SAS*, confirming that different elements of computer programs are subject to the same protection criteria as creative works.

As mentioned, the Computer Programs Directive introduced a certain originality standard for protection, formulated as the "author's own intellectual creation", which was seen as low and ambiguous at the time.[293] Moreover, the Directive gave software copyright owners a very broad reproduction right as well as a general "distribution right" that even included the ability to allow or prohibit renting (something that was not yet harmonised for other subject matter[294]). At the same time, the Directive made it clear that the new category of works was to be seamlessly integrated into the existing copyright framework, without any need for a new category.[295] The fact that copyright infrastructure was in place and offered a fast track to international inclusion was likely one of the main reasons why copyright protection was selected for computer programs in the first place.[296]

As a result, new protectable subject matter was introduced into EU copyright law, to be protected in the same way as any other literary work, but with many modifications both to the protection requirements and the rights that follow. The special model of protection did not stay completely isolated from the rest of the system, however, and it would come to influence EU copyright in different ways.

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[291] Christopher Voss, 'The Legal Protection of Computer Programs in the European Economic Community' (1992) 11 Computer/Law Journal 441, pp. 441-442.

[292] There were many who suggested versions of *sui generis* protection. See, e.g., Steven B. Toeniskoetter, 'Protection of Software Intellectual Property in Europe: An Alternative Sui Generis Approach' (2005) 10 Intellectual Property Law Bulletin 65, pp. 76-80.

[293] Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', p. 387; Lucas, 'The Council Directive of 14 May 1991 Concerning Legal Protection of Computer Programs and its Implications in French Law', p. 29.

[294] Voss, 'The Legal Protection of Computer Programs in the European Economic Community', p. 452.

[295] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 98.

[296] Ibid., p. 92; see also Samuelson, 'A Square Peg in a Round Hole? Copyright Protection for Computer Programs', pp. 257-258.

3.5.3.4. Conclusions

It has been observed that with the coming of technologies that support creativity, the standard of originality in copyright has been conclusively lowered.[297] This indeed seems to have been the case with computer programs. On the other hand, such a lowering can also be seen as "crystallisation" or movement towards an even higher level of abstraction with regard to the principles of protectability in the European copyright tradition. According to Judge and Gervais, the introduction of the new subject matter has elevated the originality test to a new level of abstraction.[298] In other words, one of the pillars of the European copyright tradition observed earlier in the thesis – the subjective connection between the author and her work – was sustained by recognising that this subjectivity can take different forms and still be valued.

In fact, it could be argued that accepting works that are illegible to humans draws even more attention to the author and the value of something that happens in the creative process as being what copyright is set out to protect. Traditionally, the purpose of the work itself (or its quality) was not deemed important, though this was partly for lack of objective criteria against which an artistic work might be assessed. By the same token, the fact that a computer program has a clear purpose is of itself irrelevant from a copyright perspective. On the other hand, when computer programs are accepted within the definition of literary works of authorship, any presumption of the "work" being at all aesthetically pleasing, educational or informative to the general public has to be set aside too. Such usefulness can be an indirect consequence of the work's creation, but it has no bearing on the protectability of the work itself. The only yardstick for protection becomes authorial control, creating subjective value in the work; however, even this cannot be easily determined in works that humans cannot read – some sort of subjective assessment needs to be conceived.

With regard to the exclusive rights, the inclusion of purely digital works which are easily substitutable with other works created to accomplish the same task has put a strain on European copyright's traditional principles of exclusivity. Control over the use of the program, however problematic to begin with, was recognised as falling under the right of reproduction, cementing the broad approach to this right already emerging in the context of digital technology. Reproduction became an objective fact encompassing any fixation in a physical medium, thereby reducing the traditional scope of flexibility that allowed this right to be seen as related to

[297] Tatiana-Eleni Synodinou, 'The Principle of Technoligical Neutrality in European Copyright Law: Myth or Reality?' (2012) 34 European Intellectual Property Review 618, p. 619.

[298] Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', p. 381.

exploitation.[299] Of course, as will be discussed further in the thesis, even the broad right of reproduction has a number of exceptions that allow defence against the exclusivity of the author on the basis of public interests.[300] These exceptions and limitations, however, represent a different structural element of European copyright law that has its own shortcomings.

In this respect, it should be mentioned here that, because of the functionality of computer programs, the exceptions to their copyright had to be specifically tailored as well. It is widely accepted that one of the key concepts behind adjusting the exclusivity of protection for programs has been the idea/expression dichotomy and the acceptance that many of the "internal elements" of a computer program will not be protectable, allowing the creation of programs serving the same purposes and employing the same problem-solving methods.[301] Other special exceptions, for instance related to the correction of errors, making backup copies, and ensuring interoperability with other programs,[302] were also introduced. One can say that all three of these exceptions, but perhaps particularly the third, address the possibility to use the computer program according to its intended function. Moreover, they are all in line with the needs of the creators of new programs meant to supplement or exchange information with the existing one.[303] The limits of these exceptions are such that they do not hurt the commercial potential of the existing program and balance different interests,[304] having in mind that the protection of computer programs was from the beginning seen as closely linked to the needs of the industry that produces them. In other words, while recognising that the protection of computer programs entails accepting a reduced standard of originality, the scope of protection was adjusted to balance interests and allow the creation of other programs. It was, after all, beneficial to the software developers themselves to make sure that the monopoly created by copyright was not overly extensive.

Thus, as has already been noted, the newly introduced subject matter was inevitably placed on top of already existing sub-surface structures of European copyright law, where the author was an agent of subjectivity and exclusive rights were tightly

[299] See a review of the discussion as to the possibilities to interpret even the broad right of reproduction as related to exploitation in Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, pp. 73-78.

[300] See Section 5.3.4 of the thesis.

[301] See, e.g., Ulmer and Kolle, 'Copyright Protection of Computer Programs', pp. 180-181; also Daniel J. M. Attridge, 'Copyright Protection for Computer Programs' (2000) 22 European Intellectual Property Review 563, pp. 654-658 for the discussion of the "non-literal" copying debate for software and the interpretation of the idea/expression dichotomy that this entails in each case.

[302] Arnold, 'Copyright in Software: Functionality', p. 26.

[303] Ibid., p. 31.

[304] Michael Lehmann, 'Theory of Property Rights and Copyright Protection of Computer Programs in Europe' (1994) 2 Iternational Journal of Law and Information Technology, p. 96.

connected to the value of that subjectivity expressed in the work. Consequently, this technological development encouraged a crystallisation of the value of the personality of the author through the criteria of protectability, as well as an expansion of the right of reproduction, even if the latter was accompanied by certain safeguards. A tension that already existed between the creator and exploiter sides of copyright became stronger, affecting the overall balance of the European and EU copyright systems alike.

3.5.4. Conclusion: technological trials and European copyright law

The two early technological challenges reviewed in this section of Chapter 3 called into question several different aspects of the European copyright system as it was then constituted. When solving the problems related to the new protectable subject matter, countries relied on legal structures in their systems that were best established and most consistent with the rest of their legal norms. A number of sedimented principles of copyright law were employed, sometimes one after the other, some having a clear place in European and EU copyright to this day, while others were contested and compromised upon.

The most important elements here, which can be said to have influenced the whole of European copyright, were probably the strengthening of the "human over machine" principle and the consistent "purification" of the criteria of protectability to favour abstractions such as creativity, subjectivity and originality. Where photographs emphasised human subjectivity, software allowed further elaboration of what that entails. Furthermore, the personal touch or "style" that was needed to render photographs protectable could be seen by others, but the choices made by an author of a computer program were largely internal to the author and not necessarily obvious in the "work".

K. Bowrey suggests that, in each technological shift, copyright law is made to "select" who to cast as author and "pretends" that this is a certain person over others.[305] This section, however, has shown that although the process of searching for and selecting an author is present during the phases of technological change, little "pretending" is involved. In accordance with the methodology of this thesis, new developments in law do not happen in a vacuum; there is the European copyright tradition to draw upon, including for the establishment of what connection between the author and work is worth protecting. Each new technology challenges the deeply sedimented principles, forcing them to evolve; but change in the sub-surface layers is slow and the core of the fundamental principles is sustained if at all possible.

[305] Bowrey, 'Copyright, Photography and Computer Works - the Fiction of an Original Expression', p. 279.

At the same time, the inclusion of new authors through the recognition of new technology's capacity to reflect their subjectivity was largely a consequence of other, non-author-related pressures. The newness of the technology meant potential demand and potential profit. The new technology, furthermore, created a need for investment in producing and disseminating works. Each time that new subject matter was included in copyright, new kinds of expressions became objects of market interactions. That economic potential and the need to protect investment played a central part in securing copyright protection for computer programs[306] is a rather undisputed fact, and the same has been suggested in respect to photographs.[307]

And thus, the legal subject of "author" at this juncture in the evolution of the European copyright tradition has been placed in an increasingly complicated position. On the one hand, copyright law was developing with varying degrees of emphasis on the author and her subjectivity, reusing and further developing the conceptualisations of the author as "genius" or at least "craftsman" and (first) "owner" of exclusive rights; while on the other hand, the driving force behind the formulation of the exclusivity in the exploitation stage of copyright was not author related. From this latter perspective, the author was more of a "resource" whose productivity was to be sustained through rewards, or merely another economic exploiter of works. The tension between creation and exploitation that arose during Shifts No. 1 and 2, when the exclusivity of the monarch was placed on the most neutral subject of the author, reappears again and, possibly, becomes even more complex.

3.6. Shift No. 5: the introduction of copyright into EU law – early decisions of the CJEU[308]

3.6.1. Explaining the nature of the shift

The shifts discussed above describe points where European copyright law has been confronted with a challenge and adapted to meet it. As demonstrated, the challenges might be of social, political, cultural or technological nature. Another issue that has

[306] This is especially true of the harmonisation of their protection in the EU, which was explicitly justified by the need for protection standards in order to enable community industry to "catch up with its competitors" and to fully realise the potential of the internal market: Voss, 'The Legal Protection of Computer Programs in the European Economic Community', p. 445.

[307] Bowrey, ''The Word Daguerreotyped: What a Spectacle!' Copyright Law, Photography and the Economic Mission of Empire', p. 15.

[308] Which was called the "ECJ" at that time, but the current name of the EU Court (CJEU) will be used in this thesis for consistency purposes.

to be discussed in a thesis that aspires to analyse EU copyright law is the meeting of European copyright legal culture and the EU (the EEC), and the consequences of this meeting for European copyright. The question of harmonisation itself will be addressed in Chapter 5 of the thesis. This section will look at the first occasions on which the newly formed economic entity that was the EEC encountered national copyright law and analyse how the relationship between this economic union and a field of law regulating subjective human intellectual activity was constituted. Even though this moment in the history of EU copyright law is not usually seen as very important in light of the harmonisation of the 1990s, it will be suggested here that some of the principles introduced by the CJEU at the time may have shaped the trajectory of development in EU copyright law.

The meeting between copyright and a new legal order built around freedom of movement and an undisturbed internal market intertwined EU copyright with a firm emphasis on the copyrighted work as a market commodity and carrier of economic value, and the author as one of its owners. At the same time, the "other" more personal and subjective elements of copyright law were also asserted to be part of the core of this system, but they were conceptualised as exerting no influence on the economic aspects and thus fell largely outside of the scope of EU law.

As discussed in Chapter 2 of the thesis, one of the characteristic features of EU copyright is its multifaceted nature and the different "dualities" the system exhibits, including that between legislative texts and their interpretations by the CJEU.[309] Shift No. 5 will not address all of the many aspects of EU copyright law, but will instead reflect on possibly one of its central pillars. The most recent tendencies in this legal system, most notably in the form of CJEU jurisprudence, will be discussed in Chapter 5.

3.6.2. The CJEU and the need for novel legal solutions

The EEC Treaty of 1957 (or the Treaty of Rome), establishing the European Economic Community (EEC), did not have any explicit provisions on intellectual property law.[310] The first cases where national intellectual property rules were directly discussed at the Community level were heard before any harmonisation and concerned their potential to violate the fundamental principles of the Common Market. These decisions related to copyright law were thus in the service of broader

[309] See Section 2.3.4 of the thesis.

[310] Indirectly, as will be elaborated later, intellectual property falls under Articles 36 TEEC and 222 TEEC which were to limit the Community's competence regarding the questions of "industrial and commercial" and any other kind of property.

objectives[311] and based on economic rationales of free movement, undistorted competition and non-discrimination.

At that time, the situation with respect to national copyright and other intellectual property laws was complicated. For one thing, intellectual property rights, by their very nature, involve exclusivity and the ability to prevent reproduction and distribution of copies on a territorial basis. Moreover, Articles 36 and 222 TEEC (now Arts. 345 and 36 TFEU) specifically exempted from the supremacy of the Community law national laws on *property ownership* and laws which restricted imports on the basis of protecting *industrial and commercial property*. Without the possibility to set aside the national intellectual property laws which hindered imports of goods and without the competence to introduce any harmonisation, the Court spent the 1960s, 1970s and 1980s trying to find a middle path. In the process it laid the groundwork for substantial harmonisation in the 1990s and beyond. Thus, there was no separate copyright agenda informing the first decisions regarding copyright's place in the EEC. Copyright was rather seen as an obstacle, to be handled in a way that would not upset the sovereignty of the Member States, the artistic, economic, technological and other functions of national intellectual property laws, or the principles of EEC law. [312]

Quite predictably, these decisions, where the relationship between the EEC Treaty and intellectual property (first trademark law and later other rights) was explicitly discussed, concerned the possibility of prohibiting parallel imports of goods on the basis of national intellectual property rights and exclusive territorial licensing agreements.[313] The first of them, *Grundig,*[314] issued in 1966, adopted an approach that where the entity claiming national intellectual property rights is an exclusive license holder in the country in question, this exclusive license agreement could be considered prohibited under Article 85 TEEC (now Article 101 TFEU).[315] However,

[311] Eleonora Rosati, 'Towards EU-wide Copyright? (Judicial) Pride and (Legislative) Prejudice' (2013) 47 Intellectual Property Quarterly, p. 47.

[312] Guy Tritton and others, *Intellectual Property in Europe* (3rd. edn, Seet & Maxwell 2008) p. 637. And also as clearly reflected in the provisions of Article 36 TEEC (now Art. 36 TFEU).

[313] For more see Annette Kur and Thomas Dreier, *European Intellectual Property Law. Text, Cases and Materials* (Edward Elgar Publishing 2013), p. 46.

[314] Joined cases C-56/64 and C-58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, ECLI:EU:C:1966:41 (*Grundig*).

[315] According to the Court in this case, trademark law was one of the tools used by Grundig to strengthen protection against parallel imports which fragmented the common market. The distribution contract between Grundig and Consten, however, was the main focus of this case as an agreement contrary to competition law expressed in Article 85(1) TEEC.

Sirena[316] and *Parke Davis*[317] later showed that this solution was impossible to apply where there was no agreement and the rightholders used their own intellectual property rights in the course of their usual economic activities to manage imports. Even though the CJEU introduced a flexible approach to the interpretation of an "agreement" for the purposes of Article 85 TEEC,[318] this situation was not compatible with the principles of free movement. The Court finally found a solution to all of these problems in *Deutsche Grammophon,*[319] in 1971, where it established the principle of *regional exhaustion* for the whole Common Market.

However, as mentioned, the constitutional law of the EEC explicitly allowed each Member State to make its own legislation in these areas. To deal with the situation, the CJEU had to invent two famous doctrines, namely the distinction between *"existence"* and *"exercise",* and the principle of "specific subject matter", both of which will be discussed next.

3.6.3. "Exercise" and "existence" of copyright

The dichotomy between the "existence" of national intellectual property rights and their "exercise" first appeared already in *Grundig*. One of the questions in this case was registration of another trademark in the national market by the exclusive licensee for the purpose of exclusive national distribution. With respect to the claim that this registration was not an agreement and thus cannot be prohibited by EEC law, the Court concluded that, while intellectual property rights under national law are not within the jurisdiction of the EEC, their *exercise* can be limited to give effect to Article 85 TEEC.[320] Later, in *Deutsche Grammophon,* the Court also found that other principles (not only those of competition law) in the EEC Treaty, "in particular those relating to the free movement of goods",[321] might also be grounds for limiting national intellectual property rights.

It has to be pointed out here that there is no mention, in Article 36 TEEC or anywhere else in the Treaty, of "exercise" or "existence" of (intellectual) property rights. This duality was invented and introduced into the emerging EU copyright

[316] Case C-40/70, Sirena Srl v Eda Srl and others, ECLI:EU:C:1971:18 (*Sirena*).

[317] Case C-24/67, Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm, ECLI:EU:C:1968:11 (*Parke Davis*).

[318] *Sirena*, para. 11; see Kur and Dreier, *European Intellectual Property Law. Text, Cases and Materials* p. 46.

[319] Case 78/70, Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmärkte GmbH & Co. KG, ECLI:EU:C:1971:59 (*Deutsche Grammophon*).

[320] *Grundig*, p. 345.

[321] *Deutsche Grammophon*, para. 7.

law on the Court's own initiative.[322] To ensure consistent interpretation of the TEEC, the CJEU could have, for instance, proclaimed that specific national intellectual property norms that were incompatible with the principles of the Common Market or that allowed incompatible actions or contracts, were invalid and could not be upheld.[323]

Moreover, the Court never provided any deeper theoretical basis for the distinction between the exercise and existence of a right. Many commentators view this conceptual distinction in the case of intellectual property rights as controversial. It has, for instance, been called "unconvincing" and "illogical" because any existence intangible property has lies in its exercise,[324] intellectual property is valueless unless exercised,[325] and so forth.[326] Interestingly, the Court invoked this duality of a right in its intellectual property cases and almost never in its cases dealing with tangible property.[327]

Whatever its initial reason and purpose, the doctrine was the first step towards copyright's integration into the EU legal system and it was grounded from the start in a demarcation between the part of copyright that was relevant from the perspective of the internal market and the "other" part. Where this separation lies in practice was hard for the Court to clarify and the doctrine was employed on a case-by-case basis during the years of its use. For instance, the CJEU argued that such issues as using national distribution rights to prohibit imports from other Member

[322] Most likely, however, the explanation for the approach chosen by the Court is its adoption of the tools of competition law where "existence and exploitation" was one of the theoretical frameworks used to delimit the effects of completion law on intellectual property rights: Rolf H. Weber, 'Data Interfaces: Tensions between Copyright and Competition Law - A New Swiss Court Practive for an Old Problem' [2020] GRUR Int 119, p. 120.

[323] Which, as some argue, should have been the only correct way to do it, as "It's not exercise of the right, i.e. the national legislation that constitutes the obstacle to free movement" in Tritton and others, *Intellectual Property in Europe*, p. 647.

[324] Aidan Robertson, 'The existence and exercise of copyright: can it bear the abuse?' (1995) 111 Law Quarterly Review 588, pp. 588 – 591.

[325] Tritton and others, *Intellectual Property in Europe*, p. 647.

[326] For more criticism see, e.g., Valentine Korah, *An Introductory Guide to EEC Competition Law and Practice* (4th. edn, ESC Publishing Limited 1990), p. 157; Cornish and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, p. 786; or T. David Keeling, *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law* (Oxford Scholarship Online 2004), pp. 55-60.

[327] Even though it is held that the Court's interpretation concerned Article 222 TEEC (and, supposedly, 36 TEEC) as a whole and so the dichotomy should be applicable to all property rights: Bram Akkermans and Eveline Ramaekers, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations' (2010) 16 European Law Journal 292. There seems to be only one case where a similar distinction was made regarding property rights to tangible objects: Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking* (Springer International Publishing 2016), p. 69, footnote 47.

States[328] or the ability to collect additional fees upon importation[329] concerned the exercise of copyright; while in *Patricia*[330] it proclaimed that the term of protection under national copyright laws was a matter of existence. As the ordinary meanings of "existence" and "exercise" imply, the part of copyright that was seen as relevant apparently related to its direct economic exploitation, leaving questions about the basis for protection and its more abstract limits to be handled outside the EU (then the EEC).

3.6.4. Doctrine of "Specific Subject Matter"

The distinction between the exercise and existence of copyright, however, proved insufficient once the Court had decided that exclusive territorial distribution rights were a serious obstacle to the emerging internal market and introduced the principle of regional exhaustion. Previously, the existence/exercise doctrine had been used to justify less extensive and more specific limitations; there now arose a need to find a basis for a more aggressive balancing between the needs of owners of the national rights and the principles of the Community.[331]

The doctrine of "specific subject matter" thus first surfaced in *Deutsche Grammophon,* where the Court proclaimed the Community-wide exhaustion of copyright and related rights.[332] Here, a German company, Deutsche Grammophon (DG), claimed that Metro had infringed on its copyright by acquiring audio records originally distributed through DG's subsidiary in France and selling them in Germany at a lower price than DG's official distributors. DG relied on the provisions of German copyright law, which granted only national exhaustion, to claim that the marketing of audio records in another Member State does not cause the exhaustion of the right of distribution in Germany. The CJEU (besides the questions of violation of EEC competition law[333]) had to determine whether such national rights are compatible with the principles of the Common Market, namely free movement of goods, undistorted competition and prohibition of arbitrary discrimination. It ruled that, in accordance with Articles 36 and 222 TEEC,

[328] *Deutsche Grammophon,* paras. 11–13.

[329] Joined cases C-55/80 and C-57/80, Musik-Vertrieb membran GmbH and K-tel International v GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, ECLI:EU:C:1981:10 (*GEMA*), para. 27.

[330] Case C-341/87, EMI Electrola GmbH v Patricia Im- und Export and others, ECLI:EU:C:1989:30 (*Patricia*), paras. 12-14.

[331] Ramalho, *The Competence of the European Union in Copyright Lawmaking*, pp. 72-73 suggests that this was an attempt to introduce a principle of proportionality in the interpretation of Art. 36 EEC.

[332] Ramalho, *The Competence of the European Union in Copyright Lawmaking*, p. 70.

[333] The CJEU ruled that there was no violation of Articles 81 and 82 TEEC (101 and 102 TFEU).

impediments to common market freedoms through the *exercise* of national copyright can only be justified for the purpose of safeguarding rights which constitute the *specific subject matter* of copyright.[334] Consequently, exercising the right of distribution in such a way as to permit only national exhaustion would be contrary to the fundamental principles of the EEC Treaty.[335]

Hints as to the meaning of this "specific subject matter" can be found in the discussion raised in Advocate General Roemer's Opinion.[336] He suggested that the "purpose of the industrial protection rights was fulfilled when the goods were first marketed, since it was possible to use the monopolistic opportunity for gain",[337] and that it would go beyond the "objective of the right if the holder was permitted to control further marketing".[338] In other words, the Court argued (or implied) that the core purpose of copyright law, at least the part with which the EU (then the EEC) is concerned, is the economic realisation of exclusive rights. This is only confirmed by the fact that in French, the original language of the AG's opinion and of the decision, what has been translated as "specific subject matter" can also be understood as "essential function" or "purpose" of copyright.[339]

The CJEU gradually refined the content of this new notion in subsequent cases before presenting a "definition" of what exactly the "specific subject matter" of copyright law is in the *Phil Collins* case in 1993.[340] Overall, throughout the years, the CJEU has identified the following features/aims as *essential* to European copyright: [341]

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[334] *Deutsche Grammophon,* para. 11.

[335] Ibid., paras. 12-13.

[336] Diana Guy and I. F. Leigh Guy, *The EEC and Intellectual Property* (Sweet & Maxwell 1981), pp. 125-126.

[337] Opinion of Advocate-General Roemer, in the *Deutsche Grammophon,* ECLI:EU:C:1971:42, p. 508.

[338] Ibid.

[339] The French "*objet spécifique*" which was the original name for the doctrine has more than just this meaning. *Objet* in French is not only "object", but also "purpose" or "aim" for something: Tritton and others, *Intellectual Property in Europe* pp. 648-649; Keeling, *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law*, p. 64.

[340] Joined cases C-92/92 and C-326/92, Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH, ECLI:EU:C:1993:847, (*Phil Collins*).

[341] The review relies on the most known cases using the doctrine of "specific subject matter", even though there were others like Case C-402/85, G. Basset v Société des auteurs, compositeurs et éditeurs de musique (SACEM), ECLI:EU:C:1987:197 (*Basset v SACEM*), where the Court stated that only "normal exploitation" of copyright could have been justified even if it partitioned the Common Market in the meaning of Art. 36 TEEC.

1. Strong remuneration rights are essential to copyright, but they are not unlimited.

The importance of remuneration, at least when placing the protected object on the market for "the first time", was already hinted at in the opinion of AG Roemer in *Deutsche Grammophon*, even if not expressly mentioned by the CJEU. The Court later confirmed the same idea of remuneration upon the first marketing for other intellectual property rights as well.

In *Coditel I*[342] (1980), the Court held that cinematographic works (at that time[343]) presented a special situation and that copyright rules for these works had to be treated differently "in relation to the requirements of the Treaty".[344] More specifically, since films are not bound to a physical medium and can be viewed many times, the copyright owner has a legitimate interest in calculating the fees based on the actual or probable number of performances.[345] Therefore, the conclusion in this case was that the Treaty cannot prohibit territorial licensing when these territorial limits were agreed upon by the parties to "protect the author and his assigns".[346]

Similarly, in *Warner Brothers* in 1988, the issue was the right to hire out video cassettes in a country where such a right was given (Denmark), but when the cassettes in question were imported from another Member State in which authors did not have this exclusive right (the UK). The Court concluded that having in mind the emerging market of renting and lending video cassettes, the right to prohibit such activity in a Member State was a justifiable restriction on imports. It elaborated that public performance, reproduction, and marketing of recordings are *essential rights* of the author of cinematographic works and that because of technical and social developments "the hiring-out of video-cassettes reaches a wider public than the market for their sale".[347] Mere protection of the right to distribute (sell) copies

[342] Case C-62/79, SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others, ECLI:EU:C:1980:84 (*Coditel I*).

[343] Later, the idea that different types of works should be treated differently was partly (but not completely, e.g., in the cases of computer software and databases) abandoned in EU copyright law. On the other hand, the principle of exhaustion was confirmed not to apply to digital copies of works, see Case C-263/18, Nederlands Uitgeversverbond and Groep Algemene Uitgevers, ECLI:EU:C:2019:1111 (*Tom Kabinet*).

[344] *Coditel I*, para. 12. Of course, "Treaty" here means the EEC Treaty.

[345] Ibid., paras 13, 14.

[346] Ibid., para. 16.

[347] Case C-158/86, *Warner Brothers Inc. and Metronome Video Aps v Erik Viuff Cristiansen,* ECLI:EU:C:1988:242 (*Warner Brothers*), para. 14.

was found to be insufficient to secure for the filmmakers a satisfactory share of the rental market.[348]

However, this right to a market share and to remuneration had some limits. For instance, in *Coditel II* (1982), with circumstances very similar to those in *Coditel I*, the Court stated that licensing agreements which introduced barriers for trade would be *unjustifiable* if they went beyond the "needs of the cinematographic industry", allowed the "possibility of charging fees which exceed a fair return of investment" or gave "exclusivity the duration of which is disproportionate to those requirements".[349] Although not articulated directly, this should imply that the "*fair* return of investment" and "*suitable* duration of exclusivity" with respect to the cinematographic industry are also parts of the *specific subject matter* of copyright.

A similar conclusion regarding the limitation of the rights of remuneration was reached in *GEMA.* Here, a German copyright management society (GEMA) claimed that if an author could not receive additional payment upon goods being imported to a Member State with a higher licensing fee, this would interfere with the "right of an author to receive fair remuneration for his intellectual effort". [350] The Court reaffirmed that restrictions on imports stemming from national copyright *can* be justified, *especially* when these rights are "exploited commercially in the form of licenses".[351] In this case, however, the right of remuneration was satisfied when the author chose the Member State where the work would be released to the market.[352] That being the case, it would be against the principles of the Common Market to allow any entity to set fees for the importation of goods to a Member State on the basis of national copyright law.[353]

2. Protection of moral interests is an essential function of copyright, but it is unrelated to commercial exploitation.

The beginnings of this approach were already visible in the conceptual distinction between the "exercise" and "existence" of copyright. Further, in *GEMA* (1981), the French government pointed out that copyright does not merely have an economic aspect but also a moral one. It argued that this makes the copyright of an author distinct from the rights held by a manufacturer of sound recordings or by other intellectual property rightholders, and so the principle of exhaustion of rights should

[348] Ibid., para. 15

[349] Case 262/81, Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, ECLI:EU:C:1982:334 (*Coditel II*) paras. 19-20.

[350] Ibid., "Facts and issues" section, p. 155.

[351] Ibid., para. 9.

[352] Ibid., para. 25.

[353] Ibid., para. 27.

not apply.[354] According to this logic, the author should have been able to prohibit his work from being exported to any other geographical area and/or impose conditions for such exploitation.[355] In response, the Court acknowledged that copyright has two aspects, moral and economic,[356] but it held that since the issue in this case arose from the economic aspect, there was no reason to elaborate on the distinction further. The Court stressed that in the economic aspect, exploitation of copyright gives rise to the same issues as that of any other intellectual property right.[357] Such an interpretation was in line with Advocate General Warner's contention that there is no difference between the economic rights of copyright holders and authors, and that the "personal" nature of an author's copyright lies solely in the moral rights aspect, which cannot be infringed by importation and exportation.[358]

When the "specific subject matter" of copyright received an explicit definition in the *Phil Collins* case in 1993, the definition included moral rights. The Court provided that the specific subject matter of copyright was "*to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licenses granted in return for payment of royalties.*"[359] In this regard it can be recalled that the harmonising directives which followed around a decade later were all unequivocal that moral rights would not be affected by the respective legislative acts.

From this it seems that the moral aspect, like other more personal elements of copyright under the exercise and existence doctrine, will not be completely detached from copyright – which would risk depriving copyright of its main justifications and the implied connection between the author's subjectivity and the exclusivity of rights. At the same time, this moral aspect has been treated as only relating to moral rights and as outside the scope of Community law, with no bearing on the economic aspects of copyright.

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[354] The *Deutsche Grammophon* case in which the principle of regional exhaustion was established did not deal with copyright per se, but with neighbouring rights. Thus there was still a possibility that the Court would rule differently where copyright is concerned.

[355] *GEMA,* p. 159.

[356] Ibid., para. 12. The Court said nothing more about these two aspects, however.

[357] *GEMA*, para. 13.

[358] Opinion of AG Warner, in *GEMA*, p. 176-177.

[359] *Phil Collins,* para. 20.

3. The subject of the economic rights is unimportant

It is possible that the distinction between moral and economic rights was made specifically to avoid dealing with the different national rules on this matter, and because the EEC was, in principle, an economic community without competence to discuss national cultural policies. Still, in the CJEU's definition of the specific subject matter, the formulation of the economic aspect – unlike that of the moral aspect, which mentions *authors* – does not indicate a subject, implying that the same principles are applicable to all of them.[360] An analysis of the Court's language in these early cases leads to the same conclusion: "author", "rightholder", "owner of copyright" and similar terms are used interchangeably, especially when the factual circumstances of the case involved multiple subjects. In *Coditel I*, for example, the Court explicitly indicated that the protection of the interests of the "author's assigns" should be treated in the same way in respect to EEC law as the protection of the interests of authors.[361] Generally, however, before 1993, the CJEU did not seem to pay much attention to the subject of the rights, nor did it make a distinction between interests on this basis.[362]

3.6.5. The legal sediments and the "author" in the first decisions of the CJEU

Even though the existence/exercise doctrine is no longer in use,[363] the "specific subject matter" test has never been retired. The CJEU has used it more recently in

[360] The Court states in *Phil Collins* that "Copyright and related rights *are also economic in nature in that they confer the right to exploit* commercially the marketing of the protected work, particularly in the form of licenses granted in return for payment of royalties" (emphasis added).

[361] *Coditel I*, para. 16.

[362] In *Coditel I* and *II*, where the claimant was a company holding rights to a cinematographic work, "owner of copyright" is used most often. "Author" comes up, however, when the Court gives the final conclusion in *Coditel I* that the EC Treaty cannot prohibit geographical limits the parties agreed upon to protect the author. In *GEMA,* where the question of moral rights and hence the special nature of copyright is raised, the Court uses "owner of rights" except when trying to indicate the initial subject of copyright whose right is exhausted by the first sale. In these cases, the Court uses "author" and "composer" interchangeably. In *Warner Brothers*, on the other hand, the "author" is used predominantly even when talking about economic rights, and the "makers of films" is only used in the final conclusion tying the Court's reasoning to the factual circumstances of the case (where the claimant was a company owning rights to a film). In *Patricia,* only "owner of copyright" is used, despite discussion of the term of protection of copyright, and in *Basset* only "author" is used (and only once), even though the case deals with the right of public performance and compensation for it, which can belong to an "owner of copyright" as easily as not. Finally, in *Phil Collins* itself, where the claimant was a British performer, "owner" and "authors and performers" are both used – the former when talking about commercial exploitation; and the latter in other cases, including the final conclusion of the Court.

[363] The doctrine was not used by the Court explicitly after the *Coditel II* case in 1982, see Keeling, *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law*, p. 55.

the *Football Association Premier League*[364] and *UsedSoft*[365] cases, as well as in the *Tom Kabinet*[366] decision, albeit without naming it directly. However, both doctrines, employed by the CJEU in the first decades of what can barely called "harmonisation", have some features in common.

As previously indicated, they subtly lay a foundation for EU copyright law in economic terms and imply that other aspects of copyright are very important, just not relevant to the internal market. In other words, in these early cases, the CJEU recognises the complexity of the surface and the sub-surface layers of European copyright and even the author as an organising concept (why else would the moral interests of authors be given such prominence in the *Phil Collins* judgement?), but not its necessity to adjudicating on matters of exploitation. The distinction between these two elements is presented as so clear and unproblematic that one can be limited without any effect on the other.

The evolution of European copyright towards a more subjective connection between author and work is presented as unproblematic in such an approach and left for the Member States to deal with. Instead, in the EU copyright law, the "author" is put on the same footing as any other "owner" of intellectual property rights. Perhaps this explains the later closeness between copyright and neighbouring rights in the directives in this area, as well as the general refusal to treat the rights of neighbouring rights holders any differently from those of authors.[367]

From a conceptual perspective, the author receives no special attention in the early cases. The term "author" is used where convenient and refers to someone whose moral interests copyright is made to defend, but within the scope of EU copyright, the rights to a work and how they are used are the relevant questions. In this respect, the author is just a first owner, without the need to elaborate how this status was attained. This right of ownership and the work as a market object can be transferred to someone else, licensed, or exploited by the author herself.

Thus, in a manner reminiscent of Shift No. 2 discussed earlier in this chapter, the first decisions of the CJEU to fall under the rubric of EU copyright law conceptualise the author as a formal owner of exclusivity but not as a subject with

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Although it was suggested by the AG in the *Magill* case in 1995 (Joined cases C-241/91 and C-242/91), the Court chose not to use it in its final decision

[364] Joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd, ECLI:EU:C:2011:631 (*Football Association Premier League).*

[365] Case C-128/11, UsedSoft GmbH v Oracle International Corp., ECLI:EU:C:2012:407 (*UsedSoft*).

[366] Case C-263/18, Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others, ECLI:EU:C:2019:1111 (*Tom Kabinet*).

[367] See Chapter 2.3.3. of the thesis.

a say over how the copyright norms are structured – this is done while balancing different economic interests or simply assuming that all use of a work is expected to generate economic returns. The author as creator has little meaning in such a system: she is a resource of works who, if Member States permit, can also be the owner of the work created.

This approach of the Court in the early cases did not disappear from EU copyright law completely. As noted in Chapter 2, though EU copyright has clear author-centred features in its normative landscape, there are many norms and tendencies that show the utilitarian orientation and economic considerations in the system. Perhaps more importantly, however, there is still a strong tendency to treat the moral and personal aspects of copyright as unrelated to, and not affecting, its economic side – something which is not unique to EU copyright but has characterised the system from the start and continues to be a guiding principle. At the same time, it has left a gap in the sub-surface structure of EU copyright in which to ask why the rights have to be protected to this "high level", why should the exceptions be narrow, and what exactly is valuable in certain works to make them protectable? The CJEU has mainly addressed these questions in the second decade of the 21st century by picking and combining elements from the copyright systems of the EU Member States.

On this point, Chapter 5 will show how the acceptance that copyright law can be developed by cultivating its different "sides" independently of each other – which seems to be especially characteristic of the EU copyright law – has contributed to widening the gap between the protectability criteria later developed by the CJEU and the exclusive rights, notably the right of reproduction that is the focus of this thesis.

3.7. The "Author in History": towards Shift No. 6?

The historical overview provided above is not complete or exhaustive. As already mentioned in the introduction, the events and shifts described are not necessarily of equal magnitude and importance, nor always presented in the order in which they occurred. This chapter has set out to attempt a reconstruction of those elements which have become embedded in the legal structures of European and EU copyright law throughout the years and continue to influence legal norms (their adoption, interpretation and application) to this day. Furthermore, the purpose was not to conduct a historical study of all the circumstances (political, economic, cultural) affecting the law, but rather to examine the law itself, the changes it underwent, the arguments and patterns in these changes, and the accounts of lawyers (now and then) who tried to make sense of them.

These legal sediments, moreover, were approached from the perspective of the author. It has been found that the first important structural legal sediment was the control and exclusivity once held by a monarch by virtue of her sovereignty in all matters of state. This control and exclusivity passed, through the system of royal privileges, to other subjects to exploit and became increasingly privatised, only to be bestowed upon the creator of works with the coming of the Enlightenment. After becoming "owner", the author also gradually became the source of justification for the rights – and her subjectivity a criterion for protectability. Technological change strengthened the role of the human author and raised the value of subjectivity to a new level of abstraction. At the same time, it caused a need for more extensive rights in order to maintain the same degree of control. The EU, as a new legal system and an economic union, shifted attention to the author as an owner and to the exploitation of copyright, leaving the subjective side for the Member States to deal with. The challenge was taken up by the CJEU in the latest stage of development of EU copyright, which will be covered in Chapter 5.

Following the methodological approach of this thesis, these different structural elements today form part of the EU copyright law, though they might not always be visible. Moreover, as K. Tuori emphasises, they are also socially constructed, sedimented from previous stages of legal development. There is nothing inevitable about their presence in EU copyright law. On the other hand, the system derives its legitimacy from these sub-surface principles, and they are accepted by the legal community and European society at large.

At the same time, the meaning and importance given to each of these sediments may vary depending on the circumstances. L. Zemer, for example, suggests that "romantic authorship" is still deeply embedded in the legal consciousness and has a habit of reappearing at inopportune times for the other agendas (for instance, those of commerce) of intellectual property policy.[368] According to the methodology used in this thesis, and as will be confirmed in later chapters, the elements deeply embedded in the EU copyright law are more than just an inconvenience; they are a source of continuity and legitimacy. The ideas of the author and her subjectivity as justifications for exclusivity and control are so integral a part of the European copyright tradition that were they to be rejected, the system would have to be rethought. In the same way, denying the author exclusivity and control (ownership) is, in European copyright culture, inseparably related to denying recognition to the "genius" of the author and the value of the human being.[369] In other words, these two elements are closely intertwined in the tradition of European copyright law.

[368] Zemer, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' p. 501.

[369] See Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law', p. 29 for a similar conclusion.

The concept of author, which, after all, is at the heart of this thesis, thus emerges as one with many different manifestations, sedimented in the sub-surface of EU copyright alongside the other principles discussed above. In the context of the structural shifts defined in this chapter, the author was conceptualised as craftsman or envoy of God, owner, genius (at least a legally acceptable form of one), servant/steward, or resource. A more thorough reconstruction of the sediments in the EU copyright system would undoubtedly uncover further ways of seeing the author. In line with the methodological approach of this thesis and following the perspective of L. Wittgenstein, all these versions of author can be said to belong to the same concept. "Author" in EU copyright law can be regarded as a *family resemblance concept*, where no single definition can be given, but many different connected manifestations of it exert their share of influence on the normative content of the legal system.

Another takeaway from this chapter, then, is that the "author" at the heart of the European copyright system is neither a "natural" nor "inevitable" figure. The conceptualisation of this subject of protection is a choice which can be made and unmade. This chapter demonstrates the flexibility of the concept: fluctuating within certain limits of the principles of the legal system at hand, never breaking or collapsing, but reinventing itself depending on the situation. As also theorised by Tuori, the process of production and reproduction of sub-surface structures in the surface layer happens both ways. As much as current legal developments are influenced by the conceptualisations sedimented into the legal system, the concept of author is constantly developing, with new members of the family being added and existing members being at least slightly changed with each new arrival. The old legitimises the new, and the new reproduces the old.

And here we may return to the context in which this thesis is situated and the problem it seeks to address – the challenge to the author concept brought by the Creative User. Indeed, the Internet is just another shift, perhaps even part of Shift No. 4, in which technology makes specific creative activities possible or expands their scale to the point that copyright law can no longer ignore them. Forming a clearer picture of the concept of author in current EU copyright legal culture will allow us to compare the "legal" forms of authorship with different manifestations of digital creativity, as well as discuss the new possibilities for development that the inclusion of Creative Users as authors might bring to the system.

Chapter 4: The "Author" and Copyright Theory

4.1. The role of copyright theory

An attempt to uncover some of the most fundamental pillars in the sub-surface layers of EU copyright shaping its concept of author to this day would not be complete without a closer examination of copyright's theory as recognised in current legal scholarship. If the building blocks of European and EU copyright presented in the previous chapter might be seen as structural elements, the theoretical approaches that will be reviewed in this chapter represent what could be called the "shallowest" part of European copyright's legal culture. Here can be found value-laden interpretations of the construction of copyright law, together with formulations of legal principles and concepts that help to make sense of the valid law and its logic.

The first part of this chapter will thus address the so-called "justifications" of copyright law that, it seems, no textbook in the field can do without. In a way, these justifications are connected to the "shifts" described above, as they are built on philosophical ideas originating from certain points in history. The justifications are not, however, legal in nature, nor do they seek to track the historical developments in law; rather, they are used to rationalise why copyright law is valuable and justified. It is not always clear how and when these philosophical theories were accepted by copyright lawyers into their field. Most likely, as with other legal sediments, they slowly seeped in during the historical shifts, being picked up by influential legal scholars, referenced by judges to explain their decisions, or mainstreamed into legislative debates by members of parliament, stakeholders, and interested third parties.[1]

[1] Such a view is only reinforced by the fact that the philosophical ideas now used to justify copyright were not necessarily influential at the time they were written and suggested. For instance, it has been observed that the philosophy of I. Kant had little influence on the copyright legal system of that historical period because of its incorrect interpretations of the legal norms: Andreas Rahmatian, *Copyright and Creativity. The making of Property Rights in Creative Works* (Edward Elgar 2011), pp. 86-87.

As a last step in recreating the contours of the concept, the second part of this chapter will seek to review the copyright scholarship dealing directly with definitions of author in European and EU copyright. This chapter, then, concludes the mapping of the elements of the author concept that have dominated the European copyright tradition to date. It will connect copyright history with its theory and prepare the ground for further discussion regarding what "author" the current EU copyright law is based on and how this figure is challenged by the forms of digital creativity associated with the Creative User.

4.2. Justifications for copyright protection

4.2.1. General

As C. Sganga has put it, "Tracing the rationales that inspire a national or regional copyright model means being able to understand its internal mechanisms and foresee its future developments."[2] Indeed, legal scholars use the copyright theories that will be discussed here in variety of ways. Some use them to critique existing norms,[3] others to interpret the legal norms or to propose future changes. Furthermore, these theories can sometimes directly influence the development of norms by way of political action. In this sense, copyright justifications are an attempt to reflect on and make visible the other structures that exist in a legal system.

There are numerous publications on this topic and to review them all would neither be possible nor useful. This part of the chapter aims to give a general overview of the main existing justifications in the European copyright tradition. It will provide a more complete picture of the content of the author concept by tapping directly into the sub-surface layers of the legal system as reproduced and further explained by lawyers themselves.

It is questionable whether the different theories on intellectual property and copyright can be categorised in a truly meaningful way, as they inevitably overlap, and any categorisation may end up being incomplete.[4] However, for the sake of analytical clarity, this section will describe the justifications for copyright protection (copyright theories) – as so many scholars have done before – by dividing them into

[2] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, p. 18.

[3] See, e.g., Alain Strowel, 'Reconstructing the Reproduction and Communication to the Public Rights: How to Align Copyright with Its Fundamentals' in Bernt Hugenholtz (ed), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Kluwer 2018), pp. 206-208.

[4] Zemer, *The Idea of Authorship in Copyright*, p. 8.

two broad categories of utilitarian and non-utilitarian justifications. This distinction will also be used to highlight the author perspective in each of these theoretical underpinnings.

As will be shown, some copyright justifications centre on the figure of the author, while others focus on wider issues such as general societal benefit or, for instance, the encouragement of science, education or culture. All of these, however, are concerned with the creation of works and their subsequent fate. Moreover, they all rest on the same underlying assumption, namely that there can be no works without creation and no creation without authors. The importance of the author as one of the main characteristics of the European copyright system is reiterated, but, depending on the nature of the justification, the "author" is seen differently and given a very different role.

4.2.2. Utilitarian justifications: protection for the benefit of the public good

The so-called "utilitarian" justifications for copyright protection explain the exclusivity and control sedimented at the core of copyright law, its current obsession with mere fixation, and its connection to the human author by emphasising the benefit such protection brings to society – its "utility".

Such justification was said, for instance, to have been behind the Statute of Anne, which proclaimed itself "an act for the encouragement of learning" and, among other things, provided that the rights to copy their manuscripts lay with the authors in order to encourage "learned men to compose and write useful books".[5] A similar provision can be found in the US Constitution's Article 1, Section 8, which gives Congress the right to "secure", for a limited time, exclusive rights for the writings of authors to "promote the progress of science and useful arts".[6] Very generally speaking, the main thrust of the utilitarian justification of copyright is that a specific form of copyright protection is given because "the world will be a better place as a result".[7]

There are several ways to assess what makes copyright justifiable from a utilitarian perspective. One of the most popular, which has received much attention in recent decades, is the law and economics approach, where different economic theories are

[5] It must not be forgotten, however, that the vesting of copy-rights in the authors of texts was only one of the tools provided by the Statute of Anne to encourage learning. The others were a mechanism to deal with exorbitant book prices and a duty for all publishers to give nine copies of every publication for the use of several specifically selected libraries and universities.

[6] US Constitution. This specific justification is considered to be the basis of all other copyright laws in the US.

[7] Mark A. Lemley, 'Faith-based Intellectual Property' (2015) 62 UCLA Law Review , p. 1328.

applied to measure just what maximises copyright's economic efficiency.[8] There may be other methods, which K. Himma calls "effects-based", that can be used to assess the legitimacy of intellectual property and copyright on the basis of criteria of social efficiency[9] such as the above mentioned education, freedom of expression, or similar. M. Lemley has proposed subdividing utilitarian justifications into two groups: *ex ante* and *ex post.* This is because some make an economic case for copyright in terms of encouraging the creation of new works (when copyright protection acts as an *incentive*) and others justify copyright in terms of efficient management of works that have already been created.[10] This way of making sense of utilitarian reasoning seems to be accepted by most legal scholars, as demonstrated, for example, by the frequent references in the literature to copyright as an incentive.

Behind incentive-based economic justifications of copyright is the idea that even though intellectual creations are non-rivalrous in nature, without artificial limits on their access and multiplication there would be no interest in producing them (so-called public goods market failure).[11] Such incentive logic presumes that publicly desirable goods would not come into existence if people could "free ride" on works without paying anything to those who incurred the costs of their production.[12] Without the exclusive rights, the benefit or value that encourages the production of the resource would never be achieved, as market value is based on scarcity.[13]

In relation to ex post rights management economic arguments, the risk of a resource that belongs to "everyone" being overused and hence losing market value, or the so-called "tragedy of the commons", can be singled out.[14] This leads to a conclusion

[8] For a review of some of these theories, see e.g., Richard Watt, 'An Empirical Analysis of the Economics of Copyright: How Valid are the Results of Studies in Developed Countries for Developing Countries' in WIPO (ed), *The Economics of Intellectual Property, Suggestions for Further Research in Developing Countries and Countries with Economies in Transition* (WIPO 2009), pp. 65-83.

[9] Kenneth Einar Himma, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes' (2008) 59 Journal of the American Society for Information Science and Technology 1143, pp. 1150-1151.

[10] Mark A. Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property' (2004) 71 The University of Chicago Law Review, pp. 129-132.

[11] This means that the market is not able to self-regulate without additional interference by the state. See Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, p. 29.

[12] Seana Valentine Shiffrin, 'The Incentives Argument for Intellectual Property Protection' in Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan 2008), p. 94.

[13] Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property', pp. 143-144.

[14] A popular but unpleasant reference in this case is an article by G. Hardin: Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science. Here he coins this famous notion of the "tragedy" by taking an old idea that the freedom of one person can limit that of another. Sadly, he also uses this theoretical construct to argue that the risks of the world's overpopulation and overuse of global

that exclusive private rights are usually desirable when it comes to management of resources,[15] including of intangible objects.[16]

As mentioned, copyright can also be justified as a means of furthering such public goods as education, cultural development, and freedom to access and impart information. Even though this group of justifications is not always seen as utilitarian,[17] it does not change the fact that these theories are focused on a result to be achieved through the copyright system and assess this result in terms of its benefits to society as a whole. This, by definition, is a utilitarian approach.[18] Such arguments assume that copyright should contribute to the achievement of certain social goals, but they do not necessarily legitimise exclusivity and control on the part of authors or rightholders.[19]

Utilitarian justifications are articulated in several EU copyright documents. For instance, the preamble of the InfoSoc Directive is replete with references to copyright as an incentive for "investment in" and "maintenance and development" of creativity,[20] and to an effective system of copyright protection as a key way to ensure adequate resources for "European cultural creativity".[21] Moreover, recital 12 in the preamble provides that adequate protection is "of great importance from a cultural standpoint", and that the Directive shall seek to "promote learning and culture" by protecting creative works while also providing exceptions and limitations to the exclusive rights.[22]

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resources should be solved by removing the human right to family life and restricting free human reproduction, which he calls "breeding".

[15] Even though this has been disproven on numerous occasions, most significantly by the Nobel Prize winner in economics Elinor Ostrom, in her work on the common-property resources. See Elinor Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge University Press 2015).

[16] For more elaboration on the distinction between utilitarian justifications for private ownership of tangible and intangible property, see Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* (Lionel Bently and Graeme Dinwoodie eds, Cambridge University Press 2018), pp. 15-21.

[17] See Simon Stokes, *Art and Copyright* (Second edn, Hart Publishing 2012), pp. 14-15, where the author specifically separates this group of justifications from the economic ones and calls them "public policy arguments". The same is done by L. Zemer in Lior Zemer, 'On the Value of Copyright Theory' <http://ssrn.com/abstract=1657855> , p. 15.

[18] See the account of the moral philosophy of utilitarianism at the Stanford Encyclopedia of Philosophy: https://plato.stanford.edu/entries/utilitarianism-history/ (accessed 23 October 2020).

[19] See Himma, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes', p. 1151.

[20] Recitals 4 and 9 of the preamble.

[21] Recital 11 of the preamble.

[22] Recital 14 of the preamble.

Generally, the utilitarian perspective holds that the rights in a copyright system must be balanced in such a way that the usefulness of their exclusivity is maximised. The theory is therefore often used in conjunction with the idea of efficiency.[23] Copyright law must be designed so that exclusive rights extend just far enough to ensure the most efficient output of creative works while yet allowing the general public access to these works to fulfil the purpose of protection. In other words, the limited monopoly of exclusive rights certainly has its social costs; but if the overall benefits outweigh the costs, the system is worthwhile, and the gains and losses have to be weighed against each other to find the most effective system.[24] At the same time, the main question in utilitarian terms is whether the fair balance struck by copyright law between the interests of authors and those of the general public ensures the best social outcome.[25] Little is (or at least, should be) taken for granted and the different legal solutions are judged against the results they are expected to deliver. In principle, a utilitarian could argue that social benefits could be achieved without copyright protection at all, by leaving all works in the public domain or by reducing the level of protection.

Regarding the author, there are several essential roles this figure plays in the utilitarian way of thinking. For one, an author is seen as an asset which, if properly managed, will produce desired products, namely creative works. The exclusive rights are granted to authors as an *incentive* to create works, and so there is no independent consideration of entitlement or "reward".[26] The exclusive rights might be seen as a reward in the extent that they act as an incentive: the author is given something that will ensure the creation of more works, or she is given something that was the motivation for her to create in the first place.[27] At the same time, it can be presumed that the author is the one to judge if the expected revenues from the work are sufficient to cover the costs of its production.[28]

In this way, the author is hardly irrelevant, but the guiding principle in formulating protection is not the value of the author, but the value and usefulness of the work.

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[23] Rognstad, *Property Aspects of Intellectual Property*, p. 16.

[24] Zemer, 'On the Value of Copyright Theory', p. 4.

[25] Zemer, *The Idea of Authorship in Copyright*, p. 11.

[26] See Lucie M. C. R. Guibault, *Copyright limitations and contracts: an analysis of the contractual overridability of limitations on copyright* (Kluwer Law International 2002), p. 11 for a similar conclusion.

[27] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, p. 26. For an example of such justification, see InfoSoc Directive preamble recital 10, which provides that, "If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work […]".

[28] Alina Ng, 'When Users are Authors: Authorship in the Age of Digital Media' (2010) 12 Vanderbilt Journal of Enterntainment and Technology Law, p. 858.

The needs and expectations of the source of works that is the author must be weighed against how valuable those creative works are. After a work is produced, its placement on the open market is encouraged so that it might be relocated to actors who value it more. The scope of rights is designed to allow maximum social use while keeping the exclusivity necessary to fulfil the incentivising function.

Consequently, from the perspective of the utilitarian justifications, it does not matter who to incentivise so long as the best outcome for the general public is attained. In other words, the subject at the centre of attention for copyright law is not determined by "natural right", but is contingent on the socially desirable results to be achieved.[29] The utilitarian perspective does not generally agree that an individual's personal concerns should be a decisive factor in determining the outcome of a situation.[30] Hence, it makes no difference if the author believes that she has an intrinsic connection to the creative work; this is not, as a rule, taken into account when deciding whether the system is justified or not. What counts from this perspective is society, or the "benefit of many".

Therefore, the utilitarian approach could be used to justify a system of protection that incentivises other subjects than authors. The work for hire doctrine in copyright, for example, can be seen as the result of a utilitarian approach to the production of works. So too can additional flexibilities in copyright for industries such as film or database production or software development.[31] Special neighbouring rights for music recording and film production are motivated by the same utilitarian incentive theory.[32]

Empirically, however, despite a significant body of research, there is still little conclusive evidence that exclusivity and control, and their current configuration, are an appropriate incentive to encourage creativity.[33] It is hard to claim that precisely

[29] Or at least this is the theoretical perspective of the utilitarian justification, as mentioned above. In reality, the utilitarian approach still leaves enough space for certain presumptions which are hard to disprove.

[30] Himma, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes', pp. 1143-1161.

[31] For a similar opinion on this function of copyright law, see Stokes, *Art and Copyright*, p. 13; or Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property' ibid., even though in the latter the author criticises these justifications as enabling too extensive protection.

[32] See, e.g., InfoSoc Directive recital 10, where the basis of protection for these different kinds of "producers" is provided as "satisfactory return" of the investment they made, in order to ensure that creation of works is continued.

[33] See Christopher Jon Springman, 'Copyright and Creative Incentives: What Do(n't) We Know?' in Rochelle Cooper Dreyfuss and Elizabeth Siew-Kuan Ng (eds), *Framing Intellectual Property Law in the 21st Century Integrating Incentives, Trade, Development, Culture, and Human Rights* (Cambridge University Press 2018); Lemley, 'Faith-based Intellectual Property', pp. 1332-1334; Nicolas Suzor,

this kind of reward is the best motivator for creating works – perhaps a different system, such as a government stipend for content creators, would be more efficient?[34] Some critics have argued that, in such a situation, copyright law should at the very least aim for greater flexibility to adapt to different circumstances,[35] or try to reconceptualise utilitarian justifications to more actively factor in actual social needs, rather than simply assuming that they benefit from exclusivity of protection.[36] It has even been speculated that if one were actually able to achieve the optimal economic effectiveness asked for by the law and economics model, it is unlikely that anyone would approve of the result.[37]

In this way, the premise that exclusivity is an incentive and that a certain configuration of rights will achieve particular social and economic goals is largely an assumption, and – given the inconclusive evidence – hard to disprove. Moreover, such a "neutral" approach is not capable of explaining some of the structural content in the legal culture of European copyright law, especially the value of the author's subjectivity and individuality, whose development has been observed since the 19th century, during different historical shifts touched upon in Chapter 3. Thus, there are other justification theories that offer alternative accounts of the exclusivity and control of copyright.

4.2.3. Non-utilitarian justifications: protecting the author

Non-utilitarian theories can be defined as searching for the "right" or "just" balance based on the preconditions that the theories themselves set, and they are not directly aimed at increasing the well-being of the greatest number of people. In this respect, utilitarian theories are (at least in theory) open to reassessing existing solutions and welcome flexibility in the copyright system, whereas non-utilitarian approaches are more conservative and strive for universality.[38] Furthermore, unlike their utilitarian

'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15 Vanderbilt Journal of Enterntainment and Technology Law, pp. 303-304.

[34] Himma, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes', p. 1153.

[35] See, e.g., Cooper Dreyfuss, 'In Prase of an Incentive-Based Theory of Intellectual Property Proteciton', pp. 1-31.

[36] See, e.g., Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright', pp. 297-342, where the author challenges the exclusivity of copyright by assessing it through the perspective of alternative social values of access, fairness, sharing, creativity, etc. Or Margaret Chon, 'Intellectual Property "from Below": Copyright and Capability for Education' (2007) 40 UC Davis Law Review, pp. 803-854, who questions the international copyright system from the perspective of distributive justice as a socially desirable goal to be achieved.

[37] See Stan J. Liebowitz, 'Is Efficient Copyright a Reasonable Goal?' (2011) 79 The George Washington Law Review, pp. 1692-1711.

[38] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, pp. 26-27.

counterparts, non-utilitarian justifications place the author at the heart of copyright's raison d'être, albeit treating this figure in slightly different ways.

Non-utilitarian theories of justification concentrate on the subject who creates the work or on the creative process as such, rather than the resulting work.[39] Of such ways to justify copyright law, the best known in general copyright theory are the so-called "natural rights" theories,[40] whose foundations are mostly credited to J. Locke, G. W. Hegel and I. Kant.

J. Locke famously elaborated on the justification of the right to property in general as the personal autonomy of the individual who expends *labour* on something that is not owned by someone else. If a person has removed an object from nature and mixed her labour with it or added something of her own to it, this, according to Locke, is a basis for ownership to emerge.[41] There are additional conditions, however. For example, appropriation is permitted provided one leaves "enough and as good" for others, and no one may take something from nature just to destroy or spoil it.[42] (These latter conditions are often evoked by copyright scholars who advocate a balanced, as opposed to expansionist, copyright protection.) Modern interpretations of the Lockean account, specifically its application to immaterial property, have expanded on the idea that the amount of labour expended must be proportionate to the value of the object appropriated.[43] Further, when it comes to immaterial property, it is necessary to reconsider what constitutes "labour" and what it is that the author is taking from "nature" and making her own.[44] Finally, there are

[39] Or as similarly observed by A. Rahmatian: "The (vaguely) Lockean copyright systems protect the person of the author through the work, the property, while the (vaguely) Hegelian author's rights systems protect the work through the author's personality protection", Rahmatian, *Copyright and Creativity. The making of Property Rights in Creative Works*, p. 83.

[40] This can also be called, e.g., "natural justice" theory, as is done in Bernt Hugenholtz and others, *The Recasting of Copyright & Related Rights for the Knowledge Economy* (2012), p. 95.

[41] What "ownership" actually means can be disputed. Even though the limits of the ownership and property rights are understood differently depending on the context and the national legal system, they always stipulate some sort of exclusive control over the object (by an individual or a group).

[42] See, e.g., Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown Law Journal, pp. 287-366, for a detailed elaboration on how these conditions manifest themselves in the context of different forms of intellectual property, including copyright.

[43] For instance, one cannot claim ownership of a more valuable object by adding to it something of little value or expending a small amount of labour on it (dropping something you own into a lake to own it or pruning a tree to establish ownership over it). See Rahmatian, *Copyright and Creativity. The making of Property Rights in Creative Works*, pp. 74-75 on the uncertainty of the interpretation of the main concepts in the Lockean theory.

[44] Himma, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes', pp. 1153-1154.

those who doubt that Lockean philosophy can be applied to intellectual property at all.[45]

Broadly, however, according to this approach, the author takes ideas, inspiration, and even other works, from the surrounding world and gives them a certain new personal expression, thereby expending her labour and deserving authorship and ownership of the resulting work.[46] Following this logic, the author should be granted exclusive rights because there is a risk of harm to the labourer if others appropriate the object in which the labour was invested.[47] On the other hand, the aspect of "harm" can be interpreted in several ways. Locke himself seems to conclude that such harm is not to be defined in economic terms: it must be presumed rather than quantified objectively, since exclusivity is based on the idea that a human owns her own person and thus her own labour and its results. Hence, the Lockean theory is often categorised as a theory of "natural rights", rather than utilitarianism, even though certain overlaps do exist.[48]

Another set of non-utilitarian arguments used by copyright lawyers can be called "personality justifications". Whereas the Lockean theory of labour is centred on the person's *body* and the labour performed through it,[49] personality justifications for copyright protection mostly deal with the human mind or will. The main claim of such theories is that entitlement to property (and intellectual property) is based on the special relationship one has with the objects of the external world that one extends one's personality towards.[50] According to the Hegelian philosophy, the legal mechanisms for protecting property are tools to safeguard the individual's self-

[45] See Rognstad, *Property Aspects of Intellectual Property*, pp. 30-31 for an account of the different opinions on Lockean theory and its suitability to ownership of immaterial objects; also Daniel Attas, 'Lockean Justifications of Intellectual Property' in Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Pargrave Macmillan 2008), pp. 29-57.

[46] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, p. 21. See also Hughes, 'The Philosophy of Intellectual Property', pp. 310-315, for a discussion on the distinction between ideas and execution in the context of the Lockean labour theory.

[47] In the case of immaterial objects, the harm supposedly means interference with "labourers' plans to sell or control their expression", in Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright', p. 311.

[48] Locke himself has pointed out that not only is labour the source of property because of the divine plan for it to be so, but also because it adds value and benefits society (while property is a reward for those putting in effort and hard work into something). See Peter Drahos, *A Philosophy of Intellectual Property* (Australian National University eText 2016), pp. 50-51.

[49] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, p. 20.

[50] Since there seems to be some controversy among legal scholars over whether Hegelian philosophy can be properly used to justify intellectual property ownership (see Drahos, *A Philosophy of Intellectual Property* ibid., pp. 95-97), it can be recalled that this thesis does not seek to delve into the *actual* meaning of the statements Hegel has (or has not) made, but to review justifications for copyright protection that are most usually mentioned as such and are the most well-known to lawyers.

actualisation through commanding physical reality.[51] This self-actualisation, which is the basis for ownership, occurs either through "occupation" or "embodiment", for instance, physically possessing the object, imposing a form onto it, or marking it as one's own.[52] In this way, physical objects become possessed by the personality of the person and become possessions – i.e. property. But since the property rights are dependent on the will of the individual, they can also be given up by alienating the object – withdrawing one's will (for instance, abandoning the object or selling it). In the case of intellectual property the opposite has to happen: one must alienate something that is a part of one's personality and internal to it, which is achieved through production of physical expressions (or copies) of the work.[53] This explains the difference between physical property and intellectual property – the physical medium of expression (e.g. a book) becomes the author's property just like any other object a person might own, but the intellectual content of this expression becomes a part of the individual and her personality.[54] Hence, the author does not forfeit the right of reproduction (and other exclusive rights) when a physical copy of a work is sold.

At the same time, a certain alienation is possible even of "intellectual productions", if it is temporary.[55] Thus, in the case of intellectual property, the alienation of the different rights in the "work" (not the physical copies of it) may occur through licensing or transfer of rights to the extent that the author no longer identifies her personality with these aspects of the work (for instance, its commercial exploitation). Complete alienation of rights to a work, on the other hand is morally unacceptable and akin to slavery, according to Hegel, specifically because a creative work is always part of the author's personality.[56]

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[51] Hughes, 'The Philosophy of Intellectual Property', p. 333. It should be noted here that in Hegel's philosophy, his theory of property starts as a part of the theory of personality, specifically of the process of becoming "a person". It is through "claiming of the external world as its own" that personality becomes existent in the external world. Hence, the "self-actualisation" that is used as a description of acquiring a possession in the context of justifications for copyright and intellectual property protection actually has a more evolutionary meaning in Hegelian philosophy. See Drahos, *A Philosophy of Intellectual Property*, p. 90.

[52] Hughes, 'The Philosophy of Intellectual Property', p. 335.

[53] The work being something that is a an expression of one's personality and will: ibid., p. 338.

[54] Or can be called the "ultimate personal property" in the Hegelian sense, see Rahmatian, *Copyright and Creativity. The making of Property Rights in Creative Works*, p. 82.

[55] Ibid., p. 81.

[56] Hughes, 'The Philosophy of Intellectual Property' p. 348. Even though, in some cases, parts of "self" can be alienated, e.g., by allowing others to make decisions over someone's conduct: Drahos, *A Philosophy of Intellectual Property*, p. 94. As A. Rahmatian summarises the argument of Hegel: "the alienation is permissible as that of a labourer or servant, without it, it becomes impermissible slavery",

The Hegelian theory has been noted as having a strong social element as well. It holds that the personality justification is a way to be recognised by the rest of society as an owner, and that through this recognition society acknowledges someone as a person.[57] As a result, the "natural law" argument is not absolutely individualistic in this context. For instance, according to Hegel, with intellectual property there must be a *visible* connection between someone's personality and the resulting work, and therefore its physical expression, even though this can be achieved simply by identifying oneself with the object.[58] However, this element of Hegelian theory is often passed over by scholars when considering personality theories as justifications for copyright.[59]

Another philosopher often mentioned in connection with personality justifications for copyright is I. Kant. Unlike Locke and Hegel, Kant specifically addressed questions of intellectual property,[60] although it is questionable which parts of his philosophy can actually be used to justify intellectual property as "property".[61] What he proposed, however, was that property is not a relationship between a person and a thing, but rather a relationship between persons in respect to things.[62] It is thus a person's will, not labour, that creates property, as this individual subjective will is an essential aspect of being human.[63] Perhaps unsurprisingly, Kant's philosophy has been directly linked to the beginning of Romanticism and the Romantic Movement.[64]

Rahmatian, *Copyright and Creativity. The making of Property Rights in Creative Works*, p. 81, footnote 93.

[57] Hughes, 'The Philosophy of Intellectual Property', p. 343. According to Drahos, this aspect comes to Hegel's philosophy through workon his theory of the "state", and hence a need to elaborate on connections between individuals that binds them into one well-functioning political unit: Drahos, *A Philosophy of Intellectual Property*, pp. 98-101.

[58] Hughes, 'The Philosophy of Intellectual Property', p. 344.

[59] For instance, relatively nothing about this aspect is mentioned in Zemer, 'On the Value of Copyright Theory' or in Rahmatian, *Copyright and Creativity. The making of Property Rights in Creative Works*, even though both otherwise give a comprehensive account of Hegel's philosophy of property.

[60] Even though these comments were sparse, he has argued that authors should receive rights to their works by virtue of their personality: Drahos, *A Philosophy of Intellectual Property* ibid., p. 95.

[61] See Rognstad, *Property Aspects of Intellectual Property*, p. 36, pointing out that Kant has himself noted that his elaborations on property ownership can only apply to corporeal things.

[62] See Rahmatian, *Copyright and Creativity. The Making of Property Rights in Creative Works*, pp. 87-89.

[63] Robert P. Merges, *Justifying Intellectual Property* (Harvard University Press 2011), p. 76.

[64] Christopher Aide, 'A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Rights' (1990) 48 University of Toronto Faculty of Law Review 211, p. 215.

The act of creation, according to Kant, is always reliant on the subjective will and choice of the author[65] – who is not merely a passive conduit for divine inspiration. It is because of this freedom of action that intellectual creations may become possessions as well. Furthermore, the urge to exercise personal autonomy and freedom, and in this way acquire possessions, is natural to all humans.[66]

By this philosophy, the personal exclusive rights to a possession must be granted to enhance individual freedom; at the same time, individual freedom is limited by the freedom of others and must be balanced.[67] Exactly what this balance should look like is to be determined by the government, which is the necessary condition for any right.[68] In any case, the personal exclusive rights have a close connection to the person of the author in the Kantian logic. A book, besides being a physical object, is from this perspective also an author's communication to the public, which is realised through a publisher, but in the name of the author.[69] This right of the author – to speak to others and have this speech respected – is inalienable. But, on the other hand, the rights to the economic aspects of the exploitation of the work are of a different nature and can be used and transferred freely.[70]

4.2.4. Making sense of the legal sediments: justifications as legal culture

The classic theories reviewed above are not the only philosophical justifications for copyright. Moreover, many variations of them have been proposed for different purposes. For instance, S. Stokes also mentions such approaches and principles as the "just reward" theory[71] and the principle of "unjust enrichment".[72] E. C. Hettinger singles out privacy and individual security as the values which can justify property

[65] Merges, *Justifying Intellectual Property* , p. 79.

[66] Ibid., p. 73.

[67] Ibid., p. 73.

[68] Ibid., pp. 93-95.

[69] Strömholm, 'Droit Moral - The International and Comparative Scene from a Scandinavian Viewpoint', p. 226.

[70] Anne Barron, 'Kant, Copyright and Communicative Freedom' (2012) 31 Law and Philosophy 1, p. 6.

[71] Which is essentially something in the intersection between utilitarian and natural rights approaches and can be interpreted either way – a reward to increase social good or a reward to reflect the inherent value of the one who creates. See Stokes, *Art and Copyright*, p. 15.

[72] This principle can also be seen from a natural rights perspective or from an economic one as free riding which discourages investment in the production of goods. Ibid., p. 16.

(and intellectual property) ownership.[73] Others, like L. Zemer, differentiate even more, specifically adding to the non-utilitarian justifications such theoretical approaches as personhood theory, social-institutional planning, traditional proprietarianism and authorial constructionism.[74]

Furthermore, the justifications, of course, are not completely isolated from each other. For example, the utilitarian and the personality approaches can be connected quite easily despite being theoretical opposites. Through the perspective that being rewarded for one's work is a basic human need and that the peaceful enjoyment of possessions directly contributes to the maximisation of pleasure and well-being of all society, the utilitarian way of thinking can incorporate the Lockean labour theory and even Hegelian and Kantian personality justifications.[75] Similarly, where the author is believed to give to society something that is a part of herself, something that did not exist before (as the personality theories suggest), it is again possible to make a utilitarian case for protection and argue that respecting and protecting this personal contribution makes it safe and desirable to create more of the same.[76] From another angle, even utilitarianism can be (and has been) seen as part of the natural order and the will of God, bringing it ideologically close to the natural rights theories.[77]

During the various historical shifts in the concept of author and the development of EU copyright law, as well as in today's copyright systems, no single justification can account for all legal normative content. In other words, the different arguments explaining the necessity and the content of copyright law tend to coexist, even though the influence of one might be more pronounced than others. Being often also connected with historical moments in the development of copyright law (as well as having exerted an actual influence on these legal developments), these philosophical theories are taken up by lawyers to add nuance to the other sub-surface structures of copyright law in a given legal system.

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[73] Edwin C. Hettinger, 'Justifying Intelectual Property' (1989) 18 Philosophy and Public Affairs, p. 45. Here the author also adds sovereignty as a third value to justify intellectual property ownership; however, this is rather similar to the autonomy and self-actualisation in the sense of the personality theories.

[74] Zemer, 'On the Value of Copyright Theory', pp. 18-21.

[75] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, pp. 21-22, 25. Meaning that since possession and security of rights to certain objects is something humans feel positively about, they are happier with fair and predictable rules than without them.

[76] See Boyle, *The Public Domain. Enclosing the Commons of the Mind*, p. 30 and pp. 25-37, where he shows the similarities and overlaps between utilitarian and *droit d'auteur* justifications.

[77] "History of Utilitarianism", Stanford Encyclopedia of Philosophy: https://plato.stanford.edu/entries/utilitarianism-history/ (accessed 23 October 2020).

At the same time, even if coexistence between the different justifications is possible, there are clear inconsistencies between the approaches, especially if viewed from the perspective of the "author". These inconsistencies reflect the tension between creation and exploitation in the European copyright tradition, which was highlighted in Chapter 3.[78] The figure of the author has very different roles in the different types of justifications. The utilitarian approach to copyright casts the author as primarily a source of desirable goods or effects, who needs to be incentivised and/or financially sustained in order to continue producing those goods. In such a view, the author can be an owner of the exclusive rights, but only as an incentive, and the subsequent fate of the work is decided by its utility to others, not by who owns it. The labour theory addresses the subjectivity and personhood attained through the autonomy of the author's body and labour, and while the idea of a person making something her own through personal input is already in evidence, the author in such a worldview is more like a craftsman. Finally, the personality theories give a more abstract role to a person's will and individuality and justify possession by portraying the author as a sort of mastermind, perhaps someone akin to the Romantic genius, affecting the external world with her personal touch.

What allows the approaches to coexist is essentially the fact that utilitarian logic is unconcerned with the creation side of copyright, especially given that it might be impossible to empirically determine what exactly motivates different authors to create, and the fact that the personality and labour theories are rather vague both about the scope of exclusivity given to the author and about the issues of economic exploitation as such. As was the case with "Shift No. 5" in Chapter 3, it is theoretically possible, following copyright theory, to present the two aspects of copyright as existing together but having little effect on each other.

In practice, the different approaches to the author have a greater effect on the different copyright norms, and there are many points where the two sides of copyright and the different strands of justification converge. This can be observed, for instance, in moral rights that may interfere with the economic exploitation of works, the calculation of the term of exclusive economic rights, and measures protecting the special place of authors even in the course of economic exploitation.[79] The European copyright tradition is constantly striving for balance between these different approaches. This equilibrium, however, is hard to achieve and is susceptible to disruption by legal and technological developments – which might have happened in EU copyright law, as will be shown later in the thesis.

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[78] Or what P. E. Geller called a tension between "marketplace norms" and "authorship norms": Paul Edward Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins Essays on Copyright Law* (Clarendon Press 1994), p. 159.

[79] Many of these elements have been examined in Chapter 2 with respect to international and EU copyright law.

4.3. Approaches to authorship in copyright

4.3.1. The many-faced author

By this point it should be clear that there is no single image of author underpinning the European copyright system. Rather, there is a family of conceptualisations which are connected under the rubric of "author", and how they interact with each other and the rest of the legal system depends on a variety of factors. At the same time, because "author" is one of the central concepts in the European copyright tradition, many scholars have attempted to grasp it over the years, both in terms of its normative meaning and its theoretical (subsurface) content. Probably the most notable contributions in this respect are those of M. Woodmansee, P. Jaszi, M. Rose, L. Zemer, and J. Ginsburg,[80] but there have been many more who have conducted significant research into the "author" and its interplay with the historical, social and philosophical contexts surrounding it.[81]

A noteworthy contribution to the subject, which also stands out for using a similar approach to that adopted in this thesis, is the work of J. Ginsburg.[82] She has suggested that six principles be taken into consideration to define the "author" in the modern Western copyright tradition:[83]

4. Authorship places mind over muscle.
5. Authorship vaunts mind over machine.
6. Originality is synonymous with authorship.
7. The author need not be creative so long as she perspires.

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[80] See Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994); Rose, *Authors and Owners. The Invention of Copyright*; Zemer, *The Idea of Authorship in Copyright*; Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author''; Woodmansee, *The Author, Art, and the Market. Rereading the History of Aesthetics*; Jaszi, 'Toward a Theory of Copyright: the Metamopthoses of "Authorship"'; Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins Essays on Copyright Law* (Clarendon Press 1994).

[81] See Alina Ng, 'Authors and Readers: Conceptualizing Authorship in the Copyright Law' [2007] Hastings Commercial and Enterntainment Law Journal; Ng, 'When Users are Authors: Authorship in the Age of Digital Media'; Chen Wei Zhu, 'A regime of droit moral detached from software copyright? - the undeath of the 'author' in free and open source software licensing' (2014) 22 International Journal of Law and Information Technology; Quaedvlieg, 'Authorship and Ownership: Authors, Entrepreneurs and Rights', among others.

[82] Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', pp. 1063-1092.

[83] According to Ginsburg herself, this list reflects the reality of "author" in both common law and continental law traditions.

8. Intent to be an author.
9. Money talks (often there are pragmatic justifications to deviate from the author-centred perspective).

Other legal scholars who have studied the concept of author have often been more concrete, pinpointing specific conceptualisations rather than just identifying broad principles, as J. Ginsburg has done. The "Romantic author", for instance, is a well-known object of discussion in the literature, but other ways of defining the author have been offered, such as "craftsman" or "steward", as will be shown below.

Thus, as also can be seen in earlier chapters, "author" in European copyright is a family resemblance concept. The different conceptualisations that fit under it are all related in some ways, but they are also distinct. There is no overarching feature connecting them; instead, they are often joined together in specific circumstances to complement one another and account for qualities that a single conceptualisation might lack. This means, then, that in EU copyright it is impossible to give a single definition of "author". It is, nevertheless, possible to identify the most common conceptualisations and the way they shape the normative content of the EU copyright law.

Many of the different images of author presented below have been directly or indirectly addressed in copyright scholarship. Yet as a rule, they have not been treated as parts of one family. The tendency has been rather to pick out one or several of them to criticise or explain current legal solutions in copyright law. Several conceptualisations, however, such as "resource" or "authority", have not been identified as author theories, but have been touched upon from other perspectives by legal scholars. This thesis suggests that the doctrinal approaches to the author and other perspectives on authorship revealed in the research above can be categorised into several distinct conceptualisations and viewed as forming a single concept, or a single network of meaning. Later the thesis will demonstrate how this family is reflected in the most recent EU copyright law, as well as how it is challenged by the subject of Creative User.

4.3.1.1. "Genius"

As explained already in Chapter 3,[84] the approach taken in this research is to explore the subsurface content of European copyright law, holding to the idea that the structures there are distinct from any social norms or historic movements. The fact that developments in literary theory or the political climate may have influenced the formation of the legal concept of author in this respect does not imply congruence between the contents of the legal and other concepts.

[84] See Section 3.4 in particular.

In the same way, what will be called the conceptualisation of "genius" in this thesis cannot be equated with how the term might have been used in the Romantic literary movement or in other social contexts. However, doctrinal texts in the European copyright tradition have engaged with this conceptualisation in connection with the legal meaning of "author",[85] and so this way of thinking about the "author" in copyright law needs to be seriously addressed.

The "genius" conceptualisation of author has also been defined as "the Romantic author",[86] connecting it to the "Romantic period" in art and literature. Indeed, as noted in Section 3.4, the influence of the Romantic model of authorship on the European copyright tradition remains an open question among copyright scholars. Moreover, as noted in Chapter 3, elements of copyright law that are ostensibly associated with this genius figure might be attributable to other influences such as technological advancements or even the sedimented logic of exclusivity and control and its transformation into private property, rather than directly to the Romantic movement in the arts.

In general terms, this conceptualisation of author has been identified as responsible for several aspects of copyright law. For one thing, the author from this perspective is seen as the valuable originator of the creative work, in the sense that the work is the author's individual expression and is not plagiarised.[87] The author "genius" can, moreover, be said to be the self-sufficient source of the creative inspiration that led to her work,[88] meaning that, again, it is the individual contribution of the author, not the external elements used by her, that are valued in copyright law. The creative process is personal, spontaneous and not limited by rules, and it imparts the creator's personal touch.[89] An even more romanticised "ideal" version of the author genius found in the literature might include special emphasis on the uniqueness of authorial creativity and the "mysterious and 'magical'" nature of the author's creative powers.[90]

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[85] See, e.g., Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', pp. 429-430; Boyle, *Shamans, Software and Spleens: law and the construction of the information society*, pp. 54-59.

[86] Even though there can also be other romanticised concepts of author, like, for instance, what M. Chon calls the "romantic collective author" (in Chon, 'The Romantic Collective Author' ibid., pp. 829-849) this section is specifically directed towards the romanticised concept of the author as genius.

[87] Craig, 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law', p. 215.

[88] See, e.g., Zhu, 'A regime of droit moral detached from software copyright? - the undeath of the 'author' in free and open source software licensing', p. 375.

[89] Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?', p. 168.

[90] See Alan L. Durham, 'Copyright and Information Theory: Toward an Alternative Model of "Authorship"' [2004] BYU Law Review, p. 104.

From this perspective, the Romantic author-genius concept has been held accountable for the presence of the idea/expression dichotomy in copyright, or at least its use as a tool to distinguish the individualised work from something that is general and owned by no one.[91] Further, it has been suggested that the presumption of a "hierarchy of artistic productions", where the derivative work is seen as less valuable than the original creation, owes its existence in copyright law to the influence of the author-*genius*.[92] This is why the conceptualisation has been singled out (or even blamed) as the chief factor responsible for the way copyright today addresses user creativity.[93]

The author-*genius* has also been linked to the problem of multiple authorship in copyright law, indicating that it is the Romantic understanding of the author which lies behind Western copyright's primary focus on the model of singular authorship.[94] In other words, this conceptualisation usually involves not just the presumption that the source of creativity is internal to the author, but also that one author is absolutely sufficient for any creative endeavour.[95]

This thesis has demonstrated that some of these associations seem to be valid in the sense that there certainly is an aspect of the author as a subjective individual in copyright law. This can be observed in the previous chapter's discussion of historical shifts and the fact that a whole group of justifications for modern copyright law that are routinely reproduced by copyright scholars are related to "personality theories" stressing the will and autonomy of the human being. It is also evident that this aspect of author was developed, and is still used, as a way to connect the author with the exclusivity and control that copyright provides in respect of her works.

If one could speculate about what form a protection specifically geared towards the author-genius might take, it would essentially depend on how much value is attached to the subjectivity and creativity of the "genius". If this figure was highly

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[91] Rosemary J. Coombe, 'The Properties of Culture and the Politics of Possesing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 Canadian Journal of Law and Jurisprudence 249, pp. 251-252.

[92] See Jaszi, 'Toward a Theory of Copyright: the Metamopthoses of "Authorship"', p. 462; Craig, 'Reconstructing the Author-Self: Some Femminist Lessons for Copyright Law', p. 216.

[93] Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights', p. 928.

[94] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', p. 426; Laura Biron and Elena Cooper, 'Authorship, Aesthetics and the Artworld: Reforming Copyright's Joint Authorship Doctrine' (2016) 35 Law and Philosophy 55, p. 56.

[95] A presumption that has been addressed by many scholars, some going as far as suggesting the opposite presumption, for instance, Zemer, *The Idea of Authorship in copyright,* ibid., who argues that it is impossible to create something without the help of the surrounding context, and so the "general public" should always be acknowledged with the status of a co-author.

valued as a cornerstone of society, then indeed it is easy to imagine that a broad protection, granting all conceivable control and exclusivity, would be the expected standard, and that nothing could be considered more a person's "own" than what has been produced by imprinting the personal touch of her genius.

4.3.1.2. Craftsman

The conceptualisation of the author-craftsman, historically attributed to a medieval understanding of authorship, has been described as a figure who achieves goals dictated by her audience through manipulation of tools and "predefined strategies".[96] In such a model, the author is neither the sole originator of a creative object (she uses strategies already defined in the trade she has learned), nor the source of creative inspiration (the goals and the standards which predetermine the work are dictated by the public). This sets it apart from the previous conceptualisation.

One of the main elements of the author as craftsman is the view that the author is imitating and reproducing something without necessarily having any personal input. A craftsman might produce a chair or even a decorative item, but the object has a predetermined function which limits creativity, and its making requires skills and techniques that anyone can acquire to a greater or lesser extent. Accordingly, the value and authority of works of craftsmanship can be seen as derived from other works which preceded them.[97] Ch. W. Zhu has suggested that the author as craftsman model challenges the privileging of "having ideas" over "making objects" that became entrenched through Romanticism's influence on copyright law.[98] In a similar vein, another aspect that has been highlighted is the craftsman's motive "to do a job well for its own sake".[99]

The challenge that the craftsman-author poses to European copyright can be observed in the discussion surrounding photography's inclusion in the European copyright system. When the author was seen as only using "know-how" and working towards a certain predefined end (for example, a portrait photograph), the result was deemed insufficient to merit copyright protection until the view took hold that the author was in fact making personal choices in the process. On the other hand, as mentioned before, mere craftsmanship (or even less with today's

[96] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', p. 427; also Salokannel, 'Film Authorship in the Changing Audiovisual Environment', p. 58.

[97] Woodmansee, 'On the Author Effect: Recovering Collectivity', p. 281.

[98] Zhu, 'A regime of droit moral detached from software copyright? - the undeath of the 'author' in free and open source software licensing', p. 379. Here the author contends that the concept of author as "craftsman" might best fit the free and open source software (FOSS) creators.

[99] Ibid., p. 380.

technology) can be a basis for neighbouring rights protection for subject matter such as non-creative photographs.[100]

Furthermore, from the analysis above and as will be seen in the next chapter, a strong association with the author-craftsman model can be observed in the development of common law copyright, where authorship is traditionally seen as having more to do with *producing* certain creative objects through skill and effort than the genius of the author's personality.[101] Quite notably, in some common law jurisdictions, a skilful copy of another work, for instance, is considered protectable by copyright on the grounds that a high degree of skill and effort went into producing it.[102] Similar tendencies to value the object more than the personality of the author can be traced in British copyright law.[103] This model is also related to the Lockean philosophy and justification of exclusive rights on the basis of labour expended (even though there are differences between them as well).

Finally, when considering what "protection" would be acceptable or needed for such an author, a likely place to start would be the recouping of investment, or simply remuneration for the effort which the craftsman has expended. Perhaps this concept could include the expectation that the author be able to earn a living from skills that took time and effort to develop, but this income would still be expected to depend on the objects produced. No exclusivity or control would be justified once the economic value of the object of craftsmanship is realised.

4.3.1.3. Servant/Steward

This approach to authorship is not as widely discussed as the first two, but it comes up in the literature from time to time. It emphasises both the author's compliance, with another (or others) or in processes of creative production, and an element of responsibility for others. In this way, the author is made an intermediary; her rights and claims to the final product are limited while the question of duties and access becomes more important.

This way of seeing the author has been described as requiring temporary and limited rights, which in turn are connected to a duty to maximise public access and enjoyment.[104] Accordingly, since the source of its inspiration is external, the

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[100] See Section 3.5.2 of this thesis.

[101] See, e.g., Roger Chartier, 'Figures of the Author' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins Essays on Copyright Law* (Clarendon Press 1994), p. 7.

[102] This is the case, for instance, in Australia, see Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', p. 21.

[103] Even though the British approach is more nuanced, see Section 5.3.3.3 of the thesis.

[104] Roberta Rosenthal Kwall, 'The Author as Steward 'For Limited Times': A Review of 'The Idea of Authorship in Copyright'' (2008) 88 Boston University Law Review, p. 704.

ultimate fate of any creation is to return to its source after the death of the author and become part of the public domain.[105]

It has been suggested that such an approach was common prior to copyright, during the Medieval period, when the author was seen as a craftsman following the generally accepted procedures of creative production, unless, by the grace of God, he was able to break away from the rules and create something truly inspired, thus becoming a servant to the will of God, the muses, or similar.[106] In Chapter 3 of this thesis it has been proposed that during the time of the royal privileges, legal conceptions of authorship did not change significantly and were left for social practices to negotiate. In this way, for instance, the "gentleman author" common in England before the 18th century can be placed within the servant/steward concept: its essential features, the avoidance of personal attribution and remuneration and ethically imposed humility,[107] signal a culture in which the author is understood as an intermediary, with no claim to the resulting work. The discussions about the author and the public domain during the French Revolution and their influence on copyright development, also discussed in Chapter 3, show a version of the servant/steward as an agent of social change.

In this connection, one cannot leave unmentioned the postmodern critique suggesting the "death" of the author, which, while not directly related to law, has left a clear trace in the legal doctrine. Essentially, this "death sentence" was proposing a relocation of the source of creativity and meaning to a sphere external to the author. In this sense, the author must give way to the reader, or as Barthes has put it, the author must die to facilitate the "birth of the reader".[108] In the Foucauldian sense, the author becomes a servant of the discourse which "will compose itself",[109] and the question of "who is speaking" loses importance.[110] To advocate such a perspective even in the context of copyright law would thus essentially mean expecting the return of a radical version of the author-servant/steward conceptualisation.

In terms of modern copyright law, R. Kwall, for instance, suggests that the "author as steward" approach is consistent with copyright in that it is natural that authors

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[105] Lior Zemer, 'Moral Rights: Limited Edition' (2011) 91 Boston University Law Review, p. 1549.

[106] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', pp. 426-427; Burke, *Authorship: From Plato to the Postmodern. A Reader*, pp. xvi-xvii.

[107] See, e.g., Chartier, 'Figures of the Author', p. 17.

[108] Roland Barthes, 'The Death of the Author' (1967) 5-6 Aspen, pp. 142-148.

[109] The source of this discourse is then the unconscious of the author or the language itself: Burke, *Authorship: From Plato to the Postmodern. A Reader*, pp. xvii, 5.

[110] Foucault, 'What is an Author?', pp. 28-29.

not only have rights, but also certain duties to the public.[111] Indeed, the different exceptions and limitations, or situations where certain uses would be seen as fair, can sometimes be explained by a market failure (the sheer impossibility of controlling certain exploitation of copyrighted works), but sometimes only by the perception that the author is part of something bigger than just the creation of a commercial object. Furthermore, such elements as the concept of the "public domain" and the idea/expression dichotomy in copyright doctrine have also been identified with the recognition of authors as being part of a creative ecology,[112] something external that is the source of inspiration and the beneficiary of resulting work.

The same conceptualisation can be seen in the utilitarian but non-economic justifications for copyright outlined above. It has been suggested that the image of the author-steward is also inferable from the Lockean theory of labour, where what is in common is God's gift and ownership on the basis of personal labour has limits and conditions.[113] As was discussed in the previous section, even personality theories that are strongly centred on the author incorporate certain elements of social recognition or duty.[114]

An interesting example of the recovery and reuse of the concept of author as servant/steward in copyright legal culture, even though taken from outside the EU, could be the Australian cases on indigenous intellectual property rights. While authorship of indigenous folkloric works in Australian aboriginal communities is not considered to belong to single individual (due to the lack of originality), it also cannot, within the meaning of copyright law, be attributed to the whole community (which did not directly participate in creating the concrete expression of the work).[115] In the landmark case of *Bulun Bulun v R & T*,[116] an Australian court acknowledged the need to adapt modern copyright rules to communal norms and provided that copyright (along with the right to authorise and prohibit reproduction) shall be allotted to the artist who has created a physical expression (painting) based on indigenous folklore, but the artist in question will be obliged to exercise his rights

[111] Kwall, 'The Author as Steward 'For Limited Times': A Review of 'The Idea of Authorship in Copyright'', p. 704.

[112] Christopher Buccafusco, 'A Theory of Copyright Authorship' [2016] Virginia Law Review Association, pp. 1258-1259, even though the author here talks about US law and case law.

[113] Kwall, 'The Author as Steward 'For Limited Times': A Review of 'The Idea of Authorship in Copyright'', p. 704.

[114] See Section 4.2.3 of the thesis.

[115] Anthony J. Casey and Andres Sawicki, 'The Problem of Creative Collaboration' (2017) 58 William & Mary Law Review, pp. 1843-1844.

[116] See Bulun Bulun v R & T Textiles Pty Ltd (1998) 86 FCR 244, 246-47 (Austl.), in ibid., p. 1843.

to the benefit of the whole community.[117] This would entail fiduciary obligations on the part of the "author", that is, only exploiting the work in accordance with the traditions of the community and enforcing the rights against infringers.[118] It seems that acknowledging that the author is a medium of expression of meaning that does not emanate from her personally has the potential to change the structure of exclusive rights as we know them.

4.3.1.4. Owner

In essence, the author as "owner" approach can be described as seeing the creator of a work as its owner, akin to the owner of any other object – that is, as the person who has the right to prohibit others from engaging in certain actions in relation to the "work". In other words, and in light of the historical "shifts" in the concept of author discussed in the previous chapter, the author-owner simply treats the author as the original holder of the sovereign rights over the creative work, who can exclusively control it, namely keep it or give it away.

In a sense, the author as "owner" is seldom an independent concept, as it needs to be supported in some way, usually through other conceptualisations or arguments clarifying the need for personal control over exclusivity. In light of the different possible justifications, the "ownership" of a work in the European copyright tradition is usually seen as separate from its authorship,[119] making it possible to easily transfer the status of "owner" to any other subject. This, one might recall, was reportedly fully expected at the time the author first became the owner of copyright's exclusivity.[120] M. Rose, is perhaps best known specifically for his work on how the author received the position of "owner" (one among owners) in modern copyright law.[121]

Some commentators have drawn attention to this conceptualisation in order to highlight the "wrongs" of modern copyright, accusing it of conflating the interests of authors with those of other economic subjects,[122] and failing to give sufficient consideration to other social values than property, exclusion, ownership and

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[117] Ibid., p. 1844.

[118] Erica Burke, 'Bulun Bulun v R&T Textiles PTY LTD. The Aboriginal Artist As A Fiduciary' (1999) 3 Flinder Journal of Law and Reform, pp. 285-286.

[119] For instance, J. C. Ginsburg points out that conflation of authorship and ownership can be confusing and should be avoided for practical reasons: Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', p. 9.

[120] See Section 3.3 of the thesis.

[121] See Rose, *Authors and Owners. The Invention of Copyright*, pp. 1-8; Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship', pp. 23-55.

[122] Ng, 'Authors and Readers: Conceptualizing Authorship in the Copyright Law', p. 393.

individualism.[123] Another criticism is related to the perception that an immaterial result of creation can be commodified at all.[124] There have also been claims that using prevalent copyright justifications to establish a strong association between authorship and ownership comes at the cost of overlooking the specific needs for return of investment and intellectual reward that these copyright justification theories put forward.[125] Finally, the failure to provide strong evidence of what formulation of exclusivity and control to use, i.e., how limited the ownership of the author-owner (or any other owner) should be, has been criticised as well.[126]

4.3.1.5. Resource

This specific conceptualisation of author is not something copyright researchers have identified directly, but it has been singled out in the chapters above as a way to indicate the approach where the author is valued solely in terms of the product or result she generates. This thesis thus proposes the term author-*resource* to describe this approach to authorship. It is distinguished from the servant/steward conceptualisation already discussed by the fact that the latter offers a theory of the author's creative process and the role this subject has in society, etc. The author-resource is not important as a subject, but only as the source of works. This perspective has no concerns about authorship in general: despite being the source of economically, culturally, educationally or otherwise valuable artefacts, the author has no "right" to protection, but is *incentivised* or otherwise managed to ensure further production of value.

In the previous sections, the author-resource logic was most visible in the utilitarian justifications, both in their economic and non-economic versions, where the creator of work was generally identified as a means to an end and the creative work as the carrier of social or economic value in its own right. In Chapters 2 and 3, it was also theorised that such an approach manifests in some elements of international and EU law, especially the TRIPS Agreement.[127]

P. E. Geller has discussed what he calls the "marketplace paradigm", an approach to copyright which began with Enlightenment values and the idea that the individually creative subject (the author) also needs to be incentivised.[128] However,

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[123] Craig, 'Reconstructing the Author-Self: Some Femminist Lessons for Copyright Law', p. 208.

[124] Ibid.

[125] Shao, 'Monopoly or Reward? The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property', pp. 756-757.

[126] See, e.g., Alexander Peukert, 'Intellectual Property as an End in Itself?' (2011) 33 European Intellectual Property Review 67, pp. 67-69.

[127] See Section 2.2.2 above.

[128] Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?', pp. 165-166.

he concludes, the approach was soon hijacked to promote the incentivising of other market actors instead, keeping the author, but without autonomy regarding dissemination in the market.[129] This account can be seen as closely related to the author-resource conceptualisation highlighted in this thesis.

It is perhaps ironic, then, that like the consecration of the author as Romantic genius, this way of conceptualising the author has also proved a common place from which to critique modern copyright law, throwing into relief the corporate interests this field of law has mostly come to protect.[130] Some industries, the film industry, for instance, have been criticised for treating authors as resources, mainly because their authorship allocation rules are designed in favour of producers rather than creators.[131] The divestiture of personhood with respect to authors has also been raised as a consequence of the "work for hire" doctrine in general.[132] In other words, from this resource-based perspective, there is no need to "protect" authors because the market already gives them enough incentive to create, even if in more author-oriented discourses such treatment might seem to border on ruthless exploitation.

4.3.1.6. Entrepreneur

This is another conceptualisation of author that has not been identified by other legal scholars under this specific heading. It appears in different forms in the literature and the current thesis as an approach that makes the author a subject with a personal interest in the *economic* exploitation of a work or sharing the risks of this exploitation.[133] This way of seeing the author differs from the others in that it gives agency and autonomy to the author during the exploitation stage of creative works even though formulated in economic terms. For this reason, this thesis refers to it as the author-entrepreneur conceptualisation.

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[129] Ibid., pp. 166-167.

[130] E.g., Litman, 'What we don't see when we see copyright as property', pp. 536-558; Jessica Litman, "Real Copyright Reform," *Iowa Law Review* 96, no. 1 (2010), pp. 1-55; Ginsburg, 'The Role of the Author in Copyright', pp. 60-66; Corbett, 'Creative Commons Licenses, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?', p. 505.

[131] Adriane Porcin, 'Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry' [2012] 35 Hastings Commercial and Enterntainment Law Journal 1, p. 2, stating that in this context authors are usually conceptualised as, and also called, "labour".

[132] See Alina Ng Boyte, 'The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship' (2014) 17 New York University Journal of Legislation and Public Policy 707, pp. 710-712. Even though this question is not horizontally harmonised in the EU and is not analysed closer in this thesis.

[133] William R. Cornish, 'The Author as Risk-Sharer' (2002) 26 Columbia Journal of Law & the Arts, pp. 3-4.

Where viewing the author as "owner" does little more than place her as the (first) attachment point of neutral exclusive rights, the author-entrepreneur conceptualisation proposed here provides a foundation for shaping author-oriented economic rights. W. Cornish suggests that his picture of the author as "risk-sharer" is largely represented in the contractual protection measures common in civil law countries, which grant fair and equitable remuneration for authors based on the income generated by the exploitation of creative works.[134]

Such a conceptualisation can also be connected to the idea that the author incurs costs in the production of creative work and has to recoup these costs with the help of copyright law.[135] In its turn, then, the author-entrepreneur can be traced in the utilitarian incentive-based justifications where they are elaborate enough to consider the author's investments.[136] The strengthening of this entrepreneurial approach in terms of granting a direct connection between the author and the users of her works has been proposed as a way to fully realise the idea of copyright as an incentive for authorial creativity.[137]

In this context it is relevant to recall Chapter 2's analysis of the relationship between authors and other commercial exploiters in the EU copyright system. As was mentioned there, EU copyright law and its interpretations by the CJEU give some indications that authors should be able to share in the economic success of their works by enjoying an unwaivable right of remuneration for certain uses, even though this right is formulated in terms of "income" and not as related to profit, return of investment or similar.[138] On the other hand, the recent DSM Directive and its Articles 18-23, harmonising protection measures for authors in contractual relationships, show clearer signs of drawing support from the author-entrepreneur conceptualisation. Along with proportionate compensation, the Directive provides for the right to access exploitation-related information, withdraw from the contract or adjust it under certain circumstances.[139] In other words, the author is not only a

[134] Ibid., p. 4.

[135] An author perspective described in Lee J. Matalon, 'Modern Problems Require Modern Solutions: Internet Memes and Copyright' (2019) 98 Texas Law Review, p. 410.

[136] And this is indeed an idea used by some copyright scholars, namely, that the artificial scarcity created by copyright and allowing economic exploitation are direct incentives to the author of the work. See, e.g., Alina Ng, 'The Social Contract and Authorship: Allocating Entitlements in the Copyright System' (2009) 19 Fordham Intellectual Property Media and Entertainment Law Review 413, p. 440.

[137] See Ng, 'Authors and Readers: Conceptualizing Authorship in the Copyright Law', pp. 404-406.

[138] See Section 2.3.3 of the thesis.

[139] See Section 2.3.2.2 of this thesis for more on this topic.

recipient of remuneration but has active control and can manage the exploitation of her work to her own benefit.

On the other hand, it has been argued in the literature that the provisions of copyright law that this thesis treats as signs of the author-entrepreneur conceptualisation are instead the product of a myth about a weak and unsophisticated "starving artist", not least because poor bargaining power is cited as a major reason for the grant of inalienable rights over economic exploitation.[140] At the same time, the fact that the author has a weaker bargaining position when it comes to taking part in the economic exploitation of a work does not automatically mean that the author's agency is taken away. The author's difficulties engaging in entrepreneurship might have more to do with how the other elements of copyright are structured, or simply with standard practices in the exploitation markets that create high barriers to entry, especially for private individuals.

4.3.1.7. Authority

In the European copyright system, as was also seen in the previous chapters, the author is not only someone who has economic control in certain circumstances, but also someone who has intellectual control. This thesis proposes that such a conceptualisation of authorship may be seen as "author-authority" and considers it to be the reason for the control that is given to the author over the content and origin of the work.[141]

Following the Kantian logic of personality and property, L. Biron separates out the authoritative element of authorship and concludes that in copyright law, its features may be found if originality is understood in the sense of origination, i.e., if the author's work is her communication carried out in her own name.[142] Even though Biron holds that the current originality requirement is not based on such an understanding, there are other norms in copyright which partly are.

This way of seeing the author is perhaps most directly associated with the inclusion of moral rights in copyright law. If the author is only seen as an "economic author" (or the owner), as L. Zemer notes is the case in the US, then copyright is oriented towards economic control and moral rights are considered secondary or

[140] Guy A. Rub, 'Stronger Than Cryptonyte? Inalienable Profit-Sharing Schemes in Copyright Law' (2013) 27 Harvard Journal of Law & Technology 49, pp. 78-81.

[141]For example, according to M. Chon, this conceptualisation of authorship, together with the conceptualisation of author as "genius", forms the basis of copyright law (at least as perceived by the critics of "romantic authorship"). In Chon, 'The Romantic Collective Author', pp. 829-843.

[142] Laura Biron, 'Creative Work and Communicative Norms. Perspectives from Legal Philosophy' in Mireille Van Echoud (ed), *The Work of Authorship* (Amsterdam University Press 2014), p. 33.

unnecessary.[143] On the other hand, the classic moral rights of paternity and integrity[144] give the author the right to exercise control (and hence authority) over the content and treatment of work in certain circumstances, even if all other rights are forfeited.

Another way to give an author authority over a work (albeit in a less personal way than moral rights) is through the rights of translation and adaptation. These are not harmonised in the EU and will not be expanded upon here, but they are present in the Berne Convention[145] and essentially grant the author control over creative transformations of her work.

M. B. Ross suggests that authority over the written text is what qualifies the modern author as such, because without it, the person who writes would simply be a scribe, carrying no personal authority over the work but merely lending the authority of "worthiness" to be written down to the original author.[146] Indeed, such an attitude would correspond with the personality justifications outlined above. However, there are ways of looking at copyright and authorship which do not completely rule out the effort put in by a "scribe" in the production of the expression as a basis for protection.[147]

4.3.2. Seeing the whole family of concepts at once

Thus, the "author" in the legal context can be conceptualised in many different ways. The categories suggested above are, of course, just suggestions, allowing us to analyse and compare the assumptions and ideas that may underlie legal norms, court decisions, and legislative proposals in the field of copyright. Other variants could doubtless be suggested by the attentive and creative legal scholar. On the other hand, the suggested conceptualisations reflect the various structures in the sub-surface layers of European copyright law discussed above. The balancing of different elements, justifications and interests that copyright engages in as a system can be reimagined as a search for balance between these different conceptualisations. They will be used to analyse the most recent EU copyright law

[143] Zemer, 'Moral Rights: Limited Edition' where L. Zemer calls this authority-oriented conceptualisation of author the "personal author", p. 1529.

[144] Art. 6bis of the Berne Convention.

[145] Arts. 8 and 12 of the Berne Convention.

[146] Marlon B. Ross, 'Authority and Authenticity: Scribbling Authors and the Genius of Print in Eigtheen-Century England' (1992) 10 Cardozo Arts & Enterntainment Law Journal 495, pp. 495-498.

[147] The labour justifications and the early forms of originality assessment in the common law tradition especially, can be examples of that. See Sections 4.2.3 and 5.2.3.3 of the thesis.

in Chapter 5 and to compare the EU's "author" with the Creative Users discussed in Chapter 6.

These different conceptualisations reflect the changing standing of authors in copyright law throughout the history of the European copyright system. As seen in Chapter 3, the concept of author has also been evolving in tandem with political and technological developments, with new perspectives on authorship sedimenting together with new legal approaches "invented" or reinvented at the time of the "shifts". It is in the nature of law, as K. Tuori theorises it, that its different structures and conceptualisations are not simply cast away when new legal solutions are needed but are made to work together with the new additions, ensuring legitimacy and consistency (at least insofar as this is possible).

Thus, even though quite self-contained, these different models of author can rarely exist in isolation. Rather, they co-exist, providing a basis for a certain normative content in a given copyright system. They are all part of the same Wittgensteinian "network of meaning", but they can be combined and used in a variety of ways. The concept of the author as genius can co-exist with the image of the author as servant, as well as those of the author as owner and authority.

In other words, this section presents some of the most prominent members of the family behind the concept of author in the European copyright tradition. They are, however, a rather quarrelsome family, with different conceptualisations contradicting one other and competing for significance. A compromise between them is needed, and the European copyright system has attempted to achieve this in different ways. At the same time, situations arise in which the different conceptualisations are not balanced, where the most radical of them takes precedence, allowing sub-surface inconsistencies to negatively affect normative solutions and throw doubt on the legitimacy of the whole system.

4.4. Conclusions for Chapter 4

In Chapters 2–4, the author perspective was chosen to review the general patterns of copyright norms, together with their history and theory. While some nuances were undoubtedly lost in the process, patterns in the way the author is conceptualised and "treated" in European copyright have been identified. The picture drawn here and in the previous chapters illustrates and provides deeper insight into the tensions identified by numerous copyright scholars – between public and private, utility and personality, corporate and creative/authorial, etc.[148] This

[148] These tensions were mentioned many times in the previous chapters, too. See, for example, the discussion in Jaszi, 'Toward a Theory of Copyright: the Metamopthoses of "Authorship"', p. 502; Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?', pp. 161-170; Litman, 'What we don't see when we see copyright as property', pp. 537-538; Roberta Rosenthal

thesis has examined the different structures, value-laden arguments, and norms from the perspective of author and framed the tensions intuited by others in author-centred terms. This multifaceted but sometimes conflicting and fragmented image of the author is the result of this first part of the investigation.

Furthermore, the research above suggests that where the author is concerned, one of the main tensions in European copyright arises from the different way this subject is approached in the creation and exploitation stages of copyright protected works. While the conceptualisations of the author as creator are usually well-developed and accepted as essential to the "existence" of copyright, the positions around "exercise" treat the author as having much less agency, if relevant at all. Even though there are some notable exceptions and historical explanations for this tendency, it is worth noting and will be relevant for the inquiry in the upcoming chapters of this thesis.

It is useful to keep in mind that the picture of the author drawn thus far is a generalised one. In different European countries or countries adhering to the European copyright tradition (which presumably makes up a majority of jurisdictions), the actual settlement between the different members of the family behind the concept of author will vary, at least slightly. This thesis now turns to the question of how the "author" is conceptualised in EU copyright law and how this specific legal system is challenged by the phenomenon of Creative Users in respect to this concept.

As already mentioned, EU copyright law is a rapidly evolving legal system, one of whose main purposes is to harmonise the laws of the Member States. But it is also a system that aspires to consistency, and, it seems, to finding its own footing based on, but not limited to, the foundational elements of the copyright of its Member States. This is problematic in itself. K. Sganga has pointed out that such mixing and matching of tradition risks producing a new legal system where the traditional balancing tools present in the national systems of the Member States no longer apply.[149] The challenge facing EU copyright is undeniable, given that balancing the various members of the family behind the concept of author is plainly a delicate undertaking for any legal system. At the same time, the uncertainty and the development of legal norms unbound by the legal culture of one particular country present a unique opportunity to devise new legal solutions unlimited by traditional justifications and dichotomies.[150]

Kwall, 'Commentary on 'The Concept of Authorship in Comparative Copyright Law': a Brief Illustration' (2003) 52 De Paul Law Review 1229, p. 1230; Rose, *Authors and Owners. The Invention of Copyright*, pp. 139-142.

[149] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, pp. 88-89

[150] See, e.g., the suggestions made by Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2017) 40 UC Davis Law Review 1151 And Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright', pp. 297-342.

The next chapter will delve into EU copyright law, focusing on the elements that are most relevant from the Creative User perspective, and will assess how the different conceptualisations of author reveal themselves and are balanced there.

Chapter 5: Current EU Copyright Law. Reflections of the Past, Negotiation of the Present, and Structures for the Future

5.1. Introduction

This chapter will now turn to the current (and rapidly developing) EU copyright law, most importantly the aspects fundamentally related to the challenge of the Creative User. It will draw on the previous chapters' analysis of the concept of author and relate EU legislation and the CJEU's interpretation of that legislation to the conceptual structure of the sub-surface layers of the European copyright system. This will not only allow to question the consistency of EU copyright law and show the level of innovation that EU institutions have brought to European copyright, but it will also help obtain an approximate picture of what author conceptualisations this legal system is built on. This will provide the basis for the later assessment of the conceptual challenges that Creative Users are raising in this legal system.

In the pursuit of EU harmonisation, many different aspects of copyright had to be addressed and new legal solutions found. In the process, more principles from international copyright law and national systems of the Member States had to be brought in and a range of different interests considered. Legal scholars have analysed these trends in the development of EU copyright from a variety of perspectives, including the strengthening of property rhetoric,[1] constitutionalisation through the introduction of fundamental rights,[2] judicial law-making of the CJEU,[3]

[1] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, pp. 151-159.

[2] This line of analysis is associated with Ch. Geiger, see e.g., Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 282, pp. 282-306.

[3] Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019).

and others.[4] Here, they will be analysed from the perspective of the concept of author.

The first steps of copyright law in the EEC and EC have already been discussed in Section 3.5 of this thesis. As concluded above, copyright's inclusion in the EU system led, first of all, to a strengthening of what this thesis calls the *owner* conceptualisation of author, which effectively took over other conceptual models. Despite the recognition of the importance of moral rights in copyright law, the moral aspect of copyright was firmly separated from the economic and both were assumed to have no influence on one another. In the same way, the interpretation of economic rights was limited to considerations of exploitation, and questions concerning the existence of rights (and thus the creation of work) were left outside the competence of the then EEC.

Viewed in terms of the legal sediments "inherited" from the Member States, this early phase of EU copyright was not so much setting the stage for the future as reflecting an approach to copyright law already visible from its historic development and strengthened by the economic agenda of the EEC. Given the emerging new technologies and the expanding market, the exploitation side of copyright seemed the most relevant candidate for further development and hence received the most attention. As will be shown in this chapter, this trend has reversed as EU copyright law has evolved, especially in the jurisprudence of the CJEU. Yet the separation between creation and exploitation stages, or the existence and exercise of copyright, arguably still persists.

The challenge that Creative Users bring to this relatively new legal system has the potential to touch nearly every aspect of it. If the "author" on which the system is built is called into question, because of the importance of this subject, there may be a need to reconsider many of the normative solutions currently employed by the system. In this thesis, however, only the criteria of protectability and the exclusive right of reproduction will be addressed in more detail. The requirements of protectability, by now quite well-developed in the EU system, are a tool to directly include or exclude authors based on predetermined conditions. The right of reproduction is not only the first right of modern copyright but also at the very heart of it, and, as the CJEU elaborated already in its early cases, it is at the heart of EU copyright law as well.[5] Moreover, owing to the transformative creative activities

[4] E.g., reference to a discussion on the different frameworks that the European and international copyright and other intellectual property rights are based on in Rochelle Cooper Dreyfuss and Elizabeth Siew-Kuan Ng (eds), *Framing Intellectual Property Law in the 21st Century. Integrating Incentives, Trade, Development, Culture, and Human Rights* (Cambridge University Press 2018).

[5] The reproduction and performance were considered to be the content of the commercial exploitation of the right which formed one of the parts of the specific subject-matter of copyright: See chapter 3.6.4

that Creative Users often engage in, the right of reproduction is central to the question of the inclusion of digital forms of creativity in the EU copyright system.

The analysis of these two fundamental elements of EU copyright law will shed light on the conceptual basis for the current normative solutions, as well as on what might change if the Creative Users' challenge is used as an opportunity to further develop the concept of author in EU copyright.

5.2. What constitutes EU copyright law?

5.2.1. Purposes of harmonisation

This section will start by reviewing, very briefly, the current state of EU copyright law. After all, much has changed since the early 1990s, the point where the previous analysis of EU copyright history left off.6 Over the past two decades, EU copyright law has seen substantial harmonisation, but though it is now more complex and nuanced, it is still based on the principles of a well-functioning internal market.7

Generally, the competence of the EU in the field of intellectual property derives from several norms in constitutional EU law – Articles 114, 118 and 207 of the TFEU.8 Article 114 TFEU allows the European Parliament and the Council to adopt measures for harmonisation of national laws for the purpose of achieving a functioning internal market. This also includes intellectual property laws. Article 118 TFEU explicitly mentions intellectual property rights and allows the European Parliament and the Council to create EU-wide unitary intellectual property rights, again for the purpose of a well-functioning internal market. Lastly, Art. 207 TFEU deals with the EU's external competence and mandates a common commercial policy, including in relation to the commercial aspects of intellectual property following the principles and objectives of the Union's external action.9 Thus, the EU's competence to issue legal instruments in the field of copyright law is predicated on the assumption that a given copyright instrument is relevant for the functioning of the internal market and that its scope is also limited by this purpose,

[6] See Chapter 3.6

[7] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 11

[8] Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd. edn, 2019), p. 43.

[9] These principles can be found in Art. 21 TEU.

at least in theory.10 The purpose and rationale of harmonisation is thus not (supposed to be) copyright itself but the functioning of the internal market.11

However, in the past decades the internal market has had to make way for other priorities. Already in 1992, after the Treaty of Maastricht, the EEC became the EC, signalling that its agenda would no longer be confined to "economic" aspects; this was followed by a commitment to "Union" in 2007.12 In addition to the aims of the common market, fundamental rights in EU law and international human rights law became factors in the harmonisation process, sometimes restricting it13 and sometimes driving it forward. This is especially visible in the recent jurisprudence of the CJEU, where attention to fundamental rights and commitment to the prohibition of discrimination has been steadily increasing, the Court even going so far as to recognise that one of the reasons for copyright protection and exceptions from this protection in the EU stems from the fundamental rights.14

Furthermore, on a certain level, even cultural integration is slowly finding its way into the arguments for harmonisation in the field of EU copyright. On the one hand, the preservation of cultural diversity among the Member States has long been a policy goal of the EU.15 On the other, EU treaties and other policy documents that have nothing to do with copyright frequently bring up unified cultural space as one of the aspects of integration and a key to a unified single market.16 It is possible that, with time, general cultural policy will become a factor in the copyright harmonisation process.

Thus, the picture drawn in Chapter 2 of EU copyright as a multifaceted system that not only reflects economic concerns but is also heavily reliant on authorship, becomes more understandable. As will be shown shortly, the trend of digging deeper

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[10] In practice, the CJEU has made the limits of interference with national intellectual property laws more flexible, see Theodore Georgopoulos, 'The Legal Foundations of European Copyright Law' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives*, vol Kluwer Law International (2012), pp. 33-37.

[11] Thomas Margoni, 'Margoni, Thomas, The Harmonisation of EU Copyright Law: The Originality Standard' (2016) Available at SSRN: https://ssrncom/abstract=2802327 or http://dxdoiorg/102139/ssrn2802327, p. 1.

[12] Frank Gotzen, 'The European Legislator's Strategy in the Field of Copyright Harmonization' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives* (Wolters Kluwer 2012), p. 44.

[13] Georgopoulos, 'The Legal Foundations of European Copyright Law', p. 40.

[14] It enough to name the most recent cases of the CJEU of *Pelham*, *Funke Medien* and *Spiegel Online* where examples of this approach have been articulated.

[15] Kur and Dreier, *European Intellectual Property Law. Text, Cases and Materials*, pp. 248-249.

[16] Tatiana-Eleni Synodinou, *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer Law International 2012), p. 4.

for EU copyright objectives is especially visible in the harmonisation carried out by the CJEU in the latest decades.

5.2.2. Harmonisation instruments

If one were to talk about the different instruments through which harmonisation of national laws of Member States is carried out and thus the system of EU copyright law is built, a logical place to start would be the harmonising regulations and directives.[17] Harmonisation "through directives" is often identified as one of the main stages of harmonisation of EU law; it is said to have occurred between 1991 and 2001, owing to the fact that seven out of eleven of the directives (including the most substantial InfoSoc Directive) were adopted during this period.[18] The next period, spanning the years from 2001 to 2009, was one of harmonisation through soft-law instruments, or the "consolidation phase", where the EU Commission had the opportunity to issue policy documents related to the already adopted legal instruments.[19] The third phase and third instrument of harmonisation, which in some circumstances can be seen as the most important of them all, is the decisions of the CJEU, especially those made since 2009, which mark the beginning of what is sometimes nicknamed "judicial activism".[20]

Chapter 3 has introduced what might also be called a "stage" in the harmonisation of EU copyright law, namely the pre-1990s decisions of the CJEU (then ECJ), which, as this thesis argues, did not so much harmonise the substantive law as frame the terms of subsequent harmonisation.[21] At the same time, some direct legal effects of those early decisions might still be felt today, for instance because the CJEU has clarified which aspects of national intellectual property are exempted from the application of Articles 34 and 35 TFEU.[22] Accordingly, lacking any other provisions

[17] To date (June 2021), the *acquis* of the EU copyright law is comprised of 11 directives and 2 regulations. The directives in question are: Directive 2001/29/EC InfoSoc Directive; Directive 2006/115/EC Rental and Lending Directive; Directive 2001/84/EC Resale Rights Directive; Council Directive 93/83/EEC Satellite and Cable Directive; Directive 2009/24/EC Software Directive; Directive 2004/48/EC IPRED Directive; Directive 96/9/EC Database Directive; Directive 2011/77/EU Term Directive; Directive 2012/28/EU Orphan Works Directive; Directive 2014/26/EU CRM Directive; Directive (EU) 2017/1564 Directive Implementing Marrakesh Treaty; Directive 2019/790 the Copyright in the Digital Single Market directive; Regulation (EU) 2017/1563 Regulation implementing Marrakesh Treaty; Regulation (EU) 2017/1128 Portability Regulation.

[18] Bernt Hugenholtz, 'Copyright in Europe: Twenty Years Ago, Today and What the Future Holds' (2013) 23 Fordham Intellectual Property Media and Entertainment Law Review, pp. 505-511.

[19] Ibid., pp. 511-513.

[20] Ibid., pp. 513-516.

[21] See more on this in Section 4.4.

[22] See Section 3.6 of this thesis.

in the harmonising instruments, such "framing" interpretation would limit the CJEU's possibilities[23] to introduce harmonisation of moral rights on the grounds that they create quantitative restrictions of imports.[24]

Currently, EU copyright harmonisation efforts can still be seen as stranded in the stage of CJEU judicial activism. Even the most recent legislative addition, the Copyright in the Digital Single Market (DSM) Directive,[25] is unlikely to reverse this trend. With the Directive yet to be fully implemented into national systems and with many questions remaining regarding the meaning of its provisions, it is too early to say whether a new period of development has begun or whether harmonisation via CJEU case law will continue. The latter seems to be the case, having in mind that in several of its decisions following the adoption of the DSM Directive the Court has handed down interpretations that arguably have a greater impact on the further development of the EU copyright law than the Directive itself.

Thus, in this chapter, the EU copyright law, or more precisely, the parts of it which are most relevant from the Creative User perspective, will be analysed, taking into consideration, first of all, relevant provisions in the directives and regulations, as well as policy documents where applicable. The emphasis, however, will be on the CJEU's interpretations of these legal norms, as these utterances tend to be the most recent source of EU copyright law and one that provides not only interpretations but also the arguments behind them, making more visible the sub-surface layers of the concepts involved.

5.3. What is protected by EU copyright? Between Genius and Craftsman

5.3.1. Introduction

Protection criteria are probably the most important provisions in any copyright law system. They form the ultimate borders for copyright: without standards for establishing protectability, all other norms and principles would lose meaning and

[23] Even the CJEU does not keep to the rule of the legal precedent it very seldom derogates from its previous interpretations: Rosati, *Copyright and the Court of Justice of the European Union*, p. 21.

[24] And there are differences between moral rights norms in different Member States which might significantly affect treatment of the same work in different parts of the Internal Market. See, e.g., Irma Sirvinskaite, 'Toward Copyright "Europeanification": European Union Moral Rights' (2010) 3 Journal of International Entertainment & Media Law 263, p. 284.

[25] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market.

never come into effect. Thus, analysing these criteria and what factual circumstances they consider as "copyright-worthy" offers a unique opportunity to explore the logic of the whole system. Especially when viewed from the perspective of the Creative User as author, as is the purpose of this thesis, the protectability standards of EU law act as a gatekeeper to include certain "authors" while potentially excluding or ignoring other creators.

The requirements for copyright protection in the EU have been formulated and rather comprehensively explained by the CJEU, supplying a wealth of material to analyse in terms of the concept of author. The Court's arguments and conclusions, as well as the comparisons and metaphors used, offer glimpses of different presumptions that, according to the understanding of law proposed by K. Tuori, might emanate from the sub-surface layers of European copyright tradition.

5.3.2. What is protected by EU copyright law?

To begin with, the current valid EU copyright law (as of July 2021) approaches the question of protectability from several different angles. As already elaborated, EU copyright protection attaches to *works* in respect of which authors get their rights.[26] The previous analysis of the relationship between authorial rights and neighbouring rights showed that a "work" is something more than just its physical fixation.[27] Fixations deemed to require significant investment (such as music recordings and first fixations of films and broadcasts) receive protection that is somewhat narrower in scope because of the lack of authorial creativity involved in their production.[28]

Hence, protecting a "work" is not as straightforward as merely protecting a certain physical object. The boundaries of a "work" are not solely determined by its external manifestation but rely on the presumptions and values embedded in copyright law around what "subject matter" to include or exclude. Protectability in current EU copyright law can be seen as having two dimensions: immaterial and physical. In other words, it excludes from eligibility certain creative endeavours and certain manifestations of these endeavours. These limits to the scope of protection of EU copyright law have been approached by the CJEU through the notions of "originality" and "expression" respectively.

As analysis later in this section will demonstrate, originality has been, and remains, the main instrument to regulate what EU copyright protects. This tendency to regard

[26] Arts. 2, 3, 4 of the InfoSoc Directive and other directives in the field of EU copyright law give the rights to "authors" in respect of their "works".

[27] See Section 2.3.3 of this thesis.

[28] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. The Berne Convention and Beyond. Volume II*, pp. 1208-1209; Hugenholtz, 'Neighbouring Rights are Obsolete', pp. 1006-1007.

originality as the most important criterion, which J. Griffiths calls the "dematerialisation" of copyright, is not a new invention of the CJEU;[29] however, it seems that the Court has elevated it to an even higher level than it has previously occupied in the European copyright system.

Therefore, in line with the analytical model in this thesis, the "what" in the title of this subsection refers not just to the different subject matter of copyright (text, music, photographs, databases, etc.), but also to the version of reality that the law implies. "What is protected" hence also means "what model of creativity is protected?", "what social values are protected?", "what interests are protected?" and so on. These models of reality, which are derived from the subsurface structures of EU copyright law made visible through the requirements of protectability, can accordingly be analysed from the perspective of author.

5.3.3. Originality

5.3.3.1. The importance of the concept

As was observed in Chapter 3, the first steps towards incorporating a new medium into copyright law often involve a (re)interpretation of originality. Photographs and computer programs were initially dismissed as candidates for protection on the grounds of being merely mechanical or not creative enough.[30] Only after a new perspective on originality was achieved did it become possible to include works which were "creative" by virtue of abstract elements of choice and control of their author.

The current originality criterion in European copyright law is often presented as setting a low bar because it does not ask for any "uniqueness" or "value" of the protected work.[31] Indeed, semantically, the originality in copyright law is perhaps more closely related to the notion of "origination". This is well illustrated by the fact that copyright does not prohibit independent creation of identical or similar work, thus making it clear from the very outset that what is valuable and protected is the personal expression and not the outward qualities of that creation.[32] The same is true in EU copyright law, which contains the general principle that copyright

[29] Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33 Oxford Journal of Legal Studies 767, pp. 767-768.

[30] See Chapter 3.5 of the thesis.

[31] Erlend Lavik and Stef van Gompel, 'On the Prospects of Raising the Originality Requirement in Copyright Law: Perspectives from the Humanities' 60 Journal, Copyright Society of the USA 387, pp. 387-443.

[32] See: Abraham Drassinower, *What's Wrong With Copying?* (Harvard University Press 2015), pp. 57-58. Here the author conceptualises the work in terms of "personal communication" of the author, making the same conclusions about the requirement of originality.

protection does not take into account quality, merit, aesthetics, or similar requirements.[33]

At the same time, merely originating from someone is not enough to fully satisfy the originality criterion. Even if quality is not assessed in the European tradition, originality includes an additional requirement of at least a minimal level of creativity or skill and effort in the process of origination.[34] In other words, the standard elements for determining if a work is original are "origination" and "some added value" through the process of creation, to put it very generally. In effect, especially in jurisdictions with a creativity-based originality requirement, the process that the author went through to create a work is among the key issues when determining if a creation qualifies for protection. Even in the common law countries where originality traditionally centred on skill and effort, the criterion places an emphasis on how the creation was achieved, asking if the "right kind of labour" was expended, to which purpose, and so on. The exact level of creativity or skill that must be demonstrated varies from one country to another.[35]

5.3.3.2. Originality in international law

As was described in Chapter 2, EU copyright law is inseparably related to international copyright law and its main instruments. However, the originality standard is not explicitly enshrined anywhere in the international legal documents. The principal source among them, the Berne Convention, provides an exemplary list of subject matter but no guidance on what makes these objects eligible for protection.[36]

Some argue that a general requirement of originality as a threshold for protectability can be partly inferred from the term "literary and artistic works" in Article 2 of the

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[33] See Walter and Lewinski, *European Copyright Law. A Commentary*, pp. 94, 587, 707. This principle is also considered as internalised in the Berne Convention, see Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 403-404.

[34] See, e.g., Paul Torremans, 'Legal Issues Pertaining to the restoration and reconstitution of manuscripts, sheet music, paintings and films for marketing purposes' in Paul Torremans (ed), *Copyright Law A Handbook for Contemporary Research* (Edward Elgar 2007), p. 31, for a description of "two requirements" of the UK originality standard; Antoon Quaedvlieg, 'The tripod of originality and the concept of work in Dutch and European copyright' (2014) 1105 GRUR Int for a model of three elements of originality for analysing Dutch and EU standards; or Karl-Nikolaus Peifer, '"Individualität"or Originality? Core concepts in German copyright law' 1100 GRUR Int, pp. 1100-1104.

[35] Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', pp. 375-408.

[36] Gunnar W. G. Karnell, 'European Originality: A Copyright Chimera' in Jan J. Kabel and Gerard J.H.M. Mom (eds), *Intellectual Property And Information Law Essays in Honour of Herman Cohen Jehoram* (Kluwer Law International 1998), p. 202.

Berne Convention.[37] The same can be concluded from the text of the Convention, which uses the term "original" as a condition for protection in certain circumstances in other articles,[38] as well as the term "intellectual creations" with respect to protectable collections of literary or artistic works.[39] Indirect references to the threshold requirements for copyright have also been incorporated into the TRIPS Agreement and the WCT.[40] As noted before, however, these references imply a minimum standard but say nothing about its content or "height".[41]

5.3.3.3. The origins of originality in EU copyright law: meeting of two legal traditions

In EU copyright, the standard of originality is de facto harmonised for all subject-matter. This is the result of a series of decisions by the CJEU, starting with the landmark *Infopaq*[42] in 2009. The harmonised standard of "author's own intellectual creation" has been described as a compromise between the common law and continental approaches[43] or even as a formulation broad enough to fully encompass the common law "skill and effort" standard.[44] At the same time, there are those who consider that the present EU originality model is directly descended from the continental approach to the protection of creativity.[45] Indeed, the close relationship

[37] WIPO, *Guide to the Berne Convention for Protection of Literary and Artistic works (Paris Act, 1971)*, p. 17; Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship', p.10; Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 102.

[38] Arts. 2(3), 8, 11, 14bis, and others. See also Margoni, 'Margoni, Thomas, The Harmonisation of EU Copyright Law: The Originality Standard ', p. 4.

[39] Art. 2(5) of the Berne Convention, see Karnell, 'European Originality: A Copyright Chimera', p. 202. The CJEU has also indicated that this specific reference to "intellectual creation" in the Berne Convention was a basis for the adoption of the author's own intellectual creation criterion. See Case C-5/08, Infopaq International A/S v Danske Dagblades Forening, ECLI:EU:C:2009:465 (*Infopaq*), para. 34.

[40] That is to say, these documents give no explanation of what constitutes "originality" save their reference to the Berne Convention.

[41] See Section 2.2.1.2 of this thesis.

[42] Case C-5/08, Infopaq International A/S v Danske Dagblades Forening, ECLI:EU:C:2009:465 (*Infopaq*).

[43] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 1466.

[44] Eleonora Rosati, *Originality in EU Copyright. Full Harmonization through Case Law* (Edward Elgar Publishing Limited 2013), p. 68.

[45] Eleonora Rosati, 'Originality in a work, or a work of originality: the effects of the Infopaq decision' (2011) 33 European Intellectual Property Review 746, pp. 746-755.

between the EU originality standard and the continental tradition often seems confirmed by the formulations used by the CJEU in its case law.[46]

The approach of this thesis, as mentioned before, is that EU copyright is a derivative built on the legal systems of the Member States, not only in the sense of borrowing their legal norms, but also because it relies on their subsurface structures for consistency and legitimacy. In the case of the emerging EU copyright law, then, the direction of development is a *choice* more than it has been in any other national system.

With respect to the originality standard, the most notable sources for its development in the EU were the continental and the common law approaches. As the title of this section indicates and as provided in Chapter 3, these two approaches signified slightly different understandings of authorship and authorial subjectivity, which the CJEU attempted to combine to formulate the EU approach. What will follow now is a very short examination of the different copyright standards, with a focus on how they were perceived prior to harmonisation. This will help to get a better insight into the conceptual choices behind the framing of the current EU requirement of originality.

Common law originality: the UK

According to the UK CDPA of 1988 (currently valid edition), section 1 (1)(a), copyright only subsists in original literary, dramatic, musical or artistic works. Several categories of works need not be original, and are instead considered to be "entrepreneurial works"; the only requirement for such works – sound recordings, film recordings, broadcasts, and published editions – is that they are not directly copied from another work.[47] The latter group, however, corresponds with the subject matter protected by "neighbouring rights" in the continental tradition.

One of the most important – if not the most important – criteria in UK copyright law, the standard of originality has evolved and changed in the years since the Statute of Anne, and has been interpreted in different ways by different national courts.[48] The customary basic definition of the old British originality standard is that the work must be a result of "labour, skill and judgement"[49] (and sometimes also of

[46] Peifer, '"Individualität"or Originality? Core concepts in German copyright law', pp. 1100-1104. See also the Opinion of the Advocate General in the C-604/10 *Football Dataco*, paragraph 37, where AG Mengozzi explains that the EU standard of originality is clearly based on the continental legal tradition.

[47] CDPA, Sections 5A(2), 5B(4), 6(6), 8(2).

[48] Lionel Bently and others, *Intellectual Property Law* (5th edn, Oxford University Press 2018), p. 96.

[49] Ibid., p. 97.

elements like capital, experience and selection[50]); or, as it is often called, the "sweat of the brow" doctrine.[51] This standard is often described as "low", asking only for minimal investment of labour and skill, and not placing any importance on novelty, creativity or ingenuity.[52] The priority of such a test is said to be the protection of the work, and the person who created it is of secondary concern.[53] Because of this, originality tests in the British and similar common law traditions are sometimes called "objective": they are said to concentrate on the work and the added value it gives to existing raw materials.[54]

However, as was already indicated in Chapter 3, even the British standard has certain traces of what might be called "romanticisation", namely, the evident relevance of the author's subjectivity. According to Bently and Sherman, the traditional British standard of originality has been essentially concerned with the relationship the author has with the resulting work.[55] It is also bound up with who is creating the work (professional or not), as well as what skill and how much of it has actually been expended. A number of landmark decisions from the UK on originality that are often cited in copyright textbooks illustrate this matter well.

For instance, in the famous *Walter v. Lane,*[56] which remains a leading case, the issue was the protectability of public speeches reported verbatim in The Times newspaper and later reprinted in a book. The Times claimed copyright for the reported speeches, pointing out that the process of reporting took much skill and effort, whereas the defendant argued that the reports were merely a copy of the uncopyrighted speeches themselves.[57] In the end, the Lords ruled in favour of The Times. As Lord James of Hereford asserted, "from a general point of view a

[50] William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights, 7th edition* (Sweet & Maxwell 2010), p. 441.

[51] Handig, 'The 'sweat of the brow' is not enough! - more than a blueprint of the European copyright term 'work''.

[52] Cornish, Llewelyn and Aplin, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights, 7th edition*, p. 448.

[53] Rahmatian, 'Originality in UK Copyright law: the Old "Skill and Labour" Doctrine Under Pressure', pp. 15-16.

[54] Tatiana-Eleni Synodinou, 'The Foundations of the Concept of Work in European Copyright Law' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives* (Wolters Kluwer 2012), p. 95.

[55] Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd. edn, Oxford University Press 2009), p. 93.

[56] Walter and Another (on behalf of Themselves and All other Proprietors of the Business of Publishing and Carrying on the Times Newspaper) Appellants; v Lane Respondent, [1900] A.C. 539, (*Walter v Lane*).

[57] The author of these speeches did not claim any copyright to them, and so they were supposed to be in the public domain.

reporter's art represents more than mere transcribing or writing from dictation. ... [It] is an art requiring considerable training, and does not come within the knowledge of ordinary persons."[58] Consequently, the journalist's report, even though copied verbatim, was considered to be an original and protected work.[59]

In *Interlego,*[60] another classic case, a toy manufacturer, "Tyco", made their own version of the famous Lego bricks. Lego claimed copyright infringement of the technical drawings of their bricks, of which there were several generations, updated throughout the years. The court found that copyright protection could only be sought for the most recent drawings,[61] which were almost identical to the non-protectable drawings of the previous generations. The designer acknowledged that he was mostly tracing the lines of the old drawings when drawing the new ones.[62] Finally, the Privy Council (Hong Kong) concluded that the differences between old and new drawings were "visually insignificant"[63] and stressed that a work does not become original by mere labour and skill: there needs to be some alternation distinguishing it from an earlier version, and regard has to be given "to the quality rather than the quantity of the addition".[64]

Lastly, in the more recent *Hyperion Records,*[65] performing editions of several works of Michel Richard de Lalande prepared by Mr. Sawkins (a leading world expert on this composer's music) were used by Hyperion Records to record a CD without his permission. Hyperion argued, in the spirit of *Interlego,* that Mr. Sawkins's editions could not be protected by copyright law as no independent original work was produced. There was "no new music" created here: the original music had merely been collected from several different sources, put together, adapted to the modern system of transcription, corrected, and supplemented with recreated missing parts, where applicable. Sawkins argued that the work required significant skill and effort. Each performing edition took around 300 hours and a grand total of 3000 editorial interventions was made to the three pieces in question.[66]

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[58] Ibid., p. 554.

[59] Notably, this is an old case, but it was later confirmed in Sawkins v Hyperion Records Ltd [2005] E.D.C.R. 33 that *Walter v Lane* still represents valid UK copyright law.

[60] Interlego AG v Tycoon Industries and Others, [1989] A.C. 217, (*Interlego*).

[61] The UK copyright laws were not applicable in Hong Kong at the time the older versions of the drawings were made.

[62] Ibid., p. 257 D-F.

[63] Ibid., p. 263 G.

[64] *Interlego*, p. 263, B-C.

[65] Sawkins v Hyperion Records Ltd [2005] E.D.C.R. 33.

[66] Ibid., paras. 8-10.

Ultimately, the Court held that the effort, skill, judgement and time invested in the performing editions *was* enough to satisfy the requirement of originality.[67] As explained by L. J. Jacob, there are different kinds of copying to consider. *Interlego* concerned an inherently mechanical function of redrawing a technical drawing, which almost any engineer could accomplish, whereas copying in this case (as well as in *Walter v Lane*) required significant talent and rare skills, which only a few people in the world possessed. As a result, the latter can be considered original but the former cannot.[68]

From the reasoning of the courts above, it is evident that the UK understanding of originality is (was) somewhat more nuanced than just looking for investment. From one perspective, the way the author is conceived in these cases is close to what this thesis calls a concept of *craftsman*. One can say that this conceptualisation implies that hard work should be rewarded, as should, presumably, the training and investment put into gaining certain skills. The result of the work is also important since, for example, in *Interlego*, at least some qualitative alteration was required. Moreover, whatever the outcome of the originality test, protection will not be available unless the result of authorial production fits into the closed list of protectable subject matter enshrined in the British Copyright Designs and Patents Act.[69]

Thus, originality still has to be proven by assessing the authorial circumstances of the creation process.[70] The different courts have linked the ability of the author to expend sufficient and appropriate skill, effort, and judgement to the author's personal qualities as well, and mentioned talent and the *freedom* to exercise individual judgement in the process of creation. In this way, the British standard of originality exemplified in these cases can be connected to the shifts described above where human subjectivity came to the fore.

The Continental model of Originality: the EU Member States

In the continental tradition, in what A. Rahmatian calls the opposite of the UK model, works are protected through an extension of the protection of the author's

[67] Ibid., para. 36.

[68] Ibid. paras. 78-85. See also H. Laddie, P. Prescott, M. Vitoria, *The Modern Law of Copyright and Designs,* (Butterworths 1995), section 4.39, which was quoted in the decision.

[69] Justine Pila, *The Subject Matter of Intellectual Property* (Oxford University Press 2017), p. 153. Supposedly, this approach became obsolete after the harmonisation of the originality standard by the CJEU. See, e.g., Handig, 'The 'sweat of the brow' is not enough! - more than a blueprint of the European copyright term 'work'', or more recently Eleonora Rosati, 'CJEU rules that copyright protection for designs only requires sufficient originality' (2019) 14 Journal of Intellectual Property Law and Practice, p. 932.

[70] Rosati, *Originality in EU Copyright. Full Harmonization through Case Law*, p. 78.

person and not as an end in itself.[71] The idea of originality in this context is a reflection of the personal emotional, subjective and irrational relationship between the author and the work.[72] Hence, the measuring stick for copyright protection becomes the personal input, the investment of one's personality and the resulting "personal touch" carried by the work. This continental standard of originality is thus sometimes called "subjective" and is grounded in what this thesis describes as the *genius* conceptualisation of author.

Despite this broad common basis, continental law countries, similarly to the UK, lack a detailed definition of originality in their copyright laws, and prior to harmonisation, the standard of originality varied between countries.[73] Furthermore, it was not uncommon for several standards of originality to be in use in a single country. Often, higher or lower requirements of originality were imposed depending on the work in question, as the examples of photographs and computer software demonstrate in Chapter 3 of this thesis.[74]

Moving to the specific interpretations of originality in EU Member States, the traditional German standard of "personal intellectual creation" (section 2(2) of the German Copyright Act), though similar in formulation to the standard eventually adopted at the EU level, was considered stricter than the latter. The personal creation standard by itself has been interpreted as a requirement for "human creativity" to be expended[75] or for some level of intentional creative activity on the part of the author.[76] The "individuality" requirement, also inherent in the test, was on the other hand somewhat more extensive than the CJEU standard. It required the author to add to her creation a personal character that is strictly individual to this author, and not to anyone else.[77] In practice, however, the German courts typically distinguished between literary and musical works, which could be protected even for exhibiting minimal creativity and individuality (the so-called "Kleine Münze" rule), and works of applied art, which were only protected if a substantial degree of creativity was

[71] Rahmatian, 'Originality in UK Copyright law: the Old "Skill and Labour" Doctrine Under Pressure', pp. 4-34.

[72] Judge and Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', pp. 375-408.

[73] Rosati, *Originality in EU Copyright. Full Harmonization through Case Law*, p. 63.

[74] See Section 3.5 of the thesis.

[75] Anne Lauber-Rönsberg, 'Autonome „Schöpfung" – Urheberschaft und Schutzfähigkeit' (2019) 3 GRUR, p. 246.

[76] Ruling out the completely accidental "creative works" from protection, even though the level of required control over the creative result that is asked is not too demanding: Wolfgang Straub, 'Individualität als Schlüsselkriterium des Urheberrechts' (2001) 1 GRUR Int, p. 4.

[77] Ibid., pp. 1102-1103.

found.[78] Accordingly, originality was seen as capable of existing to different degrees in different works, and even a low level of it could be sufficient to warrant copyright protection for some works.[79] However, the difference in individuality expressed in the work was used to determine the scope of its protection,[80] which has been called into question in light of the CJEU's decisions, especially that of *Painer*.[81]

Similarly, the French approach to originality traditionally asked for the "author's personal touch" or "mark of the author's personality"[82] and based the assessment of originality on the arbitrary choices made by the author[83] or on some other way in which the author imparted her personality, for instance through emotional expression.[84] Article L112-1 of the French Intellectual Property Code provides that all "works of the mind" of authors shall be protected by copyright. This was sometimes interpreted by the courts as coming close to a requirement of uniqueness and distinctiveness, which assisted protection of works that required little effort but were creative and distinctive, such as titles or names.[85] At the same time, once the "personal touch" test was met, the French tradition generally adhered to the principle of "unity of arts", which meant that no distinction in treatment and protection was made on the basis of the function, merit or mode of expression.[86] Thus, with time, even such works as databases, specialised telephone directories and calendars have been considered original in the French courts and given protection if

[78] Sylvie Nerisson and Reto M. Hilty (eds), *Balancing Copyright - a Survey of National Approaches* (Springer 2012) p. 438.

[79] Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly, *Urheberrecht. Komentar* (5th edn, C.H. Beck 2017), pp. 135-136.

[80] Ibid, p. 136.

[81] In the case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECLI:EU:C:2011:798 (*Painer*), para. 97, the CJEU specifically stated that the protectability of copyrighted works has to be based on the "author's own intellectual creation" criterion and if it is satisfied, the scope of protection is then the same for all works.

[82] Ben Allgrove (ed) *International Copyright Law. A practical Global Guide* (Globe Law and Business 2013), p. 185.

[83] Brad Spitz, *Guide to Copyright in France. Business, Internet and Litigation* (Wolters Kluwer 2015), p. 14.

[84] Lucie Treguier and van William Caenegem, 'Copyright, Art and Originality: Comparative and Policy Issues' (2019) 8 Global Journal of Comparative Law, p. 111.

[85] Rosati, *Originality in EU Copyright. Full Harmonization through Case Law*, p. 71.

[86] Treguier and Caenegem, 'Copyright, Art and Originality: Comparative and Policy Issues', p. 112. Also stressed in Art. L112-1 of the Intellectual Property Code.

the process of their creation was not purely mechanical and involved the making of free and creative choices.[87]

Dutch copyright law asked for originality in the meaning of "own original character" and also required the author's personal stamp, as well as free creative choices.[88] Notably, however, the Dutch originality standard has also been interpreted to cover the "vision" of the author or "aesthetic effect", giving protection even where little free creative choice was exercised by the author but the work had an overall aesthetic effect or in some other way reflected the vision of the author.[89] On the other hand, similar to the other countries discussed, Dutch copyright law until recently also had a regime in place to protect "other writings", i.e., non-original textual works, even though the protection for these was narrower in scope.[90]

Similar provisions combining various manifestations of the personal relationship between the author and the work can be found in other continental EU Member States as well.[91] In general, two things seem to be important when assessing originality in the continental tradition: the author's choices made in the process of creating the work[92] and, to larger or smaller extent, the personal character of the final work.

As such, this approach is comparable to what this thesis calls the *genius* conceptualisation of author, specifically in that the human author is seen as a self-sufficient source of creative inspiration and as someone whose exercise of choices, which were not predetermined in advance, produces a work that is to be protected. The threshold for protection, though not very high, placed strong emphasis on creativity and the reflection of the author's personal touch. Notably in the Netherlands, in cases where the individuality of the author was apparent, the actual creative process receded in importance.

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[87] Daniel J. Gervais, 'Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law' (2002) 49 Journal of the Copyright Society of the USA 949, p. 969; See also Section 3.5 of the thesis.

[88] Mireille van Echoud, *The Work of Authorship* (Amsterdam University Press 2014), p. 98.

[89] The notable example is the protectability of the Trip-Trap chair on the basis that even though the choices made by the author were in relation to the functionality of the object, they were not indispensable and so free, see: Quaedvlieg, 'The tripod of originality and the concept of work in Dutch and European copyright', pp. 1108-1109.

[90] See Nerisson and Hilty, *Balancing Copyright - a Survey of National Approaches*, pp. 677-678; Rosati, *Originality in EU Copyright. Full Harmonization through Case Law*, p. 170.

[91] See, e.g., descriptions of the national tests in Nerisson and Hilty, *Balancing Copyright - a Survey of National Approaches*, Belgium: pp. 129-131, Croatia: pp. 324-326, Italy: pp. 549-551, and others.

[92] However, the crystallisation of the element of choice as a way to impart the personality of the author is a relatively new phenomenon in the continental copyright originality tradition in general: Rahmatian, 'Originality in UK Copyright law: the Old "Skill and Labour" Doctrine Under Pressure', p. 27.

At the same time, the fate of most continental originality tests in the face of the technological developments described earlier was that of crystallisation, as well as acceptance (at least to a certain degree) of works that were not necessarily highly creative. However, it was possible to give less creative works a narrower scope of protection as well. The CJEU took it upon itself to harmonise these approaches into a single unified threshold.

5.3.3.4. The harmonised EU originality standard

Harmonisation through directives

The first steps in the harmonisation of the EU originality standard were taken already in 1991 with the Computer Program Directive, which, having in mind the different approaches to protectability of this subject matter in EU (then still EEC) Member States, provided a special requirement of originality in respect to computer software.[93] Hence, the current EU standard of originality was first introduced with specific subject matter in mind and was intended to be a concept that could include minimally creative and still "controversial" works.[94]

After its introduction the standard was criticised as being "low",[95] and it seemed at least to set a lower threshold than the continental standard. According to some commentators, the standard's wording could be read as requiring little more than that the work has not been copied.[96] Some hold that, right from the start, this was a standard somewhere in the middle between the common law and continental law traditions.[97] However, as shown above, it is no straightforward task to identify where the "middle" between these two standards lies.

Later, to ensure the functioning of the internal market, a very similar standard was adopted in relation to other subject-matter that was protected differently in different Member States, namely photographs and databases.[98] It has been suggested that the

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[93] Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 101; also recital 1 in the preamble of the Computer Programs Directive.

[94] The formulation of the "author's own intellectual creation" standard was said to have been added to ensure that the countries which excluded software due to lack of artistic quality would not be able to do so, and, in general, stipulated a lower standard closer to the common law understanding of originality: Jerome Huet and Jane C. Ginsburg, 'Computer Programs in E ams in Europe: A Compar ope: A Comparative Analysis of the e Analysis of the 1991 EC Software Directive ' (1992) 30 Columbia Journal of Transnational Law, pp. 337-338.

[95] Walter and Lewinski, *European Copyright Law. A Commentary*, p. 94.

[96] Ibid., pp. 94-98; also Huet and Ginsburg, 'Computer Programs in E ams in Europe: A Compar ope: A Comparative Analysis of the e Analysis of the 1991 EC Software Directive ', p. 338.

[97] Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 101.

[98] Term of Protection Directive, Art. 6, and Database Directive, Art. 3.

same originality standard was used for databases because the process of creating them was similar to that of creating computer programs.[99] However, when proposing it, the Commission reasoned that it should be based on the *continental* tradition because the types of databases that were protectable in the common law sense were already covered by the *sui generis* database right.[100] Further doubt regarding the "pedigree" (and thus the interpretation) of this notion of originality arises in the case of photographs. The wording of the preamble of the Term of Protection Directive indicates that they are to be considered original if they are the author's own intellectual creation *reflecting his personality.*[101]

Thus, in circumstances that are still disputed among legal scholars, several legal requirements of originality entered the EU copyright system in the space of a few years, and their consistency with the internal logic of European copyright was left for the lawyers to make sense of. Consequently, the CJEU has worked out a standard of originality which arguably does not directly follow any of its antecedents.

CJEU case law

The CJEU's judicial harmonisation of the standard of originality started in 2009 with the *Infopaq* case, where the Court was asked to decide whether scanning, storing, and printing of snippets from newspaper articles amounted to reproduction of a protected work under EU copyright law, namely the InfoSoc Directive. Here the Court declared that the notion of reproduction, which is an autonomous concept of EU law, is impossible to interpret without also interpreting the concept of "work" – another autonomous concept in EU copyright law. Consequently, the "work" was concluded to be "subject matter which is original in the sense that it is its *author's own intellectual creation*"[102] (emphasis added). Hence, if such an original work is reproduced or a part of it, which is in itself original, is reproduced, the exclusive right provided in art. 2 of the InfoSoc Directive is violated. The CJEU then left for the national court to decide whether excerpts of eleven words from a clearly original work (newspaper article) *are* original in the meaning of "author's own intellectual creation", at the same time leaving no doubt that they *could* be.

Indeed, explaining the newly introduced notion of originality, the Court stressed that the individual words which comprise the work (in this case, newspaper headlines) are not protectable: it is only through their choice, sequence, and combination that intellectual creation can be achieved.[103] For instance, in newspaper articles, it is "the

[99] Margoni, 'Margoni, Thomas, The Harmonisation of EU Copyright Law: The Originality Standard ' p. 12.

[100] Rosati, *Originality in EU Copyright. Full Harmonization through Case Law*, p. 67.

[101] Term of Protection Directive, recital 16.

[102] *Infopaq*, para. 37.

[103] Ibid., para 45.

form, the manner in which the subject is presented and the linguistic expression"[104] that makes it the author's *own intellectual creation*. Moreover, when deciding on the originality of a part of a work (such as an 11-word excerpt of an article), the Court provided that the parts can in themselves communicate to the reader "the expression of the intellectual creation of the author of that article".[105] Therefore, if determined to be the author's own intellectual creation, they too may be protected independently from the whole.

Next, in *BSA,*[106] the CJEU faced the question of whether a graphic user interface can be protected by copyright as a part of a "computer programme". The Court provided that only source code, object code and preparatory design work for a computer program are protected,[107] and that the graphic user interface is merely one element of the program, not its separate expression.[108] However, the Court concluded that a graphic user interface can be protected by copyright in its own right if it is an original work in the meaning of the "author's own intellectual creation" standard provided in *Infopaq*. The Court stressed that, when making an originality assessment, "the specific arrangement or configuration of all the components which form part of the graphic user interface" have to be taken into account, and that components or configuration of those components which are dictated by their *technical function only*, cannot meet this standard.[109] Merely following the requirements of technical function prevents the author from achieving an "intellectual creation" since it precludes the expression of creativity in an original way.[110]

Thus, the *BSA* case clarified the nature of the "arrangement" of elements which has to be performed to achieve originality. According to the CJEU, the arrangement must be "free", i.e., the options for achieving the desired result must not be too limited.[111] The same rationale appears in 2011, in *Football Association Premier League,*[112] where the CJEU had to answer, among many other things, the question

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[104] Ibid., para. 44.

[105] Ibid., para. 47.

[106] Case C-393/09, Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury, ECLI:EU:C:2010:816 (*BSA*).

[107] Thus clarifying the notion of "computer program" in Art. 1(1) Computer Programs Directive.

[108] *BSA,* para. 41.

[109] Ibid., paras. 48-49.

[110] Ibid., para. 50.

[111] Ibid., para. 49.

[112] Joined cases C-403/08 and C-429/08, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain,

of whether Premier League matches could be copyrighted in their own right. The CJEU ruled that a football game cannot be a work in the copyright sense because it lacks originality. Sporting events are subject to rules and leave "no room for creative freedom for the purposes of copyright".[113]

Finally, later the same year, the Court also decided in *Painer,*[114] a case involving the unauthorised reproduction and publication of, as well as removal of the author's name from, a school portrait photograph. The Court, among other things, had to rule on whether the picture in question could be protected by copyright, since the degree of formative freedom when creating it was rather restricted.[115] In response, the CJEU, now explicitly, pronounced the author's ability to make free and creative choices as the key condition for originality.[116] According to the Court, when it comes to portrait photography, these free choices are made when the author chooses the background, the subject's pose, the lighting, the framing of the photo, the angle of view, the atmosphere created and developing techniques for the photograph.[117] "By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'".[118] At the same time, *Painer* also explicitly confirmed that all works which are original deserve the same level of protection, which was hitherto not always the case in continental countries like Germany, where the emphasis on creativity and individuality as the yardstick for protection was seen as a reason to treat less creative works as less protectable, especially in respect to derivative creativity.[119]

The development of the standard continued in *Football Dataco,*[120] where the Court, dealing with a question of copyright protection for an annual list of fixtures to be played in English and Scottish football leagues, explicitly dismissed the British "skill and labour" standard, stating that even significant labour, skill, and

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Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen, and Karen Murphy v Media Protection Services Ltd, ECLI:EU:C:2011:631 (*Football Association Premier League*).

[113] Ibid., para. 98.

[114] Case C-145/10, Eva Maria Painer v Standard Verlags GmbH and others, ECLI:EU:C:2011:798 (*Painer)*.

[115] Ibid., para. 85.

[116] Ibid., para. 89.

[117] Ibid., para. 91.

[118] Ibid., para 92.

[119] See Section 5.3.3.3 above and also Loewenheim, Leistner and Ohly, *Urheberrecht. Komentar*, p. 136.

[120] Case C-604/10 Football Dataco Ltd, Football Association Premier League Ltd, Football League Ltd, Scottish Premier League Ltd, Scottish Football League, PA Sport UK Ltd v Yahoo! UK Ltd, Stan James (Abingdon) Ltd, Stan James plc, Enetpulse ApS., ECLI:EU:C:2012:115 (*Football Dataco*).

intellectual effort have no bearing on whether a database can be covered by copyright.[121] Nor does "adding important significance" to the data help to attain originality.[122] The Court, referring to all the previous cases of *Infopaq, BSA, Football Association Premier League* and *Painer,* reiterated that originality is about making "free and creative choices" which place the "personal touch" on the final work, and which no amount of labour can replace.[123]

In the more recent case on the question of originality, the *Cofemel* decision,[124] the CJEU further cemented the role of free and creative choices, while also settling the EU originality standard as a compromise between the common law and continental systems. In this case, the national court referring for a preliminary ruling had to resolve a dispute regarding copying of designs of jeans, sweatshirts, and t-shirts produced by G-Star in Portugal. The CJEU was asked whether national law could hold articles of applied art and industrial designs to a higher standard of originality. On this point, the CJEU concluded that "free and creative choices" and "personal touch" are the key elements in determining a work's originality, and whether the design in question also produces an "aesthetic effect" is irrelevant for this assessment.[125]

Further, when discussing the interface between copyright protection and the protection given by design law, the CJEU stressed that the objectives of these two types of protection are "fundamentally different".[126] Design law protects new and distinctive subject matter which is capable of being mass produced and with the aim of ensuring a return on the investment necessary for its creation and production.[127] Copyright, on the other hand, supposedly has some other purpose (the court chose not to elaborate on what this might be) related to the fact that the duration of protection for "works" is significantly longer than that for design. Copyright protection is *reserved* to works which are the result of the author's own intellectual creation, not subject matter that just has an aesthetic effect, the Court concluded.

Finally, in *Brompton Bicycle,*[128] regarding the protectability of the shape and the folding positions of the Brompton bicycle, the Court stressed that what has to be

[121] Ibid., para 46.

[122] Ibid., para 46.

[123] Ibid., para 38.

[124]Case C-683/17, Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721 (*Cofemel*).

[125] Ibid., para. 54.

[126] Ibid., para. 50.

[127] Ibid., para. 50

[128] Case C-833/18, SI and Brompton Bicycle Ltd v Chedech / Get2Get, ECLI:EU:C:2020:461 (*Brompton Bicycle*).

taken into consideration when determining originality are the *actual* free and creative choices made by the author and whether they reflect the author's personality.[129] The fact that choices were available to the author (the same technical result could have been achieved in several ways) was not decisive; instead, the national courts were left to check whether the conditions for originality existed when the author was creating the work.[130] More specifically, it was to be understood that if the choices made during creation were to satisfy technical requirements and to achieve a technical result (and thus were not *creative*), the conditions for originality are not met and the work is not protected.[131]

The choices made in the construction of EU originality

These are the landmark cases that have shaped the standard of originality in EU copyright law. There have been further CJEU decisions related to originality,[132] but few are as significant as the ones presented above. As mentioned when reviewing the different European national approaches to originality, it is apparent that the CJEU was making certain choices and that the path taken did not fully embrace either of the standards available in the EU Member States. Moreover, as shown in the first part of the thesis, the European copyright tradition has other conceptual structures (sediments), some of which were followed to a certain extent and others which were set aside.

First of all, one can note that several essential features of the originality requirement can be deduced from the cases analysed above:

1. Physical expression is not the object of protection

The formulation of the standard of originality by the CJEU follows the international copyright system (and disregards the common law tradition with its fixed list of protectable subject-matter) in that the form the immaterial creative work takes is seen as mostly irrelevant. *Cofemel* clarified the issue regarding the inclusion of applied art[133] and *Brompton Bicycle* asserted that even functional "works" could be protected. In *Painer,* the Court also clearly asserted that once the threshold of

[129] Ibid., para. 34.

[130] Ibid., para 37.

[131] Ibid., para. 36.

[132] The other cases where the originality criterion was mentioned after *Infopaq* include: C-406/10 (SAS Institute), C-355/12 (*Nintendo*), C-30/14 (*Ryanair*), C-419/13 (*Allposters*).

[133] The copyright protection of which had been debated even before the Berne Convention and after adopting it. See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 453-469.

originality is crossed, any type of work, regardless of the "degree of creative freedom" exercised, is to be given the same scope of protection.[134]

It has been observed that even in its language the Court has consistently treated "originality" and "work" as synonymous and never mentioned any other possible criteria (such as fixation) by which to assess the protectability of works in these cases.[135] Emphasis is thus placed not on the form of the resulting work, but on its other qualities embedded in the requirement of originality. As will be shown below, even the limitation of protection as expressed in the "expression" requirement excludes certain works solely because of their inability to be objectively perceived by others.[136] No further concrete physical delimitations are provided.

In the *Cofemel* case, the Court even went so far as to say that the objective of copyright is different from that of design law and that the latter is specifically aimed at recouping investment.[137] Indeed, nowhere in the reasoning of the Court in the numerous cases does it take into account the level of investment needed to create works and the fact that this may vary depending on the category to which the work belongs. Even when the normative content of EU law, in fact, can be seen as hinting at different scopes of protection, for instance, in the case of databases[138] or industrial designs,[139] the Court has drawn no distinction between these different types of works in its interpretation of the standard of originality.[140]

It is possible to conclude, then, that the object of protection according to the CJEU is the "work" that can be embedded in any "subject matter" and is, essentially, an authorial "production", to use the terminology of the Berne Convention.[141] It is something the author does (achieving originality in the meantime) and something that is protectable once objectively perceivable[142] – but *not* for reasons having to do with the existence of the object. The specific object becomes subject to protection

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[134] *Painer,* para. 97, later confirmed in *Cofemel,* para. 35.

[135] Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution', pp. 780-783.

[136] This will be elaborated in Section 5.3.4.

[137] *Cofemel,* para. 50.

[138] For instance, even the scope of the right of reproduction of original databases in Art. 5 of the Database Directive is somewhat different from the general right of reproduction enshrined in Art. 2 of the InfoSoc Directive.

[139] For analysis on how the harmonisation of the copyright protection for industrial designs went against the initial purpose of the EU design law, see Lionel Bently, 'The return of industrial copyright?' (2012) 34 European Intellectual Property Review 654, pp. 654-672.

[140] In the cases of *Football Dataco, SAS*, *Flos* and *Cofemel.* See Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution', p. 783.

[141] Berne Convention, Art. 2.

[142] See the next requirement of protectability, namely, "expression" in Section 5.3.4.

because of the immaterial authorial production that is embedded in that object, and all original "works" are protected to the same extent, not excluding the possibility that parts of the physical object in question are not covered by the authorial "work".

This can be seen as consistent with the logical structures which sedimented into the European legal tradition through the Romantic period, as well as the technological developments which required copyright to include different kinds of subject matter and make the criteria of protectability neutral and inclusive. At the same time, the CJEU goes even further, declaring that the same originality test applies to all subject matter, be it a photograph, a pair of jeans or a bicycle.

2. Quality or quantity definitely do not matter

The Berne Convention and the previous EU directives had already made it clear that quality, merit, purpose and similar factors are excluded from the legal assessment of originality.[143] In *Infopaq*, however, the fact that the "work" in question was able to be as short as 11 words still did not persuade the Court to talk about any *de minimis* requirement for protection. The *Football Dataco* case clarified that neither skill, nor effort, nor even *intellectual effort*[144] are meaningful from the perspective of EU copyright. Adding value (meaning) to raw data is not relevant, aesthetic effect is of no importance either.[145] Lastly, it was also proclaimed that the functionality of a work (in this case, a computer program) is not something to be protected in itself, but that the final expression of that functionality through free and creative choices is.[146]

Hence, the scope of protection that the CJEU was drawing is essentially very "personal" in nature. Even from an "immaterial" perspective, the criterion does not assess what is added to the raw data; rather it concentrates on whether the process of creation and the result have been touched by the author's personality. This touch is assessed through the presence of free and creative choices.

Again, looking from the perspective of the legal sediments in the European copyright system, this is the crystalised version of originality that was formed through the influence of Romanticism and technological challenges to copyright

[143] See, e.g., Stef van Gompel and Erlend Lavik, 'Quality, Merit, Aesthetics nad Purpose: An Inquiry Into EU Copyright Law's Eschewal of other Criteria than Originality' 236 Revue Internationale du Droit d'Auteur (RIDA).

[144] Even though fitting the general idea of originality expressed in other cases, it is still rather interesting how not even intellectual effort is sufficient to satisfy the criterion of "author's own intellectual creation".

[145] *Cofemel*, para. 50, where a comparison between the nature of protection of designs and copyright is made.

[146] *SAS Institute*, para. 46.

law. On the other hand, it is a completely unified version of this approach, indicating as it does that no other criteria such as judgement, investment, or even aesthetic effect or similar external qualities which could be seen as a reflection of authorial originality, are enough to determine protectability. Accordingly, stricter requirements that would unduly exclude non-artistic subject matter are not permitted.

3. Originality is achieved through personal input

For lack of a better name, the test of originality that the CJEU formulated might be called a "personal input" assessment. When explaining the process of achieving originality, the CJEU, in *Infopaq* and *BSA,* centred on the idea of "arrangement" of elements into a protectable whole. On the other hand, in *Painer*, the stress was on the work's overall expression of the free and creative choices through which the author stamps it with her personal touch. That freedom of choice is a necessary prerequisite for creating something original is also confirmed in *Football Association Premier League* and *BSA.*

Where the test started its life, in *Infopaq,* with no clear answer as to whether the arrangement of the raw material could be performed by mere intellectual effort and skill (for instance, following the industry standard of news reporting), the later cases settle the issue. The Court talks about free *creative* choices, but in fact, as shown above, the level of this creativity does not matter much. The test requires something that is creative in the sense that a person chose a particular solution from a range of possible alternatives (the choice was "free") and the choice was not driven by technical considerations only. The solution has to impart to the work something of the author herself (impart the author's personal touch, express her personality), but as demonstrated by *Brompton*, this personal touch seems to be assessable not on the basis of any external characteristics but after analysis of the choices made and the *purpose* behind them.[147]

This is also a clear link to the technological challenges European copyright had to face, as well as the emphasis on human subjectivity and non-mechanical human activity as the basis for the copyright protection formulated at that time. Machines carry out pre-programmed commands; an author, on the other hand, adds a personal touch to the work due to the subjectivity and spontaneity only a human being is capable of. Even from this perspective, the criterion is purified to the extreme. As long as the choices are subjective, the exact form of the personal input does not seem to matter.

[147] Something that corresponds to the "categorical intention" test described by Buccafusco, 'A Theory of Copyright Authorship', p. 1261.

This is especially visible in the recent *Brompton* case, where the Court dismissed from consideration in the assessment of originality all factors except the nature of choices made by the author. The nature of the work (both in the sense of the functional object and the design of that object) does not matter; what is key, according to the CJEU, is that the choices made by the designer when creating the shape of the bike are "free" and "creative" and the result reflects the creator's personality.[148] The fact that the shape is functional and likely the most effective way to achieve the technical result is merely to be taken into account to discern the factors influencing the creator's choices,[149] and thus does not rule out originality. Such aspects as the dangers of cumulative protection, analysed by the Advocate General in his Opinion,[150] were not mentioned by the Court as relevant either. If the creator was acting freely and not just in line with the technical constraints, there is a "work" to be protected. It remains unclear if the author can make free and creative choices and still fail to imprint her personality on the resulting work, but so far, the CJEU appears to believe that the two go inextricably hand-in-hand.

4. Materials used are not relevant for protectability

As with the final form the work takes, so too with the materials and tools used to create it: the CJEU does not delimit the protection criteria in these respects. In *Infopaq*, the Court noted that it is possible to combine unprotectable elements, such as words, and make them into an own intellectual creation through the choice of their combination and sequence. On the other hand, as mentioned above, only free and creative choices in relation to the elements thus combined can lead to protectability, as was ascertained in *Football Dataco, SAS Institute,* and others. Even though the issue of the combination of protectable elements has not come up at all in CJEU cases dealing with originality, in such cases as *Painer* (concerning choice of elements for a photograph) or *BSA* (concerning the possibility of a graphical user interface to be protected as a work) the likelihood of the author also combining protectable elements was high. Thus, the *freedom* of creative choices is the main prerequisite for protection, and the author's right to reproduce certain elements in the first place has not so far been an issue from a protectability perspective.

Having now observed some of the trends in the development of the requirement of originality in the case law, one can ask what subsurface structures of European

[148] *Brompton,* paras. 33-37.

[149] Ibid. paras. 35-36.

[150] Opinion of Advocate General M. Campos Sánchez-Bordona in the case C-833/18, delivered on 6th of February 2020, paras. 36-56.

copyright the CJEU left aside. First of all, the Court has chosen to accept as protectable the subjectivity and humanity of the author only when it is expressed in a special personal way through the making of free and creative choices. No amount of skill and judgement, to say nothing of labour or investment, will be enough to justify protection if the subjective choices are not present. Where the British standard of originality, in the face of Romanticism and technological challenges, attempted to balance between subjectivity and economic considerations,[151] the CJEU has chosen to lean on the idea of the ultimate value of human subjectivity and personality. What is more, as observed above, the criterion, which directly echoes the personality-based justifications of copyright protection, is purified to become completely neutral with respect to the medium on which the personality is imprinted and blind to the resulting work except where it can be evidence of authorial activity in the moment of its creation. Correspondingly, all original "works" are protected to the same extent, whatever their purpose or expression. Even in the continental EU Member States before harmonisation, such generalisation and commitment to a single principle for protection was unusual.

In this way, a conclusion presents itself that the work of any "author" is of the same value and that all authors, no matter their degree of creative freedom, quality, tools, etc., are of equal worth. Having brought the requirement of originality to such a level of abstraction and neutrality, there is little room left to distinguish between artistic works and others, or to raise the threshold of protectability based on external considerations such as public interest or policy. Such a step would effectively entail differentiating between more and less valuable persons, which is hard to imagine in today's society and given the commitment to human and fundamental rights,[152] as well as the principle of non-discrimination.

One area where the CJEU still may have some leeway in interpreting the requirement of originality is the criterion of "personal touch", used in cases on protectability since the *Painer* decision. It stipulates some sort of "special personal input" by the author in the final work, and the continental tradition, from which the notion stems, has treated it in at least a few cases as an objective standard, something that might be visible in the work itself, making it unique in some way. The CJEU does not make clear whether the fact that free and creative choices under normal circumstances are arbitrary and dictated by the personal decisions of the author

[151] See Section 3.5 of the thesis.

[152] See Geiger and Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!', pp.282-307, on the topic of increasing commitment to fundamental rights in the context of EU copyright.

inevitably stamps the work with the "personal touch",[153] or whether they are separate criteria.[154]

Whereas in *Painer* the "personal touch" of the author was presumed to be a consequence of free creative choices,[155] in *Cofemel*, this was already named as a "necessary" and "sufficient" condition.[156] On the other hand, *Funke Medien*, for instance, did not up the same idea of necessity, but rather repeated the wording of the *Painer* decision.[157] It is never clarified whether free and creative choices can fail to leave a personal touch in a work.[158]

Given its explicit rejection of the relevance to copyright protection of differences between works, their value and other qualities, EU copyright law is unlikely to make "personal touch" into a criterion with a separate independent meaning, thereby raising the bar of protectability. As such, following the logic of *Cofemel,* EU copyright has been evolving in the direction of protection of more fundamental values that lie in the human ability to make arbitrary choices in the first place, with little regard to their actual result.

The conceptualisation of author and the originality test

Consequently, if we consider how this (more or less) new standard of originality looks from the perspective of author, its framing of the author as the sole source of work and the source of creativity and inspiration expressed through subjective free creative choices suggests the conceptualisation that this thesis calls *genius,* as described in Chapter 2. The elements of what can be called an author *craftsman* are utterly rejected by the most recent developments in EU copyright, in that the amount of labour and skill exercised has no bearing on who counts as an author in law. Moreover, the aesthetic effect produced by the creative object – which would also

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[153] Something that Quaedvlieg argues to be the suitable interpretation of the criterion: Quaedvlieg, 'The tripod of originality and the concept of work in Dutch and European copyright', p. 1106.

[154] Bently and others, *Intellectual Property Law*, p. 101, expresses the opinion that both the final individualised result and the free creative choices must be present to render the work protectable.

[155] *Painer*, paras. 88-89: "an intellectual creation is an author's own if it reflects the author's personality.[…] That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices."

[156] *Cofeme,l* para. 30. A somewhat similar wording but as yet without the "necessity" for the personal touch was used even in Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634 (*Reckhoff*), where the Court stated that a photograph can be protected if it is "intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph". The *Cofemel* formulation was later repeated in *Brompton* para. 23.

[157] Where it seems to be presumed that if free creative choices are made, the author's personal touch is present.

[158] A possible interpretation of the phrasing in *Brompton*, para. 38.

be typical for a work of craftsmanship as something directed towards the impressions and judgement of others – is not relevant for protection either. Nor are any other qualities that might be important to the consumer or society at large. At the same time, perhaps because of a confluence of continental and common law logic or as a decisive movement in the direction already defined by technological challenges, the protection that might be justified by the creative spark of "genius" is given to (almost) any creative act.

Perhaps there is still room to interpret the "personal touch" criterion in a way that makes the work of authorship more "special", raising the protectability bar and leaving less creative works only eligible for other forms of protection. However, because the test of originality is so heavily based on the protection of the author's personality and personal relationship to her work, it follows that the fundamental rights of freedom of expression,[159] artistic freedom,[160] freedom from discrimination,[161] etc., will almost certainly demand that copyright protection of a work that reflects one's own personality be made accessible to *everyone*. What might have started as Romantic genius in an 18th-century artistic movement has filtered into the EU copyright law and through its technological challenges to become an inherent part of what it means to be human.

5.3.3.5. Conclusions on originality

The criterion of originality formulated by the CJEU in several landmark cases became a broad and inclusive concept, despite drawing heavily on what this thesis calls the author-*genius* conceptualisation. Indeed, the "author's own intellectual creation" standard was initially conceived in relation to computer software, databases and photographs – works that copyright law struggled to include due to the perceived lack of creativity involved in their production – and was only later extended to all subject matter. In effect, only works which are clearly not creative are excluded from copyright protection (such as non-creative databases), while works which show at least a minimum amount of creativity (minimal possibility and exercise of free and creative choices) are likely to be protected.[162] There are several

[159] Art. 11 CFR.

[160] Art. 13 CFR.

[161] Art. 21 CFR.

[162] There is still an ongoing discussion on what really is the lowest threshold of protection in the EU originality standard. See: Eleonora Rosati, 'Why Originality in copyright is not and should not be a meaningless requirement' (2018) 13 Journal of Intellectual Property Law and Practice 597, pp. 597-598.

possible ways to interpret "own intellectual creation", and the CJEU so far seems to have chosen to interpret it as something that anyone can easily achieve.[163]

The EU standard can thus be seen as a new creation not even "in the middle" of the classical continental and common law originality standards. It borrows some of their key features but combines them in a novel way, becoming more inclusive than either approach.[164] The "original" author in EU copyright law is not someone who needs to possess any rare skill and not someone who creates something unique or valuable. Nor does this author have to work hard or make any investment.

Another important aspect of the EU originality criterion is that it completely dismisses any kind of utilitarian reasoning or economic justification for protection. There is no talk about a balance of interests here, and there is certainly no mention of the benefit (economic, aesthetic or otherwise) to the rest of the society.[165] Thus, not only is the modified author-*genius* the predominant concept when assessing originality; other concepts like *craftsman*, *servant* or *resource* are also clearly excluded.

This picture of the conceptualisations of author and the subsurface structures underlying the threshold of protection in EU copyright law is only reinforced by the second protectability criterion developed by the CJEU.

5.3.4. "Expression"

5.3.4.1. The external limitation of "work" in copyright law

Probably ever since the Berne Convention, there has been debate about the limits of protection and the boundaries of certain subject matter in international copyright law.[166] It is generally agreed that the list provided in Art. 2 of the Berne Convention is non-exhaustive, merely containing examples of protected works, even though there are certain doubts about the article's assertion that protected works should fall within literary, scientific or artistic domains. There are also some hints in the Berne

[163] However, as mentioned, it remains to be seen how the CJEU will further interpret the meaning and importance of the "personal touch" criterion as this might raise the threshold of the originality requirement.

[164]Rahmatian refers to it as "hyena" or something between a dog and a cat: Rahmatian, 'Originality in UK Copyright law: the Old "Skill and Labour" Doctrine Under Pressure', p. 23.

[165] Something that A. Drassinower claims is at the heart of the whole copyright system, if approached from the "internal logic" perspective. See: Drassinower, *What's Wrong With Copying?*, p. 10.

[166]See Caterina Sganga, 'The notion of "work" in EU copyright law after Levola Hengelo: one answer given, three questionmarks ahead' (2019) 41 European Intellectual Property Review 415, p. 422.

Convention of the importance of the idea/expression dichotomy,[167] which was later explicitly provided as a principle of copyright law in the TRIPS Agreement.[168] Aside from that, members of the Berne Union have always had their own approaches to the importance of physical expressions of protected works.

Among the Member States of the EU it was generally accepted that some had "fixation" as a necessary condition of protection, meaning that a work had to be fixed in some material form in order to be protectable, while others did not have this requirement.[169] It has been observed that even in countries where fixation was a requirement, it was mostly for evidentiary purposes, as copyright was still vested in the immaterial work, not its fixation.[170]

The *Levola*[171] case, in 2018, was the first time that EU copyright law introduced an external limit for what "work" could mean for the purposes of protection. This thesis here uses the notion of "external" limit to mean that the criterion of "expression" does not necessarily indicate a physical limitation, but rather serves as a limit to the form the immaterial work can take. This will be explained in the section below.

5.3.4.2. The second criterion is introduced

As mentioned above, "work" was declared to be an autonomous concept of EU law already in 2009, in *Infopaq*, yet prior to *Levola,* it had no clear meaning outside of the fact that it must be original. *Levola* was one of the eagerly awaited cases from the CJEU specifically because of the breadth of this criterion formulated a decade previously.[172] In view of the precedence given to free and creative choices over all other possible requirements of protectability, there was a lively discussion on the possible outcomes of this case, where the main question was whether taste can be copyrightable.[173]

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[167] Art. 2 of the Berne Convention refers to works "whatever may be the mode of form of its expression" which is considered an important indication that ideas are not protected. See ibid., p. 407.

[168] TRIPS, Art. 9(2).

[169] Pila and Torremans, *European Intellectual Property Law*, p. 271.

[170] Ibid., p. 271. Antoine Latreille, 'From idea to fixation: a view of protected works' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), p. 146.

[171] Case C-310/17, Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899 (*Levola*).

[172] One of the interpretations of the CJEU originality judgements among copyright scholars was that the copyright is to protect anything that is creative, original and perceivable in any way, see: Caterina Sganga, 'Say nay to a tastier copyright: why the CJEU should deny copyright protection for taste (and smells)' (2018) 14 Journal of Intellectual Property Law and Practice 187, pp. 187-196.

[173] To illustrate the complexity of the question and the differences in opinion, one can refer to posts in the most reputable IP blogs published prior to the decision in November 2018: http://copyrightblog.kluweriplaw.com/2018/06/26/heksnkaas-cjeu-end-cheese-war-beginning-new-

The preliminary ruling by the CJEU here concerned a dispute originating in the Netherlands between Levola, which produces the "Heksenkaas" using a patented method of mixing herbs and soft cheese, and Smilde, which manufactured a similar-tasting product. Levola attempted to prevent Smilde's actions by claiming copyright in the taste of "Heksenkaas", arguing that it satisfied the criterion of being "author's own intellectual creation". In its decision the CJEU stated that to be considered a "work" (in the meaning of the InfoSoc Directive), the subject matter must, in fact, meet *two* cumulative conditions: to be original in the sense of the author's own intellectual creation, and to be an *expression* of this intellectual creation.[174] The Court thus concluded that *taste* is not a "work" as it does not satisfy the second criterion. To be "expressed" would entail existence of a subject matter that is "identifiable with sufficient precision and objectivity".[175] According to the Court, this was specifically to make sure that copyright protection authorities and individuals, especially other economic actors, are able to identify the protectable subject matter.[176] The taste of a food, on the other hand, is perceived subjectively, its perception can be affected by other factors, and in the current state of scientific development it cannot be precisely identified by institutions either.[177]

Soon after, the CJEU had a chance to apply this criterion in several more cases. In *Cofemel*, where the question of protectability of designs of jeans was discussed, the Court concluded that the "aesthetic effect" that a design might produce is only perceivable as a subjective sensation and therefore lacks the precision and objectivity necessary to conclude that the subject matter is a work with an "expression".[178] However, the Court seemed to imply that clothing design in general might be able to satisfy this criterion.[179]

Finally, in *Brompton*, the Court applied the two criteria of protectability when considering whether copyright protection was available for the shape and design of the famous bicycles, and asserted that the bicycle at issue, without doubt, satisfies the criterion of expression because it is objectively perceivable and identifiable with sufficient precision.[180]

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copyright-era/, http://ipkitten.blogspot.com/2018/07/the-ag-opinion-in-levola-hengelo-more.html (accessed 18 May 2021).

[174] *Levola*, paras. 35-37.

[175] Ibid., para. 40.

[176] Ibid., para. 41.

[177] Ibid., paras 42-43.

[178] *Cofemel*, para. 53.

[179] Ibid., para. 48.

[180] *Brompton*, para. 28.

5.3.4.3. The meaning of the new criterion

So far, this new criterion has been applied to such "subject matter" as taste, aesthetic effect, and bicycles, with varying success. Only bicycles, quite understandably, were found to be expressed with sufficient objectivity to be protected. On the other hand, the assessment of very different potential "works" illustrates the tendency of dematerialisation or what might be called "physical reality neutrality" pointed out in the previous section. The CJEU does not consider it important what physical medium the "work" is "expressed" in; all that matters is that it is original on the basis of the authorial creative process and that it is objectively perceivable.

In practice, such a choice of conceptual direction has the effect of making it hard to determine what is the work in a given situation, or rather what *isn't* the work. In the *Levola* case, the "something"[181] that was potentiallty the *expression* of the author's own intellectual creation was the taste of cheese, not the cheese itself. In *Cofemel*, perhaps due to the nature of the case (comparison of design and copyright protection), the "subject matter"[182] analysed was aesthetical effect rather than the design of clothing, or the jeans themselves. In the *Brompton* case, the disputed subject matter was, on the other hand, identified simply as the "bicycle".

At a more theoretical level, this inconsistency, even if problematic from the perspective of legal certainty – for the benefit of which the criterion was introduced[183] – simply demonstrates that the "work", in the framework chosen by the CJEU, can potentially be anything that the author has exercised her originality on. In the case of cheese, for instance, it is very easy to imagine that the way the cheese looks may also be a protectable "work" if original, while the taste, even if free and creative choices were exercised, will not be original (in the current state of technology), owing to the subjectivity of taste. A pair of jeans should likely be considered a purely functional item, and it is conceivable that their design might constitute a work (visibly identifiable and thus with sufficient precision); but their aesthetic effect is not a work, even if free and creative choices were exercised to achieve it. In the case of the Brompton bicycle, to say that the "work" *is* the bicycle is perhaps a simplistic conclusion, given that it remains to be seen what the work here really is, as it must be established which aspects of the bicycle reflect free and creative choices. It could thus be possible to claim that the shape or the design of the bicycle is the "work", depending on which of these could be seen as resulting from choices not solely dictated by the item's technical function. Thus, if

[181] *Levola*, para. 37: "[…] only something which is the expression of the author's own intellectual creation may be classified as a 'work' within the meaning of Directive 2001/29 […]" (emphasis added).

[182] *Cofemel*, para. 32: "[…] work that is subject of the Directive 2001/29 necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity […]" (emphasis added).

[183] *Levola*, para. 41.

"something" is objectively perceivable, it can be any aspect of reality – physical, or abstract[184] – and be protected. This refusal to connect the "work" to a more defined form might be a problem when setting the scope of the right of reproduction, as will be shown in the second part of this chapter.

Furthermore, "expression" in the vocabulary of a copyright lawyer (and hence, one might say, in the theoretical toolbox of the legal culture of the European copyright system) has several possible meanings, and the CJEU has recombined their different elements to (again) create a seemingly new criterion.

In general terms, an "expression" from the perspective of copyright law can be understood, first of all, in the sense of the idea/expression dichotomy,[185] where the "expression" is something more concrete than a mere idea. What differentiates the expression from the idea in this context is that the expression is a specific manifestation of an idea. In this sense, a copyright "expression" is not the same as a physical expression:[186] the expressions protected in copyright law are *immaterial* "works". For instance, an idea about presenting different facts which point to global warming being caused by human activity can be expressed through a text (of any form – digital or hand-written) or as a public speech using exactly the same combination of words, and both expressions are potentially protectable by copyright.[187] Folklore that is passed from mouth to ear without being fixed is another example of a work which is considered an "expression" and not an idea in the sense of the idea/expression dichotomy, but which does not have physical expression.[188]

Hence, specifically from the copyright perspective, what is protectable are ideas to which skill, effort, and labour (in the common law tradition) or creativity (in the continental tradition) have been "applied" to create a specific expression. In the light of the originality standard developed by the CJEU, EU copyright law protects those ideas which have been individualised and thus expressed by an author's free and

[184] One could, for instance, think about a design or shape of a product as the "work" but also a literary character as a "work" even if it could not be defined as merely a physical aspect of a book.

[185] The idea/expression dichotomy is not expressly provided in EU copyright law, with the exception of Computer Programs (Art. 1(2)). Generally, however, it has always been considered one of the most fundamental principles of copyright law and is explicitly provided in the text of the TRIPS Agreement (Art. 9(2)).

[186] See Rahmatian, *Copyrigh and Creativity. The making of Property Rights in Creative Works*, pp. 127-128.

[187] With the exception of the Member States with a specific fixation requirement for protection, or those with a special exception excluding public speeches from copyright protection because of the public nature of this work.

[188] Jani McCutcheon, 'The Concept of the Copyright Work under EU Law' (2019) 44 European Law Review 767, p. 773.

creative choices.[189] This, however, says nothing about the mode or form of their expression (to borrow the terminology of the Berne Convention[190]), making the idea/expression dichotomy difficult to apply in practice since it can be hard to distinguish between the two.[191] Consequently, in EU copyright law, the principle that copyright law protects only expressions but not ideas is related to the form the work takes. But it does not impose any requirements regarding this form, and the boundary between what is protectable and what is not does not rely on qualities of specific expression. For instance, regarding the *Levola* case, one could hardly claim that taste was denied protection because taste is merely an *idea*, not an expression of it.

In its decision in *Levola*, the CJEU drew on this dichotomy, explicitly referring to Art. 9(2) TRIPS Agreement, which provides that "*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*" [192] At the same time, the Court added elements that make the requirement of "expression" narrower than in the case of the idea/expression dichotomy.

As mentioned above, the CJEU stated that the "expression" as the criterion for protectability has to be not only individualised through creative choices, but also "*expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form"*.[193] In this connection, the Court then elaborated that (for example) "literary, pictorial, cinematographic or musical works" have a precise and objective form of expression, whereas the taste of food is identified with the sense of taste, which is not objective, and, moreover, liable to influence by various practical circumstances.[194]

Thus, even though tied to certain external qualities of a work, the expression requirement seems rather low. The Court's stance that something must *exist* in order to be protected is, of course, a natural one and perhaps needs no further analysis.[195]

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[189] As also confirmed by *Brompton,* para. 27.

[190] Berne Convention, Art. 2.

[191] Rahmatian, *Copyrigh and Creativity. The making of Property Rights in Creative Works*, pp. 125-127, 130-131; Angelopoulos and others, *Concise European Copyright Law*, p. 225.

[192] *Levola,* para. 39.

[193] Ibid.*,* para. 40.

[194] Ibid., para. 42. Here, the CJEU clearly sided with the position expressed in the opinion of AG Wathelet, that taste is not a work similar to other works as provided in the Berne Convention, since even though this list is not exhaustive, all the examples there refer to works which can be perceived either visually or aurally, but not those perceivable through touch, smell or taste. Opinion of AG Wathelet in *Levola*, ECLI:EU:C:2018:618, para. 51.

[195] McCutcheon, 'The Concept of the Copyright Work under EU Law', p. 772.

However, even with this low criterion, there is a threshold for what can count as protectable expression. After all, smell and taste both have a level of existence and can be perceived by others,[196] but the CJEU did not see taste as protectable because it was not possible to be perceived in an "objective" way.

At the same time, this "objectivity" should not be confused with the fixation requirement that is applied in some Member States. Even though there are those who warn that the current formulation of "expression" is so vague that it could allow the introduction of a requirement of fixation,[197] the CJEU's statement that the "expression" does not have to be "in permanent form"[198] seems to indicate a requirement less strict than "fixation". For instance, in the UK, where the requirement of fixation exists, a display of coloured lights is seen as not "fixed" enough to be protected,[199] whereas according to the logic of the CJEU's *expression*, such displays would surely be considered objectively identifiable.

Thus, the objectivity that the CJEU refers to appears to have less to do with a formal requirement than with the contextualisation of creative work, i.e., the *ability of others to perceive it and understand its limits*, even if no permanence is expected. The Court's clarification that precise and objective identification of taste is not *yet* available in the "current state of scientific development"[200] supports this view. It suggests that such identification may be possible in the future, and hence that the current exclusion of taste from protection might be a practical issue only. Of course, this leaves the question whether the sensation of taste can ever be as "objective" as sight and hearing.[201] Then again, the level of "expression" and "objectivity" of taste might be comparable to that of music, which has long been a subject matter of copyright. As yet, this question remains unanswered.

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[196] Before the *Levola* judgement, the Dutch courts had already granted protection for smells, even though in other Member States in which the question had been raised, sensory works had usually been denied protection. See Sganga, 'Say nay to a tastier copyright: why the CJEU should deny copyright protection for taste (and smells)', p. 189.

[197] Sganga, 'The notion of "work" in EU copyright law after Levola Hengelo: one answer given, three questionmarks ahead', p. 421.

[198] *Levola,* para. 40.

[199] Bently and Sherman, *Intellectual Property Law*, p. 92. On the other hand, at least in some instances, even the fixation requirement in the UK has been interpreted as meaning nothing more than "ability to get form" and the capability of being reproduced as well as being directly intelligible: Latreille, 'From idea to fixation: a view of protected works', pp. 144-145.

[200] *Levola*, para. 43.

[201] Ibid., para. 42, AG Opinion, para 60. See also McCutcheon, 'The Concept of the Copyright Work under EU Law', pp. 775-776.

5.3.4.4. Expression: the relationship between the author and other subjects

Differently from what could be observed for the development of the originality standard, the focus of the CJEU's argumentation in *Levola* was no longer solely on the author, her creative process, and her freedom to impart her personality (even though these remained important as well). Here the issue was also the relationship between the author and others: users, public institutions, other authors, etc. At the same time, as mentioned, the *Levola* judgement should presumably not be understood as a policy recommendation or an attempt to balance interests, but rather as an elaboration on what is practically impossible in the framework of copyright protection.

First of all, when explaining the need to express a work in an objective and precise manner, the CJEU did not mention any other policy arguments than identification for the purposes of protection and the establishment of infringement. There was no consideration from the perspective of users about the need to keep certain abstract works in the public domain or to avoid broad monopoly rights – both arguments that might be expected given the tendency, in recent decisions, to integrate the fundamental rights of users into the rationale of copyright law. This is especially striking as, traditionally, public interest considerations and avoidance of monopoly rights are foundational justifications for the idea/expression dichotomy.[202]

The idea of integrating the fundamental rights of users into the system of copyright protection could be connected to what this thesis calls the *steward* or *resource* conceptualisations of author. As already noted, the Court in *Levola* did not bring up this issue at all. Nor were there any complex deliberations on the unity of the work or the message the author intends to convey to the users that can only be ensured by the work's expression in a perceivable form, as might be expected if the romanticised *genius* concept of authorship were relied upon.

Thus, the main perspective taken in this decision is of legal certainty in matters of enforcement and infringement. The CJEU singled out authorities responsible for enforcement and other individuals, specifically mentioning economic actors and their need to understand the scope of protection of their competitors.[203] Consequently, the considerations of the Court were mostly economic in nature and related to the functioning of the market for copyrighted goods, as well as "legal certainty", and could be connected to ideas that took shape in the CJEU's first decisions on the relationship between EU law and copyright law, or just generally, the functioning of the internal market.

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[202] Neil Yap, 'The proof is in the planting: copyright protection of culinary arts and reform for the categories of authorial works' (2017) 39 European Intellectual Property Review 226, p. 228.

[203] *Levola,* para. 41.

Accordingly, due to the lack of further reasoning (many commentators have found the decision to be short and opaque[204]), it is hard to reconstruct any more of the conceptualisation of author from this decision. Nevertheless, what points to the previously used elements of the *genius* conceptualisation of author is, first of all, the reliance of the expression criterion on the originality requirement and the lack of any more concretely defined limit to what can be a "work". Secondly, the same perspective of author-*genius* can be extrapolated from the "disclaimer" the court inserted in the *Levola* judgement, which entertains the possibility that even sensory works might be identifiable with precision (and thus possibly protectable) in the future. Perhaps this mention of future possibilities of protection in the Advocate General's Opinion[205] and the decision of the Court[206] should not be taken too seriously,[207] as a closer analysis of the AG's Opinion reveals that the question of representation and identification through technology essentially derives from trademark law, which AG Wathelet references explicitly by drawing upon the *Sieckmann*[208] case.[209] However, such reasoning, again, sends a signal that originality is the "main" criterion of protection for copyright, while the criterion of "expression" is only a stopgap, limiting protection of original works until better technology exists to define their limits objectively and enable their enforcement. Moreover, the Court also made sure to point out that this requirement of "expression" is distinct from the requirement of fixation, stressing that the expression does not need to be in a permanent form, effectively keeping the scope of EU copyright protection broad and consistently delimited only by the originality requirement.

It should be noted that in this case, AG Wathelet specifically stressed the need to distinguish between the two criteria of the existence and originality of a "work",

[204] Sganga, 'The notion of "work" in EU copyright law after Levola Hengelo: one answer given, three questionmarks ahead', p. 415.

[205] AG Opinion in *Levola*, para. 57.

[206] *Levola,* para. 43, where the Court speaks about the "current state of scientific development".

[207] McCutcheon, 'The Concept of the Copyright Work under EU Law', p. 775.

[208] Case C-273/00, *Ralf Sieckmann v Deutsches Patent- und Markenamt*, ECLI:EU:C:2002:748 (*Sieckman*).

[209] In that case the CJEU specifically elaborated on the possibility to register smell as a trademark. Rejecting it, the Court argued that it is not possible to represent smell graphically – which was the requirement of the EU trademark law at that time. Later the requirement was changed both in the Trademark Directive and the Trademark Regulation to allow registration of marks which can be represented "using generally available technology". Hence, the question of representation of trademarks is related to their registrability and not directly to the overall scope of protection. There are other instruments in trademark law to avoid granting monopoly rights to something that is too abstract. This is not the case with copyright law.

arguing that they are not the same.[210] The CJEU, however, has clearly ignored this warning: not only has it not made clear the distinction, it has linked the "new" criterion of expression directly to originality in a way that obfuscates what should be established first, the originality or the expression.[211] The Court also specifically disregarded[212] the hints by the AG that in international copyright law, even with the "open" list of protectable subject matter in the Berne Convention,[213] protectability is implied for works perceivable by sight and hearing only. This, of course, leaves many uncertainties about the overall meaning of the "work" in the EU copyright legal system. But it also indicates that the CJEU might be quite seriously fixed upon the presumption that the specific formulation of the concept of originality must remain the main standard for protection and that no other limitations with respect to the physical aspects of "works" should be imposed beyond those which are completely necessary.

Consequently, though it includes "the others" in the equation of protectability, EU copyright law remains centred on what this thesis calls the concept of the author as *genius*. The "others" need only to be able to ascertain whether authorial activity has taken place. The work in question does not need to have any "effect" on them or to be for their benefit; such considerations are utterly unimportant to the system of EU copyright law. Similarly, no such effect or usefulness will be enough to satisfy the protectability criteria. This is partly understandable, as nothing but a work which has a clear expression can be objectively defined as an "object" (even though attained with the help of a legal fiction) at all. On the other hand, what opportunity there may have been to balance different interests through this new criterion was not grasped by the CJEU. In fact, the new requirement only served to confirm the direction in which the EU copyright standard of protectability was already headed.

5.3.5. Conclusions on protectability

Clearly, the standard of originality in EU law is broad and inclusive. It dismisses presumptions about one person's work being more valuable than another's and takes

[210] AG Opinion in *Levola,* para. 46.

[211] For more detailed analysis about how the CJEU seems to intentionally leave the criterion of originality as the main principle to delimit the scope of EU copyright protection see McCutcheon, 'The Concept of the Copyright Work under EU Law', pp. 785-786.

[212] Sganga, 'The notion of "work" in EU copyright law after Levola Hengelo: one answer given, three questionmarks ahead', p. 420.

[213] The Berne Convention states that the protectable works have to be in the "literary, scientific and artistic domain": Berne Convention Art. 2.

for granted the distinction between human and machine.[214] The author's intellectual creation is portrayed as a question of fact regarding free and creative choices, with a yet fuzzy interpretation of the meaning of "personal touch" required (or simply achieved). Thus, one could say that what is romanticised in this new kind of author in EU copyright is not the exclusivity of the creative activity, but rather its *inclusivity*.

Arguably, the criterion does not lose its meaning by becoming too low; it has its own logic, and while it is inclusive, it excludes plenty of "uninspired" products of mere skill, labour and effort, or candidates that are too simple or allow too few creative choices. As a result, not everything is protected by the copyright of the EU. Still, the standard was certainly a step down in terms of the protection threshold of many continental Member States and, perhaps, a step sideways for the common law countries. The CJEU's interpretation of the requirement of expression only strengthened this conceptual choice to purify the protectability requirements and tied them almost exclusively to the human author.

Although the author seen in the discussion above is a form of *genius*, the conceptualisation on which the EU logic of protection is built is not really the genius from the 18th-century literary and artistic movement. At the same time, EU copyright, when defining the creation phase that copyright protects, dismisses other conceptualisations of author such as *craftsman* or *servant/steward,* as it explicitly refuses to see any skill, judgement or investment as a basis for protection, and, even when given the chance, refuses to attach importance to the elements making up the work or the work's usefulness for and effect on wider society.

Following the CJEU's decisions, and as highlighted in the *Painer* case, the same originality standard now applies to all subject matter. Clearly, this implies that what matters for copyright protection is not what the object of this protection is, but something else, causing an overlap (if not complete blurring) between the notions of protected work and originality.[215] In the same vein, the *Levola* judgement makes it clear that the idea of protected subject-matter has to do mostly with the "work" embodied in the originality requirement and which can take any (physical) form,[216] with the only limitation being its perceptibility to others, which must be objective to the extent that is needed to understand the boundaries of the work and enforce exclusive rights related to it.

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[214] In the sense that the "personal touch" requirement is not given much separate content, seemingly with a presumption that the result of free and creative choices of any human always results in an individualised original "work".

[215] Sganga, 'The notion of "work" in EU copyright law after Levola Hengelo: one answer given, three questionmarks ahead', p. 417.

[216] McCutcheon, 'The Concept of the Copyright Work under EU Law', p. 784.

This specific model of dematerialisation of copyright law, i.e. detaching the ideology of protection from the "work" and attaching it to the author, serves both to include more creative works in the scope of protection and to make copyright protection more extensive.[217] If one is protecting not the physical manifestation of the work, but the immaterial work characterised as being the author's own intellectual creation and stamped with her personal touch, the exclusive rights also become decoupled from the physical medium. Is there then any difference if the work is shown physically, or sent through a wireless connection and shown to an audience as a photograph or re-drawn by another artist? If the "work" is still the same reflection of the author's free and creative choices in all these different media, it must be protected in the same way in all of them. The infringement happens not in relation to the physical medium, but in relation to the "work".

In keeping with the general trend of European copyright law and the direction of EU copyright already marked out in the early decisions of the CJEU,[218] the question of protectability analysed above was developed in isolation from other principles and norms of copyright law and seemingly unaffected by them. The purified conceptualisation of authorship, with its perception that genius lies in all of us, if we only have the chance to express it, nevertheless has to face the other legal sediments and structures of the European copyright system. These are, as explained earlier, the exclusivity and control that date back to the invention of the printing press and the grant of royal privileges, and the ownership that has to do with the "privatisation" of that exclusivity. As has been the case since the 19th century, the author-*genius* is employed as a justification for these sediments, and what follows is the figure of the *owner,* which has historically served as the basis for the development of all economic rights. What this thesis calls the author-*owner*, however, is but an attachment point for exclusivity and control -- the scope of the rights which define the exploitation stage, as well as their exceptions, are grounded in other conceptualisations of author.

[217] Even though it might have been the need for more extensive protection in the face of digitalisation that has put new wind in the sales of dematerialisation, as seen previously in Section 3.5.3. of this thesis.

[218] See Chapter 3.6 of this thesis.

5.4. Right of reproduction: how much agency for the author?

5.4.1. Introduction: reproduction and Creative User

If the criteria of protectability are decisive for what will be formally "accepted" into the copyright system, the reproduction right is one of the most important consequences of this acceptance. It is, one might say, the "original" right of copyright law, something that lies at the heart of what copyright is.[219] This right can be understood as an exclusive ability to prohibit or allow copying of a work; in modern copyright it has been defined as the right to control "fixation of a work in a tangible form".[220]

As shown in Chapter 3, the reproduction right has been the main mode of expression for the exclusivity and control that have made up the core of copyright since the invention of the printing press and the emergence of the system of royal privileges. The exclusivity of reproduction was the main tool for encouraging investment in a socially and politically useful technology and occupation, but it also implied control over what was disseminated to the populace, and how. In other words, from the very beginning, the reproduction right contained both the economic and the authoritative elements which would later change subjects (from monarch and printers to authors) and be complemented by additional rights (such as moral rights and different dissemination rights), but which are still traceable as part of European copyright tradition.

Furthermore, the reproduction right was from the start something that could be, and was even expected to be, transferred. In the regime of the royal privileges, the printers and publishers were administering a right that originally belonged to the sovereign, and even when the author became the initial holder of the right, it was standard practice to transfer the right for exploitation.[221] Its ideological connection to the author, even if consistently strengthened during the Romantic period and as a result of technological challenges, has remained unstable and has been complemented by other parts of copyright such as moral rights or, more recently,

[219] Caterina Sganga, 'The Right of Reproduction' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (1st edn, Routledge 2021) <Available at SSRN: https://ssrn.com/abstract=3803999>, p. 1.

[220] Mireille Van Eechoud, 'Adapting the Work' in Mireille van Eechoud (ed), *The Work of Authorship* (2014), p. 148.

[221] See Sections 3.2 and 3.3 of the thesis.

provisions protecting the author's bargaining position in contractual relationships.[222]

At the same time, as was briefly presented in Chapter 1, this thesis takes as its focal point the analysis of Creative User activities where "user" refers to the creator's use of and reliance on technology, as well as her non-professional background, but not to a lack of creativity.[223] The right of reproduction is a reflection of a certain model of exploitation of works which might be incompatible with the approach that Creative Users tend to adopt to culture and knowledge. Moreover, because many of the activities of Creative Users are transformative, the reproduction right can be a practical legal obstacle to their creative process. In this regard, EU copyright law is especially interesting, as the right of adaptation is not harmonised and issues of transformative use are almost certainly covered by "reproduction in part".[224]

Hence, here, the right of reproduction in EU copyright law will be analysed from the author perspective and having in mind the different legal sediments and approaches which together form a toolbox for EU legislative bodies and the CJEU to choose from. Similarly to the discussion on requirements for copyright protection, this analysis will show that European copyright has been manoeuvring between different approaches when it comes to the right of reproduction.

5.4.2. The multifaceted nature of the reproduction right

5.4.2.1. Brief history[225]

As explained earlier, the modern understanding of reproduction as something to be encouraged and also controlled is what can be called a legal sediment in the European copyright tradition, and is perhaps mainly attributable to the system of royal privileges in major European countries before the 18th century.[226] Prior to this shift and reproduction's newfound social significance, imitation and originality

[222] For more on the tools binding European and EU copyright to the author, see Chapter 2 of this thesis.

[223] See Section 1.1.3.2 of this thesis.

[224] Jonathan Griffiths, 'Chapter 20: The Role of the Court of Justice in the Development of European Union Copyright Law' in Irini A. Stamatoudi and Paul Torremans (eds), *EU Copyright Law A Commentary* (Edward Elgar 2014), pp. 1106-1107.

[225] Most points presented here are discussed in more detail in Chapter 3 of this thesis.

[226] See Section 3.2 of the thesis.

were understood rather differently. Imitation was a valued objective in itself and a way to give the original work authenticity and guarantee quality.[227]

Now present in all countries and more or less universal in its application,[228] the right of reproduction has historically been interpreted in different ways and its scope has varied. For instance, in English copyright law, the Statute of Anne of 1710 provided authors the right to print, reprint and export their books and prohibited others from selling, publishing, exposing to sale or even possessing the copies in the knowledge that they were printed, reprinted or imported without permission.[229] At the same time, the Statute of Anne made no mention of partial reproduction. As previously discussed in this thesis, partial reproductions were seen as legal and even as "new works" in their own right,[230] indicating a dedication to the economic rationale of exclusivity rather than to control over the content or formulation of texts. Even when partial reproduction began to be seen as infringement in the English law, the threshold for it was reproduction of a "substantial part", or "objective similarity",[231] a standard based largely on the presumption that copying someone's else's text is a matter of unjust enrichment or misappropriation.[232] The same approach has been sustained in the most recent edition of the UK CDPA[233] even though the tendency has been to regard ever smaller parts of a work as "substantial".[234]

Similarly, in early French copyright law, the right of reproduction was not a separate right, but rather a part of the so-called "publishing right" which gave authors an

[227] Craig, 'Reconstructing the Author-Self: Some Femminist Lessons for Copyright Law', p. 212. Something that can be seen as part of the author-*craftsman* logic discussed in Chapter 4.3.1.2 of the thesis.

[228] Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press 2019), pp. 284-285.

[229] Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org (accessed 13 November 2020).

[230] Alexander, 'Determining infringement in the eighteen and nineteen centuries in Britain: 'A ticklish job'', pp. 178-179; Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law', p. 647; see also Sections 3.4.3 and 3.5.2 of the thesis.

[231] Bently and others, *Intellectual Property Law*, p. 146.

[232] Alexander, 'Determining infringement in the eighteen and nineteen centuries in Britain: 'A ticklish job'' p. 180; Teilmann-Lock, *British and French Copyright. A Historical Study of Aesthetic Implications*, pp. 111-114.

[233] CDPA Section 16 (3), where the right of reproduction is defined as applying to the "whole work" or "any substantial part of it".

[234] Bently and others, *Intellectual Property Law*, p. 203.

exclusive possibility to sell and distribute their works.[235] Reproduction alone, without distribution, was a violation only when it took place as a preparation for distribution, was done with other commercial intent, or harmed the author's commercial interests in some other way.[236] With this logic in mind, the historical right of reproduction in French copyright law could be seen as giving the author control over physical copies of the work, allowing her to predict the potential number of users.[237] The authoritative control of the work's content and mode of presentation that was not transferred from the system of royal privileges to the revolutionary copyright could be said to have re-emerged through moral rights in French court practice during the 19th century.[238]

The English and French systems of regulating reproduction grew closer with the expansion of protected subject-matter and the internationalisation of copyright, when the ownership approach, prohibiting mere fixation, found strong expression in the European copyright system.[239] By then it was already clear that copyright would have to deal with other technologies than just the printing press. As a result, the right to reproduction was formulated, which allowed a level of control over creative works that could be seen as technology-neutral.[240] Other European countries followed suit. In Germany and Belgium, the new right of reproduction extended to reproductions by hand, which in the French system would have lacked commercial intent.[241]

5.4.2.2. Internationalisation and technological challenges

In international copyright law, the provisions of the right to reproduction can be found, first of all, in Art. 9(1) of the Berne Convention, according to which authors

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[235] French Copyright Act of 1793 (the Declaration of the Rights of Genius), Art. 1. See: French Literary and Artistic Property Act, Paris (1793), Primary Sources on Copyright (1450-1900), eds. L. Bently & M. Kretschmer, www.copyrighthistory.org (accessed 20 February 2020).

[236] Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, pp. 6-7.

[237] Severine Dusollier, 'Realigning Economic Rights with Exploitation of Works: The Control of Authors over the Circulation of Works in the Public Sphere' in Bernt Hugenholtz (ed), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Cluwer 2018), p.165.

[238] See Section 3.4.3 of this thesis.

[239] See Section 3.5.3 of this thesis for more discussion on this issue.

[240] See also Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 624. Even though the German doctrinal approach to the right of reproduction seems not to have been limited to reproduction as mere fixation, stressing the normative content of the right. See Bernt Hugenholtz, 'Caching and Copyright. The Right of Temporary Copying' (2000) 22 European Intellectual Property Review, p. 486, where B. Hugenholtz quotes J. Kohler and De Boor, who recount the German interpretation of the right of reproduction.

[241] Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, pp. 7-9.

of works protected by the Convention shall have the right to authorise the reproduction of those works in "any manner or form".[242] This broad general right was only added to the Convention in 1967, at the Stockholm Revision Conference. Its inclusion had previously been considered unnecessary, given that the reproduction right was already present in the national laws of Member States.[243] Thus, during the early years, where circumstances or new technological threats[244] warranted the inclusion of more detailed reproduction provisions in the system of international copyright law enshrined in the Berne Convention, this was accomplished through separate specific provisions.[245] For example, the Berlin Revision of 1908 introduced articles relating to reproduction of articles in newspapers and periodicals, protection from mechanical reproduction of musical works, and cinematographic reproduction of literary, scientific and artistic works.

Even if a general reproduction right was already provided by Berne Union members, its scope varied (as also shown above). This could be tolerated if each new technological issue was dealt with as it arose. However, when this type of problem solving became too complex, the approach was changed, from addressing reproduction through specific instances to providing a general right with specific exceptions. In other words, the international copyright law became based on the assumption that all copying is prohibited unless clearly allowed in the list of exceptions.[246] To ensure that this general reproduction right would not be "emptied of its significance",[247] the possible exceptions and limitations that members of the Berne union were allowed to introduce were circumscribed by what is now called three-step test (Art. 9(2) of the Berne Convention). The same scheme for protecting the reproduction right was adopted by the other international legal instruments, which, as already mentioned, can all be considered "special agreements" under Art.

[242] Berne Convention Art. 9(1).

[243] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, p. 622. Although by some accounts, the main reason might have been, on the contrary, the differences in the approach to the right of reproduction: Goldstein and Hugenholtz, *International Copyright. Principles, Law, and Practice*, p. 286; or the disagreement on the scope of exceptions and limitations: Sganga, 'The Right of Reproduction', p. 4.

[244] For instance, photographic works and cinematographic works came into the scope of copyright for their capacity to violate the rights of other authors perhaps even earlier than they did for their capacity to create original copyrightable works. See Section 5.5.

[245] Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, p. 60.

[246] Even though Z. Efroni points out that the formulation of the right in the Berne Convention might have a wider and a narrower interpretation as well: Zohar Efroni, *Access Right* (Oxford University Press 2011), pp. 210-212.

[247] In the words of one of the critics of the inclusion of the general reproduction right in the Stockholm revision, in Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, p. 64.

20 of the Convention,[248] solidifying the broad interpretation of reproduction as any fixation of work. Moreover, after the Berne Convention, the main conceptual tool for negotiating between allowed and prohibited reproduction became the three-step test. Though this clearly offered some flexibility when it came to allowing certain forms of reproduction, each permissible form had to be established via an exception for a specific context and act. This and other constraints imposed by the three-step test became even clearer following the WTO's interpretation of the test as transposed in the TRIPS Agreement.[249]

In most countries, however, the greatest push to solidify the formulation of reproduction as exclusively related to fixation came with the technological revolution of digitalisation. In the words of S. Dusollier, "the worm started eating the fruit" when legislators all over the world were faced with such issues as the reproduction of computer software[250] or just general reproduction of works through the use of computers. The challenge to decide if reproduction occurs at the moment of input into a computer system (digitisation) or at the moment of output (for instance through displaying the work on a computer screen), inevitably led to meticulous analysis of the technological processes in question. This, in turn, directly normalised the discussion around the protection of authors in connection with any fixation of the whole or part of their work, even if not immediately related to transmission to the public.[251] After all, the fixation of a work in digital form was not, in principle, legible to humans, but this did not prevent the conclusion that this process should be covered by the right of reproduction. Similar discussions occurred simultaneously in different legal systems,[252] which led to a continuous broadening of the scope of this right.

Just as the originality standard, in a historical perspective, has travelled from dealing with protected subject-matter to dealing with the creativity or effort/skill exerted by a human author, so too the reproduction right has become detached from the subject-matter and focused on the process of reproduction, which can occur in any form, using any technology, and apply to all protected works in the same way. Among the things that were lost in this transformation were the varied forms of exploitation that

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[248] See Chapter 2.

[249] Jane Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions' [2001] Revue Internationale du Droit d'Auteur (RIDA), pp. 11-16.

[250] Severine Dusollier, 'Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work' (2005) European Intellectual Property Review, p. 201.

[251] Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, pp. 97-111. See also Section 3.5.3 of this thesis.

[252] See, e.g., Jessica Litman, 'Fetishizing Copies' in Ruth Okediji (ed), *Copyright in An Age of Limitations and Exceptions* (Cambridge University Press 2017), for an account of the same discussion in the US system.

different works could be subjected to[253] and the understanding that the reproduction right was needed in order to protect concrete interests. Instead, reproduction was formulated as a disembodied property right that could belong to anyone. Even as it became increasingly "dematerialised", this right became concentrated on fixation and its prevention, without the connection to economic, social or author-centred motives that were historically present in the different national European legal cultures. As shown above, in EU copyright law this approach (albeit for slightly different reasons) is at the heart of the first copyright cases, where copyright's economic rights were taken on, and declared to be no different from industrial property rights.[254]

5.4.2.3. Reproduction right as a reflection of the exploitation stage

With this history of different formulations and perceptions in mind and looking back to the analysis in Chapter 3, it becomes clear that the right of reproduction is the first manifestation of exclusivity and control in the European copyright tradition and that it is directly related to the technology (the printing press) which made the multiplication of texts socially relevant. As such, this right was "invented" before authorship became important to the law, and this thesis suggests that the subjective creative author that we have in European copyright law today has evolved, in part, in response to the need to justify copyright's exclusivity and control.[255] The reproduction right that deals with the exploitation of works becomes a meeting point for a variety of interests and expectations, and ultimately a tool to "protect" the work of the author and the business interests of the entities exploiting it.

Seen from the perspective of modern copyright law, which is strongly marked by utilitarianism,[256] the right of reproduction, as one of the main legal tools for defining private control over protected works, imbues any multiplication or new fixation with a market value and potential for economic exploitation. Furthermore, these new fixations are products which can come into direct competition with the "original" works. Because of this, the author or the rightholder is given the right to control (re)production of her work and control the supply of the products to the market. Accordingly, new technology is seen as a "new market", and only market failure (excessive enforcement and licensing costs) can prevent the author or rightholder

[253] Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, p. 111.

[254] See Section 3.6 of the thesis. It should be recalled, however, that when analysing the "specific subject matter" of copyright in those early cases, the CJEU did not ignore other aspects of copyright but simply declared them detached from one another.

[255] See Chapter 3 and especially Section 3.4 of this thesis for more elaboration on this question.

[256] See Section 4.2.2 of the thesis for more elaboration on the utilitarian justifications which can be said to form a part of European copyright legal culture.

from exploiting it through the monopoly rights at her disposal.[257] There are those who claim that a utilitarian calculus of this kind is the only correct interpretation of the right of reproduction.[258]

While such logic appears to be mostly in keeping with even the old French and British approaches to reproduction discussed earlier, it has been taken to an extreme with the technological developments of digitalisation and the internationalisation of copyright. The emphasis in the most current "mere fixation" perspective is on the *act* of reproduction without reference to its broader implications. The object of ownership – the work – is seen as a true "object": its unity is presumed, and reproduction is an exception from this unity which must be closely controlled. Such obsession with the act of fixation in reproduction has been famously called a "copy-fetish" by J. Litman[259] and a "maximalist approach" by Z. Efroni.[260] One can say that by its logic, copyrighted works are treated as exclusive property, with any "trespassing" prohibited. It has been observed that such detached formal "propertisation" of copyright has been especially pronounced in EU copyright law.[261] This development has been presented as problematic and out of step with normal justifications of property and its natural limits in the constitutional laws of EU Member States, leaving the "property" logic void of its context.[262] The prohibition of any fixation may have originated with the economic logic of preventing software from being run on other machines and protecting a particular business model,[263] but it has since been extended to all works and thus all fixations (unless explicitly exempted), without the need to prove any harm to authors or rightholders' interests.

In response, several attempts have been made to reconceptualise the right of reproduction from a more nuanced, purpose-oriented and author-centred

[257] Like where, for instance, market failure is given as a reason for the private copying exception with duty of compensation, where otherwise it is seen as a market that the rightholder or author should have the possibility to exploit. See, e.g., Stavroula Karapapa, *Private Copying* (Routledge 2012), pp. 25-27.

[258] See Ernest Miller and Joan Feigenbaum, 'Taking the Copy Out of Copyright' in Tomas Sander (ed), *Security and Privacy in Digital Rights Management* (Springer 2001), p. 234, claiming this to be the case at least from the perspective of US copyright law.

[259] Litman, 'Fetishizing Copies', pp. 74-98.

[260] Efroni, *Access Right*, p. 217.

[261] Dusollier, 'Realigning Economic Rights with Exploitation of Works: The Control of Authors over the Circulation of Works in the Public Sphere', pp. 167-168.

[262] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, pp. 146-149. See also Rognstad, *Property Aspects of Intellectual Property*, on the dangers of relying on the generalised "metaphor" of property to talk about intellectual property, as summarised at pp. 200-201.

[263] See Section 3.5.3 of this thesis.

perspective,[264] or, alternatively, to completely replace it with some other, technology neutral right for control of dissemination.[265] There have been calls to reconceptualise the right of reproduction as one related to transmission of the "work" to others or as an act enabling authorial communication.[266] From this perspective, the formal property right as well as the physical act of duplication have little meaning; what is instead important is the purpose of reproduction or its ability to be used for disseminating the "work" and its contents. The author is not seen as entitled to sole control physical fixation of works, but she does, for instance, have exclusive control over the channel of communication and can prohibit reproductions made with the purpose or effect of transmitting the author's own intellectual creation to others.[267]

Thus, the ways in which the reproduction right is approached reflect distinct views on what "exploitation" of works could mean from a copyright perspective, testifying to an ongoing negotiation between the different values that this right to exclusivity and control in exploitation might embody. In some of these models, the author has little or no agency; the interests that are taken into consideration when shaping the right differ as well. The approach to reproduction that has developed in recent decades and generated much scholarly comment is consistent with a part of the legal sediments in the European copyright system insofar as it is based on exclusivity and control and has a privatised detached property right as its expression. At the same time, the form of this right, in the context of reproduction that we now have following the digital technological revolution, has extrapolated this control beyond what was imaginable at the time of the sediments' development and has departed from the internal logic of the norms subsequently developed in European legal systems. In other words, the right of reproduction is close to coming full circle and becoming a presumed right of a sovereign to control any interaction between the work and its audience.

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[264] See Sganga, 'The Right of Reproduction', p. 3.

[265] See, e.g., Efroni, *Access Right*, pp. 245-248; Taina Pihlajarinne, 'Should We Burry the Concept of Reproduction - Towards Principle-Based Assessment in Copyright Law?' (2017) 48 IIC 953, pp. 970-973; or Miller and Feigenbaum, 'Taking the Copy Out of Copyright', pp. 242-243.

[266] Drassinower, *What's Wrong With Copying?*, specifically claims that seeing copyright as a body of law which protects "the integrity of the work as a communicative act" is consistent with the internal structure of copyright as a field of law. See also Dusollier, 'Realigning Economic Rights with Exploitation of Works: The Control of Authors over the Circulation of Works in the Public Sphere', p. 190, where the suggestion is made to reconstruct the economic rights of the author specifically to enable control over communication of the work (non-economic exploitation); and Hugenholtz, 'Caching and Copyright. The Right of Temporary Copying', p. 486.

[267] A. Strowel calls this "dialogue" between humans that, according to him, should be reintroduced into the structure of the right of reproduction: Strowel, 'Reconstructing the Reproduction and Communication to the Public Rights: How to Align Copyright with Its Fundamentals', p. 213.

Of course, modern copyright law today has exceptions and limitations to mitigate the effect of the right, and control over the use of the work in certain situations is an effect of control over a technical process of reproduction, not the presumed absolute sovereign power of an author or a rightholder. Nevertheless, in EU copyright law there might be choices that could be made to steer the development of the right of reproduction itself in a different direction. This is especially relevant now that the bulk of uses of works takes place through digital technology.

5.4.3. Current legal regulation of the right of reproduction in the EU

5.4.3.1. International copyright law

As already mentioned, the current right of reproduction in the Berne Convention is generalised and is applicable to all protectable works. Its precise scope, however, is a question of interpretation, as the formulation "in any manner or form" is not explained anywhere in the Convention itself, nor in the preparatory works of the Stockholm Revision.[268] It is agreed that the right is supposed to be technologically neutral and cover reproductions in all forms, including where it is not possible to directly enjoy the reproduction (for instance in a medium which requires a machine to make the reproduction perceivable, such as a CD or a hard drive, etc.).[269] The reproduction right in the Berne Convention also includes reproductions in part and, supposedly, all kinds of adaptations which are classified as instances of the reproduction right.[270] The international standard of a reproduction right that is broad and applicable to any fixations has been confirmed by the WCT treaty.[271] The approach of a broad general right subject to specific exceptions is also established through the inclusion of a (non-exhaustive) list of exceptions and limitations and a three-step test to limit further possible exceptions.

[268] Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, p. 65.

[269] Ibid., pp. 67-68. The same line of reasoning was also applied once the question of digital reproduction was discussed in relation to the Berne Convention: reproduction in a computer system or into another medium which can transfer information to a computer system from which it is retrievable was also considered as reproduction, even though the work is not perceivable as such in any of these forms. See: ibid., pp. 101-103,

[270] Even though Ricketson and Ginsburg also argue that the text of the Convention could have been interpreted as implicitly requiring Member States to protect the right of adaptation. See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights. Berne Convention and Beyond. Volume I*, pp. 622-623.

[271] Even though the question of the scope of this right was controversial during the negotiation process. See Efroni, *Access Right*, pp. 214-216.

5.4.3.2. Relevant EU legal provisions

Like the requirement of originality, the reproduction right in EU copyright law was first harmonised through directives dealing with special kinds of subject matter – software and databases. Given the specificities of these works, the reproduction right that was needed to protect the interests of the authors and rightholders of these works also had to be specific. Consequently, the Computer Programs Directive in Art. 4 explicitly makes the right of reproduction broad.[272] The legislative history and the wording of the article show that the reproduction right was intended to give the author or rightholder control over any reproduction in relation to even ordinary use of the computer program.[273] Not only the use of programs, but also any kind of private copying were intentionally included in the sphere of authorial control.[274]

As often seems to be the case with EU copyright, further harmonisation continued simply by using the first formulation as a stepping stone. Next in the process of harmonisation came the Database Directive, which follows the formulation of the Computer Programs Directive exactly.[275] The InfoSoc Directive later harmonised this broad formulation of the reproduction right for all subject matter, stating that the author, in relation to his or her work will have "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part".[276] Thus, the control of the author or rightholder extends to any act of making a copy for any purpose. This is confirmed by the fact that a "temporary reproduction exception" was needed, which exempts acts whose purpose is to enable lawful use of works where such use has no independent economic significance.[277] The strength of the reproduction right is underscored by the private use exception enshrined in Art. 5(2)(b), which is only allowed when fair compensation is given to the rightholder.[278] Thus, the reproduction right covers any action of fixation regardless of its actual economic significance or purpose.

As discussed in Chapter 2, EU copyright law also has several tools to connect the right of reproduction to the author, including an inalienable right to compensation

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[272] Art. 4 of the Directive uses the broad formulation of "permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole".

[273] Even where the reproduction in the internal memory of a computer happens as a part of the normal process of use. See Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*, pp. 125-127 and Section 3.5.3 of this thesis.

[274] Giuseppe Mazzioti, *EU Digital Copyright Law and the End-User* (Springer 2008), pp. 59-60.

[275] Only the right to allow or prohibit direct or indirect reproduction is missing for the original databases. See Stamatoudi and Torremans, *EU Copyright Law. A Commentary*, p. 401.

[276] Art. 2. of the InfoSoc Directive.

[277] Art. 5(1) of the InfoSoc Directive.

[278] Implying injury to the otherwise exclusive right. The exceptions and limitations will be discussed in more detail in Section 5.4.4 of the thesis.

for exceptions and limitations,[279] as well as special provisions protecting authors' exploitation-related interests in their contractual relations.[280] These provisions do not affect the scope of the reproduction right directly but can be relevant when assessing it from the perspective of author, as will be shown later in this chapter.

5.4.3.3. Interpretations of reproduction in the CJEU case law

Despite the fact that the right of reproduction is one of the most fundamental rights in copyright law, few CJEU decisions to date have interpreted it in any depth.[281] Many decisions mention this basic right but give it only cursory treatment. Generally, in the CJEU's case law the right has been interpreted as broad[282] and as "preventive in nature" in the meaning of allowing the author to permit or prohibit reproduction.[283] Even so, over the past ten years of active interpretation of EU copyright, the CJEU has lifted up several aspects of this right and made several choices which together might allow one to speak of a general direction in which the reproduction right is tending.

Reproduction as any fixation

First, there are clear indications in the CJEU case law of a technological approach to the reproduction right, especially as according to the wording of the text of the directives, any action of fixation of a work can fall under the scope of the right.

For instance, in *Football Association Premier League,*[284] the Court had to give guidance on whether "creation of transient sequential fragments of the works within the memory of a satellite decoder and on a television screen"[285] (i.e. the copies of work which are necessary to receive a TV signal and watch it on TV screen) also fall under the right of reproduction and concluded that this is the case no matter how ephemeral the copies.[286] In *Filmspeler,* the "temporary actions of reproduction on a multimedia player" made when streaming a copyrighted file were seen as acts of

[279] See Section 2.3.1.2 of the thesis.

[280] See Section 2.3.1.3 of the thesis.

[281] Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, p. 126, Trevor Cook, 'The Restricted Acts of Reproduction and Distribution in EU Copyright Law' (2015) 20 Journal of Intellectual Property 122, p. 122.

[282] Jonathan Griffiths, 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law - (C-419/13) Art & Allposters International BV v Stichting Pictoright' (2016) 17 ERA Forum 73, p. 5.

[283] See, e.g., *Renckhoff* case, para. 29.

[284] Joined Cases C-403/08 and C-429/08, Football Association Premiere League Ltd and Others v QC Leisure and Karen Murphy v Media Protection Services Ltd, (*Football Association Premier League*), ECLI:EU:C:2011:631.

[285] *Football Association Premier League,* para. 153.

[286] *Ibid.*, para. 157.

reproduction which are required to be exempt by law or covered by the explicit permission of the author or rightholder as well.[287] Copies in illegible form have also been included in the scope of the right: in *Ulmer,* the CJEU concluded that the act of digitalisation under any circumstances (even if not for purposes of further dissemination) is to be treated as reproduction.[288]

Reproduction as more than fixation?

However, in the case law of the CJEU there are also signs that reproduction might encompass more than just "any fixation for any purpose". It should be remembered, for example, that in *Infopaq* the autonomous concepts of "reproduction" and "reproduction in part" were at the heart of the questions submitted by the national court. As mentioned above, the case concerned the possible infringement of rights by scanning (digitised) newspaper articles, running them through text recognition programme, performing a search for keywords and sending them plus the five words before and after them (11-word snippets) to the subscriber of the service. Here, the Court once again treated all acts such as those described in the data capture process as reproductions and ruled that they might fall under the temporary reproduction exception under certain conditions.

On the other hand, in the same case, the Court also interpreted the provision in Art. 2(a) of the InfoSoc Directive in such a way that restricted its meaning to the notion of "work" based on the requirement of originality. The CJEU simply proclaimed that there is no indication in the directives that a part of a work should be treated any differently than the whole and that the author's permission is needed only if what is reproduced is the "author's own intellectual creation".[289] The same approach was explicitly repeated in the *SAS* case.[290]

Of course, the *Infopaq* decision first established what the object of copyright protection is, and it follows that only actions of fixation which are carried out in relation to the object of protection can constitute reproduction at all. Nonetheless, from the perspective of interpretation of the right of reproduction what is key here is the Court's refusal to introduce any threshold for *reproduction* beyond the requirement of originality itself. The stubborn focus on "work", however, draws attention away from mere mechanical fixation and toward an analysis of the fixed parts and the work from the perspective of the author's originality and its expression. Such interpretation may not make much difference to the scope of the right. If anything, the refusal to apply any *de minimis* criterion based on, for instance,

[287] Filmspeler, para. 70.

[288] *Ulmer*, para. 37.

[289] *Infopaq*, paras. 38-39.

[290] Case C-406/10, SAS Institute Inc. mot World Programming Ltd, ECLI:EU:C:2012:259 (*SAS Institute*), paras. 63-70.

economic arguments, is a missed opportunity to give the right a more normative basis. On the other hand, through this approach, the right of reproduction becomes tangled with the protection of the author's free and creative choices and personal touch, showing at least a formal attempt to bridge the dichotomy between creation and exploitation in EU copyright law.

Here the common law tradition and its "substantial part" test for infringement come to mind.[291] In *Infopaq*, the threshold was clearly raised in a sense,[292] putting aside the economic rationale and taking up something that could be called an "originality-centred" approach.

From the arguments of the parties in the case, it is clear that several considered that the part of the work that is reproduced should not have to qualify as an independent work to find an infringement.[293] Advocate General Trstenjak addressed this possibility, suggesting that to adopt a purely technical approach to reproduction and prohibit copying of any part would be inconsistent with the need to balance what can be called the competing conceptual bases of copyright, namely, the technical nature of the right and the intellectual value for which reason copyright protection is given.[294] The CJEU, in its ruling, chose the balanced approach over the purely technical one. Its decision to make the concept of reproduction dependent on the criteria of protectability may even have gone against the wording of Art. 2, emptying the notion of "reproduction in part" of any independent meaning.

The same approach was restated in the *Football Association Premier League* case, where the Court acknowledged that transient fixation of parts of television broadcasting can fall under the concept of reproduction, but that it still needs to be determined whether at any given moment the fragments reproduced are expressions of the intellectual creation of the author.[295] On the other hand, in *Filmspeler,* the CJEU did not refer to this specific limitation of the right of reproduction, concluding only that illegal streaming could not be covered by the temporary reproduction exception due to its prejudice to the legitimate interests of the rightholder and its adverse effect on the normal exploitation of works.[296]

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[291] Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution', p. 787.

[292] See Eleonora Rosati, 'Originality in a Work or a Work of Originality: The Effects of the Infopaq Decision' (2010) 58 Journal of the Copyright Society of the USA 795, pp. 806-810, on how the *Infopaq* decision affected the British approach to reproduction.

[293] Opinion of AG Trstenjak in *Infopaq,* paras. 23, 25.

[294] Ibid., para. 58.

[295] *Football Association Premier League*, para. 157.

[296] Case C-527/15*, Stichting Brein v Jack Frederik Wullems,* ECLI:EU:C:2017:300 (*Filmspeler*)*,* para. 70.

Another instance where a "balance of interests" with respect to the scope of the reproduction right was formally discussed is the more recent *Pelham* case. Here, the question of sampling in the context of musical works (taking a small piece of a protected song and inserting it in a new song) was considered from the perspective of the exclusive right enshrined in Art. 2 (c) of the InfoSoc Directive. The Court concluded that even though "in principle" any "taking" of a sound sample (even if very short) from a phonogram should constitute reproduction, based on the ordinary meaning of the word and in light of the *purpose* of the InfoSoc Directive, this interpretation can be adjusted.[297] Implying that the fundamental rights of expression and freedom of the arts were factors in its interpretation, the Court clarified that when a sample of a phonogram is transformed in such a way that it becomes unrecognisable to the ear, it would not be considered to constitute reproduction (nor reproduction in part) within the meaning of Art. 2(c) of the InfoSoc Directive.[298] Moreover, according to the Court, this prevents the rightholder from prohibiting fixations which do not prejudice her possibilities to recoup the investment made when recording the work.[299]

This step by the Court can be seen, and has been described, as a "normative approach" that takes into consideration the purposes of copyright protection[300] and as an opening for the fundamental rights to shape the scope of exclusive rights.[301] Less optimistically, J. Quintais and B. J Jutte have referred to it as carving out "a small pocket for musical creativity".[302] However, closer analysis shows that this decision has, on the contrary, treated the right of reproduction from an almost exclusively technological perspective.

Already in *Infopaq*, AG Trstenjak found that to be considered a reproduction, the part reproduced must be recognisable as something copied from the original work.[303] Further, at least for the purposes of copyright, one of the conditions of protectability is *expression,* which requires the work to be objectively identifiable and ensures that the protectable subject matter is clear for enforcement authorities,

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[297] *Pelham,* paras. 29-31.

[298] Ibid., paras. 36-37.

[299] Ibid., para. 38.

[300] See Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 41 European Intellectual Property Review 683, p. 694.

[301] Geiger and Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!', p. 294.

[302] Joao Pedro Quintais and Bernd Justin Jütte, 'The Pelham Chronicles: Sampling, Copyright and Fundamental Rights' [2021] Journal of Intellectual Property Law and Practice (Forthcoming), p. 5.

[303] Opinion of AG Trstenjak in the case *infopaq*, para. 58.

competitors, etc.[304] It is hard to see why the same logic should not apply in relation to reproduction and infringement.

Even though a similar line of argument was dismissed by AG Szpunar in his Opinion in the *Pelham* case[305] and clearly disregarded by the Court, one could argue from basic copyright principles that it would be absurd to claim infringement when the new work has no recognisable trace of the work that was allegedly "copied". Only if creativity is understood through a purely technical and "ownership" prism (implying, again, "invisible copies" and the protected unity of the original work) that the question of reproduction can arise in such cases at all. Accepting the decision of the Court in *Pelham* as an accommodation for creative freedom means a simple recognition that the reproduction right covers any (technical) manipulation even if its outcome does not constitute *use* of the protected work or phonogram.

The fact that the Court used fundamental rights arguments to justify a decision which could have been made on the basis of the internal logic of EU copyright (and neighbouring rights) law only underlines that, as the Court stressed, the "mechanisms allowing those different rights and interests to be balanced are contained in Directive 2001/29 itself".[306] Which is to say that the fundamental rights can be used to strengthen the existing principles of EU intellectual property law, but not to challenge its basic premises, one of them being the broad interpretation of the reproduction right.

Thus, in *Pelham,* the Court clearly confirmed that the right of reproduction of phonogram owners is unlimited by any *de minimis* threshold and can be infringed if even a small piece of protected subject matter is reproduced *in* a new work.[307] This broadness of the right was rationalised by the principle of a high level of protection and the considerable investment needed to produce the product.[308] Since the Court, in *Cofemel*, concluded that copyright protection is not centred on return of investment, but (taking into consideration the length of protection) has more fundamental values to protect,[309] one can only hope that "unrecognisable to the ear" as the balancing point for interests in the EU reproduction right will also be applicable to the works of authors.[310]

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[304] See *Levola,* analysed in Section 5.3.4 of this thesis.

[305] Opinion of AG Szpunar in *Pelham,* paras. 28-30.

[306] *Pelham,* para. 60.

[307] See Martin Senftleben, 'Flexibility grave - partial reproduction focus and closed system fetishism in CJEU, Pelham' (2020) 51 IIC 751, p. 757 for a similar opinion.

[308] *Pelham,* para. 30.

[309] *Cofemel*, para. 50.

[310] If to follow the wording of Art. 2(a) of the InfoSoc Directive and having in mind that the reproduction right now seems to be narrower in the context of copyright when compared with

The last CJEU decision to be considered in relation to the reproduction right is that handed down in the *Allposters* case.[311] Even though the right is explicitly mentioned in the ruling, it raises more questions than it answers, leaving room to speculate on what other routes might be open to the reproduction right in EU copyright law.

Here, the question of what is a "copy" was raised in the context of the right of distribution, and the Court used the occasion to interpret the right of reproduction as well. The alleged infringement of exclusive rights involved the transfer of paper-printed posters of famous artistic works onto canvas via a chemical process for further commercialisation. As a result, the image on the poster was fixed onto canvas, producing what the Court called "a new reproduction" of the same work within the meaning of Art. 2(a) of the InfoSoc Directive.[312]

Significantly, in the technological process of transfer to canvas analysed in the case, the picture was not multiplied, and the initial poster was destroyed, retaining the original image. The reuse of the same image arguably did not amount to a "fixation" either. The Court, however, did not see these as relevant factors in relation to the general reproduction right enshrined in the InfoSoc Directive.[313] To make outa case of reproduction, the Court instead argued that it concerned the creation of a "new object" and gave a result which is more durable and of better quality, making it "closer to the original".[314]

As previously noted, *Allposters* is not the best source for assessing the development of the right of reproduction in the EU, since here the right of distribution and its exhaustion was the main point of the proceedings.[315] Still, the question of "copy" for the purpose of assessing exhaustion of distribution rights could have been handled without reference to Article 2(a) of the InfoSoc Directive. At the same time, the article was likely mentioned because, if there is no "reproduction" and the work remains the same (a book is gift-wrapped) or if the work copied is changed beyond

neighbouring rights protection, a conclusion also seemingly made by the AG Szpunar in his opinion in *Pelham,* para. 36.

[311] Case C-419/13, Art & Allposters International BV v Stichting Pictoright, ECLI:EU:C:2015:27 (*Allposters*).[312] *Allposters*, para. 43.

[312] *Allposters*, para. 43.

[313] Ibid., para. 45.

[314] Ibid., para. 43.

[315] For instance, *Pelham* has also demonstrated that the notion of "copy" for the purposes of the right of distribution can have a different scope than what is covered by the right of reproduction, see *Pelham*, para. 55. Also, there seems to have been some confusion even on the part of AG Cruz Villalón about what right should be applicable, with the conclusion that the distribution right should be the most relevant after all. See Toby Headdon, 'The Allposters Problem: Reproduction, Alteration and the Missapropriation of Value' (2018) 40 European Intellectual Property Review 501, p. 502.

recognition (using the *Pelham* scenario[316]), then infringement of the distribution right should not arise either.

With this in mind, *Allposters* firstly established that the EU right of reproduction involves something else than control over replication: the rights of authors or other rightholders are not infringed by there being more than one picture. This is already clear from the fact that even incidental, transient, and illegible reproductions have been included in the right. One can consider a similar scenario in which a picture is digitised and the original destroyed and ask if that would be a reproduction in the sense of Art. 2 of the InfoSoc Directive.

However, differently from the digital manipulations of a work which could be said to fall under the contemporary right of reproduction due to the creation of "invisible copies" in the course of the process, the posters in *Allposters* are not manipulated digitally. The Court concluded that since the durability and quality of the work are changed, the resulting work is a "new copy". These may be the most relevant aspects of a work to consider when authorising a certain form of its exploitation in the form of distribution, but one could imagine the same "test" for the right of reproduction being applied to other qualities of the work.

On the one hand, this could confirm the broad interpretation of the right, where any technological manipulation that changes any quality of the work intended by the author or rightholder creates a "new copy" in the meaning of Art. 2 of the InfoSoc Directive thus even including something that is "unrecognisable to the ear", and making the CJEU's balancing of fundamental rights in *Pelham* actually highly relevant. On the other hand, it provides a normative stance that it is because of the specific economic interests[317] of the author and rightholders and the fact that the work becomes more expensive and closer to the original that the right of reproduction comes into the picture. Seeing that *Allposters* came before *Pelham,* where the approach to the right of reproduction was technological, there is little hope that the CJEU will return to this purpose-oriented interpretation in the foreseeable future. Yet it is clearly not irrelevant, even if confined outside technological manipulation of works with invisible copies that the rightholders should be able to exclusively control.

[316] Even though *Allposters* came four years before *Pelham.* As was mentioned already, the idea that the copied work should be recognisably identical, at least in part, with the original was an expected element of the concept of reproduction since the invention of the printing press.

[317] This approach of the Court has been identified as aimed at preventing misappropriation of value in Headdon, 'The Allposters Problem: Reproduction, Alteration and the Missapropriation of Value', pp. 507-508. J. Griffiths also considers that the key for the Court's decision in this case was that a more economically valuable object has been created: Griffiths, 'Exhaustion and the Alteration of Copyright Works in EU Copyright Law - (C-419/13) Art & Allposters International BV v Stichting Pictoright', p. 77.

The author and the internal limits of the right of reproduction

With respect to the author conceptualisations utilised by the different approaches to reproduction, several things have to be pointed out. To begin with, the right of reproduction is a tool for exclusivity and control, but as mentioned, it is a tool which the author only has the "first ownership" of. This is why the exact delimitation of the right's scope (its "internal limits") is not necessarily clearly connectable to a certain conceptualisation of author.

One might envisage a scenario where the reproduction right, however defined, is seen as purely an economic right and not intended to serve the author beyond the first transfer of the manuscript, as was the case after the Statute of Anne, when the author became the first owner of copyright.[318] Yet, as has been shown, the historical development of copyright, as well as the current EU copyright law and its interpretations by the CJEU, paint a different picture. Not only has the subjectivity of the author historically evolved to justify and explain exclusivity and control, but the EU has been gradually developing mechanisms that give authors significance in situations of exploitation.

For instance, the CJEU, in the cases analysed above, has consistently made the scope of the reproduction right contingent on the value of authorial creativity and originality. In the case law of the CJEU, the meaning of "copy" for the purposes of the right of reproduction has been brought ever closer (if not made identical) to that of "work", which is in essence a dematerialised expression of the author's free and creative choices, as noted previously. This could be observed in *Infopaq, Football Association Premier League*, and even in *Cofemel,* where the Court specifically stressed that the purpose of copyright protection is *not* to allow a recovery of investment, but rather to serve "fundamentally different" objectives.

This allows the suggestion that EU copyright has been developing an author-as-*owner* model for the right of reproduction, insistently presenting the right's exclusivity and control as the consequence of the author's own intellectual creation. What this ownership entails, however, seems to be exactly what others have already warned about, namely the presumed complete control over any fixation. Even though the *Allposters* case might indicate that there is space left for normative interpretations of the right of reproduction, these are not applicable in digital environments. From the perspective of the concept of author, then, the purification of the criteria of protectability and the emphasis on human subjectivity and autonomy, which make the author what this thesis calls a *genius* in the creation side of copyright, in fact, serve the expansion of this authorial "property" as well.

At the same time, by choosing this particular configuration, even if it is in line with international trends, the CJEU and EU have effectively closed the door to an approach that would have allowed the actual interests of the author (or for that

[318] See Section 3.3 of this thesis.

matter, of the rightholders) to be taken into account when determining the scope of the right. The combination of what this thesis describes as author-*genius* and author-*owner* in such circumstances leads to a situation where copyright protection might be criticised as going beyond what might be considered reasonable. The internal logic of the right of reproduction, then, excludes what this thesis calls the author as *entrepreneur* or *authority*. The exclusive right of the author *genius,* then, is very broad, as if to preserve the interests of the author; but the actual interests are not reflected upon creating an object of property that, in the end, does not seem to be intended for the author.

This becomes even more visible looking at the other EU copyright tools shaping this exclusive right. Indeed, it is impossible to ignore that the economic rights, perhaps especially the right of reproduction, in the European copyright system have been balanced by the addition of another tool of "exceptions and limitations" to their otherwise broad scope. The origins and limits of these exceptions is a thesis topic in itself.[319] The following is a general sketch of what kind of external boundary these exceptions and limitations are drawing for the right of reproduction. In this respect it is worth recalling that the author *genius* can and does coexist with the author *servant,* who has a broader social mission.[320] The next section will show how EU copyright combines the different concepts of author to determine the final shape of the right of reproduction.

5.4.4. The scope of the exceptions and limitations and the reproduction right

5.4.4.1. General remarks

The internal logic of the right of reproduction is complemented by another legal mechanism in modern copyright law, namely the so-called exceptions and limitations. They are popularly regarded as an integral part of copyright law and one which promotes the public interest. The thinking is that without such additional tools to ensure users' access, the cultural, informational, educational and other goals

[319] For more on this topic, see, e.g., Daniel Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5 University of Ottawa Law & Technology Journal, pp. 1-41; Caterina Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice' (2020) 21 ERA Forum 311, pp. 311-339.

[320] See, e.g., Sections 3.2 and 3.3 of this thesis describing such double identity of the author in the early French copyright law.

routinely set out in international and European copyright laws would be impossible to attain. [321]

At the same time, as established in the previous section, the EU right of reproduction gives blanket exclusivity and control over the protection of the "author's own intellectual creation", without recourse to analysis of protected interests. Indeed, the protection of authors and the exclusivity and control that copyright gives in respect of works of authorship can themselves be seen as tools to promote general welfare, because without them, works serving the public interest would not be created at all.[322] Thus, in the European copyright tradition, the exclusive rights are generally considered to represent private control, whereas the exceptions are thought to be tools of access for users.[323] As a result, the exceptions and limitations are made into something external to the general logic of protection. In the EU context, the CJEU confirms this approach by holding the exceptions and limitations to be copyright's mechanism to balance the fundamental rights of authors and users of works.[324]

In this way, the exceptions and limitations do not represent a duty on the part of the author and are not directly the purpose of the protection. Rather, they are a balancing point for *rights*, or, when it comes to users, their privileges, since it is incorrect to call something one cannot enforce a right.[325] Moreover, though legal scholars have argued that in principle there should be no hierarchy in copyright law between exclusivity and exceptions,[326] in the context of EU copyright the exceptions and limitations have consistently been treated as derogations from the general rule, even after being explicitly proclaimed to be expressions of users' fundamental rights.[327]

The list of internationally accepted but optional exceptions and limitations can be found in Articles 9(2), 10, 10bis and 11bis(3) of the Berne Convention. The main

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[321] See section 4.2.2 of this thesis explaining such justifications of copyright protection; also Bernt Hugenholtz and Ruth Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright' [2008] Study supported by the Open Society Institute (OSI), March 6, 2008, Amsterdam Law School Research Paper No 2012-43, Institute for Information Law Research Paper No 2012-37, p. 6.

[322] See, e.g., Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations', pp. 5-6; or Tatiana-Eleni Synodinou, 'Reflections on the CJEU's Judgement in the Spiegel Online Case' (2020) 42 European Intellectual Property Review 129, p. 19.

[323] Hugenholtz and Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright', p. 9.

[324] See *Pelham*, paras. 59-60; *Spiegel Online*, paras. 42-43; *Funke Medien*, paras. 57-58.

[325] See Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* (Wolters Kluwer 2021), section 2.2.

[326] Geiger, 'Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law', pp. 520-524, provides a review of the general discussion of this question.

[327] See, e.g., *Painer,* para. 133, *Deckmyn,* para. 22, *Spiegel Online,* para. 53, *Funke Medien*, para. 69.

list In EU copyright can be found in Art. 5 of the InfoSoc Directive, which has always been considered to be exhaustive.[328] However, further exceptions and limitations applicable to all subject matter are also enshrined in the Orphan Works Directive,[329] the Marrakesh Directive,[330] and, most recently, the DSM Directive,[331] some of them compulsory for the Member States.[332] Only one exception listed in the InfoSoc Directive, the temporary reproduction exception, is compulsory, and the great majority of others are optional, making Art. 5 a rather limited tool for harmonisation,[333] and furthermore, a weak tool for the protection of users rights. Even when proclaiming them to be expressions of fundamental rights, the CJEU has still provided that, unlike the exclusive rights, which are provisions of full harmonisation, the exceptions and limitations offer the Member States some discretion in their transposition into national legislation.[334]

Another key point about the exceptions and limitations in EU copyright law is that they must all comply with a certain set of standards enshrined in the EU version of the three-step test under Article 5(5) of the InfoSoc Directive. The exhaustive list of exceptions and limitations then provides which interests or goals furnish the basis for setting aside copyright protection, and the three-step test determines to what degree the exclusive rights can be disregarded in the circumstances identified by the exceptions. As was seen in the previous section, the exclusive rights themselves, and in this case the right of reproduction, do not have any separate general

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[328] Angelopoulos and others, *Concise European Copyright Law*, p. 453.

[329] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Orphan Works Directive), Art. 6 providing a compulsory exception for certain uses of orphan works.

[330] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Marrakesh Directive), Art. 3, providing a compulsory exception for making copyrighted works accessible to blind or visually impaired persons.

[331] DSM Directive, Articles 3, 4, 5, and 6 introducing text and data mining, digital use of works for digital and cross-border teaching activities, and preservation of cultural heritage exceptions for cultural heritage institutions.

[332] Even though after the adoption of the DSM Directive it could be argued that all exceptions and limitations were made compulsory, at least in the context of OCSSPs, by the duty to observe them enshrined in Art. 17 of the Directive. See Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice', p. 312.

[333] See Marie-Christine Janssens, 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), pp. 330-331.

[334] *Spiegel Online,* paras. 26-27; *Funke Medien,* paras. 41-42.

mechanism limiting their scope other than the idea that the right should reflect the intellectual value of works that copyright aims to protect.[335]

Thus, the image of EU copyright as based on the internal logic of exclusivity and control as a reward and incentive and, more broadly, as a goal in itself, ensuring a high level of protection for authors,[336] is not changed by the idea of exceptions and limitations, which are presented precisely as a result of conflict between opposing rights. At the same time, the rights that conflict with exclusivity and control can be rather diverse, and the existing exceptions and limitations vary greatly in nature, scope and interests protected.[337]

5.4.4.2. The interests behind exceptions and limitations in EU copyright law

As mentioned, the list of exceptions and limitations in Art. 5 suggests several groups of social interests or other considerations that must be weighed against the existing copyright protection. P. Samuelson, for example, observes that the principles behind common exceptions and limitations can be grouped into various categories. These include the promotion of ongoing authorship (e.g., the quotation exception, or the fair use exception in countries where it exists), user autonomy and personal property (the private copying exception), public benefit (e.g., the news reporting or educational use exceptions), economic goals (e.g., reverse engineering of computer software, where such an exception exists), political expediency, and general flexibility of copyright laws.[338] Other comparable principles have been identified underlining internationally accepted exceptions and limitations as well.[339]

From the exceptions and limitations listed in Art. 5 of the InfoSoc Directive, it is immediately clear that they all follow a similar logic and represent a mix of different principles and values. Some of the exceptions could be seen as expressing multiple interests. Immediately evident is a big group that can be called "public interests".

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[335] Obviously, the exceptions and limitations limit the scope of the right, too, but again, as derogations applicable, in line with the three-step test, in certain special cases and under restrictions which do not allow to negatively affect the interests of the copyright owners.

[336] See Section 2.3.2.3 of this thesis.

[337] See Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations', pp. 19-23 on these general features of exceptions and limitations in the EU copyright system.

[338] Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions' in Ruth Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017), pp. 25-44.

[339] Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations', pp. 21-22.

The public interest

As straightforward examples of such interests, one may mention the exceptions of use for the purpose of illustration for teaching or scientific research (Art. 5.3(a) of the InfoSoc Directive); for reporting of current events (Art. 5.3(c)), and for the purposes of public security (Art. 5.3(e)). Some other exceptions which relate to the public interest while also safeguarding individual freedoms, such as the quotation exception (Art. 5.3(d)), the parody exception (Art. 5.3(k)), or even the temporary reproduction and private reproduction exceptions (Art. 5.1. and 5.2(b)),340 could be mentioned in this context.

The CJEU has interpreted several of these exceptions throughout the years and in the process shown that social interests can be treated differently, depending on their importance in society.341 For instance, in Painer, the CJEU addressed the question of exceptions applicable when a portrait photograph of a missing child was published without attribution in local newspapers following the child's reappearance. The Court briefly discussed the applicability of the quotation and the public security exceptions and concluded that in order to qualify for the latter, the picture's publication should have been approved by a public authority; failing that, the omission of the author's name is allowed under other exceptions only where attribution is truly impossible. A similar approach to the value of the public interest in question was later confirmed in Spiegel Online and Funke Medien, where the Court explicitly referenced the case law of the European Court of Human Rights (ECtHR) indicating that when protection is to be balanced with the freedom of expression, the nature of the expression (political, commercial, etc.) has to be taken into consideration.

In a similar vein, the CJEU has over the years taken a somewhat flexible attitude to the exceptions and limitations, showing willingness to interpret them to the benefit of users where it was in the spirit of the exception. An example might be the Ulmer case,342 where the Court clarified that to advance the public interests of promotion of research, private study, and dissemination of knowledge, it is permitted to make digitised copies of books under the exception in Art. 5.3(n) under certain conditions,

340 As they could be said, among other things, to protect the right to private life. See Natali Helberger and Bernt Hugenholtz, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law ' (2007) 22 Berkeley Technology Law Journal 1061, p. 1068 on the private copying exception.

341 For a good general review of the Court's different decisions on exceptions and limitations and the tendencies these decisions show, see Sganga, 'The Right of Reproduction', pp. 15-25; and Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice', pp. 311-339.

342 Case C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG, ECLI:EU:C:2014:2196 (*Ulmer)*.

even if corresponding e-books are available for purchase.343 Similarly, in Deckmyn, the CJEU ruled in favour of the parody exception as having the bare minimum of criteria and setting aside several others present in the national laws of the Member States.344 The Court justified its decision with the need to fairly balance the rights to property and free expression.345 Even while recognising that the exceptions were derogations from the general rule in each of these decisions, the Court also stressed that they must be effective. The same was clearly stated in the later Spiegel Online and Funke Medien decisions, where the CJEU again adopted a flexible approach to the exceptions for reporting current events and quotation.346

In other words, without delving into the detail of the different exceptions and limitations, it seems that even though control and exclusivity are the rule, the CJEU is willing to give user rights and interests weight and careful consideration in the EU copyright system as well. Indeed, the case law of the Court may be moving in the direction of giving equal weight to the rights which are not compatible with exclusivity. It is also possible, however, to explore the exceptions and limitations specifically from the perspective of the author and see what can be deduced about this subject from the way the exceptions are shaped.

The interests of author?

Being expressions of users' interests and rights, the exceptions and limitations in EU copyright can also be used to deduce the points of the exclusive rights which are deemed so important that they must always take precedence even over the public interest. For instance, the author's rights to compensation or remuneration that are provided in connection with certain exceptions and limitations in EU copyright law are seen as critical for protecting authors' economic interests.[347] The attempt to shape exceptions and limitations in a way that does not encroach on economic interests can be observed in the wording of many of the exceptions in Article 5 as

[343] Ibid., paras. 23-39.

[344] *Deckmyn*, paras. 20-24.

[345] Ibid., paras. 25-27.

[346] *Spiegel Online,* paras. 50-59; *Funke Medien*, paras 65-76.[347] For more on the discussion of remuneration rights and their different types in EU copyright law, see Thomas Riis, 'Remuneration Rights in EU Copyright Law' (2020) 51 IIC 446, pp. 446-467; also Christophe Geiger and Franciska Schönherr, 'Limitations to Copyright in the Digital Age' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar 2014), pp. 131-137.

[347] For more on the discussion of remuneration rights and their different types in EU copyright law, see Thomas Riis, 'Remuneration Rights in EU Copyright Law' (2020) 51 IIC 446, pp. 446-467; also Christophe Geiger and Franciska Schönherr, 'Limitations to Copyright in the Digital Age' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar 2014), pp. 131-137.

well,[348] although this does not necessarily mean that the economic interests of the author are safeguarded. Moreover, the author's interest in (or right to) correct attribution in connection with the dissemination of works is also reflected in several of the EU copyright exceptions and limitations.[349]

The preamble to the InfoSoc Directive clearly provides that the fair compensation that is required in certain cases of exceptions and limitations is a tool to compensate for the harm the right holder suffers as a result of the use in question.[350] As discussed previously in the thesis, the compensation due to authors for uses of their works permitted under EU copyright law, including exceptions and limitations, has already been interpreted by the CJEU in some cases to be unwaivable and related to the author's interest in securing adequate income.[351] Further, such protection of economic interests might be directly connected to the overall purpose of incentivising and protecting authorial creativity, as expressed in recitals 10-12 of the preamble of the InfoSoc Directive.

The protection of the interest of attribution that is stressed in the wording of some exceptions seemingly pertains to the dissemination of works to additional audiences. However, in all cases, attribution is not required if it is impossible, leaving this interest less protected than the economic one. This is especially true considering the fact that the exceptions mentioning it are not obligatory for the Member States and allow discretion for the purposes of their transposition into national law.[352] Moreover, in the cases where the public interest is particularly strong, as, for instance, when the work is used for the purposes of public security, attribution is not required at all.[353]

Lastly, from the way the reporting of current events and the quotation exceptions are formulated, it is apparent that the author's interest in the first publication of the work is being hinted at as well. Article 5.3(d), which regulates the quotation exception, was interpreted in the *Spiegel Online* case to require an analysis of the circumstances of publication with respect to editorial changes made to the text and

[348] For instance, the emphasis on the non-commercial nature of permitted use in Articles 5.1, 5.2 (c) and (e), 5.3 (a), (b), and (j) of the InfoSoc Directive.

[349] See the exceptions provided in Articles 5.3(a), (c), (d), (f) of the InfoSoc Directive.

[350] Recital 35 of the preamble of the InfoSoc Directive.

[351] See Section 2.3.2.1 of this thesis. See also, e.g., Giulia Priora, 'Catching Sight of a Glimmer of Light: Fair Remuneration and the Emerging Distributive Rationale in the Reform of EU Copyright Law' (2019) 10 JIPITEC 330, pp. 340-342, for a similar conclusion.

[352] The exception on the use of out-of-commerce works in Art. 8.2. of the DSM Directive provides the duty to give the name of the author unless it turns out to be impossible, and is compulsory to the Member States.

[353] See *Painer*, paras. 143-147.

the specific form in which the author made the work publicly available.[354] On the other hand, the wording of Art. 5.3(c), that might allow the author (or rightholder) to expressly reserve the use of works in connection with the reporting of current events, has not been addressed at all, even in the cases where the exception was analysed.[355]

From this general picture it is evident that authorial interests in the context of exceptions and limitations in EU copyright law have mostly been discussed in terms of economic interests, even though there is still room to further develop the protection of what can be called the moral interests of authors in the system of exceptions and limitations. Another interesting observation in the context of this thesis, however, is that being so diverse in their purpose and formulation, some exceptions and limitations in Art. 5 of the InfoSoc Directive might, in fact, be seen as capable of protecting even more complex interests of authors as well.

An example of this can be the temporary reproduction exception, which, despite the fact that any fixation of protected work is covered by the exclusive right of reproduction, nevertheless allows reproduction when this is necessary to enable a *lawful use* of the work.[356] As was explained previously, the need for this exception arose in light of the right of reproduction being adapted to digital developments, specifically to the interests of software producers to protect computer programs from being loaded without authorisation.[357] As well as being in line with the obvious public interest to allow normal use of works and ensure the effectiveness of other exceptions and limitations, the temporary use exception also makes sure that even where the exploitation interests of some are safeguarded, the use that is in the interest of others, including other authors, will not be unduly precluded.

A similar interpretation might also be suggested for the so-called "panorama exception" enshrined in Art. 5.3(h), where reproduction and communication to the public may be allowed for works permanently located in public places.[358] Even though there is a lively debate over whether this exception should allow all or only non-commercial uses,[359] indicating the importance of authors' and other rightholders' economic interests, another perspective is that the public use of works created specifically for public places is part of the authorial intent when producing

[354] See *Spiegel Online*, paras. 85-95.

[355] Namely, *Spiegel Online* and *Funke Medien.*

[356] Art. 5.1. of the InfoSoc Directive. For more about the origin and interpretation of this exception see Sganga, 'The Right of Reproduction', pp. 15-18.

[357] See Section 5.4.2 and Section 3.5.3 of this thesis.

[358] For a detailed account of the origins and national interpretations of the exception see Mélanie Dulong de Rosnay and Pierre-Carl Langlais, 'Public Artworks and the Freedom of Panorama Controversy: a Case of Wikimedia Influence' (2017) 6 Internet Policy Review 1, pp. 3-9.

[359] Ibid., pp. 7-9.

them. The same might be said of the exception in Art. 5.3(f) allowing use of public lectures and political speeches, or such exceptions as use in connection to the demonstration and repair of equipment, use for the purpose of advertising public exhibitions of artistic works, or use of a drawing of a building for the purpose of reconstructing it.[360] In other words, exceptions and limitations in some cases allow authors to ensure that the intended purpose of the work will be fulfilled, even despite the regime of control and exclusivity in place to provide a high level of protection for authors as a whole.[361]

Lastly, some limitations and exceptions clearly enable, at least to a limited extent, further creativity and the making of new works by other prospective authors. The most notable of these are the quotation and caricature exceptions.[362] However, there is not a single exception in Art. 5 which could be said to be directed at the "freedom of arts" provided in Art. 13 of the CFR. The issue of how these exceptions apply in the context of Creative Users will be revisited later in the thesis.

It seems to be generally accepted that exceptions and limitations exist because of the rights of *users*,[363] thus implying an interest which is different from that of the *author*. At the same time, certain of authors' economic and other interests can be said to be protected through the system of exceptions and limitations too, making it a particularly colourful area of EU copyright, accounting for anything that falls outside the general logic of exclusivity and control. Nevertheless, there is one final test in EU copyright law that draws the limit for all exceptions and limitations affecting the scope of the right of reproduction, namely the three-step test enshrined in Art. 5.5. of the InfoSoc Directive.

5.4.4.3. The three-step test

General Remarks

Precisely because exceptions and limitations now existing in EU copyright law must comply with the conditions laid out in the three-step test, this legal tool can be seen as the most important for the fair balance of interests (and rights) that is to be achieved through them. Even if there is still some uncertainty regarding who the test

[360] Articles 5.3 (l), (j), and (m) of the InfoSoc Directive.

[361] If to use the wording often relied on by the CJEU. See 2.3.2.3 of this thesis.

[362] Geiger, 'Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law', pp. 532-533.

[363] And, as Synodinou stresses, EU copyright law generally does not individualise users as people, but perceives them all covered under a general umbrella of "public interest": Tatiana-Eleni Synodinou, 'The lawful user and a balancing of interests in European copyright law' (2010) 41 International Review of Intellectual Property and Competition Law 819, p. 819.

applies to and under which circumstances,[364] what is important for this thesis is that it has been depicted as a key constraint on the implementation and interpretation of EU exceptions and limitations.[365]

The author's position in the three-step test in international copyright law was briefly discussed above. As mentioned, the test, especially after its reformulation in the TRIPS Agreement, became an attachment point for the interests of "rightholders", prompting questions as to whether the interests of authors were included at all.[366] Particularly in its revised form, the version also transposed into EU law, the test has been criticised by many legal scholars as rigid and hampering the further development of the European copyright system.[367]

Article 5(5) of the InfoSoc Directive instructs that, "*The exceptions and limitations provided for in [...] [this directive] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*"[368] As can be seen from the text of the clause and as interpreted by the CJEU, this test is not intended to allow the introduction of additional exceptions and limitations in the national systems of the Member States, as was the case in the Berne Convention, but rather to make sure that the exceptions already existing in Art. 5 are not interpreted too broadly.[369] As such, then, the EU typically employs the three-step

[364] See Richard Arnold and Eleonora Rosati, 'Are national courts the addressees of the InfoSoc three-step test?' (2015) 10 Journal of Intellectual Property Law and Practice 741, pp. 743-744, for a review of the discussion before the summer 2019 decisions by the CJEU which, arguably, have made the state and the CJEU itself addressees of the provision: Daniel Jongsma, 'The Nature and Content of the Three-Step Test in EU Copyright Law' in Eleonora Rosati (ed), *Routledge Handbook of European Copyright Law* (Routledge 2021), pp. 347-348.

[365] *Pelham,* para. 62; *Funke Medien,* paras. 52 and 61*; Spiegel Online,* paras. 37, 46, 79.

[366] See Section 2.2 of this thesis.

[367] See, among others, Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice', p. 316; Kamiel J. Koelman, 'Fixing the three step test' (2006) 28 European Intellectual Property Review 407, pp. 408-409; Guido Westkamp, 'The "Three-Step Test" and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making' (2008) 56 Journal of the Copyright Society of the USA 1, pp. 8-13.

[368] Thus the "three steps" of the test make sure that exceptions and limitations 1) are applied in certain special cases; 2) do not conflict with a normal exploitation of work; 3) and do not unreasonably prejudice the legitimate interests of the rightholder.

[369] Expressed by the CJEU in, e.g., the July 2019 cases. This approach has also been criticised and there are scholars who see reversal of the three-step test in a way that allows additional exceptions instead of restricting the existing ones as the way forward for a balanced development of EU copyright law. See, e.g., European Copyright Society, 'Limitations and exceptions as key elements of the legal framework for copyright in the European Union - opinion on the judgement of the CJEU in Case C-210/13 Deckmyn' (2015) 37 European Intellectual Property Review 129, p. 131.

test for constraining purposes, even where in the international copyright system it also has enabling functions.[370] Furthermore, the three-step test in EU copyright law applies not only to legislators when transposing the directive into national legislation, but also, in principle, to the national courts, who must ensure that existing national exceptions and limitations also comply with it.[371] Some Member States have directly transposed it to their national laws.[372]

In other words, the three-step test is a tool for balancing different interests and rights in the framework of EU copyright law; yet it is a tool with its own logic, which the CJEU has proclaimed to be internal to the EU copyright system.[373] That means that even if the exceptions and limitations can be said to originate in the fundamental rights of users, the balancing of these fundamental rights with the rights of authors is done through the prism of EU copyright law. Even though the Court has showed willingness to interpret existing exceptions flexibly, the three-step test remains the limit for this exercise. Indeed, the three-step test could lie behind the Court's famous insistence that the exceptions and limitations, as derogations from the main rule of protection, must be interpreted strictly.[374] The emphasis seen in recent years on the need for exceptions and limitations to be effective, therefore, will not give much wiggle room until the three-step test is also reinterpreted more flexibly.

When it comes to the conditions of the test itself, the InfoSoc Directive does not provide any further details on how they should be understood, nor have they received much independent interpretation from the CJEU over the years.[375] The WTO panel has interpreted the three-step test found in Art. 13 of the TRIPS Agreement in its *US Copyright* case,[376] and it has been suggested that the CJEU's

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[370] Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test', p. 2.

[371] Janssens, 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation', pp. 328-329; Arnold and Rosati, 'Are national courts the addressees of the InfoSoc three-step test?', pp. 744-749.

[372] Griffiths, 'The "Three-Step Test" in European Copyright Law - Problems and Solutions', p. 433.

[373] In *Spiegel Online,* paras 36, 42, 46.

[374] Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test', pp. 9-10.

[375] See Jongsma, 'The Nature and Content of the Three-Step Test in EU Copyright Law', p. 348; also Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice', pp. 316-321, for a review of the development of the "fair balance" test in the jurisprudence of the CJEU and how the three-step test has been interpreted in that respect.

[376] Dispute DS160, United States – Section 110(5) of the US Copyright Act, Panel Report WT/DS160/R, June 2000 (*WTO US Copyright*).

interpretation of Art. 5(5) of the InfoSoc Direction (as much as there has been) has essentially followed the understanding of the WTO panel.[377]

Certain special cases

This step of the test is generally interpreted to allow exceptions which are limited in scope and "narrow in qualitative and quantitative sense" as well as representing a certain distinctive objective.[378] For instance, the WTO dispute resolution panel found an exception that could benefit 70 percent of users in one particular sector and 45 percent of users in another to be too extensive to pass the first step.[379] On the other hand, it has been suggested that the interpretation of this step in both Berne and TRIPS should be simply that "there should be a sound policy justification" behind the exception.[380] The WTO panel has also concluded that this part of the test cannot be related to any policy considerations and is to be applicable with regard to the scope of the exception and the clarity of its definition.[381] Taking the Creative User activities on the Internet as an example, many of the possible exceptions proposed to handle them might fail already at this stage of the test.[382]

The CJEU has said little about this step so far. Only in *Meltwater,* which concerned the applicability of the temporary reproduction exception to the viewing of websites on users' computers, did the Court briefly note that since the copies on the screen and in the computer memory are created only for the purpose of viewing websites, they constitute a special case within the meaning of Art. 5(5) of the InfoSoc Directive.[383] Nothing else (for instance, the share of users utilising the exception) was discussed.

Does not conflict with normal exploitation of works

This second condition of the test is sometimes described as especially problematic when attempting to expand the scope of exceptions and limitations or to adopt new

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[377] Joao Pedro Quintais, 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law' (2017) 41 AMI : Tijdschrift voor Auteurs-, Media- & Informatierecht 197, p. 201.

[378] Anette Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three Step-Test?' [2009] 8 Richmond Journal of Global Law & Business 3, p. 314.

[379] *WTO US Copyright* Panel Report, paras. 6.123 – 6.133.

[380] Daniel Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9 Marquette Intellectual Property Law Review 1, p. 15.

[381] *WTO US Copyright* Panel Report, para. 6.112.

[382] Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 145.

[383] Case C-360/13, Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others, ECLI:EU:C:2014:1195 (*Meltwater*), paras. 54-55.

ones.[384] According to the interpretation of the WTO panel, the most important concept in this "step" – the normal exploitation of works – can be understood as all forms of exploitation (present and future) which are of "considerable economic or practical importance" in potential markets (including future markets).[385] "Conflict" here presumably means that the use enabled by an exception should not enter into "economic competition" with the ways normally used to extract economic value and should not deny them of "significant or tangible commercial gains".[386] Though forms of exploitation that do not typically produce economic income might not be regarded as "normal exploitation" under such a formulation, the WTO panel concluded that the mere "potential" of exploitation in general is enough to see something as coming within the concept.[387]

The CJEU has similarly drawn a line between the normal exploitation of works and loss of revenues in the second step of the test. In the *ACI Adam* case, it concluded that allowing reproductions for personal use from unlawful sources would encourage the circulation of pirated works and thereby reduce the possibilities for lawful transactions in relation to those works.[388] The same conclusion was reached in similar factual circumstances in *Hewlett Packard*, where the Court stated that applying the private use exception to reproductions made from unlawful sources would inevitably reduce "the volume of sales or other lawful transactions related to the protected works", thus "adversely affecting" their normal exploitation.[389] This argument was later repeated in the *Filmspeler* case as well.[390]

What was found not to conflict with the normal exploitation of works was viewing protected works on users' computer screens and the automatic creation of temporary copies of legally viewed content in the caches of users' computers.[391] However, this fact hardly lends itself to interpretation, as it is difficult to imagine how applying a technological process to access work that the author intended to be accessed in that manner could possibly *conflict* with the normal exploitation of the work; it namely

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[384] Quintais, 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law', p. 197.

[385] *WTO US Copyright* Panel Report, paras. 6.180 – 6.189.

[386] Ibid., para. 6.183.

[387] Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', p. 149.

[388] Case C-435/12, ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding, ECLI:EU:C:2014:254, (*ACI Adam*), para. 39.

[389] Case C-572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL, ECLI:EU:C:2015:750, (*Hewlett Packard*), para. 60.

[390] *Filmspeler,* para 70.

[391] *Meltwater*, para. 60.

forms part of the said normal exploitation that the users *are* engaging in with the permission of the author or rightholder.[392]

In essence, then, this step is a factual question[393] related to the extent of the revenues that would be or might be lost in the event that an exception or limitation is allowed. If the losses are significant or tangible, the WTO panel will not approve the exception. On the other hand, from the language used by the CJEU in the cases mentioned above, even though the Court has in all of them found that encouraging the circulation of illegal copies would "adversely affect" normal exploitation of work, the question remains whether even non-adverse effects, i.e. merely *conflict* as provided in Art. 5(5) of the InfoSoc Directive, might also be enough to fail the second step of the test. After all, the Court seems to conclude that even a reduction in sales and other lawful transactions can have the said adverse effect. Thus, it is conceivable to conclude that the CJEU's interpretation of the three-step test may be even more restrictive than the WTO panel's, according to which only the deprivation of significant economic gains amounts to a "conflict" under the second step.

Does not unreasonably prejudice the interests of the rightholder

This is supposedly the point where policy considerations can be introduced into the equation. However, many exceptions will not even make it to this step and fail at the first two. For instance, because the second step rules out any use that conflicts with economic exploitation of works, even if this conflict and limitation of economic interests could be seen as *reasonable* due to the social interest it is set to serve, it seems that the third step would be unable to accept such a limitation, as it would have already failed the second step. It has been argued that this step might be better employed and social interests better balanced against exclusive rights, if the three steps were assessed together as a whole and not cumulatively as they have been so far.[394] It has been suggested that exceptions related to Creative Users could then be possible on the basis that there might be a policy interest in keeping these forms of expression free, especially if the exception is accompanied by a compensation scheme for rightholders.[395]

In the *U.S. Copyright* case, the interpretation proposed by the WTO panel did not offer any policy recommendations after concluding that prejudice is unreasonable if a limitation "causes or has the potential to cause an unreasonable loss of income to

[392] This is also concluded by the CJEU in *Meltwater,* para. 61.

[393] Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three Step-Test?', p. 320.

[394] Koelman, 'Fixing the three step test', p. 410.

[395] Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', pp. 153-154.

the copyright owner".[396] Consequently, the third step was regarded as having no more substance than the second. The reference to the reasonable interests of the *rightholders,* which this step is supposed to balance, also makes it likely that these are the same economic interests of exploitation already assessed in step two.

5.4.4.4. The limits of exceptions and limitations and what it means for the reproduction right

Some are of the opinion that the initial three-step test in the Berne Convention was a way to ensure that the right of reproduction would not end up being treated as a "mere fixation" but rather as part of the dissemination of works.[397] According to Depreeuw, the tree-step test implied that if the action of reproduction had no independent economic significance and was not related to dissemination (but rather served other social purposes), it did not "prejudice the interests of the author" and was not prohibited.[398] As has been shown, the current interpretation of the test gives a different effect.

As already indicated, the general rule of maximum control and exclusivity in current EU copyright law is complemented by a tool to represent all other interests, namely the colourful bouquet of exceptions and limitations. But this tool is curtailed by the restrictive three-step test, which, at least in its current interpretation, restores the logic of exclusivity and control, even if clearly based on the economic interests of the rightholders.

To quote S. Dusollier, the present situation whereby any adjustments to the maximalist interpretation of the right of reproduction are made through a strictly controlled list of exceptions and limitations instead of questioning the right itself can be described as rather "twisted".[399] It has been argued, moreover, that because of the changing understanding of the "normal exploitation" of works in the digital environment and with the technological developments now underway, the three-step test will have the effect of further shrinking the freedoms guaranteed through the exceptions and limitations.[400] Indeed, in the context of Creative Users, it would

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[396] Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three Step-Test?', p. 324.

[397] Depreeuw considers that the three-step test was, after its appearance in the Berne Convention, "severed from the reproduction right" and was expanded to serve as a limitation for all exclusive rights, thus leaving the reproduction right vulnerable to becoming understood as only relating to the physical act of reproduction for whatever purpose. See Depreeuw, *The Variable Scope of the Exclusive Rights in Copyright*p, p. 97.

[398] Ibid.

[399] Dusollier, 'Realigning Economic Rights with Exploitation of Works: The Control of Authors over the Circulation of Works in the Public Sphere', p. 168.

[400] Griffiths, 'The "Three-Step Test" in European Copyright Law - Problems and Solutions', p. 441.

appear that the most recent development in the normative layer of EU copyright law, that is to say the DSM Directive, has already started to bring digital uses of copyrighted works into this territory. If all the different reproductions of all the original elements of copyrighted works uploaded by users onto online content-sharing service provider platforms are seen as "value" to be shared with rightholders, an exception making these uses free is unlikely to be seen as favourable to their economic interests. It is worth recalling here that the CJEU has already proclaimed that a German exception allowing the reuse of protected third-party materials to create new works does not satisfy the requirements of EU copyright law, including the balance of rights in this legal system implied by the three-step test.[401]

5.4.4.5. The concepts of author in the exceptions and limitations framework

Firstly, referring back to Chapter 4 and the conceptualisations of author indicated there, it is evident that the author is not seen as a *steward* or *servant* in the EU framework of exceptions and limitations, as this would imply duties and responsibilities on the part of this subject. In line with a very strong emphasis on the subjectivity of what this thesis calls the author-*genius* on the creation side of copyright, the exceptions and limitations firmly place the author on the side of exclusivity and control. The author here is the *owner* of the right of reproduction and, possibly, a *resource* for users who have their own "right" to access the created works. This is also how the conflict that requires balancing can be explained.

At the same time, the exceptions and limitations, differently from the right of reproduction itself, give the author-*owner* more agency than just a nominal attachment point for the property right. For one thing, the author clearly has an economic interest that is also protected as exclusively authorial where fair compensation is owed to authors for the use of their works. In this, the author might be an *entrepreneur* who has a stake in the exploitation.[402] The attention that is given to other interests, such as with the requirement of attribution or the sensitivity to the author's interests in first publication and use of the version authorised by the author, also shows the presence of a more personal approach to exploitation interests which fits into what this thesis calls the author-*authority* conceptualisation. Yet, as already mentioned, these aspects of the author in the context of exceptions and limitations have so far been weak.

At the same time, many of the economic interests signalled by the way exceptions and limitations are formulated, for example, their usual insistence on non-commercial use, are not connected to the author directly. They only serve to

[401] *Pelham,* para. 62, even though the Court does not give any more detailed analysis on how the "free use" in the German law fares under each of the three steps.

[402] Even though the formulation of authorial interest as related to "income" in this respect arguably also makes the conceptualisation as *resource* possible.

underline the utmost importance of economic exploitation in the system of EU copyright protection.

The final frontier, the three-step test, has so far been interpreted in a way that takes no special notice of the author and generally lifts the economic interests of all rightholders as perhaps the most important criteria for determining the external borders of the reproduction right. It can be argued, especially given the new measures aimed at protecting authors in contractual relationships, as well as the usual practice for authors to receive at least some benefits from the financial exploitation of their works, that the three-step test also directly benefits the author. However, if it does protect authors, it does so only indirectly, with generally no distinction made between the interests that different rightholders might have. In such a setting, the author might be seen as what this thesis calls an *entrepreneur* or simply a *resource* who temporarily becomes an *owner* just to transfer this status to someone else.

5.4.4.6. Conclusion of right of reproduction

The right of reproduction is today one of the rights representing the exclusivity and control deeply sedimented in the European copyright system. Over time it became strongly associated with private property and has now expanded to include any fixation without regard to its purpose or effect. It has even been suggested that in its current shape, the right of reproduction covers uses which in the "analogue world" would fall outside the purview of copyright.[403] In EU copyright law it become the manifestation of the high level of protection, particularly for authors, that was said to be the basis for the fundamental right protecting intellectual property in the first place.[404]

As the right has grown in scope, many exceptions and limitations have been added to it, representing interests opposite to exclusivity and control. These exceptions, however, have so far not been protected as strongly as the exclusive right itself. Furthermore, the purely economically interpreted and rightholder-oriented three-step test limits the balancing of these conflicting interests, ensuring that the exclusivity and control framework of this right, at least in the economic context, is not compromised. Even where there is clearly still room for more diverse interests in the three-step test, for instance, in the third step, where the reasonableness of the interests of the rightholders should be assessed and the general scope of the broad reproduction right could be limited, there is no sign of accommodation.

In this respect, the options available to EU copyright and the CJEU by way of European legal culture and the toolbox of legal sediments gleaned from the history

[403] Triaille and others, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "InfoSoc Directive")', p. 460.

[404] *Luksan*, para. 66. For more on the high level of protection see Section 2.3.2.3 of this thesis.

and theory of copyright law have yet to be utilised. Perhaps this is because the laws of the Member States in this area have already been "harmonised" by international trends and the Berne Convention to a larger extent than they have in questions of protectability. All the same, even in CJEU cases where there was a clear and easily justifiable choice, as in *Pelham,* where the national law had a different approach to the right of reproduction allowing new and independent works, the Court still opted for as much control and exclusivity as possible.

From the perspective of author, the *ownership* that this formulation of the right of reproduction implies, with the strong suggestion that it is the natural consequence of the free and creative choices of what this thesis calls author *genius,* is a rather meagre prize. The rest of the elements that form this exclusive right, for instance the exceptions and limitations, but especially the three-step test, pay the author little notice, formally equating the figure with other rightholders. Other parts of EU copyright, such as those described in Chapter 2.3.3 of this thesis, are better adapted to respond to the weaker economic bargaining position of the author and to ensure that at least some appropriate and proportionate remuneration filters down to this subject. This is not generally reflected in the structure of the reproduction right, however, and the non-economic interests of authors remain completely unaddressed.

Of course, EU copyright law does not harmonise moral rights and most national jurisdictions have moral rights systems, allowing even non-economic interests of authors to be protected. At the same time, the lack of harmonisation in this regard could be due to the fact that, given the strength of the ownership claim that EU copyright has already constructed for the author, weak moral rights would be difficult to justify, while strong moral rights might overly prejudice the economic interests of rightholders. Moreover, it is possible that this firm separation between moral and economic rights, as well as the attempts to keep the right of reproduction completely unrelated to any other interests, which have characterised the EU tradition and recent history of European copyright, are a problem in themselves.

5.5. Conclusions for Chapter 5

The EU copyright law has been developing in leaps and bounds over the past two decades, especially because of the active role the CJEU has taken in elaborating on its different legal concepts. As shown in the chapter above, in its interpretations of EU copyright law, the Court has made some very important choices that will determine the future course of development for the area. Some choices remain to be made.

From the author perspective that was taken in the chapter, what becomes clear first of all is that, as expected, the ways in which the author is conceptualised differ

depending on the legal rule in question and especially depending on which stage – creation or exploitation/dissemination – one is talking about. It has been shown, namely, that in current EU copyright law, the norms dealing with the creation side have harmonised for all subject matter what this thesis calls an author-*genius* approach. The legal sediments coming from the legal traditions of the Member States have been "purified" to the fullest extent possible, making the norms of protectability maximally universal and inclusive. The ultimate value that copyright law is meant to safeguard has been determined to be the subjectivity of the human personality that manifests through objectively expressed free and creative choices.

The right of reproduction, discussed in this chapter as a representation of one of the most important aspects of the exploitation of protected works, has also been consistently presented in a way that connects directly to the ideas behind the criteria for copyright protection. This exclusive right has been portrayed as an expression of the high level of protection of authors and has essentially been treated as an object of ownership with maximum control over exclusivity, needing no justification other than the value of the author's free and creative choices. Even if EU copyright did not "invent" the trend of expanding exclusive rights, it largely followed it, developing, for its part, the connections between the existence of the exclusive right of reproduction and the value of subjectivity the right represents. The author in this setting becomes an *owner* of the right, with the implication of private exclusivity and control, and the unity of the work as an object of property. The authorial interest in unity and exclusivity is presumed; no fixation of work however small or ephemeral is excluded from the scope of protection.

A similar line of logic is maintained in the framework of exceptions and limitations. The author, or at least the subjects who are on the side of the authorial interest, are not seen as *stewards* or *servants* with societal responsibilities. The exceptions that exist derive instead from the "external" need to compromise between authorial exclusivity and control and the rights or needs of users. The general economic interest of an author-*owner* is presumed here, and users who either compensate the author for economic losses or have already paid for access to the work, or who engage in uses that are very important for society or have no commercial purpose or significance are allowed to derogate from the scope of the extensive reproduction right. Some author-as-*authority* interests can be glimpsed in the exceptions and limitations framework too, but are given less weight than the economic interests. At the same time, if not explicitly linked to the author's person and hinting at the author as an *entrepreneur* or *resource*, the economic interests that are depicted as essential for control and exclusivity in the exceptions and limitations framework become generalised and disembodied, adaptable to any subject who may be exploiting the work commercially.

Finally, the ultimate border of the reproduction right is drawn by the three-step test, which in its current interpretation is directly aimed at protecting the commercial interests of apparently any and all rightholders of exclusive rights, without regard

for any separate interests the author might have. In this, the three-step test is a tool to stop the existing exceptions and limitations from limiting the possibilities for any current or future economic endeavours of any subject willing to undertake them. The author can be seen as an *entrepreneur* in this part of EU copyright, in that recent contractual protection mechanisms now attempt to ensure that she receives appropriate and proportionate remuneration for the exploitation of her works. At the same time, the presence or absence of such safeguards has so far not affected the interpretation of the three-step test, making it a tool that generally conceptualises the author as a *resource* of works that anyone (even the author herself, but in another capacity) might later exploit.

The picture of the author and the change in status of this subject that is presented above is something that copyright scholars have already attempted to capture, deconstruct and discuss in variety of ways. The representation in this thesis is a snapshot of the current stage of development in EU copyright law and cannot convey that complexity, focusing as it does on the analysis of the requirements of protectability and the right of reproduction. Nevertheless, this is a "family picture" of the author concept, showing the various ways to conceptualise it and how they interrelate, justifying each other and supporting each other's development.

At the same time, even before comparing this author-family with Creative Users and attempting to incorporate any further conceptualisations, certain frailties in the current co-existence can be glimpsed. To begin with, the current EU copyright law has taken both the economic and the creative conceptualisations of author and developed them to extremes, asserting some distinct overarching principles. The protection of free and creative choices permits no exceptions or compromise. The reproduction right is as extensive as possible in its existence and almost purely economic in its exercise, encompassing all fixation regardless of purpose or context. Not only does this give copyright a very broad scope, but it also creates a situation in which the author is both elevated as someone special and valuable for her subjectivity, and treated as if she were largely like any other subject acting in the market once the work is created and made accessible to others. There have been some attempts to give the author "income" for exploitation or even to enable the author's active involvement in this stage, but they are more of an afterthought, not affecting the general scope of the right or, as a general rule, the scope of the exceptions and limitations to this right.[405] The *genius* is suddenly reduced to the status of a market participant, sometimes given agency in exploitation but generally just left to her own devices. Where moral rights exist, they may help to mitigate the situation. However, depending on how they are interpreted, they may have a high threshold, and they are not currently discussed as a matter of EU law.

[405] Some exceptions and limitations are only possible if compensation specifically for the author is provided, so there are exceptions from this general rule.

Although hardly an existential threat to EU copyright law, this inconsistency, which grows every time that authors are forgotten or ignored in the discussion around exclusive rights, may be contributing to a (real or just perceived)[406] crisis in the legitimacy of copyright. Especially in the EU, where the protectability criteria and the existence of the exclusive rights have become so strongly bound to the value of the subjectivity of the author, this subjectivity has to be mainstreamed in other parts of copyright, at least to some extent, to keep the family together.

Perhaps fortunately, another group of authors, the Creative Users, is now slowly negotiating its way into the European copyright system. Inasmuch as they do not fit many of the traditional copyright categories, their presence, if acknowledged, might provide an opportunity to rethink copyright law. As with the earlier shifts discussed in Chapter 3 of this thesis, there is no need to completely rewrite copyright law or set aside the existing legal sediments to integrate new forms of authorship or technological changes such as those represented by Creative Users. This, in fact, would also almost certainly be impossible. On the other hand, certain principles, especially those of control and exclusivity in this case, might be rethought, crystallised and set on a new course of development. As stated before, there might be some options available in the context of EU copyright law that have the potential to breathe new life into the whole system.

[406] See Section 1.1.2.3 of the thesis.

Chapter 6: Case Studies of Wikipedia and Internet Memes

6.1 Introduction

In the previous chapters, the thesis has followed the elusive concept of author through theory, history, legal doctrine and EU copyright law, and in the process revealed a picture of transformation and tradition, similarities and differences, and certain deeply rooted presumptions. Indeed, the thesis intends to demonstrate that it is possible to answer the question of "what is the author" in EU copyright law, but only by embracing the complexity of roles that this subject can take in different contexts and periods.

At the same time, a detailed examination of what constitutes an "author" in EU copyright law would demand considerably more space than has already been allocated. The purpose of this thesis is to challenge the EU copyright system's ability to adapt to the emergence of the Creative User. The criteria of protectability and the reproduction right in EU copyright law were analysed in the previous chapter with this goal in mind. In this section, the identified conceptualisations will be put side by side with case studies of two Creative User communities.

The case studies chosen for this chapter do not cover all the ways in which a Creative User can contribute to culture in the digital world. On the other hand, memes and Wikipedia are perhaps two of the most visible types of Creative User activities, that anyone reading this thesis likely encounters on a regular basis. These two examples are also representative of some of the most articulated criticism for copyright law, namely its alleged inability to include massive collective authorship projects due to its inherent fixation on one author[1] and copyright law's inability to recognise derivative creativity because of its preoccupation with a certain notion of

[1] See, e.g., Chon, 'The Romantic Collective Author', pp. 830-831; Shun-ling Chen, 'Collaborative Authorship: from Folklore to the Wikiborg' [2011] Journal of Law, Technology and Policy, p. 138; Jaszi, 'On the Author effect: Contemporary Copyright and Collective Creativity', p. 51.

originality.[2] This thesis, as set out in Chapter 1, will explore these forms of digital creativity from the perspective of author and in the context of EU copyright.

Thinking about the concepts of author in EU copyright law, at least to the extent that they have been discussed above, another interesting question to ask is how the needs of the "traditional" author will change as the possibilities of digital dissemination and threats of massive illegal reproduction emerge.[3] This question will not be explored in this thesis, however. Here, the potential conceptual conflict introduced by the Creative Users is the main point of analysis, allowing, in the end, to suggest some possible solutions to this specific problem but not to all the other challenges confronting copyright authorship as a result of digital technology and the Internet.

Chapter 1 has already briefly presented the notion of UGC and clarified that it is a category covering a wide variety of forms of creativity and creators. The chapter also introduced the notion of the Creative User, implying that there is something new and interesting about users who can contribute creatively through their access to digital technologies and the Internet, and presenting the ambition to approach them as authors. Before turning to the two case studies, the next section will outline the main elements that bind all these diverse creators together, in order to better understand the nature of their activities.

6.2 Technology and Creative Users

6.2.1 Main concepts

6.2.1.1 Web 2.0

"Web 2.0" was an especially widely used buzzword in 2006-2007[4] but has since faded in popularity. Nevertheless, it is one of the key terms used to describe the technological and ideological reinvention of the Internet, whereby the user ceased

[2] E.g., Durham, 'Copyright and Information Theory: Toward an Alternative Model of "Authorship"', p. 109; Litman, 'The Public Domain', p. 966.

[3] For instance, a similar endeavour of looking for a function for traditional copyright authorship in the digital world can be found in Ng, 'When Users are Authors: Authorship in the Age of Digital Media', pp. 853-888.

[4] A simple search with "Google Trends", which analyses the frequency of searches for a specific keyword on Google nicely shows the present decline in interest in Web 2.0 after its rapid rise in 2006-2007: https://trends.google.com/trends/explore?date=all&q=%22web%202.0%22 (accessed 6 July 2021).

being just a passive consumer and started to contribute, in other words, started using the Internet as a platform for communication and sharing.

Many credit Tim O'Reilly with officially establishing the notion of Web 2.0, in 2005[5] (though there are references to this term being used in official settings even earlier[6]). After observing the differences between the entities most affected by the collapse of the dotcom bubble and those that survived, O'Reilly concluded that the new wave of applications such as Google, Ebay, Amazon and others shared certain characteristics. One of the most important of these was that they treated software, websites, and web applications not as products or objects, but rather as platforms and services.

According to O'Reilly, the "page" metaphor for a website or web application was a feature of "Web 1.0". The services of Web 2.0, on the other hand, are dynamic and based on constant development and user involvement. Thus, the greatest asset of such service platforms is data: data enabling connections between users, products and information, and data generated by the users while using the services.[7] For instance, Amazon.com was one of the first to develop its own special tools, such as showing what goods were bought together and sorting search results by popularity (i.e. attention given by other users, etc.).[8] As a result, Web 2.0 websites come to resemble social networks, and while many Internet users continue to visit hierarchically structured Web 1.0 sites,[9] the number of people using Facebook, YouTube, Instagram and similar sites is increasing every day.[10]

Other authors also stress connectivity between users, flexibility and adaptability of content and the overall significance of the role of the user as defining features of

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[5] Tim O'Reilly, 'What Is Web 2.0: Design Patterns and Business Models for the Next Generation Software' (2007) 65 Communications & Strategies. First published online at http://www.paulgraham.com/web20.html in 2005 (accessed 28 June 2021).

[6] See, e.g., Paul Graham, 'Web 2.0' (2005) <http://www.paulgraham.com/web20.html> for a first-hand account of the process of figuring out the name and implications of the new technological and social developments observed in 2005.

[7] O'Reilly, 'What Is Web 2.0: Design Patterns and Business Models for the Next Generation Software', pp. 17-37.

[8] Ibid.

[9] Graham Cormode and Balachander Krishnamurthy, 'Key differences between Web 1.0 and Wb 2.0 ' (2008) 13 First Monday.

[10] Facebook reporting an average of 1,82 billion active daily users as for October 2020: https://investor.fb.com/investor-news/press-release-details/2020/Facebook-Reports-Third-Quarter-2020-Results/default.aspx (accessed 9 November 2020); YouTube boasting of more than two billion monthly logged-in users: https://www.youtube.com/intl/en-GB/about/press/ (accessed 9 November 2020), with their growth continuously described as "explosive" since their establishment: Valcke and Lenaerts, 'Who's Author, Editor and Publisher in User-Generated Content? Applying Traditional Media Concepts to UGC Providers', pp. 119-131.

Web 2.0 applications.[11] In general, Web 2.0 is a space and a platform where Creative Users create. Even if there are many different forms of creativity there, what connects them is the fact that this creativity is fuelled and shaped by connectivity to others and the flexibility of the tools available.

6.2.1.2 Sharing economy

Another notion that is often used in connection with Web 2.0 is variously called "sharing economy", "collaborative consumption" or "collaborative economy", the latter being specifically used in the context of EU policy making.[12] "Sharing Economy" describes the exchange of value without the need for traditional legal and business structures – sharing, in other words. Even though sharing itself is hardly a rare phenomenon in human society, the Internet has enabled it to reach unprecedented levels, resulting in what could be called a "new mode of production".[13] Whereas the phenomenon of sharing economy was initially associated with the sharing of information, it has since expanded to include other resources such as skills and material objects.[14] C. J. Martin, for instance, suggests that sharing economy is centred around the following objects: 1) accommodation sharing, 2) car ride sharing, 3) peer-to-peer employment, 3) other resources including goods, skills, knowledge, infrastructure.[15]

The coining of "sharing economy" to describe the phenomenon of sharing in the digital context has been attributed, among others, to L. Lessig and his "Remix"[16] published in 2008.[17] The notion proliferated exponentially thereafter, attracting increasing academic and social interest until it peaked around 2013.[18] Overall,

[11] Cormode and Krishnamurthy, 'Key differences between Web 1.0 and Wb 2.0 '.

[12] See https://ec.europa.eu/growth/single-market/services/collaborative-economy_en (accessed 28 June 2021).

[13] Davide Arcidiacono, Alessandro Gandini and Ivana Pais, 'Sharing What? The 'Sharing Economy' in the Sociological Debate' (2018) 66 The Sociological Review Monographs 275, p. 276.

[14] See Juho Hamari, Mimmi Sjöklint and Antti Ukkonen, 'The Sharing Economy: Why People Participate in Collaborative Consumption' [2015] Journal of the Association for Information Science and Technology 2047, p. 2048. Also Maria J. Pouri and Lorenz M. Hilty, 'The Digital Sharing Economy: A Confluence of Technical and Social Sharing' (2021) 38 Emvironmental Innovation and Societal Transitions 127, p. 127.

[15] Chris J. Martin, 'The Sharing Economy: A pathway to sustainability or a nightmarish form of neoliberal capitalism' (2016) 121 Ecological Economics 149, p. 152.

[16] Lessig, *Remix*.

[17] Pouri and Hilty, 'The Digital Sharing Economy: A Confluence of Technical and Social Sharing', p. 130.

[18] Arcidiacono, Gandini and Pais, 'Sharing What? The 'Sharing Economy' in the Sociological Debate', p. 280.

however, it has no clear definition,[19] and opinions diverge on what should or should not count as sharing, with some suggesting that permanent ownership transfer or interactions with the expectation of reciprocity should not be included.[20]

The notion of sharing economy has been used quite liberally in the context of sharing of copyright-related resources, without necessarily distinguishing between sharing and gift giving, having in mind that immaterial goods, like copyrighted works, are non-rivalrous in nature. Another relevant notion that is sometimes used to discuss Creative User activities is the "gift economy", which first appeared in the context of digital technologies as early as 1993[21] and defines the new emerging economy of cyberspace where transactions happen not only for practical or commercial purposes, but also as part of community-building.[22] Y. Benkler[23] and L. Lessig[24] emphasise gift giving as sharing on a non-monetary basis, in most cases without any expectation of reciprocity. Lessig, for instance, points out environments and situations in which the introduction of money often destroys the relationship and stops the exchange. He observes that we have such environments all around us: we help our neighbours start their cars for free; we do not pay our friends to listen to our problems and give us advice. According to Lessig, "Gifts in particular, and the sharing economy in general, are thus devices for building connections with people. They establish relationships, and draw upon those relationships. They are the glue of community …."[25] Some authors do not make a distinction between sharing and gift economies at all.[26]

The sharing economy has also attracted negative attention. It has been criticised for essentially being another means of building the same capitalist systems and for

[19] Inara Scott and Elizabeth Brown, 'Redefining and Regulating the New Sharing Economy' (2017) 19 University of Pennsylvania Jurnal of Businss Law 553, pp. 558-562.

[20] See Russel Belk, 'You are what you can access: Sharing and collaborative consumption online' (2014) 67 Journal of Business Research 1595, pp. 1596-1598. But see Pouri and Hilty, 'The Digital Sharing Economy: A Confluence of Technical and Social Sharing', p. 130 for a contradicting opinion.

[21] Many sources reference Howard Rheingold, *The Virtual Community* (1993), as one of the first mentions.

[22] Ibid., chapter 2.

[23] Benkler, *The Penguin and the Leviathan: the Trumph of Cooperation over Self Interest*; Benkler, *The Wealth of Networks. How Social Production Transforms Markets and Freedom*. Even though Y. Benkler does not really use the notion of "gift economy" as such, he speaks about gifts as the basis of networked economic relationships.

[24] Lessig, *Remix* Lessig, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*.

[25] Ibid., p. 148.

[26] Alberto Romele and Marta Severo, 'The Economy of the Digital Gift: From Socialism to Sociality Online' (2016) 33 Theory, Culture & Society 43, pp. 43-63.

commercialising even aspects of life which were not commercialised before.[27] Nonetheless, more people are participating in some form of sharing economy than ever before. This development is often linked to increased consumer awareness of price, environmental impact and social sustainability following the 2008 financial crisis and growing public concern about climate change, as well as increased access to the Internet and other technologies that enable these activities.[28] With global events such as the Covid-19 pandemic and the migration of many daily activities to the Internet, it is likely that different kinds of digitally facilitated collaboration will continue to proliferate.[29]

Whatever definition is used, in the context of Creative Users and copyright law the idea of the sharing or gift economy represents a shift in the process of production and consumption of creative works. This can mean such activities as illegal file sharing or business models where the main product or service is free,[30] but it can also mean the establishment of creative communities and movements that have sharing freely and consuming jointly as their main driving force.[31] Although Internet memes can also be seen as a manifestation of such behaviour, Wikipedia will be one of the case studies explored in this chapter as a classic example of a gift economy based community.

6.2.1.3 Remix

Another notion commonly associated with Creative Users is the "remix". Remixing can be understood as an activity that combines existing cultural items to create something new and involves a variety of behaviours, many of which are not new in

[27] See Martin, 'The Sharing Economy: A pathway to sustainability or a nightmarish form of neoliberal capitalism', pp. 149-159; See also Rashmi Dyal-Chand, 'Regulating Sharing: The Sharing Economy as an Alternative Capitalist System' (2015) 90 Tulane Law Review, pp. 241-309, who is not per se critical of this presumed nature of the sharing economy herself, but argues that traditional legal principles should be applied to these platforms.

[28] A comprehensive review of academic research on this topic can be found in Belk, 'You are what you can access: Sharing and collaborative consumption online', pp. 1595-1600; also Hamari, Sjöklint and Ukkonen, 'The Sharing Economy: Why People Participate in Collaborative Consumption', pp. 1-13.

[29] See, e.g., recent reports about increased contribution activity to Wikipedia in Thorsten Ruprechter and others, 'Volunteer contributions to Wikipedia increased during COVID-19 mobility restrictions' [2021] arXiv:210210090, not yet peer-reviewed, pp. 1-13.

[30] Jyh-An Lee, 'Tripartite Perspective on the Copyright-Sharing Economy in China' (2019) 35 Computer Law & Security Review 434, pp. 436-437.

[31] See, e.g., Giorgos Cheliotis and Jude Yew, 'An Analysis of the Social Structure of Remix Culture' [2009] C&T '09: Proceedings of the fourth international conference on Communities and technologies 165, p. 165, where the authors define the main features of such communities.

their nature.[32] It has been pointed out that this is especially true in the field of music, where sampling has long been normal practice.[33] At the same time, the behaviour of digital remixing can be seen as the "next step" following what has been called the "convergence" of media and technology and the resulting new possibilities for the free transfer and mixing of different media and genres.[34] It has been suggested that remix represents the creation of a "revolutionary language" that expresses meaning through recreation and rearrangement of cultural syntax.[35]

Indeed, in the digital sphere, remix is closely related to the accessibility of digital technology and the emergence of Web 2.0. It was the remix, according to L. Lessig, that made the Internet a Read-Write rather than a Read-Only environment, restoring to cultural life a participatory dimension that had been lost since the invention of recording and play-back technologies.[36] Thus, the cultural phenomenon of remixing common to folklore was rediscovered in the digital sphere thanks to the flexibility of new tools and the accessibility of a wealth of materials. What is novel about the digital remix, however, is the sheer number of people who engage in it.[37] As with analogue remix practices, the digital Creative Users participate in what might be described as a "digital argument" – that is a set of claims that are being communicated through the re-use of other cultural artefacts.[38]

On the Internet today one can find many different remix practices, ranging from fan fiction (i.e., making new works based on characters and elements from previous novels and films) to sampling music; and from complicated multimedia mashups using popular musical and cinematographic works to the reuse of publicly available digital images. One of the case studies that will be presented below is directly related to the remix phenomenon – the culture of Internet memes. By themselves, memes may not be able to represent the complexity of a whole cultural movement; they are only a fragment of what remixing can be. However, memes are one of the most widespread remix activities among Creative Users.

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[32] Martin Irvine, 'Remix and the Dialogic Engine of Culture' in Eduardo Navas, Owen Gallagher and Xtine Burrough (eds), *The Routledge Companion to Remix Studies* (Routledge 2014), p. 15.

[33] Nicole Greenstein, 'Striking the Right Chord: A Theoretical Approach to Balancing Artists' Intellectual Property Rights on Remix Audio-Sharing Platforms' (2016) 102 Cornell Law Review, pp. 217-218.

[34] Anders Fagerjord, 'After Convergence: YouTube and Remix Culture' in Jeremy Husinger, Lisbeth Klastrup and Matthew Allen (eds), *International Handbook of Internet Research* (Springer 2010), p. 190.

[35] Frosio, *Reconciling Copyright with Cumulative Creativity. The Third Paradigm*, p. 286.

[36] Lessig, *Remix*, p. 58.

[37] Virginia Kuhn, 'The Rhetorics of Remix' (2012) 9 Transformative Works and Cultures.

[38] Ibid., at 5.1.-5.2.

6.2.2 Creative User as participant in the digital phenomena

All of these concepts are related to the shift in the production of knowledge and culture which is visible in the idea of Creative User as such. The Creative User is said to have initiated the shift away from the traditional industrial paradigm of cultural production which was often accused of commodification, commercialisation, centralisation, elitism, and Romanticism.[39] In the new model, at least in theory, the active involvement of users instead allows for participation, openness, cooperation, and flexibility. Another important feature in this transformation is the immediacy of connection between subjects and the elimination of intermediaries in the distribution of cultural products. As many commentators have noted, new technology has provided alternative distribution tools for traditional schemes of ownership and reward.[40]

As will be shown, being participants in the collaborative or sharing economy, the Creative Users also engage in economic behaviour, namely the allocation of goods or other kinds of resources.[41] From a copyright perspective it could be said that they *exploit* works, only that the purposes of this exploitation are not commercial (or at least not profit-oriented[42]), but rather motivated by other values, collaboration and other expectations of benefit from the transaction.

By now, the excitement surrounding this resurgence of *read-write*[43] culture, as L. Lessig puts it, that swept the media in 2005-2008 has subsided somewhat. The new modes of creating works have integrated themselves into the social (digital) reality of knowledge and culture production. The time is ripe, one might expect, for copyright law to find a way to more comprehensively address this form of creativity. As mentioned before, the approach at the EU level has so far been to ignore Creative

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[39] Halbert, *The State of Copyright: the Complex Relationships of Cultural Creation in a Globalised World*, pp. 183-185.

[40] See, e.g., Benkler, *The Wealth of Networks. How Social Production Transforms Markets and Freedom*; Niva Elkin-Koren, 'Copyright and Its Limits in the Age of User-generated Content.' in Eva Hemmungs Wirten and Maria Ryman (eds), *Mashing-up Culture The rise of User-Generated Content Proceedings from the COUNTER workshop Mashing-up Culture, Uppsala University May 13-14, 2009* (Uppsala Universitet 2009), pp. 17-20; or Kawashima, 'The rise of 'user creativity' - Web 2.0 and a new challenge for copyright law and cultural policy'.

[41] Pouri and Hilty, 'The Digital Sharing Economy: A Confluence of Technical and Social Sharing', p. 130; Hamari, Sjöklint and Ukkonen, 'The Sharing Economy: Why People Participate in Collaborative Consumption', p. 3.

[42] See Pouri and Hilty, 'The Digital Sharing Economy: A Confluence of Technical and Social Sharing', pp. 134-135.

[43] As opposed to the *read-only* culture put in place by the previous industrial technological revolution, see Lessig, *Remix,* pp. 28-31.

Users unless their activities become part of a profitable business model that creates a "value gap" in terms of sharing the profit derived from it.

6.3 Wikipedia: technologically enabled Creative User community

6.3.1 What is Wikipedia?

6.3.1.1 Introduction

Like all "User Generated Content" or, as this thesis sees it, the activities of Creative Users, the phenomenon that is Wikipedia is not entirely new. In general terms it is a collaborative form of knowledge production analogous to such works as academic books, articles or "normal" encyclopaedias. However, what is new about Wikipedia, and all manifestations of User Creativity, is the ability for non-professionals to organise in large cooperative projects, the scale of these endeavours (enabled by the technical architecture), and the technologically and socially enforced openness towards new participants and how the result of the work is handled. As will be demonstrated, all of these novel aspects are interdependent, arguably leading to something that can be analysed as a special form of authorship.

According to its own website, Wikipedia is "an online free-content encyclopaedia project helping to create a world in which everyone can freely share in the sum of all knowledge".[44] In other words, it is a project based on voluntary collaborative contributions aimed at creating a free encyclopaedia which can be edited by anyone accessing it (anonymously or not, depending on the preference of the editor). Wikipedia is a very large collaboration. The official statistics show that as of June 2021 it had over 41 million registered editors,[45] and during that month its users (registered and unregistered) made around 49 million edits.[46] In addition, there were more than 127,000 registered contributors who had been "active" in the previous 30 days.[47] Even though this last figure might seem to be a fraction of the total number of registered Wikipedians, it does not include unregistered contributors; yet it still indicates an enormous group of people working towards a common goal.

[44] https://en.wikipedia.org/wiki/Wikipedia:About (accessed 30 June 2021).

[45] https://en.wikipedia.org/wiki/Special:Statistics (accessed 30 June 2021).

[46] https://stats.wikimedia.org/#/all-projects (accessed 30 June 2021).

[47] https://en.wikipedia.org/wiki/Special:Statistics (accessed 30 June 2021).

One of the main ideological frameworks connecting all the project's contributors is the "Five Pillars"[48] which reflect the most fundamental principles of Wikipedia. They are formulated as follows:

1. **Wikipedia is an encyclopaedia.** This principle exists to clearly communicate the overall aim of the platform. Wikipedia is not a place where people freely write random text or express their opinions; rather, it aspires to make this open site as objective and neutral a compilation of knowledge as possible.
2. **Wikipedia is written from a neutral point of view.** This means that all views on a subject have to be presented in context and in an impartial manner. All information must be verifiably accurate, and an editor's own original (unverifiable) research or opinions have no place in Wikipedia.
3. **Wikipedia is free content that anyone can use, edit, and distribute.** All contributors voluntarily license their text to the public and allow other contributors to change and even delete it.
4. **Editors should treat each other with respect and civility.** This specifically stresses the rule of "no personal attacks", which is the main rule of communication on Wikipedia. Also, one should always act in good faith and discuss issues calmly.
5. **Wikipedia has no firm rules.** And lastly, none of the policies and guidelines are set in stone and are allowed to evolve with the community.

These five pillars essentially comprise the globally valid rules to be respected in all Wikipedia language communities. Aside from that, each language community has a degree of freedom to self-organise, and though the rules and principles are often similar among them, the structure of governance and approaches to permissible content can vary considerably. Consequently, the research that follows will be limited to the English language Wikipedia.

Wikipedia is often also referred to as a "UGC phenomenon", a "UGC site", or something along these lines.[49] In academic studies reviewed below, however, "author" appears to be the predominant concept for conveying Wikipedia contributors, although there is clear disagreement as to how wide the notion is and who exactly is included.[50] Creative Users who participate in Wikipedia refer to

[48] https://en.wikipedia.org/wiki/Wikipedia:Five_pillars (last visited 30 June 2020).

[49] See, e.g., Oded Nov, 'What Motivates Wikipedians' (2007) 50 Communications of the ACM, pp. 60-64; Heng-Li Yang and Cheng-Yu Lai, 'Motivations of Wikipedia Content Contributors' 26 Computers in Human Behavior 1377, pp. 1377-1383.

[50] In many studies, the approach is clearly a practical one, only dealing with the group of individual "authors" who can be contacted. Some use the official mailing lists of Wikipedia (e.g., Christian Pentzold, 'Imagining the Wikipedia community: What do Wikipedia authors mean when they write

themselves in a variety of ways: as "Wikipedians",[51] "editors" or "contributors",[52] and only rarely as "authors".[53] "User" is also a word that appears to be used frequently on Wikipedia itself, seemingly without controversy and interchangeably with the other titles.[54] In this thesis they will be referred to simply as "Wikipedians" but will be analysed, as explained in Chapter 1, from the perspective of "author".

6.3.1.2 The phenomenon of Wikipedia and description of its main features

Wikipedia can be described as consisting of three layers: a technological layer, a community/normative structure (or author-layer), and the product/result (or the user-layer). As will be illustrated below, these three elements are what characterise the Wikipedian and her choices in relation to the creation as well as the exploitation of Wikipedia articles.

Encyclopaedia

In many ways, Wikipedia is an *encyclopaedia* in the traditional sense of the word; its main aim to be a compilation of knowledge is clearly enshrined in the first of the five pillars. As such, it is a collection of knowledge and information presented in as objective, precise, concise, and impersonal a way as possible.[55] Indeed, one of the pillars of the whole community is the "neutral point of view", a rule that requires contributions to be based on facts and neutral reporting of existing opinions, but not the opinions themselves.[56] This even sets Wikipedia apart from the traditional encyclopaedias, which aim to capture the state of knowledge at a particular point of

about their 'community'' (2010) 13 New Media & Society, pp. 704-721); others select a handful of most active authors (e.g., Olof Sundin, 'Janitors of Knowledge: constructing knowledge in the everyday life of Wikipedia editors' (2010) 67 Journal of Documentation, pp. 840-862). Other studies seem to choose the group of "authors" based on particular criteria, for instance, by the extent, quality and acceptance of the text contributed (David Laniado and Riccardo Tasso, 'Co-authorship 2.0. Patterns of collaboration in Wikipedia' (2011) HT '11 Proceedings of the 22nd ACM conference on Hypertext and hypermedia 201, pp. 201-210).

[51] https://en.wikipedia.org/wiki/Wikipedia:Wikipedians, or https://en.wikipedia.org/wiki/Wikipedia_community (accessed 30 June 2021).

[52] https://en.wikipedia.org/wiki/Wikipedia:Who_writes_Wikipedia%3F (accessed 30 June 2021).

[53] https://en.wikipedia.org/wiki/Wikipedia:Authors_of_Wikipedia (accessed 30 June 2021).

[54] See, e.g., https://en.wikipedia.org/wiki/Wikipedia:Wikipedians (accessed 30 June 2021).

[55] See https://en.wikipedia.org/wiki/Wikipedia:What_Wikipedia_is_not#Encyclopedic_content (accessed 1 July 2021). More about the rules of contributing to Wikipedia that ensure its neutrality, quality and reliability will be presented in Section 6.3.3 later in this chapter.

[56] Sabine Niedrer and Jose Van Dijck, 'Wisdom of the crowd or technicity of content? Wikipedia as a sociotechnical system' (2010) 12 New Media & Society, p. 1374.

time. Wikipedia, in contrast, aspires to represent representations of knowledge and is an ever-evolving collection, ready to respond to ongoing events and processes.[57]

There is a vivid discussion in academic and other contexts about the content of Wikipedia in terms of its reliability, quality and usability, with the majority of the conclusions finding that it generally approaches the accuracy of a traditional encyclopaedia.[58] In fact, there is evidence that the articles with the most contributors and edits have the highest quality,[59] demonstrating that the quality of Wikipedia as a whole is only improved because of the "many eyes" looking for errors.[60] And the other way round, the aspiration for high quality and the fact that Wikipedia needs to earn the trust of its users are presumably what necessitate strong community and editing rules as well.

At the same time, Wikipedia is an *open* encyclopaedia not only in terms of who is allowed to write and read, but also in terms of its strong commitment to the openness of all knowledge. Firstly, its main principle, as expressed in the "anyone can edit"[61] policy, makes it possible to make instantaneous changes to any of its entries without the need to register or otherwise participate in the community. Of course, this ability to make a change does not guarantee that it will stay on Wikipedia for long, and there are some instances when editing can be restricted for certain articles.[62] The commitment to openness of knowledge is expressed in the "third pillar" of

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[57] Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage*, pp. 103-104.

[58] The first study of this kind came in 2005 (Jim Gilles, 'Internet encyclopaedias go head to head' (2005) 438 Nature, pp. 900-901), where Wikipedia was compared with Encyclopaedia Britannica without much difference in accuracy detected. The result was later confirmed by others: Thomas Chesney, 'An empirical examination of Wikipedia's credibility' (2006) 11 First Monday, Brendan Luyt and others, 'Improving Wikipedia's accuracy: Is edit age a solution?' (2008) 59 Journal of the American Society for Information Science and Technology, pp. 318-330, etc. However, Wikipedia articles in some specialised areas were often found to be lower in quality than the professional reference materials in those areas. See, e.g., Samy A Azer and others, 'Accuracy and readability of cardiovascular entries on Wikipedia: are they reliable learning resources for medical students?' (2015) 5 BMJ Open, pp. 1-14; and Mostafa Mesgari and others, 'The Sum of All Human Knowledge: A Systematic Review of Scholarly Research on the Content of Wikipedia' (2014) 66 Journal of the Association for Information Science and Technology, pp. 219-245.

[59] Dennis Wilkinson and Bernardo Huberman, 'Cooperation and Quality in Wikipedia' (2007) 12 First Monday.

[60] Referring to the "Linus's law" – a well-known principle in the Open Source developers' culture, which states that "given enough eyeballs, all bugs are shallow". See Eric Steven Raymond, *The Cathedral and the Bazaar. Musings on Linux and Open Source by an Accidental Revolutionary* (O'Reilly 1999), p. 30.

[61] Still used as a "slogan" of Wikipedia, but with certain nuances in recent times: https://en.wikipedia.org/wiki/Wikipedia:Introduction (accessed 9 November 2020), where it is formulated as "anyone can edit almost anything".

[62] See https://en.wikipedia.org/wiki/Wikipedia#Openness (Accessed 1 July 2021) and https://en.wikipedia.org/wiki/Wikipedia:Protection_policy (accessed 1 July 2021).

community rules, stating that neither the Wikipedian community nor any single contributor can restrict access to the results of the joint effort. Anyone can copy and distribute the text of Wikipedia. This social norm is also guaranteed by Wikipedia's adoption of a Creative Commons license, which will be discussed later in the chapter. Lastly, Wikipedians are encouraged to be concious about the resources they use for Wikipedia entries and to use freely available content whenever possible.[63]

Thus, even though similar to a traditional encyclopaedia, Wikipedia has a more active social mission and a commitment to certain values that no traditional encyclopaedia has ever been able to achieve, not least because of the constraints of the traditional encyclopaedic medium and the costs required to ensure its quality and reliability.

Technology

The main component that makes Wikipedia what it is is the wiki software. The "Wiki", which means "quick" in Hawaiian, was created in 1994 and it is this technology that enables constant editing of the website content with no possibility for exclusive private control.[64] Wiki technology is not uncommon in the Web 2.0. environment, especially for sites that aim at collecting and sharing knowledge, such as fan-sites,[65] online libraries,[66] geographical location and travel-related sites,[67] although Wikipedia is perhaps the most well-known wiki-based project. Wikipedia is also one of the most open wiki sites, giving the power to edit to (almost) anyone.[68]

In the context of Web 2.0, wiki technology creates a unique platform not inherently based on temporal organisation but representing a *space* for contribution.[69] This makes a wiki page a constantly shifting and changing "work", which always has the same address but can have different content at different instances of time.[70] At the

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[63] See: https://en.wikipedia.org/wiki/Wikipedia:Copyrights#Using_copyrighted_work_from_others (accessed 1 July 2021). Also: Ryan Safner, 'Institutional enterprenourship, Wikipedia, and the opportunity of the commons' [2016] Journal of Institutional Economics 1, p. 758.

[64] Matthew Rimmer, 'Wikipedia, Collective Authorship and the Politics of Knowledge' in Christopher Arup and William van Caenegem (eds), *Intellectual Property Policy Reform: Fostering Innovation and Development* (Edward Elgar 2009), p. 172.

[65] E.g., such sites as https://www.fandom.com/ (accessed 1 July 2021), hosting wiki-based fan communities.

[66] Probably the most well-known of them being "Wikisource", https://en.wikisource.org/wiki/Main_Page (accessed 1 July 2021).

[67] E.g., "Wiki Travel", https://wikitravel.org/en/Main_Page (visited 1 July 2021).

[68] Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage*, p. 103.

[69] Ibid., p. 102.

[70] Wikipedia is always a "work in progress": https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_a_work_in_progress (accessed 1 July 2021) and

same time, every wiki page also has a page history of all edits and a discussion related to its content, which is an integral part of the technology layer, even though this information is for uses other than organisation of the content and is not directly visible.[71]

Because of its mission and size, Wikipedia specifically has an additional technological layer that is designed to assist human Wikipedians with such tasks as grammar and language editing, gathering of raw data, alerting about vandalism, etc. These pre-programmed bots have been identified as essential to Wikipedia – so much so that they are sometimes considered co-authors of its content[72] (of course, not in the legal meaning of the term). They also are a means to better formulate and automatically enforce the community's social norms.[73]

This technological layer is what makes Wikipedia from the very beginning an open system where Wikipedians are guided and adjusted to contribute in a certain predetermined way.[74] Moreover, it is essentially the different technological solutions that make the management of this large community and its outputs possible. To direct the conduct of the users of a completely open platform towards making a good-quality encyclopaedia, a further layer of social norms and community structure is needed.

Wikipedia community

With its purpose of being an accurate and impartial encyclopaedia and its ideological as well as technological dedication to unprecedented openness, Wikipedia needs a strong community to ensure the quality and reliability of its content. Even though the wiki is a free space and anyone can make edits, it would be a mistake to assume that the organisation of the Wikipedia community is sporadic or chaotic.[75]

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https://en.wikipedia.org/wiki/Wikipedia:Editing_policy#Wikipedia_is_a_work_in_progress:_perfection_is_not_required (accessed 9 November 2020).

[71] Pattarawan Prasarnphanich and Christian Wagner, 'The Role of Wiki Technology and Altruism in Collaborative Knowledge Creation ' (2009) 49 Journal of Computer Information Systems 33, p. 34.

[72] Niedrer and Van Dijck, 'Wisdom of the crowd or technicity of content? Wikipedia as a sociotechnical system', pp. 1377-1378.

[73] Stuart Geiger, 'The Lives of Bots' in Geert Lovink and Natheniel Tkacz (eds), *Critical Point of View: A Wikipedia Reader* (Institute of Network Cultures 2011), p. 91.

[74] Dominique Cardon, 'Discipline but not Punish: The governance of Wikipedia' in Francoise Massit-Follea, Cecile Meadel and Laurence Monnoyer-Smith (eds), *Normative experience in internet politics* (Open Edition Books 2012) <https://books.openedition.org/pressesmines/595?lang=en> , at 4-8.

[75] Dan Wielsch, 'Governance of Massive Multiauthor Collaboration. Linux, Wikipedia, and Other Networks: Governed by Bilateral Contracts, Partnerships, or Something in Between?' 96 JIPITEC, p.

The structure of open self-organising online creative communities has perhaps been most studied in relation to Open Source Software, where it was said to resemble an onion with layers of members and the level of contribution increasing the closer one gets to the core.[76] The Wikipedia community, because of its more open-ended goal,[77] is not necessarily as strictly organised. In any case, even on Wikipedia, there are different access levels (and arguably reputation levels) that a contributor can have.[78] At the lowest levels are several groups of ordinary content contributors; these are topped by administrators. Ordinary contributors are also organised in a certain hierarchy, with anonymous editors and new arrivals at the bottom and "autoconfirmed users" and "extended autoconfirmed users"[79] at the top. Normally, everyone has the right to copy, paste, write things and reference them on Wikipedia, but administrators also have extended rights to delete whole articles, name and un-name them, protect certain articles from editing and edit fully protected articles.[80] Additionally, administrators have rights related to other users, such as the ability to block accounts and IP addresses, and judge the final outcome of certain kinds of forum discussions.[81] In general, aside from the formal role of administrators, contributors self-organise spontaneously, for instance, in that some of them are exceptionally active and "omnipresent",[82] or in terms of the division into "expert groups", where some active users give special attention to particular Wikipedia site.[83]

At the "core" of Wikipedia one finds various officials with special rights extending beyond those of administrators, and additional structural arrangements. These

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1, suggests that such an approach to online collaborative projects was predominant in the early research on the subject.

[76] See, e.g., Jose Christian and Anh N. Vu, 'Task-based Structures in Open Source Software: Revisiting the Onion Model' (2021) 51 R&D Management 87, pp. 87-88 and 96-98; Kerstin Press Markus M. Geipel, Frank Schweitzer, 'Communication in Innovation Communities: an Analysis of 100 Open Source Software Projects' (2014) 17 Advances in Complex Systems, pp. 1-25.

[77] Whereas the Open Source communities are aimed at creating fully functional computer software that will not work if there are mistakes in the code, Wikipedia also aims to be as accurate and well-developed as possible, but some margin of error can be seen as inevitable and non-problematic.

[78] See https://en.wikipedia.org/wiki/Wikipedia:User_access_levels (accessed 1 July 2021).

[79] A contributor usually earns her "autoconfirmed" status when an account is more than four days old and has made more than 10 edits: https://en.wikipedia.org/wiki/Wikipedia:User_access_levels#Autoconfirmed_and_confirmed_users (accessed 1 July 2021).

[80] https://en.wikipedia.org/wiki/Wikipedia:Administrators (accessed 1 July 2021), and https://en.wikipedia.org/wiki/Wikipedia:Administrators%27_guide (accessed 1 July 2021).

[81] https://en.wikipedia.org/wiki/Wikipedia:Administrators (accessed 1 July 2021).

[82] Laniado and Tasso, 'Co-authorship 2.0. Patterns of collaboration in Wikipedia', p. 6.

[83] Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage*, pp. 108-109.

officials can perform the roles of bureaucrats, stewards, developers and other more specialised ones like "pending changes reviewer" or "account creator".[84] In the very centre of the community, Jimmy Wales, the founder of Wikipedia, is still acknowledged as the most important Wikipedian and is described by some as a 'god-king'.[85]

The relationship within and between these layers has also been extensively analysed in the literature, with some disagreement on how flexible and inclusive the community is. Wikipedia is said to be based on a decentralised and community-driven governance model where even the social norms are constantly edited and remade.[86] Moreover, the community structure is not closed: one can come and go as one pleases, and therefore, even though there are certain social norms and rules in place, no real duty of reciprocity exists – each author contributes without assurance that others will do the same.[87] The "core" of the community, namely the administrators and officers with more access than the ordinary members in the Wikipedian community, are appointed through an open and democratic process.[88]

In addition to this, because of the size of Wikipedia and the continual need to respond to the text changes happening as a result of its open nature, the community needs to stay flexible and have social mechanisms in place to handle conflicts and other problems quickly and efficiently.[89] One of the most important principles on Wikipedia is "assuming good faith", which permeates the community, ensuring constructive collaboration.[90] This also suggests a flexible and transparent community where contributors can move through the layers easily, influence joint decisions, and freely make and defend their contributions.

On the other hand, there are those who claim that the normative structure of knowledge sharing communities like Wikipedia is more complex and formalised than it might first seem. E. Joyce et al., for instance, have observed that Wikipedia,

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[84] https://en.wikipedia.org/wiki/Wikipedia:User_access_levels (accessed 1 July 2021).

[85] Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage*, p. 141.

[86] See Wielsch, 'Governance of Massive Multiauthor Collaboration. Linux, Wikipedia, and Other Networks: Governed by Bilateral Contracts, Partnerships, or Something in Between?', p. 98.

[87] Ibid., p. 100.

[88] See, e.g., the description of the process of attaining consensus on the appointment of administrators at https://en.wikipedia.org/wiki/Wikipedia:Requests_for_adminship (accessed 2 July 2021) and bureaucrats https://en.wikipedia.org/wiki/Wikipedia:Requests_for_adminship#About_RfB (accessed 2 July 2021). See Joseph Michael Jr. Reagle, *Good Faith Collaboration. The Culture of Wikipedia* (MIT Press 2010), pp. 97-115, on *consensus* in the Wikipedian community.

[89] Fernanda B. Viegas, Martin Wattenberg and Kushal Dave, 'Studying Cooperation and Conflict between Authors with history flow Visualisations' [2004] CHI '04 Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, p. 582.

[90] Reagle, *Good Faith Collaboration. The Culture of Wikipedia*, pp. 59-70.

like any other bureaucracy, has a governance structure requiring special roles and special rules for filling them; it has policies and guidelines for the community's operation[91] and exhibits the characteristic tension between contributors' individual agency and the structures limiting it.[92] Indeed, the normative structure of Wikipedia is, in fact, a product of firsthand experience of what complete freedom to edit can mean for a wiki project. In the first days of its existence, Wikipedia was a small community where there was tacit agreement about the most important values and aims of the project. The first authors were mostly academics, well versed in the fields they were writing about; it was not until Wikipedia gained its first publicity that "everyone" showed up.[93] According to D. Cardon, this did work well to begin with, and the first policies, guidelines and rules were introduced as a result.[94] They exist to make sure the big and open Wikipedia functions in a productive and predictable way, even if flexibilities and accommodations are also necessary, as testified by the "fifth pillar", which asserts that "Wikipedia has no firm rules".[95]

Multi-layered but connected

From the brief description above, it becomes apparent that the three layers of Wikipedia are tightly connected. The wiki is a product of a certain vision of society and codifies its ideas and ideologies. At the same time, this is the technology that makes the democratic and inclusive relationship between authors on Wikipedia necessary and possible. The fact that anyone can edit the content of a website requires a strong communal structure with moderators, administrators and others who are there to preserve the ideals attached to the community and the final product – the encyclopaedia. The sheer amount of information to be managed, as well as the extent of technical tasks, requires technical solutions developed over time by

[91] Even though the line between these documents and so the power they have is often unclear. See ibid., pp. 51-52.

[92] Elisabeth Joyce, Jacqueline C. Pike and Brian S. Butler, 'Rules and Roles vs. Consensus: Self-Governed Deliberative Mass Collaboration Bureaucracies' (2012) 57 American Behavioral Scientist, pp. 580-584; also Bradi Heaberlin and Simon DeDeo, 'The Evolution of Wikipedia's Norm Network' (2015) 8 Future Internet, p. 2, on the conservatism of social norms on Wikipedia. The same direction of development, albeit with a more optimistic prognosis, can be found in Reagle, *Good Faith Collaboration. The Culture of Wikipedia*, pp. 90-91.

[93] Cardon, 'Discipline but not Punish: The governance of Wikipedia', pp. 209-232.

[94] Ibid.

[95] https://en.wikipedia.org/wiki/Wikipedia:Five_pillars (accessed 2 July 2021); see also Joyce, Pike and Butler, 'Rules and Roles vs. Consensus: Self-Governed Deliberative Mass Collaboration Bureaucracies', pp. 590-591.

Wikipedia editors. Because of this connection between technology and Wikipedians, Wikipedia could be called a "sociotechnical system".[96]

Another key feature of Wikipedia, which results from its permeable reader/author boundary and its democratic nature, is that the encyclopaedia is not so much a product or "work" in the traditional sense as a process or a community.[97] In other words, the result cannot be easily separated from the structure behind it. This is precisely the reason why Wikipedia is a poor reference source for other works: a reference to content on a Wikipedia page can only be made at one specific instance of time. A Wikipedia site is, at any given moment, just a "snapshot of the community's continuing conversation".[98] According to N. Miller, this turns reading and writing into parts of the same process of communication, without any work as a "product" to speak of.[99]

Already here, it is clear that Wikipedia as a community and that its way of authoring works is something that goes against some of the sub-surface sediments of European copyright law discussed in Chapter 3. The exclusivity and control and its private propertisation so clearly expressed in European copyright are not only absent, but are reversed, transforming the management of knowledge and information into an exercise of openness, sharing and consensus. Subjectivity and authorial agency are not completely removed or unappreciated in this community, but they are not associated with the struggle between human and machine and the emphasis on personality as observed in European copyright tradition. The subjectivity of a single author is integrated into the structure of the community and is not taken away, but rather channelled and shaped. Lastly, the processes of creation and exploitation of works are not separated but are rooted the same general principles, allowing the community to control exploitation in line with its values and attitudes.

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[96] Niedrer and Van Dijck, 'Wisdom of the crowd or technicity of content? Wikipedia as a sociotechnical system'.

[97] Nora Miller, 'Wikipedia and The Dissapearing "Author"' (2005) 62 ETC, pp. 37-40, specifically speaking about "writing and reading as moments in the process of communication"; and Iassen Halatchliyski and others, 'Explaining authors' contribution to pivotal artifacts during mass collaboration in the Wikipedia's knowledge base' 9 Computer Supported Cooperative Learning 97, pp. 97-115.

[98] Reagle, *Good Faith Collaboration. The Culture of Wikipedia*, p. 1. It might also be interesting to note here that this chapter of the thesis had to be changed at least a little bit every time it was reviewed, for precisely the same reason.

[99] Miller, 'Wikipedia and The Dissapearing "Author"', p. 40.

6.3.1.3 Copyright of choice: Wikipedia and Creative Commons license

Wikipedia is a large project and one of the most visited websites in the world[100] and is funded by the Wikimedia Foundation (a non-profit organisation).[101] It is not surprising, then, that it is mindful of the existence of copyright law, the principles governing it and the problems it might cause. To manage the differences of approach to works and authorship, Wikipedia uses an open Creative Commons license. Even though this is a ready-made license that builds upon the experience of many different creators, it gives at least a rudimentary idea of what "copyright law according to Wikipedia" might look like.

Most of the communities using open licenses have emerged and forged their identity in processes of conflict with and resistance to copyright law. This can be clearly seen in the history of the Open Source movement, Open Access Initiative, Creative Commons and Wikipedia itself, which follows the path of Open Access communities.[102] At the same time, the open license alone cannot account for all the ways that Wikipedia departs from the structure of European and EU copyright law.

Some claim that open licenses constitute the basis of open knowledge-sharing communities and the "glue holding communities together".[103] At the same time, the Wikipedia project has a further set of policies and rules related to the interaction between Wikipedians, the requirements of the final product, and so on.[104] While open licensing certainly make communities like Wikipedia possible in the light of how different their ideology is from the main structural elements of copyright law, it does not define or exhaust their complexity nor does it solve all problems.[105]

To allow free use, copying, distribution and transformation of its content, Wikipedia mainly uses the Creative Commons Attribution-Share-Alike License (CC BY-SA).[106] This is a public license developed by Creative Commons (a non-profit

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[100] At least as reported by Wikipedia itself. See https://en.wikipedia.org/wiki/List_of_most_popular_websites (accessed 4 July 2021).

[101] See https://en.wikipedia.org/wiki/Wikimedia_Foundation (accessed 4 July 2021).

[102] The history of the first Open Source licenses has been described by their creator as a direct counter to the proprietary and exclusionary nature of copyright. See Stallman, 'The GNU Project and Free Software', pp. 19-20; also Richard Stallman, 'Freedom, Society and Software' in Joshua Gay (ed), *Free Software, Free Society: Selected Essays of Richard M Stallman* (2002), p. 117.

[103] Pedro Nicoletti Mizukami and Ronaldo Lemos, 'From Free Software to Free Culture: The Emergence of Open Business' in Lea Shaver (ed), *Access to Knowledge in Brasil New Research on Intellectual Property, Innovation and development* (2010), p. 33.

[104] One need only look at the Five Pillars to see this: https://en.wikipedia.org/wiki/Wikipedia:Five_pillars (accessed 4 July 2021).

[105] As has been pointed out by S. Dusollier in Dusollier, 'The Master's Tools v. The Master's House: Creative Commons V. Copyright', pp. 271-293.

[106] https://creativecommons.org/licenses/by-sa/4.0/legalcode (accessed 4 July 2021).

organisation based in the US[107]) and involves letting the author choose to give up some or all[108] of her rights owned under copyright law.[109] The Specific CC BY-SA License (which is also represented by the symbol ) has the following conditions:[110]

1. The user of the work is free to copy and redistribute the material in any medium or format,
2. The user is free to adapt the work (remix, transform and build upon the material),
3. If any adaptation or transformation is carried out, the resulting new work must be licensed in the same way as the previous one (in the case of Wikipedia the same CC BY-SA or another compatible license must be used),
4. Whenever any action is taken with the licensed work, the initial author or its source has to be provided, together with an indication of any changes and a link to the license.[111]

Of special note here is the "ShareAlike" condition, i.e., the third condition in the list above. This is something that Creative Commons borrowed directly from the Open Source movement and the GNU GPL license, and which is also often called the "viral" or "copyleft"[112] requirement. It is there to make sure that the knowledge that was made free stays that way and is not enclosed by incorporating it into other all-rights-reserved products. Moreover, this is a way to keep the community strong: not only do the works that are integrated with the free content get "infected", but potential new members of the community also have a strong incentive to join if they want to build on the licensed knowledge.

Another aspect of public licenses that is important in the context of Wikipedia is the lack of any remuneration scheme for the author. The rights are given without any

[107] More information is available at https://creativecommons.org/about/ (accessed 4 July 2021).

[108] There is a special Creative Commons license to give up all of the rights associated with copyright, namely the CC-0: https://creativecommons.org/publicdomain/zero/1.0/ (accessed 4 July 2021).

[109] The full list of available licenses and more information on how they work can be found at https://creativecommons.org/about/cclicenses/ (accessed 9 November 2020).

[110] The summary of the license can be found at https://creativecommons.org/licenses/by-sa/4.0/ (accessed 4 July 2021) and the full text at https://creativecommons.org/licenses/by-sa/4.0/legalcode (accessed 4 July 2021).

[111] The same conditions and more guidance on how they apply to Wikipedia in practical terms can be found at https://en.wikipedia.org/wiki/Wikipedia:Copyrights (accessed 4 July 2021).

[112] Brian W. Carver, 'Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses' (2005) 20 Berkeley Technology Law Journal 443, pp. 455-456.

payment of royalties; therefore, authors using such licenses can only receive payment in other ways, for instance, through donations.[113] The Wikipedia community, in particular, has a strict remuneration policy, whereby if a Wikipedian is paid for a contribution, she must disclose this fact to the community.[114]

Contrary to what might be expected, the Wikimedia Foundation and Wikipedia do not own the copyright in any of the text or media contributed. The copyright stays with the contributor at all times, but contributions are automatically licensed under the CC BY-SA license.[115] So, legally, the ownership of content is not "communal", but in fact stays with each of the contributors. Moreover, the individual author retains the right of attribution (and possibly other moral rights). The same is confirmed by Wikipedia's rules of attribution,[116] where one of the options for attribution (besides providing a link to the Wikipedia site) is to provide a list of authors of a specific article.

The open licenses also have their limitations, however. For one thing, they raise a number of legal problems related to different copyright laws and contractual laws in different jurisdictions. Even the nature of the license (contractual or non-contractual) might be understood differently in different countries,[117] and specific provisions, especially in contract law, differ significantly from country to country (for example, the requirement of "consideration").[118] The questions of licensing compatibility[119] and the overall validity of the share-alike condition[120] have also been raised and remain, in principle, unresolved. Furthermore, as previously noted,

[113] The Wikimedia Foundation – an NGO behind Wikipedia – often solicits donations from readers. None of this money, however, goes directly to the authors; rather it is used to subsidise the technical infrastructure needed to sustain Wikipedia (with some occasional exceptions in the form of grants and funding different activities).

[114] https://en.wikipedia.org/wiki/Wikipedia:Paid-contribution_disclosure (accessed 4 July 2021).

[115] https://en.wikipedia.org/wiki/Wikipedia:Copyrights (accessed 4 July 2021).

[116] https://en.wikipedia.org/wiki/Wikipedia:Reusing_Wikipedia_content#Re-use_of_text_under_Creative_Commons_Attribution-ShareAlike (accessed 4 July 2021).

[117] The copyright license is non-contractual in nature (but part of copyright or property right) in the US, for example, but is considered part of contract law in Germany and many other continental legal traditions.

[118] Herkko Hietanen, A., 'A License or a Contract, Analyzing the Nature of Creative Common Licenses' (2007) 6 Nordic Intellectual Property Law Review, pp. 527-530.

[119] For a detailed study of the compatibility of different CC licenses, see Melanie Dulong de Rosnay, 'Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions' [2010] IVIR.

[120] Gonzalez, 'Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licenses', pp. 334-336.

not all aspects Wikipedian authorship can be sufficiently addressed through the simple adoption of a Creative Commons license.[121]

The upcoming sections will look more closely at the differences between Wikipedia and EU copyright law from the perspective of author.

6.3.2 The authors of Wikipedia

6.3.2.1 General observations

Even though a connection certainly exists between the "author" in copyright law and the author/contributor/editor/user on Wikipedia, as demonstrated by the simple fact that contributors keep their copyright and only license it under a Creative Commons license, there are also signs that "Wikipedian" is a more complex notion than copyright's "author".

For one thing, as described above, there are many different types of contributors, some of which are closer to bureaucrats and administrators than creators of content. This is not dissimilar to a "real life" publishing house, where people take on a variety of roles when contributing to producing a book. On the other hand, administrative or other positions on Wikipedia are seen not as being below "authorship" (or rather "Wikipediaship"), but above it. As mentioned, the administrators are only chosen from among the most active and well-socialised members,[122] and adminship grants additional possibilities to influence the structure and content of Wikipedia. Without a functioning community that includes a system of sanctions and surveillance, mass contribution and sharing of a resource might not be possible at all.[123] Furthermore, there may be some other forms of contribution that are not typical from a general copyright perspective. For instance, the first Global Wikipedia Survey, carried out in 2010, discovered that there is one more special group of people on Wikipedia, namely "ex-contributors", who no longer write anything yet do not consider themselves "readers" either.[124]

Even if, once again, this specialisation of "authors" is most likely related to the nature of the project (namely, this being an encyclopaedia), it must be stressed that in open online environments with very large numbers of contributors, there tends to

[121] For more detailed analysis see Dusollier, 'The Master's Tools v. The Master's House: Creative Commons V. Copyright'; also Elkin-Koren, 'Copyright and Its Limits in the Age of User-generated Content'; and Elkin-Koren, 'What Contracts Can't Do: The Limits of Private Ordering in Facilitating Creative Commons', pp. 387-390.

[122] See Reagle, *Good Faith Collaboration. The Culture of Wikipedia*, pp. 118-119.

[123] Cardon, 'Discipline but not Punish: The governance of Wikipedia', section 15.

[124] Ruediger Glott, Philipp Schmidt and Rishab Ghosh, 'Wikipedia Survey - Overview of Results' [2010] UNU-MERIT and Collaborative Creativity Group, p. 5.

be a structure with increasing possibilities for contribution closer to the centre and a division of tasks between contributors. Having in mind that this specialisation has been noted in other multiple creator environments,[125] the pattern's persistence suggests a need to reflect on *specialisation* as one of the features of authorship, especially against the backdrop of the unified EU copyright originality requirement.

Another general indication of a different perception of authorship in Wikipedia might be its rules of attribution.[126] The Creative Commons license discussed above allows anybody to use, distribute and copy Wikipedia's text even for commercial purposes, but only if proper attribution is given. The rules on the website[127] offer several suggestions on how to carry out this attribution. The preferred method suggested is to provide an URL to the relevant Wikipedia site, but listing all authors of a specific article is also an alternative (quite understandable when the reference is needed in some sort of printed document[128]). As mentioned, an essential part of wiki technology is the edit log, where all edits (even trivial and irrelevant ones, including vandalism) for a specific site are recorded. This is the list of authors who are to be acknowledged following the attribution rule. The same rule, however, also allows one to filter out and refrain from referencing irrelevant or minimal contributions.[129]

At first glance, this rule appears to be similar in scope to copyright law, where non-original contributions (very minor and without any individual character) would also be considered unprotectable. However, the Wikipedian rule specifically excludes irrelevant contributions (with no reference to their extent), does not exclude major but more technical contributions (such as "cleaning up" after other contributors or finding references, which form a large part of a Wikipedian's work[130]), and does not exclude major contributions which might be completely re-written in the current version by someone else. Moreover, on Wikipedia there is no differentiation based

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[125] See, e.g., Bently and Biron, 'Discontinuities between legal conceptions of authorship and social practices', pp. 239-255; or Simone, *Copyright and Collective Authorship. Locating the Authors of Collaborative Work*, pp. 72-99, specifically analysing the questions of collective authorship in Wikipedia from the perspective of British copyright law.

[126] https://en.wikipedia.org/wiki/Wikipedia:Reusing_Wikipedia_content (accessed 4 July 2021).

[127] https://en.wikipedia.org/wiki/Wikipedia:Copyrights#Re-use_of_text (accessed 4 July 2021).

[128] Even though this kind of referencing is discouraged also due to the anonymity of many of the contributors: https://en.wikipedia.org/wiki/Wikipedia:Citing_Wikipedia (accessed 4 July 2021).

[129] There is a special indicator in the log of contributors signalling a contribution that is minor in nature: https://en.wikipedia.org/wiki/Help:User_contributions (accessed 4 July 2021). There is, however, no clear indication as to what should be considered as irrelevant contribution. There are systems in place to flag irrelevant content, but they are automated, and the guidelines noted above clearly state that mere flagging does not guarantee that the content actually violates community rules.

[130] Sundin, 'Janitors of Knowledge: constructing knowledge in the everyday life of Wikipedia editors', pp. 850-854.

on any other criteria like "skill and effort" (apart from filtering out "minor" contributions, even though it is unclear what "minor" really means) or especially free and creative choices. All contributions must be attributed. This, too, directly indicates a difference in thinking about who can be considered a Wikipedian and who can be considered an author in copyright law.

6.3.2.2 Wikipedian and creation of "work"

In Chapter 5, the rules determining the legally relevant acts of creation in EU copyright law were discussed and it was concluded that they have been harmonised by the CJEU through two criteria: originality and expression. These two criteria and their current interpretation represent a certain understanding of authorship and reflect choices made among available options in the legal culture of the European copyright tradition.

It can be recalled, moreover, from Chapter 3 that the first models of authorship prior to the exclusivity of copyright were *servant* and *craftsman*, where the author was expected to have a relationship with work that was grounded in duty and accountability or to achieve a certain tangible purpose through the application of practical knowledge and ability. Later, the evolving copyright law distanced itself from these concepts and introduced increasing substance neutrality and emphasis on authorial subjectivity, with a form of the utilitarian approach remaining strong mostly in the common law copyright tradition. The EU copyright law, as discussed, has followed what this thesis calls the author-*genius* model, which ignores any craftsmanship or value imparted to the work. The most important criterion became free and creative choices, as long as they were made with a creative purpose and not merely seeking the best technical function.

This thesis did not specifically address the question of collective authorship largely because, with the exception of some provisions in relation to specific subject matter, this aspect of copyright law is not harmonised at the EU level.[131] Nevertheless, given the EU's emphasis on a specific understanding of originality for all subject matter in the EU and the traditional approach in the Member States of requiring an original contribution in multiple-authorship scenarios,[132] it is relevant to consider how the current EU protection criteria fit in the context of a large online creative community like Wikipedia.

[131] See Section 2.3.3 of the thesis.

[132] See: Aurelija Lukoseviciene, 'Scientific Authorship and Copyright Law in Big Science User Facilities: the Case of ESS' in Ulf Maunsbach, Axel Hilling and Olof Hallonsten (eds), *Big Science and the Law* (ExTuto 2021), pp. 33-64.

Community

As mentioned, on Wikipedia, the individual subjectivity of authors is shaped in a certain way by community and cooperation. The platform's technological and ideological openness makes community a necessity and determines its structure as a middle thing between open participation and procedures and roles that constructively structure this participation.[133] The already mentioned Creative Commons license makes this possible from the perspective of copyright law, enabling as it does the internal relationship of openness among Wikipedians and keeping the text open to contributions. Since similar structures (with some differences) are observed in many online Creative User communities, for instance, Open Source software developers, they can be seen as necessary for this type of Creative User project.

Thus, cooperation and collaboration could be regarded as one of Wikipedia's most important elements. Indeed, when compared to other topics in Wikipedia's normative structure, the cluster of policy and guideline articles related to questions of "collaboration" is one of the largest.[134] In fact, collaboration is just as important as the rules regarding quality control – and sometimes even more so.

In his comprehensive review of Wikipedia's collaboration phenomenon, J.M. Reagle identifies two key features that make the collaboration possible:[135] the "neutral point of view" principle (NPOV)[136] and the good faith requirement (and assumption).[137] NPOV is a policy that stipulates equal respect for all points of view on a given topic, not merely equal coverage of different views and sources. As such it requires Wikipedians to adopt a certain epistemic perspective.[138] The good faith principle encourages contributors to see the humanity of the other and to always assume that edits, mistakes, and all utterances are made in good faith. D. Cardon stresses the same feature of Wikipedia community when analysing the rule of "No Personal Attacks", which is also one of the key policies when it comes to dispute resolution. It essentially means that any comments must be directed at the content, not the contributor, which fosters good faith and a collaborative atmosphere while

[133] Joyce, Pike and Butler, 'Rules and Roles vs. Consensus: Self-Governed Deliberative Mass Collaboration Bureaucracies', p. 591.

[134] Heaberlin and DeDeo, 'The Evolution of Wikipedia's Norm Network', pp. 9-10.

[135] Reagle, *Good Faith Collaboration. The Culture of Wikipedia*, p. 45.

[136] https://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view (accessed 5 July 2021).

[137] This principle is indeed often referenced in discussions on Wikipedia and is key in most of its dispute resolution recommendations and procedures: https://en.wikipedia.org/wiki/Wikipedia:Assume_good_faith (accessed 5 July 2021).

[138] Ibid., pp. 53-59.

minimising the risk of someone being insulted.[139] In such a system, the outcome of a dispute, and thus the final expression of how a given part of Wikipedia will look, is oriented towards compromise and consensus among all (interested) contributors, rather than a single author's personal expression.[140]

From this perspective, the concept of author in Wikipedia is not centred on the subjectivity of a single individual, but rather represented by a community as a whole. The most important decisions on the structure and direction of content development are made collectively, either through direct participation of other contributors and the social rules that promote cooperation, or through the openness of the text, which can be rewritten at any time. As noted before, this cooperation and the community's size also lead to specialisation among Wikipedians and a perception that all contributions are valuable, and that some merely technical contributions might be the most valuable all.[141] While major decisions are made jointly, the actual work that is needed to put them into action requires individual skill and effort.

Openness and utility

Thus, when it comes to the individual contribution of a Wikipedian, there are also several things to consider. One factor that determines the value of an authorial contribution is its compliance with the ideology of Wikipedia, which centres not just on creating an encyclopaedia, but also on the production of freely accessible knowledge. As already indicated, the most important and influential set of rules on Wikipedia are the Five Pillars,[142] where hints about the requirements for contributions may be found. More concrete provisions are listed in the "Rules of writing articles":[143]

- Neutral point of view[144] (meaning that articles have to be objective and present a wide array of different opinions).

[139] Cardon, 'Discipline but not Punish: The governance of Wikipedia', pp. 209-232.

[140] "Wikipedia is not about winning", state the guidelines on dispute resolution: https://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution (accessed 5 July 2021). See also https://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view (accessed 5 July 2021).

[141] See Section 6.3.2.1 of the thesis.

[142] https://en.wikipedia.org/wiki/Wikipedia:Five_pillars (accessed 5 July 2021).

[143] https://en.wikipedia.org/wiki/Help:Introduction_to_policies_and_guidelines/2 (accessed 6 July 2021).

[144] https://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view (accessed 6 July 2021).

- Verifiability[145] (meaning that all statements have to be backed up by reliable sources, especially the controversial ones).
- No original research[146] (which requires authors to present existing knowledge without adding any new and unsupported theories or analyses).

In essence, these standards are not much different from those that would apply to any other encyclopaedia, whether digital or printed. The Encyclopaedia Britannica describes the same kinds of features in its entry on encyclopaedias, including the fact that most of them are compilation works created by many contributors working together.[147]

What sets Wikipedia apart from other encyclopaedias, however, is that due to its greater need for verifiability, which follows from its openness, it uncharacteristically makes external references a requirement in order to create trust not only among contributors but also between readers and authors.[148] It has been suggested that the "neutral point of view" principle is also stronger in Wikipedia than in traditional encyclopaedias,[149] most likely for the same reason of trust, since traditional printed encyclopaedias are usually more readily accepted as sources of impartial knowledge.[150] For these reasons, as noted earlier, Wikipedia is not a collection of knowledge but a collection of representations of knowledge,[151] distancing it from other encyclopaedias and perhaps moving it closer to large-scale scientific collaborations.[152] Cooperation and specialisation in the creation of pre-determined informational works present challenges in other large cooperative

[145] https://en.wikipedia.org/wiki/Wikipedia:Verifiability (accessed 6 July 2021).

[146] https://en.wikipedia.org/wiki/Wikipedia:No_original_research (accessed 6 July 2021).

[147] https://global.britannica.com/topic/encyclopaedia (accessed 6 July 2021).

[148] See Sundin, 'Janitors of Knowledge: constructing knowledge in the everyday life of Wikipedia editors', 840-862, for detailed analysis on how referencing "stabilises knowledge" on Wikipedia.

[149] Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage*, p. 113.

[150] See, e.g., Aniket Kittur, Bongwon Suh and Ed H. Chi, 'Can you ever trust a wiki?: impacting perceived trustworthiness in wikipedia' [2008] CSCW '08: Proceedings of the 2008 ACM conference on Computer supported cooperative work, pp. 477-478, for a discussion of research related to lack of trust in Wikipedia and the reasons for that.

[151] Bruns, *Blogs, Wikipedia, Second Life and Beyond. From Production to Produsage*, pp. 103-104.

[152] See, e.g., Jeremy Birnholtz, 'When Authorship Isn't enough: Lessons from CERN on the Implications of Formal and Informal Credit Attribution Mechanisms in Collaborative Research' (2008) 11 Journal of Electronic Publishing; or Agustí Canals, Eva Ortoll and Markus Nordberg, 'Collaboration Networks in Big Science: The Atlas Experiment at CERN' (2017) 26 El Profesional de la Información, pp. 961-971, on the issues of cooperation and authorship in large scientific projects. Even with thousands of contributors, however, the CERN experiments are smaller and not as "open" as the Wikipedia project.

projects as well, but are even more problematic in an online environment where there can be many more contributors, especially given Wikipedia's open nature.

Thus, looking at these requirements for individual contributions and especially having in mind that the differentiation of roles and tasks and the importance of productive and technical contributions are likely to be as high in other large online creative communities, it is evident that the author in the Wikipedian context is not an author-*genius.* The expectation of freedom of choice and personal touch in an individual contribution is replaced with an appreciation for skill, effort and the utility of the final product that would be expected from a more utilitarian approach to the creation of works and comes close to what this thesis calls an author-*craftsman* conceptualisation.

6.3.2.3 "Exploitation" of Wikipedia

It can be recalled here that the approach so far demonstrated in European and EU copyright law to the question of exploitation through reproduction has been a reaffirmation of the legal sediments of exclusivity and control, at least with respect to the right of reproduction. Moreover, EU copyright has treated any authorial interest in reproduction matters almost exclusively in economic terms, presenting the author as an *owner, entrepreneur,* or simply a *resource*. This is also visible from the framework of exceptions and limitations and the three-step test that sets the limit to those exceptions.[153]

As mentioned before, perhaps the most visible normative tool in the context of Wikipedia is the Creative Commons license, which has created space in copyright law and thereby introduced a gap for the Wikipedia community to emerge in. The specific CC-BY-SA license[154] that Wikipedia uses is not only a waiver of the traditional rights given by the copyright law, but also a strong statement of openness towards other members of the Wikipedia community and external users of Wikipedia alike. However, it has already been noted that the license does not reflect the whole complexity of Wikipedia authors' relationship with their work when it comes to reproduction.

Wikipedia and commercial interests

To begin with, and this is a characteristic shared by most Creative User communities, the creation of Wikipedia is not a commercial endeavour and the contributors have no commercial interest in their participation.

[153] See Section 5.4.4 of this thesis.

[154] https://creativecommons.org/licenses/by-sa/3.0/deed.en (accessed 6 July 2021).

Throughout Wikipedia's existence, a great number of studies have been carried out on the motivations for contributing to the site.[155] Most of them rely on the classical division of intrinsic and extrinsic human motivation, or the so-called self-determination theory.[156] In this context, intrinsic motivation means something is done for internal satisfaction, whereas extrinsic motivation means doing things for some separable goal; the former is related to the experience of freedom and autonomy and the latter to the experience of pressure and control.[157]

In accordance with the premises of sharing and gift economies outlined above, these studies have identified intrinsic and extrinsic motivations that have little to do with economic interests or control and exclusivity in general. Such intrinsic motivations as fun (enjoyment/pleasure), ideology (of openness), values (related to altruistic and humanitarian concerns for others) were found to be the most powerful reasons for sharing.[158] Extrinsic motivations such as reputation, reciprocity and self-development (improvement of skills and knowledge) were among those positively correlating with sharing behaviour as well.[159] Another more recent study has showed that the motivations for content creation and more involved participation in the community itself are often different, with extrinsic motivations prevailing for

[155] See, e.g., Bo Xu and Dahui Li, 'An empirical study of the motivations for content contribution and community participation in Wikipedia' 52 Information & Management, Yang and Lai, 'Motivations of Wikipedia Content Contributors' Cheng-Yu Lai and Heng-Li Yang, 'The reasons why people continue editing Wikipedia content - task value confirmation perspective' 33 Behaviour & Information Technology Nov, 'What Motivates Wikipedians' Pattarawan Parasarnphanich and Christian Wagner, 'Explaining the Sustainability of Digital Ecosystems based on the Wiki Model Through Critical-Mass Theory' 58 IEEE Transactions on Industrial Electronics, and others (as reported by Wikipedia itself): https://en.wikipedia.org/wiki/Wikipedia_community#Motivation (accessed 6 July 2021).

[156] The scholars who coined the Self-Determination theory and who are overwhelmingly referenced when explaining the two groups of motivations (even though there were others working on the idea too) are R. Ryan and E. Deci: Richard M. Ryan and Edward L. Deci, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' 25 Contemporary Educational Psychology 54, pp. 54-67; Edward L. Deci and Richard M. Ryan, *Intrinsic Motivation and Self-Setermination in Human Behaviour* (Springer 1985).

[157] Ryan and Deci, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions', pp. 56-57, 60-65.

[158] Kevin Crowston and Isabelle Fagnot, 'Stages of motivation for contributing user-generated content: A theory and empirical test' (2018) 109 International Journal of Human-Computer Studies 89, pp. 96-98, Nov, 'What Motivates Wikipedians', pp. 63-64; Lai and Yang, 'The reasons why people continue editing Wikipedia content - task value confirmation perspective', pp. 1376-1378; Hichang Cho, MeiHui Chen and Siyoung Chung, 'Testing an Integrative Theoretical Model of Knowledge-Sharing Behaviour in the context of Wikipedia' 61 Journal of the American Society for Information Science and Technology, pp. 1206-1208.

[159] Nov, 'What Motivates Wikipedians', pp. 60-64; Shaul Oreg and Oded Nov, 'Exploring motivations for contributing to open source initiatives: The roles of contribution context and personal values' (2008) 24 Computers in Human Behavior, pp. 2055-2073.

content creation.[160] Additional perspectives have been applied to better explain the motivation of Wikipedians, however. For example, H. Yang and C. Lai also used "self-concept" theory to explain contributors' striving to adapt their behaviour to the internal image of what one is or should be (ideal self).[161]

In other words, most authors on Wikipedia contribute with their work because it feels good to do so. Many of them believe that they are helping society by making information freely available and easily accessible. Some of them have very strong feelings about the nature of information and knowledge and believe that it should not be enclosed. Motivations associated with the community itself, like recognition, reciprocity, and the desire to improve one's knowledge about a certain subject, also play an important role. Other studies have shown that, independently of the task at hand, different digital communities share similar motivations.[162] This is likely what enables massive digital authorship projects in the first place. Remembering the principles of the gift economy, it is also likely that such undertakings would be impossible if based on other kinds of motivations.

In terms of the conceptualisation of author and in light of Chapter 5's description of EU copyright law, the Wikipedia author does not possess any attributes of *entrepreneur* or *owner*. It is no surprise, then, that Wikipedians have no interest in the control and exclusivity that characterise the exploitation phase of the work in the European copyright tradition either.

Wikipedia and sharing

In addition to the clearly non-commercial motivations of individual contributors, Wikipedia as a community has a very clear agenda of openness that defines its relationship with its readers. With the help of the Creative Commons license, each author on Wikipedia grants permission to anyone to copy, distribute, change the text and make new works from it. The main aim of Wikipedia is to be a "free encyclopaedia":[163] people contribute to help others and to make knowledge freely available.

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[160] Xu and Li, 'An empirical study of the motivations for content contribution and community participation in Wikipedia', pp. 283-284.

[161] Yang and Lai, 'Motivations of Wikipedia Content Contributors', pp. 1377-1383.

[162] See: Youcheng Wang and D. R. Fesenmaier, 'Assessing Motivation of Contribution in Online Communities: An Empirical Investigation of an Online Travel Community' (2003) 13 Electronic Markets 33, pp. 41; see also a recent literature review in relation to individual motivation for participation in online communities: Ying Chang and others, 'Effects of Intrinsic and Extrinsic Motivation on Social Loafing in Online Travel Communities' (2020) 109 Computers in Human Behavior 1, pp. 2-3.

[163] The official slogan of Wikipedia. See: https://en.wikipedia.org/wiki/Main_Page (accessed 5 July 2021).

Moreover, this specific Creative Commons license also comes with a "share-alike" condition which requires any new work incorporating materials from Wikipedia to be licensed under the CC-BY-SA license. Of course, this provision helps to a great extent to protect free content from enclosure, but it also gives an edge to the altruism and devotion of the Wikipedia community. As was demonstrated in the section above, ideology is one of the primary motivators to join Wikipedia. The mission of Wikipedia is not only to give, but also to actively spread a certain attitude towards knowledge. This can be seen as one of the few rights that Wikipedia authors retain after signing the initial copyright protection away.

As discussed in the previous section, sharing is also inherent in the wiki technology and encouraged in the relationships between community members through rules asking for good faith and consensus. The community rules explicitly prohibit personal control of content when a Wikipedian acts in a way that shows special attachment to her work and becomes an obstacle to other contributions (*ownership* behaviour).[164] Such unacceptably possessive behaviour might manifest itself as frequent disputes about an article, claiming the right to review changes before they are made, reverting changes without proving that they are detrimental to the article, discouraging other contributions, etc.[165]

Connecting these observations to EU copyright law, it is again clear that there are no hints of the author as *owner* in Wikipedia, and behaviour exhibiting exclusivity and control is actively discouraged. What is allowed, on the other hand, even if this cannot be said to define all Wikipedians, is the *stewardship* approach.[166] One is allowed, in other words, to take personal responsibility for an article, but that does not give any rights to it, only (self-appointed) duties. The element of duty and responsibility, as well as the expectation of reciprocity in this responsibility (through the share-alike condition), might be said to permeate the idea of Wikipedia. Personally and collectively, Wikipedians can be seen as something close to an author-*steward,* as described in Chapter 4.

6.3.2.4 The Wikipedia authors

There already exists some academic discussion with respect to authors in large online creative communities and the model of authorship they represent. For instance, according to S. Dusollier, the nature of the creative process in Open Source and copyleft movements is akin to the model proposed by the postmodernists who proclaimed the text to be "open" and the reader to be an equal (or even more

[164] See https://en.wikipedia.org/wiki/Wikipedia:Ownership_of_content (accessed 6 July 2021).

[165] See https://en.wikipedia.org/wiki/Wikipedia:Ownership_of_content#Examples_of_ownership_behaviour (accessed 6 July 2021).

[166] https://en.wikipedia.org/wiki/Wikipedia:Ownership_of_content#Ownership_and_stewardship (accessed 6 July 2021).

important) participant in the creation of meaning, and who declared the death of the author.[167] She suggests that the collaborative nature of the Open Source work and its seemingly unconditional surrender to the user with an invitation to contribute to its meaning is exactly what postmodernists had in mind.[168] In contrast, Chen Wei Zhu, in reference to Open Source communities, points out that there are definitely still points where the author subjectively connects to her work, attribution (which is also the right kept by all Wikipedia contributors through the Creative Commons license) being one of them.[169] Zhu, following R. Kwall,[170] identifies the Open Source author as a *steward* who acknowledges that her ability to create comes from outside herself (from the OS community) and who feels obligated to give back to that same community afterward.

In previous sections of this chapter, the Wikipedia author has also been identified as *collective*, *craftsman,* and *steward*. In addition to this, the active striving for openness through personal agency shows the Wikipedian to be what can be called a "*sharer*",[171] namely someone who has agency and eschews control and exclusivity in the creation of work as well as its exploitation.

6.4 Internet Memes – the Creative User and transformative works

6.4.1 What are Internet memes?

6.4.1.1 Introduction

While the cooperative production of "works", as in the case of Wikipedia, might still be considered something only a few Creative Users will ever engage in, the transformation and reuse of copyright-protected works has become so natural in

[167] Severine Dusollier, 'Open Source and Copyleft: Authorship Reconsidered' (2003) 26 Columbia journal of law & the Arts, pp. 288-291.

[168] Ibid., pp. 294-296.

[169] Chen Wei Zhu, 'A regime of droit moral detached from software copyright? - the undeath of the 'author' in free and open source software licensing' 22 International Journal of Law and Information Technology.

[170] Roberta Rosenthal Kwall, *The Soul of Creativity. Forging Moral Rights Law for the United States* (Standford Law Books 2010).

[171] According to the Oxford English Dictionary, "sharer" means someone who shares something or shares in something: Oxford University Press. (2013) *Oxford English Dictionary Online.* [online dictionary]. Available at https://www.oed.com/view/Entry/177541?redirectedFrom=sharer#eid (accessed 6 July 2021).

recent years that social interactions on many platforms would be unimaginable without them. This derivative creativity can take various forms. As already discussed in Chapter 1 of this thesis, the notion of the Creative User presupposes that the user not only shares something that has been created by someone else, but also adds something of her own. At the same time, some user activities are not merely "additive" but rather rework the original creation, sometimes, indeed, to the extent that the original work becomes completely unrecognisable. The analysis in this sub-chapter will focus on the most common transformative activities in which something is added but the initial work remains, as a rule, recognisable. In fact, as will be explained below, recognisability in the activities of Creative Users is often the main purpose of the creation in the first place.

6.4.1.2 Definition

Internet memes are probably among the most abundant derivative works online, and most Internet users are familiar with them as something extensively shared on social networks. Now so widespread as to have become the foundation of digital media, memes began as an occupation for a few technologically savvy specialists.[172] Even today, the most productive pockets of Internet meme creation can be found in certain online communities, some of which are specifically geared towards producing popular memes that will later reach mainstream social networks like Facebook. At the same time, even if communal production is a part of Internet meme culture, memes are a true Web 2.0. phenomenon that, perhaps more than any other Creative User activity, reflect the ability of all users to participate actively, freely reacting to and sharing the content that is made available to them.

The notion of "meme" precedes "Internet memes". It derives from the field of biology, where, in 1976, Richard Dawkins coined the term to explain the transfer of ideas, knowledge, habits and other cultural information across generations and societies.[173] In this context, memes have been described as "small units of culture that spread from person to person by copying or imitation".[174] Social everyday life has (and has always had) many examples of such memes, including clothing styles, rituals and beliefs, songs and music, tool use, etc. Even before the invention of the Internet and digital technology people were sharing, reusing and transforming snippets of each other's cultural experiences. The term "meme" thus derives from the Greek word *mimema*, meaning "something that is imitated".[175]

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[172] Kate M. Miltner, 'Internet Memes' in Jean Burgess, Alice Marwick and Thomas Poell (eds), *The SAGE Handbook of Social Media* (SAGE 2018), p. 412.

[173] Anastasia Denisova, *Internet Memes and Society: Social, Cultural, and Political Contexts* (Routledge 2019), p. 2.

[174] Limor Shifman, *Memes in Digital Culture* (The MIT Press 2014), pp. 9-11.

[175] Ibid., p. 10.

Several theories have been proposed to explain why this cultural phenomenon occurs. According to one, these "viruses of the mind" are something humans have evolved to spread and receive.[176] Thus, receiving, imitating and spreading might be seen as inherently human behaviours that do not require conscious thought or choice.[177] From another perspective, memetic activities are given more personal agency and memes are theorised not as automatic behaviour, but as an act of (re)creation and sharing of cultural artefacts that people find meaningful.[178]

The current Web 2.0 phenomenon of Creative Users making and sharing "Internet memes" is named after the same mimetic activity, which has now transferred to the Internet. Even though there is no universally accepted definition of what Internet memes are,[179] they are characterised by repackaging, imitating or changing the format or context of existing cultural artefacts,[180] or, in terms of copyright law, sharing, reusing and transforming the cultural expressions (works) of others. Thus, Internet memes can also take the form of mimicry, that is re-creating an existing work or part of it; or the form of remix, namely, directly manipulating the existing work through technological means.[181] L. Shifman defines Internet memes as "units of popular culture that are circulated, imitated, and transformed by individual Internet users, creating a shared cultural experience in the process".[182] Others provide similar definitions of Internet memes, stressing that adaptation and transformation are typical activities,[183] and that Creative Users "create, circulate,

[176] Miltner, 'Internet Memes', p. 413.

[177] There is a general disagreement among meme researchers as to whether a meme corresponds to an idea which resides in the human mind, or whether it is a certain behaviour or artefact existing only in the physical realm. See Shifman, *Memes in Digitial Culture*, pp. 37-39. On the other hand, the Internet memes that this sub-chapter sets out to analyse are, at the very least, *also* physical manifestations of ideas or concepts the user might be holding, whether these ideas themselves should be seen as memes or not. Thus, this thesis will not go further into this discussion.

[178] Ryan M. Milner, *The World Made Meme* (The MIT Press 2016), p. 21; Victoria Esteves and Graham Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures' in C. Atton (ed), *The Routledge Companion to Alternative and Community Media* (Routledge 2015), p. 561.

[179] Shifman, *Memes in Digitial Culture* p. 10; Patrick Davison, 'The Language of Internet Memes' in Michael Mandiberg (ed), *The Social Media Reader* (NYU Press 2012), p. 122.

[180] Shifman, *Memes in Digital Culture*, p. 19.

[181] Ibid., pp. 20-22.

[182] Limor Shifman, 'Memes in a Digital World: Reconciling with a Conceptual Troublemaker' (2013) 18 Journal of Computer-Mediated Communication, p. 367, even though there are those who take an even broader approach to memes. For instance, P. Davison considers any piece of culture which is transmitted online and which gains influence (centralised or distributed) to be a meme. Participation in the memetic culture for Davison is then either through transformation or through transmission (non-transformative sharing), see: Davison, 'The Language of Internet Memes', pp. 122-126.

[183] Esteves and Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures', pp. 563-564.

and transform media for their own communicative ends".[184] Of course, memes can simply be shared without being transformed,[185] but transformation and "adding" new meaning have become so common among Creative Users that it can be considered a defining feature of contemporary online communication.[186]

6.4.1.3 Memes as interconnected works

In terms of format, "Internet memes" can encompass anything, including videos, images, phrases, slogans, certain kinds of behaviour (e.g. "planking"), flash mobs, lipsyncs, fake movie trailers, remixes, parodies and other similar works.[187] However, when talking about the phenomenon of Internet memes from a sociological perspective, it is important to note that "meme" should not be understood as a single work that copies or mimics others, but as a cluster of works related to each other in complex ways. Such a relationship can be established between several works because they share the same idea (for instance, planking or owling videos and pictures), the same expressive elements (for instance, using the same picture as background or song as a basis), or relationship to the same social topic, event, etc.

The social rules of Internet meme culture dictate that the cultural artefact that is used for a meme may not be altered beyond recognition;[188] or more precisely, if something is changed so that is no longer associated with the larger Internet meme, it will not be considered a part of it. For instance, a well-known meme known as "LOLcats" has some specific elements such as, at the very least, images of cats and superimposed text as the common thread linking a variety of cat pictures into a single meme.[189] Internet memes interrelate meanings in a variety of ways and, not unlike how this thesis defines concepts, are connected through a family resemblance of sorts, always balancing between fixed premises and new expressions.[190]

It is hard to predict what will spark a successful Internet meme, i.e., one to which other Creative Users will contribute.[191] An Internet meme can begin with another

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[184] Milner, *The World Made Meme*, pp. 13-14.

[185] Perhaps at an increasing rate in the current digital world, where memes are now often also used as a badge of identification with certain communities: https://www.wired.com/story/guide-memes/ (accessed 6 July 2021).

[186] Shifman, 'Memes in a Digital World: Reconciling with a Conceptual Troublemaker', p. 365.

[187] See Shifman, *Memes in Digital Culture*, pp. 100-118, for an informative taxonomy.

[188] Esteves and Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures', p. 567.

[189] https://knowyourmeme.com/memes/lolcats (accessed 11 November 2020).

[190] Milner, *The World Made Meme*, p. 14.

[191] And there have been many attempts to identify the features that make memes successful. For instance, M. Knobel and C. Lankshear have concluded that these are: humour, rich intertextuality, and anomalous juxtaposition. See Michele Knobel and Colin Lankshear, 'Online Memes, Affinities and

work that others find meaningful to build on or exploit for their own creative expression, or it can begin with a popular or political event.[192] Because Internet memes are so strongly related to reusing existing works and the success of a meme is measured by how often this occurs, copies become more important than the "original" in Internet meme culture.[193] It is the contribution and transformation, or rather individualisation, of the accessible cultural content that makes a meme.

Memes are often also part of another phenomenon, so called "viral" content sharing, which refers to the spread of particular cultural content. But while viral spread is defined in quantitative terms and can occur without any transformation, Internet memes are characterised more by "transformative reappropriation" and do not have to amount to a "viral event".[194] Some scholars nevertheless include aspects of sharing, including sharing of unchanged cultural material, in the research of memes as well.[195] In this thesis, however, the spotlight will be on the Creative Users who produce memes or transform them in some way, and the issue of dissemination (sharing and re-sharing) will be touched upon only inasmuch as it figures in the process of creation and the expectation that lies behind it.[196]

As will be discussed in more detail later in this chapter, memes (the separate expressions contributing to a meme) can fall under the parody exception in EU copyright law, and possibly even the quotation exception. After all, as many meme researchers have concluded, humour is often the key ingredient of a successful meme.[197] On the other hand, far from all memes are humorous. For instance, such phenomena as "culture jamming" or "subvertising" are well-known reasons to produce memes that reflect critical attitudes through remixes of other, often

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Cultural Production' in Michele Knobel and Colin Lankshear (eds), *A New Literacies Sampler* (Peter Lang 2007), pp. 208-216.

[192] Miltner, 'Internet Memes', p. 412.

[193] Shifman, 'Memes in a Digital World: Reconciling with a Conceptual Troublemaker', p. 373.

[194] Milner, *The World Made Meme*, pp. 37-38.

[195] See, e.g., Knobel and Lankshear, 'Online Memes, Affinities and Cultural Production'; or Michael Johann and Lars Bülow, 'One Does Not Simply Create a Meme: Conditions for the Diffusion of Internet Memes' (2019) 13 International Journal of Communication 1720, pp. 1720-1742, trying to establish the characteristics of successful Internet memes.

[196] Others have also made this distinction between viral content and memes, see Shifman, *Memes in Digital Culture*, pp. 55-63; also Bradley E. Wiggins and Bret G. Bowers, 'Memes as genre: A structurational analysis of the memescape' (2015) 17 New Media & Society, p. 1892, specifically stressing that viral content is usually short lived and memes, because of their participatory nature, can stay around for a very long time.

[197] Miltner, 'Internet Memes', p. 416, Limor Shifman, 'An Anatomy of a Youtube Meme' (2011) 14 New Media & Society, pp. 195-196.

commercially owned works.[198] Memes are also often created to make a political point, or as an independent expression of individual artistic ideas.[199] According to Milner, a meme has to "resonate" with others in some way (to become the tool of communication that it is),[200] but this resonance can take place for many different reasons.

6.4.1.4 Internet memes: technology and culture

From the brief overview in the previous sections, it becomes evident that Internet memes, similarly to the Wikipedia community, are an old phenomenon that has been transformed by new technologies. Whereas Wikipedia was based on a specially designed wiki technology, Internet memes exploit the essential characteristics of the new technology itself, namely the convergence of media, the ease of digital reproduction and remix, as well as the anonymity, neutrality and permeability of the Internet. In other words, Internet memes are embracing precisely the open technological solutions that copyright law has extended its exclusivity and control over (albeit still with significant obstacles remaining to enforcement). Further, memes are a part of a participatory culture where imitation and reproduction are valued and essential activities.[201]

However, similarly to Wikipedia, the creator's subjectivity is not negated or removed in Internet meme culture. It is, however, expressed through the transformation of other people's work and is employed for communication and sharing purposes. While the legal sediments in the European copyright tradition that centre on exclusivity and control and private ownership hardly seem apposite to the Internet meme culture, the subjectivity of the author and the author-machine distinction might be more relevant than would at first appear. The next section will explore these features of Internet memes in more depth, showing how they translate to a certain conceptualisation of author.

6.4.2 The authors of Internet memes

6.4.2.1 General observations

To begin with, it has to be noted that since the notion of Internet memes encompasses such a wide range of works and activities, it is hard to generalise about

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[198] Wiggins and Bowers, 'Memes as genre: A structurational analysis of the memescape', p. 1898.

[199] See Natalia Mielczarek, 'The Dead Syrian Refugee Boy Goes Viral: Funerary Aylan Kurdi Memes as Tools of Mourning and Visual Reparation in Remix Culture' (2018) 19 Visual Communication 506, pp. 506-530, for an example of a non-humorous meme case study.

[200] Milner, *The World Made Meme*, p. 29.

[201] Shifman, *Memes in Digital Culture*, p. 4.

the defining characteristics that could apply to all meme creators and their relationships with, or personal expectations for, their meme's exploitation. However, some features can be found in meme culture in general, and these will be examined in the following sub-sections.

The angle used to analyse EU copyright law and the example of Wikipedia, namely the distinction between the creation and the exploitation of works, will be applied to Internet memes as well. However, even more than in the case of Wikipedia, the creation and exploitation of Internet memes are so closely related that such a division becomes blurred. Still, the distinction will be used in the following section with the understanding that the aim is not to draw an unquestionable line, but – perhaps the opposite – to show how different meme creation and exploitation are from current structures of EU copyright law.

6.4.2.2 Creation of Internet memes

In Internet culture, a meme can be mainly seen as a way to accomplish two essential goals: to show that its author is creative and unique, but at the same time to participate in a common debate and add to a common cultural experience. Through the creation of memes, in other words, Creative Users construct their individuality and reaffirm their belonging to a community.[202]

Internet memes as a form of communication

A meme, as a cultural phenomenon, is not just one work – it is, by definition, something that is copied and imitated. A single work uploaded by a user is not considered a meme unless it is reinterpreted and reused.[203] Behind the pictures or videos posted in social networks, there thus exists a bigger context of interactivity and collaboration: in the words of V. Esteves and G. Meikle, a meme is not something done *for* others, but rather *with* others.[204] The sharing in question does not necessarily happen in large groups, but can take place in small private groups as well.[205]

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[202] Ibid., pp. 33-34; Esteves and Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures', p. 565.

[203] Shifman sees this as the main feature of memes distinguishing them from just "viral" trends or files – which indicates that something is quickly spreading (is getting shared and re-shared). For instance, a piece of news can also go "viral", but this would mean it became a meme, unless there are derivatives of it being made Shifman, *Memes in Digital Culture*, pp. 55-59.

[204] Esteves and Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures', p. 568.

[205] Kate M. Miltner, 'There's no place for lulz on LOLCats: The role of genre, gender, and group identity in the interpretation and enjoyment of an Internet meme ' (2014) 19 First Monday.

A meme is thus an act of communication[206] that is intended for a certain context (community). When it is taken out of context, it can be virtually impossible to understand what a particular meme even means. This builds, one can say, a community of meme creators and recipients who are familiar with the specific genre the meme belongs to[207] or who share some other context in which the transmission of meaning through a meme becomes relevant. An example of such community might even be the well-known IPKat blog, which posts updates on the most recent IP law issues.[208] The blog is also known for using pictures of cats to add meaning (or simply entertainment) to its content. In this way, the blog is partially participating in something that is known as the LOLCats meme[209] but it does so in a context that makes the memes fully understandable only to IP professionals, rather than general Internet users. Thus, the memes here are used to communicate meaning, but within a predetermined and narrow circle. Indeed, it is also partly the internal-joke quality of this memesis that creates the IPKat community (even though rather loosely defined) in the first place.[210] In this regard, it has been observed that the imposition of boundaries and identification to certain communities through memes is a common phenomenon.[211]

Furthermore, the goal of meme production is to share. As with Wikipedia, the work (a meme or a Wikipedian article) could not be created or would have a different appearance if sharing was not assumed during the process of its creation. According to L. Shifman, "bad texts make good memes in contemporary, participatory culture".[212] By that he means that if a meme is unpolished, unfinished or incomplete, it often serves as an invitation for further communication, and other Creative Users are more motivated to add their own take, fill the gaps and contribute with new meanings. Memes are created to encourage interaction and contribution. The "author" is not the authority of meaning for that conversation, but rather only for her particular message imbued in the concrete manifestation of a meme.

Thus, one can say that the creation of memes also has some communal and cooperative qualities. This "community", however, is considerably less defined than it is in the Wikipedian context. In the case of Internet memes, the notion is primarily related to the feeling that others share the same background and will find a certain

[206] Ibid.

[207] Ibid.

[208] www.ipkitten.blogspot.com (accessed 9 July 2021).

[209] https://knowyourmeme.com/memes/lolcats (accessed 9 July 2021).

[210] On the internal joke qualities of memes see Miltner, 'There's no place for lulz on LOLCats: The role of genre, gender, and group identity in the interpretation and enjoyment of an Internet meme '.

[211] https://www.wired.com/story/guide-memes/ (accessed 12 July 2021).

[212] Shifman, *Memes in Digital Culture*, p. 86.

meme meaningful. At the same time, popular and easily accessible memes have participants from very different social and digital contexts, who have very little in common.[213] Internet memes can be used for political purposes,[214] to indicate belonging to a certain sports fan community,[215] or to form and display other identities or affiliations.[216] Differently from Wikipedia, the memes are an element of a community but rarely its main purpose (though some communities are specifically created to share memes), and reciprocity in sharing, while expected, is not required. In other words, where Internet memes are concerned, even if inviting others to join in, communication is more of a one-way process, akin to the relationship between audience and a performer.

Transformation as expression of subjectivity

While participating in a conversation and adapting to the recipients of the meme, as well as building certain elements of community, Internet meme creators are also expressing their own subjectivity and creativity through reuse and modification of the meme's elements.

This, of course, ties directly to the nature of the memes as a social phenomenon. Even though, as has been mentioned, there is a debate about whether memesis is automatic and its modifications are more similar to gene mutations, namely errors in replication, or whether it is a conscious activity, memesis on the Internet often entails the reception of cultural information and its adaptation to personal circumstances. With Internet memes in particular, alterations made by the user participating in the meme are deliberate.[217] Memes have been called "collective and individual acts of storytelling".[218]

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[213] See K. Miltner's study on the LOLCats community: Miltner, 'There's no place for lulz on LOLCats: The role of genre, gender, and group identity in the interpretation and enjoyment of an Internet meme'.

[214] See, e.g., Constance Saint Laurent, Vlad P. Glaveanu and Ioana Literat, 'Internet Memes as Partial Stories: Identifying Political Narratives in Coronavirus Memes' [2021] Social Media + Society 1, p. 3; David M. Beskow, Sumeet Kumar and Kathleen M. Carley, 'The Evolution of Political Memes: Detecting and Characterising Internet Memes With Multi-Modal Deep Learning' (2020) 57 Information Processing and Management 1, p. 3.

[215] Jeffrey W. Kassing, 'Messi hanging laundry at the Bernabéu: The production and consumption of Internet sports memes as trash talk' (2020) 34 Discourse, Context & Media, pp. 1-8.

[216] See Bradley E. Wiggins, *The Discursive Power of Memes in Digital Culture. Ideology, Semiotics, and Intertextuality* (Routledge 2019), pp. 118-124; and Noam Gal, Limor Shifman and Kampf Zohar, '"It Gets Better": Internet memes and the construction of collective identity' (2015) 18 New Media & Society, pp. 1698-1714, on how memes contribute to LGBT identity formation and expression.

[217] Wiggins and Bowers, 'Memes as genre: A structurational analysis of the memescape', p. 1891.

[218] Saint Laurent, Glaveanu and Literat, 'Internet Memes as Partial Stories: Identifying Political Narratives in Coronavirus Memes', p. 1.

Wiggins and Bowers suggest that the creation of a meme usually has three predictable stages: the presence of spreadable media, the emergent meme, and a meme.[219] Spreadable media, according to them, can be any type of media that can be consumed without alteration. It can be news, TV shows, movies, music, art, images and anything else. The emergent meme refers to the first alterations that occur in relation to spreadable media that make them more attractive for further alteration and contribution. What usually follows is a full-fledged meme, where the meme starts spreading and the number of different contributions grows. For instance, even though there is vast amount of content available on the Internet or on television, as well as a vast amount of art and other objects, cutting a specific scene from a film or selecting an image is the first step which, if successful, will lead to more people adding their own meanings to it. A meme can emerge from an act of directed creation as well, when a Creative User provides content expecting or explicitly asking that it be turned into a meme.[220] Finally, new memes may appear from other memes, for example, when they have new media connected to them or are merged with other memes. Thus, creative acts of selection, combination, transformation and similar are essential for an Internet meme to emerge.

According to L. Shifman, an Internet meme has three main elements: content, form and stance.[221] "Content" here refers to the idea behind the meme or what is communicated through it; "form" is the expression of the idea through an image, video, text, or other means; and "stance" is the communicative element of the meme describing the participant's position towards the meme and the intended audience. [222] For instance, in the "advice dog" meme,[223] the content is a dog attempting to be friendly and helpful towards humans and failing by giving poor advice, the form is an image, and the stance is the way the participant positions the meme. (For instance, the advice dog can be presented as funny or serious, ironic or mocking.)

When a Creative User participates in an Internet meme in a transformative way, any of these elements can be altered.[224] However, some elements of the meme must

[219] Wiggins and Bowers, 'Memes as genre: A structurational analysis of the memescape', pp. 1897-1899.

[220] Such as discussed by C. Smith in the example of the "Slender man" meme, where the character for the meme was created by one user explicitly asking others to add to it: Cathay Y. N. Smith, 'Beware the Slender Man: Intellectual Property and Internet Folklore' (2018) 70 Florida Law Review, p. 616.

[221] Shifman, 'Memes in a Digital World: Reconciling with a Conceptual Troublemaker', pp. 362-377.

[222] For more informative description of these elements, see ibid., pp. 366-369.

[223] https://knowyourmeme.com/memes/advice-dog (accessed 9 July 2021).

[224] Shifman, 'Memes in a Digital World: Reconciling with a Conceptual Troublemaker', p. 370.

remain the same in order for the contribution to be identifiable as part of it.[225] For instance, advice dog is recognisable as such because of the specific picture of a dog and its background. Some aspects of this form may be changed (positioning of the text and the text itself), and the stance is usually slightly different each time, depending on what the text is meant to communicate; but it should always be some sort of advice. If the form changes any further, other memes like "advice animals"[226] can be produced. Altering both stance and form can create other memes, such as "depression dog".[227] Changes to the content are usually based on a personal communication of the author (of emotions, agreement, mockery, etc.).

Not all Internet memes involve the remixing of previous works. This is especially true for more complex memes that can be imitated, such as videos with a special dance.[228] In terms of copyright law, it is also possible to be part of a meme simply by using a certain "idea" and giving it a completely original personal expression. However, even where remixing occurs, personal original expression is still possible, and arguably, common. The Creative User expresses her personality by looking for additional layers in the existing work or new metaphorical uses.[229] Thus, the "work" produced by the meme creator often has some sort of individualising element to it, and often at least some free and creative choices are exercised in its making. This allows people who would otherwise be strangers to not only to participate in the same conversation, but also to share personal perspectives quickly and efficiently.[230]

Finally, similarly to what has been seen in EU copyright, the quality of the final work and the skill exercised in making it seem to be immaterial. It is possible that a meme contribution created with greater skill will be more memorable, but creativity in terms of cleverly manipulating the meanings and the stance (attitude) of the meme are likely to be more important.[231] The only factor limiting the Creative User's creativity is the informal expectation that the internal rules ascribed to a specific

[225] Even though the connection to the specific meme can be expressed through imitation of a variety of elements. See Shifman's analysis of the most viewed imitations of the "Leave Britney Alone" video: ibid., pp. 370-371.

[226] https://knowyourmeme.com/memes/advice-animals (accessed 9 July 2021).

[227] https://knowyourmeme.com/memes/depression-dog (accessed 9 July 2021).

[228] See, e.g., the "Harlem shake" meme: https://knowyourmeme.com/memes/harlem-shake (accessed 9 July 2021).

[229] Examples of which can be the "Trumpsman" meme: https://knowyourmeme.com/memes/the-trumpsman (accessed 9 July 2021), or the "Casually Pepper Spray Everything" meme: https://knowyourmeme.com/memes/casually-pepper-spray-everything-cop (accessed 9 July 2021).

[230] Barbara Dancygier and Lieven Vandelanotte, 'Internet memes as multimodal constructions' (2017) 28 Cognitive Linguistics, p. 594.

[231] Knobel and Lankshear, 'Online Memes, Affinities and Cultural Production', p. 221.

meme will be followed.[232] At the same time, as mentioned, these are rather flexible and any of the elements of a meme can be changed.

6.4.2.3 "Exploitation" of the Internet memes

As with Wikipedia, the work created within the framework of a meme does not cease to be important to its creator or community: it is just that the benefit that is expected in the course of the work's further reproduction (exploitation) is not the same as that expected in EU copyright and is not separated from the creation phase to the same extent. Again, as with Wikipedia, the motives for creating memes vary but are almost exclusively non-commercial and tied to the nature of memes as communicative tools carrying the author's individual contribution.

Memes and commercial interests

It has been suggested that the motivations behind making memes are connected to general motivations to participate in contributory culture or the sharing economy.[233] For instance, it has been suggested that since amateur low-budget creativity generally has no way to "advertise" on the Internet, some creators create Internet memes in order to draw attention to their other creative activities – joining a bigger trend makes them more visible.[234] Other Creative Users participate in communities that create and share memes. They then tend to create memes on a regular basis, are informed about the best tools for doing so, know about different trends and genres, and have a general "meme literacy".[235] As a rule, however, the techniques of meme creation can be learned quickly and adapted to a variety of contexts, which is why this form of cultural participation is so popular.[236] This is also why the majority of Creative Users contributing to Internet memes choose widely-known memes and participate with little skill or effort using ready-available tools. As mentioned above, because of its communicative nature, there is likely some external motivation related to belonging to a community when creating Internet memes, even if the ties within these communities are not as strong as in large projects like Wikipedia. Also, unlike the Wikipedia example, the creators of Internet meme do not appear to have a strong ideological commitment to open knowledge, as will be shown later.

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[232] Miltner, 'There's no place for lulz on LOLCats: The role of genre, gender, and group identity in the interpretation and enjoyment of an Internet meme '; Victoria Emma Dantas Esteves, ''Mah LOLthesis let me show u it' : the (re)making and circulation of participatory culture : memes, creativity and networks' (University of Stirling 2018), pp. 29, 69-70.

[233] Esteves, ''Mah LOLthesis let me show u it' : the (re)making and circulation of participatory culture : memes, creativity and networks', pp. 75-77.

[234] Shifman, 'An Anatomy of a Youtube Meme', pp. 199-200.

[235] Shifman, *Memes in Digital Culture* p. 100; Miltner, 'Internet Memes', p. 414.

[236] Esteves and Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures', p. 565.

Memes, being often successful and spread widely, are sometimes employed for commercial gain by companies. The most successful memes, however, are not made for profit.[237] The "forced memes" which are often created by companies as a tool of "viral marketing" (but can be forced in some other way) are generally frowned upon by Creative Users and rarely gain popularity.[238] On the other hand, if companies, political groups and other non-user entities gather inside knowledge and exercise discretion while creating Internet memes, they have a good chance of succeeding.[239] This, again, reaffirms that Internet memes are made to share meaning.[240] If it is done in such a way that the intended audience wants to be part of the conversation, even if the motive of the one communicating is commercial, a meme can spread and become popular.

At the same time there are indications that commercial exploitation of existing Internet memes can be a sensitive topic. At least a few meme creators object to the use of their (or any other Internet memes) for commercial gain in general.[241] It has been suggested that because of their non-economic nature, monetising Internet memes threatens the basic premises of participation in cultural life.[242] In other words, although the motivation for meme creation can vary, their non-commercial nature prevails and commercial exploitation, while not "prohibited", may be irreconcilable with their culture.

Exclusivity, control and Internet memes

In contrast to Wikipedia, Internet meme culture does not have a clearly stated official position towards copyright law. Even online communities specifically created for meme production and sharing, such as "I can has chezzburgerz"[243] or 9GAG,[244] generally show little interest in engaging with copyright issues, simply providing in their terms and conditions that users are expected to create original works without borrowing or reusing the content of others, and that they are

[237] Miltner, 'Internet Memes', pp. 422-423.

[238] https://knowyourmeme.com/memes/forced-meme (accessed 12 July 2021).

[239] https://www.wired.com/story/guide-memes/ (accessed 12 July 2021).

[240] Esteves and Meikle, '"Look @ this fukken doge": Internet Memes and Remix Cultures', p. 568.

[241] V. Esteves records in her interviews reactions of a meme creator to commercial use of an already existing meme, who considers that before taking the picture from the "success kid" meme and using it for an advertisement, the permission of the person pictured should have been obtained: Esteves, "Mah LOLthesis let me show u it' : the (re)making and circulation of participatory culture : memes, creativity and networks', p. 134.

[242] Michael Soha and Zachary J. McDowell, 'Monetizing a Meme: YouTube, Content ID and the Harlem Shake' [2016] Social Media + Society 1, p. 10.

[243] https://icanhas.cheezburger.com/home/community (accessed 12 July 2021).

[244] https://9gag.com/ (accessed 12 July 2021).

considered to own their own works.[245] No public licensing solutions for these copyrightable memes are provided or discussed in the communities.

At the same time, however, lack of engagement with, for instance, public licensing tools, from the side of the community or a formal "no copyright violation" policy published on a website does not necessarily mean that the community subscribes to the essential understanding of control and exclusivity in copyright law, or that the copyright laws are generally obeyed. On the contrary, it suggests that the Creative Users do not care about copyright law enough to consider licensing options. Even a cursory glance at the postings on meme websites makes it obvious that the majority of content is not owned by the user remixing and sharing it. In principle, as explained earlier, the essential nature of memetic activity on the Internet is reproduction and sharing that falls completely outside the copyright framework, and even tools like Creative Commons open licenses do not seem to be a viable option for finding common ground between the law and Internet memes.

Regarding exclusivity and control, another aspect that can be compared between copyright law and Internet memes in the case of reproduction is the need for attribution. At the beginning of the meme movement, meme creators were typically members of closed groups and possessed of special technical knowledge. Consequently there was a strong need to make sure that the resulting memes identified a specific *group* as their source.[246] In today's meme culture, some platforms may still keep to certain rules of attribution for all uploaded memes – for instance, Facebook and YouTube allow only registered users to post works.[247] Another very active part of meme culture, however, comes from what might be called the "unrestricted web",[248] that is, anonymous sites like 4chan,[249] where attribution (not just for memes, but for all content) is intentionally discouraged.[250] Generally, even where attribution and credit are not discouraged, Internet meme creators do not regard them as particularly important, and even if they do, attribution

[245] https://about.9gag.com/copyright (accessed 12 July 2021), http://blog.cheezburger.com/legal/terms-of-service/ (accessed 12 July 2021), section 5; https://www.cheezburger.com/terms-of-service (accessed 12 July 2021), especially points 4(B), 4(E) and 5(C).

[246] Miltner, 'Internet Memes', p. 423.

[247] Even through the fact that someone posts a meme does not mean they have also created it.

[248] Davison, 'The Language of Internet Memes', p. 132.

[249] https://www.4chan.org/, (accessed 12 July 2021).

[250] The 4chan rules explicitly ask not to use avatars or attach any signatures to the posts (https://www.4chan.org/rules, (accessed 12 July 2021), rule 13), users can post completely anonymously and registration for users is not possible: (https://www.4chan.org/faq, "what is 4chan?" and "Can I Register a Username?"). There is a rudimentary system of identity certification even on 4chan: (https://www.4chan.org/faq "How do I use a "tripcode"?"); but looking at the different boards, it is apparent that a majority of users are posting completely anonymously.

and credit are impossible to prove in the framework of meme culture.[251] This lack of attribution can be seen as a wish of Creative Users to be free from copyright protection and sanctions. P. Davison, for instance, theorises that anonymity indicates the participants of meme communities choosing "freedom over security", meaning that without copyright, memes may be freely shared and contributed to, making them into a cultural practice.[252] Authorship and the attributability of authorship need to be sacrificed for this purpose.

On the other hand, even now, there are many examples where the Internet meme, as "idea" or "topic", has no author,[253] but the specific manifestation of the meme – that is, the specific creative work – has a creator attributed in some way in a specific community. As mentioned, this is common in public social networks, even though sharing does not necessarily imply taking credit for the meme. Even in specialised Internet meme communities like "I can has chezzburgerz",[254] posting is done with clear attribution to the one who did it. In addition, the users can create their own personal "sites" that other users can follow, where a record of all their memes is kept.[255] This indicates some interest in being credited, at least in the framework of the smaller meme-creator communities. Moreover, there are indications that attribution, especially in relation to where the meme or a specific contribution appeared for the *first time*, is important for Internet meme communities, and can lead to disputes between them.[256] As the profiles on the sites do not have to be linked to a person's real name, such a weak social norm of attribution does not remove the freedom to avoid the consequences of copyright violation.

Generally, while there is certainly more interest in attribution among these creators than a model of "memes as purely communicative act" could account for, it would be going too far to say that meme creators have ambitions of ownership or personal recognition (*authority*). If anything, attribution in the creation of Internet memes seems to serve the same dual purpose of communication and individual creative expression, where it is important to show to others the creative choices one has made

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[251] Miltner, 'There's no place for lulz on LOLCats: The role of genre, gender, and group identity in the interpretation and enjoyment of an Internet meme ', Esteves, ''Mah LOLthesis let me show u it' : the (re)making and circulation of participatory culture : memes, creativity and networks', p. 59.

[252] Davison, 'The Language of Internet Memes', p. 132.

[253] The creation of this common ground of communication and cultural elements which define a certain meme has been compared with folklore, calling it, "Internet Folklore": Smith, 'Beware the Slender Man: Intellectual Property and Internet Folklore', pp. 607-609.

[254] https://icanhas.cheezburger.com/home/community (accessed 12 July, 2021).

[255] http://support.cheezburger.com/support/solutions/articles/52969-what-are-member-created-sites- (accessed 12 July 2021).

[256] Esteves, ''Mah LOLthesis let me show u it' : the (re)making and circulation of participatory culture: memes, creativity and networks', pp. 59-60.

and to indicate who is communicating. Still, attribution or any kind of control is relevant only in certain communities,[257] and outside of them memes are as good as authorless. Some argue that because of these elements of Internet meme culture, memes are a "common good" or shared resource.[258]

6.4.2.4 Concepts of authorship and Internet memes

As in the case of Wikipedia, there are some clear points of connection between the authorship of Internet memes and the concepts of author identified in EU copyright law, but also some evident differences. First of all, as mentioned above, the production of Internet memes provides the creator with many individualising options, but due to technological advances, little skill or effort is required. This makes the authors of internet memes similar to what this thesis has called the author-*genius* and, differently from Wikipedia, distances them from the author-*craftsman* as defined before. Even if the personal input of the meme author is expressed through remixes of other works, this only indicates a potential conflict with the interests of others, not a lessening of the value of the creative act itself.

Once the work is created, the consequences of this act of expression of personal subjectivity in Internet meme culture have little to do with exclusivity or control. The EU copyright conceptualisations of the author as *owner, entrepreneur* or even *authority*, are not applicable in this context. Since the main overarching feature of Internet memes is communication, one could call their author a *communicating* author, emphasising the author's intention and the lack of a barrier between author and audience. Further, similar to Wikipedians, the authors of Internet memes who have an open and communication-oriented way of approaching their cultural participation could also be called *sharers*. The ideology of sharing is not firmly articulated here, but the Internet meme author creates together *with* others, turning her creative act into an invitation to join in. Cultural participation becomes a sharing activity.

[257] There is evidence that at least some of the more experienced and specialised meme creators believe that sharing too widely risks devaluation and loss of authentic meaning: Miltner, 'There's no place for lulz on LOLCats: The role of genre, gender, and group identity in the interpretation and enjoyment of an Internet meme '.

[258] Lantagne, 'Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges', p. 222.

6.5 Reviewing EU copyright law from the perspective of Creative User

6.5.1 Uneasy relationship

The idea of an often uneasy relationship existing between Creative Users and copyright law has been touched upon several times in this thesis. As discussed in Chapter 1, larger and smaller legal problems can be identified in relation to the everyday creativity of Creative Users, but it has also been suggested that inconsistencies between digital reality and today's copyright norms have the potential to undermine the law's legitimacy in a society which increasingly regards its online activities as part of its creative expression. As shown in the previous sections, looking at Wikipedia and Internet memes from an author perspective also confirms the uneasiness in the relationship between EU copyright conceptualisations and digital authorship practices. Perhaps the greatest source of unease, however, is the differences *and* similarities between the way the author is conceptualised in these different systems. In this last section, the similarities and differences will be discussed more concretely in the light of EU copyright law.

6.5.2 Protectability

6.5.2.1 Originality

As was outlined in Section 5.3.3 of this thesis, EU copyright has now effectively harmonised the standard of originality to centre on the subjectivity of a human author. According to the CJEU, the author gains the protection of copyright law if a work is produced in any manner or form while exercising free and creative choices and imparting the author's personal touch. Neither the quality nor any other characteristic of the work matters, and the skill or effort expended to create a work are to be disregarded as well. Moreover, the same standard of originality is to be applicable to all works, signalling, as described, a movement towards dematerialisation in EU copyright. Copyright law exists, according to this logic, to protect values more fundamental than recouping investment and has shaped its requirements of protectability accordingly. This thesis has concluded that such an approach can be identified with a conceptualisation of the author as *genius*, at least its special legal form.

Wikipedia

From the perspective of Wikipedia, according to what is described in Section 6.3 of this thesis, EU copyright's position on what is valuable enough to be protected (to receive legal rights) might be problematic in several ways.

First of all, as discussed, Wikipedia has a strong commitment to a specific purpose and form, that is, to be an open and usable encyclopaedia. Due to its open nature, size, and consequent need for greater reliability and management, Wikipedia's neutrality and referencing requirements are likely to be more stringent than those of any traditional encyclopaedia. These requirements inevitably have an impact on the free and creative choices a Wikipedian can make and the personal touch she can imprint in her contributions. Secondly, and perhaps even more important than the foregoing, is the Wikipedian community, which again due to the openness and the size of the project needs to be well-organised and equipped with effective management and decision-making tools. As noted before, this leads to an emphasis on consensus and to a specialisation of contributor roles, many of which do not contribute to the "work" through free and creative choices. In such a setting, the strength and consensus of the community might be even more important than the usability or quality of a work. Finally, the loop is completed by the community's dedication, in turn, to the openness that characterises Wikipedia down to the core of its software and thus necessitates a communal structure to achieve the intended result.

In such circumstances, a single "author" and her contributions are inseparable from others and it is the *community* that might be seen as the Wikipedia author. At the same time, this community is unconcerned about the originality standard of copyright law: the contributions that formally do not need to be "signed away" by license (like contributions of a technical nature) are treated no differently than the ones that are protected by copyright. Moreover, "author's own intellectual creation" and "free creative choices" are not in focus on Wikipedia. To be part of Wikipedia, a work (a contribution) must have a certain *utility* instead. Utility here refers not only to its social aspect, but also its benefit to the overall health of the community. This principle, then, can encompass everything – neutrality, verifiability, the ideology of openness, sharing, long-term sustainability and consensus in the community, etc.

More concretely, if copyright law were to integrate such intrinsically motivated, self-organising sharing communities as Wikipedia as a form of authorship, it would require an originality threshold more like the common law standard, where skill, effort and the value of the final product are emphasised. The EU's path of following continental copyright and placing the author and her creative process at the centre of the system seems to be moving it further away from the authors of Wikipedia and other similar creators working in such online sharing communities. The work of compiling a neutral, well-referenced representation of human knowledge is rather technical and non-creative, but it does demand time, skill and judgement.[259] The

[259] This can be observed in the process of becoming an administrator, for instance – presumably, these are people who have invested much skill and effort and are well known for their contributions. See https://en.wikipedia.org/wiki/Wikipedia:Guide_to_requests_for_adminship (accessed 14 July 2021).

specialisation of roles that is typical of such large digital collaborative projects also limits their participants' creativity. Lastly, because Wikipedia is a process, it is always a work in progress, with most articles being constantly edited and rewritten in certain predictable patterns.[260] As a result, such notions as "*personal touch*" are foreign in this context – whose personal touch are we talking about and when in the process should we look for it?[261]

On the other hand, an important aspect to consider, and one that cannot be set aside because of the special nature of Wikipedia as an encyclopaedia, is the *collective* nature of its "author". It is very hard to determine the value and importance of an individual author's contribution on Wikipedia, more so than in most non-digital environments, and even if it can be done, such an assessment clearly cannot be made on the basis of originality as EU copyright law interprets it. Once again: without openness there would be no community, and without community there would be no Wikipedia. The subjectivity that the author gives up in favour of communal rules is not taken away but transformed.

In some ways, copyright law and EU copyright law have attempted to address the challenge of multiple authorship through the concepts of "joint" works, where different contributions cannot be separated from one another, and "collective" works, where they can, giving protection to the contributors together or separately, depending on the circumstances.[262] At the same time, the general rule in such cases, even if not yet explicitly confirmed at the EU level, is that each authorial contribution should satisfy the requirement of originality independently and non-original contributors are not considered authors.[263] And, once again, whereas a traditional encyclopaedia might be able to get away with joint authorship or collective authorship, Wikipedia, owing to its size, openness and appreciation of all community members, cannot, providing yet another example of how the universal

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The same can be said for perhaps the only formal reward in Wikipedia: a barnstar, awarded for "*hard work and due diligence*": https://en.wikipedia.org/wiki/Wikipedia:Barnstars (accessed 14 July 2021).

[260] https://en.wikipedia.org/wiki/Wikipedia:Authors_of_Wikipedia (accessed 14 July 2021); also, Cardon, D. (2012) Discipline but not Punish: The governance of Wikipedia. In: Massit-Follea, F., Meadel, C., Monnoyer-Smith, L. (eds.) *Normative Experience in Internet Politics.* Paris: Presses Des Mines.

[261] See also van Gompel, S. (2014) Creativity, autonomy and personal touch. A critical appraisal of the CJEU's originality test for copyright. In: van Eechoud, M. (ed.) *The Work of Authorship.* Amsterdam: Amsterdam University Press, pp. 131, elaborating on this point.

[262] See Walter and Lewinski, *European Copyright Law. A Commentary*, pp. 537-538.

[263] See, e.g., Giulia Priora, 'Copyright law and the promotion of scientific networks: some reflections on the rules on co-authorship in the EU' (2019) 9 Queen Mary Journal of Intellectual Property 217, p. 223, on the German join authorship test; or Bently and Sherman, *Intellectual Property Law*, p. 130, for a description of the test in the UK.

application of the harmonised EU standard of originality does not fit the Wikipedian model of creation.

Thus, despite being enabled by technology to realise its potential, especially in terms of human connectivity, this new form of digital *collective, sharing* authorship becomes an outlier in the landscape of dematerialisation and the pursuit of personal subjectivity. To create works that are not lost in limitless reproduction and transformation when the openness of the Internet and digital technology is truly embraced, the author's subjectivity must be given shape and direction.

Internet memes

In the case of Internet memes, in contrast, the understanding of valuable creativity seems to be based on premises very similar to those of EU copyright, and thus grounded in what this thesis has described as a version of the author *genius* conceptualisation. Making an Internet meme does not involve great skill, nor does it require much effort. Personal judgement and creativity are more important; or, to put it another way, meme authors make personal creative or intellectual choices. Further, there are virtually no limits on what purpose the meme has to serve or other criteria it has to satisfy. If the Internet meme author fits into a certain meme or genre, then a meme has served its purpose. Hence, not only is a degree of authorial control over the creative process presumed and valued, but the source of the work is also the author's person. Moreover, anyone can become a meme creator – as mentioned before, the form or mode of the expression is not the main point of meme creation, and everyone's free and creative choices are valued.[264]

As opposed to the example of Wikipedia, where the Wikipedian as author can be seen as more *collectivised*, the meme creator is much more of an individual. At the same time, the purpose of the Internet meme is communication, and the community to which the communication is addressed is an essential factor to consider when choosing the tools and the format for the meme. Internet memes, while compatible with the idea of an author's "free choice", place less focus on its creative component and also include judgement as a valuable basis for the free choices that the author makes. In Internet memes, the personal touch is not unimportant, but it is not the only function a meme serves. Consequently, there is a view that some memes merely demonstrate judgement and may be lacking in creative choices, ruling them out from

[264] Even though memes naturally are often digital, this does not have to be the case. For instance, flash mobs (https://knowyourmeme.com/memes/flash-mob) are also a type of meme that happens in the "analogue world", even though they are usually coordinated online and often filmed and uploaded online.

copyright protection altogether.[265] It is likely, however, that a fair share of Internet memes would fit the inclusive originality requirement formulated by the CJEU.

Another important feature of Internet memes is, of course, the use of other people's work. On the other hand, for the purposes of protectability, EU copyright law has yet to raise any concerns about the elements that are individualised through the making of free and creative choices. As mentioned before, the status of elements which are combined has not even been raised in cases where these elements may have been copyright protected.[266] It may be of little practical use to distinguish the question of protectability from infringement, but doing so further emphasises the CJEU's formulation of the originality requirement, namely its elevation of subjectivity and free creative choices as the most valuable aspect of creativity, disregarding the circumstances under which these choices could be made. Even the communicative aspect of memes is not an issue, since as long as the subjective originality requirements of EU copyright law are satisfied, the final purpose of the work does not matter. In a way, because of the wealth of existing expressions to combine and the accessibility of creative technology and resources, the choices of an Internet meme creator could be seen as more "free" than those of a "traditional author".

It has also been observed that in their essence Internet memes are not unlike art movements such as Dadaism or Surrealism. One of the similarities is that memes are often created to criticise the real world by juxtaposing and remixing elements of it, pointing out its absurdity and irony.[267] Also, in all of these art movements, the object becomes secondary to the process of communication to the audience and the invitation for them to take part in the creation of meaning.[268] This, combined with the fact that these actions take place in public and are aimed at a broad audience, suggests that memes might be seen as an emerging art movement.[269] Thus, meme authors (at least some of them) do more than just "play games",[270] they react to society, offering a critique or an alternative view of reality. This is but one of several

[265] M. Iljadica maintains that at least in the case of memes and similar examples of derivative creativity where the contribution of the Creative User is small, the choices made would not be sufficient to satisfy the EU originality requirement: Iljadica, 'User generated content and its authors', pp. 173-174.

[266] See Section 5.3.3.4 of the thesis.

[267] Wiggins, *The Discursive Power of Memes in Digital Culture. Ideology, Semiotics, and Intertextuality*, pp. 135-136.

[268] Monica Tavares, 'Digital Poetics and Remix Culture' in Eduardo Navas, Owen Gallagher and Xtine Burrough (eds), *The Routledge Companion to Remix Studies* (Routldge 2014), p. 193.

[269] Wiggins, *The Discursive Power of Memes in Digital Culture. Ideology, Semiotics, and Intertextuality* p. 130.

[270] Jens Seiffert-Brockmann, Trevor Diehl and Leonhard Dobusch, 'Memes as games: The evolution of a digital discourse online' (2018) 20 New Media & Society, p. 2865, suggests that at least one of the elements of meme making is also playfulness in collaborative interaction.

arguments suggesting that meme creation requires creativity and conceptual choices. As with the development of photography and other later technologies, the form of Internet memes and the tools used to create them should perhaps be set aside to make space for the search for personal subjectivity.

6.5.2.2 Expression

As noted in Section 5.3.4 of this thesis, the expression requirement in EU copyright law is closely connected to originality and requires the original work to be objectively perceivable by others. Such a criterion, then, can be seen as a reaffirmation of the subjective originality test and as setting a minimum standard for protected subject matter, making sure it can be exploited further. It has been argued previously in this thesis that, similarly to the originality criterion, the CJEU has adopted a perspective of dematerialisation and equal treatment for all works, whatever the form of their expression. This approach, in fact, fits quite well with the digital works of Creative Users.

As already discussed, Wikipedia is a "work in progress";[271] no version of it is final and the text that one sees can change at any moment. However, in its case law the CJEU has stressed that the "expression" does not have to be in permanent form, and that text as such would normally qualify as an expression.[272] Even though no permanency is guaranteed, Wikipedia is certainly made up of text that is sufficiently objective and capable of being perceived. Furthermore, since the "log" on every page on Wikipedia keeps a record of all edits to every text, any of these might easily be considered a "work" in terms of the expression requirement. Similarly, even though the CJEU's way of interpreting expression is much less geared towards communication and more justified by the ability of other actors to ascertain the object of protection, the technologically-neutral and dematerialised criterion is suitable for the phenomenon of memes as well. If an Internet meme (one of its expressions) is visible to the eye, it should be considered as protectable as any other work. According to the CJEU's formulation of the criterion, if there is originality and it is objectively perceivable, it can be protected by EU copyright law.

Here, another important new feature of digital works emerges. On the Internet, all "versions" of different "works" and all their subsequent modifications are, in principle, trackable. Using Internet data (and Creative User platforms such as Wikipedia) one can normally identify who has created or modified a certain creative

[271] https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_a_work_in_progress (accessed 14 July 2021) and https://en.wikipedia.org/wiki/Wikipedia:Editing_policy#Wikipedia_is_a_work_in_progress:_perfection_is_not_required (accessed 14 July 2021).

[272] For more see Section 5.3.4 of the thesis.

object, as well as when and where. In its current form, the EU's expression requirement encompasses all these digital versions.

However, even if dematerialised and inclusive, the EU copyright criterion of expression can still only cover separate versions of Wikipedia and only individualised manifestations of an Internet meme. The whole Wikipedia (treating all its versions as one) and a meme, which is actually a network of interconnected expressions, remain "unprotectable" by copyright, or simply considered as "ideas" in the idea/expression dichotomy. As important as it is to recognise that Wikipedia and Internet memes are more than their separate expressions, based on what has been said about these digital manifestations of creativity, it is arguably the wiser alternative to leave them outside the reach of copyright protection as whole entities. In the same way as ideas in copyright's idea/expression dichotomy, Wikipedia as a whole and a meme in its entirety belong to everyone and are not bound to just one personal subjectivity.

6.5.2.3 Reproduction

As elaborated in Chapter 5 (Section 5.3) of this thesis, the right of reproduction in European copyright legal culture and EU copyright law is one of the fundamental expressions of exclusivity and control in the exploitation of creative works. The interpretation of the right in recent decades, including by the CJEU, has established it as very broad and encompassing any fixation of a work, leaving little room for normative considerations when assessing infringement. Furthermore, the internal logic of this broad right has been connected, at least ideologically, to the value of subjective authorship, namely to the originality criterion, at the same time effectively shaping the work of "author *genius"* into a neutral object of property of which the author is just one of several possible owners. This internal logic of the right of reproduction is complemented by exceptions and limitations that represent all possible derogations from the ideology of exclusivity and control, juxtaposing them with the values at the core of the exclusive right itself and further strengthening it. Finally, the three-step test, in its turn, limits the exceptions and limitations on the basis of, as currently interpreted, the economic interests of rightholders. In effect, the tendency of separating protectability from the exploitation of works where the author is concerned seems to be strong in EU copyright law.

Wikipedia

As mentioned earlier, the Wikipedian approach to "exploitation" of its content, namely the benefit that is expected once the work is created, is very different from the personalised exclusivity and control in EU copyright law. First of all, Wikipedians do not retain the right of reproduction, either in relation to the users of Wikipedia or to other Wikipedians, and with the help of the Creative Commons license this right is "given away" so that anyone can copy and distribute or modify the "original" contribution. Furthermore, the right is not just simply ignored:

openness is actively chosen and is embedded in the structure of Wikipedia on all levels – in its technology, its community and the final result.

Yet the mission of openness does not stop here. The reproduction right in the case of transformative use is changed and made conditional on the "share-alike" requirement. Thus, whereas the right of reproduction in EU copyright law is broad and includes all fixations, on Wikipedia it is reformulated to depend on the further use of the work and the conditions of that use. If such use is consumptive or aimed at further dissemination, the act is not seen as subject to control. If the further use is transformative, control (the right of reproduction) is asserted unless the subsequent work is subject to the same transformation of legal rights. It is not necessary for the person engaging in transformative use to choose the identical license for the subsequent work; all that is required is that the new license satisfy the condition of openness.[273]

This creates a situation where the author can be seen as a *sharer* or *steward/servant*, but not an *owner.* Control becomes an exception and openness is the general rule for the exploitation of creative work. Moreover, even if there is an element of control, there is no personal exclusivity. Rather, the Creative Commons license represents an approach or policy of the community as a whole. In addition, Wikipedia connects the open process of creating work with the openness of its exploitation. Even though the subjectivity and agency of the author are limited in the phase of exploitation, they are also steered and shaped during the creation stage of the work.

In such a situation, the right of reproduction in EU copyright law, as well as its system of exceptions and limitations, is reversed. If we were to reimagine the reproduction right from the perspective of Wikipedia, the work would enter the public domain upon creation, and there would be special exceptions and limitations to this rule allowing authors to object to the reproduction (and dissemination) of works in whole or in part if it did not keep with the purpose intended by the author. In such circumstances, the three-step test might be used to further protect the public domain by setting limits on what could be considered the author's "intended use". For instance, under such a utopian model, exclusivity and personal control would be permitted only in certain special cases, when the intended normal exploitation of work is clearly for a certain commercial or other similar purpose, and only to the extent necessary to recoup the investment expended when creating the work or to satisfy another special purpose.

This utopian picture of "copyright reimagined" has little practical use in the current copyright landscape, however. At the very least, though, the strongly economic

[273] See https://creativecommons.org/share-your-work/licensing-considerations/compatible-licenses (accessed 11 November 2020) for the list of compatible licenses, which also includes the "Free Art license" or the "Gnu GPLv3".

interpretation of the three-step test and the insistence that the very nature of the right of reproduction is broad control and exclusivity over any fixation is at odds with how exploitation is construed in the Wikipedian community.

Internet Memes

When analysing the right of reproduction from the perspective of meme authors, two different issues have to be addressed. As noted before, the creators of Internet memes not only have a different expectation regarding the exploitation of their work, but they are often in conflict with the reproduction rights of others already when creating the said work.

At the stage of creation, the characteristics of remix culture in the Web 2.0 environment – one of the main prerequisites for the emergence of Internet memes – present a legal challenge. As discussed in Chapter 1, attempts to allow more freedom for the derivative creativity that is a hallmark of contemporary digital culture have only been partly successful, and such Creative User activities still often land in a grey zone or are prohibited outright.

To begin with, the reproduction for private purposes exception,[274] which exists in all EU Member States, would arguably cover derivative works produced for private purposes, since reproductions in part are also covered by the exception, provided that the work on which the derivative creation is based was legally obtained.[275] On the other hand, if the actions of the Creative User went beyond strictly private use, they would fall under the exclusive rights of authors and would require explicit permission. Naturally, such a restriction is incompatible with the communicative and sharing-oriented nature of Internet memes.

There are several other exceptions and limitations in EU copyright law that could cover the production of memes by a Creative User. The first is, of course, the parody exception, applicable to a large proportion of memes if they have a humoristic purpose.[276] In fact, the majority of memes are likely to fall under this exception, as many have at least some humoristic intent. However, not all memes are funny, nor does it make sense that they should be allowed to exist only if they are. In the case of non-humorous memes, the quotation exception in Article 5.3(d) of the InfoSoc Directive could be used as a defence, especially since the CJEU has recently interpreted it to require the new work to enter into dialogue with the quoted material[277] – an approach that fits the communicative nature of memes. However, the use of the exception for works other than text, and now, it seems, music, remains

[274] Art. 5.2(b) of the InfoSoc Directive.

[275] See Section 5.4.4 of the thesis.

[276] Art. 5.3(k); also, the *Deckmyn* case.

[277] *Pelham,* para. 69.

unclear under the EU copyright acquis, and the Member States take different approaches to the issue.[278] It also remains unclear how much of the other work can be borrowed in order to qualify for the quotation exception and whether this exception allows transformation of the quoted part of the work.

Most importantly, however, the exceptions and limitations are still a derogation from the general rule of control and exclusivity. As was explained in Section 5.3.3.3 of the thesis, the question of derivative works has been partially addressed by the CJEU in the context of sampling and with respect to the neighbouring rights of phonogram producers. The Court concluded that the interests of the rightholder and of the derivative creator should be considered protected by the fundamental rights of intellectual property and the right of artistic freedom respectively.[279] However, even with this premise, the CJEU stated that the balance of these rights is already handled with the new digital technologies in mind via the framework of exceptions and limitations and the three-step test contained in the InfoSoc Directive.[280] In other judgements, the Court has also reaffirmed that even where exceptions and limitations would be effective, they must still be interpreted in a way that is compatible with the main purpose of the InfoSoc Directive, which is to provide authors (and rightholders) with a "high level of protection".[281]

The exclusive right of reproduction, on the other hand, is only limited in its internal structure by the standard of originality and, presumably, if the copied part is changed to the point where it can no longer be called a "copy" anymore (the sample has to be unrecognisable to the ear, according to the CJEU in *Pelham*[282]). As far as Internet meme authors are concerned, this piecemeal treatment of derivative creativity and the clear preference for automatic and broad private control and exclusivity over any work that is "original" is, with little doubt, a very foreign approach irreconcilable with their form of cultural participation. It might be remembered here that the only thing that separates the value of the subjective expression of the Internet meme author from the subjective expression of the traditional author appears to be the materials used in the creative act.

Similarly to Wikipedia, if EU copyright law were reimagined from the perspective of the author of Internet memes, the right of reproduction would not exist at all, or at least would not cover uses of works for the purpose of personal communication.

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[278] See Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combinaition?', p. 432.

[279] Art. 13 of the CFR.

[280] *Pelham*, paras. 59-65.

[281] E.g., *Painer*, paras. 109, 113; *Spiegel Online,* paras. 50-59.

[282] See Section 5.3.3.3 of this thesis.

Moreover, as with Wikipedia, the exclusivity and control that the meme creators currently acquire upon creating their work (if the exercise of these rights is permitted by, for example, an applicable exception) is also not in line with their needs. The control needed by the author of an Internet meme does not come in the form of an exclusive right. In fact, as seen above, in many cases, control is not expected at all, and if it is, it takes the form of a certain weak right of paternity where attribution may be required in some circumstances (inside a community, for instance).

The final utopian suggestion in the reimagining of the right of reproduction from the perspective of the Internet meme author is that it should be "open", namely a right held in relation to other works, rather than being prohibitive or compensatory in nature. In other words, instead of personal control and exclusivity over a finished work, the author of Internet memes needs a right to access other works as a way to protect her continued creativity. Through this lens, previous cultural expressions function as elements of language,[283] being combined to build up new meaning and a new "work".

As a result, the meme creator can also be said to exhibit some traces of *authority* and *steward/servant*, but not of *owner*. When these are considered together, the meme creator can moreover be understood as a type of *sharer,* like that suggested in the previous section with regard to Wikipedians, or perhaps as someone close to a communicating author, namely a person who creates in order to share directly with others. In this way, too, the creation of work and its exploitation are joined under a single logic of communicating one's personal perspective and creative take on the surrounding culture through free and creative choices.

6.6 Conclusions for Chapter 6: what can Wikipedia and Memes teach us?

In this chapter, two distinct examples of "new digital authorship" were presented. There are many other forms of this authorship that could be intriguing to investigate, but the transformative nature of memes and the collective nature of Wikipedia are the qualities that to a certain extent define large part of creative endeavours online. What is immediately clear from these two examples is that they indeed challenge the conceptualisations of authorship on which current EU copyright law appears to be founded. On the other hand, the two examples are also quite different from each other, and other forms of authorship in the digital sphere are likely to differ as well, bringing further challenges.

[283] See Kuhn, 'The Rhetorics of Remix' on remixing of works of others as a way to communicate using existing cultural artefacts as language.

Nevertheless, to draw on the discussion above, both examples of Creative Users, if put into the framework of authorship, share several fundamental characteristics, notably a pronounced focus on community, the audience (users of their works) and openness. As was described earlier, these characteristics are manifested in Wikipedia through cooperation and collective authorship, as well as a strong commitment to the community's purpose and the ideology of access and sharing. In the context of memes, they are expressed in the primary purposes of creation, i.e., belonging, communication and individualisation, and in the general aversion to control and exclusivity. Neither of these forms of authorship has commercial exploitation in its structure; on the contrary, they operate on the basis of sharing and gift giving.

Thus, by viewing Creative Users as authors and following the principle of the high level of protection of authors, the right to the protection of intellectual property in Art. 17(2) CFR, the right to artistic freedom in Art. 13 CFR, and the right to benefit morally and materially from one's authorial works in Art. 15(1)(c) ICESCR, one could argue that further development of European and EU copyright law should be attempted in order to come to terms with this new kind of author.

Of course, these perspectives on new digital authors draw a picture of what their respective "ideal" copyright law would look like, but this is not to say that only their interests should be considered. Recall here that the methodological approach of this thesis sees the conceptualisations of author in European and EU copyright law as a family of interconnected concepts. The analysis in this chapter has compared the different conceptualisations of author in EU copyright law with those in the selected Creative User environments and new forms of authorship. The *communicating* and *collective* author and the author *sharer* were identified, and some conceptualisations that are not strongly articulated in EU copyright, namely those of the author *craftsman* and the author *servant/steward,* were found to have a strong presence. Thus, including these additional conceptualisations of author in the existing "family" would mean finding equilibrium, not simply giving precedence to the most recent arrivals.

Copyright law in general, of course, is about striking a balance between different interests and expectations. On the other hand, as mentioned before, novel legal solutions are possible when openness, sharing and community are placed on the author's side of the scale, even if exclusivity, control, commercial exploitation and other similar elements are also on the same side. They might not only alleviate the everyday challenges that Creative Users experience with copyright law, but may also bring more consistency to the sub-surface structures of European copyright. Even though there are many such structures for EU copyright to choose from and some choices have clearly already been made, a more balanced approach can still be found

Chapter 7: Conclusions and Recommendations

7.1. On the concept of author in EU copyright law

As explained in Chapter 1, this thesis aimed to map the concept of author at the heart of the current EU copyright law system, to explore the challenges brought to this concept by the authorship practices of Creative Users, and to give suggestions on how these challenges might be addressed. The first and the longest part of the work was therefore devoted to investigating what is the "author" that European and EU copyright law seeks to protect, and how this concept can be formulated to be comparable to Creative Users' authorship practices. For this purpose, following the selected methodology, this thesis went deep into the structure of European copyright law.

First, it has been established that the European copyright tradition and EU copyright law are deeply intertwined with the concept of author, making it one of the (if not the) most important concepts in this legal field. At the same time, even a superficial overview shows that the content of this concept and the way it is positioned may vary depending on the context. Moreover, delving deeper into the history of European copyright through the perspective of author has demonstrated that the way it has been conceptualised has not been stable. The concept of author has been changing through history as a result of political, social, cultural and technological circumstances. Furthermore, these different stages and circumstances of development, according to the methodology of this thesis, never disappeared from the legal system completely, but stayed as part of the sub-surface layers, giving consistency to the whole copyright legal system and legitimacy for its further development. The presence of these different sediments and concepts and the ways they have directly influenced European and EU copyright law can also be seen in the traditional copyright justifications and the search for the "author" in copyright's doctrine.

Already at this point the conclusion can be drawn that the constantly evolving conceptualisation of author in European and EU copyright could be expected with the changing technological circumstances. Building on old principles while also adapting them to new environments is a natural part of what copyright law is today.

On the other hand, the different historical shifts and periods of rapid development had the effect that the conceptualisations of author and other related structural elements that have sedimented in the sub-surface layers of the European copyright legal system are not necessarily fully consistent with each other. In terms of the author, this thesis suggests, the single largest inconsistency is that the approach in the European copyright tradition to the creation and protectability of the work seems to be built on different premises than its approach to the work's exploitation. There are elements in the European copyright tradition connecting these two sides (for instance, moral rights and the way the term of protection is calculated), and yet attempts to recreate the relevant conceptualisations of author for those two stages in the work's lifecycle display significant differences. Indeed, in many cases it seems that the connection between the creating author and the exclusivity and control that is the result of this creation is more ideological than real.

Going deeper into EU copyright law and some of its most fundamental norms, namely, the right of reproduction and the criteria for protectability, it has been suggested that the EU copyright *acquis* and the decisions of the CJEU demonstrate conceptual choices being made and the creation of new norms. The toolbox informing such decisions is the European copyright law system, together with its sub-surface concepts and structures identified before. It was concluded that here the requirements of copyrightability have been formulated in a way that is possibly more inclusive than ever before, placing prominent emphasis on the subjectivity of the human author expressed through her free and creative choices. The right of reproduction, on the other hand, has been shaped from the perspective of broad exclusivity and control, giving the result that any fixation is a reproduction, with little normative basis provided. Moreover, the exceptions and limitations to this right, although having the public interest and the fundamental rights of users at heart, have been curtailed by the interpretation of the three-step test to not stray far from the economic interests of rightholders.

Thus, this thesis suggests that whereas the question of protectability in EU copyright is answered from a perspective of what has been called the author as *genius*, the general scope, at least of the exclusive right of reproduction, is formulated by transitioning the author to (the first) *owner*. The further questions of exploitation and exceptions and limitations are handled by placing the author on the back shelf and turning her into something resembling what this thesis calls a *resource,* or, if not, focusing only on the author's economic interests and seeing her as an *entrepreneur*.

Even though this combination of author conceptualisations is not unique, it has arguably become especially pronounced in the context of EU law, which has strong utilitarian and economic dimensions. Against this backdrop, certain inconsistencies become even more visible. Basing exclusive rights on such a model of *ownership,* even if as an implied continuation of the concept of the author as *genius,* makes the result a perfect fit for any other justified claim of ownership to take over. After all,

"property" is a separate civil law institute with its own logic and principles. The value that is produced by the author through free and creative choices and personal touch is effortlessly transformed into economic value in the EU copyright system, and for the purposes of economic exploitation the author is not seen as its main subject. Exclusivity and control are justified by creativity, but creativity exerts no real influence on how the exclusive rights are formulated. At the same time, as J. Ginsburg has warned, attempting to problematize the author (for instance, critiquing its conflation with Romantic genius) can nonetheless end up strengthening the economic interests of other rightholders.[1]

It could be argued that this way of structuring copyright – with protectability and exploitation not fully conceptually consistent with each other – is natural due to the different needs of different subjects in each stage: the interests of authors need to be balanced with the interests of rightholders in the stage of exploitation. And yet, the more the non-economic, the subjective, and other similar values and justifications are stressed in the norms regulating the creation and protectability of works of authorship, the more they should be reflected in the scope and structure of the exclusive rights, including the right of reproduction and its exceptions. If the author's creative subjective agency is the main (and in EU copyright, it seems, the only) measuring stick for protectability of works, how can the model of its envisioned exploitation be based on a depersonalised economic right?

J. Litman warns that to claim something as property makes the accompanying alienability and takeover of control by those with more bargaining power inevitable.[2] While there have been attempts in EU copyright law to give authors more economic bargaining power,[3] with the recent DSM Directive being of special note, this thesis suggests that to have any meaning, the value of authorial subjectivity should also be reflected in the structure of exclusive rights. This tendency to justify control and exclusivity through the value of the subjectivity of human creativity, but then formulate the exclusive rights on the basis of other values, is a discrepancy that may be contributing to the system's perceived lack of legitimacy, especially from the author's perspective.

Thus, the mapping and analysis of the different conceptualisations of author in EU copyright law already reveals certain tensions and inconsistencies. On the other hand, with its rapid pace of development, its ambition to adapt to new technology, and the heritage of the European copyright tradition on which new norms can be built, EU copyright law also presents an especially compelling opportunity to

[1] Jane Ginsburg, 'Exceptional authorship: the role of copyright exceptions in promoting creativity' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press 2014), pp. 15-28.

[2] Litman, 'What we don't see when we see copyright as property', p. 544.

[3] See Section 2.3.3 of the thesis.

choose a path that may reduce tensions and increase consistency between the different sub-surface structures. The Creative Users and their different forms of authorship thus do present a challenge to the system, but they might also help see old questions and problems in a new light.

At the same time, increasing the consistency among the principles, concepts, and structures in the sub-surface (and surface) level of EU copyright law cannot simply mean excising some of its content. For better or worse, European and EU copyright is a complex system closely connected with such quickly developing and unstable aspects of social life as technology and creativity. Therefore, especially from the author perspective employed in this thesis, the only possible solution to reduce tensions and inconsistencies may be to embrace complexity.

7.2. The challenge of the Creative User

As shown in Chapter 5, the concepts on which EU copyright has built its normative content (at least with respect to protectability and the right of reproduction) seem to be close to what this thesis has proposed to call *genius, owner*, *resource,* and *entrepreneur*. Following the methodology of the thesis, these conceptualisations can be seen to form a family which, seen together, fleshes out the concept of author in EU copyright law. In Chapter 6, after analysing two common forms of Creative User activities online, the thesis identified several different conceptualisations of author, some of which, like the *craftsman*, or *steward/servant,* are not completely new to the European copyright tradition. Others, however, such as *sharer, communicating* author and *collective* author, at least in that specific form, might be novel to copyright. The challenge and perhaps the basis for a further "shift" (Shift No. 6?) in EU copyright law could be the integration of these new types of authors, which look as if they are here to stay. As before, this integration would involve many choices, especially since EU copyright law can draw on a rich reservoir of legal sediments from the entire European copyright legal culture and at least two legal systems (continental and common law). This chapter will propose some scenarios for how such decisions may play out, even though some of them might be hard to realise, not least because of certain frameworks already set in place by the international copyright system or a lack of political will to potentially reduce the scope of exclusive rights.

When talking about the integration of "new" conceptualisations into the author family, it needs to be stressed that it should happen in a way consistent with the sub-surface elements of the European copyright tradition. After all, according to K. Tuori, it is the sub-surface content of a legal system that gives the surface norms

their legitimacy.[4] It has also been pointed out by others that in relation to online creativity, copyright would be unlikely to gain more legitimacy if the rights were exclusive to authors or if they were made open and corresponding to the online model of communal knowledge production.[5] From the perspective of the research undertaken in this study, this seems to be an accurate observation.

Another important point to note in light of the conceptual challenges brought by Creative Users is that even now, copyright, including EU copyright, is a legal system intended to cover many different kinds of authors and containing different conceptualisations and their combinations. Thus, the system, even if perhaps not completely "up to date", is still meant to be flexible and cater for a variety of social practices.[6] Once again, the different conceptualisations of author in the European copyright tradition and EU copyright law form a "family" whose different members are combined in various ways. Therefore, the only solutions that can be proposed with respect to the inclusion of Creative Users as a type of "authors" in copyright law are based on compromise.[7] Although they might not satisfy all possible needs of the Creative Users, these solutions may structurally alter EU copyright law to bring it more in line with the new conceptualisations Creative Users introduce to the family.

7.3. On the future of EU copyright law in line with the Creative User

7.3.1. General

To accommodate the Creative User within the framework of copyright law as an *author*, and the way this could be accomplished, is, of course, a matter of choice. As discussed in Chapter 1 and other parts of the thesis, there are numerous alternatives for handling the situation with respect to online creativity, including leaving it as is. At the same time, as also indicated in Chapter 1, copyright law might be experiencing real or perceived instability or a "legitimacy crisis", especially in the online environment. This thesis suggests that this lack of relevance and

[4] See Section 1.3.2 of the thesis.

[5] Ginsburg, 'The Role of the Author in Copyright', pp. 66-69.

[6] Bently and Biron, 'Discontinuities between legal conceptions of authorship and social practices', p. 261.

[7] Gervais stresses, as well, that any new legal solutions should include all different sorts of authors (the digital and the traditional) if it is to be more understandable and accepted: Gervais, 'Authors, Online', p. 393.

legitimacy is attributable, at least in part, to the nature of creative activities in online contexts, which differ from the models of creativity and exploitation of works on which the current EU legal understanding of the author is based. However, perhaps even more important than their differences in this respect may be the similarities between the "authors" of copyright and Creative Users. In other words, it is not possible to place Creative Users completely outside the "author" dominion in copyright law, but the differences make it impossible to fully acknowledge their presence there either.

It has been suggested in this thesis that EU copyright law, in terms of its roots and choices made with respect to the legal culture and structure of European copyright law, demonstrates inconsistent treatment of the author during the stages of creation and exploitation of work. It has also been shown, in Chapter 6, that the similarities between Creative Users and the concept of author in EU copyright law lie mainly in the norms, values and justifications of the requirements of protectability. It is because of the value of human subjectivity, creativity, and free and creative choices that such works as Wikipedia or Internet memes can also be considered works of authorship, thus making it relevant to protect the fundamental rights of their authors. On the other hand, the main differences can be said to lurk on the exploitation side, at least as expressed in the right of reproduction, where the interests presumed to be vital to authors are different in almost every respect from how Creative Users perceive "reproduction".

In a way then, the challenge of the Creative User is also a reflection of the inherent conceptual uncertainty of the European copyright system, especially as it is currently interpreted at the EU level. One could imagine thus that this challenge and, indeed, the inconsistencies in the underlying premises of EU copyright as seen from the perspective of author could be addressed by changing the criteria of protectability and simply reducing the variety of protected authors, perhaps even tying the rationale of protection to the economic interests for the creation of the work.[8] However, as has been stressed before, the direction taken by EU copyright in recent decades has been systematically moving away from such a solution – quite the contrary. Copyright is presented as something that is the opposite of protection of investment of money and effort alike.

It has been speculated in the previous chapters that such a position is related to the increasing connection of copyright law to the principles of fundamental rights, but also, as was the case during the "Romantic shift" discussed in Section 3.4 of the thesis, to the need to offer justification for the exclusivity and control that copyright provides. This thesis suggests that this inclusivity in protectability, in combination with the digital technologies could instead serve as a basis for reviewing certain

[8] In fact, T. Dreier predicted that this is exactly what will happen with the development of technology that will make human authorship harder to locate and distinguish: Thomas Dreier, 'Authorship and New Technologies from the Viewpoint of Civil Law Traditions' [1995] IIC 989, p. 996.

tenets of copyright law that are perhaps too detached from human subjectivity and creativity.

This is why, even allowing the possibility that EU copyright might still lean towards raising the threshold of protectability and implicitly or explicitly exclude Creative Users, for instance, by giving more content to the "personal touch criterion",[9] this solution will not be discussed in detail here. Instead, as already touched upon, the suggestions presented in the following sections will relate to the "acceptance" of the digital conceptualisations of author into the family in EU copyright law and finding "common ground" between them, both with respect to protectability *and* with respect to the exclusive right of reproduction.

7.3.2. Protectability

As identified in the thesis, the question of protectability, or rather the compatibility of the criteria of protectability with the reality of Creative Users, requires the consideration of two different issues. On the one hand, as explained in Chapters 5 and 6, protection requirements, especially under the EU standard, have become dematerialised and broad, relying on personal subjectivity above all else. This inclusive approach allows such works as Internet memes or other non-professional, negligible-investment creations to be protected, making their creators "authors" in a legal sense. The criterion of "expression" analysed in Chapter 5 does not amount to a high threshold for any of the works of Creative Users either. Quite the opposite, it generally poses no obstacle to the protection of different versions of such works in progress as Wikipedia, providing those versions are stored in some way. In other words, Creative Users and their forms of authorship do not, in fact, constitute any substantial conceptual challenge to the EU copyright where protectability is concerned.

At the same time, one of the characteristics of large collaborative online projects such as Wikipedia, as found in Chapter 6, is the unprecedented level of cooperation and specialisation, as well as the role of the community in the process of creation. Moreover, technology can also play a greater role in such undertakings than in traditional authorship situations. Without the community, the specialisation and the technology, the project and the open work(s) resulting from it would not exist at all.

In such circumstances, as also discussed above, assessing the originality and personal contribution of each "author" might mean intruding into a community's ecosystem and imposing an arbitrary division between contributors that the community either does not differentiate between, or else does so on the basis of other criteria. This is even more relevant because, as also shown above, the current

[9] See the analysis of this criterion and the requirements of protectability in Section 5.3.3 of this thesis.

EU copyright standard of originality has moved completely away from the objective criteria of protectability and has centred on free and creative choices as the main criterion by which to solve the question of authorship. Here this thesis has identified a mismatch between author conceptualisations, where Wikipedia (and other similar projects) represents the *craftsman*, the *sharer,* and the *collective* author which are not fully accounted for in EU copyright law or even explicitly rejected.[10]

Problems with large groups of specialised authors in the European copyright tradition and in the EU copyright law, especially in relation to scientific authorship, have been pointed out repeatedly by legal scholars throughout the years.[11] Different remedies have been proposed, some relating to changes in the current law, others asking the communities to better educate themselves about the workings of copyright and to structure their cooperation accordingly. Several suggestions have entailed slight modification of the exclusive rights of contributors in large communities,[12] while others have proposed a "deemed authorship" solution whereby one subject would be considered author for the sake of convenience. [13] These solutions, however, might still be incapable of doing justice to and "including" the new conceptualisations of author common in environments like Wikipedia, because they either differentiate the contributors on the basis of conceptualisations already embedded in EU copyright law, or attach the utmost importance to only a single "author".

A suggestion more in line with the findings of this thesis, however, could be something similar to what D. Simone recently proposed while analysing UK copyright law and its test of joint authorship. In D. Simone's model, the joint authorship test is contextualised, allowing the different requirements of the criteria to be assessed (at least partially) by the creators themselves.[14] Her specific recommendations for what legal norms to include are designed for the UK legal system, but the general idea could be used to complement the protection requirements laid down in EU copyright law to the reality of Wikipedia's *collective*

[10] This is especially the case with what has been called the author *craftsman* by this thesis see Section 6.3.2 for more on this issue.

[11] See, e.g., Simone, *Copyright and Collective Authorship. Locating the Authors of Collaborative Work*; Rochelle C. Dreyfuss, 'Collaborative Research: Conflicts on Authorship, Ownership, and Accountability' (2000) 53 Vanderbit Law Review 1161; Lukoseviciene, 'Scientific Authorship and Copyright Law in Big Science User Facilities: the Case of ESS', pp. 33-64.

[12] See Bently and Biron, 'Discontinuities between legal conceptions of authorship and social practices', pp. 267-270.

[13] See Pek San Tay, Cheng Peng Sik and Wai Meng Chan, 'Rethinking the Concept of an 'Author' in the Face of Digital Technology Advances: a Perspective from the Copyright Law of a Commonwealth Country.' (2018) 33 Digital Scholarship in the Humanities 160.

[14] Simone, *Copyright and Collective Authorship. Locating the Authors of Collaborative Work*, pp. 250-256.

authors without changing the already well-developed criteria of originality and expression.

As noted before, EU copyright has largely not yet harmonised the norms of authorship, including those of join authorship, explicitly.[15] Even though it can be said that the requirements of protectability have been implicitly harmonised for all creative works and thus for all authors, even where multiple contributions are concerned, it might still be possible to introduce a joint authorship test into EU copyright law that slightly adjusts the general principles in certain circumstances.

What exactly such a "new" joint authorship test would look like in the context of EU copyright would need to be worked out in more detail in future research. But one can imagine a provision with wording similar to Art. 2 of the Term of Protection Directive, for instance, which stipulates that "the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors". This provision, of course, is clearly consistent with what this thesis has called author *genius* and thus the harmonised EU originality criterion. However, if the conceptualisation of the author as *collective* were also acknowledged in the joint authorship test, without having to change the originality requirements but with the Creative Users in mind, the collaborators who have *significantly* contributed to the *expression* of a creative work, following an agreement between its authors, could also be considered as *joint authors* of the work in question.

With all certainty, such a norm would require further interpretation, especially the criterion of "expression" that should not only mean that the contribution must be made to the "objectively perceivable" work, as formulated by the CJEU,[16] but also that the contribution is not at the level of ideas or financial investment or merely technical assistance. This status should also not be granted to a non-natural person or for contributions where freedom or personal autonomy are absent. However, this could give author status to contributors who compile materials later used in the creation of works, administer a server, or review, edit, and delete entries, etc. In other words, though stopping short of the conceptualisation of author as *craftsman*, the joint authorship test could at least give recognition to the judgement, skill, or intellectual contributions of authors. This is especially relevant in the context of communities like Wikipedia, which strive for a result that has utility or a special purpose as one of its features. Thus, if interpreted correctly, this solution would be consistent with other conceptualisations of author present in the legal culture and deep structure of European copyright, and the different principles sedimented there throughout history.

In the event of a dispute, the criterion of originality of, in this case, the EU or the Member State law would allow to identify the "authors" whose agreement would be

[15] See Section 2.3.2 of the thesis.

[16] For the discussion of this criterion, see Section 5.3.4 of this thesis.

needed to recognise the joint authorship. This would mean paying respect to the "traditional" understanding of authorship based on free and creative choices, while also allowing the possibility to include other social practices and conceptualisations. Such a provision, or one like it, might still not be able to encompass all the different kinds of contributors possible in online communities, especially those of a more technical nature, as is likely the case with the Open Source communities. But it would potentially confer legitimacy on communal norms already existing in different online communities, as well as such contexts as scientific publishing, and chart a course for future development of EU copyright that acknowledges Creative Users.

7.3.3. On the right of reproduction

7.3.3.1. Shifting attention

Discussing the right of reproduction in EU copyright law, it became evident that this right has a specific internal logic and the position of the author that it projects differs from how the author is conceptualised for protectability. This thesis does not analyse other exclusive rights or, for that matter, moral rights; its focus is on the right of reproduction, and thus any conclusions must be with respect to this exclusive right only. Even if one just considers the right of reproduction on its own, however, several observations and suggestions present themselves to better connect the exploitation phase in EU copyright with the creation phase and to make it more suitable for the conceptualisations of author observed in Creative User environments.

First of all, it is clear from the analysis above that the right of reproduction is not merely an "economic right". This might have been the case at some point in the development of copyright law, but in its very essence, the right is an expression of control and exclusivity over a work and its fixations. This right is thus a useful tool for economic interactions, transforming the work into a valuable immaterial object; but it is also decisive for access, sharing, communication, and creativity, especially in the digital setting. In this regard, the right is essentially a tool for excluding what can be seen as certain established forms of online authorship. From this perspective, the separation between economic and moral rights that seems to be especially pronounced in the EU copyright law,[17] as well as the inconsistencies in the legal regulation of the creation and exploitation of the work, become even more jarring.

This thesis proposes that the integration of Creative Users as authors into the EU copyright system may be beneficial not only in terms of adding legitimacy to the

[17] See Section 3.6 of this thesis.

copyright law in online environments, but also as a starting point for a discussion about the future of copyright law, including the right of reproduction. To incorporate what this thesis has called the *sharer,* the *collective* author, the *communicating* author and the *steward/servant* conceptualisations into the current structure of the right of reproduction in EU copyright law, one must challenge the logic of the author as *owner, entrepreneur* and *resource* on which it seems to be built. To this end, it is necessary to acknowledge that copyright law might need to integrate competing authorial interests. Building on the analysis of the right of reproduction in Chapter 5, several suggestions can be made with respect to the internal logic of the right and the structuring of its exceptions and limitations.

7.3.3.2. The internal structure of the right

As elaborated in Chapter 5, the internal structure of the right of reproduction in EU copyright law seems to be based on a presumption of broadly interpreted control and exclusivity that covers any fixation of a work, even if the fixation is temporary, non-human-readable, or done without commercial intent.[18] However, if the authorial interest is not automatically associated with the author *owner* or *entrepreneur*, the default settings of exclusivity and control can be questioned. In other words, how can the right of reproduction accommodate a compromise when not all authors need exclusivity, and some oppose it, and there are groups for whom reproductions are more valuable than originals?

Many suggestions for restructuring the exclusive rights can be found in the literature, some of which have already been mentioned in Chapter 1. However, to keep with the idea of this thesis that any solution should be a compromise between all members of the family behind the concept of "author" and also be compatible with the existing sub-surface structures of European copyright law, one noteworthy proposal is to build "free use" into the internal logic of the right of reproduction.

The concept of "free use" is far from new and has long been used to balance copyright's exclusivity and control in, for instance, Germany and Sweden.[19] Unlike EU copyright, where any fixation of an original part of a work has now been declared to be covered by the right of reproduction,[20] "free use" was traditionally a tool to clarify when such fixation would fall outside the scope of the exclusive rights, including the adaptation right common in EU Member States. Although there are variations in how it is applied by courts in different countries, the crux of the test lies in assessing to what extent the individual creative elements of the older

[18] See Section 5.4 of this thesis.

[19] But also other countries, see Senftleben, 'Flexibility grave - partial reproduction focus and closed system fetishism in CJEU, Pelham', pp. 753-754.

[20] See the CJEU case law on this matter in Section 5.4.3.3 of this thesis, also Walter and Lewinski, *European Copyright Law. A Commentary*, p. 970.

work "fade into the background", giving way to the individual expression/message of the new (derivative) work.[21] In the German case law, the assessment has been done by searching for "inner distance" between the works.[22] Inner distance does not imply that the original work has been transformed "beyond recognition", but can be expressed, for instance, through "anti-thematic treatment" in parodies[23] and the use of literary characters in a different context.[24] Free use has been treated similarly in the Swedish case law, with emphasis placed on the new context/meaning of the derivative work and the new personal expression given to it.[25] In a recent case, *Svenska syndabockar*,[26] the court used the doctrine to hold that a direct reproduction of a photograph, expressed in a new original and way in a painting carrying a socially critical message, did not constitute infringement of the copyright to the photographic work.[27]

Until very recently, the existence of this provision in the abovementioned jurisdictions was generally regarded as "protected" from developments in EU copyright law, given its perceived relation to the right of adaptation, which is not yet (and possibly never will be) harmonised in EU law.[28] Unfortunately, however, in its *Pelham* judgement, in 2019, the CJEU indicated its position on this kind of recalibration of the reproduction right in EU copyright law. Here the Court ruled that such an exception from the phonogram producers' right of reproduction is incompatible with EU copyright law, since among other things it would fail the

[21] Paul Edward Geller, 'A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?' (2010) 57 Journal of the Copyright Society of the USA 553, p. 555.

[22] Kamila Kempfert and Wolfgang Reissmann, 'Transformative Works and German Copyright Law as Matters of Boundary Work' (2017) 2 Media in Action 65, pp. 69-70.

[23] Bernt Hugenholtz and Martin Senftleben, *Fair Use in Europe. In Search of Flexibilities* (IVIR, 2011), p. 27.

[24] Geller, 'A German Appraoch to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?', p. 556.

[25] See cases G.B. v Sveriges Radio AB, Swedish Supreme Court, T4739-04, NJA 2005 s. 905, 2005 (*Alfons*) and JL v MA, Swedish Supreme Court, T 1963-15, NJA 2017 s. 75, 2017 (*Svenska syndabockar*).

[26] JL v MA, Swedish Supreme Court, T 1963-15, NJA 2017 s. 75, 2017 (*Svenska syndabockar*).

[27] See Senftleben, 'Flexibility grave - partial reproduction focus and closed system fetishism in CJEU, Pelham', pp. 753-754; Nedim Malovic, 'Swedish Supreme Court Holds that Painting Based on Prior Photograph is New and Independent Creation' (2018) 13 Journal of Intellectual Property Law and Practice 604, p. 604.

[28] Quintais, 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law', p. 204; Geller, 'A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?', pp. 558-559.

three-step test and (presumably) allow too much inconsistency in national implementation of exceptions and limitations.[29]

Despite the fact that the German referring court explicitly stated its view that the "free use" is not an exception or limitation but an inherent limit to the scope of protection of (in this case) phonograms,[30] the CJEU chose to reframe it as an exception/limitation. This was indeed, as M. Senftleben puts it, a "missed opportunity" to breathe new life into the right of reproduction in EU copyright law.[31] Here it can just be noted that an interpretation of exclusive rights outside the framework of exceptions or limitations is not something the Court has never done before. Even in *Pelham* itself, the Court presumably reinterpreted the neighbouring reproduction right in order to exclude works in a modified form unrecognisable to the ear.[32] A comparable example is the *GS Media* case,[33] where the violation of the right of communication to the public was interpreted as dependent on the non-commercial actor's knowledge of the illegality of the source to which the link is provided.[34] Arguably, the introduction of a similar "exception" to the exclusive right would be problematic due to its incompatibility with the three-step test and potential inconsistencies in national implementation.

Nevertheless, from the perspective of this thesis, a provision similar to that of "free use" is to be insisted upon. For one thing, as shown above, it adds nuance and flexibility to the internal logic of the right of reproduction itself. In terms of the author, this would mean a recognition that the "author" on the exploitation side is not presumed to be only the first *owner*, *resource,* or at best an *entrepreneur*; it would signal that there could be authors with other interests and needs, namely *sharers* as well as *collective* and *communicating* authors. Perhaps even more importantly, such a balancing of this exclusive right would further bridge the gap between the values behind the norms of protectability and those of exploitation, and thus contribute to increased coherence of the sub-surface structures of EU copyright law. In fact, the Swedish approach to "free use" has been specifically described as

[29] *Pelham*, paras. 62-65.

[30] Ibid., para. 56.

[31] Senftleben, 'Flexibility grave - partial reproduction focus and closed system fetishism in CJEU, Pelham', p. 760.

[32] See Section 5.4.3.3 of this thesis on why this might not be seen as a "reinterpretation" of the limit of the right after all.

[33] Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, ECLI:EU:C:2016:644 (*GS Media*).

[34] *GS Media*, paras. 45-48.

the ability to think of the exclusive rights as not detached from the logic of protectability.[35]

It is also important to stress here that the principle of using new contexts, new messages, and individualisation of older expressions as a basis for limiting the exclusive rights is not completely foreign to EU copyright law either. As Advocate General Cruz Villalón reasoned in the *Deckmyn* case, the aim of the author of parody is not only to use part of another work, but also not to be confused with the original work and to assert her own individual contribution.[36] The same general criteria were confirmed by the CJEU in its judgement.[37] The question that needs to be asked then is: why is the "funny" form of derivative authorship treated differently than others? Without going into the possible answers to this question, it can still be argued that the same or similar requirements could be extended to any other works which change the context, message, or individual expression of a protected work. Some additional criteria might need to be developed for negotiating the threshold of creativity and individualisation for such "new work", for, instance paying attention to the degree to which the new work could be a "substitute" to the older one. Substitutive qualities would arguably imply that the author did not personalise the message and expression of the protected work enough to make it her "*own* intellectual creation". Such an interpretation specifically of the concept of "own" would also be compatible with the current CJEU case law and might be employed to protect the economic interests of the author *entrepreneur* and those of the rightholders.

Applied to the examples of Creative Users as authors analysed above, this would mean accepting that the author can also be a *sharer*, for whom copying, at least for the purposes of communication and cultural interaction, is the normal mode of authoring works. At the same time, such a "free use" direction of development for the right of reproduction would provide a footing for a whole digital cultural movement, thus potentially boosting the legitimacy of copyright law in the digital environments. Even though not all derivative creative works online would fall under such a provision, many would, and, as already mentioned, the solution represents a compromise that is compatible with the variety of sub-surface structures in EU copyright law.

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[35] Per Jonas Nordell, 'Upphovsrätten som ett jämförelseobjekt: Kommentar till Högsta domstolens dom NJA 2017 s. 75 (Svenska syndabockar)' (2017) 86 NIR : Nordiskt immateriellt rättsskydd 301, pp. 301-302.

[36] Opinion of AG Cruz Villalón in Case C-201/13, Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, ECLI:EU:C:2014:458, paras. 55-57.

[37] Case C-201/13, Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, ECLI:EU:C:2014:2132 (*Deckmyn*), para. 20, where the CJEU provides that the requirements to treat something as parody are to "first, evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery".

The CJEU has repeatedly concluded that the principal objective of the InfoSoc Directive is the "high level of protection of authors, allowing them to obtain appropriate reward for the use of their works" and stressed that the Directive is meant to safeguard the fundamental right to protection of intellectual property in Art. 17(2) of the Charter of Fundamental Rights.[38] If the "rewards" and the "protection" of intellectual property were not only seen through the prism of economics, but also in terms of respecting the heterogeneity of authorship models, it would be another strong argument for reassessing at least the right of reproduction in EU copyright law.

The concrete route to attaining such change in the surface norms of EU copyright law is somewhat uncertain in the wake of the *Pelham* decision. On the one hand, *Pelham,* being a judgement on neighbouring rights protection, will give the CJEU possibilities to consider the reproduction right of *authors* in the future. On the other hand, however, substantially changing the scope of copyright, even if consistent with the distinction between copyright and neighbouring rights drawn by the Court in its protectability cases,[39] would often not be enough to prevent infringement anyway. Nevertheless, a discussion of the position and protection of *authors* in EU copyright law, especially in light of digital online creativity and the fact that a more nuanced approach to the right of reproduction and adaptation exists in several EU countries, could provide a firm basis for incorporating the solution into a future judicial interpretation or legislation.

7.3.3.3. The external limits

As discussed in Chapter 5, the right of reproduction in EU copyright law can also be seen as "externally" shaped by exceptions and limitations and the three-step test. It was concluded that the values behind the exceptions and limitations are commonly held to represent the public interest, and that the CJEU has recently declared them to be expressions of the fundamental rights of copyright users. At the same time, the scope of each exception is capped by the so-called three-step test, which, as a rule, embodies the economic interests of *rightholders*. It was suggested that this way of limiting the exclusivity and control of the right of reproduction in EU copyright tends to strengthen the property logic and width of the right of reproduction and represents a further example of the mismatch between protectability and exploitation norms as they relate to the author.

As with the right of reproduction above, if we rethink the exceptions and limitations and the three-step test from the perspective of author and with the digital authorship of Creative Users in mind, several suggestions can be made.

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[38] See Section 2.3.2 of this thesis.

[39] E.g., in *Cofemel*, see Section 2.3.3 of this thesis.

First of all, it needs to be pointed out that the recent trend of interpreting exceptions and limitations to make them "effective" is promising from a practical standpoint, as more forms of digital authorship by Creative Users are likely to fall under them. For instance, the more flexible interpretation of the quotation exception might provide some relief for non-humorous derivative creativity, as discussed in Chapter 6. On the other hand, as noted above, simply relying on exceptions and limitations to include certain forms of authorship does not address the challenges of consistency and legitimacy discussed previously. Furthermore, the scope of this or other applicable exceptions is strongly dependent on the interpretation of the three-step test. In this regard, much has been said about the problems the current three-step test poses to the EU copyright system, and possible ways to reinterpret it have been suggested.[40]

From the perspective of this thesis, the three-step test in Art. 5(5) of the InfoSoc Directive has been said to represent the conceptualisations of author that this thesis calls *resource* and *entrepreneur*. This is mainly due to the fact that the second step of the test, the "normal exploitation of work", has currently become the most important assessment criterion and covers the potential or actual economic benefits of this exploitation. On the other hand, as discussed in Chapter 6, from the perspective of digital authorship and if the author is also seen as *steward, sharer,* or *collective*, "normal exploitation" of work does not necessarily have to be economic in nature. It is possible that the benefits and exploitation that this author expects and needs in order to disseminate and further collaborate in the creation of the work are, on the contrary, open and free.

From this standpoint, then, it seems logical that even the criterion of normal exploitation of the work should be contextualised, or rather that it could be seen as allowing interpretation of exceptions and limitations as sensitive to the context of what work is used and in what way. L. Bently and T. Aplin have argued that the quotation exception enshrined in Art. 10(1) of the Berne Convention should be the template for how national quotation exceptions are structured, namely leaving open the possibility to exempt certain uses on the basis of proportionality and "fair practice", without other limiting factors.[41] A somewhat similar idea can be glimpsed in the "reverse three-step test" proposed by D. Gervais, where he suggests that instead of prohibiting all uses that might interfere with normal exploitation or might

[40] See, for instance: Senftleben, 'User generated content: towards a new use priviledge in EU copyright law', pp. 144-154; Griffiths, 'The "Three-Step Test" in European Copyright Law - Problems and Solutions', pp. 428-457; Christophe Geiger and others, 'Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law' (2010) 1 JIPITEC 119, pp. 119-122; Jongsma, 'The Nature and Content of the Three-Step Test in EU Copyright Law', pp. 338-352, as well as analysis in Section 5.4.4.3 of this thesis.

[41] Lionel Bently and Tanya Aplin, 'Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism.' [2018] University of Cambridge Faculty of Law Research Paper No 34/2018, Available at SSRN: https://ssrncom/abstract=3119041, pp. 2-7.

unreasonably prejudice the interests of rightholders, only uses which actually *do* such harm should be prohibited.[42] Even other exceptions and limitations in EU copyright law could be structured along these lines if the three-step test were approached from the perspective of polysemous "author" that this thesis suggests. However, the rationale for making the exceptions and limitations reliant on fair practice and proportionality from this perspective would be that it would also let us determine the nature of the creative works themselves and the actual normal exploitation they were intended for.

Such an approach might be applied to argue for rewording the exceptions and limitations in Article 5(5) of the InfoSoc Directive, making them more open if their wording is too restrictive and the chance arises (for instance, the same quotation exception in Art. 5(3)(d) InfoSoc Directive). Moreover, the three-step test is arguably already a tool that national courts must apply when determining the applicability of the exceptions and limitations to specific circumstances of the case.[43] In this way, the test might be simply used on a case by case basis to ensure that minimal restrictions applied for works that were clearly intended for sharing (even if no open license was used).

As described in Chapters 3 and 5, the current exceptions and limitations in the InfoSoc Directive and the Computer Programs Directive already contain elements that appear designed to protect the interests of authors (and industries) whose needs are not fully aligned with the broad exclusivity and control of the exclusive rights. As previously concluded, even if such a solution only reinforces the broad interpretation of the right of reproduction and thus its ideological commitment to what might be called an "outdated" concept of author, not all authorial interests can be fully accommodated within the structure of the exclusive right itself (even if, for instance, "free use" rules were introduced, as recommended in the previous section).

In more concrete terms, with such an approach, works like Wikipedia content or Internet memes would generally be considered eligible for the most permissive interpretations of exceptions and limitations possible, even without the need for additional licenses (and having in mind that many creative users do not use them at all). A similar approach could be applied to the second step of the test, which ensures that the use "does not unreasonably prejudice the legitimate interests of rightholders". Even here it can be asked what constitutes "legitimate interests", and which subjects should be included in the assessment.

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[42] Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test', pp. 27-30.

[43] For discussion about who are the addressees of the three-step test see Richard Arnold and Eleonora Rosati, 'Are national courts the addressees of the InfoSoc three-step test?' (2015) 10 Journal of Intellectual Property Law and Practice 741, pp. 741-749, Daniel Jongsma, 'The Nature and Content of the Three-Step Test in EU Copyright Law. A Reapprasal' in Eleonora Rosati (ed), *Routledge Handbook of EU Copyright Law* (1st edn, Routledge 2021), pp. 345-348.

Moreover, such an approach, again, would provide a legal foundation for diverse communal practices already exercised through private ordering tools of various kinds, and might make them easier to enforce. In addition, the greater visibility of alternative "fair practices" and intended uses of the works might draw additional attention to the already existing public licenses and reintroduce the question of their use into EU copyright policy debates.[44]

Even though this might seem to be a minor point in the broader discussion around the reformulation of the three-step test, the shift in approach that may be justified by the requirement to protect different forms of authorship would likely be able to bring about a more nuanced approach to the test itself. At the very least, the attention placed on the "fair practice" of exploitation would lead to an assessment of what de facto practices already exist in different genres, industries, etc. Moreover, from the perspective of this thesis, an interpretation of the three-step test in this direction would increase consistency in the sub-surface layers of EU copyright, building stronger ties between the conceptualisations of author in the creation and the exploitation phases. This, in turn, would help enhance the practical usefulness, as well as the perceived legitimacy, of copyright law in digital environments.

7.4. Choices and challenges

This thesis did not set out to develop a concrete plan of action or precise formulations of the norms that should be included in EU copyright legislation. The aim was to examine certain fundamental premises of protectability and the right of reproduction, assess them from the perspective of Creative Users as authors, and to suggest some possible directions for the further development of the EU copyright system that would provide more conceptual consistency.

Choosing this suggested path and embarking on development of more concrete legal solutions is, of course, a decision whose outcome will depend on many circumstances. What is important to recognise from the perspective of this thesis, however, is that even a certain formulation of legal norms involves a choice of how "author" is conceptualised in EU copyright law, and thus which creators will receive the "high level of protection", as well as the fundamental right of protection of intellectual property (Art. 17(2) of the CHFR). The multiple structures and concepts in EU copyright's legal culture and deep structure certainly give flexibility of choice

[44] The EU Commission has already signalled support for a more accessible and transparent copyright licensing regime, see, e.g., Communication from the Commission "On Content in the Digital Single Market", COM(2012) 789, p. 3. However, in the stakeholder dialogue that followed the Communication, the "User Generated Content group" of stakeholders failed to reach consensus on any of the questions raised, see https://digital-strategy.ec.europa.eu/en/library/licences-europe-stakeholder-dialogue (Accessed 16 August 2021).

when building surface norms, but unless this choice is presented as such and is accompanied by consistent arguments and justifications, internal tensions between different legal norms may arise and social acceptance decline.

At the same time, even in their most general form, the suggestions made above are not without problems, and certain challenges, including those of consistency, are immediately evident. First of all, as already mentioned, they might simply be impracticable due to lack of political will and the unlikelihood of the Member States achieving consensus to adopt such measures. Moreover, shifting the approach of the three-step test might be considered at odds with its interpretation already present at the WTO level.[45] In addition to that, "opening up" EU copyright to the idea of the growing "family" behind the concept of author and looking for more flexible solutions to accommodate the different interests would inevitably have consequences in terms of decreased legal certainty and, possibly, less transparency in the application of the norms. For all of these suggestions, a substantial amount of new case law would be needed at the EU and national levels to be able to develop more predictable interpretations of the different criteria. Moreover, a more contextualised approach to copyright would almost certainly lead to differences in national implementation, which was one of the reasons for rejecting the "free use" limitation for the right of reproduction in the *Pelham* case.

On the other hand, as for instance C. Geiger has pointed out, copyright law, even of the continental tradition, is not completely unfamiliar with open concepts and flexible criteria.[46] Even the standard of originality itself is a rather open criterion, which, as has been observed, in the EU copyright context has recently been made reliant on the subjective intentions of the author.[47] A "one size fits all" approach, even if easy to administer, not only tends to accrue an assortment of different exceptions to make it work at all, but is also unlikely to do justice to the complexity of social life, especially in such fields as human creativity and technology.

The ideas offered in this thesis, once again, sought to suggest a slightly different perspective on the development and future of EU copyright law. My hope is that they might be of assistance to other research efforts in copyright law as well. After all, at least in the European copyright tradition, the author *is* one of the most central concepts, deeply permeating all levels of the legal system. The conversation here was focused on the question of Creative Users and digital forms of authorship, but the development of society and technology will certainly continue. There will be,

[45] See Section 5.4.4.3 of this thesis.

[46] Geiger, '"Fair Use" Through Fundamental Rights in Europe: When Freedom of Artistic Expression Allows Creative Appropriations and Opens up Statutory Copyright Limitations', p. 30.

[47] Ibid.

and already are, further challenges to face, and the place of human creativity, as well as the meaning of its protection, are questions which will be revisited time and again.

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