Rethinking Copyright from the 'Capabilities' Perspective in the Post-TRIPs Era: How can human rights enhance cultural participation?

Volume I of II

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

(Signature) ……

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THESIS ABSTRACT

The current scholarship on copyright predominantly considers this area of law from the standpoint of economics. Likewise, since the adoption of the TRIPs Agreement, contemporary copyright law-making and practice has mainly been constructed around the assumption that its job is to create incentives to make more expressive works in the form of copyright embedded in goods and investment. Copyright law has heavily skewed towards the protection of corporate copyright ownership rather than individual authorship. In this model, culture is seen as the marketplace for merchandising and producing the products of copyright industries and an economic space facilitating the process of creativity. Intellectual properties are said be essential assets in firms' portfolios and an important component in the macro-economic development of a country. Thus, current copyright law has predominantly an economic-oriented model that shapes its cultural and development policies.

This thesis offers an alternative framework for copyright law focusing not on economic development alone but on more broadly promoting human development and one of its predominant framework, namely the 'capabilities approach', to transform the 'controlled culture' that individuals live in to a 'fair culture'. Thus, this study's central research questions are: *How could western (UK, EU, and US) copyright laws' economic-oriented development and culture visions be reshaped through the capabilities approach and 'participatory culture' considerations in order to enhance participation in culture? And what legal resolutions and remedies could be drawn from the fundamental rights framework (specifically from the right to take part in cultural life and freedom of expression) to make such a shift in copyright laws?*

Freedom is a crucial value in the construction of a fair culture within copyright. Inspiration here is Amartya Sen's concept of 'development as freedom' and Martha Nussbaum's idea to rationalise these freedoms as touchstone values in constitutional entitlements. To promote 'development as freedom', in Amartya Sen's words, copyright law cannot be detached from the considerations of fostering people's capabilities to participate in cultural and political life. Therefore, the main contention of this thesis is that copyright law does more than encouraging the creation of more commodities and investment: it fundamentally affects human development and substantive freedoms, or capabilities, of all people to live a good life in a democratic culture and society.

The challenge that this thesis posits is how to bring the politics of human dignity and the politics of welfare into a single framework within copyright law. To this end, the capability-oriented human rights assessment of copyright law is brought to open a fresh discussion over the conventional wisdom mentioned above. To replace the existing 'culture and economic development model' with the 'culture and human development model', this study identifies capabilities or substantive freedoms (cultural human rights and freedoms), as a way of evaluating copyright law's goals in general and its impact on individuals' capabilities to freely express themselves and participate in cultural and political life. As an alternative to traditional development measures, Sen and Nussbaum propose the concept of the advancement of 'central capabilities' in which capabilities represent 'what people are actually able to do and to be'. This inquiry aims at creating a synergy between the 'capabilities approach'and human rights framework through the identification of relevant capability-based cultural human rights and freedoms to set a normative base for the construction of a fair culture. Again from a capabilities perspective, this thesis further analyses some contemporary issues surrounding contemporary copyright enforcement measures - namely notice-and-

takedown and graduated response procedures, file sharing, disclosure orders, filtering and website blocking orders, the extension of copyright terms, pre-established/statutory and additional damages, technological protection measures and the intermediary liability, the extension of criminal liability and notice-and-staydown - where the tension between copyright law and cultural human rights and freedoms are more acute. This helps to identify the important cultural netibilities (freedoms/capabilities on the Internet) in a networked world. In the final analysis, this thesis proposes two frameworks, one for legislators and one for courts, to engage with these cultural human rights and freedoms which are of importance for the advancement of human development. In the former framework, the copyright rules laid down by the Trans-Pacific Partnership Agreement are discussed as a case study to show more concretely how copyright law affects human development and to make proposals for future direction of treaty and law-making with respect to it. The second framework, by fundamentally relying on the legal test proposed by Abbe Brown in her book "*Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology,"* aims to complete this thesis with the introduction of a legal test (deconstructive multiple proportionally test) for courts to engage with a conflict of norms between human rights and copyright, which will make them take cognisance of human development paradigm, when such a conflict is encountered.

TABLE OF CONTENTS

I. INTRODUCTION*

I.1. Cultural Infusion of Copyright

Copyright is embedded in modern culture, shaping economies and welfare. Contemporary lives are infused with many copyright-protected icons and images. Harry Potter, the songs of Lady Gaga, Star Wars, and the software programs of Microsoft are some examples of this cultural infiltration. With the arrival of the World Trade Organisation (WTO) and its rigorous legal obligations, intellectual property increasingly dominates people's lives across the world. However, the repercussions of intellectual property, and in particular copyright, policies on culture often remain obscure. Rather, the focus is mostly directed to the fruits of commercial creativity and innovation. Almost all attention is paid to the production of more cultural goods: more record-breaking films, more hits, more bestsellers and more blockbuster videogames. There is little concern for 'what is being produced, by whom and for whose benefit.'[1]

Today, an ethical dogma, intellectual property is *'a type of property, but an odd kind,'*[2] has been created in the world of law that has been used to support new legislative initiatives by some global creative industry actors. Affected by this mainstream ideology, copyright laws all over the world have reached a level as if no other notion could outstrip this notion, especially as society devotes more and more

* Please note (i) that all links to websites included in this work were correct when last checked between 01 and 28 February 2017; (ii) the research in this work was finalised on 1 December 2016.

[1] Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (Yale University Press, 2012) 1.

[2] Lawrence Lessig, *Free Culture* (Penguin Press, 2004) 83 (claiming that 'to call a copyright a "property" right is a bit misleading, for the property of copyright is an odd kind of property.') (Emphasis added).

energy and resources toward the creation of intellectual property. In the past thirty years, intellectual property laws have been strengthened. Courts and legislators have become more willing to grant intellectual property protection. Fighting piracy has become an obsession with Hollywood and the recording industry, and copyright infringement has gone from being private law tort to a serious crime. Copyright laws, which were once a small lake, are now becoming a massive ocean.

I.2. Early Beginnings and 'The Spirit of Laws'

How has copyright law within the larger context of intellectual property law come to this state? Copyright law was born out of the Enlightenment in the UK in the early eighteenth century, when the Statute of Anne bestowed copyright to authors to break publisher's monopolies, encouraging the creation of new works and their broad dissemination to a more democratically engaged society.[3] Despite its different philosophical inspirations, the French *droit d'auteur* emerged as another main regulatory model in the eighteenth century, sharing this new common goal of providing incentives for the creation of new knowledge, and effective tools for its dissemination.[4] In contrast to this European deontological approach, the United States (US) Constitution, which empowers Congress to enact intellectual property laws, has

[3] For extensive academic commentaries on the legal climate surrounding the Statute of Anne see; Lionel Bently, Uma Suthersanen, and Paul Torremans, *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing, 2009); Ronan Deazley, *On the Origin of the Right to Copy* (Hart Publishing, 2004); Ronan Deazley, *Rethinking Copyright, History, Theory and Language* (Edward Elgar Publishing, 2006) Chapters 13-25.

[4] Laurent Pfister, 'Author and Work in the French Print Privileges System: Some Milestones' in Ronan Deazley, Martin Kretschmer, Lionel Bently (eds)*, Privilege and Property: Essays on the History of Copyright* (Open Books Publisher, 2010) 118.

embraced a teleological-consequential premise. Congress is authorised to grant copyright and patent rights in order to promote the progress of science and useful arts.[5] In these early beginnings, these goals were pursued by granting individual authors a monopolistic control over access to and exploitation of their works. At an international level, this ideology was also echoed in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[6] which provides certain exclusive rights to authors with a 'quantitative (incentive-based) approach'.[7] As Thomas Dreier has underlined in his work on the Berne Convention, when it was adopted at the end of the 19th century the main international concern was the transfer of copyright-protected goods from a place where they were not protected into a safe zone.[8]

[5] US Constitution Article I, Section 8.

[6] The preamble of the Berne Convention reads: 'The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.'

[7] Berne Convention Articles 6bis (Moral Rights), 8 (Right of Translation), 9 (Right of Reproduction), 11 (Right of Performance), 11bis (Right of Broadcast), 11ter (Right of Public Recitation), 12 (Right of Adaptation), 13 (Sound Recordings), 14 (Cinematographic Rights), 14bis (Protection of Cinematographic Works), See; Rochelle C. Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property' (2015) 36(4) Michigan Journal of International Law 561.

[8] Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights', in Rochelle C Dreyfuss, Diane Leenheer Zimmerman and Harry First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (OUP, 2001) 300.

Traditionally, copyright was situated on a harmony between granting authors rights in their works[9] and setting copyright boundaries, such as the idea/expression dichotomy (indicating that protection extends to expressions and not to ideas), the fact that only original works of authorship are protected,[10] the limited term of protection and the existence of exceptions and limitations to copyright.[11] As a result of this legislative framework, the public should be able to freely use ideas, unoriginal works; protected works once they have entered the public domain, and protected works, in certain specific situations, without permission or even compensation. Such 'harmony' proved

[9] For example, member countries of the Berne Convention must grant these rights: Articles 6bis (moral rights), 8 (translation right), 9 (reproduction right), 11 (public communication right), 11bis (broadcasting and cable retransmission right), 12 (adaptation right), 14 (distribution of cinematographic works).

[10] For example, the Berne Convention states that 'collections of literary or artistic works such as encyclopaedias and anthologies, which by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of the collections.' (Berne Convention Article 2(5)).

[11] The Berne Convention, for example, allows for certain exceptions to author's rights. According to Article 9(2) of the Berne Convention: 'exceptions and limitations regarding the reproduction right will only be allowed in certain cases and may not conflict with the normal exploitation of the author's work nor unreasonably hinder the legitimate interests of the author'. This test will be referred to as the *three-step test.* For other exceptions, see Articles 2bis(1) and (2) (certain speeches, certain uses of lectures and addresses), 10 (quotations, illustrations for teaching), 10bis (certain articles and broadcast works, works seen or heard in connection with current events), *11bis(3)* (ephemeral recordings made by broadcasting organisations) of the Berne Convention. Berne also allows for some limitations, in the form of statutory or compulsory licences in Articles 11bis(2) (broadcasting and related rights) and 13(1) (right of recording musical works and any words pertaining thereto). Generally, copyright exceptions may be found in connection to news reporting, quotation, criticism, scientific research, educational establishments, libraries, museums, archives, private use, people with a disability, and for purposes of administrative, parliamentary or judicial proceedings.

to be effective for a long period of time. Legislators and courts answered the challenges created by new works, new uses, and new conflicting interests, with a constant adaptation of existing rules, and the introduction of new *ad hoc* exceptions.[12]

At different times, scholarly justifications for intellectual property protection have been grounded on notions of natural rights, reward for disclosure, incentive for innovation and creativity, and other utilitarian analyses of innovation. As far as the scholarship in this area is concerned, one can easily point to the leading articles by

[12] The other two main fields of intellectual property law have followed a similar path. For example, in the UK, the Statute of Monopolies of 1624 was the first piece of legislation concerning patent law. In this statute, patent law emerged to encourage access to knowledge, obliging the patent holders to disclose pertinent knowledge necessary to enable subsequent inventions in return for limited monopoly rights, rather than protecting the knowledge as a trade secret. For a critical analysis of British patent legislation history see; Christopher May and Susan K Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers, 2006) 80–87. Trade marks developed in the theories of common law passing-off and consumer protection. See; Lionel Bently, 'From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property' in Graeme B. Dinwoodie and Mark D. Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2008) 1–49. Lionel Bently argues that while the law initially regulated trade marks because of their communicative power, in terms of potential deception and fraud, it was only in the 1860s that 'law started to be reconceptualized as protecting a trade mark as an asset.' Ibid 15.

Wendy Gordon,[13] Edwin Hettinger,[14] Justin Hughes[15] and Jeremy Waldron[16]; the widely cited book on intellectual property philosophy by Peter Drahos[17]; and many other recent works that search through the traditional discussions of John Locke, Georg Wilhelm Friedrich Hegel, Immanuel Kant, Karl Marx, and Confucius.[18] In *Justifying Intellectual Property,* Robert Merges also introduces insights from John Rawls, Robert Nozick and Jeremy Waldron to explore the foundation of the intellectual property system and to place what he describes as the 'midlevel principles' of intellectual property law.[19]

Immensely valuable though these commentaries are, they focus particularly on one theoretical argument to justify the whole complex legal institution. Most importantly, whatever the main justification within the atomic structure of the early beginnings of copyright law, they were woven into one prominent fabric: economic

[13] Wendy J. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102(7) Yale Law Journal 1540–78 (arguing for a natural-rights theory of desert as a basis for protecting intellectual property); Wendy J. Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia Law Review 149–281.

[14] Edwin C. Hettinger, 'Justifying Intellectual Property' (1989) 18 Philosophy & Public Affairs 31–52.

[15] Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Geo LJ 287–366.

[16] Jeremy Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 Chicago-Kent Law Review 841–87.

[17] Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth, 1996).

[18] Axel Gosseries, Alain Marciano, and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan, 2008); Annabelle Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (CUP, 2012); Symposium, 'The Philosophical Foundations of Intellectual Property' (2012) 49 San Diego L Rev 955–1282; Peter K Yu, 'Intellectual Property, Asian Philosophy and the Yin-Yang School' (2015) 7(1) The WIPO Journal 1–15.

[19] Robert P. Merges, *Justifying Intellectual Property* (Harvard University Press, 2011) 102–36.

development. In their critical historical account of intellectual property, Christopher May and Susan Sell write that 'the need to capture new technologies for national *economic development*, alongside the expansion of the market for books brought by printing, were important elements in political pressure to establish early intellectual property rights.'[20]

I.3. The Changing Global Landscape of IP

The idea of economic development in copyright law began to take a central role in the following centuries. This is related to the changing global landscape of intellectual property laws. In the late twentieth century, in many developed countries, the dominant industrial economies based upon the manufacturing, distribution, and consumption of tangible goods were overshadowed in size and social impact by an emerging economic system grounded on the creation, commodification, exploitation, and control of knowledge-based goods.[21] Within this knowledge-based economy, the formulas, songs, trade marks, advertising, branding, software, screenplays, designs, and formats, and the merchandising opportunities they afford, have become a driving force for the further accumulation of capital.[22] In an economy that capitalises upon

[20] May and Sell *(n 12)* 97 (Emphasis added).

[21] OECD, 'The Knowledge-Based Economy' (Paris, 1996) 9, https://www.oecd.org/sti/sci-tech/1913021.pdf.

[22] For the developments concerning intellectual property law in the 20th Century see; May and Sell *(n 12)* 133–60.

knowledge, intellectual property rights provide the legal means for protecting these assets and securing future rents.[23]

The growing value of knowledge-based goods increased pressure towards expanding the scope of intellectual property protection to cover more subject matter and to include a wider range of rights for a longer period of time. This pressure came from global entertainment and pharmaceutical industries that may benefit the most from intellectual property ratchet-up. Scholars and policy-makers who envision intellectual property rights as a key to economic growth in the information society supported the industries' standing.[24]

This understanding was accompanied by a series of developments resulting in intellectual property ratchet-up by the US entertainment industries. The first series of developments concerned 'efforts by industrialised nations and their knowledge industries to strengthen intellectual property protection standards and enforcement mechanisms in developing countries by incorporating intellectual property into the global trading system.'[25] This initiative began with 'the pressure by US intellectual property industries to expand intellectual property standards and enforcement

[23] Rosemary J. Coombe and Joseph F. Turcotte, 'Cultural, Political, and Social Implications of Intellectual Property Law in an Informational Economy' in UNESCO-EOLSS Joint Committee, eds., Culture, Civilization, and Human Society: A volume in the Encyclopedia of Life Support Systems, developed under the auspices of UNESCO (Oxford: EOLSS Publishers, 2012) 2, http://ssrn.com/abstract=2463936.

[24] Niva Elkin-Koren and Eli Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge, 2013) 5.

[25] Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP, 2011) 34.

mechanisms'.[26] In the wake of the 1980's, US-based multinational companies, who had business models and profit margins dependent on intellectual property protection, lobbied the US government to strengthen intellectual property laws and enforcement mechanisms in developing countries.[27] The US government followed the industry's suggestions. By using the Special 301 procedure, it investigated countries with low intellectual property standards and recommended retaliatory trade measures if they resisted increasing them.[28] Carolyn Deere points to two main issues, one economic and one legal, which developed countries relied upon to build a 'counteroffensive' momentum to strengthen international intellectual property protection in the 1980's. The economic consideration was the rising share of the IP-protected component in exports, 'over 25 per cent of exports in the 1980s…compared to 10 per cent in the post-war period'.[29] The legal one, though still economic, was the common opinion of the developed countries and their intellectual property industries on the insufficiency of existing intellectual property laws of the developing countries, plus the inept

[26] Ibid 35.

[27] Ibid 35.

[28] For a critical analysis see; Susan K. Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (CUP, 2003), 75–120. Peter K. Yu argues that 'instead of focusing on multilateral negotiations, the United States adopted a "divide and conquer" strategy by making trade threats using section 301 of the 1974 Trade Act, when it sought to push other countries to adopt its position on strong intellectual property protection.' See; Peter K. Yu, '(N 28) Currents and Crosscurrents in the International Intellectual Property Regime' (2004) 38 Loy LA L Rev 412.

[29] Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (OUP, 2009) 46.

enforcement mechanisms and inadequate sanctions over piracy in their legal regimes.[30]

Economic considerations framed[31] with legal arguments and channelled through a 'regime shifting'[32] strategy led to a major change in the global intellectual property architecture. At the epicentre of the fault lines created by this wave is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs

[30] Ibid 47.

[31] John Odell and Susan Sell, in their analysis of the genesis of the TRIPs agreement, have shown that powerful transnational business organisations united their lobbying efforts with their home governments and the resultant united network formed an interpretative frame that defined intellectual property as a trade issue, which was a key factor in the adoption of the agreement. Thus far, several authors have analysed how framing has been used as a strategic tool to influence the international discourse on intellectual property issues.. See; John S. Odell and Susan K. Sell, 'Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001' in John S. Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (CUP, 2006) 87; Andrew Lang, 'The Role of the Human Rights Movement in Trade Policy-Making: Human Rights as a Trigger for Social Learning' (2007) 5(1) New Zealand Journal of Public and International Law 77–102; John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP, 2000), 571–76; Amy Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 Yale Law Journal 804–85; Peter Drahos, 'Does Dialogue Make a Difference? Structural Change and the Limits of Framing' (2008) 117 Yale Law Journal Pocket Part 268–272; Duncan Mathews, 'When Framing Meets Law: Using Human Rights as a Practical Instrument to Facilitate Access to Medicines in Developing Countries' (2011) 3(1) The WIPO Journal 113–27; Duncan Mathews, *Intellectual Property, Human Rights And Development The Role of NGOs and Social Movements* (Edward Elgar Publishing, 2011) 7–9; Sebastian Haunss, *Conflicts in the Knowledge Society the Contentious Politics of Intellectual Property* (CUP, 2013) 173–81; Deere *(n 29)* 169–72.

[32] Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 Yale Journal of International Law 6.

Agreement).[33] For some developed countries orchestrated by the twelve most significant multinational companies in the intellectual property-related industries, the World Intellectual Property Organisation (WIPO), a specialised international organisation created in the late 1960's with a mandate to 'promote the protection of intellectual property throughout the world',[34] was no longer seen as an inconvenient forum to pursue their intellectual property agendas. In her political analysis of the US position on the TRIPs Agreement, Susan Sell documents how the pro-TRIPS agenda of US multinationals became not only the official mandate of the US government, but also the basis of the final TRIPs text.[35] In 1988, a coalition of business interests from the United States, Japan and Europe, called the Intellectual Property Committee (IPC), submitted a comprehensive draft of a proposed TRIPS text to their governments.[36] In similar vein, Peter Drahos describes eight different groups of the countries that negotiated the TRIPS.[37] He notes that it was the first three circles of consensus that

[33] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

[34] See; WIPO Convention.

[35] See; Susan K. Sell *(n 28).*

[36] IPC, 'Accomplishments and Current Activities of the Intellectual Property Committee' (14 June 1988).

[37] These groups are as follows:

1. US and Europe
2. US, Europe, Japan
3. US, Europe, Japan, Canada (Quad)
4. Quad plus (membership depended on issue, but Switzerland and Australia were regulars in this group)
5. Friends of Intellectual Property (a larger group that included the Quad, Australia, and Switzerland)

really mattered in the TRIPS negotiations. Through the use of these circles the process became one of hierarchical rather than democratic management.[38] Therefore, the final result was the shift of intellectual property law-making from the WIPO to the General Agreement on Tariffs and Trade (GATT) to the TRIPs agreement.[39]

Thus, pressure to advance a new intellectual property order came from those nations that can benefit economically from a broader intellectual property regime, fortified by the arguments of scholars and policy-makers, was central for world economic growth and development.[40] The prominent dialogical aspect of this framing strategy, as Odell and Sell underline, was using the rhetorical power of the concepts of *'property'*, *'piracy'* and *'theft'* to describe alleged violations of intellectual property

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6. 10+10 (and the variants thereof such as 5+5, 3+3). (The US and the European Community were always part of any such group if the issue was important. Other active members were Japan, Nordics, Canada, Argentina, Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand.)

7. Developing country groups (for example, the Andean Group -Bolivia, Colombia, Peru and Venezuela; Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay combined to submit a developing countries draft text in 1990).

8. Group 11 (the entire TRIPS negotiating group - about 40 countries were active in this group)

Peter Drahos, 'Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines' (2007) 28(1) Liverpool Law Review 15–16.

[38] Ibid 16.

[39] For a detailed account of the evolution of the TRIPs Agreement and analyses of their provisions see; Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, (3rd edn, Sweet and Maxwell, 2008).

[40] Elkin-Koren and Salzberger *(n 24)* 5.

rights in developing countries.[41] Projecting a critical insight into the negotiation history of the TRIPS agreement, Peter Drahos, with John Braithwaite, argue that had this framing of the pro-intellectual-property industry and developed country governments been objected to at the time of the negotiations, the TRIPS Agreement might not have taken the final form it did and might have been more sympathetic to the development-orientated concerns of the developing world.[42] During the TRIPS negotiations, the US-led network framed the debate 'as one between the protection of private property rights versus piracy by developing countries.'[43] The adoption of TRIPs in the mid-1990's therefore reflects a similar 'economic growth' phenomenon for the global world.

I.4. The shift from WIPO to GATT to TRIPs

Characterised through this vision, the concept of 'economic development' was described as a central objective within TRIPs. Article 7 of the TRIPs Agreement sets this economic but at the same time social development objective of intellectual property for the mutual benefit of both producers and users of technological knowledge and also takes into account, socio-economic welfare considerations.[44] The TRIPs Agreement has brought fundamental normative changes to the global intellectual property regime.[45] It dramatically increased the level of international minimum

[41] Odell and Sell, '(N 31) Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001', 87.

[42] Braithwaite and Drahos *(n 31)* 571–76.

[43] Drahos *(n 37)* 18.

[44] TRIPs Agreement Article 7.

[45] Susan K. Sell and Aseem Prakash, '(N 45) Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights' (2004) 48(1) International Studies Quarterly 143–175.

standards in eight different categories: copyrights and related rights, trade marks, geographical indications, industrial designs, patents, plant variety protection, layout designs of integrated circuits, and undisclosed information.[46] For example, the TRIPs Agreement built new obligations to protect 'product patents for food, pharmaceuticals, chemicals, microorganisms or copyright protection for software.'[47] Furthermore, it extended the geographical reach of protection by imposing intellectual property obligations on all members of the WTO—including many developing countries that formerly had recognised no such rights.[48] Likewise, as Jayashree Watal underscores, 'at least one, undisclosed information, has never been the subject of any multilateral agreement before, and another, protection for integrated circuit designs, had no effective international treaty, while others, like plant variety protection or performers' rights, were geographically limited.'[49] Additionally, the TRIPs Agreement brought new rights under existing categories, 'such as rental rights for computer programs and sound recordings (and for films under certain circumstances) under copyright and related rights; [a] higher level of protection for geographical indications for wines and spirits; [and] reversal of burden of proof for process patentees.'[50] For the first time in an international intellectual property instrument, it defined obligations regarding enforcement, including civil, administrative, and criminal procedures and remedies

[46] TRIPs art 9-40.

[47] Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer Law International, 2001) 4.

[48] Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (OUP, 2012) 22.

[49] Watal *(n 47)* 4.

[50] Watal *(n 47)* 4.

and measures related to border control.[51] It also devised the Dispute Settlement Body (DSB) in the international regime for making national compliance the subject of dispute resolution.[52]

I.4.1. TRIPs and Development Projections

From this 'economic development-oriented' perspective, it is argued that stronger intellectual property protection encourages foreign direct investment (FDI), innovation, and technology transfer, and spurs the development of national cultural and creative industries.[53] Daniel Gervais observes that the TRIPs Agreement became 'the poster child for the so-called Development Theory, according to which developing economies should import the normative, judicial and administrative infrastructure of more industrialised nations to achieve a similar level of economic development.'[54] According to this theory, the transplantation of the infrastructure will give rise to increased FDI, availability of capital and thus economic growth. Therefore, the inclusion of intellectual property protection in the WTO system has entrenched the paradigm shift from the traditional justifications to one that emphasises the promotion of international trade and the enhancement of economic policy and development.

Since the adoption of TRIPs, these dominant forms of intellectual property (e.g. copyright or patents) are continuously portrayed as a 'power tool' for economic

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[51] TRIPS Agreement arts. 41-61.

[52] Dinwoodie and Dreyfuss *(n 48)* 22.

[53] See; Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (London, 2002) 20–26; Deere *(n 29)* 9; Haunss *(n 31)* 36.

[54] Daniel Gervais, 'TRIPS and Development' in Daniel Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (OUP, 2007) 12.

development in recent WIPO publications[55] and as an 'engine of development' in recent UNESCO publications.[56] This line of development narrative is also represented in various G8 statements. In the concluding statement of the 2007 G8 meeting in Heiligendamm, Germany, for example, intellectual property rights occupy an important position. Under the heading 'Promoting Innovation - Protecting Innovation' it is claimed that 'a fully functioning intellectual property system is an essential factor for the sustainable development of the global economy through promoting innovation.'[57] Therefore, such literature suggests that intellectual property protection should be seen as an essential driver or even a pre-condition of economic growth and development in a country.

Is this just a rhetorical commitment to development? Are the minimum intellectual property standards of the TRIPs agreement, construed in the light of Article 7, appropriate for realising the development objectives of developing countries? Daniel Gervais contends that 'TRIPS should be seen, and accepted, as a given. Further, it may be defended as an appropriate reference point for developing nations in the context of TRIPS Plus bilateral trade discussions. TRIPS contains a number of rules that WTO members must implement, but also affords a fair margin of 'policy flexibility.''[58] Similarly, Peter Yu notes 'constructive ambiguities' within TRIPS which confer upon developing countries 'wiggle room' or 'policy space' for the possibility of

[55] Kamil Idris, 'Intellectual Property: A Power Tool for Economic Growth' World Intellectual Property Organization (WIPO), 2003 Publication, No. 888, 4.

[56] R Oman, 'Copyright – Engine of Development: An Analysis of the Role of Copyright in Economic Development and Cultural Vitality' (UNESCO, 2000).

[57] G8 Summit 2007, Declaration on Growth and Responsibility in The World Economy 10.

[58] Gervais *(n 54)* 59.

a pro-developmental implementation through norm-interpretation.[59] At the same time, however, he acknowledges that 'many less developed countries still lack experience with intellectual property protection and the needed human capital to develop laws that are tailored to their interests and local conditions.'[60]

Unlike Gervais and Yu, some other scholars approach intellectual property globalisation and its impacts on development with more elaborated scepticism. For example, Joseph Stiglitz, an international economist and a Nobel recipient, questions the place of a 'one size fits all' development strategies of intellectual property regimes and the place of the TRIPs Agreement in the WTO system.[61] Likewise, Cambridge economist Ha-joon Chang, reflecting upon historical perspectives in the study of economic development, observes that developed countries have successfully used the international trading system, including international intellectual property standards, to ''kick away the ladder' through which they have climbed to the top.'[62] Chang further underlines the cost to developing countries of introducing 'irrelevant or unsuitable laws' that restrict access to technologies and knowledge.[63] For Chang, developed countries disregard the fact that developing countries are now merely using 'bad' policies and institutions which they themselves used during their initial period of development.[64]

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[59] Peter K. Yu, 'TRIPS and Its Discontents' (2006) 10 Marquette Intellectual Property Law Review 387.

[60] Ibid 388.

[61] Joseph Stiglitz, *Making Globalization Work* (Norton, 2006) 116-119; see also Jagdish Bhagwati, *In the Defence of Globalization* (OUP, 2004).

[62] Ha-joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective: Policies and Institutions for Economic Development in Historical Perspective* (Anthem Press, 2003) 129.

[63] Ibid.

[64] Ibid 2.

I.5. Challenges of Copyright and IP in the Post-TRIPs Era

Over the last three decades, corporate and industrial lobbies have continued to portrayed intellectual property law as a solely instrumental mechanism to incentivise creativity (copyright), invention (patents) and industry (trade marks) for 'economic development.'[65] However, the accord specifically within copyright's traditional contours mentioned above was irrevocably lost when creative content went digital and its distribution and consumption dematerialised and moved to the Internet.[66] The ease of reproduction and dissemination of high-quality, bootleg copies posed new piracy threats and severely affected the market of copyright-protected works. In response to these challenges, copyright industries launched unparalleled campaigns to obtain resolutely legislative intervention, directed at reinforcing a protection that was deemed nullified by new technologies. The pressure was so strong and effective that the World Intellectual Property Organization (WIPO), confronted with the impossibility of modifying the Berne Convention due to the lack of support from developing countries, adopted two special treaties, the WIPO Copyright Treaty (WCT)[67] and the WIPO Performances and Producers of Phonograms Treaty (WPPT).[68] These came to be jointly known as the WIPO Internet Treaties in 1996. Most of the intellectual property

[65] Sunder *(n 1)* 24.

[66] Caterina Sganga, 'Disability, Right to Culture and Copyright: Which Regulatory Option?' (2015) 29(2-3) International Review of Law, Computers & Technology 89.

[67] World Intellectual Property Organization [WIPO] Copyright Treaty, Dec 20, 1996, S TREATY Doc No. 105-17, 36 ILM 65 (1997) [hereinafter WCT].

[68] WIPO Performances and Phonograms Treaty, Dec 20, 1996, S TREATY Doc No. 105-17, 36 ILM 76 (1997) [hereinafter WPPT].

producing countries or regions, among them the European Union (EU), followed suit, with laws specifically directed at regulating digital copyright.

Inspired by the WCT and WPPT,[69] Council Directive 2001/29/EC on Copyright in the Information Society (Information Society Directive) was adopted to answer these specific digital challenges by adapting old rights, such as reproduction and distribution, to the new technological environment, and introducing new ones, such as the right of communication to the public and the right of making the work available.[70] The Directive further lays down legal remedies against the circumvention of technological protection measures (TPMs) of digital works, implemented by producers to control access to and the use of their products.[71]

Currently, the economic discourse of intellectual property still dominates the law-making process and policy debates related to the regulation of the information environment. It has affected intellectual property laws in various venues related to the legislative initiatives and court litigation in the US, Europe and elsewhere. For instance, over the past decade, the US has pursued a proactive policy to conclude free trade agreements with numerous countries around the world. The policy includes major trade partners of the US such as the European Union (EU) and Canada as well as emerging economies and developing countries in several parts of the world. These free trade agreements regulate many more areas, especially more stringent intellectual property rights, than before. A prominent example of setting the rules of

[69] Both were signed and ratified by the EU, thus imposing international obligations on the Union.

[70] Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 [Hereinafter the Information Society Directive].

[71] Ibid Article 6.

the international intellectual property game is ACTA. Specifically under the severe critiques against the intellectual property expansion that culminated in the fall of ACTA, the USA, Japan and ten other Pacific Rim nations[72] announced that the deal on the Trans-Pacific Partnership (TPP) Agreement, an equally controversial agreement that aims to boost trade and investment opportunities, including an intellectual property chapter, between the countries, was struck on 4 October, 2015 after more than five years of tense negotiations.[73] The ongoing negotiation of the Transatlantic Trade and Investment Partnership (TTIP) Agreement between the US and the EU is another example of current international law-making that has been fashioned through the same vision of intellectual property rights.[74]

Since the adoption of the TRIPs agreement, intellectual property has been seen as an international trade issue. This existing economic-oriented vision still continues to prevail as the very spirit of new bilateral and plura-lateral treaties (including the TPP) with a slight shift. Intellectual property is now considered an issue of trade and investment with the rhetoric of property.[75] Rochelle Dreyfuss and Susy Frankel importantly point out: 'these developments suggest that the new [intellectual property] topography is unyieldingly rigid. These trade and investment rationales are

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[72] The other contracting countries are Australia, Brunei, Canada, Chile, Malaysia, Mexico, Peru, Singapore, Vietnam, and New Zealand.

[73] William Mauldin, 'U.S. Reaches Trans-Pacific Partnership Trade Deal With 11 Pacific Nations', *The Wall Street Journal* (Atlanta, 05 October 2015), www.wsj.com/articles/u-s-reaches-trade-deal-with-11-pacific-nations-1444046867; Shawn Donnan and Demetri Sevastopulo, 'US, Japan and 10 Countries Strike Pacific Trade Deal', *Financial Times* (Atlanta and Washington, 05 October 2015), www.ft.com/cms/s/0/d4a31d08-6b4c-11e5-8171-ba1968cf791a.html#axzz3tvZwBLPW.

[74] See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153020.7%20IPR,%20GIs%202.pdf.

[75] Dreyfuss and Frankel *(n 7)* 560 (Brackets are mine).

largely impervious to flexibility and balancing. They protect those holding property—incumbents—even if it is at the cost of undermining public-regarding measures and discouraging new entrants and innovation.'[76] Although they interpret this paradigm shift as a qualitative one, as Ruth Towse shows, the emerging new paradigm of the importance of copyright is also quantitative.[77] In the last few years, the creation of copyright works has been treated as investment in intangible capital assets in the National Income Accounts, rather than as income or output.[78]

In addition to these macro-economic (economic growth-oriented) considerations, within the Anglo-American legal tradition, many scholars continue to view intellectual property as a resolution to an economic 'public goods' problem in terms of micro-economic policies. Nonrivalrous and nonexcludable intellectual goods are too easy to copy and share. There will thus not be an incentive to create them, unless a monopoly right or a private property in these creations and inventions for a limited period of time is granted.[79] The ultimate result is the undersupply of intellectual

[76] Ibid.

[77] Ruth Towse, 'Economics and Economic Impact of Copyright' in Robert G. Picard and Steve S. Wildman, *Handbook on the Economics of the Media* (Edward Elgar Publishing, 2015), 340.

[78] Ibid.

[79] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) The American Economic Review 347–359. In his classic work on the economics of property rights, Harold Demsetz argues that 'a primary function of property rights is that of guiding incentives to achieve a greater internalisation of externalities.' For Demsetz, property rights are valuable in a society because they limit the creation of uncompensated externalities. In a world without transaction costs, Demsetz suggests, the creation of a clear property right will internalise the costs and benefits of an activity in the owner and permit the sale of that right to others who may value it more. Once transaction costs are taken into account, Demsetz believes that the creation or alteration of property rights could be explained by asking whether the social

goods, if we do not give a right in the form of property that enables the owner to internalise externalities, thereby avoiding free-riding.[80] Mark Lemley shows how courts and scholars have increasingly become preoccupied with the problem of the externality (free-riding)-reducing theory of intellectual property.[81]

Therefore, at the start of the twenty-first century intellectual property policymaking, dominant scholarship and practice remains anchored to a particular economic account. In mainstream policy discourses, intellectual property rights are almost exclusively treated as a means to provide *incentives* for creativity and innovation. Intellectual property law's goal is to secure economic rewards for investment in research and development for more machines and cultural products, while providing an economically optimal level of creative and technological goods.[82]

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gains from internalising an externality exceeds the costs. He cites several examples of commons that were converted into property regimes once the problem of overhunting became acute-that is, once the negative externalities associated with hunting grew sufficiently large to justify the transaction costs of creating a property rights regime. See; Ibid 348-353.

[80] Frank H. Easterbrook, 'Intellectual Property Is Still Property' (1990) 13 Harvard Journal of Law and Public Policy 112 (maintaining that a 'right to exclude in intellectual property is no different in principle from the right to exclude in physical property').

[81] Mark A. Lemley, 'Property, Intellectual Property, and Free Riding' 2005 83(4) Texas Law Review 1040–46.

[82] Sunder *(n 1)* 23.

I.6. Counterreactions within IP: The Doha Declaration and the Access to Knowledge Movement

As the norms of intellectual property rights have navigated toward more stringent protection models, they have stirred up many legal and political as well as ethical dilemmas. States and institutional actors have been faced with a variety of difficulties deriving from an inability to give full effect to intellectual property rules, and to simultaneously comply with various obligations under international human rights law.[83]

In addition, over recent years the intellectual property world has witnessed the emergence of a range of new 'access to knowledge' initiatives. These initiatives have been called 'new politics of intellectual property.'[84] These include the 'Free

[83] Davinia Ovett, 'Intellectual Property and Human Rights: Is the Distinction Clear Now?' (Oct. 2006) 1, 1, available at http://www.3dthree.org/pdf_3D/3D_GC17_IPHR.pdf. On a global level, the controversy on access to essential medicines is the most extensive and prominent debate about intellectual property rights. [Haunss *(n 31)* 143]. In November 2001, the Doha Declaration allowed some less developed and developing countries to respond to the dramatic expansion of intellectual property protection standards by raising their concerns relating to the TRIPs obstacles to access essential life-saving medicine. Declaration on the TRIPS Agreement and Public Health, WT/MIN(O1)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration]. In general on this issue, see; Peter K. Yu, 'Access to Medicines, BRICS Alliances, and Collective Action' (2008) 34 American Journal of Law & Medicine 345–94; Lisa Forman, 'Trade Rules, Intellectual Property, and the Right to Health' (2007) 21(3) Ethics & International Affairs 337–57; T. W. Pogge, 'Human Rights and Global Health: A Research Program' (2005) 36(1–2) Metaphilosophy 182–209; Susan K. Sell, 'TRIPS and The Access to Medicines Campaign' (2001-2002) 20 Wisconsin International Law Journal 481–522.

[84] Kapczynski *(n 31)* 804.

Culture' movement[85] and the 'Creative Commons' licensing project.[86] Another important initiative was the 'Geneva Declaration on the Future of the World Intellectual Property Organisation,'[87] which was born in 2004 from a meeting of varied civil society groups, including the Creative Commons and other public interest NGOs engaged in various 'access to knowledge' initiatives. The Geneva Declaration calls on WIPO to focus more on the needs of developing countries, and to view intellectual property as one of many tools for development - not as an end in itself. In association with the Geneva Declaration, in 2004 a coalition of developing countries, such as Brazil and Argentina, proposed a 'Development Agenda' as a set of reforms intended to make the WIPO more responsive to the needs of developing countries. Over the next three years the proposal generated a rich and heated debate over the role of the WIPO and intellectual property in development. The WIPO Development Agenda was an ambitious document that called upon WIPO to revisit its mandate and shift from its traditional emphasis on the promotion and expansion of intellectual property rights towards a more development-oriented approach. Eventually, in 2007, the WIPO General Assembly adopted forty-five recommendations with a view to integrating this development dimension in all of the organisation's activities. The recommendations are divided into six clusters. The most relevant ones in relation to the A2K movement are Cluster B (norm-setting, flexibilities, public policy, and public domain) and Cluster C (technology transfer, information and communication technologies (ICT), and

[85] See Free Culture Foundation; available at http://www.freeculture.org/

[86] See Creative Commons Licences, available online at http://www.creativecommons.org/

[87] See the Geneva Declaration; available at http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf.

access to knowledge).[88] The WIPO made a serious commitment 'to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns in a manner conducive to social and economic welfare.'[89]

The final development in the intellectual property sphere was the Marrakech Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled ('Marrakech Treaty').[90] This treaty, concluded under the auspices of the WIPO, was intended to 'facilitate the making available of literary and artistic works to people with visual impairments.'[91] This treaty has

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[88] For the 45 recommendations see; available at http://www.wipo.int/ip-development/en/agenda/recommendations.html.

[89] The 45 Adopted Recommendations under the WIPO Development Agenda, (2007), para 45, available at http://www.wipo.int/ip-development/en/agenda/recommendations.html.

[90] WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO Doc VIP/DC/8 (20 June, 2013) [Hereinafter: the Marrakesh Treaty]. On the Marrakech Treaty see; Abbe Brown and Charlotte Waelde, 'Human Rights, Persons with Disabilities and Copyright', in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2016) 577–602; Kaya Köklü, 'The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45(7) International Review of Intellectual Property and Competition Law 737–39; Jingyi Li, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty' (2014) 45(7) International Review of Intellectual Property and Competition Law 740–67; Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45(7) International Review of Intellectual Property and Competition Law 768–95; Simonetta Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) International Review of Intellectual Property and Competition Law 796–820.

[91] Brown and Waelde *(n 90)* 577.

essentially brought some copyright exceptions in favour of the disabled persons mentioned in the treaty and therefore enabled copyright, human rights and disability to come together through, what Abbe Brown and Charlotte Waelde call, a 'miracle at Marrakech.' [92]

I.7. Problematising 'Development'

Development has had many different meanings for various stakeholders at different times in the debates within the intellectual property sphere, as the history of intellectual property and the continuously growing literature fully illustrate.[93] Long-term

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[92] Ibid 587.

[93] Gervais *(n 54)*; Tzen Wong, 'Intellectual Property through the Lens of Human Development: An Introduction', in Tzen Wong and Graham Dutfield (eds)*, IP and Human Development* (CUP, 2011) 1–59; Chang *(n 62)*; Ha-Joon Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury Press, 2007); Margaret Chon, 'Intellectual Property and the Development Divide' (2006) 27 Cardozo Law Review 2821–2912; Margaret Chon, Denis Borges Barbosa, and Andrés Moncayo von Hase, 'Slouching Towards Development in International Intellectual Property' (2007) Michigan State Law Review 71–141; Peter K Yu, ' A Tale of Two Development Agendas' (2009) 35 Ohio Northern University Law Review 465–573; Peter K. Yu, 'The Middle Intellectual Property Powers' in Tom Ginsburg and Randall Peerenboom *(eds), Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (CUP, 2014) 84–107; Michael Blakeney and Getachew Mengistie, 'Intellectual Property and Economic Development in Sub-Saharan Africa' 2011 14(3-4) The Journal of World Intellectual Property 238–264; Mathews *(n 31)* Chapters 7 and 8; Keith E. Maskus, 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer', in *Carsten Fink and Keith E Maskus, Intellectual Property and Development: Lessons from Recent Economic Research* (OUP, 2005), 41–74; Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Peterson Institute for International Economics, 2000); Daniel Gervais (ed), *Intellectual Property, Trade and Development* (2nd edn, OUP, 2014); Abbe Brown, 'Knowledge Management and Access to Essential Technologies' in Daniel Gervais (ed)*, Intellectual Property, Trade and Development* 115–39; Rami M. Olwan, *Intellectual Property and Development: Theory and Practice* (Springer, 2013).

evolutionary processes characterising the last century of intellectual property law at the international and domestic level have encountered different development narratives. Importantly, difficult and yet meaningful questions have been raised on the contours of development that continue to shape intellectual property policies. Margaret Chon, in her thought-provoking article, notes that 'recent debates within international intellectual property law reveal a development divide – not only a divide between developed and developing countries according to their material well-being, but also a divide in understanding development as growth contrasted with development as freedom.'[94] Arguably, the debate on the meaning of development in intellectual property relates to 'the very understanding of development itself.'[95]

The empirical evidence connecting intellectual property protection and economic development is complex and inadequate[96] and 'has been characterised in the past more by conjecture than hard data.'[97] In his seminal 1958 study of the patent system in the US, Fritz Machlup concluded that 'no economist on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon society.'[98] The UK Commission on Intellectual Property Rights (CIPR) in its report, Integrating Intellectual Property Rights and Development Policy, underscores the complexity of assessing the existing

[94] Margaret Chon, 'Substantive Equality in International Intellectual Property Norm Setting and Interpretation', in *Gervais (n 54)* 476.

[95] Wong *(n 93)* 3.

[96] See the UK Commission on Intellectual Property Rights *(n 53)*.

[97] Chon *(n 93)* 2817.

[98] Fritz Machlup, 'An Economic Review of the Patent System' (Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, US Senate, 85th Congress, Second Session, Study No. 15 (1958).

evidence on the impact of intellectual property regimes on developing or developed countries.[99] A crude measure of the impact of intellectual property systems is the extent of its use by nationals. On this score, the CIPR concludes that 'in most low income countries, with a weak scientific and technological infrastructure, IP protection at the levels mandated by TRIPS is not a significant determinant of growth', whilst in technologically advanced developing countries, 'here is some evidence that IP protection becomes important when a country is well into the category of upper middle income developing countries.'[100] With regards to the relationship between intellectual property rights and FDI[101] the main conclusion about low-income countries, with a weak scientific and technological infrastructure, is that intellectual property protection is not a specific determinant of economic growth.[102] Additionally, as Keith Maskus stresses, if stronger intellectual property protection always bred more FDI, 'recent FDI flows to developing economies would have gone largely to sub-Saharan Africa and Eastern Europe . . . [rather than] China, Brazil, and other high-growth, large-market developing economies with weak IPRs.'[103] In the 2005 World Bank study, Maskus further concludes that intellectual property protection has positive effects for investment decisions in complex and high-technology industries but not in relation to industries characterised by standardised and labour-intensive technologies that

[99] See the UK Commission on Intellectual Property Rights *(n 53)*.

[100] See the UK Commission on Intellectual Property Rights *(n 53)* 22.

[101] Maskus 2000 *(n 93)* 73-79.

[102] See the UK Commission on Intellectual Property Rights *(n 53)* 25.

[103] Maskus 2005 *(n 93)* 60.

require little R&D.[104] On the other hand, a 2003 OECD study has put forward a positive correlation between intellectual property protection and FDI.[105]

Economic studies have generated uncertain results from these connections. One reason for this disjunction is the difficulty in distinguishing 'the impact of IP from other intertwined factors relating to an economy.'[106] Likewise, as Tzeng Wong notes, development economists themselves differ in their views on the linkages between intellectual property and economic development.[107] Examining the existing economics literature, Keith Maskus observes that the evidence linking IPRs to economic development is complex, difficult to measure, relies on anecdotal narratives and is open to various interpretations.[108]

Historically, several commentators have already observed how contemporary developed countries had adopted intellectual property policies quite flexibly for centuries in order to advance their industrial policies and trade interests.[109] Jerome Reichman among others, points out that until the 1980's, the USA, which currently has vigorous IPR laws, had the least protective patent laws among

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[104] Ibid.

[105] Walter G. Park and Douglas Lippoldt, 'Impact of Trade-Related Intellectual Property Rights on Trade and Foreign Direct Investment in Developing Countries' (OECD Papers, Vol. 3, No. 11, Issue 294, 2003).

[106] Wong *(n 93)* 3.

[107] Wong *(n 93)* 3.

[108] Keith E Maskus, 'Incorporating a Globalized Intellectual Property Rights Regime into an Economic Development Strategy', in Keith E. Maskus (ed), *Intellectual Property, Growth and Trade* (Elsevier, 2008), 500.

[109] See Chon *(n 93)*; Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Routledge, 2002).

developed countries and, until 1978, had relatively lax copyright laws.[110] In fact, the US was 'a former haven for pirated works of Charles Dickens, Anthony Trollope, Gilbert and Sullivan, and many other British and French authors.'[111] In China, Brazil, India and the Asian 'Tiger' economies, rapid economic growth and development occurred in the absence of strong intellectual property laws.[112] As William Kingston notes:

> 'From the start of the industrial revolution, every country that became economically great began by copying: the Germans copied the British; the Americans copied the British and the Germans, and the Japanese copied everybody. The thrust of the TRIPS Agreement is to ensure that this process of growth by copying and learning by doing will never happen again.'[113]

Given the ambivalent results of empirical studies on the economic benefits of minimum standards of intellectual property for many developing countries, one might ask why some developing countries joined TRIPs. For Peter Drahos with John Braithwaite, developing countries were misled during the TRIPS negotiations. The

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[110] Jerome H. Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?' (2009) 46(4) Houston Law Review 1116–17.

[111] Peter K. Yu, 'Intellectual Property, Economic Development and China Puzzle' in *Gervais (n 54)* 202.

[112] Blakeney and Mengistie *(n 93)* 240.

[113] William Kingston, 'An Agenda for Radical Intellectual Property Reform' in Keith E. Maskus and Jerome H. Reichman (eds)*, International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (CUP, 2005) 658.

advantages that they would receive for giving their consent to intellectual property norms were exchanged for concessions by developed countries on agricultural issues.[114] Although TRIPS was seemingly represented as a win-win solution to developing countries via linkage bargaining, "most importer nations did not have a clear understanding of their own interests and were not in the room when the important technical details were settled."[115] As Drahos and Braithwaite briefly put it, '[u]nderneath the development ideology of intellectual property there lies an agenda of underdevelopment.[116] It is all about protecting the knowledge and skills of the leaders of the pack.' For that reason, the end result, for them, culminated in 'information feudalism.'[117]

I.8. New Challenges and Narratives

In a world increasingly connected by sophisticated and complex trade relations and digital technologies, the impact of copyright law on culture and development has become global. While recent decades have seen the linking of copyright law to the international trade regime through the TRIPs Agreement and subsequent free trade and investment agreements, how should the coming decades draw more explicit connections between copyright and human development? Are the contemporary contours of copyright law enough to promote cultural participation for human development? Is the 'economic development-oriented' vision which permeates copyright architecture sufficient to enable individuals to flourish? The vigorous infusion

[114] Drahos and Braithwaite *(n 109)* 11.

[115] Drahos and Braithwaite *(n 109)* 192; for ignorance narrative also see Yu *(n 59)* 375–76.

[116] Drahos and Braithwaite *(n 109)* 12)

[117] Drahos and Braithwaite *(n 109)* 1-3, 16.

of intellectual property into all corners of people's lives has unleashed many sophisticated questions and intensified its social and cultural impact. In fact, copyright laws, within the larger edifice of intellectual property laws have considerable influence on individuals' ability to flourish, fundamentally affecting various central capabilities ranging from access to culture, information and learning materials, to the ability of citizens to democratically participate in political, economic, social and cultural discourse, to the equal opportunity to lead meaningful lives through the moral and material interests resulting from their intellectual contributions, to due process freedoms and, finally, to take part in culture in many different ways.

Culture is not a sphere of unlimited autonomy and choice.[118] Culture in the twenty-first century has spatially expanded. It is more participatory than ever before. Despite growing diversity in authoring culture, international actors still follow a narrow understanding of intellectual property. Today, the legal regime of intellectual property rights has been inserted more deeply into our lives and more deeply into the framework of international law.

This understanding is profoundly epitomised in the trade-and-investment-related intellectual property rules included in the TPP. The inclusion of provisions requiring strong protection of copyright -such as the extension of the copyright term, stipulating more stringent technological protection measures, limiting fair use and other increased forms of copyright enforcement – affect individuals' central capabilities concerning senses, imagination, thought, emotions, practical reason, affiliation, play and control over one's environment, which Martha Nussbaum places

[118] Arjun Appadurai, 'Disjuncture and Difference in the Global Cultural Economy' (1990) 2(2) Public Culture 18.

on her list of central capabilities.[119] Rules ratcheting up intellectual property rights are still trying to preserve cultural hegemony in the knowledge age. Through this hegemonic production and distribution of culture, intellectual property laws stray far from promoting freedoms (e.g. freedom of expression, access to knowledge, access to educational materials), cultural dynamism, human capabilities and fairer cultural relations. Copyright is in this sense constitutive of cultural democracy and human development which substantially affect what Lea Shaver and Caterina Sganga call the 'the right to take part in cultural life'.[120] Thus intellectual property fundamentally affects the ability of individuals to create a good life in a political society, governing the abilities of human beings to make and share culture, and to profit from this enterprise in a global knowledge economy.

The current state of the art that has been seen in the global intellectual property arena after TRIPs is insensitive to other important, pressing issues concerning human development. The intellectual-property-as-trade-and-investment approach fails to account for the wide range of values at stake in global intellectual property today. This understanding is also inadequate to address the grand-sized values implicit in current debates, from human development to justice, solely from within a traditional economic framework. The fundamental value of this approach is maximising cultural production. This narrow vision presumes that maximising cultural production in toto will lead to the greatest good for the greatest number of people. This utilitarian account is far from fully capturing the various features -such as culture,

[119] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011), 33–34. See Nussbaum's list in section I.9.1.2.

[120] Lea Shaver and Caterina Sganga, 'The Right to Take Part in Cultural Life: On Copyright and Human Rights' (2010) 27(4) Wisconsin International Law Journal 637–62.

democracy, freedom and justice- which animate contemporary intellectual property law and efforts to reform it.

I.9. Towards a 'Fair Culture'

Here arises another question: is there a need to explore new paradigms to evaluate existing policies and arguments for intellectual property? Some intellectual property scholars have critically challenged the economic-oriented utilitarian theory and its underlying assumptions on human welfare. The focus has been on the positive or negative effects of intellectual property rights on innovation and semiotic democracy.[121] To date, however, even the most ardent critics of the excessive nature of intellectual property law have taken the normative goals of intellectual property laws for granted. The powerful 'public domain' advocates, criticising the aggressive growth of intellectual property laws in the late 1990's, bemoaned the counterproductive effects of too much property on intellectual productivity.[122] Is a shrinking public domain the only problem of contemporary intellectual property law?

To identify more pressing issues, international experts, government officials, judges, and scholars have examined the interface between intellectual property rights and human rights. They have specifically paid heed to identify whether human rights

[121] Yochai Benkler, 'Freedom in the Commons: Towards a Political Economy of Information' (2002) 52(6) Duke Law Journal 1245–1276; Julie E. Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain' in L Guibault and P B Hugenholtz (eds)*, The Future of the Public Domain* (Kluwer, 2006), 121–66; Jessica Litman, 'The Public Domain' (1990) 39 Emory Law Journal 965–989; Jessica Litman, 'Sharing and Stealing' (2004) 27(1) Hastings Communication and Entertainment Law Journal 1–50.

[122] Lessig *(n 2)*; James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Harvard University Press, 1996).

should serve as a framework when intellectual property is used excessively and contrary to its functions.[123] By contrast, in searching for frameworks to evaluate existing policies and arguments for intellectual property in terms of their potential impact on human development, some commentators, including Olufunmilayo

[123] See, UN ECOSOC, Comm on Econ, Soc & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Human Rights and Intellectual Property, UN Doc E/C.12/2001/15 (14 December 2001); The High Commissioner, Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, delivered to the Sub-Comm'n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001); UN ECOSOC, Sub-Comm'n on the Promotion and Protection of Human Rights, the Realization of Economic, Social and Cultural Rights UN Doc E/CN.4/Sub.2/2000/L.20 (11 August 2000) 3. For academic commentaries on these issues, see, for example, Helfer and Austin *(n 25)*; Laurence R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5(1) Minn Intell Prop Rev 47–61; Laurence R. Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 Davis L Rev 971–1020; Christophe Geiger, 'Constitutionalising Intellectual Property Law? - The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37(4) International Review of Intellectual Property And Competition Law 371–406; Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2015); Peter K. Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' (2007) 40 Davis L Rev 1039–1149; Peter K. Yu, 'Ten Common Questions About Intellectual Property and Human Rights' (2007) 23 Georgia State University Law Review 709–53; Willem Grosheide, *Intellectual Property and Human Rights: A Paradox* (Edward Elgar Publishing, 2010); Abbe E. L. Brown, *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology* (Edward Elgar Publishing, 2012).

Arewa,[124] Margaret Chon,[125] Julie Cohen,[126] Brett M Frischmann,[127] Madhavi Sunder[128] and Tzen Wong,[129] have increasingly employed the capabilities approach. They have embraced this approach as an alternative paradigm to evaluate and guide intellectual property rights. While Wong's work provides a general overview on the triangular relationship among intellectual property law, human development and human rights,[130] Sunder is the only one who suggests some principles, albeit mostly ethical norms, to move 'from goods to good life' to create a 'fair culture'.[131]

Although commentators have examined the interfaces between intellectual property and human rights, and between capabilities and intellectual property rights separately in the past, the arrival of the TPP has ushered in a new 'era of non-multilateralism' and the new digital copyright enforcement measures have transformed individuals' 'free culture' into a 'controlled culture', both of which have raised difficult moral and legal questions concerning the appropriate policy responses to the situation. The arrival of this era has also rendered inadequate the existing literature on the

[124] Olufunmilayo Arewa, 'Freedom to Copy: Copyright, Creation and Context' (2007) 41(2) UC Davis Law Review 477–558.

[125] Chon *(n 93)*.

[126] Julie E. Cohen, *Configuring the Networked Self; Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012).

[127] Brett M Frischmann, 'Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property', Cardozo Legal Studies Research Paper No. 442 (September 23, 2014) Available online at SSRN: http://ssrn.com/abstract=2500196.

[128] Sunder *(n 1)*.

[129] Wong *(n 93)*.

[130] Ibid.

[131] Sunder *(n 1)*.

interrelationships among various intellectual property regimes, human development and human rights. These relationships create an area that deserves new insights.

By tackling the issue of intellectual property law within larger social and moral theories of global justice, one has to question how intellectual property does more than incentivise the production of innovative products in the global economy. Beyond assumptions of efficiency, self-interest, and the constraints of property law within international trade are larger concerns, which are at the forefront of contemporary research in the social sciences and humanities in relation to public policy. Thus, the challenge that this thesis posits is how to bring the politics of human dignity (human rights) and the politics and ethics of welfare (human development) into a single framework within copyright law. To this end, the capability-oriented human rights assessment of copyright law might open a fresh discussion over the conventional wisdom mentioned above. To replace the existing 'culture and economic development model' with the 'culture and human development mode', this study identifies capabilities or substantive freedoms (cultural human rights and freedoms) instead of economic metrics, such as Gross Domestic Product (GDP) or per-capita income, as a way of evaluating copyright law's goals in general and its impact on individuals' capabilities to freely express themselves and participate in cultural and political life.

Freedom is a critical value in constructing a fair culture. Inspiration here is Amartya Sen's concept of 'development as freedom'[132] and Martha Nussbaum's idea to rationalise these freedoms as touchstone values in constitutional entitlements.[133] Hence freedom is both a right and a tool for advancing further development. Modern global copyright law must grapple with the reality of difference in the world and

[132] Amartya K. Sen, *Development as Freedom* (OUP, 1999).

[133] Nussbaum *(n 119)* 62.

investigate creative legal tools that could incentivise people to share across cultures and class divides. Promoting fairness among global culture-makers generates better innovation policies, champions freedom of expression, and animates better cultural relations. Modern copyright rules should be crafted to foster the ethical distribution of knowledge. In the knowledge economy, both economic and human development counts on fair cultural exchanges in global markets. Considerations of social justice cannot therefore be peripheral to such central social relations.

How can it be possible to bridge the traditional study of law with broader questions in policy, philosophy, and cultural theory? More specifically, this study adopts the following as central research questions:

- **How could western (UK, EU, and US) copyright laws' economic-oriented development and culture visions be reshaped through the capabilities approach and 'participatory culture' considerations in order to enhance participation in culture?**
- **What legal resolutions and remedies could be drawn from the fundamental rights framework (specifically from the right to take part in cultural life and freedom of expression) to make such a shift in copyright laws?**

Through finding answers to these question, it should be possible to understand the broad cultural, social and economic dimensions of creativity. It will also enable us to establish a foundation to build a *free* but at the same time *fair* culture.[134]

[134] Sunder *(n 1)*.

I.9.1. Methodology and Ideology

How will the research question identified in this thesis be answered? Amartya Sen, in his seminal book '*The Idea of Justice*', draws attention to two basic, yet divergent, lines of reasoning about justice among leading philosophers of the European Enlightenment. This dichotomy will further help locate the particular understanding of the methodology, the selection of jurisdictions, and the ideology that are presented in this thesis. The first tradition, what Sen calls 'transcendental institutionalism', focused on identifying just institutional arrangements for a society.[135] Sen notes that this tradition can be found in the works of the philosophers Thomas Hobbes, John Locke, Jean-Jacque Rousseau and Immanuel Kant, who proposed theories of justice that focused on the transcendental identification of ideal institutions in their social contract mode of thinking.[136] Immanuel Kant and John Rawls participated in this this tradition, but provided far-reaching analyses of moral and political imperatives regarding socially appropriate behaviour. Their assessments can be seen as an 'arrangement-focused' approach to justice, arrangements including not only just institutions but also right behaviour.[137]

In contrast to confining the analysis to transcendental searches for perfectly just institutions, the 'realisation-focused comparisons', the second tradition described by Sen, aims at concentrating on an assessment of justice in actual cases primarily for the removal of manifest tensions and injustices.[138] Relying on relative comparisons of justice and injustice, this approach locates the inquiry on the nature of "the just"

[135] Amartya K. Sen, *The Idea of Justice* (Penguin, 2010) 5.

[136] Ibid 6.

[137] Ibid 7.

[138] Ibid 6.

rather than the identification of some standards for "an alternative being 'less unjust' than another."[139] Different variations of this understanding can be traced in the works of Adam Smith, Jeremy Bentham, Mary Wollstonecraft, John Stuart Mill and Karl Marx, who are among the leaders of innovative thought of the Enlightenment era.[140]

Sen prefers the latter approach in his book and puts forward two reasons why he departed from the first tradition. Firstly, he thinks that since 'there can be difference … in the exact comparative weights to be given to distributional equality, on the one hand, and overall and aggregate enhancement, on the other,' finding a unique transcendental agreement seems unfeasible.[141] Secondly, for Sen, '[i]f a theory of justice is to guide reasoned choice of policies, strategies or institutions, then the identification of fully just social arrangements is neither necessary nor sufficient.'[142]

In this thesis, the realisation-focused approach is selected to identify the most contentious issues of the post-TRIPs era. This preference affects the selection of jurisdiction and methodology. Firstly, the objective of this thesis is the identification of the current development problems stemming from an 'economic-growth-based' perspective and the formulation of a reference methodological tool for future substantive assessment and resolution of such problems. This will primarily be based on classic *doctrinal legal research.*

Secondly, searching for frameworks to assess existing policies and arguments for intellectual property in terms of their potential impact on human development, this thesis turns to social and cultural theory to more fully explore the

[139] Ibid 6.

[140] Ibid 7.

[141] Ibid 10-12.

[142] Ibid 15.

connections between cultural production and human freedom. Drawing upon a diversity of intellectual resources, such as the capabilities approach pioneered by Amartya Sen[143] and Martha Nussbaum,[144] the critical philosophical[145] and cultural[146] studies, this study aims at showing an intrinsic link between the expansion of real human freedoms and opportunities to live in a 'fair culture' with the advantages and limits of copyright law: how does copyright facilitate or restrict participatory freedoms, autonomy, and equality? Entangled in the discussion is the issue of users' fundamental rights, as well as the interests of the public at large in the promotion of human development, creativity, technological innovation, electronic commerce, net neutrality and a fair and equitable information society. The moral and critical philosophical explanations mentioned above will therefore be complemented by the guidance of the broader and overarching principles of fundamental rights. Thus, this thesis to some extent relies on *interdisciplinary perspectives* within and without the law.

This thesis does not seek to search through all problematic notions of intellectual property law on human development. Among other intellectual property rights, this thesis focuses on *copyright law*. Within copyright law, it is predominantly limited to some *contemporary popular digital enforcement measures* of the post-TRIPs

[143] Sen *(n 132)*; Sen *(n 135).*

[144] Nussbaum *(n 119)*; Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP, 2000).

[145] Jürgen Habermas, *The Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeois Society* (Polity Press, 1992).

[146] Henry Jenkins, Mizuko Ito, and Danah Boyd, *Participatory Culture in a Networked Era: A Conversation on Youth, Learning, Commerce, and Politics* (Polity Press, 2016) 4.

era.[147] The legal limitations that these enforcement measures have pitted against human development and cultural participation are the main concern of this thesis. There are several reasons for this limitation. For one thing while the attempt to dispel digital piracy threats has been strong and evident in recent copyright law-making initiatives and practice, no similar effort has been put in trying to leverage the unprecedented opportunities digital technologies and the Internet have created for participation in cultural life, such as the reduction of reproduction and distribution costs, a much more pervasive and faster diffusion of materials, and the increased availability of effective tools to remove barriers against the creation and dissemination of knowledge. The two-fold nature of the Internet and digitisation should have reasonably suggested a fine-tuned copyright law to prevent new types of infringement without stifling the capabilities of individual to participate in cultural life and freely express themselves, and rather exploiting at best the opportunities offered by technological progress. Yet, contemporary copyright law has moved towards a radically different path.

Furthermore, in an attempt to eradicate piracy to the maximum extent possible, international and national law-making efforts have substantially tilted the emphasis towards control versus access in copyright law. After the adoption of the TRIPs Agreement, the existing legal instruments fell short of providing remedies that might have been helpful to advance diverse aspects of human development. The WIPO Internet Treaties dedicate very little attention to digital exceptions and limitations, providing only a non-mandatory list of examples.[148] Following a similar approach, Article 5 of the Information Society Directive enlists several exceptions from

[147] See Chapter 3.

[148] WCT Article 10; WPPT Article 16.

which Member States may choose – a decision that once again appears particularly striking when compared with the strong harmonisation effort on the side of exclusive rights. This has led to the creation of a fragmented patchwork of divergent national solutions.[149] The same controversy surrounds the case of technological protection measures, 'since the Directive is silent on the treatmentof an act of TMP circumvention directed to an otherwise legitimate use of the work.'[150]

The alteration of the emphasis on copyright can also be seen in countries equipped with flexible, open-ended provisions to establish the existence of fair uses, such as the US, where courts have progressively moved towards a greater consideration of copyright industries' arguments in their reasoning. This is detrimental to the purpose of using copyright-protected works and the relevance for the pursuance of grand-sized issues, such as human development. Similar processes and effects can be traced to those judicial decisions that use the three-step-test to limit or exclude the application of existing exceptions if their exercise in the case at stake appears to create an unreasonable prejudice to the legitimate interest of the rights-holder.[151] Backed by such a supportive and favourable legal environment, producers are now distributing copyright materials under license agreements that expand their rights and circumscribe the scope of exceptions or ban their exercise, while technological protection measures enforce contractual clauses and guarantee extensive control.

[149] Sganga *(n 66)* 89. See Information Society Directive *(n 70)* Article 6.

[150] Sganga *(n 66)* 89.

[151] Sganga *(n 66)* 90; Daniel Gervais, 'Intellectual Property and Human Rights: Learning to Live Together' in *Torremans (n 123),* 3–23; Jonatthan Griffiths, 'The "Three-Step-Test" in European Copyright Law: Problems and Solutions' (2009) 9 Intellectual Property Quarterly 489.

As a response to this phenomenon and its consequences, the last two decades have seen a growing number of scholars and activists turning their attention to the negative impact of copyright law on – among others – the freedom of expression, the right to receive and impart information, the right to education, the right to take part in cultural life, and the freedom of research. The debate in the international fora looks at the clashes between copyright and international human rights, and on the potential implication of state human rights obligations on international and national copyright law-making, at a national level. However, this thesis moves the focus not only to the interplay between copyright and fundamental rights enshrined in constitutional charters, but also to an ideational structure of this attitude which disregards several dimensions of human flourishing.

From a realisation-focused perspective, the question of the selection of jurisdiction(s) is quite important, especially for the identification of the acute problems within a given legal system and for proposing realistic, consistent and feasible remedies and models. The research question and argument in this thesis are in particular discussed through comparative analysis of the selected themes with respect to UK (within its wider European context) and US laws. Other jurisdictions, where relevant, are also included. The analysis also needs a selection of human rights jurisdictions at an international level which are related to these domestic jurisdictions. The human rights jurisdictions therefore will be the United Nations human rights system in addition to the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU- formerly European Court of Justice -ECJ).

I.9.2. Scope

This thesis offers a framework for copyright law focusing not on economic development alone but on more broadly promoting human development and one of its core components, namely cultural human rights and freedoms, to transform the 'controlled culture' that individuals live in to a 'fair culture'. In particular, this thesis examines the legal limitations of the selected copyright enforcement measures (notice-and-takedown and graduated response procedures, file sharing, disclosure orders and filtering and website blocking orders in Chapter 3; the extension of copyright terms, pre-established/statutory and additional damages, technological protection measures, the intermediary liability and the extension of criminal liability in Chapter 5; and notice-and-staydown and technological protection measures in Chapter 6) on human development and participation in culture life. Cultural human rights and freedoms are explored to identify a normative force to challenge these enforcement measures' adverse effects. The scope of the cultural human rights and freedoms and their significance for and relationship with human development will be delineated in Chapter 2. The question of whether copyright has human rights attributes will be answered in Chapter 4 in detail. These inquiries require an analysis of the core ethical foundation of the human development paradigm that will be used in this thesis- namely the capabilities approach - and the interface between copyright and human rights. The following section contains a brief note on the dominant views on the relationship between copyright and human rights, while the capabilities approach is explained in the note in Appendix 1.

I.9.1. *Conflict v Coexistence*: a dated distinction

Before exploring where capabilities related to cultural participation are left to a twilight zone of copyright protection, it might be accurate to understand the relationship between copyright and human rights. The debate surrounding human rights and intellectual property initially spawned 'two opposing camps'[152] to explain this sophisticated interface: the 'conflict approach' or the 'coexistence approach'.[153] The advocates of the conflict approach consider intellectual property rights as being in fundamental conflict with human rights, in arguing that strong intellectual property rights are prone to undermine human rights, in particular their economic, social, and cultural aspects.[154] This approach suggests that the conflict should be resolved through recognising the primacy of human rights because normatively human rights are fundamental and of higher importance than intellectual property rights.[155] The

[152] Peter K. Yu, 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 Florida Law Review 1052.

[153] For discussion on the two approaches, see; Helfer and Austin *(n 25)* 64–89; Laurence R. Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49(1) Harvard International Law Journal 48–49; Paul L. C. Torremans, 'Is Copyright a Human Right?' (2007) Michigan State Law Review 272–73.

[154] Sub-Commission on Human Rights Res. 2000/7, IPRs and human rights, ESCOR, Commission on Human Rights, SubCommission on the Promotion and Protection of Human Rights, 52nd Sess., 25th mtg., U.N. Doc. E/CN.4/Sub.2/Res/2000/7 (2000) [hereinafter Resolution 2000/7]. For detailed analysis of the Resolution 2000/7, see; David Weissbrodt and Kell Schoff, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7' (2003) 5 Minnesota Intellectual Property Review 1–46.

[155] Makau W. Mutua and Robert Towse, 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization', in *Hugo Stokke and Anne Tostensen (eds), Human Rights in*

coexistence approach, by contrast, argues that there exists a state of balance between intellectual property rights and human rights. This ideology presumes that defining the scope of the private, exclusive rights of authors and inventors to effectively encourage and recognise creative contributions to society, on the one hand, and the broader interest of sufficient public access to the creations of authors and inventors, on the other, are two fundamental necessities of this double-edged dichotomy. Both areas of law, in this sense, are not in conflict, but rather try to reconcile those public and private rights and are essentially compatible.[156]

How do the courts interpret this relationship? Courts at a national level were for a long time traditionally reluctant to recognise any human rights, particularly freedom of expression, defence or exception outside copyright law.[157] They opined that the tension between those rights was resolved through internal mechanisms such as the idea/expression dichotomy or limitations and exceptions to the exclusive copyright. In other words, this approach adopted the view that human rights norms are 'internalised' within the doctrines of copyright law. They have resisted admitting any

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Development Yearbook 1999/2000: The Millennium Edition (Buffalo Legal Studies Research Paper No. 2010-008, 2001), 51–82, Available at SSRN: http://ssrn.com/abstract=1533544.

[156] World Trade Organisation [WTO], Protection of Intellectual Property under the TRIPS Agreement, 9, U.N. Doc. E/C.12/2000/18 Nov. 27, 2000) [hereinafter WTO Submission]; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. Of Human Rights, the Impact of the Agreement on Trade-Related Aspects of IPRs on Human Rights: Report of the High Commissioner, 11, U.N. Doc. E/CN.4/Sub.2i2001/13 (June 27, 2001). Helfer and Austin *(n 25)* 73–74; Torremans *(n 153)* 272–73; Yu *(n 123)* 709–10.

[157] Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45(3) International Review of Intellectual Property and Competition Law 316.

external human rights, freedom of expression, review of copyright. This approach can be seen in the judgement *Eldred v Ashcroft*,[158] in which the US Supreme Court upheld the constitutionality of the Copyright Term Extension Act ('CTEA'), addressing First Amendment (freedom of expression) arguments. The Court took the view that there was no conflict between copyright and the First Amendment, as any such concerns would generally be addressed adequately by the free speech accommodations built into copyright law, namely the idea/expression dichotomy and the doctrine of fair use. This approach was later maintained by the Supreme Court in the case of *Golan v Holder*.[159] Similar to *Eldred*, The Supreme Court approved the constitutionality of section 514 of the Uruguay Round Agreements Act 1994, which amends the US Copyright Act to accord protection to certain foreign works that had previously fallen into the public domain in the US.

In the UK, this perspective has essentially been embraced.[160] One of the most important examples in this sense is the landmark judgment of the Court of Appeal in

[158] 537 US 186 (2003).

[159] 132 S Ct 873 (2012).

[160] See, *e.g., Hyde Park Residence Ltd v Yelland* [2000] EWCA Civ 37 para 76 (noting that '[c]opyright is … a property right, conferring on A alone the exclusive right to do certain acts in relation to certain works including sound recordings and films. It protects the form of such works and not any information which they contain as such. And it is regulated by stature. S.30 of the Copyright Act 1988 expressly allows fair dealing with certain works for the purpose of criticism or review or of reporting current events. Copyright does not lie on the same continuum as, nor is it the antithesis of, freedom of expression. The force of an owner's interest in the protection of his copyright cannot be weighed in the same direct way against a public interest in knowing the truth. S.171(3) of the Copyright Act expressly preserves the possibility that the enforcement of copyright may be prevented or restricted on grounds of public interest').

Ashdown v Telegraph Group Ltd.[161] This case concerned the publication, in the Sunday Telegraph, of substantial extracts from Mr Ashdown's confidential and unpublished memorandum of a secret meeting at the Prime Minister's office, during which the possibility of a coalition between the Labour Party and the Liberal Democrats had been negotiated. The contents appeared to contradict statements of the Prime Minister at the time; had members of the Labour Party been informed about the meeting, there might have been political unrest. Mr Ashdown brought a case against the proprietor of the Sunday Telegraph, seeking injunctions and damages (or alternatively, an account of profits) for breach of confidence as well as infringement of copyright. In *Ashdown*, it was principally held that the idea/expression dichotomy and the fair dealing provisions laid down in the UK Copyright, Designs and Patents Act 1988 ('CDPA') would in most circumstances afford sufficient protection to freedom of expression.[162] However, as the Court noted, rare cases might still arise where freedom of expression would come into conflict with the protection afforded by copyright.[163] In such cases, the court is bound, in so far as it is able, to apply the CDPA in a way that accommodates the right to freedom of expression – through awarding damages or an account of profits or allowing the public interest defence.[164]

However, European human rights courts have chosen to follow the second perspective reflecting the view that the right to freedom of expression establishes a borderline in respect of which the extent of copyright should be assessed. The Court

[161] [2002] Ch 149.

[162] Ibid 45.

[163] Ibid.

[164] Ibid paras 47, 58

of Justice of the EU (CJEU) in a series of cases[165] have accepted that copyright is open to both any external limitation deriving from European human rights and as a human right to any internal limitation deriving from other European human rights. In *Ashby Donald and Others v France*[166] and very shortly afterwards in the admissibility decision of *Neij and Sunde Kolmisoppi v Sweden (The Pirate Bay/TBP),*[167] the ECtHR,

[165] See cases in Chapter 3 section 3.4., 3.5. and in Chapter 4 section 4.4.2.

[166] *Ashby Donald and Others v France*, App no 36769/08 (ECtHR, 10 January 2013). For a detailed analysis of the case see Chapter 1 section 1.1.4. and Chapter 3 section 3.3.2. For English translation of some part of the judgement see; 'Ashby Donald and others v France' 2014 45(3) International Review of Intellectual Property and Competition Law 354-360. For academic commentaries on the judgement see; Geiger and Izyumenko (n 157); Paul L. C. Torremans, 'Ashby Donald and Others v France, Application 36769/08, EctHR, 5th Section, Judgment of 10 January 2013' (2014) 4(1) Queen Mary Journal of Intellectual Property 95–99; Dirk Voorhoof and Inger Høedt-Rasmussen, 'Copyright vs. Freedom of Expression, ECtHR (5th Section), 10 January 2013, Case of Ashby Donald and Others v. France, Appl. Nr. 36769/08, (2013)', available at http://echrblog.blogspot.co.uk/2013/01/copyright-vs-freedom-of-expression.html; Dirk Voorhoof, 'Freedom of Expression and The Right to Information: Implications for Copyright' in Geiger *(n 123)* 331–52.

[167] *Neij and Sunde Kolmisoppi (The Pirate Bay) v Sweden* (2013) 56 EHRR SE19. For a detailed analysis of the case see Chapter 3 section 3.3.2. Also, see; '"Pirate Bay" European Convention on Human Rights, Art. 10 – Neij and Sunde Kolmisoppi v. Sweden, 2013' (2013) 44(6) International Review of Intellectual Property and Competition Law (2013) 724. For academic commentaries on the judgement see; Geiger and Izyumenko (n 157); J. Jones, 'Internet Pirates Walk the Plank with Article 10 Kept at Bay: Neij and Sunde Kolmisoppi v Sweden' (2013) 35(11) EIPR 695–700; Dirk Voorhoof and Inger Høedt-Rasmussen, 'Copyright vs. Freedom of Expression II (The Pirate Bay): ECHR Decision of the ECtHR (5th Section) of 19 February 2013 Case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. Nr. 40397/12', available online at http://kluwercopyrightblog.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/; Voorhoof (n 166) in Geiger *(n 123)*.

on the other hand, examined whether copyright, as a human right to property, is open to any internal limitation deriving from freedom of expression. Christophe Geiger and Elena Izyumenko construe these judgements in a way 'that external factors can be applied to ensure a balanced protection *beyond* the already existing exceptions and limitations built into copyright legislation, in line with the underlying principle that the exclusive right constitutes an exception to a broader principle of freedom of use'.[168] While this is true for the CJEU which has combined, at least have not distinguished, the layers of *inter-regimes* (between two regimes) or *inter-rights* (within human rights regime only) aspects in its judgements, the ECtHR's assessment of the relationship between copyright and freedom of expression has only remained within its human right regime.

Is it necessary to frame the intersection with a new outlook? It is arguable that human rights and copyright regimes speak very different languages. As previously mentioned, intellectual property lawyers, especially those in the Anglo-American tradition, use the analytical definitions of utilitarianism and welfare economics to assess the trade-offs between incentives and access and the consequences for the individuals and firms that create, own, and consume intellectual property products. The international human rights movement, by contrast, deals with a discourse of rights that seeks to delineate the negative and positive duties of states to respect and promote fundamental liberties.[169] Consequently, to mark a legal value or interest as a 'human right' often calls upon a language of 'trumps' and unconditional claims.

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[168] Geiger and Izyumenko *(n 157)* 318 (emphasis original).

[169] See; James W. Nickel, *(N 169) Making Sense of Human Rights* (2nd edn, Blackwell Publishing, 2007); Marie Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP, 2006).

These rhetorical and ideological differences merging with the 'reflexive fear' of actors for unfamiliar legal regimes, who orient themselves in the discourse of just one legal and political system and are closed to the other, has generated a resistance to change in coalescing the two.[170] Another reason for resistance is the 'opposition to actors who make rhetorical and […] inflated claims grounded in one regime to support arguments for changing the other.'[171] Some commentators engaging with human rights complain that intellectual property owners, especially transnational corporations, invoke the creator's rights and the human right to property to 'further concentrate wealth in the hands of a few at the expense of the many.'[172] In contrast, human rights sceptics in the intellectual property community believe that the ambiguous scope of human rights, inviting states to respect, protect, and fulfil economic social rights, is a barrier to 'promote government intervention in private innovation markets and radically scale back or even abolish intellectual property protection.'[173] A third basis for resistance is the concern with the ever-growing fragmentation of international regimes.[174] For those resisting intellectual property actors, the emphasis on categorical human rights and responsibilities does not comfortably fit with the rapidly

[170] Helfer and Austin *(n 25)* 504.

[171] Ibid 504.

[172] Ibid 504-505.

[173] Ibid 505.

[174] On fragmentation problem see; International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (U.N. Doc A/CN.4/L.682), 13 April 2006 – in the following: ILC Report; for a more theoretical discussion, G Teubner and A Fischer-Lescano, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999–1046; P. S. Berman, *Global Legal Pluralism - A Jurisprudence of Law Beyond Borders* (CUP, 2012).

changing technological and economic environment in which intellectual property rules operate, an environment that often requires incremental recalibrations of the balance between incentives and access.

However, a legal value or interest can be regulated in one regime, for example in human rights law, while existing in another, for example in private law, even though protection levels and considerations might differ. The most significant example is the fundamental right to property. It is regulated as a private right as well as a human right. As James Nickel reminds us 'human rights include many fundamental freedoms. Among those freedoms are some *basic economic liberties*. They include the liberty to buy and sell labo[u]r, to engage in independent economic activity, to hold both personal and *productive property*, and to buy, sell, use, and consume goods and services.'[175] Peter K. Yu, among others, points to the necessity of a 'nuanced assessment' of the human rights aspects of basic economic liberties arguing that:

> 'Although each of these approaches has its benefits and drawbacks, both of them ignore the fact that *some attributes of IPRs are protected in international or regional human rights instruments while other attributes do not have any human rights basis at all.* Thus, instead of inquiring whether human rights and IPRs conflict or coexist with each other, it is important to identify the human rights attributes of intellectual property rights and distinguish them from the non-human rights aspects of intellectual property protection.'[176]

[175] Nickel *(n 169)* 136 (emphasis added).

[176] Yu *(n 123)* 710–11.

As will be shown in Chapters 3, 4, 5 and 6, two different legal regimes can arguably conflict, coexist, compete or intersect. So can the rights that are governed under those regimes. However, their scopes are determined by the ideological, legal and political structures of each regime. Therefore, instead of focusing on the conflict and coexistence theories, it seems necessary to provide a working framework for understanding the trans-normative relationship between intellectual property rights and human rights regimes. If there is a conflict between some certain right categories or regimes, this framework will allow us to identify whether this is either an *inter-regime* (between two regimes) or an *inter-rights* (within human rights regime) conflict. Providing a deconstructive framework for analysing this interface will further alleviate concerns deriving from fragmentation, regime interaction and global legal pluralism which offer different narratives on how specific areas of international law view, define and delineate their relations to one another in the context of a continuously increasing body of rules in international law.

I.9.3. Outline of the Thesis

The first chapter introduces a cultural critical approach with which to question and theorise the underlying ideology of contemporary copyright law. It shows how copyright law defines its ecosystem and what it fails to perceive. In other words, it explains particular aspects of culture which are omitted in the current copyright understanding but are important to enable an individual to access, participate in and contribute to cultural life. Putting forward a cultural critique, that is ‘culture is a site of human development’, it explains why Amartya Sen’s and Martha Nussbaum’s capabilities approach should be adopted as a moral underpinning to enhance individuals’ cultural participation which is essential for their development.

The second chapter deals with the question of how this approach could be animated within the theory of law. To this end, it discusses the relationship and synergies between the capabilities approach and human rights. In the light of the human right to take part in cultural life and freedom of expression, it singles out cultural freedoms which are most pertinent to reflect what capabilities might have a normative force within the theory of law to attain robust human development for individuals.

To apply the findings of the first two chapters more concretely, **the third chapter** analyses five digital copyright enforcement measures, namely notice-and-takedown and graduated response procedures, file sharing, disclosure orders, filtering and website blocking orders, where the tension between copyright and cultural human rights and freedoms is more profound. This chapter shows how copyright law itself effects several dimensions of human development while creating tension with human rights.

The fourth chapter examines the human rights implications of intellectual property in general, and of copyright in particular, discussing several human rights regimes' conception of intellectual property as human rights, in a way that shows the current standing of the relevant case law. Providing a framework for this question is essential to show the type of relationship which occurs when copyright and human rights are juxtaposed.

The fifth chapter essentially discusses the copyright rules laid down by the Trans-Pacific Partnership Agreement as a case study to show the findings of previous chapters more concretely and to make proposals for the future direction of treaty(law)-making with respect to copyright law. Amidst the legal controversies of approaching Brexit and the negotiation of the TTIP Agreement between the US and the EU, the case study depicts the hypothetical effects of the TPP Agreement's on multiple cultural

human rights and freedoms and thus human development, while concluding with a model of a human rights-based assessment method from a capabilities perspective for the implementation and adoption of copyright provisions laid down in international treaties or domestic legislation.By relying on Abbe Brown's legal test from her book '*Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology,'*[177] **the final chapter** aims to complete the thesis with the introduction of a legal test conducive to human development (deconstructive multiple proportionally test) for courts to resolve a conflict of norms between human rights and copyright, when such a conflict is encountered. To structure Brown's test more deeply, it brings the German constitutional doctrine of '*practical concordance*' and describes seven criteria applicable to identifying and resolving the conflicts between copyright and human rights. Finally, it applies this test through two case studies, which involve German implementation of notice-and-stay-down measures -which are highly demanded by the US entertainment industries and have been referred to in several UK intermediary cases to justify its outcome- in YouTube cases and the recent case before the US Supreme Court challenging the constitutionality of US technological protection measures.

The thesis will end with concluding remarks.

As has been seen from this introduction, the thesis examines several complex concepts and theories from different disciplines. It is important to note that its main messages are directed towards the non-expert reader: in other words, the thesis does not anticipate that the reader will be expert across the disciplines. Because of the target audience, and in order to understand how these concepts fit together in

[177] Brown *(n 123).*

this thesis, and thus the original contribution made by the work, it is necessary to have a firm basis of the subtleties and complexities of each of the disciplines. This has meant that it has was inevitable and necessary for this thesis to exceed the stipulated word limit.

CHAPTER 1

1. Reflections on A Critical Cultural Approach to Copyright

1.1. Seeing Copyright through Emerging Culture

1.1.1. The Good: The Innovation Tree and Ubuntu

'Ubuntu' is the name for a Debian-based Linux operating system for personal computers, smartphones and network servers. It is also the registered trade mark[178] for this operating system. Ubuntu was developed by UK-based Canonical Ltd, a company owned by a South African entrepreneur. The Ubuntu project is publicly committed to the principles of open-source software development; people are encouraged to use free software. What makes Ubuntu significant here is its lexical meaning. Taking its ancient roots from South Africa, the definition of Ubuntu from the Oxford English Dictionary is: '*a quality that includes the essential human virtues; compassion and humanity'.*[179] Ubuntu also has close ties to a southern African tree called marula.

The marula tree, a plant native to southern Africa, is revered in Namibian culture. For more than half of Namibia's population living in rural areas, the marula tree plays an important role as a source of food and income. Traditionally harvested almost exclusively by women, who have long valued it, the fruit and nuts of the marula tree are highly rich in certain oils, antioxidants and acids, which are essential for the preservation of healthy human skin. The most important part of the marula tree is the oil, as it can be used as a meat preserver, skin moisturiser and an ingredient for popular foods such as jam and alcoholic beverages. Tree by tree, kernel by kernel,

[178] EU Trade Mark No EU004059119, class 9, 41 and 42, proprietor: Canonical Limited.

[179] Oxford Dictionary of English (3rd edn, OUP, 2010) (Edited by Angus Stevenson).

the laborious work of extracting marula oil has passed from generation to generation. Women there has sold marula products in their communities on an informal scale for many years. Thus, the traditional knowledge that rural Namibian communities possess plays a vital role in their livelihood.

The destinies of both Namibian women and marula changed in 1999, when CRIAA SA-DC,[180] a Namibian non-governmental organisation (NGO), introduced the idea of producing marula oil of a higher quality and in larger volumes for sale at home and abroad for the cosmetic industry. Backed by the NGO, Namibian women, with the help of the Namibian government, set up the Eudafano Women's Cooperative (EWC) to market marula products for local and export markets. In less than a decade, over 5,000 women in 22 groups, producing marula oil from wild trees, joined the EWC. As from 2010, the EWC is the second largest producer of marula products in southern Africa. Tapping into their traditional knowledge of harvesting and processing the hard nuts of the marula tree, rural Namibian women can now produce marula products from their houses but reach an international market.

In 2000, the EWC became the exclusive provider of marula oil to The Body Shop, one of the world's largest cosmetic companies, which uses it in products such as lipstick, foundation, blusher and eye shadow. To attest to the high quality of marula oil as a natural moisturiser, The Body Shop publicised marula's long history within Namibian culture and its modern day production through the EWC.[181] As the popularity of natural products has increased, local producers throughout southern Africa decided

[180] The full name of the NGO is The Centre for Research, Information, Action in Africa Southern Africa - Development and Consulting.

[181] The Body Shop's advertisement video is available at http://www.thebodyshop.com/commitment/ingredient_marula.aspx.

that they needed to protect their traditional knowledge and to stimulate economic growth through international marketing. To this end, the EWC became an early member of PhytoTrade Africa which is a non-profit organisation, founded in 2001, as the trade association of the natural products industry in southern Africa. It is a membership-based organisation representing private sector businesses, development agencies, individuals and other interested parties. Its purpose is to alleviate poverty and protect biodiversity in the region by developing an industry that is not only economically successful but also ethical and sustainable.

As more companies have noticed the potential uses and benefits of marula, new research and development (R&D) projects have been initiated. In 2005, for example, Aldivia SA (Aldivia), a French company that produces natural and organic ingredients for cosmetic manufacturers, launched a R&D project with PhytoTrade and the Southern African Natural Products Trade Association. The project aimed at using marula to develop a natural, environmentally-friendly botanical ingredient for cosmetics. The result of the project was the development of an extraction process called 'Ubuntu'. This innovation is used to manufacture cosmetics without any petrochemicals or solvents, leaving a limited carbon footprint, and is named 'green chemistry'. Maruline, 100% natural marula oil with enhanced antioxidant properties, was the first product of the Ubuntu process.

Whether the name Ubuntu was chosen deliberately or not, the intellectual property aspects surrounding this extraction process truly reflect the word's virtuous meaning. In 2006, Aldivia filed a patent application for the Ubuntu with the international Patent Cooperation Treaty system.[182] This patent is held jointly by Aldivia and the

[182] For the specification of the patent see; https://patentscope.wipo.int/search/en/detail.jsf?docId=WO2006097806.

primary African producers represented by the Southern African Natural Products Trade Association.[183]

1.1.2. The Bad: An African Lion

Marula is a case where intellectual property meets Ubuntu. The law does not always work in the same way, however. Solomon Linda's case is a tragic one where intellectual property interfaces with the seedier sides of global injustice. In 1939, a Zulu migrant worker and entertainer who called himself Solomon Linda improvised falsetto vocal lines against a rolling, driving vocal chant into a microphone in one of Johannesburg's first recording studios. He called the song *'Mbube'*, which means lion in Zulu. Linda's composition *'Mbube'* was performed and recorded by the Original Evening Birds in South Africa. It became one of the first African pop hits. When Linda made the song, he was poor man, living in a squalid hostel in Johannesburg.

The song's fame started in Africa but crossed the Atlantic: Pete Seeger, one of the fathers of American folk music and world music, noticed the African hit. He converted *'Mbube'* into *'Wimoweh'* in the 1950s and registered the copyright in the new composition under his *nom de plume* Paul Campbell. As a consequence, across the Atlantic, the song was treated as African 'folklore' and therefore as part of the public domain and free for the using. A decade later, the American music legend George Weiss rewrote '*Wimoweh'* as '*The Lion Sleeps Tonight*'. Its American counterparts generated considerable income from Linda's song, since it was reborn

[183] For the full account of this case study see; 'A Tree and Traditional Knowledge: A Recipe for Development' [WIPO Case Studies on Intellectual Property (IP Advantage)], available online at http://www.wipo.int/ipadvantage/en/details.jsp?id=2651.

as the Walt Disney Company's immensely profitable and popular soundtrack '*The Lion Sleeps Tonight*'.[184]

Linda's African melodies contributed the wealth of the US but not himself. In 1962, Linda died from a treatable kidney disease at age of fifty-three, leaving behind almost no possessions. In 2000, a South African journalist chronicled the injustice. Later in 2004, supported by the South African government and a private recording company, Linda' descendants brought a lawsuit in South Africa against the Walt Disney company for its use of his song in '*The Lion King*' film and stage musical without paying any royalties to them. Eventually in February 2006, Linda's heirs settled the lawsuit. However, there was one final injustice: the settlement was too late for Linda's daughter Adelaide, who died of AIDS in 2001, unable to afford a potentially life-saving anti-viral treatment.[185]

1.1.3. The Ugly: 'Hope' for Freedoms

There are other cases where artists have had to challenge the copyright holders. One of these cases involves a poster. This case, if not as tragic as Linda's case, is another good illustration of how copyright protection can clash freedoms. One day in winter 2008, a graphic artist named Shepard Fairey made two posters of an iconic figure of our time. These were the Obama '*Progress*' and '*Hope*' posters, the latter of which came to be known as the 'Hope Poster'. Fairey's primary objective in making and distributing copies of the 'Progress' and 'Hope' Posters was to help Barack

[184] Owen Dean, 'Copyright in the Courts: The Return of the Lion' (2006) (2) WIPO Magazine 8. See also; Clinton Heylin, *It's One for the Money: The Song Snatchers Who Carved Up a Century of Pop & Sparked a Musical Revolution* (Constable, 2015) 167-169; 377-379; 415-416.

[185] Dean *(n 184)* 9-10; Sunder *(n 1)* 82–83. See also, Clinton Heylin *(n 184)* 415-416;

Obama win the Democratic nomination for President and then the general election.[186] The 'Hope Poster' became the most popular and merchandised symbol of the Obama campaign, although not officially adopted by it. The poster displayed then Senator Obama looking into the distance with shadings of red and blue on his face, which was placed above the word 'Hope'.[187]

A total of roughly 700 Progress Posters and 350,000 Hope Posters were printed in the course of the campaign. Only a small percentage of the posters (350 Progress Posters and 1,400 Hope Posters) were sold at modest prices ($45 and $35 each, respectively). The rest were either distributed at campaign events or donated to campaign workers.[188] Fairey, however, subsequently earned more than $1 million worth royalties from ancillary uses of the 'Hope Poster', including the use of the poster by a clothing company, the sales of its four fine art editions - one displayed in the National Portrait Gallery-, as well as commissions from the Presidential Inauguration Committee and from MoveOn.org to use its image in various post-election celebratory posters and displays.[189] Fairey's work also turned onto a piece of very popular and sought-after poster art from after its success in the campaign.

Shepard Fairey's success, however, was short lived. Due to the success of the image, people began questioning Fairey's source of inspiration. Fairey consistently

[186] William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart and Marita Sturken, 'Reflections On the Hope Poster Case' (2012) 25(2) Harvard Journal of Law & Technology 244-338, 249, 269.

[187] For the poster see: Ibid 327, Appendix: Figures, Figure 1: The Hope Poster.

[188] Ibid 253.

[189] Ibid 254.

stated that he was inspired by an image found on the Internet.[190] In 2009, a blogger named Tom Gralish for the first time accurately identified a professional photojournalist Mannie Garcia as the creator of the reference photo.[191] The 'Hope Poster' was admittedly based on a Garcia's photograph taken of President Obama (then senator from Illinois) at a 2006 conference honouring the work of George Clooney and his father in Darfur.[192] The Associated Press (AP), the owner of the copyright in the photograph because of being the wire service for which Garcia was working at the time he took the photograph, claimed compensation from Fairey. Fairey admitted to pay a customary license fee, but the AP insisted on taking a share of all of Fairey's revenue from the 'Hope Poster'. When negotiations collapsed, Fairey brought a case, seeking a declaratory judgment that he had not engaged in copyright infringement. Two years later, the parties settled the suit.[193] The parties agreed to financial terms that remain confidential.[194]

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[190] Ibid.

[191] Tom Gralish, 'Found - AGAIN - the Poster Source Photo' — Scene on the Road, January 21, 2009 available at http://www.archive.is/SFiT.

[192] Fisher et al. *(n 186)* 246.

[193] The key provisions of the settlement were: '1) Neither side surrenders its view of the law; 2) Fairey agrees not to use another AP photo without obtaining a license from the AP; 3) In the future, the parties will share the rights to make and distribute posters and merchandise bearing the Hope image; 4) Fairey and the AP will collaborate in creating a new set of images based upon AP photos.' Ibid 269.

[194] Ibid.

1.1.4. *Ashby Donald and other v France*: Is Photography Less Art than a Catwalk?

Do not make mistake: the visual artists are not treated differently in Europe. In *Ashby Donald and other v France,*[195] three photographers made their way to Strasbourg to claim their right to freedom of expression on the fashion pictures. In *Ashby Donald*, the applicants were three fashion photographers - Robert Ashby Donald, Marcio Madeira Moraes and Olivier Claisse.[196] Claisse had taken pictures at fashion shows in Paris in March 2003. Later, the photographs had been published on a website of an American fashion company Viewfinder run by the other two applicants without the consent of the fashion houses.[197] Following the publication of pictures, The French Fashion Federation and a number of haute couture companies[198] filed a complaint about the three photographers before the Central Brigade on the Suppression of Artistic and Industrial Counterfeiting (*Brigade centrale pour la re´pression des contrefacons industrielles et artistiques*) for copyright infringement.[199] The photographers were accused by the Public Prosecutor before the Paris Criminal Court of counterfeiting under Articles of L. 335-2 and L. 335-3 of the French Intellectual Property Code (*Code de la Propriété Intellectuele*) for unauthorised reproduction or public communication of those works.[200] The first instance court acquitted the

[195] *Ashby Donald (n 166)*.

[196] Ibid para 4.

[197] Ibid para 7.

[198] Including Chanel, Christian Dior, and Hermes.

[199] Ibid para 8.

[200] Ibid para 9.

applicants on 17 June, 2005.[201] Upon appeal by the civil parties and the Public Prosecutor, the Paris Court of Appeal reversed the decision, finding the applicants guilty as charged. The Court of Appeal also held that the photographers had infringed their copyright not only in the claimants' clothes but also in the fashion shows themselves.[202] The three fashion photographers were ordered by the Paris Court of Appeal of Paris to pay fines between 3,000 and 8,000 Euros and an award of damages to the French Design Clothing Federation and all five fashion houses, all together amounting to 255,000 Euros. They were also ordered to pay for the publication of the judgment of the Paris Court of Appeal in three professional newspapers or magazines.[203] Thus, even cat walk was under copyright protection in France.

Before the Court of Cassation, the photographers argued that making the photographs available on the internet was allowed by the exception for the purposes of reporting current events (Article L. 122-5 9 of the IPC) and this also fell into their right to freedom of expression (Article 10 ECHR).[204] In its judgment of 5 February 2008, the Court of Cassation simply dismissed the photographers' appeal by stating that the internal copyright exception of Article L. 122-5 9 did not apply to the seasonal fashion industry and that the Paris Court of Appeal has accordingly sufficiently justified its decision.[205] The photographers therefore lodged a complaint before the ECtHR, putting forward in particular that the fashion photographs were 'nformation' of general public interest under Article 10 of the ECHR. According to the applicants, the

[201] Ibid para 10

[202] Ibid paras 11-13.

[203] Ibid paras 14-15.

[204] Ibid para 17.

[205] Ibid para 18.

publication of the photographs on a website by a media organisation, even for sale, amounted to a proportionate exercise of freedom of expression. The ECtHR's answers to the photographers was not heralding.[206]

1.1.5. A Late Introduction: The Emerging Rhetoric of Cultural IP

A principal *raison d'être* of intellectual property has been said to be 'culture': intellectual property is a tool for supplying incentives for cultural production from literature to art and science. The word 'culture' in this sense denotes both artistic and scientific knowledge, the production of which is the express purpose of copyright and patent laws. This is the constitutionally mandated purpose of law in the US.[207] This influence of intellectual property law over culture is also captured in a major publication of the WIPO with respect of copyright.[208] As Arpad Bogsch, a former Director General of the WIPO, writes in *Guide to the Berne Convention for the Protection of Literary and Artistic Works*:

> 'Copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of the national *cultural heritage* depends directly on the level of protection afforded to literary and artistic works. The higher the level, the greater

[206] See Chapter 3 section 3.3.2.

[207] See generally the U.S. Const., art. 1, §8, cl. 8, empowering Congress 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'

[208] See; WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva, 1978).

> the encouragement for authors to create; the greater the number of a country's intellectual creations, the higher its renown; the greater the number of productions in literature and the arts, the more numerous their auxiliaries in the book, record and entertainment industries; and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and *cultural* development.'[209]

The WIPO has chosen culture as its central theme for World Intellectual Property Day in 2016, adopting the title '*Digital Creativity: Culture Reimagined*' for 'exploring the future of *culture* in the digital age: how we create it, how we access it, how we finance it'.[210] Similarly, in a strategic document published by the European Commission in 2011, it is further emphasised that intellectual property 'has an essential role to play in the quality of daily life by fostering *cultural* diversity'.[211]

In scholarly literature, James Boyle has put forward a 'cultural environmentalism' paradigm to challenge the privatisation of our intellectual

[209] Ibid 3 (emphasis added).

[210] Emphasis added. See the WIPO's thematic webpage for the World Intellectual Property Day, 26 April 2016, 'Digital Creativity: Culture Reimagined', available online at http://www.wipo.int/ip-outreach/en/ipday/#videos.

[211] Communication from the Commission, 'A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe', Brussels, 24 May 2011, COM (2011) 287 final, p. 3 (emphasis added).

commons.[212] Lawrence Lessig has emphasised the importance of 'free culture'.[213] Yochai Benkler has also shown how production methods premised on intellectual commons provide more opportunities for participating in the creation of production.[214]

Yet the study of intellectual property still seems principally isolated from critical studies of culture, as if intellectual property and - in particular, copyright protection- had sprung, fully formed, independent of cultural forces. In effect, scholars, policy-makers and legislators pay little attention to what culture is and how this object of copyright law, culture itself is changing. How can a cultural critique be embedded within copyright law to elaborate critical processes of creative engagement and exchange that enrich our lives? From books, music, art, and film to videogames and software programmes, intellectual property, and particularly copyright, is one of the most important legal systems for regulating the production and dissemination of culture today. The economic vision mentioned in Introduction[215] by itself can provide only very narrow insights in relation to several contours of intellectual property laws. In order to understand the multidimensional implications of intellectual property, especially copyright's influence on and interrelationship with culture, it is necessary to integrate cultural theory with economic theory within the law itself. It is time to make this inquiry, since it is needed to know what vision of culture copyright law promotes.

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[212] James Boyle, 'Cultural Environmentalism and Beyond' (2007) 70 Law and Contemporary Problems 5–21.

[213] Lessig *(n 2)* 8.

[214] Yochai Benkler, *The Wealth of Networks How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

[215] See Introduction sections I.2.-I.6.

What, then, do the four cases tell us about the critical cultural approach to intellectual property law? The international and national routes travelled by the Namibian women's '*Ubuntu*' in marula, Linda's '*Mbube*', Fairey's '*Hope Poster*' and Viewfinder's fashion photographs links north and south; east and west; past and present; medicine, song and photographs; intellectual property, culture and human development; and capabilities, empowerment and rights. These cases illustrate a number of important points. Firstly, they show that cultural context is not peculiar to just copyright but also patents. In conventional intellectual property discourse, culture is understood to be books, the fine arts - especially painting and music - and films. The Maruline case demonstrates that sometimes culture is associated with the (bio)technological and expressive value of traditional knowledge. A cultural approach to traditional knowledge comes together with the conventional approach to intellectual property at two points: As the Namibian example illustrate, intellectual property protection for traditional knowledge can create necessary incentives for the perseveration, cultivation and exchange of resources and knowledge.[216] Intellectual property protection further enables a cultural environment where a knowledge society begins to emerge.[217] The central question in many of these cases then becomes who should claim authorship and inventorship, and how much rightful is their claim, in these cultural creations and inventions. The European Patent Office (EPO) has admitted the inadequacy of existing resolutions and calls for the recognition of claims coming from the changing landscape of knowledge age. In *Scenarios for the Future,* a leading work exploring the critical issues that the office will confront in the near future, the EPO asks: '*As the rules of the global jungle take shape, who will survive? And for how*

[216] Sunder *(n 1)* 42.

[217] Ibid 43.

long?[218] The second important concern in relation to intellectual property's traditional-knowledge related cultural context is how to devise legal mechanisms to protect this cultural material heritage. In this sense, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is a further step which aims at sharing the benefits arising from the utilisation of genetic resources in a fair and equitable way.[219]

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[218] European Patent Office, *Scenarios for The Future: How Might IP Regimes Evolve By 2025? What Global Legitimacy Might Such Regimes Have?* (2007) 9 (emphasis in original). Madhavi Sunder argues that tradition knowledge should not be seen as an element of the public domain. See; Sunder *(n 1)* Chapter 6.

[219] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefi ts Arising from their Utilization to the Convention on Biological Diversity : Text and Annex / Secretariat of the Convention on Biological Diversity available online at https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf. Concerns about biopiracy in the field of patented inventions can be seen along similar lines. For instance, attempts by Western companies and institutions to patent the Indian staples turmeric, neem and basmati rice gave rise to denunciation from the developing world. See; Subramanya Sirish Tamvada, 'TRIPS and Human Rights: The Case of India' (2010) 2 Jindal Global Law Review 143-144. Another notorious case involves the hoodia cactus which has been used by indigenous people – notably the South African San people of Kalahari Desert – for generations as a remedy to suppress hunger and to give them energy when hunting or on long trips across their inhospitable land. 'Leveraging Economic Growth through Benefit Sharing Story' [WIPO Case Studies on Intellectual Property (IP Advantage)], available at http://www.wipo.int/ipadvantage/en/details.jsp?id=2594. A patent over the appetite-supressing element of the plant was eventually acquired by the global pharmaceutical company Pfizer to develop this element of the plant as an anti-obesity and diet drug to serve a market potentially worth billions. Ibid. See; Olufunmilayo Arewa, 'Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property' (2006), available at SSRN: http://ssrn.com/abstract=596921 or http://dx.doi.org/10.2139/ssrn.596921. Other examples of the failure of global intellectual property frameworks to protect traditional knowledge include a wide range

However, the protection of cultural heritage is not only related to traditional communities. In the contemporary world, modern cultures also have cultural heritage dimensions. According to Article 2(1) of obligations under the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, intangible cultural heritage means:

> 'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.'[220]

These old and new architectural styles of culture are further combined with the second point that can be drawn from the above-narrated four cases: that is, the production and dissemination of cultural knowledge need to be also construed through anthropological and contemporary cultural studies perspectives. In effect, culture conceived of anthropologically also involves a range of socially transmitted human

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of medicinal products, cultural production and other materials, such as rosy periwinklet, the Ami Song of Joy, the arogyapaacha plant and the album Deep Forest. Ibid.

[220] The Convention for the Safeguarding of the Intangible Cultural Heritage Adopted on October 17, 2003 (Paris) [Hereinafter CSICH].

activities. So conceived, culture involves a style, or an overarching set of values or themes, shaping many of its components. Culture conceived in cultural studies involve new modes of cultural production and engagement where old and new actors converge, while new power relations are written that blur the line between who authors and consumes culture.

These four cases further show the intercultural dimensions of creativity, innovation and communication.[221] The cooperation established to produce Maruline by the Ubuntu process represents a unique and positive partnership that has set new standards for benefit-sharing among traditional knowledge holders and international companies. Linda created a timeless and popular song by mixing American jazz music with South African tunes of this time. The transformation of Linda's song into '*The Lion Sleeps Tonight'* is thus another example to show how intercultural communication can occur between south and north across the Atlantic especially in the field of music. Linda's song also supports Paul Gilroy's 'Black Atlantic'[222] thesis, denoting intercultural communication among the African diaspora in music. Fairey took Garcia's ordinary news photo from the digital world and convert it to a cultural phenomenon in the real world through the rapidly changing means of technological revolution, while the three American photographers, by adding their own interpretation, brought the reality of a fashion show to digital world. This show how digital lives are inextricably intertwined with the actual lives of modern individuals.

Lastly, these four cases show the interfaces between human development, freedoms and intellectual property, an issue which is further elaborated in this and the following chapters. To some extent, the cases of Namibian women, Linda, Fairey and

[221] Sunder *(n 1)* 83.

[222] Paul Gilroy, Black Atlantic: Modernity and Double-Consciousness (Harvard University Press, 1995).

Viewfinder delineate the interfaces among intellectual property rights and other freedoms. With the R&D, intellectual property protection and commercialisation of Maruline, the marula tree has become an even more important part of the lives of tens of thousands of rural producers in Namibia, their families and communities. Current and future intellectual property strategies translate into economic benefits for cooperatives such as EWC, which increase access to education and healthcare, raise living standards and stimulate the development of rural communities.[223] Patent related to Namibian farmer's knowledge becomes a basis for livelihood, conservation, learning and social networking. In this way, a knowledge society emerges. Developing countries as well try to thrive as knowledge societies through which all people have the capabilities to participate in the production and dissemination of knowledge, while maintaining a decent livelihood. The denial of Linda's remuneration for his contribution to our culture in turn precluded him and his family from having the capabilities to access life-saving medicines.[224] Fairey, if not affected economically, had to make a deal to renounce his artistic, creative and political expressive freedoms as well as freedoms to participate in cultural and political life and the decision-making that relates to it by building a political standing through his creative cultural image. Three American photographers were no different in forgoing their artistic and creative expressions, but the followers of their website also lost their capabilities to access to culture and knowledge.

As previously mentioned, current intellectual property law has an economic-oriented model that shapes its cultural and development policies.[225] Current law has

[223] 'A Tree and Traditional Knowledge: A Recipe for Development' *(n 183)*.

[224] Sunder *(n 1)* 83.

[225] See Introduction.

heavily skewed the protection of corporate intellectual property ownership rather than individual authorship. Intellectual properties are said be essential asset and investment in firms' portfolios, which give them incentives to reap a microeconomic advantage in their business market. They are also seen as an important component of macroeconomic development of a country. This chapter fundamentally question copyright law's contemporary model: culture and economic development. Thus, this chapter introduces a deeper inquiry about this model revolving around these questions: What is culture? How does copyright law envision culture? How do individuals participate in producing culture? Who owns the power in cultural production?

The first section of this chapter therefore moves beyond conventional conceptions to open up a fresh approach to thinking about the value and meaning of culture in copyright law. Yet this section is not constructed around the denial of the economic dimension of culture. Instead, despite the entanglement of meanings, this section introduces two common conceptions of culture, one anthropological and one philosophical: culture as tradition and culture as commodity. In addition to these two dominant understandings of culture, the new concept of participatory culture is also examined. Confronted with a complex, fluid, widespread and polymorphic phenomenon, this conceptual introduction offers not a complete definition of culture in copyright law, but rather an identification of different dimensions of culture. Given the vast terrain of interconnections between intellectual property and culture, this analysis is mostly restricted to copyright, a limitation principally maintained throughout the entire thesis. Another limitation derives from a political and pragmatic choice. Since the current issues surrounding traditional knowledge deserve a comprehensive examination on their own, which go beyond the scope of this chapter, they are omitted.

It additionally questions where copyright is situated in these different domains of culture. And which dimension of culture is left out in the current legal formation of copyright? Taking culture into account will help us to better locate individuals within their social context, where their choices can actually have a meaning; it will help us to bring into question forms of action. This chapter is for a rediscovery of culture for current and future copyright policies and perspectives.

1.2. The Ambiguity of Culture

Complex and polysemous, the concept of culture is not reducible to any single definition, especially when it is envisaged within the wide diversity of policy choices at a global level. A return to the etymological sources of the term culture confirms the ambiguity of its significations and its multiple paradoxes.[226] In fact, in the 1950s, anthropologists Clyde Kluckhohn and Alfred Kroeber identified over 150 definitions of culture.[227] Raymond Williams, one of the prominent founders of cultural studies in the UK, calls culture 'one of the two or three most complicated words in the English language.'[228] Williams suggests three broad definitions: (1) culture refers to 'a general process of intellectual, spiritual and aesthetic development',[229] (2) culture also

[226] For an etymological inquiry see; Céline Romainville, 'Introduction: The Multidimensionality of Cultural Policies Tested by European Law', in Céline Romainville (ed), *European Law and Cultural Policies / Droit Européen et Politiques Culturelles* (Peter Lang SA, 2015) 19–20 (noting that 'the Latin term 'cultura' does not have an equivalent in the Greek world. Roman in origin, it comes from the term 'colere,' which signifies 'to live somewhere,' 'to cultivate' or even 'honour.').

[227] See Alfred L Kroeber and Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Papers of the Peabody Museum of American Archaeology & Ethnology, Harvard University, 1952).

[228] Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Fontana Press, 1988) 87.

[229] Ibid 90.

may suggest 'a particular way of life, whether of a people, a period or a group',[230] (3) culture can be used to refer to 'the works and practices of intellectual and especially artistic activity.'[231] How much do current social studies and particularly law mirrors Williams's definitions?

1.2.1. Culture as Tradition

Before discussing how intellectual property law conceives culture, it is necessary to begin with some common conceptions of it: culture as tradition and culture as commodity. For more than a century, the leading anthropological conception of culture was defined as a static tradition. The first anthropological definition of culture is attributed to Edward B. Tylor. In 1871, Tylor delineated culture as a 'complex whole which […] includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'[232] In 1966, Edward T. Hall wrote, '[N]o matter how hard a man tries it is impossible for him to divest himself of his own culture, for it has penetrated to the roots of his nervous system and

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[230] Ibid.

[231] Ibid.

[232] Edward B. Tylor, 'Primitive Culture' in Paul Bohannan and Mark Glazer (eds), *High Points in Anthropology* (2nd edn, 1988) 6. Other anthropologists followed Tylor's conception of culture in the twentieth century. Bronislaw Malinowski defined culture as 'inherited artifacts, goods, technical processes, ideas, habits, and values.' See; Bronislaw Malinowski, 'Culture' in Encyclopedia of the Social Sciences 4:621 (1931). Ruth Benedict described culture as 'learned behaviour' passed down from generation to generation. See; Ruth Benedict, *Race: Science and Politics* (Viking Press, 1959) 13. Margaret Mead called culture 'the whole complex of traditional behavior which has been developed by the human race and is successively learned by each generation.' See; Margaret Mead, *Cooperation and Competition Among Primitive Peoples* (McGraw-Hill Higher Education, 1937) 17.

determines how he perceives the world.'[233] Culture conceptualised as tradition was handed down from above, repeatedly recreated from generation to generation. In this view, it is antique, fixed, singular and transferable.[234]

Modern scholars challenged the unitary model of the idea of culture as tradition. These intellectuals especially observed that cultural groups were diverse, interacted with other cultures and were in flux.[235] Anthropologists like Renato Rosaldo highlighted that cultures are in fact intimately connected by diverse layers such as class, race, gender and sexuality.[236] Clifford Geertz, another highly influential anthropologist, emphasised the pivotal role communication and meaning-making play in understanding culture. In his widely cited book, *Interpretation of Culture*, Geertz proposed that culture 'denotes an historically transmitted pattern of meaning embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men [and women] communicate, perpetuate and develop their knowledge about and attitudes towards life.'[237] Culture, then, from a modern anthropological perspective, is *a system of shared meanings* that are handed down from generation to generation through symbols that enable individuals to communicate, maintain, and develop an understanding of life.[238] In short, culture enables us to make sense of, express, and give meaning to our lives. At the core of this definition is the notion of *constant change* and *meaning-making*. According to this view, culture is made, not

[233] Edward T. Hall, *The Hidden Dimension* (Doubleday, 1966) 177.

[234] Sunder *(n 1)* 50.

[235] Ibid 50.

[236] Renato Rosaldo, *Culture & Truth: The Remaking of Social Analysis* (Beacon, 1993).

[237] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 89.

[238] Kathryn Sorrells, *Intercultural Communication* (2nd edn, Sage Publications, 2016) 5.

found, and culture-making is a continuous, dynamic process. Therefore, cultural theorists today view culture as socially constructed webs of shared meaning.

Sharing is crucial for not just creating new artefacts but also for creating a shared meaning that holds us together. The beauty of '*The Lion Sleeps Tonight*' is that it is a song that the whole world knows. Fairey's 'Hope Poster' created a symbolic, yet shared zone among American people, who had similar concerns about their future. The press function of three American photographers' website featuring their photographs, through the facilitating environment of the Internet, enables its users to share and curate their own fashion photographs, which is an important element of contributing cultural life.

1.2.2. Culture as Commodity

Another dominant approach views culture as a commodity. In his influential work *The Structural Transformation of the Public Sphere*, Jürgen Habermas pictures the emergence of the liberal bourgeois public sphere in the late eighteenth and early nineteenth centuries during the era of the Enlightenment. What Habermas calls 'the public sphere' consists of the places and spaces where private individuals assembled to debate publicly the daily affairs of their own societies. Critical and rational debate took place in certain social circles and sites such as salons, coffee houses, pamphlets and journals, where public opinion was freely formed. For Habermas, the Enlightenment did not simply enable public access to cultural knowledge in the form of text, but also allowed truly democratic participation in cultural debates about the meaning of these works. Habermas' depiction of the public sphere in the Enlightenment era was conceptually distinct from state and market; it was a site for production and circulation of discourse that could in principle critique the state, a scene

for debating and deliberating rather than economically trading.[239] Despite this free environment of public debate, participation in discourse-making was partial and constituted by a number of significant exclusions along axes of class, race, and gender as well as being premised upon distinctions of public and private that served male bourgeois interests and helped to consolidate bourgeois power.[240]

Nevertheless, Habermas, in the second half his book, recounts an ironic decline of this Enlightenment culture of rational and critical debate. Two parallel developments, namely the rise of the mass media and the introduction of leisure for a bourgeois middle class, transformed the participatory culture of the Enlightenment era, where citizens freely debated and generated meaning, into culture consumption.[241] Culture, by the end of the twentieth century, Habermas believes, had morphed into static commodities transferred to the masses with little if any opportunity to meaningfully engage with the imposed culture. The mass public of culture consumers succeeded the reading public that critically debated the issues of their culture.[242] Debate evolved into 'a canned commodity' for consumption and for enjoyment as entertainment and leisure rather than as political engagement of the people.[243] Mass media secured power and cultural authority in the name of making knowledge accessible to the public. The separation between cultural elites – writers, artists, big

[239] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25/26 Social Text 57.

[240] Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, 1998) 253.

[241] Habermas *(n 145)* 160–68.

[242] Ibid 168.

[243] Sunder *(n 1)* 52.

media companies – and the general public was intensified. As Habermas underscores, 'the public is split apart into minorities of specialists who put their reason to use nonpublicly and the great mass of consumers whose receptiveness is public but uncritical'.[244] Intellectual property rights, especially copyright, further protected and strengthened the creative elite. Thus, the public sphere was converted into a private market where these cultural elites could impose autocratic cultural control.[245]

1.2.3. Contemporary Features of Culture

1.2.3.1. *'Participatory Culture'*

Today Foucault's famous 'author function'[246] falters. The 'idle spectator'[247] of the twentieth-century he describes, claims a stronger place in culture-making. Culture is no more commodity, no more tradition only. At the beginning of the twenty-first century, a new phenomenon is dethroning the conventional conceptions of culture as tradition and commodity. These century-old conceptions view culture as something that is given and passively consumed. Today, as culture is more modernised and more options are provided for people through technology and liberalisation, culture is becoming more a sphere of conscious choice.[248] Culture in the twenty-first century is more 'participatory' than previously. In this new era, the audience not only passively

[244] Habermas *(n 145)* 175.

[245] Sunder *(n 1)* 53.

[246] Michel Foucault, 'What is an Author?' Trans. Donald F. Bouchard and Sherry Simon in Donald F. Bouchard (ed), *Language, Counter-Memory, Practice* (Cornell University Press, 1977) 113-18.

[247] Michel Foucault, 'What is Enlightenment?' in P. Rabinow (ed), *The Foucault Reader* (Pantheon Books, 1984) 32-50.

[248] Appadurai *(n 118)* 18.

consumes culture but also actively takes a role in the production, dissemination and interpretation of that culture. Henry Jenkins describes this new phenomenon as 'participatory culture' in his seminal work *Textual Poachers: Television Fans and Participatory Culture.*[249] He has developed the term over time in his subsequent works, *Convergence Culture*[250] and *Spreadable Media*.[251] He points out that '[a] participatory culture is a culture with relatively low barriers to artistic expression and civic engagement, strong support for creating and sharing creations, and some type of informal mentorship whereby experienced participants pass along knowledge to novices. In a participatory culture, members also believe their contributions matter and feel some degree of social connection with one another.'[252]

Following in Jenkins' footsteps, Madhavi Sunder observes that 'the cultural authority is yielding to a more dialogic process, in which ordinary individuals have the power and claim the authority to produce knowledge of the world, from journalism to music, art, and science.'[253] Indeed, the contemporary technological media allows many people to communicate with others simultaneously.[254] Content stored in digital form can be far more easily manipulated than content in analog form.[255] Digital video

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[249] Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (Routledge, 1992).

[250] Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (NYU Press, 2008).

[251] Henry Jenkins, Sam Ford and Joshua Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture (Postmillennial Pop)* (NYU Press, 2013).

[252] Henry Jenkins with Ravi Purushotma, Margaret Weigel, Katie Clinton, and Alice J. Robison, *Confronting the Challenges of Participatory Culture Media Education for the 21st Century* (MIT Press, 2009) 5-6; Jenkins, Ito, and Boyd *(n 146)* 4.

[253] Sunder *(n 1)* 8.

[254] Sunder *(n 1)* 58.

[255] Sunder *(n 1)* 59.

cameras, authoring software, peer-to-peer networks, YouTube, podcasts, torrents, blogs, music streaming platforms, Wikis and social networks are new circles in the digital world where individuals create, share ideas, participate and enjoy culture.[256] As Jean Burgess and Joshua Green, authors of a recent study on YouTube, note, '[c]onsumption is no longer necessarily seen as the end point in an economic chain of production but as a dynamic site of innovation and growth in itself.'[257]

1.2.3.2. 'Converging Culture'

While the participatory culture is a trend originating from the audience's desire to be creative and social, the old media and participatory new media are converging as well. 'Convergence culture' emerges 'where old and new media collide, where grassroots and corporate media intersect, where the power of the media producer and the power of the media consumer interact in unpredictable ways.'[258] It is a space of struggle and negotiation within the bigger edifice of popular culture. It cannot be explained and understood as something imposed top–down or as something spontaneously emerging from the 'bottom'; it is a complex and contradictory sets of both forces.[259] The British science fiction television series *'Doctor* Who', as Neil Perryman shows, is a significant example of convergence culture. The BBC has made the programme available across a range of different platforms: phones, podcasts, video blogs, websites, interactive red-button adventures and games. In addition, it has

[256] Sunder *(n 1)* 59-61.

[257] Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Polity, 2009) 43.

[258] Jenkins *(n 250)* 2.

[259] Ibid 18.

launched two complementary series that take characters into other contexts. In this way, the BBC has invited the programme's fans to 'create their own superhero,' or to develop their own storyline to share with the show's creators and with other fans on its website.[260] This convergence of media is also known as transmedia storytelling. Henry Jenkins views it as 'a new aesthetic that has emerged in response to media convergence, where audiences act as 'hunters and gatherers, chasing down bits of the story across media channels' participatory process that can potentially result in a 'richer entertainment experience.'[261]

As more groups assert control over the processes of cultural production and circulation, participatory culture becomes a means of challenging oppressive cultural constraints that negatively affect both individual liberty and social status. Yochai Benkler claims that the effect of expanded media participation is a more self-reflective and critical public, which ultimately encourages a deeper understanding and appreciation of culture and the systems that facilitate its construction.[262] Sustained through these critical reflections, participatory culture reshapes the economic and political relationships of cultural exchange by altering expectations about social, emotional, and moral investments in society. As Stuart Hall writes, '[p]opular culture is one of the sites where this struggle for and against a culture of the powerful is

[260] Neil Perryman 'Doctor Who and the Convergence of Media: A Case Study in Transmedia Storytelling' (2008) 14(1) Convergence 21-40.

[261] Jenkins *(n 250)* 20-21.

[262] Benkler *(n 214)* 15.

engaged…It is partly where hegemony arises, and where it is secured…That is why 'popular culture' matters.'[263]

1.2.3.3. 'Remix Culture'

Fuelled by these technological and social changes, 'participation' in the production of culture can be seen in a broad range of cultural spheres such as music, film, videogames and books. Patrik Wikström emphasises that 'the increased connectivity of the audience network combined with various kinds of music production tools enable 'non-professionals' to create, remix and publish content online.'[264] This development, combined with the audience's improved access to digital sounds and images online, has led to what is often called a 'remix culture.'[265] Remix culture is closely related to Jenkins's participatory culture, but stresses the phenomenon of consumers' sampling and borrowing pieces from existing popular culture to create new meanings and new artefacts. In the music world, this kind of recycling is manifested in several ways, such as '*plunderphonics*' - musical works solely made out of samples of existing recordings-, '*mash-ups*' - musical works made by remixing instrumental sound from one song with the vocals from another-, '*anime music videos*' - short clips from Japanese anime movies, where the characters' lip movements are synched with the lyrics of the song-, '*slash music videos*' – clips containing homoerotic stories in which characters, a popular example of which is the Star Trek characters, Mr Spock and

[263] Stuart Hall, 'Notes on Deconstructing 'the Popular'' in John Storey (ed)*, Cultural Theory and Popular Culture: A Reader* (4th edn, Routledge, 2009), 518.

[264] Patrik Wikström, *The Music Industry: Music in the Cloud* (2nd edn, Polity Press, 2014) 21.

[265] Don Tapscott and Anthony D. Williams, *How Mass Collaboration Changes Everything* (Penguin, 2006) 137.

Captain Kirk, from one narrative are transformed into new meanings by remixing the right sounds with the right images.[266] Some professional artists have also used some of these techniques and created works that have reached a relatively respectable level of recognition. Beyoncé is one of the leading stars who has embraced the participatory culture. Her hit song, '*Single Ladies (Put a Ring on It)',* has inspired hundreds of fans to post themselves dancing to the song on YouTube, when she invited them to create their own versions of that song. In 2004, a disc jockey named Dangermouse mashed up the Beatles' '*White Album*' and hip-hop artist Jay-Z's '*Black Album*' to create the award-winning '*Grey Album*'.[267] The industrial rock megastar Trent Reznor, aka Nine Inch Nails, provided tools and building blocks to his fans and encouraged them to rip, mix, and burn their own tunes with his seventh studio project , '*Ghosts I–IV',* developing their own songs and remixes, while the rock band Radiohead did the same with their album called '*Rainbows*'.[268] Music fans also make their own music videos to their favourite song to express how the song makes them feel.

1.2.3.4. *'Countdown'* in Dance Culture

In the autumn 2011, the Afro-American pop star Beyoncé released a music video for her single *'Countdown'.*[269] In the video, Beyoncé appears in a series of quick

[266] Wikström *(n 264)* 224-227.

[267] Ibid 225.

[268] Ibid 161-163. Wikström writes that the London-based singer and songwriter Imogen Heap 'regularly published a video blog in which she discussed the development of her musical ideas during the production of her latest album '*Ellipse*'. Eventually she published 40 video episodes on YouTube during the two years the album was in production. In each episode she played pieces of her music, explained her thinking and asked for feedback'. Ibid 250.

[269] The video is available at http://www.beyonce.com/album/4/?media_view=video.

edits, sometimes in close-up, sometimes in split screens, sometimes in long and medium shots with a small group of backup dancers. The video is filled with several references to icons of the 1950s, '60s, and '70s, including Audrey Hepburn, Andy Warhol, and Diana Ross. However, as some were quick to notice, much of the dance vocabulary in the video, as well as some of the *mise-en-scène* and camera shots, bore a resemblance to two works by the Belgian choreographer Anne Teresa De Keersmaeker (the Belgian choreographer and major figure in contemporary dance): '*Rosas danst Rosas'*, from 1983, and '*Achterland'*, from 1990.[270] The *Rosas danst Rosas* choreography was filmed by filmmaker Thierry De Mey in 1996. De Keersmaeker issued a statement accusing Beyoncé of plagiarism and threatened legal action against Sony, Beyoncé's music label.[271] In a further statement, she mentioned that she saw a clip on YouTube, where schoolgirls in Flanders are dancing Rosas danst Rosas to the music of Like a Virgin by Madonna, which made her think about the influence of the global pop culture on the art she makes: 'does this mean that thirty years is the time that it takes to recycle non-mainstream experimental performance?' she asked.[272]

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[270] Anthea Kraut, *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance* (OUP, 2015) 263.

[271] James C McKinley Jr., 'Beyoncé Accused of Plagiarism over Video' *New York Times* (October 10, 2011) available at http://artsbeat.blogs.nytimes.com/2011/10/10/beyonce-accused-of-plagiarism-over-video/?_r=0. See also, Judith Mackrell, 'Beyoncé, De Keersmaeker – and A Dance Reinvented by Everyone' *Guardian* (9 October 2013) available at http://www.theguardian.com/stage/2013/oct/09/beyonce-de-keersmaeker-technology-dance.

[272] For her full statement see; http://theperformanceclub.org/2011/10/anne-teresa-de-keersmaeker-responds-to-beyonce-video/.

However, instead of suing the pop diva and her production company for copyright infringement, in June 2013 De Keersmaeker launched '*Re: Rosas! The fABULEUS Rosas Remix Project*'. In an echo of Beyoncé's 'Single Ladies' video contest,[273] De Keersmaeker turned to the Internet to call to the public to learn the *Rosas* choreography and upload videos of themselves performing it. Through teaching her audience the choreographical components of her work, she allowed them to submit their own versions of '*Rosas danst Rosas'*. Since then, hundreds of people have uploaded their video clips onto the project's website and have reinvented this contemporary dance work as a participatory community all around the world.[274]

This re-embodiment of contemporary art work has not just change racialised[275] relationships in the niche world of dance. It has also invited modern

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[273] In February 2009, Beyoncé announced the launch of a "Single Ladies" Dance Video Contest. Fans aged eighteen and older were invited to adhere precisely to the dance routine performed by Beyoncé and her two dancers in the original production. See Beyoncé Announces Official 'Single Ladies' Dance Video Contest Feb 23, 2009, available online at http://www.prnewswire.com/news-releases/beyonce-announces-official-single-ladies-dance-video-contest-65757482.html.

[274] For the project's website see; http://www.rosasdanstrosas.be/en-home/.

[275] Beyoncé's re-embodiment of De Keersmaker's choreography thus represents a clash between avant-garde culture versus popular culture—and a corresponding clash between different types of capital—artistic versus economic. Anthea Kraut argues that Beyoncé's '*Countdown*' reverses 'the legacy of an equation between whiteness and property ownership [that] has shaped dancers' engagement with copyright in meaningful ways'. She notes that: 'the story of choreographic copyright has time and again demonstrated both the privilege whites hold to "use and enjoy" and take credit for movement material generated by black and brown dancers and the obstacles facing black and brown dancers who have sought to occupy the terrain of possessive individualism. Beyoncé's choreographic actions in "Countdown"—turning the white avant-garde into fodder for her own cultural production—flip the script that has long authorized white artists to take from non-white and "high art" to borrow from

individuals in great numbers to take part in this cultural transformation, while embodying their own versions of a dance work.

1.2.3.5. Blogosphere Culture

Participatory community also contributes to the cultural production in the blogosphere. Thousands of blogs comment on the latest developments of the Game of Thrones or the Star Wars. 'The best blogs tells stories' notes Jill Walker Rettberg in his book, *Blogging*.[276] Understanding the power of story-telling, teenagers write and publish their fan fictions based on Harry Potter or Buffy the Vampire Slayer, converting the characters into new, and at times controversial, 'superheroes' of their own narratives[277] sometimes to tacitly challenge the current male-oriented characterisation of protagonists in fiction[278] or to create their own culturally close heroes and heroines.[279]

1.2.3.6. Culture as a Site of Human Development

Today, in the context of globalisation, the understanding and practice of culture is complex, located at the nexus of economic and social justice agendas. In this sense, there is a growing recognition that culture plays a critical role in human

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"low."' Kraut *(n 270)* 264. On racial connections between copyright protection and choreography also see; Caroline Joan S. Picart, *Critical Race Theory and Copyright in American Dance: Whiteness as Status Property* (Palgrave Macmillan, 2013).

[276] Jill Walker Rettberg, *Blogging* (2nd edn, Polity Press, 2014) 115.

[277] Sunder *(n 1)* 33, 68.

[278] Sunder *(n 1)* 113.

[279] Sunder *(n 1)* 134.

development and global justice. Key components of human development include the production and just distribution of essential cultural goods, from medicines to biotechnology to educational materials, art, and literature. All of these are vital to human flourishing. They also have a direct relation to what Nussbaum calls 'central human capabilities,' from the capability to live 'a human life of normal length,' to 'being able to use the senses, to imagine, think, and reason … in a 'truly human' way … cultivated by adequate education.'[280]

The cultural sphere then is a site for the expansion of human capabilities, in particular for countries' ability to meet the UN Millennium Development Goals - which include the eradication of global poverty, universal education, gender equality, child and maternal health, progress in fighting HIV/AIDS, and environmental sustainability- and the Sustainable Development Goals[281] – which cover more ground and address inequalities, economic growth, decent jobs, cities and human settlements, industrialisation, oceans, ecosystems, energy, climate change, sustainable consumption and production, plus peace and justice. Indeed, culture is crucial to the way we view, experience, and engage with all aspects of our lives and the world around us. It is shaped by the historical, political and social contexts in which we live. It is located at the interface of the three codes of law, politics and aesthetics. It is, in a cruder term, the representational space of the social.i[282] To promote 'development as

[280] Nussbaum *(n 119)* 33.

[281] Transforming Our World: The 2030 Agenda for Sustainable Development (UNGA Resolution A/RES/70/1, 25 September 2015).

[282] Joshua Clover, 'Ambiguity and Theft' in Kembrew McLeod and Rudolf Kuenzli (eds), *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law* (Duke University Press, 2011) 86.

freedom',[283] in Amartya Sen's parlance, intellectual property law cannot be detached from the considerations of fostering people's capabilities to participate in cultural production.

Additionally, it is essential to recognise that cultural production is both an end in itself and a means of development. In other words, culture, with all its interconnections to law, aesthetics and politics, is a space where we sow the seeds of our own capabilities for development and harvest its fruits as freedoms for further development. As the Namibian case at the beginning of this chapter illustrates, appropriate protection of traditional knowledge through intellectual property rights could potentially direct significant revenues into these countries. Linda's remuneration would have given him and his family a decent and healthy life. Fairey's artistic expression helped American citizens change their political destinies through cultural communication. The fine that was imposed on three American photographers by the French courts was enough to cease their capabilities to contribute cultural debate. Sen underlines that 'cultural liberty is important not only in the cultural sphere, but in the successes and failures in social, political, and economic spheres. The different dimensions of human life have strong interrelations.'[284] Thus, as Sunder persuasively argues, '*working through culture*' is conducive to provide means of economic development for these neglected societies, while supplying recognition and remuneration for their meaningful cultural production.[285]

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[283] See; Sen *(n 132) Development as Freedom*.

[284] Amartya K. Sen, 'Cultural Liberty and Human Development' in United Nations Development Programme (UNDR), *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (2004) 13.

[285] Sunder *(n 1)* 10, 137-144.

1.2.3.7. ‘Democratic’ Culture

Another dimension of culture is ‘democracy’. The contribution of culture oftentimes targets the democratic training of citizens, but also to the creation and functioning of a vigorous public sphere and debate.[286] This dimension is closely connected to the hermeneutic conception of culture, which refers to the particularity of the work operated by culture on meaning of social and human experiences.[287] In this sense, culture is what form and gives meaning to the human experience: information, knowledge, understanding and expression. Because it engages specifically with searching for meaning, culture has a critical value for any democratic regime. It emerges as a layer of the socio-cultural conditions necessary for the establishment and functioning of a democracy and for the creation and vitality of the public debate. For democratic theorists, the importance of inclusion of citizens in the public sphere is primordial for the constitution and functioning of a vigorous democratic debate. Democracy is considered as the result of a public sphere for discussion, in which the diversity of opinions can be expressed, the collective will is constructed, and dialogue on the principles of equality and autonomy is articulated. Yet, the cultural public sphere can lead to seeing things differently, make visible different options for the creation and functioning of the modern economic, social and cultural system, and allow for a discussion on the possible alternatives.[288] As Sunder eloquently puts:

[286] Jürgen Habermas, *The Crisis of the European Union. A Response* (Polity Press, 2012) 48-70.

[287] Romainville *(n 226)* 26.

[288] Ibid.

> ‘This important point—that simply having the capacity to have a say in political affairs empowers individuals to make their voices heard—applies equally well to children and adults. Today even if individuals are not blogging, they may still be more likely to produce some political content—even if that simply means posting comments on citizen blogs and traditional media sources, which increasingly invite and air emailed questions and “Tweets.” At this juncture, actual participation by the masses may be less significant than the widespread knowledge of the potential to contribute, which may be empowering enough and threatening to traditional cultural and political authority.’[289]

The link between cultural participation and political and civic engagement has been more systematically studied in the US with important research carried out for the National Endowment for the Arts (NEA). The 2008 Survey of Public Participation in the Arts found a ’sizeable overlap in populations that attend arts events and do other kinds of civic and social activities.’[290] Another important NEA analysis is Art-Goers in their Communities: Patterns of Civic and Social Engagement, which showed that arts participants were involved in civic activities at a much higher rate than those who did not participate. The difference in levels of civic engagement was even greater for those who themselves created or performed art, as opposed to simply attending.[291] There is therefore a growing body of evidence, mostly from the US, to support the claim that arts and cultural participation is associated with civic

[289] Sunder *(n 1) 72.*

[290] National Endowment for the Arts 2009 28.

[291] National Endowment for the Arts, 2009b 6 -11.

engagement. Fairey's work, surging an enormous attention at the 2008 election, is a quintessential example of culture and democracy relationship.

1.3. Culture within the Current IP Discourse

From a more legal perspective, in UNESCO's seminal publication *Cultural Rights and Wrongs*,[292] Rodolfo Stavenhagen suggests at least three different conceptions of culture that are implied in the practice of international and intellectual property law. These definitions are strikingly similar to those described by Raymond Williams. The first of Stavenhagen's three underlying conceptions of culture is culture as 'capital'.[293] This view conceives of culture as "the accumulated material heritage of humankind in its entirety, or of particular human groups, including monuments and artefacts."[294] It also connotes Habermas's depiction of culture as a commodity. This understanding is most compatible with free trade markets. For example, in the context of globalisation, culture, in the form of symbolic goods such as TV shows, movies, music, and etc., is increasingly a 'capital' resource for economic growth in global trade. Culture interpreted as 'capital' is envisioned as 'a purely quantitative process'[295] of the publication of more books, making more films and songs, designing numerous software programmes and videogames, and wider circulation of media content, such

[292] Halina Niec (ed), *Cultural Rights and Wrongs* (UNESCO, 1998).

[293] Rodolfo Stavenhagen, 'Cultural Rights: A Social Science Perspective' in Niec *(n 292)* 4. See also; A. Yupsanis, 'The Concept and Categories of Cultural Rights in International Law – Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties' (2010) 37 Syracuse Journal of International Law and Commerce 219.

[294] Stavenhagen *(n 293)* 4.

[295] Ibid.

as TV shows etc. The increase in the number of cultural products and services is at times regarded as the same as the cultural development.[296]

Stavenhagen second definition of culture is associated with 'creativity' and defined as the 'process of artistic and scientific creation.'[297] These two accounts – culture as capital and culture as creativity- represent two separate aspects of the traditional characterisation of culture in intellectual property law: The first constitutes the underlying regulatory objectives of some of the recent international intellectual property treaties.[298] The second resonates through 'Eurocentric and colonial assumptions —assumptions that undergird distinctions made between "high" culture (which is deemed genuinely creative and therefore protectable) and "low" culture (which is deemed not truly "original" and therefore in the public domain).'[299] In addition, just as significant to observe is the fact that especially the nature of copyright law, as can be seen in the succeeding sections, mimes the existing attitude of designation of authorship title (which happened in the past as elevating one rare individual an

[296] Ibid.

[297] Ibid.

[298] For instance, the Article 7 of the TRIPs Agreement reads:

> '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.'

(Emphasis added). The Trans-Pacific Partnership Agreement pronounces an identical commitment in its Article 18.2.

[299] Caroline Joan Picart, *Law in and as Culture: Intellectual Property, Minority Rights, and the Rights of Indigenous Peoples* (Fairleigh Dickinson University Press, 2016) 65.

authorial figure, or 'creator'— who forges something 'radically new' and 'original'[300]; but is now heavily skewed to protect the interests of corporations as opposed to individual authors[301]). In terms of cultural freedoms, the idea of culture as 'capital' locates the 'right to culture' around the binary between 'the right to own culture' and 'the equal right of access by individuals to . . . accumulated cultural capital' and can be viewed as an extension of the right to development.[302] In the second case, cultural rights are identified with this dichotomy: 'the rights of cultural creators'[303] as opposed to 'the right to participate in culture'.

Finally, Stavenhagen's third definition, of culture as a 'total way of life', is more anthropological.[304] In this third meaning, culture is defined as 'the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups.'[305] This description is perhaps the one most useful in protecting indigenous peoples' traditional knowledge and traditional cultural expressions as constitutive of an indivisible whole—that is, as 'a coherent self-contained system of values, and symbols as well as a set of practices that a specific

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[300] For critical academic commentaries on authorship see; Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'' (1984) 17(4) Eighteenth-Century Studies 425-448; Martha Woodmansee, 'On The Author Effect: Recovering Collectivity' (1992) 10 Cardozo Arts & Ent L J 279-292; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) Duke Law Journal 455-502.

[301] Mark A Lemley, 'Romantic Authorship and the Rhetoric of Property' (1997) 75 Texas Law Review 873, 882-888.

[302] Stavenhagen *(n 293)* 4.

[303] Ibid 5.

[304] Picart *(n 299)* 65.

[305] Stavenhagen *(n 293)* 5.

cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.'[306]

Rosemary Coombe embraces the same definitions as Stavenhagen and underscores certain tensions between the different definitions.[307] For example, the second description, culture as 'creativity', protects individual rights whereas the third description, culture as a 'total way of life', protects 'collective rights; even more significantly, how broadly one must draw the boundaries of the collective is vague'.[308] The consequential tension in definitional interpretations leads to conflicting policy choices, as Coombe puts:

> 'If culture is viewed as the sum total of a society's cultural capital, then "cultural development" may mean "more culture" in the sense of encouraging more creative activity, more cultural products, and thus more intellectual properties . . . However, if the right to culture is understood as the right to "one's own culture" then cultural development may have a different meaning. Under the third understanding of culture, the right of a group to maintain its cultural integrity might take precedence over the rights of cultural creators in the wider society, and the group might choose to restrict access to and use of elements of its cultural heritage in the expressive and scientific work of others if doing

[306] Ibid 5.

[307] Rosemary J. Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' Indiana Journal of Global Legal Studies 6, no. 1 (Fall 1998) 73-74.

[308] Ibid 74.

> so was deemed necessary to preserve the group's identity. Certain exercises of these cultural rights and rights to cultural identity, however, might also be seen to restrict improperly freedom of expression and the free flow of information in the larger society and thus to violate significant political and civil rights.'[309]

Where do current intellectual property laws stand vis-a-vis Coombe's and Stavenhagen's definitions? Today, when intellectual property scholars and practitioners argue for intellectual property law to promote 'culture', it is generally based upon the commodity view of culture. In fact, the law protects incentives for big cultural elites, from Apple to Disney, from Universal Music to Microsoft, in order to produce cultural products for mass consumption. These global cultural producers are incentivised to educate and entertain the public, and in turn, current intellectual property law supports the prospect that the public should passively receive cultural products. Aesthetic production, Fredric Jameson reminds us, is now increasingly seen as commodity production.[310] In addition, we have witnessed new intellectual property laws that are designed to actively maintain the commodity view of culture, giving these cultural producers even greater exclusive control over their cultural products. Especially, in recent decades, we have seen the expansion of intellectual property laws on three fronts. Firstly, in addition to classical subject matter, databases, software, DNA sequencing, business methods, 3D shapes, geographical indications and, potentially, traditional knowledge are also covered (subject matter). Secondly,

[309] Ibid 74.

[310] Fredric Jameson, *Postmodernism, Or, The Cultural Logic of Late Capitalism* (Duke University Press, 1991), 4–5.

there has been a gradual extension of the period for which protection is granted (time). Thirdly, through international trade institutions and instruments, such as the WTO and the TRIPs Agreement, intellectual property rights have a global reach (space).[311] In the legal space, we have entered an era in which the commodity view of culture and the market-dominant view of a networked world have merged. Driven by this utilitarian rationale, intellectual property rights are constantly reformulated to give incentives for the production of more cultural goods. Culture, as understood in intellectual property law, is thus reduced to expressions confined to tangible media, which is circulated, sold, consumed, and protected solely by market-oriented legal standards. Broadly construed through this view, intellectual property laws attach various individual proprietary rights to knowledge-based productions and thus enable these to be exchanged as commodities. In this way, they provide the basis for investment in knowledge-based productions including software, films, logos, modes of manufacture, pharmaceutical formulae, music, scripts, and business plans. The law assumes that expressive and innovative goods would not be created without market-based incentives and reifies economic rationalism as a natural human trait. The law imagines the human subject as 'economic man or woman' where all dimensions of human life are explained in terms of market rationality. Thus, intellectual property law projects the idea that private control of resources fosters the most efficient distribution of these resources and aims at producing a larger pool of knowledge-based goods, namely a proliferation of products and services.[312] Because of the emphasis on economic utility and entrenched power structures, intellectual property law protects the incentives for

[311] Eva Hemmungs Wirten, 'Visualizing Copyrights, Seeing Hegemony: Toward a Meta-Critique of Intellectual Property' in McLeod and Kuenzli *(n 282)* 252.

[312] Coombe and Turcotte *(n 23)* 5.

particular cultural producers to produce cultural products for mass consumption, turning a process embedded with meaning and propelled by rapid technological advances into a fixed commodity. For this reason, intellectual property operates largely to protect investment in cultural capital. Nonetheless, how can it be possible to project light onto the broader dimensions of intellectual property through cultural understandings of creativity and innovation?

1.4. A Critique of Commodified Copyright

1.4.1. 'Free Culture' and 'Public Domain' Critiques

The cultural, political, and social implications of intellectual property rights are matters of growing concern. 'Overprotecting intellectual property is as harmful as underprotecting it,' wrote Federal Ninth Circuit Court of Appeals Judge Alex Kozinski more than twenty years ago, when he dissented in *White v Samsung Electronics America*.[313] 'Culture is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.'[314]

Within the scholarly critique of intellectual property, like Judge Kozinski's, one prominent argument against the current intellectual property laws' 'land grab' is that the exponential expansion and trenchant enforcement of intellectual property might endanger further creation and innovation. A maximalist intellectual property law, they argue, proves to be a poor innovation policy. Creativity and public domain are key

[313] *White v Samsung Electronics America,* 989 F 2d 1512, 1514 (9th Cir) (Kozinski, J., dissenting).

[314] Ibid.

concepts in resisting intellectual property hardliners.[315] The critics contend that the alternative to a deeply commodified world of invention and innovation, with hundreds of thousands of licensing markets, is a rich information and innovation commons, from which all can draw freely, supporting a thin and well-defined layer of intellectual property rights close to the ultimate commercially viable innovation. Lamenting the lack of overarching cultural policy principles able to balance the restrictions imposed by corporate intellectual property holders, the sceptics have founded initiatives such as Free and Open Source Software, Creative Commons, and the Access to Knowledge (A2K) movement[316] to establish processes of civil society cultural policy-making in the absence of decisive government political activity to better serve public needs for greater access to protected materials.

Pioneering public domain scholar James Boyle observes that just as the first enclosure of the commons and industrialisation had threatened our natural environment, this new expansionism in cyberspace and our cultural commons threaten to decimate our cultural landscape and impoverish our cultural heritage. Boyle articulates this critical insight in his book, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* around the contested concept of 'romantic

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[315] Boyle *(n 122)*; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (1st edn, Yale University Press, 2008); Lessig, *(n 2)*; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Academic, 2008); Kembrew McLeod, *Owning Culture: Authorship, Ownership and Intellectual Property Law* (Peter Lang Publishing, 2001); Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (University of Minnesota Press 2007); Kembrew McLeod and Rudolf Kuenzli *(n 282)*; Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York University Press, 2001).

[316] Kapzinscky *(n 31)*.

authorship': the idea that individuals and even corporations create out of nothing rather than borrow from a rich public domain of freely circulating sources and inspirations. He points to the conceit of 'romantic authorship' as the driving force behind the expansion of intellectual property: 'The author vision blinds us to the importance of the commons - to the importance of the raw material from which the information products are constructed.'[317] Boyle is also concerned about the morality of conferring legal protection to some members of society as authors, while leaving out others. He laments the distributive effects of such intellectual property laws as 'colossally unfair'[318] and boldly calls for 'a critical social theory of the information society'[319] which would consider a 'cultural environmentalism' paradigm to challenge the privatisation of our intellectual commons.[320]

In his influential book *Free Culture,* Lawrence Lessig, another prominent public domain advocate, worries about the metamorphosis of a culture where we will need permission to express ourselves if that speech requires using somebody else's words. He provides a more elaborate account of culture, where he thinks that law in the past used to distinguish between commercial and noncommercial culture: the 'commercial culture' means the 'part of culture that is produced and sold or produced to be sold'. The 'noncommercial culture' constitutes 'all the rest'.[321] Lessig notes that 'at the beginning of our history, and for just about the whole of our tradition, noncommercial culture was essentially unregulated…The focus of the law was on

[317] Boyle *(n 122)* xiv.

[318] Boyle *(n 122)* 142.

[319] Boyle *(n 122)* xiv.

[320] Boyle *(n 315)* 241.

[321] Lessig *(n 2)* 8.

commercial creativity…This rough divide between the free and the controlled (culture) has now been erased.'[322] The end result, according to Lessig's critique, is that the legal codes and technologic changes together are transforming our once 'free culture' into an increasingly 'permission culture.'[323] Lessig's account transcends innovation policy to consider the requirements of a free society. A free culture is not merely efficient; it is essential to a democratic society. Lessig acknowledges the importance of freedom to participate 'in culture and its growth.'[324]

1.4.2. Intertextuality

Both Lessig and Boyle offer a foundation for a critical cultural and social theory of the information society. Both reveal the equally important role of sources and audiences. They further show the idiosyncrasies and cultural bias in intellectual property law's allocation of authorship and protection. They also recognise the problem of rewarding a narrow group of contributions to the world's culture and science.

Indeed, supported by ample evidentiary examples, several scholars have shown that the dependency on others' works is inevitable in cultural production. Nobody finds inspiration in a vacuum. Pointing to this reality of *derivativeness*, the art historian Glenn Watkins exposes how much current postmodern art owes to its modernist past. In drawing a picture of twentieth-century music and arts, he points out that whether it is Cubism, Futurism, Dada, Surrealism or Pop Art, appropriation has sustained its centrality across the artistic movements in the 1960s, 1970s, 1980s and

[322] Lessig *(n 2)* 8 (Brackets are mine).

[323] Lessig *(n 2)* 8.

[324] Lessig *(n 2)* 94.

1990s.[325] In his book, *Pyramids at the Louvre,* Watkins reveals several intertextualities between the past and the present, between indigenous or folk artefacts and contemporary art compositions, between public domain and authored works, between cultures and between artists themselves, in addition to other many examples; especially in the music of Igor Stravinsky, Maurice Ravel, Claude Debussy and Darius Milhaud;[326] in the art of Pablo Picasso[327] and the Cubists;[328] in the anthologies of Nancy Cunard[329]; and in the performances of Josephine Baker.[330] One can find plenty of evidence of artistic and musical borrowing in the European classical and art-music tradition. Brahms's *First Symphony* borrowed musical expressions from Beethoven's *Ninth Symphony*. One can also distinguish elements of Beethoven's *Ninth Symphony* in Mendelssohn's *Lobgesang*, as well as in a great deal of Wagner's work. A major theme from Brahms's *First Symphony,* a reworking of Beethoven's tunes, also forced its way into the introduction to Mahler's *Third Symphony*.[331] In the contemporary music world, Paul Gilroy in his book, *The Black Atlantic,* argues that musicians who were part of the African diaspora not only emulated each other's musical ideas but also did so across geographic boundaries; music became one of the key vehicles of cultural exchange which was both multidirectional and dialogic. In fact, members of the African diaspora who were spread across the Atlantic regions of North and South America,

[325] Glenn Watkins, *Pyramids at the Louvre Music, Culture, and Collage from Stravinsky to the Postmodernists* (Harvard University Press, 1994) 2.

[326] See Watkins's almost every chapter.

[327] Ibid 72, 293-297.

[328] Ibid 229-274.

[329] Ibid 164-171.

[330] Ibid 134-139.

[331] McLeod and Kuenzli *(n 282)* 1.

Western Europe, and Africa have been listening to and responding to each other for years. This has become a norm in today's music. Similarly, in literature, as Kembrew McLeod and Rudolf Kuenzli write, 'collage was an essential method used to create literary works like T. S. Eliot's *The Waste Land*, Kathy Acker's *Blood and Guts in High School,* William Burroughs's *Naked Lunch,* James Joyce's *Ulysses*, and Marianne Moore's poetry.'[332] These examples demonstrate that borrowing and allusion, all forms of the fine arts practice of collage, have been at the centre of the very creation itself from the beginning of art-making. Thus, artists' appropriation of other artists' works is an integral and longstanding part of creative production.[333]

Apart from these aesthetical and historical assessments, how do courts perceive intertextuality? In the US, the courts have interpreted the concept of intertextuality through the 'fair use' doctrine. The relevant statutory provision sets out four factors to be considered in determining whether a particular use made of a protected work is fair.[334] Under the first factor, the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, is assessed. This involves whether the use is transformative in nature. Under the second factor, courts consider the nature of the copyright-protected work. Under the third factor, the amount and substantiality of the portion used is considered. Finally, the fourth factor requires consideration of the effect of the use on the potential market for or value of the copyright-protected work.[335] Unlike 'fair dealing' in the UK

[332] Ibid 1.

[333] Olufunmilayo B. Arewa, 'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2006) 84 North Carolina Law Review 550-52.

[334] US Copyright Act of 1976, s 107.

[335] Ibid.

discussed below, the applicability of the fair use doctrine is not confined to cases where the use of a copyright work has been made for specific enumerated purposes.

In the light of these formal requirements, the fair use doctrine has always protected commentary, criticism, and scholarly appropriation of copyrighted materials from claims of copyright infringement.[336] Since the Supreme Court's judgement in *Campbell v Acuff-Rose Music Inc*,[337] the fair use doctrine has protected parody as well. In *Campbell*, the rap group 2 Live Crew composed, recorded, and released commercially a song called 'Pretty Woman', which parodied Roy Orbison's rock ballad '*Oh, Pretty Woman*'. The Supreme Court held that 2 Live Crew's song fell within the doctrine of fair use. In relation to the first fair use factor, namely the purpose and character of the use, the court noted that 'parody has an obvious claim to transformative value'.[338]

Notwithstanding the '*Pretty Woman'* obiter for musical parodies, the ensuing US case law in music sampling has been far from drawing a definitive conclusion. In 1991, the ruling of the Southern District of New York in *Grand Upright Music, Ltd v Warner Bros Records Inc*[339] found that the use of a sample, consisting of three words and the accompanying music from the melody, from Gilbert O'Sullivan's '*Alone Again (Naturally)*' was wilful infringement of copyright on musical composition. The court granted a preliminary injunction and referred the case to the US Attorney for potential criminal prosecution. Subsequently, in 2002, unlike the District Court of New York, the

[336] *See* 17 U.S.C. § 107 (1976).

[337] 510 US 569 (1994).

[338] Ibid 579.

[339] *Grand Upright Music Ltd v Warner Bros Records Inc* 780 F Supp 182 (SDNY 1991).

Central District Court of California in *Newton v Diamond*[340] found that there was no copyright infringement when the Beastie Boys sampled a three-note sequence and one background note from a recording of the musical composition '*Choir*' created and performed by Newton for their song '*Pass the Mic*'. The court further held that the sample was neither a quantitatively nor a qualitatively substantial piece of Newton's composition, and therefore *de minimis*.

The question of whether music sampling infringes record companies' exclusive rights on sound recordings was addressed by the US Court of Appeals for the Sixth Circuit in *Bridgeport Music v Dimension Films.*[341] This case concerned N.W.A.'s song '*100 Miles and Runnin"*, which includes a two-second guitar sample from George Clinton's and Parliament Funkadelic's '*Get Off Your Ass and Jam*' which was pitched, looped and extended to a seven-second sequence and repeated several times. In contrast to the application of *de minimis* with regard to copyright on musical composition in *Newton v Diamond*, the Sixth Circuit held that sampling any section of sound recordings, regardless of their quantity or quality, might be regarded as copyright infringement. This judgement *de facto* refuses the application of the substantial similarity test or *de minimis* rule on reproductions of recordings.

The Bridgeport case has attracted criticism from commentators[342] and the US courts in subsequent sampling cases have departed from this rationale. In *VMG Salsoul LLC v Ciccone*,[343] for example, the Ninth Circuit had to decide whether a modified version of a 0.23-second horn segment in Madonna's song '*Vogue*' allegedly

[340] *Newton v Diamond* 204 F Supp 2d 1244, 1248–1256 (CD Cal 2002).

[341] 410 F 3d 792 (6th Cir 2005).

[342] See; McLeod and Kuenzli *(n 282)* 140-147.

[343] 824 F 3d 871.

copied from a song known as '*Love Break*' infringed the claimant's copyright on the sound recording. Contrary to the Sixth Circuit rule set forth in *Bridgeport*, the Ninth Circuit affirmed the district court's grant of summary judgment in favour of defendants Madonna, Pettibone and their associated record labels, music publishers and distributors on the grounds that the *de minimis* exception to copyright infringement applies to sound recordings, as well as to other types of copyrighted works.[344]

In modern art context, the Koons cases further exemplify judicial disparity in the interpretation of what constitutes fair use.[345] In the first case, *Rogers v Koons*, [346] the photographer Art Rogers sued Jeff Koons for his use of Rogers's photograph, '*Puppies*', to create a sculpture Koons entitled '*String of Puppies*'. The Second Circuit rejected Koons' contention that his sculpture was a satire or parody on contemporary society, because there was no critique of the underlying work that had been copied.[347] A few years later, the same court took a different position in *Blanch v Koons*.[348] Andrea Blanch, a fashion photographer, brought a lawsuit against Koons for using Blanch's photograph in one of his Easyfun-Ethereal paintings, '*Niagara'.* Koons took Blanch's photograph, Silk Sandals by Gucci, from an Allure magazine article about metallic cosmetics, extracted only the legs from the photograph, and after modifying superimposed them onto a pastoral landscape along with other images. Although

[344] Ibid 886-887. For a similar judgement see; *Saregama India Ltd v Mosley* 687 F Supp 2d 1325, 1326–1327 (SD Fla 2009).

[345] Willajeanne F. McLean, 'All 's not fair in art and war: A look at the fair use defense after Rogers v. Koons' (1993) 59 Brooklyn Law Review 373.

[346] 960 F 2d 301 (2d Cir 1992).

[347] Ibid 310.

[348] 467 F 3d 244 (2d Cir 2006)

Koons appropriated Blanch's image, the court by referring the Copyright Clause in the Constitution concluded that the use was fair.[349]

Out of the music and modern art context, a more notable example from the US case law in term of the construction of intertextuality concerns *The Wind Done Gone,* a best-selling novel by African American writer Alice Randall. Randall's novel retells the original story of Margaret Mitchell's *Gone with the Wind* from the viewpoint of the slaves on the plantation. In marked contrast to Mitchell's romantic depiction of pre-Civil War plantation life, Randall's story is interwoven with miscegenation and slaves' calculated manipulation of their masters, offering a pointed critique of the racial and societal views expressed in the Mitchell's novel. Mitchell's heirs, not happy with Randall's critique, brought a copyright infringement action against Randall's publisher. A Georgia district court preliminarily enjoined the novel's publication. In *Suntrust Bank v Houghton Mifflin,*[350] however, the Eleventh Circuit Court of Appeals later quashed the preliminary injunction.[351] The Court explained that Randall's work was a transformative parody of *Gone With the Wind*, not merely a sequel.[352] It held that by precluding public from learning Randall's 'viewpoint in the form of expression that she chose,' the trial court's order amounted to 'a prior restraint on speech,' and thus was 'at odds with the shared principles of the First Amendment and copyright law.'[353]

[349] Ibid 259.

[350] 268 F 3d (11th Cir 2001) 1257.

[351] Ibid.

[352] Ibid.

[353] Ibid. See; Barbara S. Murphy, 'The Wind Done Gone: Parody or Piracy? A Comment on Suntrust Bank v Houghton Mifflin Company' (2002) 19(2) Georgia State University Law Review 576-577.

Despite the importance of the case law recognising the intertextuality between different copyright works as lawful, one cannot conclude with certainty that which changes to these works would necessarily constitute fair use. Thus, potential users should be extremely vigilant regarding potential copyright infringement claims derived from their activities. This means that they should inquire as to the source of the pre-existing material contained in the appropriation work of art.

In the UK, the courts, the determination of whether an intertextual dealing, and thus an intertextual borrowing, is 'fair', is made in the light of the three 'Laddie factors'.[354] The first factor is whether the alleged fair dealing is in commercial competition with the original work. The second factor is that a dealing which takes place in relation to a work that is unpublished weighs against the dealing being fair. The third factor is that the greater the amount and substantiality of the part taken from the work, the less likely it is that the taking will be found to be a fair dealing.[355] The defence of fair dealing is applicable only where the dealing with a protected work is made for one of the enumerated purposes set out in the CDPA, namely: non-commercial research and private study[356]; criticism, review or quotation[357]; reporting current events[358]; parody, caricature and pastiche[359]; and noncommercial

[354] For a brief overview of the UK case law on fair dealing see; Mary Vitoria, Adrian Speck, Lindsey Lane, Daniel Alexander, Michael Tappin, Fiona Clark, Robert Onslow, Charlotte May, Iona Berkeley, James Whyte, *Laddie, Prescott and Vitoria's The Modern Law of Copyright and Designs* (4th edn, Butterworths Law, 2011) sections 21.44-21.48.

[355] Ibid sections 21.44 and 21.45.

[356] CDPA, s 29.

[357] CDPA, s 30(1).

[358] CDPA, s 30(2).

[359] CDPA, s 30(A).

instruction.[360] Notwithstanding these exceptions, the limitations surrounding the fair dealing provisions have given rise to questions as to whether they are able to function effectively as a mechanism for accommodating transformative and derivative uses of previous works. Some of these questions relate directly to the statutory constraints[361] of the fair dealing provisions, while the others relate to the manner in which they have been interpreted and applied by the court.

The UK courts have not been consistent in interpreting the precise scope of these grounds, having applied both broader and narrower approaches. In *Fraser-Woodward v BBC*,[362] for example, the BBC's use of certain of the claimant's photographs in a television programme did not inevitably and seriously damage their value, and was therefore found fair. In contrast, in *Ashdown*, The Court of Appeals observed that the court could apply the CDPA in a manner which in rare cases accommodated the publication of the precise words in a copyright work by another person where it would be in the public interest and for the protection of right to freedom of expression.[363] In most of such cases, it would be sufficient simply to reject the discretionary remedy of an injunction, which would leave the defendant still liable to any claim for damages or an account of profits.[364] Thus, a core weakness of the fair dealing provisions, as identified by the Gowers Review of Intellectual Property in 2006,

[360] CDPA, s 32(1).

[361] Strictly prescribed conditions to qualify as a fair dealing in cases of criticism, review and quotation, reporting news are significant examples.

[362] [2005] EWHC 472 (Ch).

[363] *Ashdown (n 161)* para 45.

[364] Ibid para 46.

is their insufficiency to promote derivative and transformative uses of copyright works.[365]

Parallel with this, Boyle persuasively argues that the Eurocentric conception of authorship –rewarding originality and/or labour through legal regimes of ownership – is counterproductive in recognising the *derivative* nature of creativity and innovation. As has been shown, vague fair use doctrine and overly prescribed fair dealing defences, which are built at the periphery of the concept of authorship, are equally not enough to shape a good vision of intertextuality within copyright law. Authorship also blurs our vision to identify which works are actual expressions of originality. What Boyle ignores about authorship is that it has become, if not the root of all evil, then at least a serious stumbling block to the appreciation of different forms of cultural production as well as their inherently *collective* nature. 'Individual authorship' conceals the significance of artefacts and practices that fall outside this narrow frame. The repercussions of this predisposition are most acutely observed within a legal regime that fails to accommodate the specificity and value of traditional knowledge and expression.[366] However, it is not just peculiar to them. Culture's 'the way of life' paradigm goes beyond traditional communities and their intellectual contributions.

[365] Andrew Gowers, Gowers Review of Intellectual Property (HM Treasury, 2006) ('Gowers Review') 61 – 62.

[366] See Coombe *(n 240)*.

1.5. A Critique of the Critique

1.5.1. The Appropriation of Creativity: Transformative, Corporate and Unjust

The musicologist Joanna Demers notes that '[w]ith the rise of disco, hip-hop, and electronic dance music, transformative appropriation has become the most important technique of today's composers and songwriters.'[367] Demers's statement encapsulates two key facts about borrowing and allusion: first, it is central to the business process, and musicians across a wide variety of genres embrace it; second, it epitomises a tension 'between the positive connotation of the adjective "transformative" and the more negative connotation (at least in legal circles) of the noun "appropriation."'[368] There is also another tension embodied in Demers's statement which requires us to question which appropriation is and/or should be aesthetic, ethical, and legal. The influential public domain advocates, mooring their argument to the traditionally accepted language of efficiency, praise the historical balance of intellectual property law between intellectual property rights and the public domain, which is being unbalanced in the knowledge age in favour of more intellectual property control. To strike a right balance in intellectual property law, as these scholars suggest, we need a rich public domain which will also promote innovation. They see the public domain as a sea for everyone to fish in and pay short shrift to other values that the public domain signifies for individuals. The lines between inputs and outputs of innovation are quite dynamic. Being in the public domain today is not a guarantee

[367] Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (University of Georgia Press, 2006) 9.

[368] Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011) 7.

that one will be there tomorrow. As Sunder reminds us, 'at the end of the last century, we witnessed the migration of many forms of knowledge from the public domain to intellectual property: university research, business methods, and even life forms.'[369] Most of this migration of knowledge has occurred under the *corporate appropriation*. Disney has most frequently been cited as the quintessential example of corporate appropriation of this vast cultural heritage, which draws not just on the public domain works of identifiable authors,[370] fables and tales[371], but also arguably works of other authors from the non-western world.[372] The public domain and the Disney trajectory, despite drawing on an individual example, reveals that 'one of the most successful miners of public domain' is 'on the one hand the killer of creativity, on the other, the very embodiment of it.'[373] This chain of creativity, oscillating between the public and private domain, not only marks that ownership is in constant flux, 'but also creativity is driven by individual works and simultaneous collective memory practices and infrastructure.'[374]

The single-sided creativity emphasis helps to mask the importance of other values. There are cases that show the extent to which the public domain overshadows *unjust appropriation*. The music industry especially is full of these unfair practices. The Linda's case is a telling one. Linda's song encountered the common fate of being incorrectly and easily considered as belonging to the public domain.

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[369] Sunder *(n 1)* 136.

[370] Wirten *(n 311)* 255.

[371] Wirten *(n 311)* 255.

[372] Sunder *(n 1)* Chapter 6.

[373] Wirten *(n 311)* 255.

[374] Wirten *(n 311)* 256.

Another ironic story involves Jay-Z's *'Takeover.'* This case uncovers the perplexing ways that copyright law manages 'art, the operation of sample licensing, and the music industry's troubling relationship with race.'[375] When Jay-Z, one of the best-selling hip-hop artists of all time, made *'Takeover,'* one of the musical parts that he sampled was a laconic six words from KRS-ONE's *'Sound of Da Police'*: *'Watch out! We run New York.'* Although *'Takeover'* samples less than two seconds of KRS-ONE's vocals, Jay-Z nevertheless had to license all of the other elements sampled in the remaining four minutes and seventeen seconds of KRS-ONE's song. This is the rule of the music industry's sample clearance system. Astonishingly, KRS-ONE's song has a connection with the legendary song collector Alan Lomax, whose Depression-era recordings for the Library of Congress archived hundreds of little-known American folk and blues songs. Here is where the irony starts. In the 1930s, Alan Lomax copyrighted the nineteenth-century folk song *'Rosie.'* In the 1960s, the Animals, a music band, rewrote and called the song *'Inside Looking Out,'* in which they included Lomax as a co-author. Grand Funk Railroad then covered the song a few years later, and KRS-ONE sampled it in the 1990s. Therefore, the Animals' Eric Burdon and Bryan Chandler, as well as Alan Lomax, had a songwriting credit on KRS-ONE's *'Sound of Da Police.'* They received this credit and partial ownership despite the fact that the rapper only sampled a very brief guitar riff played by Grand Funk Railroad. The sample neither provides the central hook for his song nor is it very audible in the mix. However, it was sufficient for Lomax to become a co-author on two classic hip-hop tracks, namely *'Sound of Da Police'* and Jay-Z's *'Takeover.'*[376] This case marks racial,

[375] McLeod and DiCola *(n 368)* 95-96.

[376] Ibid 95-97.

economic, and musical paradoxes at play in music licensing. In their empirical study on music sampling practices in the US, Kembrew McLeod *et al* argue that:

> 'The history of the twentieth century American music industry is also a history of the exploitation of African American artists by whites. It was not uncommon for a black songwriter to have his or her name replaced by a businessperson or musician with more legal and economic resources but little or no involvement in songwriting. For instance, Elvis Presley reportedly didn't write a single song in his life, but his name appears on the publishing credits of several songs he recorded. Alan Lomax's hip-hop songwriting credits are an uncomfortable reminder of this legacy. Aside from the sticky racial politics, this case also underscores another dynamic at work. The process of adaptation and transformation that occurred during the evolution of the original song "Rosie" is a great example of how the folk music process works—or, we should say, used to work.'[377]

Copyright in particular and intellectual property law in general are not just about promoting culture. It is sometimes about the attribution of authorship according to racial relations in a society. Copyright and business practices supported by it have, at times, retrospectively created an unfair appropriation of the public domain, as well as sometimes prospective appropriation of musical work in different genres across the generations. Thus, the public domain critique does not recognise the disparities in

[377] Ibid 97-98.

individuals' capabilities to exercise the freedoms that the law provides, while these freedoms are defined through the vision of the marketplace. Public domain scholars use 'commoner' as an epithet to describe the people who easily appropriate popular art and innovation for their own purposes. The public domain movement abandons the commoner to the mercy of an unregulated marketplace where she must struggle to realise her rights. The commoners are not differentiated according to their capabilities in the exploitation of the public domain. Some are more equal than others in utilising the public domain, e.g. Disney, George Weiss and Alan Lomax were successful, whereas the public domain is rather less than public domain for the commoners.

1.5.2. Out of Sight and Out of Cult: On the Cultural Hegemony of Copyright

Equally, the 'free culture' understanding does not fully explore the emerging characteristics of culture; the cultural vision inserted into the 'free culture' theory remains uncertain. As we have seen in the preceding discussion, the media producers-consumers dichotomy has noticeably eroded. The older notions of *passive* media spectatorship have been replaced by a 'participatory community,'[378] occupying a more *active* role in culture-making processes: 'we might now see them as participants who interact with each other according to a new set of rules that none of us fully understands.'[379] This cultural *convergence* generates a dialogue amongst people and produces a cultural flow that in many cases even crosses international boundaries. As Rosemary Coombe notes, 'Everywhere individuals and groups improvise local performances from (re)collected pasts, drawing on foreign media,

[378] Sunder *(n 1)* 8.

[379] Jenkins *(n 250)* 3.

symbols, and languages. Forces of global capitalism have created a situation of late modernity that is "decentered, fragmented, compressed, flexible, refractive, and meanings are fashioned with materials from diverse cultural lifeworlds."'[380] There is a great 'potential for a return to what Habermas calls the 'unfinished project of Enlightenment,' that is, the promise of a time when cultural meaning comes from the people themselves.'[381]

The voices of the new participatory community echo through several spheres of culture. From fan fictions to mash-ups, machinima to blogs, Wikis to YouTube, the modern individual reinvents herself, while participating in communication. Already apparent in the Web 1.0 environment, these types of creative activity have accelerated remarkably in Web 2.0, which encourages even more interactive and collective cultural production. Some scholars characterise the creative expression fostered by the architecture of networked digital technologies as 'postmodern' because it challenges many assumptions of *possessive liberal individualism* underpinning dominant copyright doctrines.[382] In her book *Copyright, Communication and Culture,* Carys Craig argues that for an elaborate understanding of the 'socially situated author' we should rethink copyright such that 'protected works are not objects of property but moments of speech; authors are not individual rights-holders but contributors to a

[380] Rosemary J. Coombe, 'Contingent Articulations: A Critical Cultural Studies of Law' in Austin Sarat and Thomas R. Kearns (eds)*, Law in the Domains of Culture* (University of Michigan Press, 2000), 44.

[381] Sunder *(n 1)* 53.

[382] Peter Jaszi, 'Is There Such a Thing as Postmodern Copyright?' in Mario Biagioli, Peter Jaszi, and Martha Woodmansee (eds)*, Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (University of Chicago Press, 2011) 413–14; Pamela Samuelson, 'Copyright and Freedom of Expression in Historical Perspective' (2003) 10 J Intell Prop L 326-27.

collective conversation; original expression is not independently produced but derived from the texts and discourses that make up our culture; users are not trespassers but participants in a public dialogue.'[383] Challenging the conventional authorship construct of copyright, Margaret Chon, like Craig, suggests that the new participatory community is a 'romantic collective author' as opposed to a 'romantic individual author.'[384] This term '[d]enotes in a generic sense (rather than as a legal term of art) a group of users who create either a joint work, a compilation, or a collective work pursuant to'[385] current copyright laws in place. The *user* in this context often refers to a type of *author* who creates content, often denoting *user-generated content*, rather than simply being a consumer of copyrighted works.[386] The user-generated authorial creativity ranges from purely personal expression (e.g. on YouTube, Twitter, Facebook) to opinion-based reviews (e.g. on Yelp) to fact-based contributions (e.g. Wikipedia) and to fiction-based narratives (e.g. Machinima and other fan fictions).[387]

The user-based authorship of aggregated works is in fact the predominant form of expressive activity in digital environments, and the examples above are only a few samples taken from a wide range of works generated by creative fans.[388] Nevertheless, there are still asymmetrical power relations in authoring culture.

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[383] Carys J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar Publishing, 2011) 57.

[384] Margaret Chon, 'The Romantic Collective Author' (2012) 14(4) Vanderbilt J of Ent and Tech Law 831.

[385] Ibid 835.

[386] See; Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2009) 11(4) Vanderbilt Journal of Entertainment & Technology Law 846–50.

[387] Chon *(n 384)* 835.

[388] Wikström *(n 264)* 227.

Corporations -and even individuals within corporate media- still seize greater power than any individual user or even the aggregate of users. Some users have greater capabilities to participate in this emerging culture than others. The old media has generally exerted its power through intellectual property. For example, the Harry Potter[389] and Star Wars[390] universes have not always been friendly to its fans, with cease-and-desist letters being a popular method of controlling the brand. J K Rowling won a copyright case against the man who tried to publish a commercial version of his fan-based Harry Potter lexicon, the online version of which Rowling had admittedly used herself while writing the final books in the series.[391] J K Rowling and Warner Bros's lawyers in India issued a cease-and-desist letter to the publisher of *Harry Potter in Calcutta*, a book penned by an Indian author where Harry Potter meets figures from Bengali literature.[392] Heather Lawver, a young girl, faced the same problem, when Warner Bros demanded she shut down her fan website called *The Daily Prophet,* an

[389] See; Aaron Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Routledge, 2011) 116–31.

[390] Debora J. Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation In A Globalized World* (Routledge, 2014) 193.

[391] 'Rowling wins book copyright claim' available online at http://news.bbc.co.uk/1/hi/entertainment/7605142.stm. Deborah Halbert notes that 'the Harry Potter fan case is also not easily clear cut. As the blog The Learned Fangirl notes, the case ended up being narrated as a fight between a fan and author, but the lexicon itself was not the work of a sole, original author, in this case Vander Ark, but a compilation of the work of untold numbers of fans who had contributed to the online version. Thus, when Vander Ark sought to commercialize the lexicon with him as the sole author, he also ignored the work by fans who had made his site so successful.' Halbert *(n 390)* 208 ft 114.

[392] For legal disputes iniatitated by the copyright holders on Harry Potter see; Schwabach *(n 389)* 116–31.

online school newspaper for the fictional Hogwarts.[393] Likewise, when fans of *Buffy the Vampire Slayer* sought to do their versions of the musical episode called 'Once More with Feeling,' Twentieth Century Fox Television sent cease-and-desist letters to those who were trying to pay homage to the series and used their control of the copyright to shut down any such performances.[394] Viacom, an American global mass media company, asserted over 150,000 copyright violations[395] in its lawsuit against YouTube.[396] The pursuit of individual network users has also been a preoccupation of the record industry's individual trade bodies. It has been reported that the Recording Industry Association of America (RIAA) filed over 35,000 lawsuits against individual file sharers between 2003 and 2009.[397]

The 'collective author' is abandoned to face the *prohibitive* sides of intellectual property. Creative practices, new social norms, values and conventions, as well as new moral economies, are left to flourish in 'the shadows of the law.'[398] Some scholars argue that the doctrinal category of transformative fair use bears much of the weight of this current shift and plague of corporate litigiousness. For example, Anupam Chander and Madhavi Sunder argue that the growing genre of fan fiction as

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[393] Jenkins *(n 250)* 178, 194-196.

[394] Seth Sutel, ''Buffy' Fans Bemoan Demise of Sing-Along' (The Associated Press, October 12, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/12/AR2007101201604_pf.html

[395] Branwen Buckley, 'SueTube: Web 2.0 and Copyright Infringement' (2008) 31(2) The Columbia Journal of Law & the Arts 239.

[396] *Viacom International, et al, v YouTube, YouTube LLC, and Google Inc* United States District Court, Southern District of New York, Case 1:07-cv-02103-LLS, Document 117, July 2, 2008.

[397] Diana Sterk, 'P2P File-Sharing and The Making Available War' (2011) (7) Northwestern Journal of Technology and Intellectual Property 9(7) 495.

[398] Demers *(n 367)* 111.

a specific type of appropriation art requires a more generous application of the fair use doctrine.[399] Examining the scope of possible copyright infringement on YouTube, from direct copying to derivative works, Deborah Halbert more provocatively suggests that 'virtually everything that the site offers should be considered a fair use.'[400] Furthermore, Craig advocates for a broad and flexible defence to infringement that would contextualise the contributions of the many stakeholders involved in creative processes,[401] while detached from 'an owner-oriented understanding of copyright' and the overprotection that technological control provides.[402]

Driven by 'an owner-oriented understanding of copyright', courts and business practices have created an atmosphere where the copyright holders and the old media can shout. In this environment, the transformative and/or collective author can only whisper. As has been seen, increasingly, culture is no longer a static object handed down by cultural authorities. Changing technologies and social mores have made culture more interactive and participatory. Nevertheless, this ironically puts the 'collective author' more at risk of committing copyright infringement.[403] The law privileges only narrow forms of transformative use (parody[404] in the US, statutorily-pigeonholed exceptions[405] in the UK). This leaves a host of socially and culturally

[399] Anupam Chander and Madhavi Sunder, 'Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use' (2007) 95 California Law Review 612-17; Jaszi *(n 382)* 418-20. See also; Sunder *(n 1)* Chapter 5.

[400] For those cases see; Halbert *(n 390)* 186-196.

[401] Craig *(n 383)* 191.

[402] Ibid 192.

[403] Sunder *(n 1)* 42.

[404] *e.g. Campbell (n 337)* 569. See section 1.4.2.

[405] See section 1.4.2.

worthwhile activities in a legal grey zone. Despite providing valuable insights, proposed visions of 'free culture' or subaltern concepts of intellectual property (from authorship to originality and fair use/dealing) show little understanding of the benefits of, what Sunder calls, *working through culture* in human development - that is, playing through culture (*Re: Rosas* and *Buffy the Vampire Slayer*); learning through culture (*Heather Lawver*); making a living through culture (*Solomon Linda*); creating an 'agency' through culture (*Harry Potter in Calcutta*); artistically, politically and economically expressing yourself through culture (nearly all examples mentioned here but especially *hip-hop music* and *Shepard Fairey* and *Ashby Donald*); and many others which can enhance capabilities through culture. Thus, approaching the emergent social dynamics through the extant legal concepts or 'free culture' does not acknowledge the ways in which the concept of culture today is radically changing.

1.6. Conclusion

What is significant in the cases and issues mentioned in this chapter is *Ubuntu*: ethics in and of law. This is not to say that copyright is immoral. Rather, the problem lies at the hearth of its ideational philosophy. The utilitarian account of copyright fails to capture the dynamics of culture and its role in intellectual property creation and dissemination.[406] The cultural theories that have been elaborated in this chapter complement the economic assessment of copyright. The goal of economic analysis is to maximise economic welfare. Cultural and social theories, however, go beyond the incentives for economic development and supply valuable insights about the changing forms of cultural productions in addition to cultural consumption. A

[406] Sunder *(n 1)* 25.

copyright law that envisions culture as a collection of static commodities or imposed tradition only fortifies the exclusive power of copyright holders. This understanding endangers individuals' capabilities to author their lives, contribute to the existing cultural and political discourse, and make cultural meaning themselves. These outcomes have a significant impact on freedom, equality, social relations, economic growth and overall human development. This shows that copyright does not merely provide incentives and reward to creators; it also designs cultural and social relations. The connection between intellectual property, in particular copyright, and development is not restricted to GDP. Economic, social and cultural conditions are intertwined and mutually reinforcing.

In order to integrate human development with the other ultimate goal of copyright law, namely economic development, it is appropriate to pay heed to what vision of culture shoud be promoted and how to contextualise capabilities within law. Understanding social relations that revolve around fictitious property seems more persuasive for making sense of the ultimate ends (achieving valuable functionings) than talking about the simple glamour of economic analysis that masks one-sided assumptions behind its numbers and fails to show clear empirical support for current copyright laws.[407]

The cultural implications of copyright law remain undefined in many contexts. The critical aspects of the concept culture demonstrated in this chapter might arguably help to rethink such contexts upon which copyright law can be situated to foster human development. As discussed throughout this thesis, technological changes and cultural processes are already challenging some of the conceptions in copyright law, perhaps

[407] Ibid 16.

changing its landscape irreversibly. The current legal conceptions - the definition of authorship and fair use/dealing - built within copyright law are not adequate to accommodate these changes. Utilitarian-centred creativity and public domain issues and access-to-knowledge concerns are continually brought to the fore in copyright-related policy and structural reforms. Many of these concerns are appropriate but do not sufficiently engage with the several dimensions of the cultural ecosystem of copyright law. This results in to lose the sight in dealing with more pressing issues within copyright law. This chapter has presented several niche aspects of culture that are left out in current narratives, which requires to discover changing dynamics of culture from a combination of ethical, legal, cultural and political perspectives.

This chapter has further revealed that the economic vision of copyright law is far from identifying how it structures cultural and social relations. Equally, this view of the law cannot recognise the diversity and the differences in power and knowledge. Copyright acknowledges some authors, excludes others. The new *participatory community* is one important but disregarded actor in the processes of the production of cultural meaning. A robust public domain argument certainly sets the basis for this community to create and share freely in democratic and political society. It is true that in order to make a new culture it is essential to be free to borrow from a culture that came before. At the same time, free culture is not always a fair culture. Copyright law should not leave fans, participatory community, *Fairey, Ashby Donald* and others in the nebulous spheres of law. Copyright should not be the law of copyright holders, which transform our once free culture to ‘controlled culture’. In this sense, copyright law should regulate cultural exchanges on more balanced ethical terms that recognise the emerging changes within culture. Therefore, copyright laws must promote a free flow of culture - but on fair terms. How can one go beyond the incentives to explore

the fair terms that can fashion copyright law in the new realms of human life and livelihood? Is there a normative force that can be a remedy for the advancement of not only ethical values but also our capabilities?

CHAPTER 2

2. Cultural Human Rights and Freedoms for Copyright

2.1. Introduction

At the start of the twenty-first century, full compliance with the TRIPs Agreement became binding across the globe in all countries, even within the world's least developed. Intellectual property rules, since then, have infiltrated even more profoundly into all aspects of our lives and more in international law than at any other period in history. Intellectual property policies affect the opportunities we have, and the capabilities we may develop. Amartya Sen[408] and Martha Nussbaum[409] define human capabilities as opportunities 'what people are actually able to do and be'[410] and 'what they have reason to value.'[411] Intellectual property laws are stringent, influencing our broad range of capabilities, from accessing life-saving medicines, to participating in political and cultural discourse, to growing sufficient agricultural products, to accessing food and to the capacity to make a living from one's intellectual creations. For that reason, intellectual property laws have crucial effects on human flourishing. Madhavi Sunder very aptly points to these connections, saying that:

> 'Intellectual property laws affect our ability to think, learn, share, sing, dance, tell stories, joke, borrow ideas, inspire and be inspired, reply, critique, and pay homage. In short, intellectual property laws do much

[408] Sen *(n 132)*.

[409] Nussbaum *(n 144)*.

[410] Nussbaum *(n 119)* 18.

[411] Ingrid Robeyns, 'The Capability Approach' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/archives/sum2011/entries/capability-approach/.

> more than “incentivize innovation,” as the common perception goes. Intellectual property bears fundamentally on the basic activities that make for a full and joyful life. Furthermore, in a global Knowledge Economy, intellectual property distributes wealth and power and affects global justice’.[412]

How can the capabilities be animated within the theory of law? How can they be linked to cultural freedoms we have? Which methodology might be used? The French philosopher Jacques Derrida, in his critical book ‘*Limited, Inc*’ pays particular attention to refute conventional assumptions about authorship.[413] He previously wrote an important essay called ‘*Signature Event Context*’. The scholar John R. Searle responds to this with his very critical ‘*Reiterating the Differences: A Reply to Derrida*’.[414] This prompted Derrida to write his own astute reply in *‘Limited Inc’*. In this book, Derrida begins by quoting a brief passage from Searle’s ‘Reply’ with his following signature: ‘Copyright © 1977 by John R. Searle’.[415] Searle, in his essay, acknowledges ‘H. Dreyfus and D. Searle for discussion of these matters.’[416] Rather than being a single author, Derrida suggests that ‘the "true" copyright ought to belong . . . to a Searle

[412] Sunder *(n 1)* 1-2.

[413] Jacques Derrida, *Limited Inc* (Northwestern University Press, 1988).

[414] Jacques Derrida’s ‘Signature Event Context’ and John Searle’s ‘Reiterating the Differences: A Reply to Derrida’ first appeared in the form of a polemic in *Glyph* 1 (1977). Derrida’s reply to Searle, ‘Limited Inc abc,’ appeared in *Glyph* 2 (1978). They were reprinted together with ‘Signature Event Context’ in Limited Inc, ed. G. Graff (Evanston: Northwestern University Press, 1988).

[415] Derrida *(n 413)* 29-30.

[416] Ibid 31.

who is divided, multiplied, conjugated, shared.'[417] Therefore, Derrida writes that he should hold a share of Searle's essay as well, what he mordantly calls 'the stocks and bonds' of 'this holding company, the Copyright Trust.'[418] He continues to refer to this company as 'three + n authors', then abandons this cumbersome expression. Instead he gives the 'collective author' the French name '*Société à Responsabilité Limitée*'—literally 'Society with Limited Responsibility (Limited Liability).'[419] SARL is normally the abbreviation of this type of company, so for the rest of the book, Derrida playfully refers to Searle as 'Sarl', amusingly claiming his share of the copyright of the 'Reply.'[420] With this sardonic linguistic play, he problematises the simple division of 'author' and 'non-author' and other false binaries, suggesting that this terrain 'is slippery and shifting, mined and undermined.'[421]

This insight echoes through Derrida's writings, in which he encourages readers to play with the text - deconstructing and reconstructing it. How can one reflect Derrida's account of deconstruction to meaningfully spot cultural capabilities (freedoms) that are interacted with copyright, which are necessary for individuals to flourish? To draw an interactive triangle of culture, copyright and human development, it is necessary to identify which cultural freedoms are at stake when protecting copyright.

Is there a normative ground in law to conceptualise and realise the capabilities approach for copyright? To what extent do/can human rights complement

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[417] Ibid.

[418] Ibid.

[419] Ibid 36.

[420] Ibid.

[421] Ibid 34.

the rationalisation of capabilities into copyright? How, in other words, would it be possible to build 'capabilities' in copyright law by grounding it on human rights? This chapter is mainly about the selection of cultural freedoms (capabilities) that are associated with and embedded in copyright through the lens of human rights.

To make such an analysis, this chapter begins with outlining the relationship between human rights and the capabilities approach. The next analysis following this section is the identification of capabilities/freedoms from international human rights instruments that can represent a basis to build capabilities within the legal framework of copyright. This framework is a good starting point to lead the states, policymakers, lawmakers and courts to take cognisance of capabilities that fall under the shadow of copyright law.

In terms of terminology, whether the term 'fundamental rights' or 'human rights' is used depends on the respective source: rights deriving from international law are called human rights, while rights deriving from domestic national constitutional law, as well as from European law are termed fundamental rights. The substantive differences between the two correspond only to any differences in the contents of the relevant provisions.[422] Many international human right instruments have been widely ratified by and adopted within several domestic constitution laws. Thus, this conceptual distinction has been largely eroded. Therefore, in this chapter, as well as throughout the thesis, these terms will be used interchangeably, with more emphasis on human rights. Additionally, this chapter does not aim to discuss the vexed issue of

[422] See P Kinsch, 'Human Rights and Fundamental Rights (ChFR and ECHR)' in Jurgen Basedow, Klaus J. Hopt and Reinhard Zimmermann, *The Max Planck Encyclopedia of European Private Law* (OUP, 2012) 839.

the foundation of human rights.[423] Nor does it aim to expand on a general theory of human rights. It is a widely held view that the concept of human rights is, to a certain extent, though not entirely legal.[424] From this perspective, human rights are rights,[425] namely just claims and entitlements that derive from moral and/or legal rules.[426] Following the famous formulation of Wesley Hohfeld in this thesis, rights are considered to include four legal relations: powers, immunities, liberties and claim-rights.[427] Thus, human rights have identifiable right holders and assignable duty-bearers.[428] Moreover, in this thesis it is assumed that human rights entrenched in bills of rights display value pluralism in terms of their moral foundations.[429] In other words, as far as bills of rights are concerned, this thesis takes the view that there is no

[423] For justifications of human rights see generally; Michael Freeman, *Human Rights* (Polity Press, 2011) 61-88; James Griffin, *On Human Rights* (OUP, 2008); Nickel *(n 169)*; Charles R. Beitz, *The Idea of Human Rights* (OUP, 2011); James Nickel, 'Human Rights' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/archives/win2014/entries/rights-human/; Rowan Cruft, S. Matthew Liao and Massimo Renzo, *Philosophical Foundations of Human Rights* (OUP, 2015).

[424] Freeman *(n 423)* 4.

[425] Nickel *(n 169)* 9.

[426] Freeman *(n 423)* 7. See also; Jeremy Waldron, *Theories of Rights* (OUP, 1984); F. Kamm, 'Rights' in Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro, *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, 2004) 476–513; Leif Wenar, 'Rights' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/archives/fall2015/entries/rights/

[427] For the definition of these terms see; Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710-770.

[428] Nickel *(n 169)* 9.

[429] Elinor Mason, 'Value Pluralism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/archives/sum2015/entries/value-pluralism/

convincing argument in favour of an assumption that would rank those rights in terms of a single overarching value.[430]

2.2. Human Rights and Capabilities: Specifying Important Entitlements and Obligations

2.2.1. Theoretical Reflections

From a brief note provided in the Appendix 1, it is arguable that individuals have many capabilities, and the potential is enormous. Not all freedoms (capabilities) are equally important. Some can be trivial, and some can be harmful to the individual or to others.[431] Thus, which capabilities should be adopted for a minimally dignified life that should be guaranteed to all individuals in a society that is just? The large body of international human rights elaborates a list of essential human rights.[432] For example, the Universal Declaration of Human Rights arguably includes a comprehensive list of such entitlements that should represent minimum standards for a just society and a dignified life. This has been a major achievement of the twentieth century in which the international community has articulated an extensive set of human rights instruments in the form of covenants, treaties, declarations, general comments and other

[430] For a different view see the chapter entitled 'Moral Pluralism' in Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2008) 105–116.

[431] Nussbaum *(n 119)* 67.

[432] For the list of universal human rights instruments see; http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx

documents, and to set up a process for their refinement and implementation.[433] What is the relationship between human rights and capabilities?

2.2.2. Amartya Sen

Much of the literature on this relationship has focused on defining the overlaps and differences between human rights and capabilities as theoretical concepts.[434] The links between human rights and the capability approach are

[433] For the UN core International Human Rights Instruments see; International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 (XX), UN GAOR, 20th Session, Supp No. 14, Annex, UN Doc A/6014 (12 March 1966) [CERD]; International Covenant on Civil and Political Rights [ICCPR]; International Covenant on Economic, Social and Cultural Rights Article 15(l)(c) 993 UNTS 3 (16 December 1966) [ICESCR]; Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (18 December 1979) [CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, UN GAOR, 39th Session, Supp No 51, UN Doc A/39/51 (10 December 1984) [CAT]; Convention on the Rights of the Child 1577 UNTS 3 (20 November 1989) [CRC]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families A/RES/45/158 (18 December 1990) [ICMW]; International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006) [CEDC]; Convention on the Rights of Persons with Disabilities A/RES/61/106 (13 December 2006) [CRPD]. See also European Convention on Human Rights (ECHR); American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.

[434] Sakiko Fukuda-Parr, 'Human Rights and Development' in Kaushik Basu and Ravi Kanbur (eds), *Arguments for a Better World: Essays in Honour of Amartya Sen Vol. II* (OUP, 2008) 76–99; Diane Elson, Sakiko Fukuda-Parr and Polly Vizard, *Human Rights and the Capabilities Approach: An Interdisciplinary Dialogue* (Routledge, 2011); William F. Birdsall, 'Development, Human Rights, and Human Capabilities: The Political Divide' (2014) 13(1) Journal of Human Rights 1-22; Gauthier De Béco, 'Human Rights Indicators and MDG Indicators: Building a Common Language for Human Rights and

principally discussed by Sen.[435] Sen suggests that both 'process-freedoms' and 'opportunity-freedoms' that meet a threshold of 'importance' can be characterised as human rights; and that many (but not all) human rights can be captured and characterised in the language of capabilities.[436] This central argument significantly departs from the 'negative liberty' understanding of human rights. Sen advocates for the 'plausibility' of economic and social rights, such as the 'freedom to be guaranteed some basic medical attention for a serious health problem'.[437] The concept of *obligation* also occupies a central place in Sen's analysis. The classic definition of a right includes the reciprocal or correlative duty (or duties) on the part of a duty holder.[438] This correlative relationship is echoed in Sen's framework especially with those freedoms that are 'sufficiently important' to be regarded as human right.[439] Sen also distinguishes his framework from libertarian models[440] by arguing that the

Development Organizations' in Paul Gready and Wouter Vandenhole (eds), *Human Rights and Development in the New Millenium* (Routledge 2014) 50–70. For the resources written by Sen and Nussbaum see the next relevant footnotes.

[435] Amartya K. Sen, 'Consequential Evaluation and Practical Reason' (2000) 97(9) The Journal of Philosophy 477–502; Amartya K. Sen, 'Elements of A Theory of Human Rights' (2004) 32(4) Philosophy and Public Affairs 315–356; Amartya K. Sen, 'Human Rights and Capabilities' (2005) 6(2) Journal of Human Development 151–166; Sen *(n 135)* 355–87.

[436] Sen 'Human Rights and Capabilities' *(n 435)* 152–157; Sen *(n 135)* 367–372.

[437] Sen, 'Elements of a Theory of Human Rights' *(n 435)* 328–329; Sen *(n 135)* 367 and 379–385.

[438] See Hohfeld *(n 427)*.

[439] Sen, 'Elements of a Theory of Human Rights' *(n 435)* 338–342; Sen *(n 135)* 367 and 372–376.

[440] For example see; Robert Nozick, *Anarchy, State and Utopia* (Wiley-Blackwell, 1974); Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960).

obligations that correspond to rights can be *positive obligations*[441] as well as *negative obligations* of omission and non-interference to support human rights. The combination of positive obligation with the negative obligation paradigm is further underlined by the argument that rights should be linked to obligations through a system of 'consequence-sensitive' links, and that rights should be included in the description of 'outcomes' and reflected in social evaluation.[442]

2.2.3. Martha Nussbaum

Nussbaum also explores the connections between capabilities and human rights as a central question in her work.[443] Nussbaum suggests 'thinking of the basic capabilities of human beings as needs for functioning' that are connected with claims to assistance by others. This approach, as she suggests, leads to the concept of

[441] See; Alastair R. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004); Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 563-583; Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, 2013).

[442] Amartya K. Sen, *Resources, Values and Development* (Harvard University Press, 1984) 311–312; Amartya K. Sen, 'Well-being, Agency and Freedom: The Dewey Lectures 1984' (1985) 82(4) The Journal of Philosophy 169–221; Sen, 'Consequential evaluation and practical reason' *(n 435)* 492–494 and 499–501; Amartya K. Sen, *Rationality and Freedom* (Belknap Press, 2002) 408–456; Sen *(n 135)* 372-375.

[443] Martha C. Nussbaum, ''Human Capabilities, Female Human Beings' in Martha C. Nussbaum and Jonathan Glover (eds), *Women, Culture and Development: A Study of Human Capabilities* (OUP, 1995); Martha C. Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review 273–300; Nussbaum *(n 144)* 96–101; Nussbaum *(n 119)* 62–68.

correlated duties and represents a basis for many contemporary aspects of human rights.[444] Characterising the capabilities approach as 'a species of human rights approach', Nussbaum argues that the common ground between the two approaches 'lies in the idea that all people have some core entitlements just by virtue of their humanity, and that it is a basic duty of society to respect and support these entitlements'.[445] She also identifies a close relationship of content. She notes that '[t]he central capabilities on [her] list overlap substantially with the human rights recognised in the Universal Declaration and other human rights instruments,' and that '[i]n effect they cover the same terrain as that of the so-called first-generation rights (political and civil rights) and the so-called second-generation rights (economic and social rights)'.[446]

According to Nussbaum, the idea of capabilities can help to clarify the nature and scope of the idea of human rights, by providing an understanding of what it means to guarantee human rights, as well as a framework for delineating economic and social rights, and for thinking about the grounds of human rights.[447] Nussbaum's framework also helps clarify how *human dignity* can provide 'grounds' for a theory of human rights. The contemporary human rights movement gives a central role to the idea of human dignity;[448] and an emphasis on dignity and capabilities can, Nussbaum

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[444] Nussbaum *(n 443)* 88.

[445] Nussbaum *(n 119)* 62.

[446] Ibid 62-63.

[447] Ibid 24-37.

[448] For commentaries on several aspects of the idea of human dignity and its relationship with human rights see: Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law 655-724; Jack Donnelly, 'Human Dignity and Human Rights', Commissioned by and Prepared for the Geneva Academy of International Humanitarian Law and Human Rights in the framework of the Swiss Initiative to Commemorate the 60th Anniversary of

contends, avoid important limitations that shape traditional theories based on 'rationality' and 'reasoning'.[449] According to Nussbaum, 'ten capabilities then, are *goals* that fulfil or correspond to people's pre-political entitlements: thus, we say of people that they are entitled to the ten capabilities on the list. In the context of a nation, it then becomes the job of government to secure them, if that government is to be even minimally just.'[450] Similar to Sen, Nussbaum thinks that a focus on capabilities clarifies that the ultimate goal is not merely 'negative liberty' or the absence of state interference, but that 'the state has an affirmative task of securing capabilities.[451] For Nussbaum, the capabilities list can also constitute the focus of an '*overlapping consensus'*, free-standing from any particular metaphysical, political or religious viewpoint for the conception of human rights.[452]

2.2.4. Others

In their discussion on the capabilities approach and human rights, Polly Vizard *et al* acknowledge that the conceptual relationship between capabilities and human rights remains unresolved, including whether any capabilities should be seen

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the Universal Declaration of Human Rights (2009), available at: https://tr.scribd.com/document/200255016/HUMAN-DIGNITY-AND-HUMAN-RIGHTS; Catherine Dupré, 'Human Dignity in Europe: a Foundational Constitutional Principle' (2013) 19 (2) European Public Law 319-341; Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing, 2015); Jeremy Waldron, 'Is Dignity The Foundation of Human Rights?' NYU School of Law, Public Law Research Paper 12–73 (2013), http://dx.doi.org/10.2139/ssrn.2196074.

[449] Nussbaum *(n 119)* 24-29.

[450] Nussbaum *(n 119)* 27.

[451] Nussbaum *(n 119)* 32.

[452] Nussbaum *(n 119)* 34.

as human rights.[453] William Birdsall draws a general overview of the common but (for him less mutual) trajectories of human development and human rights, presenting the discussions around the contested 'right to development'[454] as a binder between the two sides dealing with development at the global level. Similar to other commentators,[455] he points out important gaps, inherent divisions between capabilities approach and human rights movements: '[t]his divide arises because the two approaches operate in different development realms: human rights in the experiential realm of power politics; the [capability approach] in the philosophical realm of public policy. Human rights are practice seeking to be put into theory while the [capability approach] is theory seeking to be put into practice'.[456] Likewise, Gauthier de Béco points out that human rights are a field dominated by lawyers and legal experts, while development and policy-making is largely left to social scientists, predominantly economists.[457] While human rights would be rather concerned with norms, principles and a correct application of them, development research and practice 'concentrate on capacity building and try to improve resilience'.[458] Accordingly, the latter tend to have adversarial ties to governments, whereas 'the former privilege partnerships with them, as they consider those governments weak rather than wicked.'[459]

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[453] Elson, Fukuda-Parr and Vizard *(n 434)* 16.

[454] See; United Nations General Assembly, 1986 Declaration on the Right to Development, GA Res. 128, UN GAOR, 41st Sess., Supp. No. 53, UN Doc. A/RES/41/128 (1986) 186.

[455] Sen; Nussbaum *(n 119)*; Fukuda-Parr *(n 434)*; Elson, Fukuda-Parr and Vizard *(n 434)*; de Béco *(n 434)*.

[456] Birdsdall *(n 434)* 2 (Brackets are mine).

[457] de Béco *(n 434)* 51.

[458] Ibid.

[459] Ibid.

However, as Sakiko Fukuda-Parr argues, 'the merger of human development and human rights as concepts is not a question but a fact'.[460] While the two concepts are not the same, their interface goes deeper than the simple sharing of broad visions.[461] Recognising the importance of *legal codification* of individual rights, Nussbaum shows the instrumental role of positive law and the ways in which capabilities can be safeguarded and supported through constitutions, jurisprudence and legal action.[462] Is there any development or view that might support Nussbaum's argument about the role of law in securing capabilities?

2.3. From Capabilities to Human Rights

While from the beginning of the 1990's the capabilities approach has been recognised as a powerful development paradigm, human rights have been entering development space on two fronts: the right to development and the human rights-based approach (HRBA) to development. In 1986, the United Nations General Assembly adopted the Declaration on the Right to Development.[463] The Declaration embedded universal human rights into development space with its commitment that 'The right to development is an inalienable human right by virtue of which every human

[460] Fukuda-Parr *(n 434)* 96.

[461] Nussbaum *(n 119)* 62.

[462] Martha C. Nussbaum, 'Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism' (2007) 121 Harvard Law Review 5–97.

[463] 1986 Declaration on the Right to Development *(n 454)*186. For an academic commentary on the status of right to development see; Stephen P. Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Journal 139-168; Stephen P. Marks, 'Human Rights and Development' in Sarah Joseph (ed), *International Human Rights: A Research Handbook* (Edward Elgar Publisher, 2010) 167-195.

person and all peoples are entitled to participate in, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized.'[464]

Since the adoption of the Declaration, the UN has extended the influence of the right to development through various legal instruments, the most important two efforts being the adoption in 2000 of a Millennium Declaration committed 'to making the right to development a reality for everyone and to freeing the entire human race from want'[465] and Millennium Development Goals (MDGs).[466] The HDR 2003, which was devoted to the MDGs, affirmed that the MDGs contribute to the right to development.[467]

In the late 1990's, a reform initiative mandating UN agencies to incorporate human rights norms into their programs was launched by then UN Secretary-General Kofi Annan. The Office of the High Commissioner for Human Rights took this opportunity to push for the integration of human rights and development, a strategy that became known as the 'human rights-based approach (HRBA)' to development.[468] The 'common motivation and basic compatibility' of human

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[464] 1986 Declaration on the Right to Development *(n 454)*.

[465] United Nations, The Millennium Declaration, UN General Assembly Resolution 55/2, adopted 18 September 2000, Article 11.

[466] United Nations, Millennium Development Goals, available at: http://www.un.org/millenniumgoals/poverty.shtml

[467] UNDP, *Human Development Report 2003* (2003).

[468] Mary Robinson has referred to 'rights-based approaches' to development as 'the operational expression of the link between human rights and development'. See; United Nations Office of the High Commissioner for Human Rights, Development and Rights: The Undeniable Nexus (speech delivered on June 26,2000, by Mary Robinson, UN High Commissioner for Human Rights).

development and human rights was the main focus of the 2000 HDR, underlining the ways in which the human rights perspective can supplement human development by consensus-building around common goals and by introducing the notions of obligations and accountability. The report also pointed to the need for new approaches that aim to integrate international human rights standards and principles into applied policy frameworks for development, poverty alleviation and in other areas of public policy. It also emphasised the necessity for a new research agenda for evaluating both the human rights situations of individuals and groups, and the compliance of states with their international human rights obligations, including through the use of socio-economic indicators.[469]

Later, the Office of the High Commissioner for Human Rights (OHCHR) defined the HRBA as 'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed at promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.'[470] The official HRBA policy of the UNDP has become the central drive of a number of initiatives, emerging to develop indicator sets and measurement tools to be used in assessment of human rights situations across different countries of the world.[471] Today, these

[469] UNDP, *Human Development Report 2000* (2000) 7-12.

[470] United Nations, Office of the United Nations High Commissioner for Human Rights*, Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (2006) 15.

[471] For example see; United Nations, Office of the High Commissioner for Human Rights, 'Report On Indicators For Monitoring Compliance With International Human Rights Instruments' (HRI/MC/2006/7) (2006), ; United Nations, Office of the High Commissioner for Human Rights, 'Report on Indicators for

Promoting and Monitoring the Implementation of Human Rights' (HRI/MC/2008/3) (2008); United Nations, Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012); Paul Hunt, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' in *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Health*: *Annex, Mission to Glaxosmithkline* UN Doc A/HRC/11/12/Add.2 (5 May 2009); Education Project Proposals for Right to Education developed by Action Aid in collaboration with non-government organizations (NGOs) (Right to Education Project), available online at http://www.right-to-education.org/blog/right-education-project-launches-online-guide-monitoring-right-education-using-human-rights; Economic and Social Rights Fulfilment Index (ESRF Index) proposed by: Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, 'An Index of Economic and Social Rights Fulfillment: Concept And Methodology' (2009) 8(3) Journal of Human Rights 195–221; and Susan Randolph, Sakiko Fukuda-Parr and Terra Lawson-Remer, 'Economic And Social Rights Fulfilment Index: Country Scores And Rankings' (2010) 9(3) Journal of Human Rights 111–131; Sabina Alkire, Francesca Bastagli, Tania Burchardt, David Clark, Holly Holder, Solava Ibrahim, Maria Munoz, Paulina Terrazas Tiffany Tsang and Polly Vizard, 'Developing The Equality Measurement Framework: Selecting The Indicators' (Equality and Human Rights Commission Research Report: 31, 2009), available at http://www.equalityhumanrights.com/sites/default/files/uploads/EMF%20front_cover,_title_page,_contents_etc.pdf; Polly Vizard, 'Specifying and Justifying A Basic Capability Set: Should The International Human Rights Framework Be Given A More Direct Role?' (2007) 35(3) Oxford Development Studies 225-250; Sakiko Fukuda-Parr, 'The Metrics of Human Rights: Complementarities of the Human Development and Capabilities Approach' in Elson, Fukuda-Parr and Vizard *(n 434)* 73-89; Tania Burchardt and Polly Vizard, '"Operationalizing" the Capability Approach as a Basis for Equality and Human Rights Monitoring in Twenty-first-century Britain' in Elson, Fukuda-Parr and Vizard *(n 434)* 91-119; Jean Candler, Holly Holder, Sanchita Hosali, Anne Maree Payne, Tiffany Tsang and Polly Vizard, 'Human Rights Measurement Framework: Prototype Panels, Indicator Set and Evidence Base' (Equality and Human Rights Commission Research Report: 81) (2011), available at http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/HRMF/hrmf.pdf.

initiatives cover various human rights from the UDHR to strengthen a mutual relationship between human rights and human development. In their exercise of operationalising the capabilities approach, for example, Tania Burchardt and Polly Vizard turn to the UN covenants on political and civil and economic, social, and cultural rights to generate a rights-based list of capabilities.[472]

How is Burchardt and Vizard's paradigm seen by the human rights world? The connections between capabilities and rights are more evident to human rights scholars. Sandra Fredman, for example, suggests that the articulation and development of the principle of positive obligation in international, regional and domestic human rights law and jurisprudence represent a 'transformation' of the concept of human rights. According to Fredman, the conceptual content of human rights shifts from a paradigm based on non-interference and non-intervention to a substantive understanding of human rights based on the notions of human flourishing and positive duty.[473] Comparatively listing human rights and capabilities, Stephen Marks likewise observes that '[t]he aim of this juxtaposition of lists of capabilities and of rights—each list derived from quite different processes—is to underscore how human rights norms address, at least in part, similar concerns to those of the philosopher considering the good life and, we could add, those of the policymaker

[472] See; Burchardt and Vizard *(n 471).* See the table showing their capability-human rights matching in Table 2.1. in Appendix 2.

[473] Sandra Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' (2006) Public Law 498-520; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008) Chapters 1, 9-30.

advocating human development.'[474] He further notes that 'each of the capabilities in Nussbaum's list may be contemplated as a starting point for a human rights understanding of the development process'[475]

In exploring the philosophical foundations of the UDHR, Johannes Morsink argues that capabilities theories provide a powerful account of the moral underpinnings of the rights listed in the UDHR.[476] Morsink points out that Nussbaum's and Sen's account of human capabilities presume that 'all human beings are born free and equal' and as such are entitled to and have a right to the development of their capabilities.[477] According to Morsink, this understanding is encapsulated in Article 2 of the UDHR which states that all human beings 'are entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[478] The idea that the realisation and enhancement of human capabilities is necessary for human development, Morsink argues, further permeates the entire Declaration, especially with respect of a person's fundamental right to his dignity[479] and reiteration in several articles of every person's right to the full

[474] Stephen P. Marks, 'The Human Rights Framework for Development: Seven Approaches' in Mushumi Basu, Archna Negi and Arjun K. Sengupta (eds), *Reflections on the Right to Development* (Sage Publications, 2005) 33.

[475] Ibid 34-35.

[476] Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, 2009) 161–185.

[477] Ibid 169.

[478] Ibid 169.

[479] UDHR Article 22.

and free development of his or her personality.[480] This moral tenet of rights which denotes the full and free development of human personality is embedded in several articles of the UDHR directed not only at civil and political rights but at social rights.[481] In Morsink's view, both Sen's and Nussbaum's capabilities would be stronger if it referred to the metaphysics of human rights which, he argues, is required to account fully for the normative grounding of the Declaration. Morsink explains why he turns to the capabilities approach to strengthen his development of a metaphysics of human rights and his concept of their inherence as follows:

> 'The advantage of adding capabilities to an analysis of the Declaration is that it gives us a clear way of saying something about the adjective "human" in the clause "human rights." Most books about human rights tells us a great deal about what a *right* is (a justified claim that can activate the duties of others), but they frequently fail to tell us about the import of adjective *human* in the crucial juxtaposition of these two words.'[482]

Thus, Morsink argues that the capabilities approach provides a compelling account of the normative basis of the UDHR. It is important to note, at least for some leading human rights scholars, the extent to which Sen's implied capabilities and Nussbaum's explicit list resemble human rights. However, is it necessary to find a

[480] UDHR Articles 22, 26 and 29.

[481] Morsink *(n 476)* 170-171. These rights and their equivalents in Nussbaum's list are shown in Table 2.2. in Appendix 3.

[482] Ibid 172.

genealogical link between the capabilities approach and human rights? Human rights and capabilities have many aspects in common. The human rights concept, like the capabilities approach, at least the Nussbaum version, is a theory of minimal entitlements. As Morsink shows, the UDHR has many provisions that regulate many capabilities in Nussbaum's list. Other human rights treaties or national constitutions make similar commitments. However, unlike human rights, there is no certain criteria of identifying, weighing and prioritising capabilities.[483] This renders them different. The best way of solving these problems is context-dependent. Human rights emerge in the form of a list of eclectic values covering different aspects of human and social conditions rather than as a unified moral and political theory.[484] This list-based nature of human rights leads to pluralistically thinking about their foundation.[485] This enables societies to match them with capabilities. In this sense, human rights can serve to grant institutional protection for the minimum threshold of capabilities identified by Nussbaum, while the capabilities approach can embody a normative account of political and moral principles for the construction of the main argument of this thesis. Instead of placing the capabilities approach as a moral foundation of human rights, it is arguably better to conceive the concept of human rights as means to allow individuals to enjoy a good life.[486] Thisc will enable the creation of a synergy between

[483] Freeman *(n 423)* 71.

[484] Waldron *(n 448)* 4.

[485] For some reflection on the list-based nature of human rights, see John Rawls, *Political Liberalism* (Columbia University Press, 1986) 292; Jeremy Waldron, 'Socio-economic Rights and Theories of Justice' (2011) 48 San Diego Law Review 793.

[486] Michael Haas*, International Human Rights: A Comprehensive Introduction* (2nd edn, Routledge, 2014) 2.

these two and to identify interfaces that will be animated within the copyright theory. As regards the building of human development perspectives within intellectual property law Ruth Okediji helpfully delineates the future direction of a human rights-based approach:

> '[T]he human rights narrative must seriously re-engage the content of specific human rights guarantees and determine whether intellectual property rights *as they exist and in light of the conditions that produced them* can ever truly be reconciled with the core principles of international human rights law, which requires state and global attention to local conditions affecting the realization of improved social conditions.'[487]

Following this premise, the next section identifies the human rights framework from several international human rights instruments to embody a legal basis for the protection of minimum levels of capabilities which are the most relevant for individuals to participate in culture and which are affected by the foundational context of copyright law. After making such a list of human rights, in the succeeding sections the question of whether copyright law, the main topic of this thesis, affects these capabilities will be examined. While Chapter 3 discusses the negative effects of the five contemporary digital copyright measures on cultural human rights and freedoms which will be depicted in the next section on the protection of capabilities, Chapter 4 seeks to highlight the relevant legal framework for several attributes of

[487] Ruth Okediji, 'The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights' in Gervais *(n 54)* 372–373 (Original emphasis).

copyright that are protected as human rights and thus serve to empower individuals to protect some of their capabilities as well.

2.4. A Human Rights Framework for Cultural Capabilities (Freedoms)

Different lists of cultural freedoms can be drawn from international human rights instruments that can be labelled 'cultural human rights'.[488] It must be noted that there is a general tendency to use the label 'cultural rights' rather than a singular 'right to culture'.[489] Although the latter is occasionally used, culture 'in and of itself, has not often been articulated as a free standing human right; rather, it is commonly understood as an underlying principle of human rights law with which other rights overlap'.[490] The first factor leading to this outcome is the difficulty in the conceptualisation of cultural rights owing to the eclectic and broad nature of the term 'culture'.[491] The second factor is that 'cultural rights' diverge from general human rights for their dual– individual as well as collective – and 'transversal' character –

[488] Yvonne Donders, 'The Legal Framework of the Right to Take Part in Cultural Life' in Yvonne Donders and Vladimir Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (UNESCO Publishing/Ashgate, 2007) 235; Yvonne Donders, 'Culture and Human Rights' in David Forsythe (ed), *Encyclopedia on Human Rights Vol 5* (OUP, 2009) 443.

[489] Elissavet Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff Publishers, 2007) 110.

[490] M. Hadjioannou, 'The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law' (2005) 8 Chapman Law Review 204.

[491] As underlined by UN ECOSOC, Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 43rd Session, Annex, UN Doc E/CN.4/1987/17 (8 January 1987) paras 11–58.

since they provide entitlements that can also be classified as civil, political or social rights.[492]

However, a general distinction can be made between cultural rights in a narrow sense and cultural rights in a broad sense.[493] Cultural freedoms considered from a narrow perspective correspond to rights that explicitly refer to 'culture', such as the right to participate in cultural life,[494] and the right to enjoy culture for members of minorities,[495] the right to education for children with due respect for their cultural identity,[496] or the right of migrant workers to respect for their cultural identity and their right to maintain cultural links with their country of origin.[497] Apart from these rights, the broad group contains other civil, political, social and economic rights that have a direct connection with culture. It might be argued that almost every human right has a connection with culture, but the rights specifically meant here are the right to self-determination,[498] the rights to freedom of thought and religion,[499] freedom of expression,[500] freedom of association[501] and the right to education.[502] Cultural rights

[492] Caterina Sganga, 'Right to Culture and Copyright: Participation and Access' in Geiger *(n 123)* 561.

[493] Donders, 'The Legal Framework of the Right to Take Part in Cultural Life' *(n 488)* 235; Donders, 'Culture and Human Rights' *(n 488)* 443-444.

[494] UDHR Article 27, ICESCR Article 15(1)(a), CEDAW Article 13(c), CRC Article 31.

[495] ICCPR Article 27.

[496] CRC Article 29.

[497] ICRMW Article 31.

[498] ICCPR and ICESCR Article 1.

[499] ICCPR Article 18 and ICRMW Article 12.

[500] ICCPR Article 19 and ICRMW Article 13.

[501] ICCPR Article 22 and ICRMW Article 40.

[502] ICESCR Articles 13 and 14, CEDAW Article 10, and ICRMW Article 30.

may also refer to the cultural dimension of human rights. Although some human rights, at first glance, may not have a direct connection with culture, most of them have important cultural implications. For example, the rights to food and health have an important cultural dimension in terms of crops, ways of farming, use of medicine and ways of medical treatment. Cultural rights are therefore more than merely those rights that directly refer to culture, but include all human rights which protect and promote the components of the cultural life of individuals and communities as part of their dignity.[503]

Which cultural freedoms are relevant to identify capabilities within copyright frameworks? The 2004 United Nations Development Programme's (UNDP) Human Development Report (HDR) is the first document to focus on the connection between cultural freedoms and human development.[504] As the 2004 HDR stresses, 'cultural liberty is a human right and an important aspect of human development,'[505] 'central to the capability of people to live as they would like and to have the opportunity to choose from the options they have—or can have.'[506] The 2004 HDR defines cultural liberty mostly in relation to cultural identity, such as traditional knowledge, beliefs, art, laws, morals, customs, language, religion and all other traits acquired by an individual as a member of culturally identified groups.[507] It examines key areas of policy for cultural diversity and globalisation, including traditional knowledge, trade in cultural goods and migration. Traditional knowledge is the only cultural space in relation to which the 2004

[503] Donders, 'The Legal Framework of the Right to Take Part in Cultural Life' *(n 488)* 236.

[504] UNDP, *Human Development Report 2004 - Cultural Liberty in Today's Diverse World* (OUP, 2004).

[505] Ibid 6.

[506] Ibid 13.

[507] See; ibid Chapters 1-4.

report mentions the role of intellectual property laws as a means of legal protection for such knowledge.[508] With respect of cultural goods, it points to two critical principles: the role of cultural goods in nurturing creativity and diversity should be recognised; and equally the disadvantage of small film and audio-visual industries in global markets should be recognised.[509] Without considering the role of intellectual property laws, the report advocates supporting cultural industries through production subsidies and tax breaks for cultural industries that respect and promote diversity while keeping countries open to global flows of capital, goods and people.[510]

As previously mentioned in Chapter 1, copyright's understanding of culture and influence on cultural participation has been explained in terms of the public domain, creativity and economic development. International human rights, however, have rarely been invoked to elucidate these arguments.[511] Copyright, in effect, can create tension with many types of human rights that might protect several cultural capabilities (freedoms). For example, copyright holders can entirely restrain some forms of expression by seeking injunctions against those who express themselves by means of unauthorised uses of copyright-protected material. Alternatively, some digital enforcement measures can be applied so as to take down some legal content on the Internet or to cut the connection of users. Likewise, if such technological measures are taken, the use of particular expression diminishes. These actions

[508] Ibid 95.

[509] Ibid 96-98.

[510] Ibid 98-99.

[511] Helfer, 'Toward a Human Rights Framework for Intellectual Property' *(n 123)* 1017–18 (suggesting the potential use of the human rights framework to advocate for greater public access to patented and copyrighted goods).

implicate the right to freedom of expression – a right that is found in many international and regional human rights instruments and domestic constitutions. Limits on access to the manifestations and products of culture also implicate other rights and freedoms. Informed political participation, for example, requires access to information, such as news reports and other media – and many sources of such information can be protected by copyright.[512] These limits also implicate the human rights to take part in cultural life. These issues will be elaborated with examples in more detail in Chapter 3 in terms of UK, EU and US laws. In the following section, however, the theoretical framework of the right to take part in cultural life and freedom of expression, amongst other human rights, is provided before making an analysis of concrete cases where copyright creates tension with cultural capabilities (freedoms). These two rights are the most relevant ones, since as has previously been shown, they might help to bring a fresh outlook on making sense of the term 'culture' while expanding the development vision within copyright laws' discourse and practice. Accordingly, a list of the sub-rights or corollary rights under the right to take part in cultural life and freedom of expression, and limitations to these rights will be outlined in the next section to form a human-rights-based legal framework for the evaluation of copyright's real influence on several cultural capabilities (freedoms).

[512] To the extent that copyright raises the cost of textbooks and other classroom materials, it has the potential to impede the realisation of the human right to education. See, e.g., Enyinna S. Nwauche, 'The Judicial Construction of the Public Interest in South African Copyright Law' (2008) 39 International Review of Intellectual Property and Competition Law 930 (noting that the right to education should be recognised as among the human rights that are furthered by the right to freedom of expression).

2.4.1. The Right to Take Part in Cultural Life

The right to take part in cultural life is one of the most prominent cultural rights that highlights the relationship between copyright, culture and human development.[513] This right is incorporated most notably in Article 27 of Universal Declaration of Human Rights (UDHR),[514] and Article 15(1)(a) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR-Covenant)[515]. It is further adopted by the specialised UN human rights instruments without discrimination

[513] For academic commentaries on several aspects of the right to take part in culture see; Donders, 'The Legal Framework of the Right to Take Part in Cultural Life' *(n 488)*; Donders, 'Culture and Human Rights' *(n 488)*; Yvonne Donders, 'Cultural Rights in the Convention on the Diversity of Cultural Expressions: Included or Ignored?' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation of International Law?* (Intersentia, 2012) 165–182; Pok Yin S. Chow, 'Culture as Collective Memories: Emerging Concept in International Law and Discourses on Cultural Rights' (2014) 11 Human Rights Law Review 611-646; Lisa M. Coleman, 'Creating a Path to Universal Access: The FCC's Network Neutrality Rules, the Digital Divide & the Human Right to Participate in Cultural Life' (2011) 30 Temple Journal of Science, Technology & Environmental Law 33–50; Julie Ringelheim, 'The Evolution of Cultural Rights in International Human Rights Law' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran David Harris (eds), *International Human Rights Law* (2nd edn, OUP, 2014); Ben Saul, David Kinley and Jaqueline Mowbray, 'Article 15: Cultural Rights' in Ben Saul, David Kinley, and Jaqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP, 2014) 1175–1232; Elissavet Stamatopoulou, 'Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights' (2012) 34 Human Rights Quarterly 1170–1192; Céline Romainville, 'Defining The Right to Participate in Cultural Life as a Human Right' (2015) 33/4 Netherlands Quarterly of Human Rights 405–436.

[514] Universal Declaration of Human Rights, Article 27, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

[515] ICESCR Article 15(l)(c).

of the specific categories of people they protect.[516] Its official interpretation (as laid down in Article 15(1)(a) of the ICESCR) is provided in General Comment No 21 by the Committee on Economic, Social and Cultural Rights (CESCR).[517]

At the European level, this human right is partially embodied in the Revised European Social Charter[518] and in Article 25 of the Charter of Fundamental Rights of the European Union (CFR or the Charter). It must be noted that in these two instruments, the protection of this right is limited to specific groups (the elderly and

[516] For example; ICERD Article 5(e)(iv); CEDAW Article 13(c); CRC Article 31(2); ICMRW Article 43(1)(g); and CPRD Article 30(1). At a regional level, the right to participate in cultural life is also recognised in Articles 5 and 15 of the Framework Convention for the Protection of National Minorities, Article17(2) of the African Charter on Human and People's Rights, Article14(1) of the Additional Protocol to the American Convention on Human Rights, and Article 42(1) of the Arab Charter on Human Rights.

[517] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21: Right of everyone to take part in cultural life (Article 15, para 1(a) of the Covenant on Economic, Social and Cultural Rights) E/C.12/GC/21 (21 December 2009). The legal sources of the right to participate in cultural life are also rooted in Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 embodies, for instance, explicit references to fundamental rights as requirements, but also as limits to cultural diversity. Preamble para 12 and Article 2(1)(7); Article 4 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS (Convention on Cultural Diversity). The Council of Europe Framework Convention on the Value of Cultural Heritage for Society recognises that 'rights relating to cultural heritage are inherent in the right to participate in cultural life'. Article 1 of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS 1999 (Faro Convention).

[518] European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), 529 UNTS 90 (The Social Charter) Articles 15 and 30. The Social Charter as revised in 1996 recognises the right to participate in cultural life for elderly people (Article 23), people with disabilities (Article 15 para 3) and people suffering from poverty (Article 30).

disabled people in the ESC) with the specific aim of fostering their inclusion into society.[519] The Charter further protects its most classic element, namely freedom of art, in Article 13. Moreover, the drafters of the Charter decided to provide a broad reference to cultural diversity in Article 22 of the CFR under the form of a general principle instead of a fundamental right to participate in cultural life. Article 22, in conjunction with Article 3 of the Treaty on European Union (TEU)[520] and Article 167 of the Treaty on the Functioning European Union (TFEU),[521] which emphasise the importance of culture and of a common cultural heritage, offer, to a certain extent, an indirect protection of the right to participate culture, since the protection and promotion of cultural diversity is prerequisite for the right to participate in cultural life.

By contrast, the European Convention of Human Rights (ECHR) does not explicitly recognise a right to participate in cultural life. However, the ECHR indirectly protects some of its dimensions through recognising the freedom not to suffer from

[519] For academic commentaries on the right to participate in cultural life under EU law see; Céline Romainville, 'The Right to Participate in Cultural Life under EU Law' (2015) 2 European Journal of Human Rights/Journal Européen des droits humains 145–172; Céline Romainville, 'The Effects of EU Interventions in the Cultural Field on the Respect, the Protection and the Promotion of the Right to Participate in Cultural Life', in Céline Romainville (ed), *European law and cultural policies/Droit européen et politiques culturelles* (Peter Lang, 2015) 191–231.

[520] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, OJ C 325/5 [hereinafter TEU].

[521] European Union, Treaty on the Functioning of the European Union (Consolidated Version), 26 October 2012, OJ C 326, p. 47–390 [hereinafter TFEU].

any interference in the access to and participation in cultural life,[522] artistic freedom[523] and the freedom of association in the cultural sector.[524] The European Court of Human Rights also protects cultural interests by integrating cultural considerations in the interpretation of restrictions on the right to property.[525]

Amongst these instruments, General Comment No 21 on Article 15(1)(a) of the ICESCR is marked as a milestone in the development of the right to take part in cultural life within the work of UN treaty bodies.[526] The most important contribution of General Comment No 21 is that it offers an international and comprehensive interpretation of Article 15(1)(a) of the ICESCR, aimed at elaborating the rights enlisted in the Covenant through incorporating the latest developments in cultural rights in the international arena which has changed the ways in which one can view 'culture' and therefore cultural rights.

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[522] *Akdas v Turkey* App no 24351/94 (ECtHR, 16 July 2010) para 30; In *Akdas,* The ECtHR has recognised that the right to receive information also applies to cultural works, including European literary heritage works. It viewed seizing Turkish translations of the novel 'The Eleven Thousand Rods' of Guillaume Apollinaire and criminally convicting its Turkish publisher for publishing this book as a violation of the right to receive information. Ibid. In the same vein, the ECtHR had previously recognised, in *Khiirshid Mustafa and Tarzibachi* v *Sweden,* a right to access to cultural expressions in the case of foreign television programmes. See; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 December 2008) para 44. Also see; *Autronic AG v Switzerland* App no 12726/87 (ECtHR 22 May 1990).

[523] Based on Article 10 of the Convention, the ECtHR has recognised since its *Miiller* case that artistic expression is covered by freedom of expression. See; *Müller v Switzerland* App no 10737/84 (ECtHR 4 May 1988) para 33.

[524] *Gorzelik and others v Poland* App no 44158/98 (ECtHR 17 February 2004).

[525] *Beyeler v Italy* ECHR 2000-I para 113.

[526] Chow *(n 513)* 626.

In General Comment No 21, the normative content of this right focuses on the concepts of 'cultural life' and 'taking part'. The concept of 'cultural life' is related to the definition of culture. It must be noted that the definition of culture in General Comment No 21 transcends the drafters' conception of it.[527] Culture was originally conceived of as high culture - that is, culture in the traditional 'classic highbrow' sense as including art, literature, orchestra music, theatre and architecture (products of those few who could be called 'artists')- at the *travaux préparatoires* of Article 27 of the UDHR and Article 15 of the ICESCR.[528]

As shown by Pok Yin Chow, the concept of culture has undergone a dramatic transformation over recent decades at the level of international discourse as well as in the work of the UN human rights treaty bodies, especially the CESCR.[529] The expansion in the scope of protection has moved from protecting culture as high culture, to protecting culture as popular culture - in which a right to take part in cultural life is considered to mean access to books, films, radio, television, newspapers and magazines. These changes have been made for the democratisation of cultural institutions.[530] Finally, this extension of the definition of culture within the meaning of

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[527] Ibid.

[528] For a detailed study of the drafting process of Article 27 of the UDHR and Article 15 of the ICESCR, see Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafts and Intent* (University of Pennsylvania Press, 1999) 366; Yvonnes Donders, *Towards a Right to Cultural Identity?* (Intersentia, 2002)141; Ragnar Adalsteinsson and Páll Thórhallson, 'Article 27' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights* (Martinus Nijhoff Publishers, 1999) 575; and Roger O'Keefe, 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR' (1998) 47 *International and Comparative Law Quarterly* 912.

[529] Chow *(n 513)* 619-624.

[530] Chow *(n 513)* 619-621. See; 60 Section A 1976 Recommendation on Participation on Cultural Life.

the right to participate in cultural life culminated in General Comment No 21 which adopts the understanding of culture as a way of life which includes 'all manifestations of human existence' and is conceived as a 'living process, historical, dynamic and evolving'.[531] The concept of cultural life is thus defined as a 'way of life', encompassing 'inter alia, . . . , language, oral and written literature, music and songs, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions'.[532] This covers cultural products such as the arts and literature, as well as the process of culture, reflected in cultural manifestations and expressions as well as systems of meanings, values and symbols. This particularly wide definition derives from anthropological and sociological studies on culture – as mentioned in Chapter 1, and it has been incorporated also in other international documents, specifically in several UNESCO declarations and conventions which address cultural rights.[533]

[531] General Comment No 21, para 11.

[532] General Comment No 21, para 13.

[533] See in particular the following UNESCO documents: UN Educational, Scientific and Cultural Organisation (UNESCO), *UNESCO Universal Declaration on Cultural Diversity*, 2 November 2001; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005; Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003; Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989; Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, 26 November 1976.

Citing instruments such as the Fribourg Declaration[534] and the UNESCO Declaration on Cultural Diversity, General Comment No 21 identifies three main components of the right to 'take part' in cultural life.[535] The first is 'participation' and covers:

> 'the right of everyone – alone, or in association with others or as a community – to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice'.[536]

The second is 'access'. This entails the right to everyone:

> 'to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to

[534] This is a text dedicated to the progress of cultural rights emanating from a group of scholars and associations. Fribourg Declaration on Cultural Rights, 7 May 2007, available at:www1.umn.edu/humanrts/instree/Fribourg%20Declaration.pdf.

[535] General Comment No 21, para 15.

[536] Ibid para 15(a).

benefit from the cultural heritage and the creation of other individuals and communities'.[537]

The third component is 'contribution to cultural life'. This entails the 'right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. […]'.[538]

According to General Comment No 21, the right to take part in cultural life implies negative and positive state obligations.[539] To clarify the nature and content of states' obligations, General Comment No 21 provides quite a detailed list of general[540] and specific legal obligations[541] with 'minimum core obligations',[542] which represent the 'minimum essential levels' for the respect of the right. Although States have a wide margin of appreciation with respect of the forms of implementation of the right, for the CESCR there is a minimum level of recognition and protection which is applicable with

[537] Ibid para 15(b).

[538] Ibid para 15(c).

[539] Ibid para 6.

[540] Ibid paras 44-47.

[541] Ibid paras 48-54. The classic tripartite typology, namely the obligation to respect, the obligation to protect and the obligation to fulfil, is followed in identifying specific legal obligations: 'The obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in Article 15, paragraph 1 (a), of the Covenant' (Ibid para 48).

[542] Ibid para 55.

immediate effect,[543] therefore it is not subject to the 'progressive realisation' that usually applied to economic, social and cultural rights.[544] The following list of rights can be drawn from General Comment No 21, which constitutes the normative content of the right to take part in cultural life: 1) the right to freely choose own cultural identity;[545] 2) the right to belong or not to belong to a culture;[546] 3) the right to freedom of opinion and the right to freedom of expression;[547] 4) the right to seek, receive and impart information and ideas of all kinds and forms including art forms;[548] 5) the right to freedom to create, individually, in association with others, or within a community or group, without censorship of cultural activities in the arts and other forms of expression;[549] 6) the right to cultural heritage;[550] 7) the right to take part in the decision-making process relating to cultural life;[551] 8) the right to traditional knowledge, folklore and expression;[552] 9) the right to equality and non-discrimination;[553] 10) the right of

[543] Ibid paras. 55, 66 and 67.

[544] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156-229; Eitan Felner, 'Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights' (2009) 1(3) Journal of Human Rights Practice 402-435.

[545] General Comment No 21 para 49(a).

[546] Ibid paras 49(a) and 55(b).

[547] Ibid paras 49(b) and 55(c).

[548] Ibid para 49(b).

[549] Ibid para 49(c).

[550] Ibid paras 49(d) (right to access); 50(a) (in times of war and peace, and natural disasters); 50(b) (in particular the most disadvantaged and marginalised individuals and groups); and 54(b).

[551] Ibid paras 49(e); 54(a) and 55(e).

[552] Ibid para 50(c).

[553] Ibid paras 50(d), 52(b), 52(g), 52(i) and 55(a).

association and assembly;[554] 11) the right to a language;[555] 12) the right to access to cultural life;[556] and 13) the right to engage and contribute to cultural life;[557] and 14) the right to education.[558]

This broad approach towards the right to take part in cultural life consequently poses questions about the exact scope and normative content of this right. Due to the broad and vague scope of the definitional aspects, namely 'cultural life' and 'to take part', human rights scholars lament the difficulty in elaborating a core content of this right, without which it would lose its *raison d'être*.[559] Céline Romainville, for example, argues that this broad approach makes it difficult to orient the accurate implementation of the right and thus diminishes its 'normative force'.[560] To enable the implementation of this right, she suggests a middle ground between the restrictive definition pronounced in the wording of the Article 27 of UDHR and Article 15(1)(a) of the ICESCR as a right to access to certain artworks and the problematic 'anthropological' definition given the current international law practice, especially in General Comment No 21.[561] In Romainville's proposal, the right to participate in cultural life is understood as 'dealing with cultural identities only within the specific circle of cultural life': it thus 'refers to cultural expressions and heritages and to the

[554] Ibid paras 52(c) (for cultural and linguistic minorities) and 55(c) (in general).

[555] Ibid para 55(c).

[556] Ibid paras 49(d) (for minorities) and 55(d) (in general).

[557] Ibid para 52(b)(h) 55(c).

[558] Ibid paras 52(i); 54(c) and 55(c).

[559] Donders, 'The Legal Framework of the Right to Take Part in Cultural Life' *(n 488)* 261; Romainville *(n 513)* 427; Stamatopoulou *(n 489)* 107.

[560] Romainville *(n 513)* 427.

[561] Ibid 428.

processes of understanding, expression, learning, communication, and creation, which are based or linked with those cultural expressions and heritages'.[562] Additionally, a more precise definition of the right to participate in cultural life, Romainville argues, helps to underscore its importance role for social justice[563] and in such debates with respect of 'the integration, or restriction, of copyright and *droit d'auteur* in the name of the public interest and other human rights',[564] the latter of which was partially discussed in General Comment No 17 on the right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which one is the author.[565]

Following Sen's and Nussbaum's ideas, participation in cultural life can be seen as being an essential freedom for people, giving them a substantive choice regarding their affiliation in cultural life and, consequently, their way of life. Participation in a diverse cultural life enables people to follow a certain cultural heritage, or not. In Nussbaum's view, participation in cultural life can be seen as a

[562] Ibid 429.

[563] This relates to the issues such as equal access and participation for all in culture and equal access to cultural education. See; Ephraim Nimni, 'Collective Dimensions of the Right to take Part in Cultural Life' Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights (2008), UN doc E/C.12/40/4, 3.

[564] Romainville *(n 513)* 430.

[565] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, para 1 (c) of the Covenant) E/C.12/GC/17 (12 January 2006). For a general discussion of the General Comment No 17 see Chapter 4.

‘combined capability’ which relates to ‘innate powers’ of people as well as ‘external opportunities’.[566] It requires positive support that creates possibilities and institutional infrastructure and thereby enables all individuals to actually enjoy that particular capability.[567] Even if Sen and Nussbaum do not share the same understanding of the relationship between human rights and capabilities, it is possible to find a common ground between them on the fundamental role of culture as a condition for the exercise of various ‘functionings’ and as a capability that must be positively supported. To portray a working framework with respect of tripartite interaction among culture, copyright and human development, it is therefore possible to identify six main entitlements that can represent the essential minimum of the right to take part in cultural life for individuals. This framework is built primarily on General Comment No 21. However, the relevant international instruments, court and state practice, and academic literature is also used as a source. These six entitlements are:

2.4.1.1. The Right to Freedom of Artistic and Creative Expression

As General Comment No 21 states, the recognition of artistic and creative freedom of expression ‘is closely related to the duty of States, . . . , under article 15[3], “to respect the freedom indispensable for scientific research and creative activity”.’[568] Likewise, Article 5 of UNESCO’s Universal Declaration on Cultural Diversity provides that ‘all persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother

[566] Nussbaum *(n 443)* 273–300.

[567] Ibid.

[568] See General Comment 21 para 49(c).

tongue'.[569] This freedom applies to active creation of culture in both its material and spiritual sense.

This right has two dimensions: the first is producing artistic and creative expression (meaning-making in cultural life), and the second is benefiting from the protection of moral and material interests resulting from such engagement. The latter is limited to the protection of the material and moral interests deriving from authorship. It is regulated under Article 27 of the UDHR and Article 15(1)(c) of the ICESCR, and is subjected to an extensive analysis in General Comment No 17.[570] It also has an economic dimension[571] which will be discussed comprehensively, while singling out human rights attributes of copyright, in Chapter 4.[572]

In addition to Article 15 (3) of the ICESCR, the first limb of this freedom is also clearly protected in Article 19 (2) of the ICCPR, which states that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds 'in the form of art'.[573] Similarly, under Article 27 of the UDHR, everyone has the right 'to enjoy the arts'.[574] A more indirect protection of this freedom is provided by the freedom of expression, the normative significance of which in

[569] UN Educational, Scientific and Cultural Organisation (UNESCO), UNESCO Universal Declaration on Cultural Diversity, 2 November 2001.

[570] General Comment No 17.

[571] Ibid para 4.

[572] See Chapter 4 section 4.2.3.

[573] UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights: The right to freedom of artistic expression and creativity, 14 March 2013, A/HRC/23/34, para 9.

[574] Articles 13 and 31 of the Convention on the Rights of the Child, Article 13 (1) of the American Convention on Human Rights and Article 14 of its Protocol in the area of Economic, Social and Cultural Rights, and Article 42 of the Arab Charter for Human Rights also contain such explicit provisions.

intellectual property will be discussed in detail in the succeeding section.[575] However, it must be noted that the first limb of the freedom of artistic and creative expression reinvigorates the cultural and artistic dimension of freedom of expression.[576] As Romainville reminds, the artistic and cultural values of a work are in many instances disregarded especially in the interpretation of Article 10 of the ECHR. She notes that in the European Court of Human Rights' (ECtHR) case law, artistic expression is blended into the 'general regime of freedom of expression'[577] instead of being protected for its specific function with respect to lives of individuals and democracies.[578] In fact, in *Vereinigung Bildender Künstler v Austria*,[579] a large scale painting called '*Apocalypse*' - which showed a collage of various public figures[580] in extremely obscene depictions- was not protected as an artistic expression *per se*, but only because it was subsumed into a parodic and satirical expression of a political idea.[581] A similar attitude can be seen in *Lindon, Otchakovsky-Laurens and July v*

[575] Relevant provisions include Article 19 of the UDHR, Article 10 of the ECHR, Articles 9 and 17 of the African Charter on Human and Peoples' Rights, and Article 32 of the Arab Charter for Human Rights. UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights: The right to freedom of artistic expression and creativity, 14 March 2013, A/HRC/23/34, para 10.

[576] Romainville *(n 513)* 431.

[577] Romainville notes that 'the theoretical basis of freedom of expression such as marketplace of ideas or the idea of watchdogs of democracies favour a certain type of expression which is of a political, rational, linear and written nature'. Ibid.

[578] Ibid.

[579] *Vereinigung Bildender Künstler v Austria* (2007) 19 EHRR 34.

[580] These were Mother Teresa, Austrian Cardinal Hermann Groer, and various members of the Austrian Freedom Party (FPÖ)- a right-wing party. Ibid para 8.

[581] Ibid para 34.

France.[582] In the *Lindon* case, the ECtHR interprets an author's use of fictional characters as defamation and rejects recognising the particular power of the fictional narrative.[583] Accentuating the specific nature of the artistic and creative freedom of expression is important as it denotes the creation of a specific status and better legal protection for fictional narratives, and the recognition of the value of art in culture and aesthetics.[584]

As the first UN Special Rapporteur in the Field of Cultural Rights (Special Rapporteur) importantly points out, 'artistic activity relies on a large number of actors not reducible to the artist *per se*, encompassing all those engaged in and contributing to the creation, production, distribution and dissemination of artistic expressions and creations'.[585] The Special Rapporteur further notes that barriers to the enjoyment of the freedom of artistic and creative expression affect a wide range of people: 'the artists themselves, whether professionals or amateurs, as well as all those participating in the creation, production, distribution and dissemination of artwork'.[586] The relevant stakeholders include 'authors, musicians and composers, dancers and other performers, including street performers, comedians and playwrights, visual artists, authors, editors, film producers, publishers, distributors, directors and staff

[582] *Lindon, Otchakovsky-Laurens and July v France* (2007) 46 EHRR 35.

[583] Ibid.

[584] Romainville *(n 513)* 432.

[585] *Lindon, Otchakovsky-Laurens and July v France* para 5.

[586] Ibid para 42.

working in libraries, galleries, museums, cinemas or theatres, curators and organisers of cultural events',[587] as well as audiences.[588]

This freedom serves to protect several capabilities of individuals, which has significant ramifications with respect to intellectual property. Firstly, through substantive freedoms enshrined under Article 27 of the UDHR and Article 15(1)(c) of the ICESCR, it provides a capability to maintain a decent livelihood (protection of material interests). Secondly, it enables opportunities to protect individuals' personal integrity reflected through their work (protection of moral interests). These two aspects of the freedom are further discussed in Chapter 4.[589] Thirdly, as General Comment No 21 recognises, the freedom 'to create […] implies that States Parties must abolish censorship of cultural activities in the arts and other forms of expression, if any'.[590] This element of the right to participate in cultural life is further confirmed by the work of the first UN Special Rapporteur in the Field of Cultural Rights (Special Rapporteur).[591] Fourthly, today a core debate is whether copyright regimes have evolved in such a way that the rights of authors and artists move away from promoting creativity. As has been discussed in Chapter 1, public domain advocates stress that certain free uses of work have shrunk considerably due to the trenchant use of copyright. Artistic expression and creativity may entail the re-appropriation of previous works either as a part of a parodic or satiric response to the narratives embedded in

[587] Ibid.

[588] Ibid.

[589] See Chapter 4 section 4.7.

[590] General Comment No 21 para 49(c).

[591] UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights : The right to freedom of artistic expression and creativity, 14 March 2013, A/HRC/23/34.

them; or as a part of expressions targeted to critique current social, political or cultural institutions or economic powers; or independently to express opinions in cutting-edge art forms. Restrictions on these types of artistic productions are particularly visible as the aesthetic censorship of art that is implemented through copyright, as artists are not free to choose their preferred style or to borrow from others. This censorship occurs particularly in the world of hip-hop culture, where sampling is the norm and an art in itself, as well as in other areas of contemporary art and media especially in parodies and satires.[592] Under current copyright regimes, such styles of music or visual arts are subjected to an inconsistent judicial treatment or narrow statutory regulation and sometimes deemed to be devoid of any artistic merit, as mentioned in Chapter 1.[593] This reflects a world vision of one-sided authorship while simultaneously creating hurdles for all others. This attitude leads to further restrictions on abstract, new or conceptual art, which can be revealed in the form of financial censorship. For example, Kembrew McLeod and Peter DiCola show that the current system for licensing samples is inefficient and limits creativity by setting present-day licensing fees quite out of reach of many artists with the help of copyright and business practices that derive from asymmetric power differences in music sector.[594] It is important to recognise the artistic freedoms of all persons when they participate in cultural life or wish to engage in creative activities. This issue is a field which is often overlooked in

[592] See Chapter 1 section 1.4.2.

[593] See ibid.

[594] McLeod and DiCola *(n 368).*

current debates about intellectual property.[595] Accordingly, the challenge is to find appropriate solutions, which continue to protect copyright holders' rights and their fair interests of remuneration but, at the same time, respect the freedoms of secondary artists to 'quote' and refer to these copyright holders' productions, or to appropriate some parts of them. Individuals alone or together with members of a group should be provided freedom to create culture unhindered by state or other interference. Thus, protecting these freedoms equally means that states must prevent their violations by third parties.[596] Lastly, 'public officials, judges and legislators, when creating or evaluating limitations to artistic freedoms, should consider the nature of artistic creativity as opposed to its value or merit for, as well as the right of artists to dissent, to use political, religious and economic symbols as a counter-discourse to dominant powers, and to express their own belief and world vision'.[597] This mirrors 'senses, Imagination, and thought' capabilities in Nussbaum's list, which means '*being able to use imagination and thought in connection with experiencing and producing works . . . , literary, musical, and so forth.*'[598] The use of the imaginary and fiction must therefore be seen and respected as a crucial element of the freedom indispensable for creative activities.[599]

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[595] Netanel examines this debate within the general framework of freedom of expression. For hip-hop music's freedom of expression connections see; Neil Weinstock Netanel, *Copyright's Paradox* (OUP, 2008) 19-23.

[596] Stamatopoulou *(n 489)* 123.

[597] UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights: The right to freedom of artistic expression and creativity, 14 March 2013, A/HRC/23/34, para 89(d).

[598] For Nussbaum's list see; Appendix 1.

[599] Ibid.

2.4.1.2. The Right of Access to and Enjoyment of Cultural Heritage

The right of access to and enjoyment of cultural heritage is the second substantive freedom protected by the right to participate in cultural life. This right is recognised in Article 15(2) of the ICESCR, and is also implicitly protected under the legal instruments related to cultural policies. [600] The instruments in relation to the protection of cultural heritage refer to human rights to only a limited extend due to the lack of clarity about what cultural heritage is.[601] However, there is now tendency to explore the right of access to and enjoyment of cultural heritage in human rights realm.[602]

In General Comment No 21, the CESCR states that the obligation to respect the right to take part in cultural life '…includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group [. . .] to have access to their own cultural and linguistic heritage and to that of others.'[603] The Committee stresses that '...in many instances, the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected'.[604]

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[600] See; UNESCO's the Convention concerning the Protection of the World Cultural and Natural Heritage (1972); the Convention on the Protection of the Underwater Cultural Heritage (2001); and the Convention on the Safeguarding of the Intangible Cultural Heritage (2003).

[601] Romainville *(n 513)* 432.

[602] See namely UNHRC, 'Report of the Independent Expert in the field of Cultural Rights on the issue of cultural heritage' UNGAOR 17th session, UN doc A/HRC/17/38 (21 March 2011) (by Farida Shaheed).

[603] Ibid para 49(d).

[604] General Comment No. 21 para 50.

As the Special Rapporteur points out in her report on the right of access to and enjoyment of cultural heritage, 'access' and 'enjoyment' are aspects of this right which essentially denote a capability 'to know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and creations of others, without political, religious, economic or physical encumbrances'.[605] According to her report, access and enjoyment mean more than being 'mere beneficiaries or users of cultural heritage', and they also imply 'contributing to the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes'.[606] More specifically, access to cultural heritage includes '(a) physical access to cultural heritage, which may be complemented by access through information technologies; (b) economic access, which means that access should be affordable to all; (c) information access, which refers to the right to seek, receive and impart information on cultural heritage, without borders; and (d) access to decision making and monitoring procedures, including administrative and judicial procedures and remedies'.[607]

Several aspects of the definition of cultural heritage provided in Chapter 1[608] correspond to one significant concept of copyright law: the 'public domain'.[609] In

[605] UNHRC, 'Report of the Independent Expert in the field of Cultural Rights on the issue of cultural heritage' *(n 602)* para 58.

[606] Ibid.

[607] Ibid para 60.

[608] See Chapter 1 page 75.

[609] For critical academic commentaries on the intellectual property laws' treatment of public domain see; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 Law and Contemporary Problems 33-74; Boyle *(n 315)*; Litman *(n 121)*; Deazley *(n 3)* 101–34.

legal literature, the 'public domain' is generally portrayed as works that either never have fallen into copyright protection or that are no longer within the term of protection under the applicable copyright laws.[610] However, the public domain is also a part of the common cultural and intellectual heritage of humanity[611] and is the major source of inspiration, imagination and discovery for creators.[612] The European Parliament resolution on 'Europeana - the next steps' for preserving and disseminating Europe's cultural heritage refers to this, stating that 'European cultural heritage is largely made up of works in the public domain, and access to them should be provided in the digital world as far as possible in high-quality formats.'[613] The works in the public domain are important for access to knowledge and must be accessible for the benefit of creators, inventors, universities and research centres.[614] They are also crucial resources in preserving history, scientific knowledge, technology and inventions, and cultural heritage for present and future generations. Access to and enjoyment of these works foster learning, innovation and creation of new works.[615] Therefore, the limitation of material in the public domain and the narrowing of possibilities of free use may adversely affect the right of access to and enjoyment of cultural heritage.

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[610] See; Carys J Craig, 'The Canadian Public Domain: What, Where and to What End?' in Rosemary J. Coombe, Darren Wershler and Martin Zailinger (eds), *Dynamic Fair Dealing: Creating Canadian Culture Online* (University of Toronto Press, 2014) 67-69.

[611] Boyle *(n 315)* 248.

[612] Litman *(n 121)* 968.

[613] European Parliament resolution of 5 May 2010 on 'Europeana - the next steps' (2009/2158(INI)) OJ C 81E, 15.3.2011, p. 16–25; 17.

[614] See generally; Boyle *(n 315)*.

[615] Tyler T. Ochoa, 'Origins and Meanings of the Public Domain' (2002) 28 University of Dayton Law Review 215

2.4.1.3. The Right to Access to Cultural Life and Information

The third freedom deriving from the right to take part in cultural life is access to culture and cultural information. General Comment No 21 emphasises the importance of access to cultural life several times,[616] requiring 'material' and 'intellectual' access to cultural life and information. The material accessibility implies more affordable performances, activities and cultural institutions, particularly envisaging indigent people in society.[617] The material dimension also implies that cultural institutions offer equal access to opportunities, especially regarding people with disabilities[618] and the elderly.[619] The 'intellectual' dimension of accessibility focuses on three elements:[620] access to cultural information and to media,[621] access to culture with respect to the linguistic diversity of the country,[622] and lastly access to, and enrichment of, cultural capital and cultural references.[623] In this sense, the right of

[616] General Comment No 21 enunciates that 'it is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated'. See General Comment No 21 para 16(b).

[617] Ibid.

[618] Ibid para 31.

[619] Ibid para 28.

[620] 'Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination'. Ibid para 16(b). 'States parties, . . . , should go beyond the material aspects of culture . . . and . . . promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).' Ibid para 70.

[621] Ibid para 49(b).

[622] Ibid paras 16(b), 52(a) and 55(c).

[623] Ibid paras 43 and 49(b).

access to culture is closely linked to the right to education[624] and can be understood as a 'right to knowledge of cultural resources'.[625] It is also closely connected with freedom of expression, which includes the right to seek and receive information.[626]

2.4.1.4. The Right to Contribution to Cultural Life

The fourth freedom deriving from the right to participate in cultural life complements the rights of access to culture and freedom of artistic and creative expression: right to contribution to cultural life. In the General Comment No 21, the CESCR highlights that the right to take part in cultural life entails rights of participation in, access to, and contribution to cultural life, and encompasses the right of everyone 'to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.'[627] Contribution to cultural life refers to substantive opportunities to actively take part in the diversity of artistic creation, to contribute to the creation and enhancement of cultural expressions, to be involved in the identification and protection of cultural heritage and in the familiarisation with the diversity of creations, expressions and heritage.[628] It is more

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[624] General Comment No 21 para 54(c). General Comment No 21 reads; '*Access* covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication,'. Ibid para 15(b).

[625] Romainville *(n 513)* 434.

[626] General Comment No 21 para 49(b).

[627] Ibid para 15 (a).

[628] Ibid para 15(c).

related to those substantive opportunities which individuals are empowered 'to express themselves freely, to communicate, to interact and engage in creative processes with the goal of the full development of his personality, projects, and progress in society'.[629] The right to contribute to cultural life firstly implies the recognition of individuals' contribution to cultural life, being worthy of combining.[630] It further covers the right to receive, when needed, help and concrete assistance -such as financial help or institutional support- in order to be able to participate in cultural life, especially for a nonprofessional artist.[631]

2.4.1.5. The Right to Freedom of Choice

Freedom of choice requires that individuals have the opportunity to choose to take part in cultural life or not to and that they also have the choice to determine which cultural lives they want to be involved in.[632] The protection of this freedom refers to the fact that cultural life is protected only because it allows the individuals to define and exercise their freedoms. Freedom of choice fortifies cultural diversity since it postulates the existence of a rich and diverse cultural environment.[633]

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[629] Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (adopted 26 November 1976) UNESDOC, Records of the General Conference, 19th Session, I para 14 (b) UNESCO doc 19C/Resolution, I, 29.

[630] General Comment No 21 para 15(c). See; Romainville *(n 513)* 434.

[631] General Comment No 21 para 52(d).

[632] Ibid paras 15(a), 49(a) and 52(b).

[633] Romainville *(n 513)* 435.

2.4.1.6. The Right to Participate in Decision-making in Cultural Matters

The process aspect of the right to take part in cultural life is the right to contribute to decision-making in cultural matters.[634] This prerogative extends to taking part in culture by empowering individuals to be partners of the 'definition and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights'.[635] This right attributes obligations to states to enact appropriate legislation and to establish effective mechanisms for 'allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated'.[636] It can for instance culminate in 'the creation of adequate consultative bodies in the development and implementation of cultural policies, in fostering the participation of citizens and associations in the management of public cultural services and in enhancing citizen participation in the evaluation of cultural policies'.[637] Thus, effective participation in decision-making processes relating to cultural life is a key element for the realisation of other substantive freedoms mentioned above.

[634] General Comment No 21 para 49(e).

[635] Ibid para 15(c).

[636] Ibid para 54(a).

[637] Romainville *(n 513)* 435.

2.4.2. Limitations to the Right to Take Part in Cultural Life

As with the other rights set out in the ICESCR, the right to take part in cultural life is not absolute. It may be subject to limitations. Such restrictions must, however, respect certain conditions: they must be 'determined by law',[638] acceptable 'in a democratic society',[639] 'compatible with the nature of these rights' and strictly necessary for the promotion of 'general welfare'.[640] The requirement of 'determined by law' is satisfied when the limitation: 1) is defined in any form of national law (usually enacted by an elected parliament) which conforms with international human rights standards; 2) is adequately accessible and sufficiently clear; and 3) is formulated in such a way that a person can foresee, to a degree that is reasonable in the circumstances, the consequences which a given action entails.[641] The second

[638] Any restriction imposed on one of the human rights in the ECHR, the ICCPR and the ICESCR must be 'prescribed by law' (ECHR Articles 9(2), 10(2), and 11(2)) or 'determined by law' (ICCPR Article 19(3) and ICESCR Articles 4. See; ICCPR Articles 12(3), 18(3), 19(3), 21 and 22; ECHR Articles 5(1) and 8(2); ACHR Articles 12(3), 13(2) and (4), 15, 16(2), 21(2) and 22(3); and ACHPR Articles 11, 12(2) and 14. Some articles contain a slightly different wording, such as 'in accordance with the law' (notably ECHR Article 8(2)) and 'in conformity with the law').

[639] See ICESCR Articles 4 and 8; ICCPR Article 19(3) and ECHR Articles 8(2), 9(2), 10(2), and 11(2).

[640] ICESCR Article 4. See General Comment 21 para 19.

[641] E.g. UNHRC, General Comment No. 19: Protection of the family A/45/40 (Vol 1) (Supp) (27 July 1990); UNHRC, General Comment No. 16: Right to privacy A/43/40 (8 April 1988); 1-2 IHRR 18 (1994) para 4; and Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, E/CN.4/ 1985/4 (1985) para 15. Within the ECHR context see; *Kennedy v the United Kingdom* App no 26839/05 (2010) 52 EHRR para 151; *Rotaru v Romania* (2000) 8 BHRC 449 para 52; *Liberty and others v the United Kingdom* (2008) 48 EHRR 1 para 59; *Iordachi and others v Moldova* App no 25198/02 (ECtHR, 2009). para 37; *Leander v Sweden* (1987) 9 EHRR 433 para 50. See also; Amrei Müller, 'Limitations to

requirement is associated with the principle of proportionality which plays a vital role in assessing the necessity of limitations, and requires that the limitation of rights is proportional in its scope and intensity to the purpose being sought.[642] In other words, the interference must correspond to a pressing social need and, in particular, that it must be proportionate to the legitimate aim pursued.[643] The third and fourth requirements are significantly different from limitation articles of other human rights instruments. In general, 'minimum core obligations' under each economic, social and cultural right is considered as representing the 'nature of these rights'.[644] The requirement of 'general welfare' is to be interpreted restrictively in the context of Article 4 ICESCR.[645] While the meaning of 'general welfare' is not explained by the *travaux préparatoires*, the fact that permitting limitations for reasons of maintaining public order, public morality and the respect for rights and freedoms of others was explicitly rejected during the drafting process makes clear that the term 'general welfare' does

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and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review 578-579.

[642] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N P Engel, 2005) 275.

[643] See the analysis by UN Human Rights Committee (HRC), General Comment No. 34: Freedoms of opinion and expression (Article 19) CCPR/C/GC/34 (12 September 2011) para 22; UNHRC, General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 11 IHRR 905 (26 May 2004) para 6; and Müller *(n 641)* 583-584. See also; *Olsson v Sweden* (No.1) A 130 (1988); 11 EHRR 259 at para 67; and *Chassagnou v France* 1999-III; 29 EHRR 615 (GC) para 113.

[644] UN CESCR, General Comment No. 3: The nature of states parties' obligations (Article 2, para 1) E/1991/23 (Supp) (14 December 1990).

[645] Alston and Quinn *(n 544)* 201-202.

not implicitly include these terms.[646] The notion of 'national security' was equally never suggested as a legitimate ground for limitation to economic, social and cultural rights.[647] Consequently, in the context of the ICESCR, 'general welfare' should be understood as referring primarily to the economic and social well-being of the people and the community.[648]

2.4.3. Freedom of Expression

Another human right that can be based in animating cultural capabilities within copyright law is the right to freedom of expression. The status of freedom of expression as a fundamental right is enshrined in international and regional human rights instruments as well as national constitutions. Internationally, freedom of expression is recognised in Article 19 of the UDHR and Article 19 of the ICCPR; the latter providing that freedom of expression may be subject only to certain necessary restrictions as are provided by law (eg for respect of the rights or reputations of others). At European level, freedom of expression (including the receiving and imparting of information and ideas) is enshrined in Article 10 of the ECHR and Article 11 of the CFR of the EU. The ECHR provides that the exercise of the right may be subject to various restrictions as are prescribed by law and are necessary in a democratic

[646] Müller *(n 641)* 573.

[647] Ibid.

[648] Erica-Irene A. Daes, 'The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities' E/CN.4/Sub.2/432/Rev.2 (1983) 123-4. See also ibid. 55, where the Special Rapporteur comments that 'its [general welfare's] purpose is to promote man's dignity and well-being . . . the general welfare is something quite different from ''reason of State''.' Similarly, see Alston and Quinn *(n 544)* 202.

society. Freedom of expression is also enshrined in several national constitutions across many jurisdictions, perhaps most famously in the First Amendment to the US Constitution.

Generally speaking, freedom of expression, although it may be delineated in several different ways, is broadly defined. It has different shades in different contexts. There are four broad types of expression. 'Artistic expression' exists when a person wishes to express themselves artistically; 'commercial expression' is used, for example, to advertise goods or services; 'political expression' is the dissemination of ideas, opinions and information which relate to government or public affairs; and finally there is the dissemination of ideas, opinions and information which do not fall within government or public affairs. The four forms of expression are not equal. Political expression is afforded the greatest level of protection.[649] The different forms of expression are not mutually exclusive.

The main elements of the freedom of expression are freedom to voice opinion, freedom to receive, seek and impart information, freedom of the press and the media, freedom of artistic and creative expression, freedom of cultural expression, freedom of science, freedom of the Internet, and the right to whistle-blowing.[650]

What is relevant to copyright law turns on the understanding of what freedom of expression means and why expression should enjoy greater freedom than

[649] See; Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, OUP, 2012) 644-683; Ivan Hare, 'Is the Privileged Position of Political Expression Justified' in Jack Beatson and Yvonne Crips (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP, 2000) 105-121.

[650] For the definitions and legal grounds of these freedoms see; Wolfgang Benedek and Matthias C. Kettemann, *Freedom of Expression and the Internet* (Council of Europe Publishing, 2014) 23-38.

other human activities. Yet legal scholarship and jurisprudence invoke different justifications in this respect. Some view freedom of expression as instrumental to collective self-government and democratic deliberation.[651] Others highlight the importance of freedom of expression for the search for truth.[652] For others, freedom of expression is, rather, an essential element of individual autonomy and achieving personal fulfilment.[653] For yet others, the central meaning of freedom of expression lies in nurturing dissent, fostering tolerance, or checking government abuse.[654] A further rationale for protecting freedom of expression as a human right is suggested in the 'capabilities approach' to human rights, which focuses on freedom of expression as a way to enable valuable functionings, especially fostering the 'senses, imagination, and thought' capabilities in Nussbaum's list.[655]

2.4.4. Limitations to Freedom of Expression

As regards to the UN's human rights regime, Article 19 (3) of the ICCPR imposes three requirements according to which states may restrict the exercise of freedom of expression. Those conditions are to be implemented narrowly.[656] According to the Special Rapporteur, there are several procedural requirements that any limitation to the right to freedom of expression has to follow in order to pass the three-part cumulative test. Firstly, such a limitation must be 'prescribed by law' which

[651] Alexander Meiklejohn, *Political Freedom: Constitutional Powers of the People* (OUP, 1965).

[652] See; John Stuart Mill, *On Liberty* (Penguin, 1982).

[653] See; John Rawls, *A Theory of Justice* (2st edn, Harvard University Press, 1999).

[654] See; Frederich F Schauer, *Free Speech: A Philosophical Enquiry* (CUP, 1982) 40–44.

[655] See her list in Appendix 1.

[656] General Comment No. 34, paras 21-36.

is clear and accessible to all individuals (principle of legality with sub-principles of foreseeability/predictability and transparency). Secondly, a limitation chosen must be adopted to achieve a legitimate objective, namely to protect the rights or reputations of others or national security, public order, or public health or morals (principle of legitimacy). Thirdly, it must be proven to be 'necessary' and the least invasive means possible to achieve the specific aim (principles of necessity and proportionality).[657]

The ECHR takes the wording of the ICCPR almost intact into its Article 10, but adds important further requirements specifying a number of those limits. Most importantly, paragraph 2 of Article 10 of the ECHR contains a list of the legitimate interests that can justify limitation of freedom of expression. These 'legitimate interests' include national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation of the rights of others, prevention of the disclosure of information received in confidence, and maintenance of the authority and impartiality of the judiciary.

The ECtHR has produced extensive case law in relation to permissible limitations to freedom of expression particularly through the concept of 'democratic society' that pervades the whole text of the Convention. For more than three decades,[658] the Court has developed the 'necessary in a democratic society test' in

[657] UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 14th Session UN Doc A/HRC/14/23 (20 April 2010) (Frank La Rue) paras 72-87; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 7th Session UN Doc A/HRC/17/27 (16 May 2011) (Frank La Rue) para 24. See also; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 71st Session UN Doc A/71/373 (6 September 2016) (David Kaye) paras 12-19.

[658] *Sunday Times v the United Kingdom* Series A No 30 (App no 6538/74) (26 April 1979).

the light of Articles 8-11 of the ECHR.[659] This test takes into account whether the restriction is an interference by the public authorities with the exercise of the right; whether the restriction is prescribed by law; whether it is necessary in a 'democratic society,' necessarily meaning the existence of a pressing social need; or whether the purpose of the restriction is to protect one of the 'legitimate interests' described above.[660] Although the text of Article 10 does not include an explicit reference to it, the ECtHR has also added a test to determine the extent to which the principle of proportionality is respected, so that the level of restriction maintains an appropriate balance between the freedom of expression and the necessity of its restriction in a democratic society.

2.5. Conclusion

In the *Fairey* case,[661] the principal parties mainly focused on the questions of whether the copying amounts to an improper or unlawful appropriation and whether his act would qualify as a fair use, even though Fairey were deemed to have taken some protected expression.[662] Fairey also argued that the functions of the fair use doctrine is to ensure that copyright law does not go against the First Amendment.[663] The case also ignited debate among scholars particularly with respect to the scope

[659] See; Steven Greer, *The Exceptions to Articles 8 and 11 of the European Convention on Human Rights* (Council of Europe Publishing, 1997).

[660] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (OUP, 6th edn, 2014) 315.

[661] See Chapter 1 section 1.1.3.

[662] Fisher et al *(n 186)* 257–68.

[663] Ibid 262.

and limitations of the fair use doctrine under American copyright law[664] and originality.[665] Many of them believe that Fairey's work should be considered as a fair use.[666] Some others on the other hand have argued that Fairey's posters are more creative than Garcia's picture, Garcia captured a moment in which Obama struck a pose similar to that typically used for depicting political leaders which is known as the 'three-quarters pose'. Some photography experts have recognised the transformative creativity that Fairey added to Garcia's photo. A few scholars also discussed the First Amendment aspects of the case.[667]

What is important here is not just positioning Fairey's work as a fair use against Garcia's photo. However, another important question in this case is which freedoms are affected when Fairey had to face infringement claims from a well-known multinational news agency. A few scholars have underlined the freedom of aspects of the case. One may in fact point to his freedom of political expression, most notably his right to voice an opinion. However, it is not just this but also Fairey's freedom of artistic

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[664] Ibid; Jo-Na Willams, 'New Symbol of Hope for Fair Use: Shepard Fairey v. the Associated Press' (2009) 2(1) Landslide 55-60; Shelly Rosenfeld, 'Photo Finish - Copyright and Shepard Fairey's Use of a News Photo Image of the President' (2011) 36(2) Vermont Law Review 355-372; Rachael L. Shinoskie, 'In Defense of Fairey and Fair Use' (2010) 28(1) Entertainment and Sports Lawyer 16-21; Elizabeth Dauer and Allison Rosen, 'Copyright Law and the Visual Arts: Fairey v. AP' (2010) 8(1) University of Denver Sports and Entertainment Law Journal 93-104.

[665] Craig *(n 383)* 140.

[666] See the commentaries cited in footnote 664.

[667]Alison C. Gaughenbaugh, 'Is There Hope - Incorporating the First Amendment into a Fair Use Analysis' (2010) 36(1) University of Dayton Law Review 87-114; Hiro Senda, 'Hope or Nope - Is Obama Hope Protected by Idea/Expression Dichotomy, Fair Use Doctrine, & First Amendment' (2010) 10(1) Chicago-Kent Journal of Intellectual Property 65-105.

and creative expression was subdued by the Associated Press's copyright. Perhaps Fairey's case was not as tragic as Linda's case[668] in earning money out of his artistic contribution. However, Fairey both as a citizen and as an artist, when settling the case, had to leave his capabilities and freedoms to participate in political and cultural life under the control of the Associated Press. The case also made him renounce his freedom to participate in the decision-making in cultural and political matters. Equally, the outcome of the settlement was a warning to citizens, who might want to contribute to cultural and political life and participate in decision-making in cultural and political matters through the technological advances which make it easier to produce such posters, to be wary when they engage with cultural products.

Accordingly, reviewing copyright from a capabilities approach perspective requires to pose many more questions than those often asked within economic-development-oriented arguments for copyright protection and its in-built flexibilities. It invites to explore, for example, who ultimately benefits from copyright protection and what are the positions of the stakeholders in this system. How do other areas of law[669] interact with copyright laws to create options in designing more equitable social arrangements between authors' rights and public access to and participation in culture through copyright-protected works? This chapter has fulfilled the task of answering the latter from a human rights perspective, while several answers to the former are provided on selected issues in different part of the thesis.

This chapter has revealed that capabilities and human rights are neither similar nor completely different. They take their origins from different traditions. While the capabilities approach is a critical, and yet alternative, framework for development

[668] See Chapter 1 section 1.1.2.

[669] For example contract law, competition law (Abbe Brown) and human rights law (Helfer and others).

measurement, human rights are political but mostly legal regimes defining universal and inalienable rights for individuals. However, there are certain overlaps between them.

As previously mentioned,[670] a capabilities approach provides some tools for evaluating the cultural impact of copyright. Importantly, it also highlights the role of human agency and substantive freedoms (capabilities) conferred to this agent in shaping copyright laws' policy considerations and implementation. A multidisciplinary approach is especially needed for the construction of such a paradigm concerning copyright, given that it can have both positive and negative impacts on nearly all aspects of human development. This chapter has demonstrated that the merger of the capabilities approach and human rights is not only a political choice to shape such policy choices, but also a reality at international human rights discipline and human development studies. However, instead of trying to determine where the capabilities approach and human rights stand against each other, what is important is corrective collaboration and synergy between them to provide resolutions for making policy choices concerning copyright law.

This chapter has further demonstrated that the legal framework that can be drawn from the human rights to take part in cultural life and freedom of expression are good harbours to accommodate access to and participation in culture issues and provide capabilities that aim to achieve these ends. These two rights are positioned at the intersection of many different concepts, intellectual traditions and legal instruments. This diversity of perspectives and domestic, regional, and international sources suggests that it is better to approach challenges to copyright grounded in

[670] See Chapter 1 sections 1.2.3.6. and 1.5.2.

human rights from multiple perspectives. This point has particular relevance when considering these rights in different institutional and textual contexts.

Through the combination of the normative force of the capabilities approach in ethics and development and the normative force of human rights in law, it is now time to identify the specific cases that might show copyright laws' negative (Chapter 3, partly 5 and 6) and positive (Chapters 4, partly 5 and 6) impacts on several aspects of human development.

CHAPTER 3

3. Netibilities: The Internet of Things, Culture and Freedoms

3.1. Copyright's Digital Challenges

Today we are in the middle of another global campaign against 'piracy'. The Internet has triggered this campaign. The Internet has generated new business models or technologies that enable the efficient spread of content. Peer-to-peer (P2P) file sharing is among the most efficient online technologies that facilitate the easy spread of and access to content in a way unimagined a scant generation ago. Thus, the Internet has become a repository of rich and diverse online content.

The classic functioning of the Internet involves at least three parties: content authors (i.e. creators of online content), Internet users (i.e. those seeking access to online content) and Internet intermediaries (i.e. entities that provide access to, store and link online content).[671] Yet online content could be illegal at many levels. Copyright infringement by Internet users is especially a mass phenomenon. The rise in unauthorised downloading of digital music, film and video since the beginning of the P2P revolution has become increasingly controversial in relation to copyright material.[672] The arrival of 'Web 2.0' interactive user generated or mediated content (UGC or UMC) sites - such as eBay, YouTube, Facebook- has been another key

[671] Althaf Marsoof, ''Notice and takedown': A Copyright Perspective' (2015) 5(2) Queen Mary Journal of Intellectual Property 188.

[672] Lilian Edwards, *Role and Responsibility of The Internet Intermediaries in The Field of Copyright and Related Rights* (2011) 3, available at http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf.

development that has triggered the debate over Internet intermediary liability.[673] This has led copyright holders to pursue a four-fold strategy: Firstly, for many years, it has been the 'notice-and-takedown' (N&T) approach that has allowed copyright holders to have infringing online content removed (or taken down) from the Internet in a swift and cost-effective way by notifying the relevant Internet intermediaries that are responsible in making the content visible to Internet users. Secondly, the distributors of P2P sharing software were, most successfully in the US, sued for contributory and/or vicarious copyright infringement.[674] Thirdly, direct copyright infringement claims were brought against many individual Internet users.[675] Since by participating in a P2P network, users necessarily disclose their Internet Protocol (IP) addresses to other users of the network, they can be easily identified. That way, copyright holders were able to obtain the users' IP addresses by joining the P2P network.[676] Finally, due to

[673] Ibid.

[674] See: *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd*, 125 S Ct 2764 (2005); *A&M Records, Inc v Napster, Inc,* 114 F Supp 2d 896 (ND Call 2000) affirmed by *A&M Records, Inc v Napster, Inc,* 239 F3d 1004 (9th Cir 2001); and *In re Aimster Copyright Litigation* 334 F 3d 643 (7th Cir 2003).

[675] Kristina Groennings, 'Costs and Benefits of the Recording Industry's Litigation Against Individuals' (2005) 20 Berkeley Tech L J 589.

[676] The actual identity of the users in question could then be uncovered to the users' Internet access providers by making a request pursuant to US Copyright Act § 512(h). However, Article 8 of Parliament and Council Directive 2004/48 on the Enforcement of Intellectual Property Rights neither requires Member States to lay down an obligation to reveal subscribers' identities in the context of civil proceedings (i.e., Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271 para 58) nor prohibits them from laying down any such obligations (ie Case C-557/07, *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH*, 2009 E.C.R. I-01227, para 29). See; Council Directive 2004/48/EC of 29

the success of these enforcement strategies, a new method of distributing infringing content online has become commonplace: users wishing to download infringing content visit certain websites that provide download-links to files that have been uploaded to file hosting providers (e.g. rapidshare.com, fileserve.com, or hotfile.com). In this scenario, users do not share their IP addresses with anyone other than the website providing the download links and the file hosting provider. Different from P2P networks, it is not technically possible for a third party to see who is downloading what. Suing the website operators who make the download links available is often not practical since they are located in jurisdictions with weak or non-existing copyright laws. File hosting providers, on the other hand, can claim immunity under the safe harbours of Copyright Act § 512(c) and Article 14 of the E-Commerce Directive[677] for as long as they have not been notified of a particular infringing file or, in case they receive such a notification, act expeditiously to remove, or disable access to, the file. Copyright holders therefore have to constantly scan websites known to provide download links in order to notify the infringing files to the corresponding file hosting provider. This is a time-consuming and costly task. In response, copyright holders have increasingly employed a new strategy against unlawful content on the Internet that infringes intellectual property rights, projecting their attention onto online intermediaries: seeking injunctions against Internet access providers and Internet

April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16 [Hereinafter the Enforcement Directive].

[677] Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services in Particular Electronic Commerce in the Internal Market [2000] 2000 OJ L 178/1, 11 [hereinafter the E-Commerce Directive].

website operators, which enjoin them to block access to websites providing infringing download links.[678]

As previously mentioned,[679] cultural life may take many forms. It includes artefacts of popular culture, both high and low forms of artistic expression, traditional culture and knowledge, and digital culture.[680] It is mostly at the nexus of digital culture where the human rights and copyright frameworks often contradict. This brings us a broader perspective: what kind of human rights and freedoms protecting capabilities to participate in culture are at stake due to digital copyright enforcement regimes? This chapter aims at showing a link between the expansion of human freedoms and capabilities to live in a 'fair culture' with the advantages and limits of copyright law: how does copyright interact with participatory capabilities that are necessary components of human development and where do these two values lie at the framework drawn in Chapter 2 in relation to the human rights to take part in cultural life and freedom of expression?

To draw a tripartite connection among cultural human rights and freedoms, the capabilities approach and copyright, this chapter examines concrete cases where the tension between copyright and the rights to take part in cultural life and freedom of expression have become increasingly acute due to the recent expansion of copyright law across a number of jurisdictions, which has not been counterbalanced by a similar expansion of the freedoms afforded to users and Internet intermediaries.

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[678] Lukas Feiler, 'Website Blocking Injunctions under EU and US Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?' (TTLF Working Papers, 2012) 3-4.

[679] See Chapter 1 section 1.2.

[680] Shaver and Sganga *(n 120)* 644.

However, this identification should be, and is, confined to the issues where copyright burdens cultural netibilities more profoundly in facing its digital challenge through digital enforcement measures, such as notice-and-takedown and graduated response procedures, disclosure orders, file sharing and (website) blocking injunctions. This assessment is made according to the frameworks that are provided in Chapter 2 for the right to take part in cultural life and the right to freedom of expression. Since courts and scholars have predominantly pointed to the freedom of expression of these enforcement regimes, their analyses are discussed in each enforcement regime's section. The right to take part in cultural life is discussed in a separate section for all.

The term Netizen is a combination of the words Internet and citizen as in 'citizen of the net.'[681] Similarly, the term 'netibilities' is used as a portmanteau of the words Internet and capabilities in identifying substantive freedoms (protected by human rights) on the Internet.

Thus, this chapter examines more precisely and in the light of concrete cases when and how copyright does—and does not—burden netibilities (digital cultural freedoms). It is possible to divide copyright's burdens on cultural freedoms into three distinct, yet interrelated categories.[682] Firstly, copyright imposes a 'censorial burden' on cultural freedoms. Because of copyright, the users of copyrighted work are often unable to convey their expression and contribute to production and dissemination of culture effectively, and the participatory community explained in Chapter 1[683] are unable to obtain access to certain expressive works or are deprived of necessary

[681] Michael Hauben and Ronda Hauben, *Netizens: On the History and Impact of Usenet and the Internet* (Wiley-Blackwell, 1997).

[682] These categories are adapted from Neil Natanel's classification in Netanel, *(n 595)* 109-154.

[683] See Chapter 1 sections 1.2. and 1.5.

means to access. This is one of main issues of this chapter. Secondly, copyright imposes a 'prohibitive cost burden' on cultural freedoms. Even a copyright holder who is willing to license sometimes insists on a license fee a particular secondary author cannot afford. This problem is more evident in hip-hop music and user generated content. Licensing issues are held out of the scope of this chapter. Thirdly, copyright culminates in a 'distributive burden'. The copyright as a whole imposes differential burdens on different types of participants of the cultural production process. Highly concentrated copyright industries controlling vast inventories of copyrighted works enjoy the predominance of copyright's benefits. Copyright's distributive burdens fall most heavily on individuals and intermediaries. While some aspects of copyright's burdens are quite direct, others are surprisingly complex.

3.2. Notice-and-action

Internet intermediaries facilitate a wide range of conduct using services supplied over the layered architecture of modern communications networks. Members of this class include search engines, social networks, internet service providers, website operators, hosts, and payment gateways, which together exert a critical and growing influence upon national and global economies, governments and cultures.

'Notice-and-action' is an umbrella term for a range of procedures designed to eliminate illegal or infringing content from the Internet through these intermediaries.[684] The Organisation for Economic Co-operation and Development

[684] For the history of the intermediary liability regimes and the 'notice-and-action' procedures see; OECD, Directorate for Science, Technology and Industry, Committee for Information, Computer and Communication Policy, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives:

(OECD), in a recent comprehensive report on Internet intermediary liability, identifies four different models for Internet intermediary co-operation: 1)'notice-and-takedown', 2)'notice-and-notice', 3)'notice-and-disconnection' or 'graduated response', and 4)'filtering'.[685] These model legal frameworks for Internet intermediaries have developed taking two different approaches: (i) 'horizontal' regulation that deals with the liability of intermediaries across all types of content, or (ii) 'vertical' regulation which lays down rules for special domains (copyright, protection of children, personal data, counterfeiting, domain names, online gambling, etc).[686]

Notice-and-takedown procedures, the progenitor of all these mechanisms, essentially entails Internet intermediaries (most notably hosting service providers) to act swiftly to remove or disable access to infringing content in order to benefit from statutory exemptions from any liability they may have incurred in hosting such content.[687] Although involvement of public authorities is not excluded, it is also not required.[688] The following section examines notice-and-takedown and graduated response regimes respectively.

Forging Partnerships for Advancing Public Policy Objectives for The Internet Economy' (22 June 2011) 10-24.

[685] Ibid 57-67.

[686] Ibid 12-13.

[687] Jef Ausloos and Aleksandra Kuczerawy, 'From Notice-and-Takedown to Notice-and-Delist: Implementing the Google Spain Ruling' (CiTiP Working Paper 24/2015 KU Leuven Centre for IT & IP Law - 5 October 2015) 14; Yin Harn Lee, 'Copyright and Freedom of Expression: A Literature Review' CREATe Working Paper 2015/04 (May 2015) 155.

[688] For an extensive analysis of the Internet intermediary governance issues from multiple perspectives, and in the context of different cultures and regulatory frameworks see; Urs Gasser and Wolfgang Schulz, 'Governance of Online Intermediaries Observations From a Series of National Case Studies'

3.2.1. How did notice-and-takedown emerge?

Today, most intermediaries have notice-and-takedown policies. On a closer glance, it becomes apparent that the emergence of notice-and-takedown is a direct consequence of law reform in the US. In the mid-1990's the emerging US online industry recognised the serious threat posed by the risk of intermediary liability for content posted by third parties. In fact, the early *Stratton Playboy Enters v Frena, Inc*[689] case, which was filed against an Internet Bulletin Board Service acting as a typical content host, suggested that a direct copyright liability can be found on the part of the service provider, notwithstanding the lack of control or knowledge over the infringing material posted on the platform by third party Internet users.[690] This approach was later criticised by the seminal opinion in *Religious Technology Center v Netcom On-line Communication Services, Inc*[691] where although the court found that a Bulletin Board Service did not engage in direct copyright infringement,[692] the court left open the possibility of there being contributory copyright infringement.[693].

(Berkman Center Research Publication No. 2015-5 - February 18, 2015), available at SSRN: http://ssrn.com/abstract=2566364 or http://dx.doi.org/10.2139/ssrn.2566364.

[689] 839 F Supp 1552 (MD Fla 1993).

[690] Similarly, in *Oakmont, Inc v Prodigy Services Co* 1995 WL 323710 (NY Sup Ct 1995), despite out of copyright context, it was held that service providers who assumed an editorial role with regard to customer content were publishers and thus responsible for their customers' libel and other torts.

[691] 907 F Supp 1361 (ND Cal 1995).

[692] Ibid para 23.

[693] Ibid para 31. It is suggested that the better approach to tackle Internet intermediaries after the Netcom judgement is through contributory (or indirect) copyright liability, rather than through direct forms of liability. See; Jay Dratler, Jr and Stephen M. McJohn, *Cyberlaw: Intellectual Property in the Digital Millennium* (Law Journal Press, 2014) §6.01[2](a)).

It was feared that the attitude of courts in the US actively imposing liability on Internet intermediaries would hamper the development of online technologies and networked connectivity.[694] This lack of harmonisation in the emerging case law led to calls from industry for special statutory regimes giving immunity from liability – or in US terminology, 'safe harbours'.[695] Thus, a growing concern over copyright infringement online and 'the courts' willingness to expand the reach of contributory and vicarious liability in copyright law' have led to legislative effort culminating in the enactment of the Digital Millennium Copyright Act 1998 (DMCA),[696] which introduced this demanded legal immunity to Internet intermediaries, essentially limiting their copyright liability.[697] It is argued that 'it has been the DMCA's safe harbours that have enabled much of the vibrancy that we see in the online world today.'[698]

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[694] Nathan Lovejoy, 'Standards for Determining When ISPs have Fallen out of Section 512(A)' (2013) 27(1) Harvard J L & Tech 259.

[695] Edwards *(n 672)* 4.

[696] The Digital Millennium Copyright Act, Pub L No 105-304, 112 Stat. 2860 (28 October 1998). Title II (codified at 17 USC § 512 (2006)).

[697] Mark Bartholomew and John Tehranian, 'The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law' (2006) 21(4) Berkley Tech L J 1407. In the US, liability of Internet intermediaries is essentially governed by two provisions of federal law: Section 230(c) of the Communications Decency Act and Section 512 of the United States Copyright Act - the DMCA. The former one applies to defamation, invasion of privacy, tortious interference, civil liability for criminal law violations, and general negligence claims based on third-party content. The latter act was enacted specifically for copyright infringements. The analysis in the preceding section focuses on the DMCA regime. For more on Section 230(c) of the Communications Decency Act see; David Ardia, 'Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act' (2010) 43 Loyola of L A L Rev 452.

[698] Lovejoy *(n 694)* 259.

3.2.2. US Law

Section 512 of the DMCA creates a safe harbour for Internet intermediaries against copyright liability in the event they expeditiously takedown, or remove links to, content that infringe copyright upon acquiring knowledge of an infringement.[699] Intermediaries that provide four types of online services are eligible for this immunity: (a) transitory digital network communications, where an Internet intermediary acts as a 'mere conduit' in providing Internet access (e.g. telephone companies);[700] (b) system caching;[701] (c) information residing on systems or networks at the direction of a user (including hosting);[702] and (d) providing links (information location tools) (e.g. search engines, hyper-linkers and price aggregators).[703]

To benefit from the safe harbours, Internet intermediaries must not have 'red flag knowledge' of infringement on their systems.[704] They must also comply with two main threshold conditions that apply to any of the four types, and each type of Internet intermediary must also comply with a set of specific qualifying conditions. Firstly, all must adopt and reasonably implement 'a policy that provides for the termination in appropriate circumstances of subscribers and account holders' who are 'repeat infringers', and publicise this. Secondly, all must accommodate and not interfere with

[699] 17 USC § 512.

[700] 17 USC § 512(a).

[701] 17 USC § 512(b).

[702] 17 USC § 512(c).

[703] 17 USC § 512(d).

[704] 17 USC § 512(c)(1)(A)(ii).

'standard technical measures' that copyright holders use to identify or protect copyrighted works.[705]

Hosting platforms and search engines/hyper-linkers must comply with three additional conditions. Firstly, they must not possess 'actual knowledge' that material on their system or network is infringing,[706] and must not be aware of facts or circumstances from which infringing activity is obvious ('red flag knowledge'). Upon obtaining such knowledge or awareness, the Internet intermediary must expeditiously remove, or disable access to the allegedly infringing material, or it will lose statutory immunity.[707] Secondly, Internet intermediaries must not have received a financial benefit that is directly attributable to infringing activity where the Internet intermediary has 'the right and ability to control' that activity.[708] Thirdly, the Internet intermediary must implement the 'notice-and-takedown' procedure. Upon receiving a valid notice from a copyright holder or its agent of specific allegedly infringing content that is posted on the hosting platform, or to which location tool providers have linked, the OSP must act expeditiously to remove or disable access to the identified material.[709] To be valid and give rise to an obligation for an Internet intermediary to respond, takedown notices must contain specified information, including the location of the allegedly infringing

[705] 17 USC § 512(i)(2).

[706] 17 USC § 512(c)(1)(A); § 512(d)(1).

[707] 17 USC § 512(c)(1)(A); § 512(d)(1).

[708] 17 USC § 512(c)(2); § 512(d)(2).

[709] 17 USC § 512(c)(1)(C).

material.[710] Courts have held that notices that do not sufficiently identify the allegedly infringing content would not lead to Internet intermediaries' liability.[711]

The DMCA regime includes several procedural safeguards for Internet users (targets) whose material is targeted in the takedown notice, and to limit potential wrong or overbroad content removal. Targets can submit a counter notice to the Internet intermediary in certain circumstances.[712] Upon a valid counter notice, Internet intermediaries must put the allegedly infringing content back within ten to fourteen days after its removal if the copyright complainant has not initiated a copyright infringement case against that target. Additionally, to protect against misuse of the notice and counter notice procedures, the DMCA provides a right of action to recover damages, and costs for any party's knowing material misrepresentation in a notice or counter notice that results in content being improperly removed or restored.[713] Finally, the regime contains an important general limitation for Internet intermediaries to actively police expression on their systems: the safe harbours cannot set a requirement that an Internet intermediary monitor its service or affirmatively search for facts pointing to infringing activity.[714]

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[710] 17 USC § 512(c)(3).

[711] See; *Perfect 10 v CCBill* 488 F 3d 1102 1114; *UMG Recordings, Inc v Veoh Networks Inc,* 665 F Supp 2d 1099, 1108-09 (CD Cal 2009), aff'd sub nom. *UMG Recordings, Inc. v. Shelter Capital Partners LLC,* 667 F 3d 1022 (9th Cir 2011), opinion withdrawn and superseded on reh'g, 718 F 3d 1006 (9th Cir 2013), and aff'd sub nom. *UMG Recordings, Inc v Shelter Capital Partners LLC,* 718 F 3d 1006 (9th Cir 2013); *Hendrickson v eBay, Inc,* 165 F Supp 2d 1082, 1093 (CD Cal 2001).

[712] 17 USC § 512(g)(2)-(3).

[713] 17 USC § 512(f).

[714] 17 USC § 512(m).

Two questions have become central in litigation to qualify for a statutory safe harbour: what level and type of knowledge triggers an intermediary's duty to act? And does Section 512 support the view that Internet intermediaries have a 'notice-and-staydown' obligation in order to benefit from the statutory safe harbour? With respect to the first question, US Courts appear to converge around three points. Firstly, 'knowledge' under the DMCA means specific knowledge of particular infringing content, rather than generalised awareness of infringement on the intermediary's network.[715] Secondly, such specific knowledge need not arise from formal, DMCA-compliant copyright notices; it can result from third-party communications or other 'facts that would have made the specific infringement 'objectively' obvious to a reasonable person.'[716] Thirdly, the 'wilful blindness' doctrine prohibits intermediaries from turning a blind eye and actively avoiding knowledge of infringement.[717] With respect to the second question, it has been held that neither the wilful blindness

[715] *Viacom Int'l, Inc. v YouTube, Inc,* 676 F 3d 19, 30-32 (2d Cir 2012); see also *UMG Recordings, Inc. v Shelter Capital Partners LLC,* 718 F 3d 1006, 1021-22 (9th Cir 2013) (declining to adopt 'a broad conception of the knowledge requirement' and holding that the safe harbour requires 'specific knowledge of particular infringing activity); *Capitol Records, Inc v MP3tunes, LLC,* 821 F Supp 2d 627, 644 (SDNY 2011), on reconsideration in part, No 07 CIV 9931 WHP, 2013 WL 1987225 (SDNY, 14 May, 2013) (holding that general awareness of rampant infringement is not enough to disqualify a service provider of protection).

[716] *Viacom Int'l, Inc v YouTube, Inc,* 676 F 3d 19, 31 (2d Cir 2012).

[717] Ibid 34-35 (stating that the wilful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA). See also; *Capitol Records, LLC v Vimeo, LLC,* 972 F Supp 2d 537, 553-555 (SDNY 2013).

doctrine nor the ‘red flag’ knowledge principle requires the intermediary to take affirmative steps to monitor or seek out infringement.[718]

3.2.3. EU and UK Laws

In the EU, the liability regime debate came to be seen more as a holistic problem of whether Internet intermediaries should in general be made responsible for the content they made accessible to the public, and more importantly, whether they could in practice take any steps to deal with such a responsibility and avoid risk.[719] In the EU, the question of liability of Internet intermediaries was first addressed in the E-Commerce Directive.[720] Broadly speaking, the E-Commerce Directive’s liability regime covers not only the traditional internet service providers sector, but also a much wider range of actors, such as selling goods or services online (e.g. Amazon and eBay); offering online information or search tools for revenue or not for revenue (e.g. Google, BBC News website, MSN); and ‘pure’ telecommunications, cable and mobile communications companies offering network access services.[721]

Furthermore, the E-Commerce Directive takes a horizontal approach to the liability. This means that the liability exemptions cover various types of illegal content and activities (infringements on copyright, defamation, content harmful to minors, unfair commercial practices, etc.) and different kinds of liability (criminal, civil, direct,

[718] *UMG Recordings, Inc v Shelter Capital Partners LLC,* 718 F 3d 1006, 1029-1030 (9th Cir 2013) (citing Viacom, 676 F3d at 38 and quoting *Capital Records, Inc. v. MP3tunes, LLC,* 821 F.Supp. 2d 627, 635 (S.D.N.Y. Oct. 25, 2011)).

[719] Edwards *(n 672)* 4.

[720] E-Commerce Directive *(n 677)*.

[721] E-Commerce Directive *(n 677)* Recital 18.

indirect).[722] These 'safe harbours' protect intermediaries from liability, including actions that constitute a participation in an infringement of copyright, in the provision of three types of services: 'mere conduit' (Article 12), 'caching' (Article 13) and 'hosting' (Article 14).[723] Each safe harbour is governed by a separate set of conditions that must be met before the intermediary may benefit.[724]

Article 12 of the E-Commerce Directive targets traditional Internet access providers and backbone operators.[725] The liability exemption in this article refers to providers of 'mere conduit' services where they merely transmit content originated by and destined for other parties. To benefit from liability exemption, the Internet intermediary must not initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission.[726]

The second liability exemption is provided by Article 13 of the E-Commerce Directive. This applies to the 'caching' of information by providers of so called 'proxy-servers.'[727] Just as 'mere conduits,' this type of intermediaries can only be exempted

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[722] Natali Helberger et al., 'Legal Aspects of User Created Content' in IDATE, TNO, IViR, User-Created Content: Supporting a Participative Information Society, Study for the European Commission (DG INFSO) (December 2008) 220, available at: http://www.ivir.nl/publicaties/download/233

[723] Christina Angelopoulos, 'Sketching the Outline of A Ghost: The Fair Balance Between Copyright and Fundamental Rights in Intermediary Third Party Liability' (2015) 17(6) info 73.

[724] Aleksandra Kuczerawy and Jef Ausloos, 'NoC Online Intermediaries Case Studies Series: European Union and Google Spain' (February 18, 2015) 3, available at SSRN: http://ssrn.com/abstract=2567183

[725] Ibid.

[726] E-Commerce Directive *(n 677)* Article 12(1). See Kuczerawy and Ausloos *(n 724)* 4-5; Edwards *(n 672)* 9.

[727] Patrick van Eecke and Maarten Truyens, 'Liability of Online Intermediaries' in *Legal analysis of a Single Market for the Information Society: New Rules for A New Age?* (SMART 2007/0037) a study

from liability if they are in no way involved with the information transmitted.[728] Thus, where these intermediaries cache material, they will not be liable for it subject to the same conditions as in Article 12.[729] This immunity is also subject to the service providers taking down cached copies once they obtain actual knowledge that the original source of the information has been removed or access to it disabled, or removal or blocking of access has been ordered by a competent court or authority.[730]

Article 14 of the E-Commerce Directive provides the third liability exemption for Internet intermediaries. Typically, it concerns information society services, notably webhosting services, that provide web space to their users, where users can upload content to be published on a website (eg YouTube).[731] In contrast to mere conduit or caching services, storage in hosting services may be provided for a prolonged period of time, and may also be the primary object of the service.[732] The Court of Justice of the EU specified conditions of this immunity in two trade mark cases where it held that in order to enjoy the benefit of the liability exemption, a service provider's conduct must be neutral. The Court defined neutrality as a conduct that is 'technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.'[733]

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commissioned by the European Commission's Information Society and Media Directorate-General (November 2009) 8, available at: http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037

728 E-Commerce Directive *(n 677)* Recital 43.

729 Edwards *(n 672)* 9.

730 E-Commerce Directive *(n 677)* Article 13(1)(e).

731 van Eecke and Truyens *(n 727)* 9.

732 Kuczerawy and Ausloos *(n 724)* 6.

733 Joined Cases C-236/08−C-238/08 *Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-2417 paras 113-114; Case C-324/09 *L'Oréal SA v eBay Int'l AG* [2011] ECR I-6011 112-116.

The Court further ruled that Article 14 of the Directive applies to hosting providers if they do not play an active role that would allow them to have knowledge or control of the stored data.[734]

Under Article 14 of the E-Commerce Directive, hosting service providers are exempted from liability if they have no knowledge of illegal activity or information.[735] However, hosts only remain immune from liability if they act expeditiously to remove or disable access to information upon obtaining knowledge of its illegal character.[736] Strictly speaking, the E-Commerce Directive does not actually provide a 'notice-and-takedown' procedure. It merely implies it through its conditions for liability exemption.

Interestingly, the E-Commerce Directive introduces different levels of knowledge regarding criminal and civil liability. Under Article 14(1)(a), host providers are exempt from criminal liability in respect of the 'storage' of information provided by a recipient of their services, so long as they have no 'actual knowledge' of 'illegal activity or information'. They are immune from civil liability so long as they have no such actual knowledge and are not aware of 'facts and circumstances from which the illegal activity or information is apparent'. Thus, for the former, 'actual knowledge' is required, while for the latter it is enough to establish 'constructive knowledge' of the service provider.[737]

At EU level, no guidelines are provided with regard to the implementation of notice-and-takedown. The E-Commerce Directive leaves the introduction of the actual procedures to the discretion of the Member States. In recital 46, it stipulates that the

[734] Case C-324/09 *L'Oréal SA v eBay Int'l AG* [2011] ECR I-6011 112-116.

[735] E-Commerce Directive *(n 677)* Article 14(1)(a).

[736] E-Commerce Directive *(n 677)* Article 14(1)(b).

[737] Kuczerawy and Ausloos *(n 724)* 7.

removal or disabling of access should be undertaken in observance of this right and of procedures established for this purpose at national level. In Article 16 and recital 40, the E-Commerce Directive encourages self-regulation in this field. Since the majority of the Member States chose a verbatim transposition of the E-Commerce Directive, the matter has mostly been left to self-regulation.[738] This however proved to be inefficient, since in most of the countries no measures have ever been introduced. The result is a lack of any firm safeguards in many jurisdictions.[739] Accordingly, the main difference between the US and the EU on matters of notice-and-takedown is that EU law does not include all of the formalities that exist under US law and all of the protections.

3.2.4. 'DMCA-plus' Enforcement in US Law

In the US, the copyright industries have never been satisfied with the protection regime provided in the DMCA. In the words of the Motion Picture Association of America (MPAA), they are always looking for ways to 'improve upon default legal standards (such as the DMCA)' and to exact promises of increased

[738] Thibault Verbiest et al., 'Study on the liability of Internet Intermediaries' (12 November 2007) (Markt/2006/09/E) 14-16, available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf

[739] European Commission, Online Services, Including e-commerce in Single Market, Commission Staff Working Paper, (11.1.2012) SEC (2011) 1641 final; Accompanying the document: Communication from the Commission to the European Parliament, the Council The European Economic and Social Committee and the Committee of the Regions, A Coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services, COM(2011) 942, p. 43-46, available online at http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf

cooperation from 'recalcitrant players'.[740] As the Internet has grown exponentially in terms of both users and services, the copyright industries have lobbied continuously for more aggressive enforcement standards from a wider range of intermediaries.[741] In Congress, the courts, and the media, they have demanded that online intermediaries of all kinds do more to protect their intellectual property rights.[742] In particular, they have sought new ways to reach and close 'pirate sites' that are beyond the reach of US law.[743]

Copyright holders, for example, have applied to courts to hold that the repeat infringer provision in Section 512(i) of the DMCA requires service providers to terminate users who have been the subject of multiple allegations of infringement in a single notice from a copyright holder.[744] For instance, another interpretation of the repeat infringer

[740] Comments of the Motion Picture Association of America, Inc 2–3 (August 21, 2013) submitted in US Patent and Trademark Office, Voluntary Best Practices Study (Docket No. PTO-C-2013-0036), available at http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf

[741] Ibid 2 (arguing that 'all players in the Internet ecosystem' including 'the various intermediaries that facilitate online commerce and speech…must play a meaningful role in addressing the problem of rampant piracy on the Web'); Comments of the Recording Industry Association of America, Inc. (RIAA) 1 (August 19, 2013), submitted in US Patent And Trademark Office, (asserting that 'all responsible stakeholders in the Internet ecosystem…have a role to play in…deterring illegal activity').

[742] Ibid 2.

[743] Their most controversial effort in this area was the famously failed lobbying campaign for the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA). See generally; Annemarie Bridy, 'Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA' (2012) 30 Cardozo Arts & Ent L J 153.

[744] For example, see; *UMG Recordings, Inc v Veoh Networks Inc,* 665 F Supp 2d 1099, 1110 (CD Cal 2009) at 1118. Under Section 512(i), a service provider is required to adopt and reasonably implement

provision once popular among copyright holders is that a user should have his or her account terminated or suspended after a set number of (usually three but maybe any other specific number) consecutive DMCA notices of infringement what is named as 'strikes'.[745] To the great frustration of copyright holders, courts have been clear that notice-and-takedown does not equate with notice-and-staydown.[746]

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a program for terminating account access for repeat infringers in certain circumstances (17 USC § 512(i)).

[745] See; Annemarie Bridy, 'Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet. Intermediaries' in John A. Rothchild (ed), *Research Handbook On Electronic Commerce Law* (Edward Elgar, 2016) 185-209).

[746] *UMG Recordings, Inc v Veoh Networks Inc*, 665 F Supp 2d 1099, 1110-1111 (CD Cal 2009). Recognising that Congress abstained from specifying any precise criteria for account termination when it adopted Section 512(i), US courts have never interpreted the DMCA's repeat infringer provision so as to embrace this approach, what has been variously termed as 'notice-and-disconnection' or 'graduated response' or 'three strikes and you're out'. For example, see; *Corbis Corp v Amazon.com, Inc,* 351 F Supp 2d 1090, 1101 (WD Wash 2004) ('Given the complexities inherent in identifying and defining online copyright infringement, § 512(i) does not require a service provider to decide, ex ante, the specific types of conduct that will merit restricting access to its services. As Congress made clear, the DMCA was drafted with the understanding that service providers need not make difficult judgments as to whether conduct is or is not infringing.') (internal citation and quotation marks omitted). Adoption of a graduated response model would be sufficient but is not necessary to confer to a provider the protection of the safe harbours in Section 512(i). See; Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 Oregon Law Review 100. See also *Disney Enters, Inc v Hotfile Corp*, No. 11-20427-CIV, 2013 WL 6336286, at 24 (SD Fla Sept 20, 2013. The question of whether a notice from a copyright holder, without more, can establish that a person is an infringer for statutory purposes is not definite. Compare; *Perfect 10 (n 711)* 1088 (concluding that 'an internet service provider who receives repeat notifications that substantially comply with the requirements of § 512(c)(3)(A) about one of its clients, but does not terminate its relationship

In recent years, however, copyright industries' demands have been met through an expanding regime of 'DMCA-plus' enforcement. These DMCA-plus enforcement tools have ostensibly sprung from *voluntary arrangements*, but they are largely a result of political pressure and express or implied threats of governmental regulation.[747] In 2011, five of the largest broadband Internet service providers[748] in the US agreed in a Memorandum of Understanding (MOU) with film and music industry trade groups[749] to implement a 'six strikes' graduated response protocol for mitigating unauthorised peer-to-peer filesharing.[750] In 2007 and 2014, respectively, user

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with the client, has not reasonably implemented a repeat infringer policy'), reversed in part on other grounds, *Perfect 10 (n 711)* 1102 with *Corbis* at 1105 (concluding that notices from a copyright owner function to bring a potential infringement to the provider's attention, but do not, in themselves, provide evidence of blatant copyright infringement, because they could be erroneous).

[747] Bridy, 'Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries' *(n 744)* 191. See also; Annemarie Bridy, 'Internet Payment Blockades' (2015) 67(5) Florida Law Review 1524-1568.

[748] The participating Internet service providers are AT&T, Verizon, Comcast, Cablevision, and Time Warner. See; Memorandum of Understanding 24 (Attachment A) (July 6, 2011), available at http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-ofUnderstanding.pdf [hereinafter MOU].

[749] The participating copyright holders are the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), the American Association of Independent Music (A2IM), and the Independent Film and Television Alliance (IFTA). Ibid 25.

[750] See; Annemarie Bridy, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 Fordham Intellectual Property, Media & Entertainment Law Journal 1-67; Mary LaFrance, 'Graduated Response by Industry Compact: Piercing the Black Box' (2012) 30 Cardozo Arts & Ent L J 165-186.

generated content platforms YouTube[751] and Vimeo began proactively filtering user uploads to block files that match reference files in a database populated by rights owners.[752] The technology underlying both systems relies on digital fingerprinting to sample an uploaded file and compare it against a database of reference files provided by participating copyright owners.[753] In addition, in 2012, Google voluntarily altered its search algorithm to demote 'pirate sites' in search rankings.[754]

3.2.5. Going Beyond Notice-and-Takedown in EU and UK Laws

In Europe, since 2008, the copyright industries have turned to the more indirect strategy of seeking Internet intermediary cooperation adoption of extra-enforcement regimes. This strategy has followed three trajectories: Firstly, since 2008, 'graduated response' regimes have mushroomed across some EU countries, buttressed by either legislation or judicial decisions. Secondly, copyright holders have sought to obtain a court order requiring Internet intermediaries to reveal information relevant to the alleged infringement. Thirdly, copyright holders have sought to obtain

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[751] These are Content ID for YouTube and Copyright Match for Vimeo. For a detailed explanation of YouTube's Content ID system see; Chapter 6 section 6.6.1.1.

[752] See; Bridy, 'Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries' *(n 744)* 195–197.

[753] See Brad Stone and Miguel Helft, 'New Weapon in Web War over Piracy' New York Times (February 19, 2007), available at http://www.nytimes.com/2007/02/19/technology/19video.html (discussing fingerprinting technologies for identifying audio and video). For a technical discussion of how fingerprinting is used to identify copyrighted content, see Craig Seidel, 'Content Fingerprinting from an Industry Perspective' (2009) IEEE International Conference on Multimedia and Expo 1524–1527.

[754] See; Bridy, 'Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries' *(n 744)* 200.

a court order that requires Internet intermediaries to filter copyright material and monitor the activities of their customers and ultimately block access to certain websites, such as torrent sites or 'cyber lockers', which they allege are vital to the continuation of unlawful filesharing.

The 'graduated response' regimes in Europe were pioneered by the French government.[755] In the leading French model, popularly known as 'HADOPI'[756], passed in May 2009, an administrative body was empowered to issue infringement warnings to alleged infringers, and to suspend the Internet access of repeat infringers.[757] However, the French legislation has itself proved very controversial particularly with respect to the possibility of termination and whether there is a human right to access the Internet. It was partially repealed by the Constitutional Council on the basis that only judges had the power to impose that sanction.[758] Under the revised scheme, the Commission for Protection of Rights (an autonomous body within Hadopi), after

[755] See; David LeFranc, 'The Metamorphosis of Contrefaçon in French Copyright Law' in Lionel Bently, Jennifer Davis, and Jane C. Ginsburg (eds), *Copyright and Piracy* (CUP, 2010) 55-79; Alain Strowel, 'The 'Graduated Response' in France: Is it the Good Reply to Online Copyright Infringements?' in Irene A. Stamatoudi (ed), *Copyright Enforcement and The Internet* (Kluwer International Law, 2010) 147-162; Christophe Geiger, 'Honourable Attempt but (Ultimately) Disproportionately Offensive against Peer-to-peer on the Internet' (2011) 42(4) International Review of Intellectual Property and Competition Law 457; Rebecca Giblin, 'Beyond Graduated Response' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (CUP, 2014) 81-112; Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) Columbia Journal of Law & the Arts 147-210.

[756] 'Haute autorite pour la diffusion des œuvres et la protection des droits sur Internet' (or, in English, 'High Authority for the Dissemination of Works and the Protection of Rights on the Internet'). The same term refers to both the law and the agency tasked with its administration.

[757] Giblin, 'Beyond Graduated Response' *(n 754)* 83.

[758] Ibid.

receiving two allegations of infringement and sending two notices to those alleged infringers, may investigate to determine whether it considers the subscriber's Internet connection ought to be suspended. It may then forward the case file to prosecutors who can go ahead and when successful, judges may impose sanctions including up to one year's suspension of access and fines of up to €1,500.[759]

Inspired by the French example, the UK Digital Economy Act 2010 (DEA) provisions insert amendments to the Communications Act 2003 for establishing a basis for a 'graduated response' regime.[760] Sections 3-16 of the DEA lay the foundations for the imposition of new obligations on Internet service providers to police their subscribers' online activities. Firstly, these sections require Internet service providers: 1) to notify their subscribers if the internet protocol (IP) addresses associated with them are reported by copyright holders as being used to infringe copyright based on evidence collected by investigatory agents' monitoring software and recorded in Copyright Infringement Reports (CIRs), and 2) to keep records of those subscribers who have received numerous notices so that copyright holders can take targeted legal action against alleged persistent infringers. The DEA refers to these as the 'initial obligations', but provides that they only have legal effect when an 'initial obligations code' – made and/or approved by OFCOM, the UK's regulatory body

[759] The law also provided for subscribers who negligently failed to secure their Internet connections (but did not themselves commit infringements) to be fined the same amount, and have their connections suspended for up to a month. Suspended subscribers are not permitted to switch to a different ISP and must keep paying subscription fees. Ibid 83-84.

[760] For background see BIS/DCMS, Digital Britain: Final Report (Cm. 7650, June 2009). For academic commentary see; Anne Barron, 'Graduated Response' À l'Anglaise: Online Copyright Infringement and The Digital Economy Act 2010' (2011) 3(2) Journal of Media Law 305-347.

of the communication industry, with the consent of the relevant Secretary of State– is in force. Secondly, if the initial obligations fail to impede online infringement significantly, Internet service providers may be required to take 'technical measures' (which may include capping connection speeds, bandwidth-throttling and disconnection) against subscribers who are alleged to be persistent infringers. The Act refers to these as the 'technical obligations'. Together, the initial and technical obligations envisage a 'graduated response' regime. To carry out these tasks, the Act requires the drawing up of secondary legislation.

In June 2012, OFCOM published the Revised Draft Initial Obligations Code (hereafter 'the proposed OFCOM Code'), outlining how the DEA would work.[761] As envisaged, the proposed OFCOM Code covers only the six large Internet service providers and only copyright holders submitting CIRs and paying towards the cost of the system would be able to utilise it.[762] According to the proposed OFCOM Code, if such reports are made with respect to their respective IP addresses in any given month, subscribers of a given Internet service provider would be notified by this provider. If a subscriber is sent three notifications within a 12-month period, their details would be included on a 'copyright infringement list'. Copyright holders, in turn,

[761] Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom's Proposal to Make by Order a Code for Regulating the Initial Obligations' http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf; and Ofcom, 'Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012' http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf. For academic commentary see; Luke Anthony, 'DEA Initial Obligations Code: Second Time Lucky?' (2012) 23 Entertainment Law Review 238.

[762] These are BT, Everything Everywhere, O_2, Sky, TalkTalk Group and Virgin Media.

are entitled to view the list and on the basis of such information to target legal action.[763] Although an application for judicial review of the DEA on a number of grounds, including non-compliance with the E-Commerce Directive, was unsuccessful,[764] five years after the passage of the DEA the topic remains so controversial that the system has yet to be brought into operation. On 19 July, 2014, the UK Government announced the launch of the Creative Content UK initiative which brings together the film and record industries (represented by the Motion Picture Association and the British Record Music Industry (BPI)) and four leading UK ISPs, namely Sky, British Telecom, TalkTalk and Virgin Media, around a voluntary scheme modelled on the 'copyright alert system'[765] that was adopted in the US.[766] It is understood that the Act will not be brought into practical effect unless and until the voluntary scheme has been tried.

[763] Ofcom, "Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012." http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf.

[764] *British Telecommunications Plc & Anor, R (on the application of) v The Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin), later approved upon appeal in *R (British Telecommunications plc and TalkTalk Telecom Group plc) v Secretary of State for Culture, Olympics, Media and Sport and others* [2012] EWCA Civ 232 para 75.

[765] MOU 1 (introducing the idea of '[a] reasonable alert-based approach'); see also Ibid 7–14 (setting forth the technical requirements of 'copyright alert system').

[766] See; Press release; New education programme launched to combat online piracy available online at https://www.gov.uk/government/news/new-education-programme-launched-to-combat-online-piracy

In contrast with France's government-administered system, Ireland's graduated response system is privately administered.[767] Similar to the 'copyright alert system', the legal foundation for the Irish system is a contractual arrangement between private parties.[768] Unlike the MOU, however, which was negotiated outside the context of litigation, the agreement that produced the Eircom graduated response system was an agreement to end an ongoing legal dispute.[769] After an eight-day trial, Eircom and IRMA agreed in 2009 to a settlement that required Eircom to implement a 'three strikes' protocol.[770]

In Europe, some countries such as Germany,[771] however, have clearly come out in opposition to graduated response, as has the European Parliament since April 2008, emphasising fears as to the effect on freedom of speech, privacy and due process.[772] In Spain, in the face of much judicial and public controversy, legislation has been introduced allowing for website blocking, but not for user disconnections.[773]

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[767] See Press Release, Ireland's largest Internet service provider Eircom, Statement on Illegal File Sharing,

http://pressroom.eircom.net/press_releases/article/eircom_Statement_on_Illegal_File_Sharing

[768] See; *EMI Records v Eircom Ltd* [2010] IEHC 108 para 1 (H Ct) (Ir).

[769] Ibid para 1.

[770] Ibid paras 2, 9.

[771] Edwards *(n 672)* 31.

[772] See eg, http://www.iptegrity.com/index.php?option=com_content&task=view&id=173&Itemid=9

[773] Edwards *(n 672)* 31.

3.2.6. Freedom of expression and notice-and-takedown

3.2.6.1. In General

Notice-and-takedown mechanisms on both continents are far from perfect; they are often accused of leading towards easy and unquestioned removals.[774] The issues are a direct result of policymakers giving Internet intermediaries the role of gatekeepers responsible for policing content online.[775] Both in the EU and the US the flaws of notice-and-takedown procedures have led to discussions on how to improve the current system.[776]

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[774] See for example: R.J. Barceló and K. Koelman, 'Intermediary Liability In The ECommerce Directive: So Far So Good, But It's Not Enough' Computer Law & Security Report 2000 Vol. 4 231-239; T. Verbiest et al. *(n 738)*; OECD, 'The Economic and Social Role of Internet Intermediaries' (April 2010) ft. 83, available at: http://www.oecd.org/internet/ieconomy/44949023.pdf; Jennifer M. Urban and Laura Quilter, 'Efficient Processes or Chilling Effects? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22(4) Santa Clara Computer & High Technology Law Journal 621-693 ('Urban-Quilter study'); Electronic Frontiers Foundation, 'Unintended Consequences: Fifteen Years under the DMCA' (March 2013), https://www.eff.org/pages/unintended-consequences-fifteenyears-under-dmca.

[775] See; Jonathan Zittrain, 'A History of Online Gatekeeping' (2006) 19(2) Harvard Journal of Law and Technology 254-298.

[776] In 2010, the European Commission launched a public consultation on the e-Commerce Directive as part of its periodic review process. See; Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC), http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm. In January 2012, the European Commission announced a new initiative on 'Notice-and-Action' procedures. The goal of this initiative is to set up a horizontal European framework for notice-and-action procedures, to combat illegality on the Internet and to ensure the transparency, effectiveness, and proportionality of notice-and-action procedures, as well as compliance with fundamental rights. See; Commission Communication to the European Parliament, The Council, The Economic and Social Committee and

A criticism levelled against notice-and-takedown relates to the fact that determinations made by Internet intermediaries, in relation to the legality or otherwise of content, are influenced by their own potential liability capable of being imposed under the legal framework within which they operate. Notice-and-takedown procedure, as noted above, is a peculiar kind of internet content self-regulatory measure. In theory, it consists of a scheme in which the content hosts agree to remove content in case of a legitimate notice by the consumer, without having to prove the legality of the content before a court of law. The notice-and-take down mechanism then implies that intermediaries shall, as a rule, experience a conflict of interests. In essence, the notice-and-takedown mechanism applicable to content hosts and search engines requires the removal of infringing content solely based upon the information provided in a notice

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The Committee of Regions, A coherent framework for building trust in the Digital Single Market for e-commerce and online services {SEC(2011) 1640 final}, p. 12-15, ft. 49, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF. A more thorough analysis of the existing problems related to elimination of illegal content was conducted in the Commission Staff Working Document on Online services, which accompanied the 2012 Communication. This Working Document discusses a range of issues regarding the regulation of intermediary liability in the E-Commerce Directive. The bulk of the analysis focuses on issues of fragmentation and legal uncertainty. Additionally, it discusses some specific problems of the Notice and Action procedures. All of these factors can have a negative impact on freedom of expression of the content providers, as well as content receivers. See; European Commission, Online Services, Including e-commerce in Single Market, Commission Staff Working Paper, 11.1.2012 SEC(2011) 1641 final; Accompanying the document: Communication from the Commission to the European Parliament, the Council The European Economic and Social Committee and the Committee of the Regions, A Coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services, COM(2011) 942, http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf . Within US law context see; Gasser and Schulz *(n 688)*.

of claimed infringement provided by a copyright holder (unless, of course, there are other circumstances where a service provider's actual knowledge or awareness of the infringing material or activity can be inferred). This requires the Internet intermediary to assess the validity of the copyright holder's claim that the content, which is either hosted or linked by that intermediary, is infringing. Upon the receipt of such a one-sided infringement notice, they must decide swiftly about removing or blocking content in order to exonerate themselves from possible liability. This basically makes them a judge in their own cause. In these circumstances, the wariest approach is to act upon any indication of illegality, without engaging in any (possibly burdensome and lengthy) balancing of rights that require protection. Consequently, any investigation of the illegal character of the content is usually omitted.[777] This may therefore lead to preventive over-blocking of entirely legitimate content. In fact, the notice-and-takedown mechanism creates 'an incentive to systematically take down material, without hearing from the party whose material is removed, thus preventing such a party from its right to evidence its lawful use of the material'.[778] This could easily culminate in 'private' and 'collateral' censorship.[779] As Jack Balkin explains, relying on intermediaries to enforce laws about expression creates a structural problem:

[777] See; C. Ahlert, C. Marsden and C. Yung, 'How Liberty Disappeared from Cyberspace: the Mystery Shopper Tests Internet Content Self-Regulation' ('Mystery Shopper') at http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf.

[778] Barceló and Koelman *(n 773)* 231.

[779] Aleksandra Kuczerawy, 'Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative' (2015) 31(1) Computer Law & Security Review 48.

> ‘Collateral censorship occurs when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B’s speech. This will lead A to block B’s speech or withdraw infrastructural support from B. In fact, because A’s own speech is not involved, A has incentives to err on the side of caution and restrict even fully protected speech in order to avoid any chance of liability.’[780]

While this extra-judicial process is useful to keep pace with the speed and spread of the Internet, it questions the procedural fairness, transparency and accountability of the ‘notice-and-takedown’ system that ultimately determines the rights and interests of parties to a dispute arising from the creation, storage and sharing of online content. This over-cautious attitude of intermediaries towards notice-and-takedown and the lack of an independent, unbiased and balanced mechanism by which a determination as to the legality of content could be reached is the central problem that renders notice-and-takedown questionable. It also opens a way to potential abuse by bogus victims, for example by business competitors or political adversaries.[781] Thus, although it is argued that the legal immunity (safe harbour) aims at ensuring the growth of Internet technology, which will only be constrained if liability is directed at Internet intermediaries, the notice-and-takedown procedures may in fact constrain the free flow of information – the very purpose for which the Internet was designed and needs to be developed for.[782]

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[780] Jack M. Balkin, ‘Old-School/New-School Speech Regulation’ (2014) 127 Harvard Law Review 2309.

[781] Kuczerawy *(n 778)* 48-49.

[782] Marsoof *(n 671)* 183–205.

A process where a private party, and possibly future defendant, decides on its own discretion whether content should be removed or blocked can lead to interference with the right to freedom of expression of both intermediaries and users. Concern about the possible 'chilling effect' on freedom of expression was voiced by a number of organisations.[783] Amongst them, Frank La Rue, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression in his report to the United Nations Human Rights Commission briefly explains the potential conflict of 'notice-and-takedown' practices with the exercise of freedom of expression on the Internet, noting that:

> '[…] while a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their

[783] See; Council of Europe (Council of Ministers), Council of Europe (Council of Ministers), Declaration on freedom of communications on the Internet, 28.05.2003, p. 6; Council of Europe, Human rights guidelines for Internet Service Providers – Developed by the Council of Europe in co-operation with the European Internet Service Providers Association (EuroISPA), July 2008, paras 16, 21 and 24, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/HInf(2008)009_en.pdf; C. Wong and J.X. Dempsey, 'Mapping Digital Media: The Media and Liability for Content on the Internet' (Open Society Foundation, Reference Series No.12, 2011) 16; Electronic Frontier Foundation, 'Takedown Hall of Shame', available at http://www.eff.org/takedowns; and Chilling Effects Clearinghouse, available at http://www.chillingeffects.org/index.cgi.

content has been flagged as unlawful often have little recourse or few resources to challenge the takedown.'[784]

The implications of the notice-and-takedown procedure for freedom of expression were also confirmed by the Ninth Circuit in *Perfect 10 v CCBill*,[785] where it stated that:

'Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.'[786]

There is an underlying question of whether those who are not speaking but providing a forum for facilitating the expression of others have expressive rights. Digital content clearly forms part of the scope of freedom of expression when seen from the user's perspective of the speaker. However, do Internet intermediaries have free-standing right to freedom of expression? This point arose in the *Pirate Bay* case discussed below,[787] before a principal supranational court in Europe—the ECtHR. The judgement confirmed the right to freedom of expression of a P2P network

[784] UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 7th Session UN Doc A/HRC/17/27 (16 May 2011) (Frank La Rue) para 42 (citations omitted).

[785] *Perfect 10 (n 711)* 1102 .

[786] Ibid 1112.

[787] See section 3.3.2. below.

without much clarity as to why and to what extent any such right exists. The *Pirate Bay* was an admissibility decision, which may explain its brevity.

A further analysis with respect to the human rights aspects of the notice-and-takedown procedure and intermediary liability was provided by the ECtHR in *Delfi v Estonia.*[788] In *Delfi*, the Grand Chamber of the ECtHR ruled that the holding of a newspaper portal liable for the comments of end users was not a violation of the freedom of expression, where the comments amount to hate speech and speech inciting violence.[789] Although *Delfi* was not concerned with copyright as such, it illustrates a general idea: as the Grand Chamber found, neither an automatic word-based filtering system of deletion of comments based on stems of certain vulgar words nor a notice-and-take-down system ensured sufficient protection for the 'privacy

[788] *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013). The case was referred to the Grand Chamber in 17/02/2014: *Delfi AS v Estonia* App no 64569/09 (2015) ECHR 586 (GC).

[789] For academic commentaries on the case see; Lisl Brunner, 'The Liability of an Online Intermediary for Third Party Content The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia' (2016) 16 (1) Human Rights Law Review 163-174; Tatiana-Eleni Synodinou, 'Intermediaries' Liability for Online Copyright Infringement in The EU: Evolutions and Confusions' (2015) 31 Computer Law & Security Review 63-67; Martin Husovec, 'ECtHR Rules On Liability of ISPs as A Restriction of Freedom of Speech' (2014) 9(2) Journal of Intellectual Property Law & Practice 108-109; Martin Husovec, 'General Monitoring of Third-Party Content: Compatible with Freedom of Expression?' (2016) 11(1) Journal of Intellectual Property Law & Practice 17-20; Lorna Woods, 'Delfi v Estonia: Curtailing Online Freedom of Expression?' (18 June 2015), available at http://eulawanalysis.blogspot.co.uk/2015/06/delfi-v-estonia-curtailing-online.html; Eileen Weinert, 'Delfi AS v Estonia: Grand Chamber of the European Court of Human Rights Hands down Its Judgment: Website Liable for User-Generated Comments' (2015) 26(7) Entertainment Law Review 246-250.

rights'[790] of third persons with respect to hate speech and speech inciting violence.[791] Accordingly, the ECtHR concluded that the right to protection of reputation is a lawful, legitimate and proportional interference with the applicant intermediary's freedom to impart information.[792]

In *MTE v Hungary*,[793] the issue of the liability of a host provider, an online newspaper, for the comments of its readers has come before the ECtHR again. In this case, however, the ECtHR's chamber, while referring at a number of points in its judgment to the reasoning of the *Delfi* Grand Chamber, gave a new interpretive pattern for the *Delfi* ruling. Furthermore, new perspectives were adopted with regard to the notice-and-takedown system, which now seems to be legitimate in the eyes of the Court.[794] In the *MTE* case, the Court ruled that holding an Internet intermediary liable

[790] *Delfi (n 787)* para 137 (noting that 'the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life').

[791] Ibid paras 156-159. In addition, on some occasions, the administrators of the portal removed inappropriate comments on their own initiative. This was also found inadequate.

[792] Ibid para 162.

[793] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt (MTE) v Hungary* App no 22947/13 (ECtHR, 2 February 2016).

[794] For academic commentaries see; Christina Angelopoulos, 'MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression' (5 March 2016) available at http://kluwercopyrightblog.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/; Dirk Voorhoof and Eva Lievens, 'Offensive Online Comments - New ECtHR Judgment' (15 February 2016), available at http://echrblog.blogspot.co.uk/2016/02/offensive-online-comments-new-ecthr.html; Lorna Woods, 'Freedom of Expression and Liability for Internet Comments: A Key New ECHR Judgment' (21 February 2016), available at http://eulawanalysis.blogspot.co.uk/2016/02/freedom-of-expression-and-liability-

for the infringing content (offensive statements that do not amount to hate speech) posted by its users indeed violated that intermediary's freedom of expression.[795] Finding that Hungarian courts had not sufficiently weighted freedom of expression (Article 10) and the right to protection of reputation (Article 8), the Court considered the notice-and-takedown regime and suggested that 'if accompanied by effective procedures allowing for rapid response, the notice-and-takedown system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved.'[796] In conclusion, the notice-and-takedown system was seen sufficient to protect intermediaries from the liability deriving from the infringement of the rights of third parties by Internet users and no filtering requirement was needed in addition to this system.

3.2.6.2. Empirical Studies

Although such assertions are made against the practice of notice-and-takedown, very little research has been undetaken by conducting empirical research to verify these claims and understand how notice-and-takedown works in practice. Despite the tremendous changes since the laws regulating notice-and-takedown procedures were passed, this has been so largely because the relevant data has been so hidden from public view and so politically sensitive to the parties involved.

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for.html; Eileen Weinert, 'MTE v Hungary: the first European Court of Human Rights ruling on liability for user comments after Delfi AS v Estonia' (2016) 27(4) Entertainment Law Review 135-139.

[795] *MTE (n 792)* para 91.

[796] Ibid para 91, tracking the wording of *Delfi (n 787)* para 159.

Reviews by the Oxford Centre for Socio-Legal Studies,[797] Jennifer Urban and Laura Quilter,[798] Laura Quilter and Marjorie Heins,[799] the recent statistical inquiry into notices by Daniel Seng,[800] and three empirical studies, using both qualitative and quantitative methods and documenting the notice-and-takedown process as it works today, by Jennifer Urban, Joe Karaganis and Brianna Schofield[801] largely exhaust the empirical research literature on the topic.[802] The initial studies cover notice-and-

[797] Christian Ahlert, Chris Marsden and Chester Yung, 'How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation' (2004), available at http://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2014/12/liberty.pdf ('Liberty project').

[798] Urban and Quilter *(n 773)* ('Urban-Quilter study').

[799] Laura Quilter and Marjorie Heins, Intellectual Property and Free Speech in the Online World: How Educational Institutions and Other Online Service Providers Are Coping with Cease and Desist Letters and Takedown Notices (Brennan Center for Justice, 2007).

[800] Daniel Seng, 'The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices' (2014) 18(3) Virginia Journal of Law and Technology 369-473.

[801] Jennifer M. Urban, Joe Karaganis and Brianna L. Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley Public Law Research Paper No. 2755628, 2016), available at http://ssrn.com/abstract=2755628.

[802] For other recent but generally narrower empirical reviews see, Bruce Boyden, 'The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem' (2013), available at http://cpip.gmu.edu/wp-content/uploads/2013/08/BruceBoyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf; Kris Erickson, Martin Kretschmer and Dinusha Mendis, 'Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options' (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309903/ipresearch-parody-report3-150313.pdf; Department of Commerce Internet Policy Taskforce, 'Copyright Policy, Creativity, and Innovation in the Digital Economy' (2013), available online at http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf.

takedown practices that were in place in the early to mid-2000s when the use of the notices were essentially defined in hundreds. This limited literature, however, suggests that two factors affect the notice-and-takedown practice: '(1) the threat of liability under the underlying law applicable to Internet intermediaries, and (2) the sense of security presented by safe harbour provisions (that requires intermediaries to remove illicit content upon notice) against such liability.'[803] These two factors are direct consequences of the legal framework within which Internet intermediaries operate, and which influences the manner in which an intermediary carries out its risk assessment upon receiving a takedown notice. These studies also suggest that notice-and-takedown procedures put into place by Internet intermediaries are implemented without adequate investigation as to the legitimacy of the underlying claim and the detrimental effects of the abuse of the system on freedom of expression.[804]

While Seng's study portrays the dramatic increase in the number of notices sent in recent years and their sectoral analysis, Urban, Karaganis and Schofield's review provides the most striking and detailed source with respect to the notice-and-takedown mechanism in the US, particularly the one that is used by Google. Their first study shows that 'the DMCA is deeply embedded in the practice and policies of both OSP [online service providers] and rightsholders, and that its liability protections remain central to OSPs' sense of their freedom to operate.'[805] While their second study quantitatively examines a number of takedown notices randomly taken from a set of over 108 million requests submitted to the Lumen[806] archive over a six-month period-

[803] Marsoof *(n 671)* 204.

[804] See the Liberty project *(n 796)* and Urban-Quilter study *(n 773)*.

[805] Urban, Karaganis and Schofield *(n 800)* 10.

[806] Hosted at https://lumendatabase.org/

most of which relate to Google Web Search, their third study provides a further detailed quantitative examination of a sample of notices that were sent to Google in relation to its Google Image Service, isolated from the same random sample of takedown requests taken from the Lumen archive. These two quantitative studies are based on the manual review and specific coding process.[807] Urban, Karaganis and Schofield's second study demonstrates that nearly 30% of the takedown notices were of questionable validity, which translates into almost 31 million requests.[808] Their third study, on the other hand, shows that 70% of the requests raised serious questions about their validity. 53% of which was from only one individual sender.[809] A significant number of invalidity reasons were related to 'improper' subject matter (such as trade marks and defamation claims), fair use concerns, copyright ownership issues, and potentially inaccurate identification of the allegedly infringing material.[810]

The findings of these studies point to a potential tension between notice-and-takedown procedures and two requirements of any limitation to freedom of expression: legality and necessity (proportionality).[811] The basis in domestic legislation requirement is unproblematic since, as noted above, the DMCA and the E-Commerce Directive, and other domestic legislation, provide a legal basis for interfering. They are also adequately made available. However, it is arguable from the findings of empirical studies that the notice-and-takedown procedures fail to comply with the foreseeability

[807] Urban, Karaganis and Schofield *(n 800)* 11.

[808] Ibid.

[809] Ibid 12.

[810] Ibid 11-12.

[811] See Chapter 2 section 2.4.4.

aspect of the legality principle.[812] In fact, not just the law applicable to intermediaries (*e.g.* the DMCA, the E-Commerce Directive, etc.), but also the law (copyright law) applied by the intermediaries in determining the legality of content are both relevant to how notice-and-takedown procedures are practised. As Urban, Karaganis and Schofield's studies demonstrate, the fallacy rate in the implementation of copyright law to determine lawfulness of content complained of range from 30% to 70% of all takedown requests examined. Due to the gigantic numbers of takedown notices and the intent to escape from the risk of being held liable, the intermediaries find themselves in a position not just to create a self-censorship ecosystem that quells their main function (imparting information), but also to extend this censorship mechanism to the ordinary Internet user's capabilities to access and use such content. Thus, if notice-and-takedown mechanisms were to function properly with respect to the protection of copyright on the Internet, the manner in which Internet intermediaries interact with the underlying principles of copyright law in making determinations as to the legality (or otherwise) of content must be streamlined and properly codified to provide coherence and certainty.[813] Otherwise, the current ambiguous formation and implementation of the law (the uncertainty in the law as to which content complained of should be deemed unlawful by an intermediary) could be incompatible with the legality principle, and therefore may result in an unjustified interference with the freedom of expression.

Another significant finding of Urban, Karaganis and Schofield's studies is that at least a third of expressive content in Google Web Search and more than double this amount in Google Image services are taken down due to notices of a highly

[812] See ibid.

[813] Marsoof *(n 671)* 202.

questionable validity. If this finding is reflected in the whole intermediary services and if one considers the growing number of notices with every passing day, this means that current notice-and-takedown practices wipe a significant amount of content out without valid grounds. As Daphne Keller notes, 'a good notice and takedown process does two things. It takes unlawful content down, and it keeps lawful content up.'[814] It is obvious that there is a pressing social need to end digital piracy. However, it seems difficult to say that any social need could justify a black hole approach that leads to the unjustified loss of gross numbers of expressive content on the Internet. Therefore, it might be argued that these practices fail to comply with the principle of proportionality and represent a questionable interference with the freedom of expression of Internet users.

In sum, although freedom of expression needs further theoretical development in this respect, its protection of both the active and passive dimensions of expressive behaviour as well as the ability to search for information, have important implications for a variety of current debates over regulation of the Internet, including net neutrality and the obligations of Internet intermediaries. In the context of notice-and-takedown procedures, the inability to access lawfully available material that is taken down is a direct censorial burden on capabilities of individuals that are embedded in the right to freedom of expression. The current law equally creates an unjustified distributive burden on Internet intermediaries in allocating copyright liability

[814] Daphne Keller, 'The GDPR's Notice and Takedown Rules: Bad News for Free Expression, But Not Beyond Repair' (29 October 2015) available at http://cyberlaw.stanford.edu/blog/2015/10/gdpr%E2%80%99s-notice-and-takedown-rules-bad-news-free-expression-not-beyond-repair.

on their business activities that ultimately restricts their roles in imparting expressive content.

3.2.7. Freedom of expression and graduated response

The ultimate sanction in a graduated response is usually some form of disconnection from the Internet, although typically of limited time, such as 'suspension' in the UK DEA 2010; a maximum of a year in HADOPI. Such sanctions can be imposed simply in relation to the connection through one Internet service provider (*e.g.* the DEA) or may conceivably involve being placed on some kind of national Internet service provider 'blacklist' which would more closely approximate a true ban from the Internet (*e.g.* HADOPI). In both cases, but more critically in the latter, issues arise as to whether this now fundamentally impairs the right to freedom of expression, or more specifically, of access to knowledge.[815]

[815] A large body of literature has discussed whether, relying on human rights as a benchmark, a graduated response is a proportionate response to the problem of online copyright infringement. See; James G. H. Griffin, 'The Effect of the Digital Economy Act 2010 upon 'Semiotic Democracy'' (2010) 24(3) International Review of Law, Computers & Technology 251-262; Edwards *(n 672)* 30-49; Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34(1) University of New South Wales Law Journal 1-40; Monica Horten, 'The Digital Economy Act in the Dock: A Proportionate Ruling?' (2012) 3(1) Journal of Intellectual Property, Information Technology and E-Commerce Law 81-87; Bridy *(n 749)*; Dinusha Mendis, 'Digital Economy Act 2010: Fighting a Losing a Battle? Why the 'Three Strikes' Law is Not the Answer to Copyright Law's Latest Challenge' (2013) 27(1-2) International Review of Law, Computers & Technology 60-84; Rebecca Giblin, 'Beyond graduated response' *(n 754)* 81-112; Felipe Romero-Moreno, 'Unblocking the Digital Economy Act 2010; Human Rights Issues in the UK' (2013) 27(1-2) International Review of Law, Computers & Technology 18-45; Felipe Romero-Moreno, 'Incompatibility of the Digital Economy Act 2010 Subscriber Appeal Process Provisions with Article 6 of the ECHR' (2014) 28(1) International Review of Law

In *EMI Records v Eircom Ltd*, Charleton J noted that while disconnection was a 'serious sanction',[816] it would not completely isolate people from the Internet: 'while it is convenient to have internet access at home, most people in Ireland have only to walk down to their local town centre to gain access for around €1.50 an hour.'[817] Likewise, open access areas are now widespread. Access to the Internet is easily found in coffee shops, libraries, airports, commercial centres, universities and many other public spaces. While this is certainly the case, none of these is an exact equivalent of accessing the Internet from home. Consequently, it can be argued that Charleton J's proposition significantly underestimates the value of having internet access at home. With a home internet connection, it is easy to access the web at any time to swiftly look up information, to check email and conveniently respond in a timely manner, and to communicate with friends and family long after internet cafes or libraries have closed. Likewise, through the internet, people can converse with others via online chats, increase knowledge by taking distance-learning courses, publish social commentaries on their own websites and develop social communities in the virtual world.[818] Suggesting that users can resort to other facilities to gain access to

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Computers & Technology 81-97; Felipe Romero-Moreno, 'The Digital Economy Act 2010: subscriber monitoring and the right to privacy under Article 8 of the ECHR' (2016) 30(3) International Review of Law, Computers & Technology 229-247.

[816] *EMI Records (n 767)* para 9.

[817] Ibid. Alain Strowel also defends the graduated response system by noting the availability of alternative access to users whose internet service has been suspended. See; Alain Strowel, 'Internet Piracy as A Wake-Up Call for Copyright Law Makers – Is The "Graduated Response" A Good Reply?', (2009) 1 (1) WIPO Journal 83.

[818] Peter K. Yu, 'Digital Copyright Enforcement Measures and Their Human Rights Threats' in Geiger *(n 123)* 468.

the Internet means 'that information is no longer available on demand, that students need to take their reading books and materials and set up at a cafe to study, that contractors who work from home need to relocate their office, that families need to take their years of receipts and financial documentation to the library to complete their tax returns, and that individuals are required to look up and communicate sensitive health information on public terminals.'[819] For that reason, it is no wonder that access to the internet in the digital age is seen as crucial to the enjoyment and exercise of freedom of expression. As the Special Rapporteur Frank La Rue declares:

> '[T]he Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and North African region has shown the key role that the Internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights.'[820]

[819] Suzor and Fitzgerald *(n 814)* 10.

[820] UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 7th Session UN Doc A/HRC/17/27 (16 May 2011) (Frank La Rue) para 2 (citations omitted).

Thus, the graduated response system is problematic from a human rights standpoint because it not only curtails expressive freedoms but also takes away the essential tool Internet users need to provide and access information.[821]

Four key points weigh against the proposition that termination is a reasonably proportionate penalty for copyright infringement. Firstly, termination typically affects all members of a household, employees of the company, sometimes even neighbours, not just the subscriber named in the service contract. Thus, termination of access is liable to affect several people, not only the subscriber who receives three notices of infringement.[822] Thus, if a graduated response scheme is implemented, it would in most cases penalise not just copyright infringers, but all of the family or friends they live with. Secondly, to the extent a graduated response scheme is effective in reducing copyright infringement, it is likely to have a similarly strong chilling effect on socially beneficial but unlicensed uses. These types of uses, protected by fair use or dealing defences, require the user of copyright material to make a judgment about whether their otherwise infringing use is permissible.[823] Thirdly, termination also prevents subscribers from carrying out a wide range of lawful acts that fall outside the copyright context, such as reading newspapers, writing blogs, contributing to the discussion in forums and etc., many of which are not just related to using the right to seek and receive information, but also the right to voice an opinion.

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[821] Yu *(n 817)* 468.

[822] The DEA provides a defence to show that the alleged subscriber was not the person who infringed the copyright. However, Nicolas Suzor and Brian Fitzgerald think that it is not easy for the subscriber to prove this, because they do not keep accurate logs of all internet access by people. See; Suzor and Fitzgerald *(n 814)* 10.

[823] Ibid 11.

Finally, the sanctions applied in the graduated response system are immensely disproportional to the offence. As Peter K Yu convincingly argues:

> '[I]t is worth comparing the disconnection initiated by the graduated response system against the limited Internet access still enjoyed by prisoners and parolees. For many of these people, including those who have committed Internet and Internet-related crimes, Internet disconnection is not the preferred punishment. Nor is disconnection an absolute ban, devoid of built-in discretion from the authorities, such as probation officers. Under most circumstances, the draconian sanction of Internet disconnection is often replaced by monitored access, filtering, site blocking, unannounced manual inspection, or a combination of these options.'[824]

Alongside the courts' reluctance to cut off the internet access of criminal convicts, it seems particularly questionable to support internet disconnection based on mere alleged repeat copyright infringement. Such a sanction is particularly problematic given that it has been universally accepted that individuals have the right to be presumed innocent until proven guilty. Moreover, in today's digital age, if these alleged repeat infringers no longer have access to the internet, international human rights obligations may require governments to provide some form of reasonable alternative access to ensure the respect, protection and fulfilment of their freedom of expression and other Internet-connected human rights.[825]

[824] Peter K. Yu, 'The Graduated Response' (2010) 62(5) Florida Law Review 1423.

[825] Ibid 1424-1425.

To be deprived of internet access, then, is likely to have quite severe consequences. The Special Rapporteur Frank La Rue states that 'he is alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights' and singled out the DEA and French HADOPI in particular, as pieces of legislation that violate human rights.[826] He points out that:

> 'Cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, (is) [sic] disproportionate and thus a violation of article 19, paragraph 3 of the International Covenant on Civil and Political Rights. […] The Special Rapporteur calls upon all States to ensure that Internet access is maintained at all times, including during times of political unrest ... (and) [sic] urges States to repeal or amend existing intellectual copyright laws which permit users to be disconnected from Internet access, and to refrain from adopting such laws.'[827]

In sum, the graduated response system has raised both direct and indirect threats to the freedom of expression and receipt of communications of every form of idea and opinion capable of transmission to others.[828]

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[826] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression *(n 819)* para 49 (citations omitted).

[827] UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 7th Session UN Doc A/HRC/17/27 (16 May 2011) (Frank La Rue) paras 78-79 (citations omitted).

[828] Ibid paras 11, 78 and 79.

3.3. File Sharing

3.3.1. Technical and Legal Background

File-sharing is a popular and effective way of exchanging information online. One of the most widely used forms of this technology is P2P file-sharing. The first-generation P2P networks, such as *Napster*, allowed users to connect to a central server in order to upload a list of files to be transmitted and to search for the location of files on other users. Then, the server provided required information for the users enabling them to start a direct exchange of files between their computers (nodes). In contrast, the second-generation P2P networks, such as *Kazaa* and *Grokster*, enabled the sharing of files by a direct exchange between individual users' computers rather than through a central server.[829] Users, by connecting to one or more computers with high bandwidth and processing power (supernodes), can transfer and exchange index information. Thus, the file sharing takes place directly between the users through a decentralised process called the 'FastTrack', which assigns indexing functions to computers connected in the network, called 'supernodes'.[830] Similar to the second generation file sharing systems, the third generation P2P networks, such as *BitTorent*, enable the simultaneous downloading and uploading of protected files.[831] However, unlike the second generation P2P networks, the BitTorent software renders the transfer of files much more quickly and efficiently due to the use of advanced

[829] Enrico Bonadio, 'File Sharing, Copyright and Freedom of Speech' (2011) 33(10) European Intellectual Property Review 621.

[830] Alain Strowel, 'Introduction: Peer-to-Peer File Sharing and Secondary Liability in Copyright Law' in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Publishing, 2009) 2.

[831] Ibid.

technology called ‘Swarming’, which enables users to obtain pieces of a file from different computers simultaneously based on data packets transmission. The third-generation P2P networks are equipped with built-in encryption and anonymity features, which hinder the tracing of users’ computers and data exchanged.

When file sharing technologies are used to share files that contains material protected by copyright, this will generally amount to copyright infringement both on the part of the person who uploads the file and the person who downloads.[832] While the uploader will have infringed the copyright owner’s ‘communication to the public’ and ‘making available’ rights, the downloader will have infringed the copyright owner’s exclusive right to copy the work (primary infringers).[833]

In P2P networks, the primary infringers are numerous and difficult to reach, and going after them poses many legal and practical problems. Copyright holders thus often prefer to direct their legal actions against ‘secondary infringers’, who allow, encourage or promote direct infringements, for instance, those who operate the P2P networks or develop the technical tools (in particular the software) to enable primary infringements online. The emergence of P2P networks over the Internet has, therefore, brought the issue of secondary liability to the forefront.

From a copyright point of view, the main controversy surrounding P2P networks is whether providers of these technologies and services can be liable when users infringe copyright through their networks. In US law two approaches towards indirect copyright infringement have been applied traditionally, namely contributory

[832] Bonadio *(n 828)* 621.

[833] Lee *(n 687)* 137.

liability and vicarious liability.[834] Contributory liability is applied in cases where a third party knows or suspects the direct infringement and contributes materially to the act of infringement of another.[835] However, in *Sony Corp of Am v Universal City Studios Inc*[836] the 'non-interference principle' was adopted which requires that 'indirect liability rules should seek a balance between providing effective relief to intellectual property holders and avoiding interference with legitimate commerce.'[837] The Court in the *SonyBeatamax* case essentially held that the intent to cause infringement could not be inferred solely from the design or distribution of a product capable of substantial non-infringing use, which the manufacturer knew is used in some cases for copyright infringement.[838] The vicarious liability arises where a third party has the right or ability to control the primary infringer's actions and receives financial benefits from the infringing conduct.[839]

Both doctrines of indirect copyright infringement were applied later in *A&M v Napster.*[840] The Court concluded that Napster had materially contributed to the primary infringing acts by means of encouraging and assisting its clients to infringe the record

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[834] Allen N. Dixon, 'Liability of Users and Third Parties for Copyright Infringements on The Internet: Overview of International Developments' in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Publishing, 2009) 15.

[835] Ibid.

[836] *Sony Corp of Am v Universal City Studios, Inc,* 464 US 417 (1984).

[837] Stacey Dogan, 'Principled Standards vs. Boundless Discretion: A Tale of Two Approaches to Intermediary Trademark Liability Online' (2014) 37 Columbia Journal of Law & the Art 505.

[838] *Sony Corp of Am v Universal City Studios, Inc,* 464 U.S. 417, 442 (1984).

[839] Dixon *(n 833)* 15.

[840] *A&M Records (n 674)*

companies' copyright rights[841]. Furthermore, it was found that Napster gained financial benefits from the failure to supervise its own website and thus vicarious liability was also imposed.[842]

After the fall of the infamous file-sharing program Napster[843] and its progeny, namely Aimster,[844] a new strand of P2P digital file-sharing programs took over the illegal downloading marketplace.[845] However, the recording and film industries in the US continued their lawsuit campaign against the predecessor software.[846] Recently, the Supreme Court of the United States, in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*[847] decided that the creators of software that invited illegal downloading could be held secondarily liable for their users' infringements; such liability would attach if the creators encouraged the infringement in violation of a version of the 'inducement' rule often utilised in patent infringement cases.[848]

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[841] Ibid.

[842] Ibid.

[843] *A&M Records (n 674)*.

[844] *In re Aimster (n 674*).

[845] *Grokster (n 674)* 2764.

[846] Scott J. Sholder, 'Speak No Evil: MGM v. Grokster's Potential Free Speech Implications in the Wake of the Inducement Standard and Secondary Liability for Expression' (2007) 37(3) Seton Hall Law Review 799.

[847] *Grokster (n 674)* 2770 (2005).

[848] Ibid. For commentaries see; Galen Hancock, 'Metro-Goldwyn-Mayer Studios, Inc. v Grokster, Ltd.: Inducing Infringement And Secondary Copyright Liability' (2006) 21 Berkeley Tech L J 189-212; Rebecca Giblin and Mark Davison, 'Kazaa goes the way of Grokster' Authorization of Copyright Infringement via Peer-to-Peer Networks in Australia' (2006) Australian Intellectual Property Journal 53-76; Jane Ginsburg and Sam Ricketson, 'Inducers and Authorisers: A Comparison of the US Supreme

While US law uses the rubrics 'contributory liability' and 'vicarious liability', along with the more recently developed principle of 'inducement liability', UK law relies on the notion of 'authorisation' - now enshrined in statutory law[849] and interpreted more broadly than its strict meaning in some circumstances[850] - as well as on other common law tort[851] and criminal law principles.[852]

The leading authority in the UK is *CBS Records v Amstrad,*[853] in which the House of Lords defined the term authorise restrictively. The House of Lords held that neither the sale of a double-speed twin-tape recorder (a case factually similar to

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Court's Grokster Decision and the Australian Federal Court's Kazaa Ruling' (2006) 11(1) Media & Arts Law Review 1-24.

[849] CDPA, s 16(2): 'Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.'; s 16(3): 'References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it— (a) in relation to the work as a whole or any substantial part of it, and (b) either directly or indirectly.'

[850] For instance, purchasing agents, juke box providers, bandstand owners and other similar third parties were held liable for authorising the infringement of the others. See; Dixon *(n 833)* 17.

[851] Such as vicarious liability: Under general common law principles, an employer who hired the performers (who infringed copyright) can be held vicariously liable for employees' (performers) or agents' infringements done under the employer's authority. For example, see; *PRS v Mitchell & Booker* (Palais De Danse) [1924] 1 KB 762; *PRS v Kwik-Fit Group Ltd* [2008] ECDR (2) 13 (OH CS); *PRS v Bradford Corporation* [197-23] MCC 309; *Standen Engineering v Spalding & Sons* [1984] FSR 554; *Pensher v Sunderland CC* [2000] RPC 249. Or joint tortfeasor liability: a third party can be held liable if he or she is engaged in a 'common design' with someone who commits or authorises an infringement in pursuance of that design. For example, see; *In The Koursk* [1924] All ER Rep 168.

[852] In rare cases a secondary liability can be applied to a person who knowingly incites (encourages, threatens, endeavour to persuade or incites), aids or procures another to commit a criminal copyright offence. Dixon *(n 833)* 18.

[853] [1988] AC 1013, [1988] All ER 484.

SonyBeatamax) nor the advertisement of it amounted to an authorisation.[854] However, the leading case applying the 'authorisation' standard to those who facilitated infringement on the Internet is *Twentieth Century Fox v Newzbin*.[855] The case concerned material, particularly films, that third parties had uploaded to Usenet sites without the licence of the relevant copyright holders. Newzbin also offered a paid service to access the index of these sites. By so doing, Newzbin enabled users to download files from Usenet bulletin boards, particularly using NZB files, which collect together all components of a work for downloading. In the circumstances, it was found that many of the Newzbin subcategories were obviously infringing and the judge took the view that the defendant knew this.[856] Moreover, the judge held that the Newzbin facility provided the means for infringement; that it had been designed by the defendant, and was entirely within the defendant's control.[857] Likewise, the defendant did nothing to hinder the infringement: there was no filtering and other preventative mechanisms amounted merely to 'window dressing'.[858]

The *Newzbin* decision has become a key case in the legal strategy of the content owners who are seeking to reduce levels of P2P file-sharing through orders blocking access to websites of the software providers who operate and are located out of the jurisdiction.[859]

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[854] Ibid 492-493.

[855] *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch).

[856] Ibid paras 46, 78.

[857] Ibid 100.

[858] Ibid para 101.

[859] For the discussion of website blocking injunctions see sections 3.5.1., 3.5.3. and 3.5.4.

3.3.2. *Ashby Donald* and *the TPB*: Pirates are Human

The US and UK Courts in the cases discussed above make no analysis in relation to freedom aspects of the file sharing technologies. However, the European Court of Human Rights (ECtHR), in its decisions in *Ashby Donald v France,*[860] a case relating to visual arts, fashion shows and photo-sharing, and in *Neij and Sunde Kolmisoppi v Sweden*,[861] a case involving file-sharing, acknowledged the value of these technologies from the perspective of freedom of expression.

In the *Ashby Donald* case, the ECtHR started its assessment by establishing that the applicant's convictions - regardless they resulted from a copyright infringement - comprised an interference with their right to freedom of expression.[862] Having identified the existence of an interference under Article 10(1), the ECtHR shifted its focus on to its famous "three-part test" under Article 10(2).[863] On the basis of Article 10(2) of the Convention, the exercise of freedom of expression may be subject to formalities, conditions, restrictions or penalties, only if they are 'prescribed by law', pursue one or more of the legitimate aims referred to in Article 10(2) of the Convention and are 'necessary in a democratic society'.[864] The ECtHR was brief but clear in finding respectively that the interference by the national authorities was prescribed by law and pursued the legitimate aim of the 'protection of rights of others' (that is of the copyright

[860] No. 36769/08, 10 January, 2013, unreported.

[861] *The Pirate Bay (n 167)*.

[862] *Ashby Donald (n 166)* para 34.

[863] For further discussion of the 'three-part test' as a tool for assessing restrictions on freedom of expression, see, M Macovei, *Freedom of Expression: A Guide to The Implementation of Article 10 of the European Convention on Human Rights (Human Rights Handbooks No 2)* (Council of Europe Publishing, 2001).

[864] *Ashby Donald (n 166)* para 35.

holders) and the 'prevention of crime.'[865] Then, the ECtHR directed its examination to the necessity of the interference – the so-called 'necessity test'.[866]

On whether the interference was necessary in a democratic society two considerations were conspicuous in the Court's assessment. In *Ashby Donald*, the ECtHR firstly reviewed "the nature of information" and "the character of information" at issue.[867] On this score, the Court held that the information about fashion did not relate to a debate of general public interest. It went on to hold that the applicants' expression was primarily commercial in nature. These findings ultimately led the Court to endorse that national authorities enjoy a particularly 'wide margin of appreciation' in evaluating local needs and conditions, if the nature and character of speech are similar to the present case.[868]

When it came to the crux of the discussion, setting the appropriate standards of the so-called balancing copyright as a human right to property on the one hand and freedom of expression on the other, the Court preferred not to enter the murky waters between those competing fundamental rights. Once again, it underlined that when there are two competing interests that are both protected by the ECHR; the national authorities have a wide *margin of appreciation* to balance them. On this account, the

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[865] *Ashby Donald (n 166)* para 36.

[866] The test of 'necess[ity] in a democratic society' requires the Court to decide whether the 'interference' challenged corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued ('proportionality test') and whether the reasons given by the national authorities to justify it are relevant and sufficient (see, *Sunday Times (n 658)* para 62). For further discussion of the 'democratic necessity test' see; Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights (Human Rights Files No 15)* (Council of Europe Publishing, 1997).

[867] Geiger and Izyumenko *(n 157)* 321.

[868] *Ashby Donald (n 166)* para 39.

ECtHR laid particular emphasis on the fact that 'intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention' and that in such a situation the state is accorded '*a wide margin of appreciation*.'[869]

Finally, the Strasbourg Court in *Ashby Donald* did not regard the fines and the substantial award of damages as disproportionate to the legitimate aim pursued, arguing that the applicants provided no evidence that these sanctions had "financially strangled" them.

Having established that the convictions applied were proportionate, it was held that the interference with the applicants' freedom of expression was necessary in a democratic society. The Court nevertheless reached the conclusion in *Ashby Donald* that there was no violation of Article 10.[870]

In *Ashby Donald*, the ECtHR viewed the applicants' expression as primarily commercial, since the photographs were made available both for free and sale on the *Viewfinder* website.[871] The profit-making character of the speech in the case steered the Court in this direction. The ECtHR thus recognised a wide margin of appreciation. In fact, the Court has on many different occasions come to the same conclusion that the standards of protection may be less severe for commercial expressions.[872] However, there is no clear explanation in the ECtHR's case law, as well as in *Ashby*

[869] *Ashby Donald (n 166)* para 40; *The Pirate Bay (n 167)* 10-11.

[870] *Ashby Donald (n 166)* para 45.

[871] Ibid para 39.

[872] See; *Demuth v Switzerland* App no 38743/97 (ECtHR, 5 November 2002) para. 42, Reports of Judgments and Decisions 2002-IX; *Markt Intern Verlag GmbH and Klaus Beermann v Federal Republic of Germany,* No. 10572/83, 20 November 1989, para. 33, Series A No. 165; and *Casado Coca v. Spain,* No. 15450/89, 24 February 1994, para. 50, Series A No. 285-A.

Donald, of what exactly is to be understood under the notion of 'commercial expression'. The character of expression, offering photographs for sale, also led the Court to hold that the applicants' speech did not concern a debate of general interest, although it noted that the applicants made 'photographs of fashion shows accessible to the public' and 'the public is interested in fashion in general and *haute couture* fashion shows in particular.'[873] This kind of reasoning is also problematic, as well as ambiguous. First, the Court in so doing created a controversy. After accepting the general public interest in conveying information regarding fashion shows and trends, in the final analysis it reached the opposite conclusion. Second, it is not clear from the judgement why the Court did not see the expression as artistic as well, even though under many copyright laws photographs are seen as artistic work. In fact, fashion shows are a matter of great public interest, for artistic as well as commercial purposes. The extensive scale of media coverage and public attention given to these shows demonstrates that there is widespread public interest.[874] Similarly, the Court failed to address, as Geiger and Izyumenko point out, the 'essential function of the press in a democratic society.'[875] *Viewfinder,* a fashion website 'akin to the digital version of

[873] *Ashby Donald (n 166)* para 39.

[874] The US District Court, adopting this opinion, rejected to enforce the French judgment on the grounds that it was contrary to the free speech protected by the First Amendment of the American Constitution. *Sarl Louis Feraud International v. Viewfinder Inc.,* 406 F.Supp.2d 274 (SDNY 2005) paras 282–283, 286 [cited by Geiger and Izyumenko, supra note 181, 326]. The decision was since then reversed on appeal. *Sarl Louis Feraud International v. Viewfinder Inc.,* 489 F.3d 474 (2nd Cir. 2007); [cited by Geiger and Izyumenko *(n 157)* 327].

[875] Geiger and Izyumenko *(n 157)* 329-330.

Vogue,'[876] may have a commercial purpose in publishing the photographs as its primary purpose, but it also facilitates the dissemination of artistic information, if a catwalk in a fashion show and outfits that are displayed are protected as dramatic and artistic works under national copyright law. The commercial purpose of the media should not, however, disentitle it automatically to protection afforded to freedom of expression. Are fashion photographers and media less journalist than the political media is? On this score, would it be a commercial speech, if a newspaper publishing primarily financial news put photographs of these fashion shows on its issue or website (both accessible on payment) to depict how artistic failure/success of an *haute couture* company in their new designs would affect their bond in the stock market? Or, does the public deserve less information on what they wear, which directly shapes their daily dressing, than what their home country politicians discuss? And if a fashion show, despite its huge media attraction, is so trivial as to appeal to the general public interest, why is it given quite extensive human rights protection as a right to property? The ECtHR left these issues unsettled by forming a cursory protection hierarchy among the categories of expression and ignoring the potential and actual category overlap. As Geiger and Izyumenko aptly conclude:

> '[T]he case would probably have been decided differently if the photographs were posted and made freely available by the photographers on their website in the context of a report on the fashion show. The fact that some of the pictures were sold indicated that, at least for those pictures, the commercial purpose of the posting clearly

[876] *Sarl Louis Feraud International v. Viewfinder Inc*. (2007) 476 [cited by Geiger and Izyumenko *(n 157)* 335].

> dominated over the information purpose. In any case, the Court's reasoning could have been more comprehensive and differentiated if all the relevant proportionality criteria had been applied, and *Ashby Donald* could have provided guidance on how to mark the boundary between infringing and non-infringing uses of copyrighted expression in the future. In this regard, it can be considered as a missed opportunity.'[877]

This is not the only opportunity that the judgement missed. It is true that Viewfinder is styled as an Internet fashion magazine.[878] Viewfinder has not simply copied the claimants' dresses, but displayed a particular depiction of them.[879] In addition to the photographers' role as media in imparting information about the fashion show, their right to artistic and creative expression was also at stake.

In *Neij and Sunde Kolmisoppi* the complaint was brought by Fredrik Neij and Peter Sunde Kolmisoppi. During 2005 and 2006 they were both involved in the running of the website 'The Pirate Bay' (TBP), one of the world's largest file sharing services on the Internet, which allows users to exchange digital material such as music, films and computer games. In January 2008, Neij and Sunde Kolmisoppi were charged with complicity to commit crimes in violation of the Copyright Act. Subsequently, several entertainment companies brought private claims within the proceedings. In April 2009, the Stockholm District Court sentenced Neij and Sunde Kolmisoppi to one year's imprisonment and held them, together with the other defendants, jointly liable for

[877] Geiger and Izyumenko *(n 157)* 338 (Emphasis original).

[878] *Sarl Louis Feraud International v Viewfinder Inc,* 489 F.3d 474 (2nd Cir. 2007) at 476 (emphasis added).

[879] See for the website; http://www.firstview.com/.

damages of approximately 3.3 million Euros. On 26 November, 2010, the Court of Appeal reduced the first applicant's prison sentence to ten months and the second applicant's sentence to eight months but increased their joint liability for damages to approximately 5 million Euros. Ultimately, the Supreme Court refused leave to appeal in February 2012. The applicants eventually applied to the ECtHR, claiming that their conviction for complicity to commit crimes in violation of the Copyright Act had breached their freedom of expression and information under Article 10 of the ECHR.[880]

Similar to *Ashby Donalds v France*,[881] the ECtHR concluded that the applicants' convictions, despite deriving from a copyright infringement, was an interference with their right to freedom of expression.[882] The ECtHR went on to hold, however, that the interference was justified by the three conditions set out by Article 10(2) of the ECHR. Specifically, it was 'prescribed by law', as their convictions were rooted in the Copyright Act and the Penal Code, and related solely to copyright-protected digital material; it pursued the legitimate aims of protecting the rights of others and preventing crime; and it was also 'necessary in a democratic society'.[883] In *the TBP*, unlike *Ashby Donald*, the ECtHR stayed away from the question of whether the expression was of a commercial nature. Rather, it stressed that 'the safeguards afforded to the distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate.'[884]

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[880] For details see; *The Pirate Bay (n 167)* 2-5.

[881] See Chapter 1 section 1.1.4.

[882] *Ashby Donald (n 166)* para 34; *The Pirate Bay (n 167)* 9.

[883] *The Pirate Bay (n 167)*10.

[884] *The Pirate Bay (n 167)* 11.

In relation to the necessity test, the ECtHR held that the applicants' interests in exchanging information had to be balanced against the rights of copyright owners to protect and prevent the free dissemination of their copyright-protected material; thus, while the applicants benefited from the right to freedom of expression under Article 10(1), the copyright owners benefited from the protection of Article 1 of the First Protocol of the ECHR.[885] The ECtHR went on to observe that, in balancing those competing interests, the state has a wide margin of appreciation, the extent of which may vary depending on the type of information in dispute.[886] While information that is important to political expression and debate can expect heightened protection under Article 10, the nature of the information in dispute in this case served only to widen the margin of appreciation still further. A final consideration in the balancing of these competing interests was the term of imprisonment and financial liability imposed on the applicants. Not taking 'any action to remove the torrent files in question, despite having been urged to do so' and staying 'indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB' satisfied the ECtHR in rendering the sanctions imposed proportional. Having established that the convictions applied were proportionate, it was further held that the interference with the applicants' freedom of expression was necessary in a democratic society. The Court accordingly reached the conclusion that the application was 'manifestly ill-founded'.[887]

In sum, the enforcement of copyright with respect to P2P networks represents a restriction, but, according to the ECtHR, a proportionate one, to the

[885] *The Pirate Bay (n 167)* 11.

[886] Ibid 11.

[887] Ibid 11.

freedom to impart information. However, the Court did not reflect upon the impact of the decision on Internet users' rights.

3.4. Disclosure Orders

Another strategy against piracy on the Internet has been seeking a court order to require Internet intermediaries to disclose certain information about the alleged infringers. In Europe, the shift towards putting more responsibility onto Internet intermediaries through disclosure orders goes as far back as the *Promusicae v Telefónica* case.[888] In this case, the CJEU was asked to consider whether there is an obligation under EU law on a telecom service provider to disclose personal data for bringing civil proceedings against copyright infringement. Promusicae (*Productores de Música de España*), a Spanish organisation of producers and publishers of musical and audio-visual recordings, brought an action against the telecommunications service provider Telefónica (*Telefónica de España SAU*) before the Spanish courts. The purpose of the action was to obtain a preliminary injunction requiring Telefónica to disclose some of its customers' identities and actual addresses, who were allegedly illegally accessing the works on which members of Promusicae have the exploitation rights, in order to sue them for copyright infringement. These proceedings were addressed to Telefónica, since internet protocol (IP) addresses allocated to it had been used for sharing copyrighted material without the consent of the right holders.[889] The Juzgado de lo Mercantil No 5 de Madrid (Commercial Court No 5, Madrid) referred the

[888] *Promusicae (n 676)*. For an academic commentary on the case see; Xavier Groussot, 'Case C–275/06 Productores de Música de España Promusicae v Telefónica de España SAU Judgment of the Court Grand Chamber of 28 January 2008' (2008) 45(6) Common Market Law Review 1745-1766.

[889] *Promusicae (n 676)* para 29-31.

case to the then Court of Justice, now the CJEU, by asking whether EU IP law must be interpreted as obliging Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.[890] The CJEU held that EU data protection legislation does not inhibit Member States from introducing an obligation to disclose personal data in the context of civil proceedings; nor does EU IP law – as well as Articles 41, 42, 47 of the TRIPs Agreement- require it.[891]

The EU Court then went on to examine whether excluding an obligation to communicate personal data in civil proceedings violates 'the fundamental right to property and the fundamental right to effective judicial protection.'[892] It firstly established that the 'fundamental right to property, which includes intellectual property rights such as copyright and the fundamental right to effective judicial protection constitute general principles of Community law.'[893] However, for the CJEU, the matter in question involves 'a further fundamental right, namely the right that guarantees protection of personal data and hence of private life.'[894] The EU Court eventually held that if a state did impose such an obligation, this state and its authorities must then not only craft their national laws in a manner consistent with the general rules of secondary EU law but also ensure that the right to property and thus the enforcement

[890] Ibid para 32.

[891] Ibid paras 54, 59-60.

[892] Ibid para 61.

[893] Ibid para 62 (internal references omitted).

[894] Ibid para 63.

of intellectual property rights has to be balanced against other fundamental rights.[895] Furthermore, the interpretation of the directives and such a piece of legislation must be in compliance 'with the other general principles of Community law, such as the principle of proportionality.'[896] Despite adopting the so-called *balancing paradigm*, the CJEU did not explain how exactly this balance was to be attained in this particular case, while clearly stressing that EU law, including Article 17 (2) of the EU Charter, does not require an obligation to disclose personal data in civil infringement proceedings.

3.5. Filtering and Website Blocking

3.5.1. Technical and Legal Background

Since it became apparent that neither suing P2P sites nor users would be a viable solution to end or reduce online infringement, rightholders have focused on the possibility of asking courts to grant orders against Internet intermediaries to act as filters to do so. Two main approaches have emerged. The first one is to ask (or to sue) Internet intermediaries so that they block certain websites to all their subscribers, which might be either P2P intermediaries such as torrent sites, or actual hosts of infringing material. This is called 'website blocking'. This can be implemented through asking the sites that translate URLs and thus direct Internet traffic – the Domain Name System (DNS) routers - to block resolution of the domain names notified as used by alleged piracy sites. This is known as 'domain name blocking'.

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[895] 'A fair balance [should] be struck between the various fundamental rights protected by the Community legal order' see; Ibid para 68.

[896] Ibid para 70.

The second approach is that the intermediaries can be ordered to monitor for or filter out certain types of traffic coming to its subscribers such as using certain protocols (*i.e.* P2P traffic) or matching certain constraints (*i.e.* notified copyright works). Monitoring essentially means proactively seeking out infringing content. Monitoring techniques vary according to the type of content sought, the type of intermediary, the type of communications (encrypted or plain text) and the nature of the communication (client-server, peer-to-peer, etc.). Hosting providers generally use monitoring software (such as web crawlers) that searches for specifically identified illegal content on their servers. The illegal content can be identified through lists of protected subject matter submitted to the intermediary by rightholders, specific 'strings' or other indicators of content illegality (*e.g.* the use of specific words or expressions that may be indicators of infringement-related activities). Monitoring can also operate before (or at the same time as) the content is uploaded. Access providers, on the other hand, use software that can 'intercept' and 'read' the information transmitted over their network's segment. Technically speaking, the Internet is a packet-switched network where a single piece of information, say an e-mail, to be sent from point A to point B, is subdivided in many small packets of information. Different packets of the same information commonly travel through different routes to reach point B. To intercept and read and then identify potentially infringing content, these intermediaries usually employ the 'Deep Packet Inspection' system by which not only the 'headers' of the data packet, but also the 'body' of the data packet is read. This means that when all the packets of a single data transfer are collected and aligned following the right

sequence, it becomes possible to read the content of the data by considering the 'packets body'.[897]

Filtering is a more proactive technique in the identification of allegedly infringing content through incorporating monitoring with cutting off access to selected material (blocking) or removing the material altogether from the service (removal).[898] Thus filtering is acting against material identified through monitoring in order to then block access to it or remove it. Instead of waiting for unlawful content to be reported, intermediaries may decide to, or be required to, locate as many instances of illegal content as possible. Modern technical instruments immensely ease such efforts. Fingerprinting technology is a quintessential example of these tools using a condensed digital summary of each piece of protected content (*e.g.* of a videoclip) to identify it among all the traffic uploaded on a hosting website or flowing through a network. Rightholders can apply to register a fingerprint of that work to a database, which is held by the intermediary applying the filtering, before an infringement is identified. If a match is detected, the potentially infringing content is removed. One such system is YouTube's Content ID.[899] In filtering technologies, the detection of allegedly infringing content is automated, simplifying the enforcement process. Filtering can also enable removal of certain types of content from pages that are intentionally allowed by URL blocking. However, it involves the monitoring of the totality of the information passing through the intermediary, which may impose a big

[897] See; Thomas Margoni and Mark Perry, 'Deep Pockets, Packets, and Safe Harbours' (2013) 74(6) Ohio State Law Journal 1195-1216.

[898] Blocking and removal are classical measures used in notice-and-takedown systems.

[899] See further; Case Study 1 in Chapter 6 section 6.6.1.

technical and financial burden on it. Filtering can be done manually by human labour.[900]

Although under current US law injunctions requiring Internet Service Providers to block foreign websites are theoretically available, they have not been sought by copyright holders.[901] While notice-and-takedown applies content-hosts and search engines, compelling them to takedown or de-link alleged infringing content hosted or linked by them, the website blocking injunction has been used in the EU to control the conduct of Internet service providers. In the EU, Article 8(3) of the Information Society Directive requires that Member States 'ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'[902] The Directive does not

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[900] See Christina Angelopoulos, Annabel Brody, Wouter Hins, Bernt Hugenholtz, Patrick Leerssen, Thomas Margoni, Tarlach McGonagle, Ot van Daalen and Joris van Hoboken, 'Study of Fundamental Rights Limitations for Online Enforcement through Self-regulation' (Institute for Information Law (IViR), University of Amsterdam, 2015) 9-10.

[901] The DMCA authorises copyright holders to seek injunctions against Internet service providers (referring in the context of the DMCA to a wide range of providers, not only those providing Internet access), even when a service provider qualifies for a safe harbour from monetary damages. The DMCA limits the scope of such injunctions according to the service provider's function. See; 17 USC § 512(j)(1)(2) and (3). The DMCA's injunctive relief provisions appear to be little used for a number of reasons. Most importantly, the claimant would have to establish a basis for liability on the part of the ISP, an expensive and uncertain proposition given the lack of clear precedent. Also injunctions cannot be issued absent notice to the ISP and an opportunity to appear before the court hearing the application for an injunction. See; Department of Commerce Internet Policy Taskforce, 'Copyright Policy, Creativity, and Innovation in the Digital Economy' (2013) 51-52, 62, available online at http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf

[902] Information Society Directive *(n 70)* Article 8(3).

specify any particular technique to be required by such an injunction. Courts in several Member States have applied their national legislation implementing this provision to issue orders requiring ISPs to block access to specific infringing websites, sometimes through DNS blocking, sometimes through IP blocking, and sometimes without specifying the method.

Although there have been no reported cases on network-level filtering in the US[903], in the following sections, the case law of the ECtHR, the CJEU and UK courts on website blocking, monitoring and filtering are briefly outlined.

3.5.2. *Scarlet* and *Netlog*: Filtering and Monitoring

On the foundation of *Promusicae*, the CJEU subsequently began to draw a much more detailed assessment with respect to the interrelationship between copyright and human rights. In the cases of *Scarlet Extended v SABAM*[904] and *SABAM v Netlog,*[905] the CJEU elaborates further on the need to balance the right to (intellectual) property and other fundamental rights under the EU Charter. SABAM is the Belgian Society of Authors, Composers and Publishers, a copyright collecting society representing the copyright interests of an array of Belgian artists from musicians and film-makers to novelists and graphic designers. In both cases, it initiated proceedings before the national court for injunctions to require an intermediary to install a filtering system that would monitor the traffic of its users' files on the Internet,

[903] Department of Commerce Internet Policy Taskforce *(n 900)* 65.

[904] Case C-70/10 *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA* (SABAM) [2011] ECR I-11959.

[905] Case C 360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (CJEU, 16 February 2012).

and to stop and prevent the exchange of copyrighted works through peer-to-peer file sharing. In addition, it sought a declaration order that the copyright contained in its repertoire had been infringed through using these intermediaries' services. *Scarlet* concerned a filter obligation imposed on an internet access provider, whereas *Netlog* concerned a similar obligation imposed on a social network provider. The central question asked the CJEU in both cases was whether the Information Society Directive[906] and the Enforcement Directive,[907] the E-Commerce Directive,[908] the Data Protection Directive,[909] the E-Privacy Directive[910] and fundamental rights as protected in the ECHR, preclude such a filter obligation.

The CJEU began with reiterating that under EU intellectual property law copyright right holders may apply for an injunction against intermediaries when their services are used to breach their rights. It then noted that domestic courts' injunctions could require their addressees not only to take measures designed to cease copyright infringement but also to prevent future violations.[911] Although the formulation of the rules governing the granting of injunctions and their application was a matter for the Member States to deal with, relevant rules should respect the limitations of the EU directives and the sources of law upon which they were based.[912] In the CJEU's view,

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[906] Information Society Directive *(n 70)*.

[907] Enforcement Directive *(n 676)*.

[908] E-Commerce Directive *(n 677).*

[909] Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

[910] Council Directive 2002/58/EC of 31 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37.

[911] *Scarlet (n 903)* para 31.

[912] *Scarlet (n 903)* paras 32-33.

however, the filtering mechanism requested from Scarlet and Netlog required the active observation of all electronic communications that were conducted on its network and therefore amounted to the general monitoring of all the data and information transmitted, and thus was a breach of the E-Commerce Directive.[913] Furthermore, the EU Court found that it violated Article 3 of the Enforcement Directive, which states that intellectual property enforcement measures must be fair and proportionate and must not be excessively complicated and costly.[914]

The CJEU then continued to examine whether the injunctions in question were consistent with EU law in the light of fundamental rights under the EU Charter. Recalling that the injunction requested would serve to protect an intellectual property right, the CJEU observed that 'the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the [EU] Charter.'[915] Drawing on its judgment in *Promusicae*, it further noted that the right to intellectual property, as safeguarded in the EU Charter, was not an inviolable and absolute right;[916] it should be balanced against the protection of other fundamental rights. The EU Court again emphasised the need for national authorities and domestic courts implementing EU law to find a fair balance between the protection of copyright holders and the protection of the fundamental rights of those affected by the adoption of the measures devised to protect copyright.[917] In both cases, according to the CJEU, the competing rights were the protection of intellectual property under Article17 (2), on the one hand, and the

[913] Ibid paras 34-40.

[914] *Scarlet (n 903)* paras 34 and 36; and *Netlog (n 904)* para 37-38.

[915] *Scarlet (n 903)* para 43; and *Netlog (n 904)* para 41.

[916] *Scarlet (n 903)* para 43; and *Netlog (n 904)* para 41.

[917] *Scarlet (n 903)* para 45.

freedom to conduct a business afforded to ISPs pursuant to Article 16 of the EU Charter, on the other. The CJEU held that the injunction to install the contested filtering system 'would result in a serious infringement of the freedom of the ISP concerned to conduct its business,' as it would require the ISP to install a complicated, costly, and permanent filtering system at its own expense.[918] Thus the need for a 'fair balance' between the protection of intellectual property rights and the freedom to conduct a business was frustrated.

The EU Court's reasoning continued by adding other stakeholders' interests into the balancing test, who were not parties to the cases. As to the users of Scarlet's and Netlog's services, the Court held that the injunction for the contested filtering system could violate the customers' right to the protection of their personal data and their freedom to receive and impart information, enshrined in Articles 8 and 11 the EU Charter respectively.[919] The CJEU first pointed out that the installation of the contested filtering system would entail the systematic analysis of all content transmitted through the intermediaries' network and thus the collection and identification of the users' IP addresses, which constituted protected personal data.[920] Secondly, the introduction of the filtering system could undermine freedom of information, since it did not include appropriate safeguards that would adequately distinguish lawful from unlawful content, with the risk of lawful communications being blocked.[921] On this basis, the Court

[918] *Scarlet (n 903)* para 48; and *Netlog (n 904)* para 46. It is worth noting that the CJEU equally finds such an injunction to be contrary to Article 3 (1) of the Enforcement Directive since it is 'unnecessarily complicated' and 'costly'.

[919] *Scarlet (n 903)* para 50; and *Netlog (n 904)* para 48.

[920] *Scarlet (n 903)* para 51.

[921] *Scarlet (n 903)* para 52.

accordingly concluded 'that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.'[922]

In terms of human rights, the CJEU's analysis did not go much deeper than the summary above. The CJEU's judgments were relatively short, straightforward and uncontroversial. More specifically, unlike the Advocate General's comprehensive analysis, the CJEU in *Scarlet* did not discuss the case law of the ECtHR. The ECtHR has been quite critical of systems to intercept communications,[923] including when such systems monitor traffic data rather the content of communications.[924] It paid less attention to the fundamental rights of Internet users. Specifically, the Court did not discuss the secrecy of communications or the right to respect for private life (Article 7 of the Charter). It further disregarded the right to a fair trial (Article 47 of the Charter), since the users were theoretically supposed to be identified by cryptic technological codes of the contested filter system as an infringer without being given sufficient rights to defend themselves before a lawfully established, independent and impartial court by using legal safeguards provided by this right. Thus, being stigmatised as an infringer and banned from accessing lawful content would violate the blocked users'

[922] *Scarlet (n 903)* para 53; and *Netlog (n 904)* para 51.

[923] *Liberty v United Kingdom* (2008) 48 EHRR 1 para 56; *S and Marper v United Kingdom* (2009) 48 EHRR 50 paras 104-105.

[924] *Copland v United Kingdom* (2007) 45 EHRR 37 para 41-44; *Malone v United Kingdom* (1985) 7 EHRR 14 paras 83-84.

right to a fair trial and access to court. This might equally breach their right to an effective remedy (Article 47 of the Charter).

From the Court's analysis in *Scarlet* and *Netlog* it might be deduced that EU law, construed in the light of fundamental rights requirements, precludes the granting of injunctions obliging ISPs to install filtering systems with the characteristics of the filtering system at issue. The judgments however provide little guidance when it comes to more specific filter obligations. SABAM sought injunctions for the imposition of a filtering system with particularly extreme features. The contested filter system was thought to apply to all of the service provider's internet traffic, indiscriminately to all users, for an unlimited period, as a preventative measure and exclusively at the ISP's expense. Arguably, a less vigorous filter system, say, which is specific with regard to the group of suspected persons, but general in respect of the content, or which is paid for mutually between the right holder and the ISP and for a temporary time period (i.e. 1 year) might still be possible after the judgments.

3.5.3. *UPC Telekabel:* (Website) Blocking

While SABAM cases were marked as victories for Internet intermediaries, the legal contestation between them and right holders has quickly bounded into different arenas. This time, the trend of putting more responsibility on Internet intermediaries has concentrated on website blocking orders. Specifically, the UK courts have handed down a few blocking injunctions in a series of cases (*i.e. Newzbin*

I,[925] *Dramatico Entertainment*,[926] *Paramount Home Entertainment*,[927] *Football Association Premier League v BSkyB*,[928] *EMI Records Ltd v British Sky Broadcasting Ltd*[929]) under section 97A of the Copyright Designs and Patents Act 1988 against websites which massively infringe copyrights.

The position under European law was unclear until the CJEU confirmed that this could be done at an EU-wide level by its recent ruling in the case of *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*.[930] The case[931] derived from the claims for a website blocking injunction of two

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[925] *Twentieth Century Fox (n 854)*.

[926] *Dramatico Entertainment v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) in relation to the blocking of the Pirate Bay website.

[927] *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch).

[928] [2013] EWHC 2058 (Ch).

[929] [2013] EWHC 379 (Ch).

[930] Case C-314/12 *UPC Telekabel Wien v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECDR 12.

[931] For commentaries on the case see; Gemma Minero, 'European Union: case note on "UPC Telekabel Wien"' (2014) 45(7) International Review of Intellectual Property and Competition Law 848-851; Joel Smith, Andrew Moir and Rachel Montagnon, 'ISPs And Blocking Injunctions: UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and and Wega Filmproduktionsgesellschaft mbH (C-314/12)' (2014) 36(7) European Intellectual Property Review 470-473; EU Focus, 'ISP May Be Ordered To Block Website Infringing Copyright' (2014) (319) EU Focus 27-28; Tiffany Stirling, 'Do Shoot The Messenger: Site-Blocking Injunctions Against Internet Service Providers Upheld by the CJEU UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH UPC Telekabel Wien GmbH ("UPC") v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH (C-314/12) [2014] E.C.D.R. 12' (2014) 25(6) Entertainment Law Review 219-221; Steven James, 'Digesting Lush v Amazon and UPC Telekabel: Are We Asking Too Much Of Online Intermediaries?'

film production companies, Constantin Film and Wega, whose films were provided for downloading or streaming on a foreign website operated in Germany under *kino.to.* An injunction requiring DNS blocking and blocking of the website's current and future IP addresses was originally ordered by the Commercial Court Wien in May 2011. The case finally advanced to appeal to the Austrian Supreme Court which amended the injunction to 'outcome prohibition' and referred several questions to the CJEU. Thus, UPC Telekabel was ordered to adopt any measure that could possibly and reasonably be expected of it to block *kino.to.*

One of the main issues in this case was whether the internet access providers' services are used by a third party to infringe copyright. The primary argument made by UPC Telekabel, an Internet service provider established in Austria, in the proceedings was that such an injunction cannot be addressed to it, because, at the material time, it did not have any business relationship with the operators of *kino.to* and it was never established that its own customers acted unlawfully. UPC Telekabel also claimed that the various blocking measures that might be introduced could, in any event, be technically circumvented and some of them are excessively costly. The persons uploading the infringing copies on the relevant website are not using the services of the internet access provider which was subject to the blocking order.

(2014) 25(5) Entertainment Law Review 175-178; Christina Angelopoulos, 'CJEU in UPC Telekabel Wien: A Totally Legal Court Order…To Do the Impossible' available at http://kluwercopyrightblog.com/2014/04/03/upc-telekabel-wien/; Christina Angelopoulos, 'Are blocking injunctions against ISPs allowed in Europe? Copyright Enforcement in the post-Telekabel EU Legal Landscape' (2014) 9(10) Journal of Intellectual Property Law & Practice 812-821; Julia Hörnle, 'On Whose Side Does the Internet Access Provider Stand? Blocking Injunctions Against Communication Service Providers. Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film' (2014) 19(3) Communications Law 99-100.

The CJEU rebuffed this argument and found that access to materials on the internet requires both uploading and downloading of content, so that the internet access provider plays an inevitable role in the process of infringement. It held that an internet access provider which allows its customers access to copyright protected materials made available to the public is an intermediary in the sense of Article 8 (3) of the Copyright Directive, since excluding injunctions against internet access providers would undermine the objective of the Directive to guarantee a high level of protection.[932]

The second issue was whether the injunction should specifically describe the technical measures the intermediary must take to block access to a particular website and whether the fundamental rights recognised by the EU preclude such a blocking injunction. The CJEU firstly identified three types of conflicting fundamental rights 1) copyright under Article 17 (2) of the Charter, on the one hand, and 2) the freedom to conduct business under Article 16 and 3) the freedom of expression and information of internet users pursuant to Article 11, on the other. Repeating its *Promusicae* conclusion, it held that it is important to find a proportionate balance between these competing fundamental rights.[933]

The CJEU found that the injunction in question was rightly balanced with regard to the intermediary's freedom to conduct a business. In this respect, the EU Court held that the contested injunction restricted the intermediary's free use of resources and imposed a significant cost affecting the organisation of activities and require complex technical solutions, but that it was justified when balanced with

[932] *UPC Telekabel (n 929)* paras 32-33.

[933] Ibid paras 46-47.

intellectual property rights.[934] It emphasised that an injunction of a more general nature (not specifying the precise measures to be taken) is not in breach of EU law, as it gives the internet access provider the required flexibility to implement the court order within its resource constraints.[935] The CJEU held that the defence that the internet access provider had taken reasonable measures was sufficient protection to safeguard its legitimate interests[936] and that the reasonableness requirement provided sufficient legal certainty.[937]

Interestingly, the EU Court was reluctant to provide a similar assessment about users' rights. The CJEU held that the blocking must not prevent internet users from accessing lawful, non-copyright infringing content. However, it decided to leave this controversial issue to the intermediaries. In other words, internet access providers were put under an obligation to bring an end to the infringement of copyright or related rights without affecting the accessibility of lawful information.[938] Oddly, the obligation of striking a fair balance between competing rights through the non-specified website blocking measure was given to intermediaries. According to the CJEU, however, it would be for national courts to evaluate the appropriateness of this assessment. To ensure the right balance is maintained, the national courts must also provide a right for the internet users to assert their rights before the court once the implementing measures taken by the intermediary are known.[939]

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[934] Ibid paras 47, 50, 51.

[935] Ibid para 52.

[936] Ibid para 53.

[937] Ibid para 54.

[938] Ibid para 56.

[939] Ibid para 57.

As Pekka Savola highlights, this seems to provide *locus standi* for users to assert their rights before the court, which has not been ordered in many jurisdictions.[940] A user could therefore address the court with a complaint that the specific blocking method chosen affects his/her fundamental rights. The question then is, does this *locus standi* principle apply exceptionally only in the case of general injunctions, such as those provided by the Austrian law, or should it be extended to all blocking injunctions, even the specific ones that are issued by courts? It is suggested that this also applies to national courts issuing specific orders, unless proportionality has also been reviewed from the users' perspective.[941]

Finally, with regard to copyright protection, the Court noted that a complete cessation of infringements might not be possible or achievable in practice; this does not pose a problem, given that, as previously emphasised in *Scarlet*, there is nothing whatsoever in Article 17(2) of the Charter to suggest that intellectual property is inviolable and must be absolutely protected.[942]

To sum up, according to the CJEU, blocking injunctions are compatible with EU law, provided that 1) an internet access provider can choose the technical implementation which is best suited for its business, including taking costs into account, but that 2) this implementation a) must not restrict accessing lawful content

[940] Pekka Savola, 'Website blocking in copyright injunctions: a further perspective' (28 March 2014), available at http://the1709blog.blogspot.gr/2014/03/website-blocking-in-copyright.html.

[941] Pekka Savola, 'Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers' (2014) 5 JIPITEC 121.

[942] *UPC Telekabel (n 929)* paras 58-61.

for user rights, while; b) simultaneously making it more difficult for/seriously discouraging users to access infringing content.[943]

The judgement was lauded as a victory by some collective management societies.[944] While it undoubtedly represents another option in fighting online piracy, the decision is unlikely to have a notable impact on the approach of EU courts to website blocking, since, as Julia Hörnle reminds us, 'no technical implementation of internet blocking easily satisfies all three criteria: URL blocking may be most effective but is very expensive, IP address blocking tends to overblock and domain name blocking is entirely ineffective. So it is little comfort that the CJEU leaves the choice between unattractive options to the internet access provider.'[945] Indeed, while it is easy to assume that it makes it a little more difficult to access the blocked website, it is less certain that it discourages serious internet users, who are using the services of the addressee of that injunction from accessing the subject-matter made available to them.

3.5.4. *Yildirim, Akdeniz and Cengiz*: Website Blocking and Users

It is important to note that the CJEU's approach is different from the ECtHR's approach in relation to users' rights in intermediaries cases. In *Ahmet Yildirim v*

[943] Ibid paras 62-64.

[944] International Federation of the Phonographic Industry (IFPI) issued a positive statement in support of the ECJ ruling and said that: 'The decision by the ECJ today confirming that website blocking does not infringe fundamental rights in the EU is an important clarification that will strengthen the ability of the music and other creative industries to tackle piracy.' The statement is available at http://www.ifpi.org/news/decision-by-the-European-Court-of-Justice-on-website-blocking.

[945] Hörnle *(n 930)* 100.

Turkey,[946] the ECtHR emphasised the participatory dimension of free expression in noting that the Internet 'has become one of the principal means for individuals to exercise their right to freedom of expression today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest.'[947] In *Ahmet Yildirim*, upon an Internet user's application, the Court found that a measure resulting in a complete interception of access to Google sites in Turkey 'by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect.'[948] This interference, for the Court, 'did not satisfy the foreseeability requirement under the Convention and did not afford the applicant the degree of protection to which he was entitled by the rule of law in a democratic society.'[949] The Court further held that 'the judicial review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general.'[950] This ruling suggests that other intrusive or overly-extensive blocking measures would be disallowed by the Court.

Subsequently, *Akdeniz v Turkey*,[951] the ECtHR was confronted with an issue of blocking accessing to the websitesmyspace.com and last.fm because they were

[946] *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR,18 December 2012).

[947] Ibid para 54.

[948] Ibid para 66.

[949] Ibid para 67.

[950] Ibid para 68.

[951] *Akdeniz v Turkey* App no 20877/10 (ECtHR, 11 March 2014) (inadmissibility decision).

disseminating musical works in infringement of copyright.[952] The applicant, who was regular user of the websites, complained about the collateral effects of blocking, which amounted, according to him, to a disproportionate response based on Article 10 of the ECHR. In *Akdeniz*, it was held that the applicant in the case could 'without difficulty have had access to a range of musical works by numerous means without this entailing a breach of copyright rules.'[953] The Court also distinguished this case from *Ahmet Yildirim v Turkey,* as it involved copyright and commercial speech, where Member States have a wider *margin of appreciation*,[954] as opposed to political speech and the ability to participate in public debate. Whereas admitting the need to balance, in cases such as this one, the possibly conflicting copyright and freedom to receive information,[955] the Court nevertheless stated that the sole fact that the applicant—like other Turkish users of the two music-sharing websites—had been indirectly affected by blocking did not suffice for him to be regarded as a 'victim' for the Convention purposes.[956] The Court noted in particular that the blocking did not concern the applicant's own website[957] and neither did it deprive the applicant of other—

[952] Ibid.

[953] Ibid.

[954] For academic commentaries on the concept of margin appreciation see; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP, 2012); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

[955] *Akdeniz (n 950)* para 28.

[956] Ibid para 24.

[957] Ibid para 27.

legitimate—ways of accessing the musical works at issue.[958] Consequently, the availability of accessible expressive alternatives for receiving information led the Court to find no violation.[959]

Another notable case, in which the ECtHR considered an Internet user's position against the measure imposed on intermediaries, is the case of *Cengiz & Others v Turkey*.[960] In this case, the Court departed from the *Akdeniz* case and re-affirmed its *Ahmet Yildirim* judgment. The *Cengiz* case concerned the blocking of the YouTube website in Turkey in 2008.[961] This deprived the applicants, who are academics, of an important source of information and ideas and an important outlet for their academic work.[962] The Court underlined that particular media can supply types of information that are of particular interest to certain categories of people.[963] The Court confirmed that, given the particular features of YouTube and how the applicants utilised it, there was no equivalent platform available to them as a result of the blocking measures.[964] The Court held that while the applicants were not directly targeted by the blocking measures, there had nevertheless been an interference with

[958] The Court noted further that the websites were blocked because they did not comply with copyright legislation and that neither the collateral effects of blocking, nor the nature and the character of disseminated information were such as to raise an important question of general interest. Ibid paras 25, 26 and 28.

[959] *Akdeniz (n 950).*

[960] *Cengiz & Others v Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015)

[961] Ibid

[962] Ibid para 50.

[963] Ibid para 51.

[964] Ibid para 52.

their right to receive and communicate information.[965] This collateral effect of the impugned measures was an important consideration for the Court in reaching its conclusion that the applicants' right to freedom of expression had been violated.

3.5.5. What is at stake?

Lawrence Lessig identifies four different types of file sharing in P2P systems, which also applies to all content shared on the Internet. According to Lessig's taxonomy, the first category is type A where 'sharing networks [are used] as substitutes for purchasing content.' Thus, '[C]ategory A: users who download instead of purchasing.' Category B are 'some who use sharing networks to sample music before purchasing it.' Category C users are 'many who use sharing networks to get access to copyrighted content that is no longer sold or that they would not have purchased because the transaction costs of the [Internet] are too high.' Finally, there is Category D users 'who use sharing networks to get access to content that is not copyrighted or that the copyright owner wants to give away.'[966]

In Lessig's view, 'from the perspective of the law, only type D sharing is clearly legal': '[f]rom the perspective of economics, only type A sharing is clearly harmful.' Furthermore, while '[t]ype B sharing is illegal but plainly beneficial', '[t]ype C sharing is illegal, yet good for society (since more exposure to music is good) and harmless to the artist (since the work is not otherwise available).'[967]

Filesharing networks clearly make possible 'the sharing of content that copyright owners want to have shared or for which there is no continuing copyright'

[965] Ibid paras 54-58.

[966] Lessig *(n 2)* 68-69.

[967] Lessig *(n 2)* 69.

(type D sharing).[968] This sharing benefits society and the public domain with no legal harm to authors or right holders at all.[969] Lessig accordingly concludes that '[i]f efforts to solve the problem of type A sharing destroy the opportunity for type D sharing, then we lose something important in order to protect type A content.'[970]

On what basis can it be argued that the interests of the Internet users in lawful content are balanced with those of copyright holders in pirated ones, when the contested website blocking clearly wipes out the lawful ones? There is no satisfactory explanation in the CJEU's assessment in *Telekabel* on the distinction of lawful and unlawful content in these filesharing networks and on the question of how to balance them. In contrast, it is arguable from the *Cengiz* case that the ECtHR is more protective of users' rights. Although the EU Court embraces its oft-repeated balancing paradigm, no clear framework is delineated on how to protect lawful sharing and therefore users' rights. This demonstrates that its assessment is superficial and is not nuanced with many contours of online filesharing. As Lessig points out, 'how sharing matters on balance is a hard question to answer—and certainly much more difficult than the current rhetoric around the issue suggests.'[971]

In sum, from EU law's and the ECHR's perspective, copyright law's modern inventions in coping with digital piracy discussed in this section - namely disclosure, filtering and website blocking claims against intermediaries, either on the legal grounds of secondary infringement or in the form of injunctions against intermediaries as third parties- pose profound adverse effects on the freedom of those intermediaries to

[968] Lessig *(n 2)* 72.

[969] Lessig *(n 2)* 72-73.

[970] Lessig *(n 2)* 73.

[971] Lessig *(n 2)* 69.

conduct business, their right to impart information and the right of the public to receive and impart information and personal data protection.

3.6. The Right to Take Part in Cultural Life and Digital Enforcement Regimes

The Special Rapporteur Frank La Rue underscores that '[t]he right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an 'enabler' of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly.'[972] The Special Rapporteur views the right to freedom of opinion and expression on the Internet as a 'catalyst' for 'the realisation of a range of other human rights.'[973] While this view reflects that fact that human rights are interdependent and mutually reinforcing and have an enabling or empowerment function, it fails to recognise the importance and independent function of other cultural human rights on their own accord.

As Lawrence Lessig eloquently puts: 'Text is today's Latin. It is through text that we elites communicate […]. For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of 'writing' are the vernacular of today. They are the kinds of 'writing' that matters most to most.'[974] Since images, audio files and video clips are now highly important to

[972] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression *(n 818)* para 22.

[973] Ibid.

[974] Lessig *(n 315)* 68.

communication in the digital environment, the tensions and conflicts raised by digital copyright enforcement measures have greatly increased. For many Internet users, the reuse of copyrighted content is needed if they are to actively take part in online communities or to produce what is generally referred to as 'user-generated content.'[975] Indeed, today the digital copyright enforcement measures also pose many challenges against the protection of cultural rights, rights that commentators have found 'to be among the least understood and developed of all human rights both conceptually and legally.'[976]

However, how far can these arguments go? They are only related to cultural (not political, not even commercial) expressions after all. At what point does the burden of copyright enforcement measures on access reach to the level of a human rights violation? The digital enforcement measures discussed in this chapter provides a good opportunity for considering the role of human rights in ensuring access to knowledge and participation in cultural life since it gives rise to two central conceptual questions inherent in defining cultural rights and freedoms: how much access and participation is required? And when does non-state activity lead to state responsibility?

How much access and participation is required? The internal definitions that stem from the right to take part in cultural life is not easy to portray in terms of access and participation in the context of information and knowledge. On this score, the

[975] Yu *(n 817)* 458.

[976] Stephen A. Hansen, 'The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights' in Audrey Chapman and Sage Russell (eds*), Core Obligations: Building A Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 281.

question of how much culture or expression is needed is not easy to answer. It can also be difficult to articulate restrictions on access to knowledge and culture as a human rights violation since cultural goods are in some sense replaceable by other identical items; 'the need for access to one particular cultural good could at least in some instances be satisfied by access to another.'[977] Drawing an appropriate line around where access starts and where it ends is highly complex. However, the answer to the question of how much access and participation is required, in some ways is directly associated with the definition of the right itself. As explained in Chapter 2,[978] according to the CESCR, the right to take part in cultural life has three components: participation, access and contribution to cultural life.[979] States are under an obligation to take 'positive action' to protect the right to participate in cultural life, including by 'ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods.'[980] Thus, Article 15 of the ICESCR necessitates access to as much cultural material as possible to realise its goal - namely, to ensure that people are able to participate in, have access to, and contribute to a cultural life of their choice. As Molly Land convincingly argues, '[a]ccess in this sense is not an end in and of itself, but a means to an end, and the amount of cultural goods needed by any one person will differ depending on the person and their particular needs and situation.'[981]

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[977] Molly Land, 'Region Codes and Human Rights' (2012) 30 Cardozo Arts & Entertainment Law Journal 278.

[978] See Chapter 2 section 2.4.1.

[979] General Comment No 21 para 15.

[980] Ibid para 6.

[981] Land *(n 976)* 278.

The CESCR's interpretation of the right to participate in cultural life gives rise to two additional requirements. Firstly, access to and participation in cultural life must be guaranteed without discrimination.[982] The Committee notes that the obligation of non-discrimination means that 'no one shall be excluded from access to cultural practices, goods and services.'[983] Secondly, sufficient cultural goods must be available to enable individuals to make meaningful choices in relation to their cultural identity and development. As the CESCR explains in General Comment No 21, the definition of participation in cultural life is centred on individual choice.[984] Everyone should have the ability 'to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice.'[985] In order to obtain these outcomes, the CESCR recommends that states adopt 'policies for the protection and promotion of cultural diversity, and facilitat[e] access to a rich and diversified range of cultural expressions.'[986] The creativity and meaning inherent in expression is what renders each cultural good distinct and unique and enables these goods to play such a vital role in human development.[987] Thus, the right to participate in cultural life means that the state has to safeguard access to a diversity of works sufficient to allow individuals to make meaningful choices.[988]

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[982] General Comment No 21 para 21.

[983] Ibid para 22.

[984] Ibid para 15. See also Peter K. Yu, 'Region Codes and the Territorial Mess' (2012) 30 Cardozo Arts & Entertainment Law Journal 228.

[985] Ibid para 15(a).

[986] Ibid para 52(a).

[987] Land *(n 976)* 280.

[988] Ibid.

The CESCR has explicitly stated that one of the 'core obligations' of the right to participate in culture is the obligation '[t]o eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind.'[989] As interpreted by the Committee, culture refers to the sum total of things 'through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.'[990] Thus, as Yu explains, 'the enjoyment and exercise of cultural rights depend largely on the existence of cultural materials.'[991] Limiting individuals' capabilities to engage with cultural materials on the Internet based solely on the copyright holder's infringement allegation, as is the case in the notice-and-takedown and the graduated response procedures, constitutes a barrier to express our humanity and create our world view. By disproportionally restricting access to these important materials, the notice-and-take-down, the graduated response procedures, blocking injunctions and filtering techniques therefore threaten to intrude on the individuals' enjoyment and exercise of their right to access to cultural life.

Moreover, cultural engagement takes place in a variety of settings that include home, purpose-built cultural buildings and cafes, libraries, small-scale adapted spaces, institutions such as care institutions, schools and prisons. However, as a report from the British Art Humanities Research Council's Cultural Value Project emphasises, the home and the virtual space of the Internet are where most

[989] General Comment No 21 para 55(d).

[990] Ibid para 13.

[991] Yu *(n 983)* 226.

engagement with cultural activities takes place and yet this fact is virtually ignored in discussions about graduated response (*Eircom* case) and website blocking (*Akdeniz* case), which claims -as noted above- that there are alternative spaces to engage with culture.[992] Indeed, the home and the digital world frame most of our engagement with film, music, television and radio, literature, video games, and various forms of digital, online activities. Cultural activity that is carried out at home through digital engagement with others is expanding fast. The British Film Institute's study in 2011 revealed that approximately 400 million film viewings in the UK appeared to be downloaded or streamed from the Internet per year.[993] The great majority of our experience of music of all kinds occurs online,[994] as the sale of digital downloaded music exceeded that of CDs in 2011, and the transition has accelerated with the purchase of music downloads and now streaming through sites such as Spotify, or specialised services such as Pandora.[995] Another report in 2014 estimated that almost 250 million people worldwide listen to music through streaming services, mostly free sites supported by advertising, which alters experiencing music from ownership of a music CD to having access to

[992] Geoffrey Crossick and Patrycja Kaszynska, 'Understanding the Value of Arts & Culture' (The AHRC Cultural Value Project, 2016) 25.

[993] It is estimated that there is a total of over five billion film viewing occasions per year in the UK, 8 per cent of which occurs online. See; British Film Institute, *Opening our Eyes. How film contributes to the culture of the UK* (BFI, 2011) 16, available at http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-opening-our-eyes-2011-07_0.pdf.

[994] For example, see; M. Bull, *Sound Moves: I-Pod Culture and Urban Experience* (Routledge, 2007).

[995] Crossick and Kaszynska *(n 991)* 35.

music itself.[996] You Tube has emerged as 'a free global jukebox'.[997] In addition, according to a study in 2008, the top ten online activities are searching, emailing, communicating via social networking sites, instant messaging, downloading music, listening to radio, watching a film, TV programme or video clips, rating and reviewing, sharing thoughts on the forums, downloading a film, TV programme or video clips.[998] Internet users also read and write blogs, share photos, subscribe and follow a RSS feed, share their written work, and read news.[999] Through disconnecting the allegedly copyright infringing users from the internet, the graduated response regimes deprive these users of benefiting from a great deal of legal cultural engagement. Measures entailing blocking or removing the content from the Internet have similar effect on the part of the Internet users. In this sense, these enforcement regimes disproportionately restrict the right to choose to take part in cultural life or not to and the right to determine which cultural lives users want to be involved in.[1000] In as much as these users comment, share their own ideas, video clips, photos, write reviews and blogs, network

[996] Mark Mulligan and Alun Simpson, *The Streaming Effect: Assessing the Impact of Streaming Music Behaviour*, available at http://www.deezer-blog.com/assets/sites/18/MIDiA-Research-The-Streaming-Effect-Executive-Summary.pdf.

[997] Pacey Foster and Richard E. Ocejo, 'Brokerage, Mediation, and social Networks in the Creative Industries' in Candace Jones, Mark Lorenzen, and Jonathan Sapsed (eds), *The Oxford Handbook of the Creative Industries* (OUP, 2015) 412.

[998] Natali Helberger, Lucie Guibault and E. H. Janssen, User-Created-Content: Supporting a Participative Information Society. Understanding the Digital World, Final Report 2008; Amsterdam Law School Research Paper No. 2012-32; Institute for Information Law Research Paper No. 2012-26 (February 23, 2012) 50.

[999] Ibid 51.

[1000] General Comment No 21 paras 15(a), 49(a) and 52(b).

and contribute in any other way to the creation of culture on digital platforms, their right to contribute to culture[1001] is also adversely affected by the consequences of these two enforcement regimes.

There is another reason to be concerned about the expressive and cultural rights of Internet users and website operators, who have no seat at the table when broadband providers and copyright holders negotiate 'best practices' -such as DMCA-plus enforcement tools (the MOU)- for mitigating online infringement, including which sanctions to impose, which content to remove, and which websites to block without judicial intervention and any explicit statutory ground. These enforcement models could be seen as unjustified interference with the freedom of expression, as they are clearly in breach of the above-mentioned foreseeability principle on the part of those parties left out. Furthermore, General Comment No 21 provides a positive obligation on states to '[allow] persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated'.[1002] Holding Internet users and website operators out of these private and voluntary arrangements that go beyond the statutory enforcement measures clearly obliterate their right to participate in decision-making in cultural matters.

The repercussions of the conviction on Viewfinder, the website used by three photographers in the *Ashby Donald* case,[1003] are good illustrations of how copyright unduly restricts the right to participate in culture life. It allows the users of the website

[1001] Ibid para 15(a) and (c).

[1002] Ibid para 54(a).

[1003] See above section 3.3.2.

to share pictures featuring on the website on different photosharing platforms, such as Pinterest. Through the interwoven architecture of the Internet, it enables users to curate their own fashion photographs. In a case study of Flickr, Burgess shows how the photosharing website's architecture allowed it to go beyond publishing and viewing images, to social and aesthetic engagement. Through social networking and communities of practice, users can share comments and advice, negotiating aesthetics and techniques. 'Participation that begins with casually storing and sharing family photos with an existing personal network can and does evolve into a more ambitious engagement with photography as a craft and a form of creative practice.'[1004] Therefore, the conviction decided in *Ashby Donald* also represents a restriction on the users' right to take part in cultural life, more specifically their right to artistic and creative expression and right to contribute to cultural life.

Today another important concern is related to the pressure exerted by copyright holders to impose their copyright on material that comprise cultural heritage. These limitations can be imposed on the public domain in several ways. Firstly, this can be through demanding the extension of the duration of the period of copyright, which has already happened in some countries.[1005] Secondly, as Lessig's above-mentioned taxonomy shows, much of the content on the P2P networks, as well as on other digital platforms (websites, search engines, social network sites), is in the public domain. As has been seen in cases such as *Napster, the Pirate Bay,* and *the UPC Telekabel*, courts have, in completely closing these platforms, treated public domain

[1004] Jean Burgess, 'Remediating Vernacular Creativity: Photography and Cultural Citizenship in The Flickr Photosharing Network' in Tim Edensor, Deborah Leslie, Steve Millington and Norma Rantisi (eds), *Spaces of Vernacular Creativity. Rethinking the Cultural Economy* (Routledge, 2010) 123.

[1005] For a detailed analysis of this issue see Chapter 5 section 5.2.

content as the same as copyrighted-material. The Internet intermediaries -taking down public domain content upon a questionable notice, as has been shown by the Liberty project, Urban and Quilter's and Urban, Karaganis and Schofield's studies- have equally abstained from adopting a nuanced approach to distinguish between them.

3.7. Conclusion

'Piracy' has been an issue for copyright from its early beginnings.[1006] The piracy problem is thought to have become yet more pressing in the age of digital technology, as new forms of communication have emerged. At the same time, the dynamic, innovative global Internet has fundamentally and structurally changed the way that society engages with culture. The idea that new digital copyright enforcement measures might have a role to play in addressing this challenge has been at the centre of the current theory and practice of the law. Copyright's all too comfortable enforcement measures in response to digital piracy, particularly those narrated in this chapter, oftentimes impede its accommodation of many forms of society's cultural participation. Given the pervasive nature of private regulation concerning these enforcement measures in access to cultural information and knowledge today, finding an answer to the question of to what degree cultural participation transcends these measures has never been more important.

Indeed, in an age where digital cultural engagement is highly important, users who cannot exercise their cultural rights due to the strong digital enforcement

[1006] The use of the term piracy dates to the seventeenth century, when within the Stationers Guild in the UK the violators of the Guild's register was began to be called as 'pirates'. See; Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (University of Chicago Press, 2009) 41. 'The history of piracy is the history of modernity.' Ibid 516.

measures are unlikely to be able to function effectively in the digital environment. The global digital divide stemming from these enforcement measures could lead many individuals to miss out the unprecedented opportunities generated by the information revolution. Such obstacles to cultural rights would make it difficult for individuals to develop the human capabilities identified by Martha Nussbaum and Amartya Sen.[1007]

Conceptual frameworks and theories of human rights provide a powerful ground for the idea of the framing of cultural rights and freedoms in the copyright discourse, which is so often ignored in copyright's accommodation of human development. Indeed, by drawing on the human rights template provided in Chapter 2, this chapter has shown that it is possible to place cultural rights and freedoms into conceptual legal reasoning to consider the various cultural engagements and choices upon which digital copyright enforcement conventions might have a restrictive effect. The parallel between cultural human rights and netibilities in this regard also draws attention to another way in which human development might be of interest to policymakers and courts; research into the impact of copyright on several cultural practices and participation might well provide policymakers and courts today with theoretical evidence of how a change in the law might affect human development among other issues. In this way, the collaboration of human rights and development have the potential to point copyright in a promising direction, as it confronts its digital challenge.

In this context, this chapter has categorically explored notice-and-takedown and graduated response procedures, file sharing and (website) blocking injunctions so as to modify copyright's own rationale in regulating culture, while adopting an

[1007] See the brief note in Appendix 1.

approach which draws on the strength of theoretical and conceptual theories of human rights and human development: their flexibility in capturing changing cultural practices. The most significant disjuncture between human rights and human development theories and copyright policy is the latter's emphasis on the protection of interests of rightholders. This chapter has argued that copyright should draw upon these theories when working through the difficult question of how, in certain cases, it might relax its strict protection approach in digital world.

Although it is apparent from this chapter that the European courts have had difficulties in figuring out the European standards applicable to the field of digital copyright enforcement, recent case law marks a fundamental change. These courts point to a greater consideration of the interests of all parties to the copyright enforcement process, including those of Internet users, although this approach is still insufficiently theorised and elaborated. The CJEU (*e.g. SABAM and Telekabel*) and the ECtHR (*e.g. Cengiz*) have even gone as far as to mandate the 'users' rights' which could be enforced in courts, thus arguably being attentive to freedom of expression. From this perspective, it can be argued that they move towards an understanding of freedom of expression as an integral part of European (copyright) law. On the other hand, it also appears that both European courts expect online intermediaries to be very actively involved in the copyright enforcement process, which might prove problematic in terms of prior restraints and the private-party censorship.

Without doubt, all this leaves wide room for further inquiry and theorisation, which would enable copyright and its enforcement strategies to be tested from the angle of fundamental rights. This inquiry will continue in more detail in Chapters 5 and 6. However, this discussion would be one-sided if it were built on the assumption that copyright only restricts human rights and human development. Therefore, there

remains another question: does copyright, somehow, support several human rights and capabilities? Does it have some attributes which might co-exist with human rights? The answers lie in Chapter 4.

Rethinking Copyright from the 'Capabilities' Perspective in the Post-TRIPs Era: How can human rights enhance cultural participation?

Volume II of II

Submitted by, **Hasan Kadir Yilmaztekin** to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law, April 2017.

CHAPTER 4

4. Copyright as a Human Right?

4.1. *De lege lata* human rights framework of copyright

Courts, human rights bodies, legal scholars, human rights advocates and supporters of free culture have discussed the interface between human rights and intellectual property rights through multiple lenses. Some commentators claim that intellectual property rights are a genre of human rights. Harry Goldsmith suggests that intellectual property rights are implicitly covered within international human rights treaties, noting for example that the protection of 'moral and material interests of the author' provided under Article 27 of the UDHR is analogous to the protection of intellectual property rights.[1008] Audrey Chapman reflects this view, arguing that Article 15(1)(c) of the ICESCR is a form of intellectual property protection.[1009] Chapman concludes that as intellectual property rights are forms of fundamental human rights, they should be universally and effectively recognised, observed and guaranteed.[1010] In similar vein, Willem Grosheide notes that intellectual property law and human rights law share a related origin. He further argues that as intellectual property rights are

[1008] Harry Goldsmith, 'Human Rights and Protection of Intellectual Property' (1968) 12(2) Trademark and Copyright Journal of Research and Education 889.

[1009] Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)' in Evgueni Guerassimov (ed), *Approaching Intellectual Property as a Human Right* (UNESCO Publishing, 2001) 10.

[1010] Ibid 30.

recognised as private rights they fall within the protection of general property rights provided by human rights instruments.[1011]

Academics like Laurence Helfer,[1012] Christophe Geiger,[1013] Peter Yu,[1014] Lea Shaver[1015] and Abbe Brown[1016] have provided frameworks for approaching the protection of intellectual property issues under the umbrella of human rights. Their different approaches examine the many circumstances in which intellectual property rights and human rights can conflict yet coexist, and which resolutions should be embraced when conflicts arise.

The remainder of this chapter seeks to cast a new light on the foundational questions surrounding this debate and revisits the protection of copyright under different human rights regimes to elucidate practical (*is- de lege lata*) frameworks provided by the relevant human rights legislation and the interpretation of those norms by the respective human rights courts and institutions.

How has copyright, within the larger context of intellectual property rights, been conceptualised in the real world of human rights? In finding answers to this question, one must first seek a legal basis along the lines of some fundamental

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[1011] Willem Grosheide, 'Intellectual Property Rights and Human Rights: Related Origin and Development' in Grosheide *(n 123)* 14.

[1012] Helfer, 'Towards a Human Rights Framework for Intellectual Property' *(n 123)*.

[1013] Geiger, 'Constitutionalising Intellectual Property Law? - The Influence of Fundamental Rights on Intellectual Property in the European Union' *(n 123)*.

[1014] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' *(n 123)*.

[1015] Lea Shaver, 'The Right to Science and Culture' (2010) 1 Wisconsin Law Review 121-184; Shaver and Sganga *(n 120).*

[1016] Brown *(n 123)*.

international instruments, such as: the UDHR[1017], the ICESCR[1018], the ECHR[1019] and the EU Charter[1020]. This chapter examines how international human rights bodies and courts, and the CJEU have perceived the human rights attributes of copyright. It begins by analysing the legal framework in the UDHR and the ICESCR. It then continues to examine the case law of the two European courts (the ECtHR and the CJEU) by outlining the reasoning inherent in their analyses of the interface between copyright and human rights. After portraying the development of the case law of these two courts, it later provides an assessment of their perception of copyright (and intellectual property). It then turns back to our initial question: copyright a human right? In this part, the chapter seeks to find answers to the question by going back and forth between positive and ideal law. It finally concludes with a question to open a discussion of the normative and systemic adjustments needed to alleviate the tension or conflict between copyright norms and the international human rights system.

[1017] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) [hereinafter UDHR] Article 27.

[1018] ICESCR Article 15(l)(c).

[1019] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [hereinafter ECHR]

[1020] Charter of Fundamental Rights of the European Union, 2010 OJ C 83/02 [hereinafter EU Charter].

4.2. The UN human rights system

4.2.1. The author's[1021] human right to protect material and moral interests

4.2.2. Legal framework

The first traces of the recognition of intellectual property rights as human rights can be found at the birth of the international human rights movement. The second paragraph of Article 27 of the UDHR provides a principle which is remarkably analogous to the notion of intellectual property: 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.'[1022] The first paragraph of the same article contains an equally important and counterbalancing principle which states that '[E]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'[1023] While it is not a binding international instrument, the UDHR is widely considered to have acquired the status of customary international law, and represents 'the single most authoritative source of human rights norms.'[1024]

In addition, Article 15(1)(c) of the ICESCR, structurally and linguistically similar to Article 27 of the UDHR, imposes an obligation on contracting states to recognise and protect the universal right to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of the author.'[1025]

[1021] Helfer and Austin name this right as the creator's human rights. See; Helfer and Austin *(n 25)* 171.

[1022] UDHR Article 27(2).

[1023] UDHR Article 27(1).

[1024] Torremans *(n 153)* 277.

[1025] ICESCR Article 15(1)(c).

Moreover, Articles 15(1)(a)-(b) outline the right of everyone 'to take part in cultural life; to enjoy the benefits of scientific progress and its applications.'[1026] The first general characteristic of Article 15(1) of the ICESCR is that it, unlike the UDHR, is a binding international agreement.[1027] Additionally, Article 15(1) (c) is drafted narrowly, mainly focusing on the moral and material interests of authors. The protection of the author's moral interests stems from the idea that authors are inherently identified with their creations. The recognition of material interests, however, has a relatively limited legal basis in a human rights context so that this provision should not be construed as a licence conferring a monopoly rent to authors. Rather, it provides only basic material compensation for effective costs incurred in developing a new scientific, literary, or artistic production and to foster a decent standard of living.

It is arguably possible to draw some preliminary conclusions flowing from the language and the drafting history of these international instruments. First, both Articles 27(2) of the UDHR and 15(1)(c) of the ICESCR recognise a number of distinct rights: everyone's cultural rights, everyone's right to benefit from scientific and technological developments and authors' 'right to the protection of interests in intellectual creations.'[1028] Likewise, both basically provide a framework within which the development of science and culture is undertaken for the benefit of society while recognising the need to give specific incentives to authors for their contributions to this development. In this sense, paragraphs of both articles are 'intrinsically linked to each other'[1029], and more specifically focus on protecting society's interests in culture and

[1026] ICESCR Article 15(1)(a)(b)

[1027] Helfer, 'Toward a Human Rights Framework for Intellectual Property' *(n 123)* 979.

[1028] Yu, 'Ten Common Questions About Intellectual Property and Human Rights' *(n 123)* 711.

[1029] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1071.

the development of science as well as authors' moral and material interests in their specific individual or collective contributions to the development of a science, art or culture.[1030] Further, during the UDHR's and ICESCR's drafting processes, the delegates explored the interaction of human rights and intellectual property rights so that the author's right to the protection of interests in intellectual creations was not contingent, even if the drafters' intentions for the inclusion of this right remain ambiguous.[1031] However, the difficult negotiation process of drafting Articles 27(2) and 15(1)(c) demonstrates that the right to the protection of interests in intellectual creations was 'far from self-evident.'[1032] Indeed, the issue has always been controversial. The persistent lack of consensus on how intellectual property rights should be treated was ultimately a reflection of the countries' different perspectives – perspectives that seem to have some relevance today as well, 'as not all countries have the same approach to economic, social and cultural development.'[1033] Neither article included the right until after considerable debate and repeated reintroductions, deriving from these differing views of the delegates. It is accordingly not an unexpected outcome that the drafting history, as Chapman observed, supported 'relatively weak claims of intellectual property as a human right.'[1034]

[1030] Ibid 1071-1072.

[1031] Helfer, 'Toward a Human Rights Framework for Intellectual Property' *(n 123)* 978; Torremans *(n 153)* 275; Morsink *(n 528)* 220-21.

[1032] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1070.

[1033] Ovett *(n 83)* 2.

[1034] Audrey R. Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building A Framework for Economic, Social And Cultural Rights* (Intersentia, 2002) 315.

Additionally, both articles leave many important questions unanswered. First and foremost, they do not definitively define the scope of the right to the protection of one's interests in intellectual creations. Nor do they make any reference to which existing intellectual property rights are covered.[1035] Furthermore, it is not necessarily clear how an 'interdependent relationship'[1036] between a societal interest in benefitting from artistic or scientific advances, on the one hand, and authors' interests in their creations, on the other, has to be finely established and harmoniously tuned. However, it might be for the overall good of society flowing from authors' artistic and scientific innovations which motivated the delegations to adopt the enjoyment of the fruits of science and art as a counterbalancing factor, since intellectual property rights frameworks do not generally recognise everyone's right to enjoy the 'benefits of scientific progress and its applications' either as an individual and/or a collective right.

4.2.3. General Comment No 17

In November 2005, the CESCR, appointed by the UN, adopted General Comment No. 17 in an effort to clarify the relationship between intellectual property rights and human rights.[1037] This is an important document because it, as the authoritative interpretation of Article 15(1) (c) of the ICESCR, outlines a

[1035] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1072.

[1036] Ibid 1071.

[1037] See; General Comment No 17.

comprehensive assessment of the normative content of the article and its relation with other rights contained in the ICESCR.[1038]

In its opening words, the Committee clearly establishes that everyone has the right to the protection of their interests in intellectual creations as a human right.[1039] The second paragraph of the Comment starts with the wording 'In contrast to human rights, intellectual property rights are generally of a temporary nature, and cannot be revoked, licensed or assigned to someone else.'[1040] The same paragraph goes on to read that human rights are 'timeless expressions of fundamental entitlements.'[1041] The Committee specifically makes a fundamental distinction between this human rights claim, which derives from the inherent dignity and worth of all persons, and legal entitlements recognised under current intellectual property regimes, which primarily protect business interests and investments.[1042] In fact, the Committee specifically lays stress on two guarantees of the human right to the protection of interests in intellectual creations, the personal link between authors and their creations, on the one hand, and their material interests to enjoy an adequate standard of living and intellectual property, on the other, to show the distinguishing qualifications of that right's content.[1043]

[1038] Yu, 'Ten Common Questions About Intellectual Property and Human Rights' *(n 123)* 726; Hans Morten Haugen, 'General Comment No. 17 on "Authors' Rights"' (2007) 10(1) The Journal of World Intellectual Property 53.

[1039] General Comment No17 para 1.

[1040] General Comment No 17 para 2.

[1041] General Comment No 17 para 2.

[1042] General Comment No 17 para 1-2.

[1043] General Comment No. 17 para 2.

Despite its effort to provide a comprehensive assessment of Article 15(1)(c), the Comment provides little practical guidance. For example, it fails to address the explicit parameters of when an intellectual effort might enjoy human rights protection, and when it might not. Accordingly, the Comment does not provide the full answer to which scientific, literary and artistic productions can qualify for human rights protection in accordance with Article 15 1(c). Furthermore, the general comment does not follow the structure of Article 15(1), and therefore it fails to take into account how societal interests, which are protected under the right to take part in cultural life and enjoy the benefits of scientific progress, interact with the moral and material interests of the author. This is especially problematic since the Comment states that the interests in Article 15(1)(c) are 'fundamental, inalienable and universal entitlements,'[1044] but at the same time emphasises that states and other institutional actors are required to strike a balance between these obligations and obligations under the other provisions of the ICESCR, 'with a view to promoting and protecting the full range of rights guaranteed in the Covenant.'[1045] One possible explanation for the Comment's inability to address clear guidance can be found in the wording of Article 15 1(c) itself, which is both ambiguous and complex.[1046]

4.2.4. The Special Rapporteur's Report on Copyright Policy

In March 2015, Farida Shaheed, the first and now-former UN Special Rapporteur in the Field of Cultural Rights (Special Rapporteur), released her report on

[1044] General Comment No. 17 para 1.

[1045] General Comment No. 17 para 35.

[1046] Haugen *(n 1037)* 66.

'Copyright Policy and the Right to Science and Culture.'[1047] Focusing on 'the interface of copyright policy with the protection of authors' moral and material interests and the public's right to benefit from scientific and cultural creativity,'[1048] one of the key points stressed in this report is that intellectual property rights are not human rights: ' . . . this equation is false and misleading" and 'the human right to protection of authorship is, . . . , not simply a synonym for, or reference to, copyright protection, but a related concept against which copyright law should be judged.'[1049]

From the perspective of artistic freedom and autonomy, the report notes that the human right to protection of authorship requires that copyright policy be carefully designed to ensure that authors benefit from moral[1050] and material interests.[1051]

From a cultural participation perspective, the report suggests that exceptions and limitations to copyright should be developed to ensure the conditions for everyone

[1047] Special Rapporteur in the Field of Cultural Rights, Copyright Policy and the Right to Science and Culture: Rep. of the Special Rapporteur in the Field of Cultural Rights, Summary, $ 4, Human Rights Council, UN Doc A/HRC/28/57 (December 24, 2014) (by Farida Shaheed) [hereinafter Special Rapporteur's Report on Copyright Policy].

[1048] Ibid para 6.

[1049] Ibid para 29 ('Protection of authorship as a human right requires in some ways more and in other ways less than what is currently found in the copyright laws of most countries').

[1050] Ibid paras 34-39. The protection of moral interests in this human right can strengthen the moral rights in copyright law (para 38) and protect authors 'from charges of copyright infringement for adapting or distributing their own works' (para 39).

[1051] Ibid paras 40-51. This can be done by strengthening authors' hands through copyright reversion (para 44), recognition of a resale right (para 45), introduction of statutory licences for uses based on exception and limitations (para 46) requiring that exclusive licence agreements between authors and third parties be in writing (para 47).

to enjoy their right to take part in cultural life by 'help[ing] assure artistic livelihoods'[1052] 'empower[ing] new creativity [through] enabl[ing] caricature, parody, pastiche and appropriation art to borrow recognizably from prior works'[1053] permitting legitimate educational usages,[1054] expanding spaces for non-commercial culture[1055] and making works accessible for persons with disabilities or speakers of non-dominant languages.'[1056] It further views the main challenge as being related to international copyright treaties making copyright protection mandatory, while treating exceptions and limitations as optional.[1057] To address this issue, the report recommends exploration of 'the possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognized by most States, and/or an international fair use provision.'[1058] The report also emphasises the importance of open-licencing for cultural participation.[1059]

The report further brings recommendations on a number of issues, such as ensuring transparency and public participation in law-making,[1060] ensuring the

[1052] Ibid para 62.

[1053] Ibid para 63.

[1054] Ibid para 64.

[1055] Ibid para 65.

[1056] Ibid paras 67-70.

[1057] Ibid para 74.

[1058] Ibid para 76.

[1059] Ibid paras 77-84.

[1060] Ibid paras 92-93

compatibility of copyright laws with human rights,[1061] and the protection of the indigenous peoples, minorities and marginalized groups.[1062]

Although the Special Rapporteur's views are easily understandable from the perspectives of both access and development, her report has an inherent tension: how can the human right to science and culture offer good guiding principles for copyright policy, while they are completely different? How should one deconstruct these two allegedly different rights to unpack whether there are overlaps, differences, tensions and/or coexistence?

Laurence Helfer, in his seminal analysis of the interface between human rights and intellectual property rights, illustrates three possible future scenarios of 'the creation of a human rights framework for intellectual property'. In the first two, human rights can either be placed as 'external limits' on intellectual property[1063] or invoked as a premise in the form of the authors' rights and property rights provisions in international human rights treaties to further expand the existing intellectual property protection.[1064] Both use human rights law to support arguments for changing 'the existing baseline of intellectual property protection' from one direction to another. Helfer's 'third framework', however, analyses the possibility of using intellectual property rights to advance the realisation of human rights. He simply defines the third framework as follows:

[1061] Ibid paras 94-98

[1062] Ibid paras 114-118

[1063] Helfer, 'Toward a Human Rights Framework for Intellectual Property' *(n 123)* 1017–18.

[1064] Ibid 1014-1017.

> ‘Where intellectual property laws help to achieve human rights outcomes, governments should embrace it. Where it hinders those outcomes, its rules should be modified (but not necessarily restricted…).’[1065]

Instead of invoking human rights law to reshape intellectual property protection, intellectual property law is utilised to attain human rights ends and therefore intellectual property has only a ‘secondary’ and ‘instrumental’ role in this framework. Since its role is secondary, achieving human rights goals is not restricted to just using appropriate intellectual property rules, but states can also provide other means.[1066] Thus, the relationship between copyright and the right to science and culture is far more complex than the Special Rapporteur envisages and needs to be further elaborated and contrasted with other human rights regimes.

4.3. The ECHR human rights system

4.3.1. Legal Framework

As far as the ECHR is concerned, intellectual property rights have been protected under the auspices of the “right to peaceful enjoyment of possessions.”[1067] The concept of ‘possessions’ has been defined in broad terms by the ECtHR and the European Commission of Human Rights (Commission). The Strasbourg organs have extended it to a wide variety of concrete proprietary interests of economic value.[1068] The concept ‘possessions’ has an ‘autonomous’ meaning which is not restricted to

[1065] Ibid 1018.

[1066] Ibid 1014-1020.

[1067] ECHR Protocol 1 Article 1.

[1068] *Kopecký v Slovakia* ECHR 2004-IX.

ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of Article 1 of Protocol No 1 of the ECHR. Whether such interests qualify as possessions is independent from their formal meaning in domestic law.[1069]

4.3.2. Case law of the Commission and the ECtHR

4.3.2.1. Early Interpretations of the Commission

Relying on these principles, the Commission, in the very earliest case law, viewed patents as a possession under Article 1 of Protocol No. 1 in *Smith Kline and French Laboratories Ltd v Netherlands*.[1070] The case was related to a compulsory licence granted by the Dutch patent office.[1071] The Commission concluded that the Dutch compulsory licensing scheme was a justified interference with the right to property in patents. Hence no violation of the right to property was found.[1072] The

[1069] *Iatridis v Greece* App no 31107/96 para 54 (GC); *Beyeler (n 525)* para 100; *Broniowski v Poland* ECHR 2004-V para 129 (GC); *Anheuser-Busch Inc v Portugal* App no 73049/01 (2007) 44 EHRR 42 (GC) para 63.

[1070] See *Smith Kline and French Laboratories Ltd v Netherlands* App no 12633/87 (Comission, 4 October 1990).

[1071] Ibid.

[1072] The Commission followed this position in *Lenzing AG v the United Kingdom* App no 38817/97 (Commission 9 September 1998). This case was also related to a patent. However, in that case the 'possession' was not the patent as such, but the applications made by the applicant company in civil proceedings in which it had sought to change the British system of patent registry. Declaring the application was inadmissible due to being manifestly ill-founded, the Commission held that there had been no interference with the applicant company's right to the peaceful enjoyment of its possessions, as it had been given an opportunity to bring its claims concerning the patent to a court with full

Commission also stated that the right to property also includes copyright in *Aral v Turkey.*[1073]

4.3.2.2. *Dima v Romania:* Something Borrowed

Until 2005, the full-time Court did not directly address this issue.[1074] In a 2005 admissibility decision, *Dima v Romania*,[1075] the ECtHR considered the scope of the right to property in a copyright case.[1076] The case concerned a graphic artist, Viktor Dima, who worked in the Defence Ministry's plastic arts studio and developed the designs of a new national emblem and seal. He drew those designs in response to a competition that was held shortly after the fall of Romania's communist regime.[1077] The Parliament later in 1992 chose a revised version of the design as the state emblem and seal, and specified Dima as the graphic designer in a statute published in Romania's official journal.[1078] The government did not, however, pay him for his work. Upon his application, he received a series of letters from the Copyright Agency, informing him that he was the author of the graphic design and eligible to enjoy all rights in domestic copyright law. On the support of these positive statements, Dima

jurisdiction. Ibid. For another case that is related to patents see *British-American Tobacco Company Ltd v the Netherlands* App no 19589/92 (Commission, 20 November 1995).

[1073] *Aral v Turkey* App no 24563/94 (ECtHR, 14 January 1998) (admissibility decision).

[1074] See; Laurence Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' in Paul L. C. Torremans (ed), *Intellectual Property And Human Rights, Enhanced Edition Of Copyright And Human Rights* (Kluwer, 2008) 39.

[1075] *Dima v Romania* App no 58472/00 (ECtHR, 16 November 2005) (admissibility decision).

[1076] For a comprehensive academic commentary on the case see; Helfer (n) 39-43.

[1077] *Dima (n 1074)* para 3-4.

[1078] Ibid para 6.

filed three infringement actions in the Romanian courts against two private firms and a state-owned enterprise that had, for profit, reproduced and distributed coins by using the design.[1079]

The artist was frustrated by all domestic judicial venues, including the Supreme Court of Justice. Although that court acknowledged that he had personally created the design, it held that Dima did not have a copyright in the design of the state symbols. The court further reasoned that the Parliament, which had commissioned the designs, should be deemed the author of the work.[1080] As an alternative ground, it held that state symbols could never be the subject of copyright either under the 1956 copyright statute which was in effect at the time Dima created the design, or under the 1996 statute.[1081] The former did not exclude state symbols from copyright protection, while the latter expressly included such an exclusion rule.

Dima challenged these rulings as a violation of the right of property. The Court firstly stated that the right to property under Article 1 of Protocol No 1 protects copyright. However, it went on to hold that Dima was not entitled to any 'legitimate expectation' to 'acquire a possession' as author of the emblem because the existence of a valid copyright was, in the first place, an unresolved issue.[1082] The Strasbourg Court reached this conclusion by acknowledging its 'limited power' to review allegations of legal or factual errors committed by national courts when interpreting domestic laws.[1083] As Laurence Helfer points out, it is relevant that the Court did not

[1079] Ibid para 11-26.

[1080] Ibid para 14.

[1081] Ibid para 61-62.

[1082] Ibid para 87.

[1083] Ibid para 93.

try to ‘second-guess the Romanian court’s interpretation of domestic copyright law in a case whose facts were sympathetic to the creator.’[1084]

4.3.2.3. *Anheuser-Busch Inc v Portugal:* Creating a (property) right from a possibility (of intellectual property)

Two years later, the Court extended its human right to property-oriented protection to trade marks and applications for registration of trade marks in the landmark case of *Anheuser-Busch Inc v Portugal.*[1085/1086] This case has been so far the first and single authority of determining whether trade marks and applications for registration of trade marks have any premise in human rights discourse. Although it was related to trade marks, the reasoning of the Grand Chamber in this case deserves to be given full attention to understand how intellectual property is rationalised within the human right to property. The case of *Anheuser-Busch v Portugal* is merely the last venue of a protracted litigation on a trade mark between Anheuser-Busch Inc, which is an American public limited company producing beer and selling it under the brand name *‘Budweiser’* in a number of countries around the world, and Budejovicky Budvar

[1084] Helfer *(n 1073)* 41.

[1085] *Anheuser-Busch (n 1068)*.

[1086] Klaus Beiter, ‘The Right to Property and the Protection of Interests in Intellectual Property—A Human Rights Perspective on the European Court of Human Rights’ Decision in Anheuser-Busch Inc. v Portugal’ (2008) 39(6) International Review of Intellectual Property and Competition Law 714–21: Megan M. Carpenter, ‘Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter’ (2009) 99 Trademark Reporter 892–930; B. Goebel, ‘Trademarks as Fundamental Rights—Europe’ (2009) 99 Trademark Reporter 931–55; Jennifer W. Reiss, ‘Commercializing Human Rights: Trademarks in Europe After Anheuser-Busch v Portugal’ (2011) 14(2) The Journal of World Intellectual Property 176-201.

(Budvar), a brewer incorporated in the Czech Republic. In 1981, Anheuser-Busch applied to register *'Budweiser'* as a trade mark in Portugal. The Portuguese National Institute for Industrial Property did not grant the application, because prior to the date of this application 'Budweiser Bier' had been registered as a geographic designation of origin on behalf of the Czech company, Budejovicky Budvar. In 1989, Anheuser-Busch sought a court order nullifying Budvar's registration of *'Budweiser Bier'* as an appellation of origin, which was granted in 1995. Subsequently, the Portuguese registration office registered the "Budweiser" trade mark on behalf of Anheuser-Busch. The Czech company appealed that decision, relying on the '1986 Agreement', a bilateral treaty between Portugal and Czechoslovakia (now applicable in the Czech Republic) which came into force in 1987, protecting registered designations of origin. After a series of appeals and counter appeals, the Portuguese Supreme Court upheld the revocation of the registration of the trade mark concerned, holding that the designation of origin 'Ceskebudejovicky Budvar', which translated into German as 'Budweis' or 'Budweiss', was protected by the 1986 Agreement. The registration of *'Budweiser'* as a trade mark on behalf of the applicant company was therefore revoked.[1087]

Anheuser-Busch then applied to the ECtHR, claiming that the Supreme Court ruling amounted to an unlawful deprivation of property in violation of its right to property under Article 1.[1088] The Second Chamber of the Court held that although a trade mark could be a possession under Article 1, this provision applies only 'after final registration' of a trade mark. On appeal, however, the Grand Chamber partially reversed the Second Chamber's decision eventually concluding that both registered

[1087] *Anheuser-Busch (n 1068)* para 12-24.

[1088] Ibid para 46.

trade marks and trade mark applications of a multinational corporation fall within the ambit of Article 1 of Protocol No 1 of the ECHR that protects private rights to property. The Grand Chamber, in extending the protection of fundamental property rights, first established that intellectual property is a type of possession under Article 1 of Protocol No 1 of the ECHR.[1089] It then held that a trade mark application, because it can be assigned and has commercial value, can be considered as a property right and also a 'possession' for the purposes of the Convention. According to the Grand Chamber, trade mark registration applications constitute a 'legitimate expectation' for a bundle of financial rights and interests upon filing. Accordingly, the Grand Chamber unanimously concluded that the application for registration of a trade mark should be considered as a possession.[1090]

On the particular facts presented, however, an overwhelming majority of the Grand Chamber, 15 votes to 2, held that Portugal had not violated Article 1 of Protocol No 1.[1091]

[1089] Ibid para 72.

[1090] Ibid para 78.

[1091] Anheuser-Busch *(n 1068)* para 87. Two separate opinions, one concurring, the other dissenting, were added to the judgment. Judges Elisabeth Steiner and Khanlar Hajiyev agreed with the Grand Chamber's judgment. The concurring judges noted that it was 'never a foregone conclusion' that the trade mark would be registered, given the 'complexities' of the law involved, so there could not be 'justified reliance'— a legitimate expectation—upon it. See; *Anheuser-Busch Inc v Portugal* Joint concurring opinion of Judges Steiner and Hajiyev paras 9-10. Judges Lucius Caflisch and Ireneu Cabral Barreto dissented. In their joint dissenting opinion they noted that the Court erred in its reasoning, when it deemed the conflict concerned as a 'private' conflict between private companies.[1091] Instead, "the applicant company's grievance is that it has been deprived of a 'possession' or 'legitimate expectation' by the Portuguese courts; and that this line of reasoning by the Grand Chamber created controversy

4.3.2.4. *Balan v Moldova:* Something changed

One year after *Anheuser-Busch*, the Court in *Balan v Moldova*[1092] signalled some developments that might strengthen the hands of authors. In 1985 Pavel Balan published a photograph 'Soroca Castle', a well-known historical site in Moldova, in the album *Poliptic Moldav*, and received author's fees for it.[1093] In 1996 the Ministry of Internal Affairs of Moldova ('the Ministry') used the photograph as a background for national identity cards. Balan was not consulted and did not agree to this use of his photograph.[1094] Then he requested the Ministry to compensate him for the infringement of his rights, as well as to conclude a contract with him for the future use of the photograph.[1095] When the government rejected his requests for compensation, he initiated court proceedings for copyright infringement. The lower court, subsequently confirmed by the Supreme Court of Moldova, acknowledged his copyright and awarded him a modest compensation equivalent to 568 US dollars.[1096] However, the government continued to use the photograph on identity cards without permission, ultimately leading Balan to sue for the financial loss caused by the

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while delivering 'a lengthy analysis' on the applicability of Article 1 of Protocol No. 1 in paragraphs 66-78 of the judgment. The dissenters finally stated that since the applicant's 'legitimate expectation' upon filing a trade mark registration application 'was destroyed through the retroactive application of the 1986 Agreement,' there was an unlawful interference with the applicant company's 'legitimate expectation' and, accordingly, a violation of Article 1 of Protocol No. 1.' See *Anheuser-Busch Inc. v Portugal* Joint dissenting opinion of judges Caflisch and Cabral Barreto Paras 7-9.

[1092] *Balan v Moldova* App no 19247/03 (ECtHR, 29 January 2008).

[1093] Ibid para 7.

[1094] Ibid para 8.

[1095] Ibid para 9.

[1096] Ibid para 10.

unlawful use of his photograph and for compensation for infringement of his moral rights.[1097] While the trial court agreed with Balan, the Court of Appeal, as confirmed later by the Supreme Court, rejected his claims – arguing that he had already been compensated by the earlier judgement. Furthermore, although the Supreme Court reaffirmed Balan's copyright in the photograph, they added that an "identity card" was an official document which could not be subject to copyright.[1098]

Balan challenged the courts' rulings before the ECtHR. He alleged that his rights under Article 1 of Protocol No 1 had been infringed as a result of the refusal by the Moldovan domestic courts to compensate him for an unlawful use of his work. The Fourth Section of the Court this time united to depart from the Court's assessment in a very similar case of *Dima v Romania,* while coming to the opposite conclusion: On the question whether Balan had a 'possession' protected by Article 1 of Protocol No 1, the Court emphasised that Balan's copyright in the photograph was upheld by the domestic courts. He thus had 'a right recognised by law and by a previous final judgment, and not merely a legitimate expectation of obtaining a property right.'[1099] The ECtHR then found an interference with the copyright in a photograph in the unauthorised use of the photo by state authorities. In so doing, the unanimous judges dismissed the Government's erroneous argument that the official character of identity cards affects the copyright vesting in a photograph used as background on such cards.[1100] In the following justification analysis, the Court examined 'whether the

[1097] Ibid paras 14-15.

[1098] Ibid paras 16-18.

[1099] Ibid para 34.

[1100] Ibid paras 38-40.

interference with the applicant's rights was proportionate to the aims pursued.'[1101] It essentially explored whether there is any less interfering measure that is equally effective to achieve the stated goal and reasonably available to the state authorities concerned. With regard to this question, the Court stated that Moldova could achieve its aim of issuing identity cards certainly without the need to use Balan's copyrighted work without permission.[1102] The ECtHR thus held that the Moldavian courts 'failed to strike a fair balance between the interests of the community and those of the copyright owner, placing on him an individual and excessive burden' which results in a violation of Article 1 of Protocol No 1.[1103]

4.4. The EU human rights system

4.4.1. Legal Framework

Within European Law, there is another important resonance of the 'property rationale' concerning the interface between human rights and intellectual property rights: it is rooted in the EU Charter. The EU Charter, unlike its predecessor, the ECHR, does not just include the human right to property in Article 17 (1), linguistically reminiscent of Article 1 of Protocol 1, but, importantly, also in Article 17(2) the short provision: 'intellectual property *shall be* protected.'[1104] Scholars have observed that this short statement was translated into French as '*la propriété est protégée*' or into

[1101] Ibid para 44.

[1102] Ibid para 45.

[1103] Ibid para 46.

[1104] EU Charter Article 17(2) (Emphasis added).

German as '*Geistiges Eigentum ist geschüzt*.'[1105] If correctly translated, this would be 'intellectual property *is* protected.'[1106] Highlighting the uncertainty concerning the scope of the protection, its interaction with the right to property and other human rights, Geiger calls this norm 'a mysterious provision with an unclear scope.'[1107] Although its language is modelled on an 'enigmatic formula'[1108], it has been argued that Article 17(2) should be construed as 'confirmation' that intellectual property is a species of human right to property under Article 17(1).[1109]

4.4.2. *Luksan v van der Let:* Who owns fundamental rights over cinematographic works?

The CJEU has recently engaged in clarifying the ambiguities of the conceptual nature of Article 17(2). Despite its reluctance to theoretically justify the property

[1105] Christophe Geiger, 'Intellectual Property Shall Be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with An Unclear Scope' (2009) 31(3) European Intellectual Property Review 115; Jonathan Griffiths and Luke McDonagh, 'Fundamental Rights & European IP law – The Case of Art 17(2)' in Christope Geiger (ed), *Constructing European Intellectual Property* (Edward Elgar, 2013) 80; Alexander Peukert, 'Intellecual Property as an End in Itself?' (2011) 33(2) European Intellectual Property Review 69.

[1106] Geiger *(n 1104)* 115; Griffiths and McDonagh *(n 1104)* 80; Peukert *(n 1104)* 69.

[1107] Geiger *(n 1104)*.

[1108] Griffiths and McDonagh *(n 1104)* 80.

[1109] Geiger argues that 'Article 17(2) of the Charter could then be considered to be nothing more than a simple clarification of art.17(1), with the consequence that there would be absolutely no justification *to expand* remedies on this ground.' See; Geiger *(n 1104)* 116. Griffiths and McDonagh suggest that 'Art 17(2) is subservient to the more generally worded Article 17(1).' See; Griffiths and McDonagh *(n 1104)* 81.

doctrine in copyright in the four leading cases *Promusicae v Telefónica*,[1110] *Scarlet Extended v SABAM*[1111] and *SABAM v Netlog,*[1112] and *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*,[1113] which are discussed in Chapter 3,[1114] it was also used to untangle copyright and related rights in cinematographic works under the mantle of human rights in *Luksan v. van der Let*.[1115] In 2008, Martin Luksan, as scriptwriter and principal director, and Petrus van der Let, as commercial producer, concluded a 'directing and authorship agreement' for the production of a documentary film on the topic of German photography from the Second World War. In the agreement, copyright and exploitation rights were assigned to the producer, but the director preserved rights concerning the distribution of the documentary on digital networks, closed circuit television, and pay TV. However, once the film was shot, the producer made it available on the internet and assigned pay TV rights to a TV network.

Luksan sued the producer, contending that these forms of exploitation violated rights that were reserved to him in the contract and claiming that half of the statutory rights to remuneration were vested in him. Van der Let responded by arguing that a statutory assignment of those rights is provided to him by virtue of Paragraph 38(1) of the UrhG (copyright code) which grants all exclusive exploitation rights to the producer and therefore that the relevant provision in the contract was void. The producer also

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[1110] *Promusicae (n 676)*.

[1111] *Scarlet (n 903)*.

[1112] *Netlog (n 904)*.

[1113] *UPC Telekabel (n 929)*.

[1114] See Chapter 3 sections 3.4. and 3.5.

[1115] Case C-277/10 *Martin Luksan v Petrus van der Let* (CJEU, 9 February 2012).

claimed the entire amount of remuneration rights, arguing that they necessarily share the fate of exploitation rights and that the statutory provision acknowledged the possibility of contrary agreements.

Several questions concerning the legitimacy of a national rule vesting exploitation rights in a cinematographic work in the producer rather than the director of that work were referred to the CJEU, essentially on the questions of 1) whether EU copyright law must be understood so that the principal director of a cinematographic or audio-visual work is directly entitled by law to own the main exploitation rights, and 2) whether Austrian copyright laws which allocate these exploitation rights exclusively to the film producer are inconsistent with EU law.[1116]

After clarifying that, within EU law, the principal director is always considered an author of such works,[1117] this interpretative path followed by the CJEU made its way to Art.14*bis* of the Berne Convention which allows Berne Union countries to deny the principal director certain exploitation rights, such as those at issue in the main proceedings. On this account, the CJEU noted that the international agreement allows, but does not require, a similar provision. According to the CJEU, Member States are expected to refrain from adopting an optional measure which is contrary to EU law and '[a]ccordingly, they can no longer rely on the power granted by Article 14*bis* of the Berne Convention.'[1118] In order to support this argument, the CJEU, by citing both the general right to property as well as the vague statement that intellectual property 'shall be protected', the Court found that:

[1116] Ibid para 36.

[1117] Ibid paras 37-53.

[1118] Ibid para 64.

> '[…]the principal director of a cinematographic work must be regarded as having lawfully acquired, under European Union law, the right to own the intellectual property in that work…In those circumstances, the fact that national legislation denies him the exploitation rights at issue would be tantamount to depriving him of his lawfully acquired intellectual property right.'[1119]

The CJEU thus ruled that an interpretation of EU law based on the right in Art.14*bis* BC to grant certain exploitation rights in cinematographic works to persons other than the principal director *inter alia* would inevitably violate 'the requirements flowing from Article 17(2) of the [EU Charter] guaranteeing the protection of intellectual property.'[1120]

The CJEU also clarified whether the exploitation rights of cinematographic works under consideration, as well as the right to fair compensation provided under the 'private copying' exception (Article 5(2)(b) of Directive 2001/29), can be vested by law, originally and directly, in the principal director: While the former may be subject to a rebuttable presumption of transfer, the latter cannot be waived or transferred.[1121]

Following *Luksan*, one may argue that 'national rules depriving authors of exploitation rights as a matter of law will inevitably contravene [fundamental] EU law.'[1122] In searching what sort of conflict avoidance mechanisms have been adopted

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[1119] Ibid paras 69-70.

[1120] Ibid para 71.

[1121] Ibid paras 73-109.

[1122] Jonathan Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38(1) European Law Review 76 (Brackets are mine).

by European Human Rights Courts when they 'address intersections with intellectual property rights', Henning Grosse Ruse-Khan observes that the CJEU in *Promusicae* intended to set up 'via harmonious interpretation, a coherent framework of the Community's international [intellectual property] obligations (especially TRIPS), the EU Charter, and all relevant secondary EU (IP) laws' in order to resolve a conflict between internal EU law and external laws;[1123] but it adopted a somewhat different approach in *Luksan*: It simply 'prioritised EU Charter rights over international IP flexibilities.'[1124] Ruse-Khan finds 'this line of argumentation' 'questionable' for two reasons:

> '(1) While Art.351 (1) TFEU explicitly safeguards "rights and obligations arising from" pre-existing agreements such as the BC, the CJEU applies this rule narrowly to obligations only – thereby disregarding the rights granted under such treaties – for example under Art.14*bis* BC.[...] (2) The expropriation argument presumes that IP rights are originally granted by virtue of an EU Directive – rather than the national implementation legislation. That appears odd given that IP rights in the EU remain territorial in nature – unless of course they are true EU-wide rights granted by EU institutions.'[1125]

[1123] Henning Grosse Ruse-Khan, 'Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights' in Geiger *(n 123)* 76.

[1124] Ruse-Khan *(n 1122)* 77.

[1125] Ruse-Khan *(n 1122)* 78.

Searching for substantive repercussions of the CJEU's use of the language of fundamental rights, Griffiths, on the other hand, asserts that if the exploitation rights protected by copyright are understood as separate property interests, it may become possible to advocate that 'the national rule at issue [i]s depriving the principal director of a number of property rights to which he ought to have been entitled.'[1126] For him, in the traditional approach of monist jurisdictions such as Austria and Germany (where the various exploitation rights are understood as sub-elements of a more general entitlement to copyright or author's right), however, "the outcome might be different.'[1127]

Griffiths further contends that 'the Court's conclusion on [A]rticle 17 is primarily rhetorical, serving to bolster the prior decision that the exploitation rights in question were to be allocated to authors as a matter of European copyright law.'[1128] The impression stemming from the pragmatic use of this pithy property rhetoric by the CJEU, as Griffiths points out, was intensified by the fact that when the CJEU in *Luksan* held 'that national rules presuming the transfer of rights from authors to third parties (rather than vesting them automatically by operation of law) was consistent with the requirements of EU copyright law, the question of whether or not such presumptions were compatible with the fundamental right to property was not even discussed:' This kind of rule certainly comprises an interference with a property right and therefore should have been subjected to the CJEU's 'fair balance' test. In effect, in many cases, there might be little practical difference between an automatic vesting and a presumed

[1126] Griffiths *(n 1121)* 76.

[1127] Griffiths *(n 1121)* 76.

[1128] Griffiths *(n 1121)* 77.

transfer.[1129] Similarly, the Court's judgement that the principal director of a cinematographic work was entitled, by operation of law, directly and originally, to fair compensation for private copying was not supported by reference to Article 17.

For that reason, the judgement has been characterised as 'inconsiderate'[1130] and 'thinly reasoned.'[1131] Whereas some other commentators have praised the *Luksan* decision by noting that 'it contributes to the development of a flexible system which, despite differences in national legislation, appears ready to face the economic, social, and technological challenges of our time.'[1132]

4.5. An analysis of the ECtHR's and the CJEU's case law

Frustratingly, neither the ECtHR nor the CJEU have explained why they have viewed intellectual property rights, including copyright, as possessions under the relevant fundamental rights norms. Equally, they both fail to address the parameters of when, why and how a form of intellectual property could enjoy human rights protection, and when it would not fall under the protection afforded by property rights. Accordingly, the Courts' case law does not contribute to the current understanding of why and how intellectual property rights can/should qualify for human rights protection in accordance with their fundamental rights legislation. Apparently, this question will

[1129] Griffiths note that 'the Court's failure to consider this issue can perhaps be explained by the fact that such presumptions are to be found in the legislative *acquis*.' Griffiths *(n 1121)* 77.

[1130] Ruse-Khan *(n 1122)* 78.

[1131] Griffiths *(n 1121)* 76.

[1132] Stefano Barazza, 'Authorship of Cinematographic Works and Ownership of Related Rights: Who Holds the Stage? *Martin Luksan v Petrus van der Let,* Case C-277/10, European Court of Justice (ECJ), 9 February 2012' (2012) 7(6) Journal of Intellectual Property Law & Practice 396.

be settled through a case-by-case analysis, and it is necessary to wait for future cases to make a deeper analysis.

However, the structure of Article 1 Protocol 1 of the ECHR and Article 17(2) of the EU charter provide a specific foundation for protecting intellectual property rights as human rights. The property notion under these articles has enabled the Courts to creatively characterise a few areas (subject matters) of intellectual property rights as human rights in various situations. Within the ECHR system, these include: the designs of a new national emblem and seal (*Dima*), the word used as an unregistered trade mark for beer and the application for the registration of this mark (*Anheuser-Busch*), a photograph of a historic castle (*Balan*) and the catwalk and clothes displayed in a fashion show (*Ashby Donald*). Within the EU Charter system, these involve: musical works (*Promusicae, Scarlet* and *Netlog,*) and cinematographic works (*Luksan* and *Telekabel*). It is also clear that copyright, patents, trade marks, and even trade mark applications, have been viewed as possessions.

In attaining these conclusions, notwithstanding repeatedly emphasising an autonomous meaning of 'possessions' under Article 1, the ECtHR first and foremost has relied on national law in order to describe whether an asset or a claim having an economic value for its owner is legally recognised within the ECHR system. In *Anheuser-Busch*, for example, it determined whether the trade mark application conferred financial interests and rights by making reference to Portuguese law.[1133] Similarly in *Balan*, in deciding whether the applicant had a copyright and thus a human right to property in his photograph was settled by referring to the assessment and acceptance of the domestic courts on this account.[1134] In *Ashby Donald*, the question

[1133] See; *Anheuser-Busch (n 1068)* paras 76-78, 83.

[1134] See; *Balan (n 1091)* para 34.

of whether fashion shows and clothes were copyrighted and therefore possessions was determined by just approving the national law's assessment.[1135] The Strasbourg Court has continuously assigned interpretation of national intellectual property law to the national courts and generally eschewed reviewing their decisions in that regard.[1136] Consequently, it has not constituted its own understanding of what a possession is within the meaning of Article 1 of Protocol 1 at a human rights level, independently from how national laws style their intellectual property laws.

After the *Ashby Donald* and *TPB* judgements, some commentators in Europe concurred in arguing that copyright enforcement is open to external limitations stemming from human rights,[1137] although copyright protection was subjected to human rights scrutiny in *Ashdown v Telegraph Group Ltd*[1138] well before these two cases.[1139] For these commentators,[1140] the Strasbourg Court attained this outcome by the so-called 'balancing paradigm.'[1141] The ECtHR itself refers to this concept in its reasoning in *Ashby Donald.*[1142] Indeed, the Court has left the door ajar for a human rights review of copyright enforcement for certain types of speeches, especially political speeches, affecting the general public interest. However, this review is made from within the human rights context, and unless national courts follow a similar line

[1135] *Ashby Donald (n 166)* para 36.

[1136] Ruse-Khan *(n 1122)* 82.

[1137] Geiger and Izyumenko *(n 157)* 318.

[1138] *Ashdown (n 161)*.

[1139] For an analysis of this case see Chapter 3 section 3.3.2.

[1140] Geiger and Izyumenko *(n 157)* 318, 330-335.

[1141] For the comprehensive analysis of this concept see; Helfer, 'Towards a Human Rights Framework for Intellectual Property' *(n 123)* 46-51.

[1142] *Ashby Donald (n 166)* para 40.

of reasoning as in *Ashdown,* it seems difficult to argue that such an external limitation is implemented.

Balancing paradigm is one that is also familiar to the CJEU's 'a fair balance' test. However, this rhetoric surrounding the oft-repeated balancing paradigm might have puzzled the policymakers, judges, and commentators[1143] about its outcomes, even though the way it was implemented had nothing to do with balancing at all. In a balancing exercise, the competing interests are given weight on an equal footing. In order to call something balanced, the competing interests should have the same weight on each side of a measuring scale. Curiously, the former Commission had previously considered this type of conflict in the case of *Socie´te Nationale De Programmes FRANCE 2 v France.*[1144] In this case, it accepted that copyright formed a legitimate limitation on freedom of expression under Article 10(2). However, no reference to Article 1 of the First Protocol as a basis for the copyright protected interest

[1143] Christophe Geiger for example contends that tensions between property and freedom must be brought into a balanced relationship and that this reasoning offers possibilities for a balanced development of intellectual property law generally [Geiger, 'Constitutionalising Intellectual Property Law? - The Influence of Fundamental Rights on Intellectual Property in the European Union' *(n 123)* 386]. Likewise, Daniel Gervais argues that conflicts between copyright and rights such as the right to privacy or to information imply striking a balance [Daniel J. Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitation' (2008) 5 University of Ottawa Law & Technology Journal 1]. Finally, Laurence Helfer and Graeme Austin suggest that striking the appropriate balance between recognising and rewarding human creativity and innovation and ensuring public access to these fruits of those endeavours poses the 'central challenge' when bringing together the two regimes of human rights and intellectual property [Helfer and Austin *(n 25)* 507].

[1144] *Socie´te´ Nationale De Programmes FRANCE 2 v France* App No 30262/96 (Comission, 15 January 1997). Also, see; *N V Televizier v The Netherlands* App no 2690/65 (Comission, 3 October 1968).

was made. Virtually seven years before its decision *in Smith Kline & French Lab. Ltd. v. the Netherlands*, the Commission had not considered any need to balance between the two human rights as protected under the Convention. By conferring a constitutional mandate to intellectual property enforcement, the Strasbourg Court has come to this point through progressively elevating intellectual property rights, specifically copyright, to the status of a human right and recognising a stronger claim for them than the competing interests such as freedom of expression. This is a natural outcome of the win/lose ideology in trying a dispute. The Court in reality did not perform a balancing exercise, rather it resolved the conflict between copyright as a form possession and freedom of expression by just picking, or approving to choose, one of them. Alexander Peukert, amongst others, points out that the basic logic behind the balancing paradigm, namely that competing interests are of equal rank, is 'conceptually flawed and should be replaced by a justification paradigm' noting that:

> '[The balancing paradigm] fails to explain according to which normative criteria a conflict between fundamental rights is to be resolved. What such weighing without a scale will yield is not foreseeable, and it automatically tends to lead to ad-hoc interventions with weak if any foundation in positive law. When it comes to conflicts between the fundamental right to property and other fundamental rights such as the freedom of expression, the balancing paradigm is particularly inappropriate: The reason for this specific defect is that the balancing paradigm rests upon the assumption

that all fundamental rights are of equal normative value, and that there is no hierarchical order between them.'[1145]

According to Peukert, intellectual property protection should be justified (*ex ante* justification), before it enters into effect, since 'the legislature encroaches upon the public domain.'[1146] Once the legislature introduces new intellectual property norms, then an interference with them should be justified (*ex post* justification).[1147] Through a normative lens under the rule of law it becomes possible to prevent 'ad hoc decisions' and promote 'criticism and review by forcing the court into a structured, transparent reasoning.'[1148] He thinks that 'the role of the judiciary' in justifying the expansion and limitation of intellectual property 'is relatively limited' as opposed to the role of the legislature, even though advocates of the balancing paradigm suggest otherwise.[1149]

Griffiths, on the other hand, thinks that the 'dramatic "constitutionalisation" of European copyright law [in *Luksan*, as well as in *Scarlet*] has been predominantly cosmetic, designed to offer rhetorical support for its harmonisation agenda.'[1150] For him, this is just for 'provid[ing] rhetorical cover for the expansion of its own jurisdiction.'[1151] Indeed, in contrast to the artificial self-restraint created by the ECtHR

[1145] Alexander Peukert, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature' in Geiger *(n 123)* 135 (Internal notes omitted).

[1146] Ibid 140.

[1147] Ibid.

[1148] Ibid 141.

[1149] Ibid.

[1150] Griffiths *(n 1122)* 77.

[1151] Ibid 78.

itself, the CJEU has been bolder in utilising a more general competence to determine both the appropriate boundaries of property rights and the compatibility of any interference with Article 17. This has also influenced the degree of deference to national courts. It is lesser with respect to the CJEU because of its multifunctional role in the EU law. Likewise, the CJEU has exercised a multiple proportionality test in resolving conflict among various fundamental rights, even though its analysis has been perfunctorily reasoned to comparatively assess the relative weights of the fundamental rights concerned. The ECtHR, however, has done this assessment from just one human right angle (the single proportionality test).[1152]

Therefore, despite the aforementioned appraisals of human rights courts and institutions, quite difficult, yet glaring, questions, ranging from the conceptual ground of protection and the existence of corporate 'human' rights, to the very definition of when copyright is protected under the umbrella of human rights, remains. Does the 'property' label reflect the true character of intellectual property, and thus copyright? Second, how exactly does one ascribe human rights attributes to copyright? While Chapters 5 and 6 illustrate Peukert's *ex ante* and *ex post* justification argument respectively, the next section provides answers to these questions.

4.6. Is 'Intellectual Property' A Misnomer?

The inclusion of intellectual property in the category of fundamental rights is obviously linked to broader trends towards 'propertisation' in intellectual property law. Being critical of this 'maximalist tendency', Peukert cautions that behind this semiotic metamorphosis there lies a 'self-sufficient property logic' that has been built into

[1152] For a detailed analysis of the balancing approaches of these courts see Chapter 6 section 6.2.

intellectual property law.[1153] Does this tendency fit into intellectual property theory? In his influential book '*A Philosophy of Intellectual Property*', Peter Drahos defines 'intellectual property' as a 'twentieth-century 'generic term' used to refer to a group of legal regimes which began their existence independently of each other at different times in different places.'[1154] Copyright, patents, designs, trade marks and protection against unfair competition form the traditional core of intellectual property. If this is a generic term implying the propertisation of intellectual creations and inventions protected under the separate doctrines of the mentioned legal regimes, is intellectual property a misnomer? Does the 'property' label reflect what these separate regimes truly ascribe? According to Mark Lemley, the widespread use of the term 'intellectual property' is a trend that followed the foundation of the WIPO in 1967, which has only become really common in the past few years.[1155] Although intellectual property did not acquire property attributes until a few decades ago, the use of the 'property' label, as Peter Yu reminds us, can be dated back to at least the eighteenth century in the United States and to the nineteenth in Europe.[1156]

Stewart Sterk, on the other hand, emphasises the importance of the choice of language and the shift in terminology, in noting that:

[1153] Peukert *(n 1104)* 68-69.

[1154] Drahos *(n 17)* 14. See for an identical use: William Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (OUP, 2004) 2. See also: Arpad Bogsch, *Brief History of the First 25 years of the World Intellectual Property Organization* (Geneva, 1992) 8.

[1155] Lemley *(n 301)* footnote 126. See also; Cornish *(n 1153)* 2.

[1156] Peter K. Yu, 'Intellectual Property and the Information Ecosystem' (2005) 1 Michigan State Law Review 3-4.

> ‘Property rules are imagined (not always accurately) to be rule-like, rigid and formal. Tort doctrines are imbued with standard-like concepts of “reasonableness.” A person who appropriates another’s property is a “thief.” No comparable term of opprobrium attaches to a tortfeasor who interferes with prospective profits. One might surmise then, that introduction of the property label into copyright and patent was not accidental.’[1157]

So far, intellectual property has been characterised by a bundle of exclusive rights, providing incentives to create or invent, and their limitations, safeguarding roles for competition, innovation, and free expression for the benefit of the economy and democracy. In the past generation, however, this logic has withered; it has increasingly come to resemble corporeal property.[1158] As a consequence of the general acceptance of the ‘intellectual property’ label, one of the most striking legal changes in the past generation has been the ‘propertisation’ of intellectual creations by virtue of the various analogies to the protection afforded other forms of property, particularly real property.[1159] Therefore, the duration and scope of intellectual property rights have expanded almost without limit.[1160]

[1157] Stewart E. Sterk, ‘Intellectualizing Property: The Tenuous Connections Between Land and Copyright’ (2005) 83 Washington University Law Quarterly 419-420 (Internal citations omitted).

[1158] Michael A. Carrier, ‘Cabining Intellectual Property Through a Property Paradigm’ (2004) 54(1) Duke Law Journal 4.

[1159] Sterk *(n 1156)* 420.

[1160] Carrier *(n 1157)* 4; Lemley *(n 301)*.

Additionally, as Neil Netanel has suggested, intellectual property rights holders have widely and systematically invoked the rhetoric of private property to support their lobbying efforts as well as litigation, seizing rhetorical advantages which would not otherwise be available.[1161] Lemley further observes that 'the rise of property rhetoric in intellectual property cases is closely identified not with common law property rules in general, but with a particular economic view of property rights.'[1162] Most importantly, many national courts have upheld this argument and have unquestioningly regarded 'property' as a conceptual basis of protection for absolute rights of exclusion of intellectual property holders without any restraints.[1163] Similarly, as has been mentioned before, some political institutions and regional human rights bodies and courts have joined this trend. One might find it understandable that courts have shown compassion in providing relief for the plight of the intellectual property holding remedy seekers from the prism of property. Yet despite the contemporary

[1161] Neil Weinstock Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing' (2003) 17(1) Harvard Journal of Law & Technology 22.

[1162] Lemley *(n 301)*.

[1163] For cases in the UK see; *Levi Strauss & Co & Anor v Tesco Stores Ltd & Ors* [2002] EWHC 1625 (Ch) para 22; *Ashdown (n 161)*. For an academic commentary on these cases see; Abbe E.L. Brown, 'Human Rights: In the Real World' (2006) 1(9) JIPLP 603-613. For cases in the USA see; See, e.g., *San Francisco Arts & Athletics, Inc v United States Olympic Committee* 483 US 522 (1987) ('when a word acquires value as the result of organization and the expenditure of labor, skill, and money by an entity, that entity constitutionally may obtain a limited property right in the word. . . . The USOC's right to prohibit the use of the word Olympic in the promotion of athletic events is at the core of its legitimate property right.'); *Ruckelshaus v Monsanto Co*, 467 US 986 (1984) ('trade secrets laws confer a property right which cannot be "taken" by government disclosure of the secret unless the government pays just compensation').

tendency of courts to view intellectual property as private property, the question remains whether the human right to property, as a matter of policy, can be an appropriate platform, one that adequately protects the interests resulting from intellectual creations.

A property-based human rights protection for intellectual property interests would obviously be an option to provide the necessary protection for material interests in intellectual creations. Yu opines that the effectiveness of such a system depends on the local conditions of each state.[1164] However, another question arises here: Is it appropriate, as a matter of policy, to use a property analogy for positing intellectual property rights into a human rights context? The answer to that question requires an understanding of how intellectual property law operates to benefit the public and how it affects society.

Within private law, many intellectual property lawyers today bemoan the analogy between real property and intellectual property, which originated in nineteenth-century labelling retained under the strength of a rights-holders' lobby dominated by multinational corporations. In their separate seminal articles, Mark Lemley and Stewart Sterk explored the problems of analogising real property to rights in intellectual creations and inventions. They both find significant problems with this uneasy analogy and, based on the economic and doctrinal understanding of property, describe fundamental differences between real property and intangible intellectual

[1164] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1088; Yu, 'Ten Common Questions About Intellectual Property and Human Rights' *(n 123)* 735.

property.[1165] Their argument is essentially that using the term 'property' suggests a sovereignty over intellectual creations that has never existed in law and is not justified by the rationales underpinning these laws.[1166]

Modern legal thought has diverged from the Blackstonian concept of property rights as absolute dominion over corporeal entities as well as from the highly individualistic Roman law concept of ownership,[1167] embodied in the Institutes of Justinian, again as *dominium* -an absolute right over property, inviolable and good against the world. Contemporary scholars define property rights in many different ways, most notably as 'a relationship among human beings', 'a bundle of sticks', 'a right to exclude' or 'a set of rules governing access to and control of material resources.'[1168] In addition, the aim of private law is to govern relationships horizontally between individual persons and the definition of private property depends on the different aspects of the legal relations among those individuals. The property right protected in leading conventions on human rights and national constitutions predominantly focuses on the protection of individuals and groups against the abuse of power by governments. In most instances its original purpose has been to regulate relationships vertically between states and

[1165] Mark A. Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 Texas Law Review 1033; Sterk *(n 1156)* 417. See also Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1039–1149, 1127-1128.

[1166] Sterk *(n 1156)* 420–421.

[1167] In consequence, Roman law lacked the idea of compulsory purchase--even the state could not forcibly acquire a man's property, except by the ultimate expedient of prescription. See; Barry Nicholas, *An Introduction to Roman Law* (OUP, 1962) 157.

[1168] For definitions see; Gregory S. Alexander and Eduardo M. Penalver, *An Introduction to Property Theory* (CUP, 2013) 1-6. Also see; Ali Riza Coban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate Publishing, 2004) 9-34.

individual persons, to protect them against the state. Yet over time, human rights discourse and legal reasoning has additionally gained an effective role in cases and legal relationships between individuals as well. Specifically, in many national jurisdictions, as well as in European and UN human rights regimes, it is currently possible to witness a transplant of the human rights discourses of constitutional and international public law into private law, which ultimately leads to a horizontal implementation of human rights.

With this traditional difference in mind, in his analysis of property rights as human rights, Schermers concludes that most property rights cannot be included in the category of fundamental human rights.[1169] The difference between the aims of private law and human rights law would inevitably justify a distinct construction of the human right to property. This distinctive feature requires a separately demarcated nature of the human right to property, which is subcategorised and requires the nuanced treatment of both government self-restraint and action, but it is still a context dependent right (correlation forming between its private and public law sphere). Considering this limited character, Schermers is not convinced that the protection of property under the ECHR is 'the most appropriate guideline for a general definition of the fundamental human right to property'. While the ECHR might contemplate public interest concerns, he argues that it is too nebulous to differentiate between types of

[1169] Henry G. Schermers, 'The International Protection of the Right of Property' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension, Studies in Honour of Gérard J. Wiarda* (Carl Heymanns Verlag KG,1988), 565- 580.

property and pays too much attention to limiting government action while ineffectively compensating by leaving open too many exceptions to its sweeping general rule.[1170]

For that reason, courts need to justify how the divergent principles of real property and intellectual property law will comparatively and mutually apply to each other, if they wish to join the trend of analogising with real property. As can been seen from the previous case law of the ECtHR and the CJEU, they could not escape the national contextual definitions of the intellectual property rights in question. The shadow falling upon case law due to the (mis)analogising of real property to rights in intellectual creations and inventions has impeded the courts from constructing a coherent and meaningful definition of the human right to property in intellectual property cases. The property gloss over intellectual property rights, as Yu points out, might have confused policymakers, judges, jurors, and commentators, notwithstanding the significant differences between attributes of real property and those of intellectual property.[1171] This leads to another conclusion, as Peter Drahos writes:

> 'We would not know who the real winners and losers are when states, legislatures and judges shift the boundaries of abstract objects and draw new enclosure lines in the intellectual commons.'[1172]

[1170] Ibid 579–80.

[1171] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1127-1128.

[1172] Drahos *(n 17)* 7-8.

All these points demonstrate that 'reasoning by analogy is as dangerous as it is ubiquitous.'[1173] Lemley vividly highlights the *sui generis* nature of intellectual property law in saying that: 'The needs and characteristics of intellectual property are unique, and so are the laws that establish intellectual property rights.' In order to depict the true character of intellectual property law, he finally reminds us of a-few-decades-old decision of the Supreme Court of Canada, which should find its place in human rights courts and other bodies' construction of property rights:[1174]

> '*Copyright law is neither tort law nor property law in classification*, but is statutory law. It neither cuts across existing rights in property or conduct nor falls in between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.'[1175]

4.7. Deconstruction of Human Rights Attributes of Copyright

4.7.1. In General

Regardless of the various arguments that have been advanced against recognising intellectual property rights as human rights, the aforementioned human rights instruments and courts have articulated unequivocal commitment to protect some interests in intellectual creations. While these instruments and decisions seem to strongly suggest that intellectual property rights can be rationalised as human rights,

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[1173] Sterk *(n 1156)* 420.

[1174] Lemley *(n 1164)* 1075.

[1175] *Compo Co Ltd v Blue Crest Music Inc* 45 CPR (2d) 1, 13 (Sup Ct Canada 1979) (Emphasis added).

however, General Comment No. 17 - as an official interpretation of Article 15(1)(c) of the ICESCR – and the Special Rapporteur's Report on Copyright Policy enunciate that this is not always the case. This conclusion seems to accord with the basic insight, which is, as Drahos argues, that it is indeed problematic to conclude that all intellectual property rights - by virtue of their universal recognition **-** qualify as human rights.[1176] He points to the limited life of intellectual property rights and further accentuates that few observers would argue that a state that has failed to enact a trade mark system has violated a human right.[1177] This analytical path would suggest that only some intellectual property rights and some interests embedded within them could be conceptualised as human rights. Thus, each human rights regime needs a closer look through a nuanced lens so as to find out the answer to this question.

The General Comment and the Special Rapporteur's Report on Copyright Policy are silent as to which intellectual property rights specifically fall within the purview of human rights protection. By contrast, there is a strong scholarly consensus around the conclusion that copyright, as a whole, has a claim to the status of human rights.[1178] Because a creator's personality manifests itself through his/her forms of expression, protecting that author's expression and the dissemination of the ideas or artistic value flowing from this expression for the benefit of society is, in effect, a way of safeguarding human dignity and the cultural development of society as a whole.[1179]

[1176] Peter Drahos, 'Intellectual Property and Human Rights' (1999) 3 Intellectual Property Quarterly 361.

[1177] Ibid 366.

[1178] Torremans *(n 153)* 290; Yu, 'Ten Common Questions About Intellectual Property and Human Rights' *(n 123)* 726; Rochelle Cooper Dreyfuss, 'Patents and Human Rights: Where is the Paradox?' in Grosheide *(n 123)* 72.

[1179] Dreyfuss *(n 1177)* 72-73.

This argument has also found support in the decisions by European human rights courts discussed above. These decisions made it clear that copyright can be protected as a human right to property. However, this holistic, more accurately catch-all, approach, saying that copyright with its own entirety is a human right, lacks the fundamentals of sufficient legal rationalisation.

Yet even if an intellectual property right, and therefore a copyright, does qualify as a human right with all the sweeping interests that are assured, neither the aforementioned instruments nor their exegeses provide adequate guidance as to how such a right and the interests imbued into its protection regime should be juxtaposed to other rights that require access to the fruits of creativity. What are these interests, and how can they be protected under the mantle of existing human rights regimes? The next section will seek answers to these questions.

4.7.2. Moral interests

Willem Grosheide underscores that most of current copyright scholarship perceives moral rights as human rights.[1180] To this end, reference is made to several human rights instruments.[1181] Of course there is some truth in this broad argumentation, but on what basis and to what extent can moral rights be safeguarded under various human rights regimes? How did moral rights historically spring into copyright laws and how have they been reflected in those instruments' protection philosophies?

[1180] Willem Grosheide, 'Moral Rights' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, 2009) 247–48.

[1181] For example UDHR Article 27, ICESCR Article 15(1)(c), International Covenant on Civil and Political Rights 1996 (ICCPR) Article 19, ECHR Article 1 Protocol 1, EU Charter Article 17(2).

The protection of the author's moral interests stems from the idea that authors are inherently identified with their creations:[1182] moral rights shield the author through his work by giving recognition and protection to creative integrity, reputation and personality.[1183] The advent of moral rights in modern sense may perhaps be traced back to the highly romantic French legal concept of *le droit d'auteur*, first embodied as a 'literary and artistic property' in the Laws of 1791 and 1793.[1184] The author's right essentially emerged from the Enlightenment. This was 'the product of rationalist philosophy, which saw an author's intellectual creation as an emanation of his personality/individuality-in metaphysical terms, his[/her] very soul.'[1185] Use of an author's work without permission was seen as equivalent to an assault on his/her spirit. This understanding tends to presume a moral link between the protection and a work. Therefore, works lacking sufficient creativity will not attract the protection of *droit d'auteur.* Since it has been conceptualised as 'the most sacred right of man,' 'in extreme cases normative judgments of intrinsic merit may even be applied.'[1186] From its revolutionary origins, the concept of moral rights (*droit moral/droits moraux*) flourished 'through elaboration of the prerogatives' in the jurisprudence of the French courts during the course of the 19th century.[1187] It was gradually introduced in the first

[1182] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1081-1083.

[1183] Gillian Davies and Kevin Garnett, *Moral Rights* (Sweet & Maxwell, 2010) 3.

[1184] Elizabeth Adeney, *The Moral Rights of Authors and Performes: An International and Comparative Analysis* (OUP, 2006)165; Davies and Garnett *(n 1182)* 16.

[1185] Simon Newman, 'The Development of Copyright and Moral Rights in the European Legal Systems' (2011) 33(11) European Intellectual Property Review 682.

[1186] Newman *(n 1184)* 682.

[1187] Adeney *(n 1183)* 165.

half of the twentieth century into the copyright laws of continental-European countries of the civil law tradition.[1188]

Since its inception as a legal ground for the protection of authors, lawyers in different jurisdictions have converged in identifying five broad categories of moral rights: 1) the right of attribution-paternity (*droit de paternité*),[1189] 2) the right of disclosure (*droit de divulgation*),[1190] 3) the right of respect or right of integrity (*droit à l'intégrité*),[1191] 4) the right of retraction (*droit au retrait et droit au repentir*),[1192] and 5) the right of access (*droit d'accès*).[1193] These rights are now widely recognised in varying degrees in 162 different jurisdictions throughout the world.[1194] Certain moral

[1188] It should be noted that the French dualist theory of the author's right diverges from the German monist or unitary approach. French Law makes a distinction between the author's right to assert his creative relationship to his work and his right to put the work to economic use. The German jurisprudence assumes them as two tenets of a single right. Hence, under German law an author's right may not be assigned, while the author may transfer the economic rights of his work. Under French law an author may licence his economic rights of his work, but his droit moral remains, of course, unassignable (Davies and Garnett *(n 1182)* 24-27).

[1189] The right of attribution is the right to claim authorship of the protected work (see; Davies and Garnett *(n 1182)* 5).

[1190] The right of disclosure is the right to determine when the work is ready for public dissemination and in what form the work will be disseminated (see; Davies and Garnett *(n 1182)* 6).

[1191] The right of integrity is the right to prevent the distortion, mutilation, or other modification of the work in a manner prejudicial to the author's honour or reputation (see; Davies and Garnett *(n 1182)* 6).

[1192] The right of retraction is the right to withdraw the work from public dissemination and public use (see; Davies and Garnett *(n 1182)* 6).

[1193] The right of access is the right to demand access to a work from the original owner of the work or to a copy of the work (see; Davies and Garnett *(n 1182)* 6).

[1194] Davies and Garnett *(n 1182)* 4, ft 4, 955-1016.

rights - the right of attribution and the right of integrity - have been given international recognition in Article 6*bis* of the Berne Convention.[1195] In 1996 the WTTP introduced international protection for certain moral rights in favour of performers for the first time.[1196]

Historically, the common law world may be said to have been separated from *le droit d'auteur* tradition with regard to the legal protection of moral interests. The French concept of *le droit moral,* inviolable, inalienable and theoretically eternal, has been most potentially disconcerting to common law eyes. One reason for this disjunction was that common law's copyright grew out of early Renaissance censorship as a largely pragmatic response to technical change. However, it would be fair to say that the idea of the protection of moral interests was never completely alien to common law's copyright. In the early case of *Millar* v *Taylor,*[1197] some personal and moral links between the author and the work were established. In this case, Millar was a bookseller who in 1729 had purchased the rights to James Thomson's poem *'The Seasons'.* Millar fulfilled the requirements of the Statute of Anne, and therefore received the full protection of the statute. After the term of copyright ended, Robert Taylor began printing a competing volume. Millar sued, claiming a perpetual common

[1195] Bern Convention Article 6*bis* reads as follows: '[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.'

[1196] WTTP Article 5 states that: '[T]he performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.'

[1197] *Millar v Taylor* (1769) 4 Burr 2303.

law right, despite the Statute of Anne.[1198] Astonishingly, one of the greatest judges in English history, Lord Mansfield, agreed with Millar. According to him, the common law would bar Taylor from reprinting Thomson's poem without Millar's permission, as he appeared to see copyright as blend of economic and personal (moral) rights.[1199]

For a long time after *Millar v Taylor*, moral rights in the UK received limited protection through a variety of measures. These included: 'giving artists protection against the unauthorised alteration of their drawings or the fraudulent affixing of signatures to them;'[1200] 'a general right against false attribution of authorship;'[1201] 'the

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[1198] Ronan Deazley, 'Commentary on *Millar v. Taylor* (1769)' in Lionel Bently & Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008), www.copyrighthistory.org.

[1199] 'From what source, then, is the common law drawn …? [The author] can reap no pecuniary profit if, the next moment after his work comes out, it may be pirated upon worse paper and worse print, and in a cheaper volume ….

[The author] may not only be deprived of any profit, but lose the expense he has been at. He is no more the master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty edition. Any one may print, pirate and perpetuate the imperfections to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the person by whom his work shall be published.'

Millar v. *Taylor* (1769) 4 Burr. 2303; 98 Eng. Rep. (K.B. 1769) 201, 252, 253 (cited by Davies and Garnett *(n 1182)* 14).

[1200] Fine Arts Copyright Act 1862 s.7; replaced and widened by Copyright Act 1956 s.43.

[1201] Copyright Act 1956 s. 43;

publication right'[1202]; 'the adaptation right'[1203]; 'the law of contract'; 'passing off'; and 'defamation'.[1204] Thus it was argued in the UK, and is still argued in the US, that the provisions of the common law are sufficient to fulfil the requirements of Article 6*bis* of the Berne Convention, and no specific legislation is required. The status of moral rights as a ground for action in English law eventually came into being with the CDPA 1988.[1205]

[1202] e.g. *Doyle v Wright* [1928-35] MCC 243 (Ch 191) (Eng).

[1203] See; Gerald Dworkin, 'Moral Rights and the CommonLaw Countries' (1993) Report to the ALAI Conference.

[1204] Newman *(n 1184)* 683.

[1205] In the UK, Chapter IV Moral Rights of CDPA 1988 grants the following specific moral rights: 1) the right to be identified as author or director (the right of *paternity) (*CDPA, ss 77-99); 2) the right to object to derogatory treatment of work (the right of *integrity)* (CDPA, ss 80-83); 3) the right not to have a work falsely attributed to one as author or director (false attribution of work) (CDPA, s 84); 4) a right to privacy in respect of certain photographs and films (CDPA, s 85). For commentaries on these provisions see; Davies and Garnett *(n 1182)* 79-336; Adeney *(n 1183)* 368-440. Under French Law these moral rights are recognised: 1) the right of attribution (*droit de paternité*) (The Intellectual Property Code (Code de la Propriété Intellectuelle (CPI)) art. L. 121-1); 2) the right of disclosure (*droit de divulgation*) (CPI art. L.121-2); 3) the right of respect or right of integrity (*droit à l'intégrité*) [CPI L. 121-1 al. 1. There are many other provisions in French law which specify the right of respect: art. 121-5 al. 3 for audio-visual works; art. 132-22 for works which can be executed publicly by theatres, cinemas, TV channels, digital servers; art. 132-11 al. 2 in the publishing sector]; 4) the right to retract (*droit au retrait et droit au repentir*) (CPI art. L. 121-4); and 5) the right of access (*Droit d'accès*) (CPI art. 111-3). For commentaries on these provisions see; Davies and Garnett *(n 1182)* 365-402; Adeney *(n 1183)* 163-215. Germany has these five types of moral rights, but in varying forms. For commentaries on the moral rights system of German Law see; Davies and Garnett *(n 1182)* 403-434; Adeney *(n 1183)* 217-276. The US took a narrower interpretation of the requirements regarding moral rights in the Berne Convention. In the US, moral rights are arguably protected under various federal and state laws including explicit protection through

Which of these moral interests can be protected under the umbrella of human rights? Articles 27(2) of the UDHR and 15(1)(c) of the ICESCR are precise international commitments to guarantee moral interests. The drafting history of Article 27 shows that delegations across the political divide were motivated by a wide variety of beliefs and rationales to support or reject the inclusion of a clause on the individual rights of authors and inventors in an article on public rights of access to science. It was the French initiative with the support of South American socialist countries, which proposed to incorporate moral interests in the scope of the protection of these individual rights of authors and inventors for intellectual creations, while the US, UK, and former British colonies opposed the proposal to the very end.[1206] With respect to the protection of moral interests in intellectual creations, General Comment No. 17 states: 'The protection of the "moral interests" of authors was one of the main concerns of the drafters of [A]rticle 27, paragraph 2, of the Universal Declaration of Human Rights […] Their intention was to proclaim the intrinsically personal character of every

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an amendment in the US Copyright Act by the Visual Artists Rights Act ("VARA") of 1990. Unlike Berne, VARA protects only one group of authors – visual artists, or more accurately, those who create "works of visual art." VARA gives visual artists the right to claim authorship in their work, and to prevent the use of their name in association with a work. In addition, artists are granted the right to prevent the intentional distortion, mutilation or other objectionable modification of their works. Artists who qualify for federal moral rights protection can also prevent any destruction of certain works. Under VARA, moral rights are not transferable by license or assignment, but are waivable in writing. The rights end with the life of the author, unlike economic rights which endure for 50 years after the death of the author. For the historical background on the development of the moral rights system in US see; Thomas F. Cotter, 'Pragmatism, Economics, and the *Droit Moral*' (1997) 76 N.C. L. REV. 1. For commentaries on the moral rights system of US Law see; Davies and Garnett *(n 1182)* 857-954; Adeney *(n 1183)* 441-540.

[1206] Morsink *(n 528)* 8.

creation of the human mind and the ensuing durable link between creators and their creations.'[1207]

The General Comment distinguishes moral interests that are protected under current copyright regimes from moral interests that are protected under a human rights regime.[1208] This quick proposition however ignores the fact that even though the protection layers and shapes are different, they protect the same interests behind the rights granted regardless of whom they are militated against. Yet, behind the different political propensities there are important areas of convergence on the underlying philosophies and moral rationales which led the drafters of these two instruments to the adoption of moral interests in copyright laws as a reflection within human rights regimes. The underlying rationale for the protection of moral interests was most notably based both on considerations of public interest, *inter alia* the encouragement of creative activity and the assurance of the work's authenticity,[1209] and of individual authorial protection.[1210] As one commentator writes:

> '[Some] delegates were concerned to entrench in international law the author's individual rights to control the "moral" aspects of his or her work;

[1207] General Comment No 17 para 12.

[1208] General Comment No 17,para 2.

[1209] See; Morsink *(n 528)* 222 (quoting Chinese delegate Peng-chun Chang: '[L]iterary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected.'); Maria Green, 'Drafting History of the Article 15(1)(c) of the International Covenant' (International Anti-Poverty. Law Center) U.N. Doc. E/C.12/2000/15 (October 9, 2000) paras 35 ('Respect for the right of the author would assure the public of the authenticity of the works presented to it.' (quoting Uruguayan delegate Tejera)).

[1210] Green *(n 1208)* paras 35-38. See also General Comment No. 17 para 2.

> some were concerned to confirm that *"moral" right* as a means of protecting the public interest in the integrity of a published creation; some were probably guided by a simple desire to reinforce the existing *international copyrights laws*. In all cases, however, it is noticeable that the drafters appeared to be thinking almost exclusively of authors as individuals.'[1211]

The CESCR construed from their drafting histories that the right to the protection of moral interests in intellectual creations 'include[s] the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour and reputation.'[1212] While there is no indication that the Berne Convention was a major influence on these two instruments, this interpretation linguistically mirrors the Convention's Article 6*bis* on moral rights. It is accordingly arguable that only moral interests that are protected by the right of attribution and the right of integrity under current copyright laws would be safeguarded under these two instruments. On the contrary, any other moral rights and interests, unless they overlap or fall into the

[1211] Green *(n 1208)* para 45 (Emphasis added).

[1212] General Comment No. 17, para 13. The Committee used the same terminology in defining the States' obligations to protect the moral interests of authors against infringement by third parties; 'In particular, States parties must prevent third parties from infringing the right of authors to claim authorship of their scientific, literary or artistic productions, and from distorting, mutilating or otherwise modifying, or taking any derogatory action in relation to such productions in a manner that would be prejudicial to the author's honour or reputation.' Para 31.

aforementioned description, would not be embodied in the UN human rights system. Equally, these two instruments clearly refer to the protection of 'authors'.[1213] On this score, since they are designed for the protection of moral and material interests on '*authorial creativity*', the moral, as well as material, interests that are secured for the performers, unless the concept of authorship is redefined, would be refused human rights protection, since performing is not considered as work of authorship in many jurisdictions.[1214]

With regard to Article 1 Protocol 1 of the ECHR, there is no clue in the ECtHR's case law as to whether the right to property extends to moral rights. Legal scholarship is however separated into two camps.[1215] While some suggest that Article 1 Protocol

[1213] See; The Special Rapporteur's Report on Copyright Policy para 27 ('From the human rights perspective, the term "author" is to be understood as including individuals, groups or communities that have created a work, even where that work may not be protected by copyright. Within both the human rights and the copyright framework, both professional and amateur authors/artists may qualify for recognition as an author').

[1214] The Ninth Circuit Court in the US has quite recently adopted a completely different approach to performing. In the Garcia case, the trial judge in granting an injunction deemed performers' creativity as an authorship, going against general wisdom which sets the scene for the author/performer divide under current copyright laws [*Garcia v Google Inc,* No. 12-57302 (9th Cir, 26 February 2014) available at: http://cdn.ca9.uscourts.gov/datastore/opinions/2014/02/26/12-57302%20web%20revised.pdf]. Nevertheless, this decision has not created any common ground for consensus among judges or legal scholars, as the opposite conclusion was held by the Seventh Circuit of the United States Court of Appeals a few months later in the Banana Lady case [*Conrad v AM Community Credit Union*, case no. 13-2896 (7th Cir, 14 April 2014), available at: http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D04-14/C:13-899:J:Posner:aut:T:fnOp:N:1326031:S:0].

[1215] Helfer *(n 153)* 42.

1 covers only the economic value of a possession,[1216] others argue that Article 1 Protocol 1 also protects moral rights.[1217] An extensive analysis of the Strasbourg Court's previous case law evidences that the Court's understanding of possession covers a wide range of rights, claims and interests which may be classified as assets.[1218] Exploring the meaning of possessions in the ECtHR's case law on Article 1 Protocol 1, Bernadette Rainey, Elizabeth Wicks and Clare Ovey quite recently note that 'all manner of things which have an *economic value*' qualify as property rights. This demonstrates that only 'economic interests' stand out in the Court's analysis.

Indeed, it is difficult to imagine that any kind of possession of property in the form of an asset confers upon its owner a right to be identified as the creator of that

[1216] Coban *(n 1167)* 149-150.

[1217] J. Drexl, 'Constitutional Protection of Authors' Moral Rights in the European Union - Between Privacy, Property and the Regulation of the Economy" in Katja S. Ziegler (ed.), "Human Rights and Private Law: Privacy' (Hart Publishing, 2006)(cited by Geiger *(n 123)* 383 ft 54).

[1218] Rainey, Wicks and Ovey *(n 660)* 496 (Emphasis added). They state that '[t]he Strasbourg organs have held that company shares are possessions. A patent is also a possession, as is an internet domain name. Indeed, the provision is applicable to all intellectual property as such, including applications for registration of a trade mark. Goodwill in a business constitutes possessions, as does a licence to serve alcoholic beverages where this is vital to an applicant's business. Telecommunications licences for providing internet and fixed telephony services are possessions. Similarly a licence to extract gravel was regarded by the Strasbourg Court as a possession, as was a licence to run a bonded warehouse. Fishing rights are possessions. A planning permission is a possession. But a driving licence is not a possession. Tips paid to waiters were held in one case not to constitute possessions of the waiters, but compulsory deductions from the wages of those who are not members of the union for trade union activities will constitute an interference with possessions. In another case, it was suggested that royal property in issue as private property, and had not established a distinct set of rules relating to royal property, the case was decided by the application of ordinary principles.' Ibid 496-497.

property (paternity right) or to challenge misattribution as author of that property (false attribution of work). Nor does it include a claim that enables its owner to sue infringers who have subjected his or her property, *inter alia* an asset, to derogatory treatment (integrity right). Equally, owners of property have no such privacy right, which can be found in copyright law, over their property, because the subject that they own is inherently overt (privacy rights in photograph and films). One may still, however, identify a possession under an exclusive right or claim, instead of a possession in a certain category of the subject material (e.g. literary, artistic, dramatic or musical works, or etc.) of copyright, which empowers it to obtain those moral interests. This kind of approach still seems ill-founded and unjustifiable, because ownership of a claim and ownership of a thing are quite distinct concepts. Likewise, because the ECtHR only guarantees economic interests, a claim right for the protection of moral interests would be thrown out due to the lack of pecuniary consequences for its holder. This understanding can also lead to questions like: are all rights property rights? Even though the owners of property do not establish a personal link with the thing that they own or the thing does not serve a purpose to distinguish them as a creator of it among others, it is interesting that some scholars still expand the protection of property to moral interests, which have always been historically strictly detached from 'economic' interests on intellectual creations. Therefore, it might be argued that moral interests are not inherently suitable for the protection under the shield of the human right to property. Although the CJEU is silent in relation to moral interests, the same account would be valid for the EU Charter, as genealogic connections between the two treaties would lead the underpinning economic-oriented ideology of the ECHR to resonate in the EU Charter.

4.7.3. Material Interests

The wording of Articles 27(2) of the UDHR and 15(1)(c) of the ICESCR refer to the moral and material interests of authors. These two sets of interests are already protected under the bundle of exclusive rights provided by the existing copyright regimes. At first glance, the notion of 'material interests' under these human rights norms can correspond to the various types of economic interests usually guaranteed either by copyright or the right to private property.

Yu, among others, by tracing the drafting history of Articles 27(2) of the UDHR and 15(1)(c) of the ICESCR in order to find a human rights basis for intellectual property rights, distinguishes the right outlined in those articles as a distinct type of right 'that exists independently of property rights.'[1219] He also cautions that the phrase 'material interests' included in the scope of those articles should not be considered "broadly to cover all types of economic rights as protected in the existing intellectual property."[1220] The recognition of the material interests, therefore, has a relatively limited legal basis in a human rights context so that this provision should not be construed as a licence conferring a full monopoly rent to authors. Rather, it provides only basic material compensation (just numeration)[1221] for effective costs incurred in developing a new scientific, literary, or artistic production and to foster a decent standard of living.[1222] Indeed, defining the legal obligation of how to protect material interests under Article 15(1(c), the Committee notes that:

[1219] Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1086.

[1220] Ibid 1088.

[1221] Ibid 1088.

[1222] General Comment No. 17 para 15.

> '[…] Similarly, States parties are obliged to prevent third parties from infringing the material interests of authors resulting from their productions. To that effect, States parties must prevent the *unauthorized use of scientific, literary and artistic productions* that are easily accessible or reproducible through modern communication and reproduction technologies, e.g. by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of *any use* made of their productions and to *remunerate them adequately*. States parties must ensure that third parties adequately compensate authors for any unreasonable prejudice suffered as a consequence of the *unauthorized use of their productions.*'[1223]

The Comment prefers a broader concept – 'unauthorised use' - instead of 'reproduction'. It means any - either permanent, transient, temporary, even incidental to some other utilisation of the work - use of the work. This is different from the concept of exploitation (use) of rights granted in copyright.

Referring to this paragraph of the Comment, Helfer and Austin put forward that the Committee, by attaching material interests to the right to an 'adequate standard of living,'[1224] 'apparently impl[ies] a right to compensation from unauthorised "reproduction."'[1225] They further suggest that there may be links between the human right to protection of material interests and the derivate work right, to the extent that

[1223] General Comment No. 17 para 31 (Emphasis added).

[1224] General Comment No. 17 para 15.

[1225] Helfer and Austin *(n 25)* 193, 200-203.

the latter, like the right of reproduction, is closely associated to the 'creator's ability to pursue a livelihood.'[1226]

On its face, the phrase 'unauthorised use' in the paragraph above comports with the traditional contours of the right of reproduction. For the most part, however, economic rights in copyright have developed in a piecemeal fashion in response to external pressure, most obviously to technologic change and the growing need to recognise protection for certain creative contributions to human understanding. The history of copyright suggests that classical economic rights in copyright have been governed under six broad categories: the reproduction right, the distribution right, the rental and lending right, the right of communication to the public (the right to performance), related economic rights (performers' economic rights, resale right-*droit de suite*) and the right to adaptation. These rights have been enshrined in different forms in international treaties, most notably the Berne Convention,[1227] the WIPO Copyright Treaty,[1228] the Rome Convention,[1229] the WIPO Performance and

[1226] Ibid 203-205, 210.

[1227] The Bern Convention recognises the following economic rights empowering copyright holders to control some certain activities: 1) Article 8 (the right to translation) 2) Articles 9 and 14 (the right to reproduction); 3) Articles 11, 11*ter* and 14 (the right to public performance and communication); 4) Article 11*bis* (the right to broadcasting); 5) Article 12 and 14 (the right to adaptation); 6) Article 14 (the right to distribution of cinematographic works) and 6) Article 14*ter* (*droit de suite*).

[1228] WIPO Copyright Treaty contains the following economic rights: 1) Article 6 (the right to distribution); 2) Article 7 (the rental right); and 3) Article 8 (the right to communication to the public). These provisions are to be without prejudice to the relevant provisions of the Bern Convention (WCT Article 8).

[1229] Economic rights in neighbouring media works were initially regulated by the Rome Convention as follows: 1) Article 10 (the right to reproductions of producers of phonograms) and 2) Article13 (the right to fixation, rebroadcast, reproduction and public communication of broadcasters).

Phonogram Treaty 1996 (WPPT),[1230] the TRIPs Agreement,[1231] and in various EU directives, specifically the Software Directive,[1232] the Rental and Lending Rights Directive,[1233] the Satellite Broadcasting Directive,[1234] the Database Directive,[1235] the

[1230] WIPO Performance and Phonogram Treaty distinguishes between the rights of performers and producers: 1) Article 6 (the right to broadcast and communication with the public, and the right to fixation of performers); 2) Article 7 (the right to reproduction of performers); 3) Article 8 (the right to distribution of performers); 4) Article 9 (performers' rental rights); 5) Article 10 (the right to make available of performers); 6) Article 11 (the right to reproduction of producers); 7) Article 12 (the right to distribution of producers); 8) Article 13 (producers' rental rights); 9) Article 14 (the right to make available of producers).

[1231] In terms of economic rights, the TRIPs Agreement refers to the Bern Convention (TRIPs Agreement Article 9(1)). However, it extends rental rights to computer programs and films in Article 11. It also restates the minimum rights for phonogram producers and broadcasters in Article 14(1)(2).

[1232] Directive 91/250/EEC has been repealed and replaced by this Directive. See; Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16 Article 4(a) (the right to reproduction); Article 4(b) (the right to adaptation) and Article 4(c) (the right to distribution).

[1233] Directive 92/100/EEC has been repealed and replaced by this directive. See; Council Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 Article 3 (rental rights), Article 7 (the right to fixation), Article 8 (the right to communication) and Article 9 (the right to distribution).

[1234] 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 [1993] OJ L 248/15 Articles 2 and 4.

[1235] Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJL 077/20 Article 5(a) (the right to reproduction); Article 5(b) (the right to adaptation); Article 5(c) (the right to distribution) and Article 5(d) (the right to public performance and communication).

Resale Rights Directive[1236] and the Information Society Directive,[1237] as well as in national statutes.[1238] The substantive nature and types of these economic rights differ from one jurisdiction to another.[1239] As well as generating a complex and inconsistent system of rights, the aggregate and responsive way in which economic rights have been crafted has also yielded a degree of overlap between them. The similitude of interests in protection shields between the right of reproduction and the right of adaptation, and the distribution right and rental and lending right are the most significant examples of this overlap.[1240] In effect, any adaptation of a work at least requires the use of the original work. Constraining the right of adaptation, as well as the right of reproduction, as Helfer and Austin point out, would seem to conflict with the guarantees under Articles 27(2) of the UDHR and 15(1)(c) of the ICESCR.[1241]

[1236] Council Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32.

[1237] Information Society Directive *(n 70)* Article 2 (the right to reproduction); Article 3(1) (the right to communication); Article 3(1)(b)-(d) (rental rights); Article 3(1)-(2)(a)-(d) (the right to make available); Article 4(1) (the right to distribution); and Article 4(2) (the right to adaptation).

[1238] For example in the UK these economic rights are recognised: 1) the right to reproduction (the right to copy the work) (CDPA, s 17); 2) the right to distribution (the right to issue copies of the work to the public) (CDPA, s18); 3) rental rights (the right to rent and lend the work) (CDPA, s 18A); 4) the right to perform or show the work in public (CDPA, s 19); 5) the right to communicate the work to the public (CDPA, s 20); 6) the right to adaptation (CDPA, s 21) and 7) resale rights (The Artist's Resale Rights Regulations 2006, s 3). For a detailed analysis of economic rights under the UK law see; Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP, 2014) 140-176, 369-371.

[1239] Ansgar Ohly, 'Economic Rights' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, 2009) 212–41.

[1240] Ibid 218, 220.

[1241] Helfer and Austin *(n 25)* 203-205, 210.

Likewise, the resale right might not be protected under the UN human rights regime, because the subsequent uses of the relevant work are in the first place authorised by the author. Equally, due to the limits of the linguistic extent of those articles, performers' economic interests could not qualify as human rights, since they are not considered authorial productions. This is the last point that current understanding can reach relating to the UN human rights regime. At this stage, therefore, the precise scope of material interests' protection afforded by the UN human rights regime is, like many other substantive issues, impossible to depict fully, since the Committee's interpretation, as well as the language of Articles 27(2) of the UDHR and 15(1)(c) of the ICESCR, is not clear enough to deduce any further plausible conclusion. These interests can be protected under these articles, provided that they are utilised to enable individual authors a decent livelihood. Other elements of contemporary copyright law clearly go beyond what these two articles require.[1242]

With regard to the ECHR system, no clear indication can be found in the ECtHR's reasoning either. In its copyright cases, on the other hand, the material interests tried by the ECtHR, without making a clear distinction among material interests that might be protected as possessions, have been the right of reproduction and the right to communicate the work to the public (i.e. *Balan*, *Dima*, and *Ashby Donald*) and the right of protection against secondary infringement (i.e. *TPB*). Given the fact that the ECtHR has embraced a purely economic-oriented and broad understanding in extending the concept of possession to a wide range of rights and interests which may be classified as assets, any state intervention to interests giving an economic gain to the copyright holder would be considered as a violation of Article

[1242] The Special Rapporteur's Report on Copyright Policy para 26.

1 of Protocol 1. This analytic path still adds very little to current understanding to find out clear-cut results for the question of which material interests would be protected in the world of human rights.

Apart from its judgement in *Luksan*, the CJEU, like the ECtHR, has not distinguished among material interests.[1243] It was content with holding that copyrights of the referring courts' home countries shall fall within the ambit of Article 17(2). In these cases, it has overseen the right of reproduction, the right to make the work available to the public (i.e. *Promusicae*), and the right of protection against secondary infringement (i.e. *Scarlet, Netlog and Telekabel*). In *Luksan*, however, it positioned certain exploitation rights (such as reproduction right, satellite broadcasting right and any other right of communication to the public through making works available to the public) under Article 17(2).[1244] Whereas it did not make a similar assessment in relation to two circumstances comprising different material interests: 1) national rules presuming the transfer of rights from authors to third parties (rather than vesting them automatically by operation of law); 2) the right to fair compensation for private copying of the author of the cinematographic work. It is not clear whether this difference in the

[1243] In *Promusicae,* it held that: 'It should be recalled that the fundamental right to property, which includes intellectual property rights such as copyright (see, to that effect, Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 para 65), and the fundamental right to effective judicial protection constitute general principles of Community law.' See para 62. It was equally straightforward in *Scarlet* and *Netlog* in reasoning that: 'The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter').' See *Scarlet (n 903)* para 43 and *Netlog (n 904)* para 41. It followed this brevity in Telekabel as well '(i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter.' See para 47.

[1244] *Luksan (n 1114)* paras 71-72.

CJEU's analysis was intentional or mere negligence. This ambiguity in the CJEU's reasoning about material interests is no guarantee of their demise. Despite the lack of sufficient clarification, in the light of its case law *in toto*, however, the CJEU would arguably be ready to see any enforceable economic right under copyright laws of EU member states as human rights through its market-oriented perspective.

4.8. Conclusion

Is copyright a human right? The current state of scholarship and case law on the interfaces between copyright and human rights presents a patchwork and haphazard picture. Certain economic interests without maximum limits in copyrights, as well as patents and trade marks, qualify as human rights in the ECtHR's case law. The *Anheuser-Busch*, *Ashby Donald* and *TPB* cases evidence that even the small fortunes that can be earned from intellectual property rights can be seen as economic interests deserving human rights protection. However, certain economic interests only in copyright have a limited reach in the UN human rights regime in terms of both maximum monetary value and the substantive nature of rights in which they are embedded. With the exception of copyright, there is no indication of other intellectual property rights in the CJEU's understanding in this respect. Moral interests in copyright falter in the ECHR and EU Charter regime, while certain moral interests qualify as human rights in the UN system. The ECHR and EU Charter extend legal remedies for protecting the human rights of corporations, while the UN system is completely cold to this idea. While the ECHR and the EU Charter adopt an economic-oriented approach, the UN human rights system transcends economic considerations. The ECHR and EU charter envision intellectual property rights as commodities and a means of investment. As Emberland highlights, '[i]t would be meaningless to disconnect the

Convention's democratic model from core values of a capitalist system.'[1245] In addition to the recognition of the economic aspects of copyright, the UN human rights system sees it in its cultural and societal settings as well. This culture-and-society-oriented outlook is embodied in the CESCR's, as well as in the Special Rapporteur's Report, interpretation, where it conceptualises 'intrinsic links' to the other rights recognised in Article 15 of the Covenant.[1246] All have acknowledged that in some circumstances copyright as protected human rights may contradict other human rights norms, but none has provided an appropriate and extensive legal method to resolve the conflict.[1247]

The fragmentation of international law is often considered a source of normative and institutional conflict. The cases explained above (*e.g. Balan, Dima, Ashby Donald* etc.) further demonstrate that copyright law and human rights, at least some attributes of them, seem to be mutually reinforcing, in addition to the more popular narrative in which copyright somehow negates or overrides human rights. This does not however change the fact that the overly fragmented clusters of international human rights architecture have enabled *divergent* positions in the interpretation of the interfaces between copyright and human rights. The situation is also exacerbated by the inadequate interpretations of intellectual-property-related human rights norms due to deeper differences about the nature and function of human rights in a political

[1245] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP, 2006) 42.

[1246] For example; the right to take part in cultural life (art. 15, para. 1 (a)), the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)), and the freedom indispensable for scientific research and creative activity (art. 15, para. 3). See; General Comment No 17 para 4.

[1247] For a more detailed analysis see Chapter 6 section 6.2.

society. The preceding discussion accordingly shows how different, but also overlapping, analyses leave out some foundational questions on the paradoxical co-existence and conflict of intellectual property rights and human rights.

With respect to copyright and human rights, could the strengths of one regime actually promote the goals of another? This chapter also vindicates two main pillars of Laurence Helfer and Graeme Austin's human rights framework for intellectual property rights: 'the *protective* and *restrictive* dimensions of human rights in the intellectual property context.'[1248] The protective dimension is built on state obligations to respect, protect, and fulfil creators' rights and the right to property set out in several international instruments, namely Article 27 of the UDHR, Article 15(1)(c) of the ICESCR, and Article 1 of the ECHR's First Protocol.[1249] Despite its considerably narrower scope than those mandated by intellectual property treaties and statutes, the human rights protection of material and moral interests stemming from intellectual creation involves 'the existence of a zone of personal autonomy in which individuals can achieve their creative potential, control their productive output, and lead the independent intellectual lives that are essential requisites of any free society.'[1250] This dimension, for Helfer and Austin, may also vindicate 'more expansive legal protections for individuals and groups vis-à-vis other actors involved in the production and distribution of knowledge goods.'[1251] By 'the framework's emphasis on human creativity rather than economic exploitation' in an intellectual property context, as Helfer and Austin suggest, states might be able to demarcate legal rules, such as work

[1248] Helfer and Austin *(n 25*) 512 (Emphasis added).

[1249] Ibid 513.

[1250] Ibid 514.

[1251] Ibid 515.

for hire principles, which grant control of copyright work to powerful actors at the expense of disadvantaged actors, in a more restrictive fashion 'to achieve socially beneficial ends.'[1252] The legal protection that derives from the human right to property simultaneously entails states 'to preserve latitude for governments to adopt economic and social policies that adversely affect property owners while, at the same time, condemning arbitrary deprivations of property by state actors.'[1253]

By contrast, the restrictive dimension appears 'where a state expands legal protections for creativity and innovation beyond those required to establish the zone of personal autonomy.'[1254] The first component of the framework's restrictive dimension is a process inquiry that seeks to determine what role, if any, intellectual property protection actually plays in hindering or guaranteeing civil and political rights, and 'minimum levels of economic and social wellbeing in areas such as health, food, and education.'[1255] Helfer and Austin suggest that the identification of these matters requires 'careful, objective, and context-specific empirical assessments'[1256] and well-structured human rights impact assessments of intellectual property protection.[1257]

[1252] Ibid.

[1253] Ibid.

[1254] Ibid 516.

[1255] Ibid 517.

[1256] Ibid 518.

[1257] Taking into account the criticism raised against the 2006 report of the National Human Rights Commission of Thailand, reviewing a draft of the Thailand–United States Free Trade Agreement, Helfer and Austin contend that 'these measurement tools should include at least the following components: (1) an evaluation of whether existing or proposed intellectual property protection rules and policies help or hinder the realization of specific human rights outcomes; (2) an assessment, to the greatest extent possible, of the relative causal contributions of intellectual property rules and policies in comparison to

Once these assessments are carried out, states 'will need to decide whether to revise existing intellectual property protection rules and how best to do so.' This is 'the second, substantive stage of the framework's restrictive dimension.'[1258] Are these two dimensions the only paradigms that portray this debate? Is this the extent that law can reach?

In addition to conflict and coexistence (restirictive and protective) ideas, it is possible to describe three more linkages between copyright and human rights: *conditionality*, *conformity* and *confluence*.[1259] *Conditionality* refers to the establishment of legal contingency between copyright policies and compliance with international human rights norms.[1260] The inclusion of a provision requiring a state to abide by human rights norms in the qualification criteria of becoming a contracting state of an international agreement regulating copyright is one example that sets up conditionality

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other factors; and (3) an identification of the legal and policy measures, whether or not consistent with the existing intellectual property regime, that will facilitate these human rights outcomes.' Ibid 519.

[1258] Ibid 520. Helfer and Austin also note the effects of the restrictive component of the framework on distributional consequences of intellectual property protection: 'The intellectual property system is generally agnostic about both the static and the dynamic distributional consequences of monopoly pricing structures. But these distributional consequences are a central concern of human rights law in general and economic and social rights in particular, which prioritize the needs of the most marginalized and disadvantaged individuals and groups above the needs of those with greater financial means. Stated more pointedly, intellectual property protection may help states to satisfy their obligations to protect and fulfil economic and social rights. But its effect is greatest where it is needed least.' Ibid 521.

[1259] For a discussion of these linkages with respect to trade and human rights laws see; Tomer Broude and Holger P. Hestermeyer, 'The First Condition of Progress? Freedom of Speech and the Limits of International Trade Law' (2014) 54(2) Virginia Journal of International Law 295-321.

[1260] See; Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005).

between copyright and human rights regimes.[1261] *Conformity* is more about a functional link between these regimes, which means that copyright law should be interpreted in light of human rights, not only in cases of conflict, but also more generally. This interpretative notion might be advanced with respect to a particular human right or a cluster of rights.[1262] The *confluence* thesis presumes that copyright law has sufficient overlaps with human rights law that it can, at least in certain cases, spontaneously enhance traditional human rights. Instead of conflict, it posits a mutual reinforcement between two separate regimes of law that appear somehow to 'point in the same direction,'[1263] in the sense that the protection of copyright may also promote human rights, especially the freedom of expression. This idea can be seen in the characterisation of copyright as 'the engine of freedom of expression' – the famous metaphor of O'Connor J in the leading US Supreme Court decision in *Harper & Row Publishers v Nation Enterprises*.[1264] Copyright can also be seen as an economic forum which both provides remuneration opportunities to authors and allows them to assert a degree of financial and artistic autonomy, While the remuneration aspect is related

[1261] For one expression of such an approach, see Secretariat of Comm'n on Human Rights, Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization: Note by the Secretariat, UN Doc E/CN.4/Sub.2/2004/17 (9 June 2004) (by Robert L. Howse).

[1262] Broude and Hestermeyer *(n 1258)* 302.

[1263] See; In Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the International Law Commission, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, para 93, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[1264] 471 US 539 (1985).

to the capability to have control over one's material environment in Nussbaum's list[1265], enabling authors to continue producing works, the autonomy aspect is related to Sen's agency notion[1266], promoting the creation of a diverse variety of works rather than those that have been approved by a patron or government. Accordingly, it lays the foundation for robust public discourse which is an aspect of a democratic society.[1267]

Thus, this discussion additionally suggests that the full implications of obligations arising from several copyright-related human rights is only beginning to emerge. The understanding of these obligations also requires a comparative assessment of other provisions, specifically the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and freedom of expression. This multiple-comparativism is also vital to resolve the conflicts, if any, between two different human rights. To this end, much more nuanced explanation is needed for establishing human-rights-consistent and human-development-friendly principles that could guide intellectual property law-making initiatives toward particular policy outcomes. Despite the complex picture of human rights implications on copyright, what is fairly certain that human rights may require policymakers and courts to look beyond the traditional preoccupations that have shaped policy development in the copyright field, and to see law making initiatives from a different perspective. What kind of legal tools can be used to draw such future projections? The next two chapters

[1265] For Nussbaum's list see Appendix 1 Table 1.

[1266] For Sen's agency notion see Appendix 1.

[1267] See; Netanel, 'Copyright and a Democratic Civil Society' (1996) 106(2) Yale Law Journal 288–289 and 347–352. Also see; Rebecca Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation' (2000) 42 Boston College Law Review 35-37.

provides answers to this question from conflict, conditionality, conformity and confluence paradigms.

CHAPTER 5

5. The TPP's Copyright Provisions and Cultural Human Rights?

5.1. Introduction: Genealogy, Political Background and Questions

When economic operators do business internationally, not only goods and services go across national boundaries, but also the culture, opinions, information and ideas that they carry. Because intellectual property can be conducive to this international cultural and commercial exchange, it can also be welfare enhancing. For that reason, the TRIPs Agreement recognises that some intellectual property protection is consistent with liberalising trade.[1268] However, intellectual property can also function as a form of trade barrier, because intellectual property rights can be used to prevent imports of goods or services. Too much intellectual property protection is almost never trade enhancing, but is rather protectionist.

The US and the EU today are at a crossroads. Still in economic recession: they have no option for economic recovery other than by making full use of their 'trumps'. As Christophe Geiger vividly highlights, 'with labour [and costs of production] being considerably cheaper elsewhere, the Old World is faced with a relatively simple equation: 'innovate or disappear.''[1269] In order to overcome this problem, they have no choice but to rely on the legal protectionism which can be used in the 'knowledge

[1268] Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM 1197, [Hereinafter TRIPS Agreement or TRIPS].

[1269] Christophe Geiger, 'Introduction' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar Publishing, 2013) XX.

economy.'[1270] Historically, to keep this economy under control, the international intellectual property regime has been dragged between non-multilateralism and multilateralism.[1271] As this goes on, 'history will repeat itself, causing us to feel like it is *déjà vu* all over again.'[1272] In fact, today is no different. A similar approach has been taken in the aftermath of the collapse of the Doha Development Round. This follows a global historical trend towards forum-shifting in the context of external intellectual property policy. Developed countries use 'regime-shifting'[1273] or 'forum-shifting'[1274] strategies to impose the desired standard for intellectual property protection in the venue where they will encounter the least resistance. Typically, bilateral agreements offer the path of least resistance, since developed countries are able to use their higher

[1270] See e.g. Dominique Foray, *The Economics of Knowledge* (MIT Press, 2004); OECD, 'Innovation in the Knowledge Economy, Implications for Education and Learning' (OECD Publishing, Centre for Educational Research and Innovation, 2004).

[1271] Bryan Mercurio, 'TRIPS-Plus Provisions in FTAs: Recent Trends' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP, 2006) 216.

[1272] Peter K. Yu, '*Déjà Vu* in the International Intellectual Property Regime' in Matthew David and Debora Halbert (eds), *The Sage Handbook of Intellectual Property* (Sage Publications, 2014) 114.

[1273] As Laurence Helfer defined it, regime shifting is 'an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another.' Laurence R. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 Yale Journal of International Law 14. See also; Laurence R. Helfer, 'Regime Shifting in the International IP System' (2009) 7(1) Perspectives in Politics 39-44; Yu *(n 28)* 409-416.

[1274] Braithwaite and Drahos, *Global Business Regulation (n 31)* 564–71.JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 564-71 (2000); Susan K. Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TTP' (2011) 18(2) Journal of Intellectual Property Law 447-478.

bargaining power to impose the TRIPs plus rules. As Jean-Frederic Morin underlines, 'asymmetry in economic power presents powerful states with an alternative path in creating desired norms that they would not be able to achieve at the multilateral level.'[1275] The intellectual property '*demandeurs'* in particular have continued to negotiate bilateral and regional preferential trade agreements (PTAs) containing provisions that go beyond the TRIPs standards.[1276] In effect, when multilateral venues are not receptive to the strengthening of levels of intellectual property protection, bilateral agreements are preferred to ratchet up intellectual property protection standards and tie the signatories of these agreements to the multilateral process. This strategy has been used in the EU and US PTAs.[1277] Developing countries have not remained silent on this trend. They have responded to this global intellectual property ratchet by either negotiating their own milder agreements (sinic agreements)[1278] or seeking to materialise their agendas in different multilateral fora (the WIPO Development Agenda, the Beijing and Marrakesh Treaties). This ideological gap has created a clash of 'currents' between pushing for international harmonisation of

[1275] Jean-Frederic Morin, 'Multilaterairng TRIPS-Plus Agreements: Is the US Strategy a Failure?' (2009) 12(3) The Journal of World Intellectual Property 191.

[1276] Jayashree Watal, 'Is TRIPS a Balanced Agreement from the Perspective of Recent Free Trade Agreements?' in Josef Drexl, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix, *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 44.

[1277] Pedro Roffe, 'Intellectual Property Chapters in Free Trade Agreements: Their Significance and Systemic Implications' in Drexl, Ruse-Khan and Nadde-Phlix *(n 1275)* 19.

[1278] Peter K. Yu, 'Sinic Trade Agreements and China's Global Intellectual Property Strategy' in Christoph Antons and Reto M. Hilty (eds), *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region* (Springer, 2015) 248-283.

intellectual property norms and pushing for state autonomy.[1279] One feature of this new era is the clash of beliefs and 'the epoch of incredulity.'[1280]

In the epoch of incredulity since TRIPs came into force, the ratcheting-up of intellectual property norms through PTAs has been controversial.[1281] The main justification usually used to support a 'new gold standard'[1282] on the enforcement of intellectual property rights is the spread of counterfeiting and piracy on a global scale, presented as an ever-growing international phenomenon with major economic and social repercussions.[1283]

Arguably, and perhaps ideally, a high-quality agreement is not one that only concentrates on heightened intellectual property protection which is designed primarily to serve the interests of large developed countries, such as the US, which export more intellectual property than they import. As Susy Frankel argues, 'a high-quality

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[1279] Yu *(n 28)* 328.

[1280] Charles Dickens, *A Tale of Two Cities: A Story of the French Revolution*.

[1281] Susy Frankel, 'The Intellectual Property Chapter in the TPP' in C. L. Lim, Deborah Kay Elms, Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (CUP, 2012) 157.

[1282] See Henning Grosse Ruse-Khan, 'Criminal Enforcement and International IP Law' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2012) 184.

[1283] See in particular the figures quoted in: OECD, *The Economic Impact of Counterfeiting and Piracy* (OECD Publishing, 2008), updated in 2009 see, OECD, *Magnitude of Counterfeiting and Piracy of Tangible Products: An Update* (OECD Publishing, 2009) 1. See also; the European Patent Office (EPO) and the Office for Harmonization in the Internal Market's (Trade Marks and Designs) (OHIM) work entitled 'Intellectual Property Rights Intensive Industries: Contribution to Economic Performance and Employment in the European Union', Industry-Level Analysis Report (September 2013), available at http://oami.europa.eu/ows/rw/resource/documents/observatory/IPR/joint report epo ohim.pdf .

intellectual property agreement ought to be one that balances the interests of the developing and developed worlds in a real and effective manner.'[1284] Indeed, many scholars, public interest advocates and experts believe that a quality agreement for the twenty-first century ought not to only support increased levels of innovation and creativity in all countries, but also to take into account the interests of the full range of stakeholders affected by such laws.[1285]

The ratcheting-up of intellectual property norms also creates complex connections between the regulation of international intellectual property and cultural human rights and freedoms. International intellectual property rights may interfere with various cultural freedoms, which, under international law, apply universally.

[1284] Frankel *(n 1280)* 158.

[1285] See Global Congress on Intellectual Property and the Public Interest, Washington Declaration on Intellectual Property and the Public Interest, (2011), available at http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf [hereinafter the Washington Declaration] (declaring that because 'international intellectual property policy affects a broad range of interests within society, not just those of rights holders . . . policy making should be conducted through mechanisms of transparency and openness that encourage broad public participation . . . [and] [n]ew rules should be made within the existing forums . . . [to ensure] both developed and developing countries have full representation, and . . . the texts of and forums for considering proposals are open.'); Sean Flynn, 'Law Professors Call for Trans-Pacific Partnership (TPP) Transparency' (May 9, 2012), http://infojustice.org/archives/21137 (maintaining that 'if the goal [of the TPP process] is to create balanced law that stands the test of modern democratic theories and practices of public transparency, accountability and input,' then public participation and transparency measures comparable to those seen in lawmaking in multilateral institutions or Congress is needed in the TPP negotiating process); Electronic Frontier Foundation, 'Trans-Pacific Partnership Agreement' https://www.eff.org/issues/tpp (noting that 'digital policies [in the TPP] benefits big corporations at the expense of the public').

In the last decade, international intellectual property law has encountered a new form of normsetting activity: since the Doha round of the WTO negotiations stalled, new trade rules, and thus intellectual property rights, have been made increasingly through a *narrow network* of countries in a *non-multilateral* setting. These countries have banded together with like-minded countries in both the developed and developing worlds to strengthen obligations relating to the protection and enforcement of intellectual property rights. In this respect, a prominent example is ACTA. Only two weeks after the adoption of the WIPO Development Agenda, despite the ground-breaking success of this development, several countries formally launched negotiations on the highly controversial ACTA. ACTA was negotiated by Australia, Canada, the European Union, Japan, Morocco, Mexico, New Zealand, Singapore, South Korea, Switzerland and the US. Proposing to set a new and higher benchmark for international intellectual property enforcement, this plurilateral agreement was finally concluded on 15 April 2011, after three years and eleven rounds of formal negotiations. Out of the eleven negotiating parties, all but Switzerland and five members of the European Union (Cyprus, Estonia, Germany, the Netherlands and Slovakia) have since signed the Agreement. The agreement enters into force only thirty days after the date of deposit of the sixth instrument of ratification, acceptance or approval.[1286] Negotiating partners committed 'to work cooperatively to achieve the Agreement's prompt entry into force.'[1287] Thus far, Japan is the only country to have ratified ACTA.

[1286] Article 40 ACTA.

[1287] Joint Press Statement of ACTA Negotiating Parties https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag .

ACTA has never been able to gain any momentum. This was primarily due to the influence, and almost entirely orchestrated, by civil society groups, academics, netizens,[1288] and legislators within ACTA-negotiating countries, despite guarantees that ACTA rules were consistent with domestic legislation.[1289] The first concrete blast against ACTA came in July 2012 when the European Parliament overwhelmingly rebuffed ACTA, despite claims that the agreement could result in export, economic and employment gains.[1290] Thanks to the persistent campaign against ACTA, the agreement has politically passed away.[1291]

[1288] Michael Hauben and Ronda Hauben, *Netizens: On the History and Impact of Usenet and the Internet* (Wiley-Blackwell, 1997).

[1289] E.g. US Congressional Research Service 'The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues' 7-5700 (19 July 2012) 4; Australia National Interest Analysis: *Anti-Counterfeiting Trade Agreement* [2011] ATNIF 22 Summary § 7, § 29-30; Knowledge Ecology International, 'De Gucht Responds to MEP Françoise Castex: Says ACTA is Binding Agreement, Consistent with EU '*Acquis*" (07 February 2011) http://keionline.org/node/1073.

[1290] 478 MEPs voted against ACTA and 39 in favour. 165 abstained following refusal to delay the final vote until the ECJ had ruled on ACTA's compatibility with EU treaties as requested by the centre-right European People's Party group. Parliament Press Release 'European Parliament Rejects ACTA' (04 July 2012); EU Observer 'ACTA in Tatters after MEPs Wield Veto' (04 July 2012); Frontier Economics & Business Action to Stop Counterfeiting and Piracy 'ACTA, in the EU: Assessment of Potential Export, Economic and Employment Gains' (June 2012)

[1291] Sujitha Subramanian, 'The Changing Dynamics of the Global Intellectual Property Legal Order: Emergence of a 'Network Agenda' (2015) 64 International & Comparative Law Quarterly 104.

The most recent and another quintessential example of this wave of intellectual property normsetting is the TPP[1292], an equally controversial agreement. The TPP began as a quadrilateral agreement known as the Trans-Pacific Strategic Economic Partnership Agreement, or more commonly as the 'P4' or 'Pacific 4'.[1293] In March 2010, shortly before the eighth round of the ACTA negotiations in Wellington, New Zealand, negotiations were expanded to include Australia, Peru, Vietnam, the US nearby the existing TPP members. Since then, Malaysia, Mexico, Canada and Japan have joined the negotiations.

An extensive intellectual property chapter, similar to those intellectual property chapters found in existing US free trade agreements, have been built into the TPP. This goal was even proclaimed by the Office of the US Trade Representative's update statement on the TPP negotiations in November 2011:

[1292] Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam, signed 4 February 2016 [2016] ATNIF 2 (not yet in force).

[1293] As Meredith Lewis recounts: '[The negotiations were initially] launched by Chile, New Zealand and Singapore at the APEC leaders' summit in 2002. These original negotiations contemplated an agreement amongst the three participating countries, to be known as the Pacific Three Closer Economic Partnership … However, Brunei attended a number of rounds as an observer, and ultimately joined the Agreement as a 'founding member'. The Agreement was signed by New Zealand, Chile and Singapore on July 18, 2005 and by Brunei on August 2, 2005, following the conclusion of negotiations in June 2005.' Meredith Kolsky Lewis, 'Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities' (2009) 4(2) Asian Journal of the WTO and International Health Law and Policy 403–404.

> ‘TPP countries have agreed to reinforce and develop existing [TRIPS] rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.’[1294]

Since the TPP negotiations have been kept confidential, like its predecessor ACTA, the draft text of the TPP intellectual property chapter was disclosed through WikiLeaks.[1295] The agreement was finally concluded on 4 October, 2015.[1296]

[1294] See; https://ustr.gov/tpp/outlines-of-TPP.

[1295] James Love, ‘KEI analysis of Wikileaks leak of TPP IPR text, from August 30, 2013,’ available at: http://www.keionline.org/node/1825.

[1296] See; Office of the United States Trade Representative, Press Release (4 October 2015) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership; William Mauldin, ‘U.S. Reaches Trans-Pacific Partnership Trade Deal With 11 Pacific Nations’ *The Wall Street Journal* (Atlanta, 05 October 2015), available at www.wsj.com/articles/u-s-reaches-trade-deal-with-11-pacific-nations-1444046867; Shawn Donnan and Demetri Sevastopulo, ‘US, Japan and 10 Countries Strike Pacific Trade Deal’ *Financial Times* (Atlanta and Washington, 05 October 2015), available at www.ft.com/cms/s/0/d4a31d08-6b4c-11e5-8171-ba1968cf791a.html#axzz3tvZwBLPW.

As Peter K Yu predicted, the potential scope of the intellectual property chapter in the TPP is even more controversial in relation to the protection of several cultural human rights and freedoms, despite the fact that it is more inclusive from the standpoint of developing countries, and includes more provisions that could benefit these countries. [1297] At the core of the controversy is the level of intellectual property protection which is much more extensive than TRIPs, and even more extensive than other intellectual property chapters in free trade agreements to which the US is a party.[1298] The intellectual property chapter in the treaty was one of the most contentious even during negotiations.[1299] There were multiple leaks and conspiracy theories over the course of its negotiation, and, towards the end, it encountered a Mexican standoff over biological data protection.[1300]

Subsequently, however, the TPP agreement met with the same fate as its progeny ACTA: on 23 January, 2017, the newly elected President Donald Trump

[1297] Yu *(n 1271)*130.

[1298] See; Australia–United States Free Trade Agreement (AUSFTA), available at www.dfat.gov.au and Free Trade Agreement between the US and the Republic of Korea, June 30, 2007, available at www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html (KORUS).

[1299] See eg 'Business Lobbyist Sees Strong Objections to US IPR Demands in TPP' (2012) 30(21) *Inside US Trade* (25 May 2012); 'USTR Faces Resistance on Variety of Copyright Issues in TPP Talks' (2012) 30(12) *Inside US Trade* (23 March 2012).

[1300] See e.g. 'TPP Faces Uncertain Future, With Lawmaker Objections, Elections Looming' (2016) 34(1) *Inside US Trade*.

issued an executive order withdrawing the US from the expansive agreement.[1301] In addition to liberalising trade among 12 Asia-Pacific economies, the TPP was seen to be the major non-military pillar of the previous administration's 'pivot' to the Asia-Pacific region to counter China.[1302] In recent years the TPP's importance was framed not only in terms of its economic value,[1303] but also as a symbol of the US's political and economic leadership and commitment in East Asia.[1304] The new administration, however, frames its withdrawal from the TPP through a domestic economic lens.[1305] The withdrawal was not about the protection of cultural human rights and freedoms, but due to blaming the treaty for job losses and focusing on perceived gains in the manufacturing industries.[1306] The TPP has also been controversial in signatory countries where ratification is being debated.[1307] The US withdrawal will likely lead to its end.

[1301] David Smith, 'Trump withdraws from Trans-Pacific Partnership Amid Flurry of Orders' *The Guardian* (23 January 2017), available at https://www.theguardian.com/us-news/2017/jan/23/donald-trump-first-orders-trans-pacific-partnership-tpp.

[1302] See; Chi Wang, *Obama's Challenge to China: The Pivot to Asia* (Routledge, 2016).

[1303] It has been claimed that the TPP agreement represents nearly 40 percent of global GDP. See https://ustr.gov/tpp/overview-of-the-TPP.

[1304] See; https://ustr.gov/tpp/.

[1305] 'We've been talking about this for a long time. It's a great thing for the American worker' said President Trump as he signed the executive order in an Oval Office ceremony. See; David Smith, 'Trump withdraws from Trans-Pacific Partnership Amid Flurry of Orders' *The Guardian (*23 January 2017), available at https://www.theguardian.com/us-news/2017/jan/23/donald-trump-first-orders-trans-pacific-partnership-tpp.

[1306] Ibid.

[1307] See for example, debates in New Zealand: New Zealand Parliament, *Hansard (Debates)*, House of Representatives, Volume 718 Session 1, 11 May 2016 (Dr Kennedy Graham); New Zealand Parliament,

However, the TPP's intellectual property chapter (Chapter 18) still deserves a closer look, as it is the most recent international legal text reflecting the general vision of intellectual property industries in developed countries. All categories of intellectual property rights are affected by the TPP. Chapter 18 is detailed. At seventy-five pages, it has eighty-three clauses, 161 footnotes and six annexes. It dictates domestic rules in relation to the form and substance of broad areas of international intellectual property law within the member nations. Particularly in copyright, it sets out who should be protected by copyright;[1308] extends the degree and scope of copyright rights and regulates them in great detail[1309] (some of them highly technology specific[1310]); increases the length of copyright protection;[1311] and provides detailed rules relating to enforcement including a prescriptive model for anti-circumvention law.[1312] Furthermore, it requires an extensive array of enforcement procedures and remedies including factors that courts should consider in setting damages, and broad

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Hansard (Debates), House of Representatives, Volume 718 Session 1, 4 May 2016 (Fletcher Tabuteau). For examples from Canada see: Canadian Parliament, *House of Commons Debates*, Volume 148 Number 020 1st Session, House of Commons, 18 February 2016 (Irene Mathyssen); Canadian Parliament, *House of Commons Debates*, Volume 148 Number 063 1st Session, 1 June 2016 (Tracey Ramsey). There is also an ongoing public consultation process on the implementation of the TPP in Canada: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=8148299&Language=e&Mode=1&Parl=42&Ses=1

[1308] *Eg*, TPP IP Chapter Article 18.62 (performers and producers of phonograms).

[1309] Ibid Article 18.58 (right of reproduction); Article 18.59 (right of communication); 18.60 (right of distribution); Article 18.62 (rights in performances and phonograms).

[1310] Ibid Article 18.62.3 in particular (distinguishing between analogue and digital transmissions).

[1311] Ibid Article 18.63.

[1312] Ibid Article 18.68.

requirements for criminal liability.[1313] Finally, it requires prescriptive intermediary liability rules.[1314]

There is no one way of assessing the merits, demerits, or achievements of the TPP's intellectual property chapter, since, like any subsection of a big trade agreement, more than one role is attributed to it.[1315] The requirements of these roles are not entirely convergent. Chapter 18 seeks to establish a framework of intellectual property rules. It is at the same time an integral part of an ambitious attempt to develop regional (and potentially supra-regional) trade rules and economic integration, as a step towards establishing an Asian free trade area. The main focus still lies on economic development and commodity aspects of culture. However, where does the intellectual property chapter of the TPP stand in terms of human development? How much does it foster cultural participation? Article 18.2 of the intellectual property chapter sets the objectives of the treaty:

> '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

[1313] See Ibid [Article 18.71 (General Obligations); Article 18.72 (Presumptions); Article 18.73 (Enforcement Practices with Respect to Intellectual Property Rights); Article 18.74 (Civil and Administrative Procedures and Remedies); Article 18.75 (Provisional Measures); Article 18.76 (Special Requirements Related to Border Measures); and Article 18.77 (Criminal Procedures and Penalties)]

[1314] Ibid Article 18.81-18.83.

[1315] Kimberlee G. Weatherall, 'Intellectual Property in the TPP: Not 'the New TRIPS'' (2016) 17 Melbourne Journal of International Law 20.

social and economic welfare, and to a balance of rights and obligations.'[1316]

While the objectives provision does not establish affirmative obligations on the part of member nations, it does set the tone for the obligations that follow. This objective is further supported by Article 18.4 of the chapter which explains the understanding of the treaty with respect to the intellectual property policy:

'Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to: (a) promote innovation and creativity; (b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and (c) foster competition and open and efficient markets, through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users and the public.'[1317]

The abovementioned objectives and understanding are ostensibly compatible with the rhetorical commitments of the US policy to use PTAs as a component of an integrated approach to economic development.[1318] However, the TPP involves both

[1316] Ibid Article 18.2.

[1317] Ibid Article 18.4.

[1318] Office of the USTR, 'New U.S. Initiatives to Boost Trade and Investment Opportunities for Least Developed Countries' (December, 2011).

opportunities and risks for developing countries. The effects of a comprehensive and high-standard TPP on development are difficult to predict.[1319]

Many TPP provisions on intellectual property have already led to legitimate concerns among commentators.[1320] Amongst others, Sean M. Flynn *et al.* recently analysed the TPP's leaked intellectual property chapter and compared it with past agreements.[1321] Adding a critical analysis, they provide a deeper understanding of how the TPP agreement changes international intellectual property norms as well as how it supersedes the TRIPs Agreement.[1322] It is understood from the final text that the treaty is bringing various 'TRIPs-plus' standards that establish higher standards for

[1319] Joel P. Trachtman, 'Development Aspects of a Trans-Pacific Partnership' (3 November, 2011) 1, available at SSRN: http://ssrn.com/abstract=1953943.

[1320] Sean M. Flynn, Brook Baker, Margot Kaminski and Jimmy Koo, 'The U.S. Proposal For An Intellectual Property Chapter In The Trans-Pacific Partnership Agreement' (2012) 28(1) American University International Law Review 105-202; Kimberlee G. Weatherall, 'Section by Section Commentary on the TPP Final IP Chapter Published – Part 2 – Copyright' (November 7, 2015), available at https://works.bepress.com/kimweatherall/32/; Peter K. Yu, 'TPP and Trans-Pacific Perplexities' (2014) 37(4) Fordham International Law Journal 1129-1182; Margot E. Kaminski, 'The TPP and Copyright', Concurring Opinions' (14 November, 2013), http://www.concurringopinions.com/archives/2013/11/the-tpp-and-copyright.html; Angela Daly, 'What will the Trans Pacific Partnership Agreement Mean for Copyright' *Inside Story* (18 November, 2013), available at: http://insidestory.org.au/what-will-the-trans-pacific-partnership-agreement-mean-for-copyright; and Krista L. Cox, 'The United States' Demands for Intellectual Property Enforcement in the Trans-Pacific Partnership Agreement and Impacts for Developing Countries', available at: http://keionline.org/sites/default/files/TPP_IP_Enforcement_4OCT2012_KLCworkingpaper.pdf.

[1321] See; Flynn et al. *(n 1319)* 105-202.

[1322] Ibid.

protection of intellectual property than TRIPS, extend protection to a broader array of intangible property, and eradicate flexibilities established in TRIPS.[1323]

More specifically within the copyright context, commentators have emphasised the following issues as problematic:

1. The extension of copyright terms (which would extend beyond TRIPS/Berne and existing US FTA terms);

2. The provisions on pre-established/statutory and additional damages

3. The technological protection measures (TPMs)/Anti-circumvention provisions which seek to transplant the US' inflexible provisions with their expensive and bureaucratic approach;

4. The inflexible intermediary liability

5. The extension of criminal liability.

These are also the most pertinent issues to cultural freedoms discussed in the previous chapters. Since the discussion of all intellectual property rules goes beyond the scope of this thesis, this chapter provides a critical assessment of the treaty's most contentious copyright rules, which might have a direct impact on cultural human rights and freedoms. Therefore, this chapter evaluates these questions:

- ❖ As part of a trade agreement: does the copyright section enhance human development? Does it contribute to, or detract from, the overall aspirations of human rights frameworks - discussed in Chapters 2, 3 and 4 - to advance the

[1323] Cox *(n 1319)*.

capabilities of individuals to take part in cultural life and express themselves in a democratic society?

- ❖ Is the copyright section in conflict with these cultural human rights and freedoms? If so, which provisions?

These interrelated questions allow to think about the copyright sections from a different viewpoint. Both perspectives pose highly relevant challenges that were disregarded by the intellectual property negotiators, and are essential to show how to judge their success or failure in enhancing development.

This case study will enable seeing how cultural human rights freedoms that serve human development are envisioned in the current international normsetting activities concerning copyright. Frankel again argues that 'a knowledge economy is one that is based on the use of knowledge and the creation and development of knowledge-based industries.'[1324] This view is still narrow and economic-and-industry-oriented, and far from reflecting several features of the knowledge society. As previously shown,[1325] knowledge-based industries are just one element of the knowledge society, which has evolved so as to position a participatory community at the centre where the enclosure lines among intellectual property industries, users and intermediaries have blurred and are mostly intertwined. In this chapter, the overall direction of the TPP to tighten copyright standards is used as a case study to show whether cultural human rights and freedoms, which are important for human development, go hand in hand with the purpose of encouraging creativity, which is another important attribute of the knowledge society.

[1324] Frankel *(n 1280)* 158-159.

[1325] See Chapter 1 section 1.2.3.

The first section examines these five problematic matters respectively in the light of the two questions posed above (conflict principle). After hypothetically showing the profound implications of the TPP-mandated copyright provisions on human development (conflict and confluence principles), the next section offers a model to make this assessment empirically (conformity principle). It additionally suggests a normative adjustment model for future law-making with regard to copyright both at international and national level (conditionality principle).

5.2. Copyright Term Extension

The current term of copyright that TRIPs requires is life of the author plus 50 years or 50 years from the making, where an author's life is not the basis of calculating the term.[1326] The Berne and TRIPs Agreements except photographic works and works of applied art, which must be granted 25 years' protection from creation.[1327] The WCT removed this flexibility for photographic works.[1328] The TPP prolongs the basic copyright term another 20 years and (for non-WCT parties) extends the term for photographic works and applied art (if protected) by considerably more. Terms must be extended for all in-copyright works because of Articles 18.83 and 18.10. Amongst the TPP parties at least Australia, Chile, Mexico, Peru, Singapore and the US have a longer term of copyright protection than the TRIPS minimum. Thus, it is understood that Brunei, Canada, Japan, Malaysia, New Zealand and Vietnam would all be required to increase their copyright terms.[1329]

[1326] TRIPs Agreement Article 12.

[1327] Berne Convention Article 7(4) and TRIPs Agreement Article 12.

[1328] WCT Article 9.

[1329] Weatherall *(n 1319)* 12.

The extension of the copyright term has been widely criticised. Most economists believe present day terms to be excessive.[1330] In *Eldred v Ashcroft*, the extension of term was challenged as unconstitutional on the ground that it conflicted with the constitutional clause from which US copyright law derives.[1331] In an amicus brief to the Supreme Court in that challenge to the Copyright Term Extension Act, seventeen economists, including five Nobel Prize winners (Ronald Coase, James Buchanan, Milton Friedman, Kenneth Arrow, and George Akerlof), estimate that extension for new works creates at most 1 per cent value for a twenty year prospective extension and they conclude therefore that extension of term has negligible effect on investment decisions.[1332] Furthermore, they noted that the then term of protection in the USA had nearly the same present value as a perpetual copyright term.[1333]

Notwithstanding the economic rationale that was put forward by these eminent economists, the analysis of the Supreme Court is built on the discussion about the extent to which copyright theory effects both legislative freedom and on debates about conflicting visions for the development of modern US copyright law in a constitutional

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[1330] See, for example, Gowers Review *(n 365)*; Institute for Information Law (IViR), 'The Recasting of Copyright & Related Rights for the Knowledge Economy, University of Amsterdam for DG Internal Market' (2006), available at http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf. See also; a report commissioned by IFPI, the organisation representing the recording industry worldwide, concluded that term extension will not harm consumers. LECG, 'The Economics of Copyright Term Extension: A Review of the Economic Submissions Regarding the Extension of Copyright for Sound Recordings' (27 May, 2007), available at http://www.ifpi.org/content/library/legc-study.pdf.

[1331] *Eldred v Ashcroft* (2003) 239 F 3d 372; 537 US 186 (US Sup Ct).

[1332] George A. Akerlof et al., 'The Copyright Term Extension Act of 1998: An Economic Analysis' (2002).

[1333] Ibid.

democracy. The Supreme Court, in upholding the constitutionality of the Copyright Term Extension Act, relied heavily on the Copyright Acts of 1790, 1831, 1909, and 1976 as precedents for retroactive extensions. One of the arguments supporting the act was that 'longer terms would encourage copyright holders to invest in the [cultural] restoration and public distribution of their works.'[1334] The major argument for the act was that the Constitution specified that Congress only needed to set time limits for copyright, the length of which was left to their discretion. Thus, as long as the limit is not 'forever', any limit set by Congress can be deemed constitutional.[1335]

The Court adopted an 'ontological' approach to copyright law: the constitutional inquiry in its analysis is more about what copyright is than what it does.[1336] This narrow ontological approach was also maintained with respect to copyright law's consequential effects on other constitutional freedoms. Reiterating its opinion in *Harper & Row, Publishers, Inc v Nation Enterprises,*[1337] the Court held that there was no conflict between copyright and the First Amendment (freedom of expression), since any such concerns would generally be addressed adequately by the idea/expression dichotomy and the doctrine of fair use. However, it noted that the DC Circuit 'spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment,"'[1338] and suggested that such a conflict might

[1334] *Eldred (n 158)* 207 (Brackets are mine).

[1335] Ibid 208-210.

[1336] Graeme W. Austin, 'Copyright's Modest Ontology - Theory and Pragmatism in Eldred v. Ashcroft' (2003) 16(2) Canadian Journal of Law and Jurisprudence 164.

[1337] *Harper & Row Publishers (n 1263)* 560.

[1338] *Eldred (n 158)* 221.

arise if and when Congress changes 'the traditional contours of copyright law'.[1339] No explanation was given in relation to what these traditional contours were.

The approach taken in *Eldred v Ashcroft* was further elaborated by the Supreme Court in *Golan v Holder.*[1340] The *Golan* case concerned a constitutional challenge, specifically a challenge to section 514 of the Uruguay Round Agreements Act 1994, which amends the US Copyright Act to accord protection to certain foreign works that had previously fallen into the public domain in the US. It was claimed that the provision in question was in contradiction with the First Amendment. The Supreme Court upheld the constitutionality of the challenged provision. In doing so, it repeatedly referred to the 'pathmarking decision in Eldred.'[1341] Most notably, it clarified that copyright law's two built-in doctrines – the idea/expression dichotomy and the fair use doctrine – were what the Eldred court had meant by 'copyright's traditional contours'.[1342] It accordingly concluded that there was no need for heightened scrutiny in this instance as section 514 'leaves undisturbed the "idea/expression distinction" and the "fair use" defense.'[1343] These challenges failed and the US has become one of the main proponents of extending the term even further.

However, an ontological perspective on copyright invites further inquiry into copyright's 'moral core',[1344] an inquiry that in turn requires to ask what is it about

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[1339] Ibid.

[1340] *Golan (n 159)* 873.

[1341] *Golan (n 159)* 889.

[1342] *Golan (n 159)* 890.

[1343] *Golan (n 159)* 890–891.

[1344] Jane C. Ginsburg, 'The Concept of the Author in Comparative Copyright Law' (2003) 52 DePaul Law Review 1063.

copyright that means that modern legal systems tolerate its exceptionalism in economic systems that largely forgo monopoly power and in cultural environments that support various cultural freedoms?

Generally speaking, longer protection provides more incentives and thus more creations. Simultaneously, however, longer protection increases the access costs for later authors and thus the costs of creation. This equally leads to reduced incentives for creation. Numerous policymakers have pointed to these problems with term extensions. For instance, the Cambridge economist, Rufus Pollock, estimates that the optimal length of copyright protection would be around fifteen years.[1345] According to New Zealand's Government, the 'only significant cost' of the TPP's incursions into regulatory freedom derives from copyright term extension.[1346] The Government has estimated that the extension alone will cost its economy NZ$55 million (about C$51 million) per year in terms of the 'foregone savings on books, films, music and other works'. [1347] Australia extended its terms as a result of the AUSFTA (Article 17.4.4).

[1345] Rufus Pollock, 'Forever Minus a Day? Some Theory and Empirics of Optimal Copyright' (August 7, 2007), available at http://rufuspollock.org/papers/optimal_copyright.pdf accessed 16 August 2016. William Landes and Richard Posner argue not only in favour of strong protection but also for an indefinite duration; more precisely, they favour an indefinitely renewable copyright. See; William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003).

[1346] New Zealand Government, 'TPP In Brief' available at https://www.beehive.govt.nz/sites/all/files/TPP-Q&A-Oct-2015.pdf

[1347] New Zealand Government, 'TPP In Brief' available at https://www.beehive.govt.nz/sites/all/files/TPP-Q&A-Oct-2015.pdf ; New Zealand Ministry of Foreign Affairs and Trade, 'Economic Modelling on Estimated Effect of Copyright Term Extension on New

Independent analysis commissioned by a Senate Committee at the time the AUSFTA was signed,[1348] and more recently the Australian Productivity Commission,[1349] concluded that this extension imposed significant costs on the Australian economy and was against Australia's interests. In 2015, Broadview Press, an independent Canadian academic publisher that has been a vocal proponent of copyright, warned about the dangers of the term extension to its business and the academic community.[1350] There seems to be little evidence or economic theory to support the idea that extending copyright terms will raise incentives for creativity. The gains are

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Zealand Economy', available at (https://www.tpp.mfat.govt.nz/assets/docs/TPP%20-%20Analysis%20of%20Copyright%20term%20extension,%20explanatory%20cover%20note.pdf.

[1348] Philippa Dee, 'The Australia-US Free Trade Agreement: An Assessment' (Report Commissioned by the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, APSEG Australian National University, June 2004).

[1349] Australian Productivity Commission, 'Bilateral and Regional Trade Agreements' (Research Report -November 2010). It states: 'In terms of AUSFTA … some estimates of the effects suggesting that the copyright provisions could result in an annual net cost to Australia of up to $88 million … The net effect is that Australia could eventually pay 25 percent more per year in net royalty payments, not just to US copyright holders, but to all copyright holders, since this provision is not preferential. This could amount to up to $88 million per year, or up to $700 million in net present value terms. And this is a pure transfer overseas, and hence pure cost to Australia.'

[1350] Broadview CEO Don Lepan described how 'unlimited, or excessively long, copyright terms have often kept scholars from publishing (or even obtaining access to) material of real historical or cultural significance.' He held up Broadview's editions of Mrs. Dalloway and The Great Gatsby as examples of top-notch texts available in Canada but not the US where terms are longer. Don Lepan, 'Copyright, the TPP, and the Canadian Election' (October 14, 2015), available at http://donlepan.blogspot.ca/2015/10/copyright-tpp-and-canadian-election.html/.

simply too far into the future to be considered.[1351] Within a country, the result is substantial and unnecessary transaction costs, and real monetary costs (royalties) with little or no benefit for most secondary creators and consumers. Only corporate copyright holders are likely to benefit (somewhat) from term extension.[1352] In the case of the TPP, the term extension is a major windfall for the US and a net loss for other TPP countries with shorter copyright protection terms. It ultimately costs creators and consumers as additional royalties are sent out of the country.

It is true, as was held in *Eldred* and *Golan,* that legislators are free to extend the copyright term to a forever-minus-a-day time frame. However, the US Supreme Court's mostly theoretical and ontological approach endorsing this freedom is quite problematic. This approach, at least in *Golan*, lacks an analytic discussion of this freedom in the light of the abovementioned empirical findings. In so doing, the theoretical underpinnings of copyright law are confined to presumptions that revolve around the bargain theory between the access and incentive dichotomy and are taken out of their practical context. Despite this ample empirical evidence, the optimal level of protection of consumers and secondary authors is given a lesser weight in the assessment of the constitutionality of copyright term extension.

In addition to this law-and-economics-based analysis which relies upon the evaluation of transaction costs, there is another problem which relates to the interface between copyright law and cultural freedoms. Proponents of the view, similar to that of the US Supreme Court, that copyright incorporates principles that accommodate

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[1351] See; Rebecca Giblin, 'Rethinking Duration: Disaggregating Copyright's Rewards and Incentives via a System of Rolling Rights' (Monash University Faculty of Law Legal Studies Research Paper No. 2014/09, February 5, 2015), available at: http://ssrn.com/abstract=2561108

[1352] Weatherall *(n 1319)* 13.

freedom of expression essentially presume that, even if these values could potentially come into conflict with each other, any such conflict can ultimately be resolved through the application of the statutory exceptions and limitations contained in copyright law.[1353] However, today many scholars caution against assuming that copyright law's internal principles necessarily safeguard freedom of expression, such that the courts (and possibly negotiators and lawmakers) need not engage further with the conflict between them.[1354] It in fact seems impossible to argue that these doctrines, that are considerably curtailed through a narrow and incoherent judicial interpretation and thus have become either too vague (as is the case in the US fair use principle and the idea/expression divide) or too prescriptive (as is the case in the UK fair dealing principles), can provide sufficient protection space for many cultural freedoms described in the previous chapters.

[1353] See *e.g., Ashdown (n 161)*; *Harper & Row Publishers (n 1263)*; *Eldred (n 158)*; Estelle Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating' in Torremans *(n 123)* 133-160; Paul L. C. Torremans, 'Copyright (and Other Intellectual Property Rights) as a Human Right' in Torremans *(n 123)* 195-216; Melville B. Nimmer, 'Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?' (1970) 17 UCLA Law Review 1189-1193.

[1354] *Ashdown (n 161)*; Jonathan Griffiths, 'Copyright Law and Censorship: The Impact of the Human Rights Act 1998' in Eric Barendt and Alison Firth (eds), *Yearbook of Copyright and Media Law 1999* (OUP, 1999) 16; Michael Birnhack, 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' (2003) 14(2) Entertainment Law Review 24; Michael Birnhack, 'Copyright Law and Free Speech after Eldred v Ashcroft' (2003) 76 Southern California Law Review 1275; Eric Barendt, 'Copyright and Free Speech Theory' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005); Robert Danay, 'Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom' (2005) 8 Yale Journal of Law & Technology 40-41.

Copyright term extension policies undermine two important aspects of the right to take part in cultural life and freedom of expression: the public domain and access to information. Although the Statute of Anne of 1710 introduced a limited term of protection, it was not until 1774 that the idea of a perpetual copyright was rejected for the first time in history.[1355] The concept of public domain emerged at that moment. Simply put, from then on, booksellers were no longer in a position to control the development of culture. The public domain became an essential part of the copyright philosophy.[1356] It accordingly began to represent a great repository of free information and cultural heritage, enabling access to information and future creativity, for the protection of freedom of expression and other cultural freedoms embodied in the right to take part in cultural life.

The TPP-mandated copyright term extension would directly affect numerous works which would take decades longer to enter the public domain.[1357] This represents a pure profit for copyright holders and a transfer of wealth from users to copyright holders, most of whom will be located overseas since a majority of copyright content consumed in most TPP countries will be produced overseas (except for the US). In other words, in a policy world in which copyright strives to balance creativity and access, term extension restricts access but does not enhance creativity.

[1355] *Donaldson v Beckett*, 1774, 2 Brown's Parl Cases 129, 1 Eng Rep 837; 4 Burr 2408, 98 Eng Rep 257; 17 Cobbett's Parl Hist 953 [1813].

[1356] Christophe Geiger, 'Legislative Comment the Extension of the Term of Copyright and Certain Neighbouring Rights - A Never-Ending Story?' (2009) 40(1) International Review of Intellectual Property and Competition Law 82.

[1357] See; Michael Geist, 'Official Release of TPP Text Confirms Massive Loss to Canadian Public Domain' (November 5, 2015), available at www.michaelgeist.ca/2015/11/official-release-of-tpp-text-confirmsmassive-loss-to-canadian-public-domain/.

As previously mentioned,[1358] General Comment No 21 states that one of the main components of the right to take part in cultural life is *access* which 'covers in particular the right of everyone […] to benefit from the cultural heritage.'[1359] Likewise, '*[a]vailability* […] of cultural goods and services that are open for everyone to enjoy and benefit from, including […] intangible cultural goods, such as […] knowledge' is a 'necessary [condition] for the full reali[s]ation of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.'[1360] It is further provided that '*[a]ccessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all […] without discrimination […] [and] also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.'[1361] The obligation to respect within the right to take part in cultural life 'includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group […] [t]o enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind.'[1362] The CESCR points out that '[t]his implies the right of all persons to have access to, and to participate in, varied

[1358] See Chapter 2 section 2.4.1.

[1359] General Comment No 21 para 15(b).

[1360] General Comment No 21 para 16(a) (Emphasis original).

[1361] General Comment No 21 para 16(b) (Emphasis original) (Internal notes omitted).

[1362] General Comment No 21 para 49(b).

information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.'[1363]

The damage caused by copyright term extension involves more than just higher costs to consumers and educational institutions. It is also a massive blow to access to a shared cultural heritage. An important concern in relation to this freedom, highlighted by the first UN Special Rapporteur in the Field of Cultural Rights, 'is 'the pressure exerted by entertainment and media companies to impose their ownership on material that is part of the shared cultural heritage' through the copyright term extension.[1364] She observes that 'the limitation of material in the public domain and the narrowing of possibilities of free use' may harm 'contemporary art practices.'[1365] As the Special Rapporteur further underlined in her report, 'cultural heritage is to be understood as resources enabling the cultural identification and development processes of individuals and communities which they, implicitly or explicitly, wish to transmit to future generations.'[1366] Copyright is granted for the creation and production of new works, not to allow for the indefinite exploitation of works that already exist. Any excessive extension of copyright term therefore encroaches upon the development of individuals through cutting their access to a shared cultural heritage. This affects their right to artistic and creative expression and their right of access to and enjoyment of cultural heritage.

[1363] General Comment No 21 para 49(b) (Internal notes omitted).

[1364] UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights : The right to freedom of artistic expression and creativity, 14 March 2013, A/HRC/23/34, para 83.

[1365] Ibid (internal notes omitted).

[1366] UNHRC, 'Report of the Independent Expert in the field of Cultural Rights on the issue of cultural heritage' *(n 602)* para 6.

In sum, depriving the public domain of a vast wealth of cultural works for a longer time due to the TPP's copyright term extension rule, directly and *disproportionately* limits an individual's freedom of expression -particularly the right of artistic and creative expression, the right to access cultural life and the right to access and enjoyment of cultural heritage.

The challenge is to find appropriate solutions, which neither infringe on copyright holders' rights nor their fair remuneration interests but, at the same time, respect the right of authors and consumers to use previous authors' productions. While the damage to the public domain and access to cultural life and heritage stands as a negative aspect of the TPP's copyright section, there is a potential for an implementation approach that would mitigate some of the harm. As Kimberlee Weatherall points out in her review of the TPP copyright provisions, earlier versions of the agreement would have prohibited the implementation of any formalities, such as registration, for copyright.[1367] This rule was left out from the final TPP text.[1368] The Berne Convention prohibits the use of formalities for works covered by the treaty, but the TPP countries could conceivably treat the term beyond Berne as a supplementary regime that falls outside of the Berne standard.[1369] Copyright registration would not eliminate all the harm to the public domain. However, for those who desire the extension, it would be more difficult to maintain their rights.

[1367] Weatherall *(n 1319)* 12.

[1368] Ibid. For an earlier version see; Wikileaks, Press Release, 'Updated Secret Trans-Pacific Partnership Agreement (TPP) - IP Chapter (second publication)' (October 16, 2014), available at https://wikileaks.org/tpp-ip2/.

[1369] Weatherall *(n 1319)* 12.

5.3. Pre-established/statutory and additional damages

Subsection 6 of Article 18.74 of the TPP offers two broad options in the calculation of damages for the infringement of copyright or related rights: pre-established damages and additional damages. In the US, two broad justifications are put forward for pre-established damages and statutory damages. Historically they were intended to ensure that copyright holders could obtain compensation where proving actual damages is difficult or costly.[1370] Pre-established damages also have punitive and deterrent elements, particularly for commercial piracy and wilful copyright infringements.[1371] Art 18.7.8 refers to both justifications of compensation and deterrence.

On the other hand, additional damages are part of the Australian copyright enforcement system.[1372] They are in essence a form of exemplary or punitive damages, awarded at the discretion of the court taking into account such matters as the flagrancy of the infringement, the conduct of the defendant and the need to deter similar infringements in the future.[1373]

[1370] Pamela Samuelson and Tara Wheatland, 'Statutory Damages in Copyright Law: A Remedy in Need of Reform' (2009) 51 William and Mary Law Review 439-511; Peter K. Yu, 'Digital Copyright Reform and Legal Transplants in Hong Kong' (2010) 48 (4) University of Louisville Law Review 717.

[1371] Kimberlee G. Weatherall, 'Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 3 - Enforcement' (November 5, 2015) 18, available at: http://works.bepress.com/kimweatherall/33/. Since the award for wilful infringement was increased to a maximum of $150,000 per work infringed, a sum vastly out of proportion with the actual harm caused by many infringements. See; 17 USC § 504(c)(2).

[1372] Copyright Act 1968 (Cth) s 115(4).

[1373] Weatherall *(n 1370)* 18.

It is important to note however that the TPP does not require establishing the level at which pre-established damages are set. There are countries other than the US which have pre-established damages set at lower levels.[1374]

Pre-established damages present serious problems. Speaking of the US system, Pamela Samuelson and Tara Wheatland note that '[a]wards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.'[1375] Such awards are catastrophically punitive and lead to a private rent-seeking while encouraging litigation. The availability of potentially large damages awards without proof of economic loss arguably encourages copyright litigiousness.[1376] Oftentimes, pre-established damages are used as a convenient threat, for instance in the cease-and-desist letters that the recording industry sends out *en masse* to Internet users.[1377]

Additional damages awards in Australia have their own problems. The discretion to make such awards is unprincipled and the outcomes can be to some extent arbitrary. It has been noted that in some cases, Australian additional damages awards have exceeded ten times the proven harm or loss, reaching very substantial six-figure sums.[1378]

[1374] See for example; s 38.1(1) of Canadian Copyright Act 1985 requiring "not less than $500 and not more than $20,000".

[1375] Samuelson and Wheatland *(n 1369)* 441.

[1376] See; Matthew Sag, 'Copyright Trolling, an Empirical Study' (2015) 100 Iowa Law Review 1105.

[1377] Peter K. Yu, 'P2P and the Future of Private Copying' (2005) 76(3) University of Colorado Law Review 663–670.

[1378] Weatherall *(n 1370)* 20.

For any restriction upon the right to freedom of expression 'prescribed by law', it should be drafted so that it is clear and precise.[1379] The lack of a provision setting the bottom and top threshold of the pre-established and additional damages creates uncertainty and thus interference with the legality principle. If the TPP countries draw up a threshold of damages with precise terms, they can avoid this problem.

Furthermore, the TPP does not differentiate between commercial and non-commercial infringements. Likewise, it does not distinguish wilful from non-wilful infringement.[1380] While it is understandable why pre-established damages are needed to target commercial piracy, they become highly problematic when applied to internet users or non-wilful infringers. Weatherall highlights that the requirement of pre-established damages in the TPP does not require the extremely high pre-established damages stipulated by US law.[1381] However, the repeated claims to courts for awards of pre-established damages have also led to excessively high damage awards against individual file-sharers which were highly disproportional to their offences. A significant example is *Capitol Records v Thomas-Rasset*,[1382] a peer-to-peer file-sharing case, in which a jury awarded over $1.92 million against an individual file-sharer for making available only 24 songs for unauthorised downloading, despite the trial judge's

[1379] See Chapter 2 section 2.4.4.

[1380] For example, in Australia where in the case of innocent infringement, no damages are available but an account of profits may be ordered. See; Weatherall *(n 1370)* 19.

[1381] Weatherall *(n 1370)* 19.

[1382] *Capitol Records v Thomas-Rasset* 579 F Supp 2d 1210, 1213, 1227 (D Minn 2008). See; *Yu (n 1369)* 717.

estimate of actual damages of around $50. The final award in the case following various legal processes was US$222,000.[1383]

In terms of human rights, the next issue to be considered is whether the pre-established and additional damages conform to the principles of necessity and proportionality. With regard to freedom of expression, the Human Rights Committee (HRC) has clarified its view that the requirement under Article 19(3) of the ICCPR that a measure limiting freedom of information and expression be 'necessary', imposes a substantial burden of justification on government agencies. It has stated that this equates to a requirement that any 'restrictive measures must conform to the principle of proportionality':

> 'They must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected . . . The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination.'[1384]

The HRC further states that:

[1383] *Capitol Records v Thomas-Rasset* 692 F 3d 899 (8th Cir 2012).

[1384] Human Rights Committee, General Comment No. 34 para 34.

> ‘When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.’[1385]

Arguably, when assessing the necessity and proportionality of these damages, the gravity of the infringement should be considered. In many circumstances concerning individual file-sharers, an infringement might be so trivial that any extreme award, as seen in US law, would be deemed disproportionate. Thus, because the TPP’s provisions on pre-established and additional damages are not specifically targeted at serious and wilful copyright infringement cases of ‘commercial scale’, an argument can be made that they represent a disproportionate restriction on freedom of expression. These damages may also have a collaterally harming effect on the right to access and contribute to cultural life, where they are granted against individual Internet users while exercising such freedoms, since the superfluously deterrent nature of these damages might unduly hinder them from such a cultural participation protected under the right to take part in cultural life.

5.4. Technological Protection Measures

One of the most controversial aspects of the TPP involves the anti-circumvention provisions, often referred to as the ‘digital lock’ rules. These provisions feature legal protections for technological protection measures (TPMs, a broader

[1385] Ibid para 35.

umbrella that captures digital rights management, or DRM). It has been argued that 'the TPP reflects the policy wishes of the US and its lucrative software, gaming, film and music industries.'[1386]

Before discussing the TPP's TPM rules, it is necessary to understand the US system. The US has complex anti-circumvention regulations in the DMCA.[1387] The DMCA arranges its anti-circumvention provisions along two dimensions. Firstly, it distinguishes between TPMs that 'control access to a work' ('access control') and measures that 'protect rights of the copyright owner' (so-called 'rights control'). Both are protected to differing extents. Protected access controls are defined as TPMs that 'in the ordinary course of [their] operation, require the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.'[1388] Protected rights controls are defined as TPMs that 'in the ordinary course of [their] operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.'[1389] Section 1201(a) (1) of the DMCA contains a general prohibition against circumvention of access controls, the scope of which is very broad since even non-infringing acts of access control circumvention are forbidden.[1390] Circumvention of rights controls is, on the other hand, not prohibited. Section 1201(a)(2) and 1201(b)(1) of the Act contain anti-trafficking provisions that apply to both access- and rights controls and target both devices and services. Acts

[1386] Dennis O. Cohen, 'The Impact of the TPP on Digital Rights Management' (2016) E-Commerce Law and Policy 11.

[1387] 17 USC § 1201-1205.

[1388] 17 USC § 1201(a)(3)(B).

[1389] 17 USC § 1201(b)(2)(B).

[1390] 17 USC § 1201(a)(1)(A).

covered are 'the manufacture, import, offer to the public, provide, or otherwise traffic.' The DMCA therefore prohibits tools that can be used for circumvention purposes based on their primary design or production, regardless of whether they can or will be used for noninfringing purposes. Like the criterion laid down in article 6(2) of the Information Society Directive, however, uncertainty remains regarding the exact meaning of the criterion 'primarily designed or produced.'

A person who circumvents an access-control measure violates § 1201(a)(1)(A) and is subject to the civil remedies of § 1203. If the circumvention is done 'willfully and for purposes of commercial advantage or private financial gain,' the circumventer is subject to the criminal provisions of § 1204. On the other hand, a person who circumvents a rights-control measure does not commit any violation of § 1201, and is not subject to any remedies or penalties under § 1203 and § 1204. Instead, such a circumventer is subject only to liability for copyright infringement under § 501(a). Rights-control measures, like access-control measures, are protected against the manufacture and distribution of devices and technologies that circumvent the measures. Consequently, access controls receive greater protection under the DMCA. Furthermore, the DMCA distinguishes between the actual circumvention of technological protection measures and preparatory activities, in particular the production and distribution of tools that can be used to circumvent such measures. While the DMCA prohibits the actual circumvention and preparatory activities with respect to access control technologies, it only targets preparatory activities with respect to usage control technologies.[1391]

[1391] The following table shows the classification of the prohibited acts in the DMCA.

The type of the prohibited acts in the DMCA	The relevant provisions
Act of circumventing an access control	17 USC 1201 (a)(1)(A)

The anti-circumvention provisions of the DMCA provide both criminal sanctions[1392] and civil remedies.[1393] One of the concessions made to users under the DMCA is the fact that the Act does not prohibit circumvention of rights controls. Apart from this accommodation, the DMCA includes a list of statutory exemptions allowing the circumvention of access control mechanisms. The exemptions are generally very narrowly worded and subject to specific and very detailed criteria. They all relate to the prohibition of circumventing access control mechanisms. Some of them also relate to the prohibition of trafficking in access control circumvention devices[1394] or to the prohibition of trafficking in rights control circumvention devices[1395] or both. The exemptions cover: (i) non-profit libraries, archives and educational institutions so that they can decide whether to acquire a work; (ii) law enforcement, intelligence and other government activities; (iii) reverse engineering of computer programs for the purpose of achieving interoperability with other programs; (iv) encryption research; (v) protection of minors; (vi) circumvention to counterwork the collection by the TPM of personally identifying information; and (vii) security testing.[1396] The DMCA further

Act of circumventing a right control	N/A
Mechanisms that let you circumvent an access control	17 USC 1201 (a)(2)
Mechanisms that let you circumvent a right control	17 USC 1201 (a)(2)

[1392] 17 USC § 1204(a).

[1393] 17 USC § 1203(b).

[1394] 17 USC § 1201(a)(2).

[1395] 17 USC § 1201(b).

[1396] 17 USC § 1201(d) to (j) – also relates to § 1201(a)(2).

provides for an administrative rulemaking procedure by the Librarian of Congress, by which additional exemptions from the prohibition on circumvention can be created.

The DMCA effectively creates a new 'right of access' for rights holders. This right can be used to protect works that are not protected by copyright, provided a protectable material is contained behind the technological 'lock' of a TPM. Thus, for example a phone book which is not protected by copyright can be protected behind a TPM if it contains some protected material.[1397]

The TPP closely tracks the purpose of the DMCA's TPM regime, even using remarkably similar language, although with a slightly different structure. The TPP contains extensive requirements for TPMs that go beyond what is required by the WIPO Internet treaties. Specifically, the TPP requires its member states to create civil liability for the following acts: (a) circumventing a technological measure that controls access to a protected work; or (b) manufacturing, importing, selling, or otherwise

[1397] In the EU, the Information Society Directive, by contrast, contains express provisions prohibiting the circumvention of TPMs that have been applied to copyright works. The relevant prohibitions are set out in Articles 6(1) and 6(2) of the Directive..In the UK, the CDPA 1988 contains three categories of provision dealing with situations in which a person facilitates access to works that the person concerned is not entitled to use or receive. The first category, in sections 296ZA-ZF, relates to the circumvention of effective technological measures applied to copyright works other than computer programs and is designed to implement Article 6 of the Information Society Directive. The second category, which is found in section 296, applies only to computer programs (and intended to implement Article 7(1)(c) of the Software Directive. The third category, in sections 297-299, relates to reception of transmissions. The provision concerning computer programs are less prescriptive than those concerning other works. Following the large schema of the Directive, the CDPA distinguishes between two sorts of objectionable acts: on the one hand, protection is given against the act of circumvention itself; on the other, protection is given against those who make or sell devices that enable circumvention or who supply services that achieve that end.

providing products or services that (i) are marketed for use of circumventing effective technological measures; (ii) have only limited commercially significant use other than to circumvent effective technological measures; or (iii) are designed for the purpose of circumventing effective technological measures.[1398] According to the TPP, circumvention must be a wrong separate from infringement.[1399]

A number of points arise on these provisions concerning the extent of the protection provided and the kinds of technology covered. The first question is what kind of TPMs are covered and what kind of acts are banned. In Article 18.68, an 'effective technological measure' is defined as a device that controls access or protects rights in copyrighted works.[1400] Hence, just as under the DMCA,[1401] the TPP require member states to prevent unauthorised decryption (access control TPMs) and selling or marketing of either decryption devices (access control TPMs) or devices that stop the copy-blockers (right/copy control TPMs) from working.[1402] Likewise, the TPP embraces a broad approach by prohibiting both circumvention and sale/marketing of TPMs. However, a member state can continue to allow mere circumvention of right/copy control TPMs.[1403]

A second issue relates to whether TPP-mandated protection is restricted to technologies used to prevent infringement or designed to cover a broader range of technologies used by copyright holders to control use and access. Kimberlee

[1398] TPP IP Chapter Article 18.68(1).

[1399] Ibid Article 18.68(3).

[1400] Ibid Article 18.68(5).

[1401] 17 U.S.C. § 1201(a)(b).

[1402] Cohen *(n 1385)* 11.

[1403] Weatherall *(n 1319)* 21.

Weatherall suggests that the protection refers to geo-blocking TPMs[1404] – measures used to deny access to content to those outside of a certain geographical region.[1405] She further contends that because it is stated in the TPP that the technologies protected must be used by copyright holders in connection with the exercise of their rights and to restrict unauthorised usage, this statement should be construed as 'allowing exclusion of any technology whose use is unrelated to the exploitation of copyright content.'[1406]

A final question relates to the enforcement of criminal as well as civil liability. The TPP requires member states to create criminal liability for wilful circumvention or trafficking of circumvention of TPMs for the purposes of commercial advantage or financial gain.[1407]

The restrictive approach in the TPP also applies to the creation of anti-circumvention exceptions, although the provision on exceptions is much better than the original proposals which were modelled on the US approach and would have had a fixed list of permissible exceptions and required evidence to justify new exceptions

[1404] Footnote 81 of Article 18.68 brings an exception to allow for devices that overcome region-coding on physical copies of films (ie, DVDs). The footnote is technologically specific, dated, and hence likely useless. It applies only to films (not region-coded video games or other content), and only to physical copies, so the means for circumventing geo-blocking of downloads are not saved.

[1405] Weatherall *(n 1319)* 20-21.

[1406] Weatherall writes that 'access controls on software embedded in another product – whether a printer or garage door opener, or a car or tractor – should be entirely excluded from anti-circumvention law.' See; Ibid 21.

[1407] TPP IP Chapter Article 18.68(1). Note that governments can exempt themselves completely from all anti-circumvention law (footnote 89).

to the circumvention ban.[1408] The TPP explicitly permits its member states to create exceptions for some of the DMCA-mandated categories,[1409] namely non-profit libraries, archives, and educational institutions, as well as museums and public non-commercial broadcasting entities.[1410] However, there is no direct reference to the other exceptions in US law.[1411] They would have to fall under a catch-all exception scheme stated in Article 18.68(4). Under this text, new exceptions can be crafted on a member state's own timetable, via administrative or legislative processes, and do not require 'evidence' as such. It would be entirely permissible under this provision to simply decide appropriate exceptions through a legislative process or through the promulgation of regulations. It is likely that the DMCA's other exceptions are intended to fall under the Article 18.68(4) scheme, but that is not explicit. For that reason, Michael Geist thinks that the TPP may still not allow some flexibilities, such as the Canadian law establishing the possibility of creating a positive requirement on copyright holders to unlock their locked content in case of being entitled to the benefit of any of the limitations.[1412] He argues that Article 18.68(4) is limited to writing

[1408] Wikileaks, 'Secret Trans-Pacific Partnership Agreement (TPP) — IP Chapter' (13 November, 2013), available at https://wikileaks.org/tpp. This approach was seen in the US FTA which has proven to be too inflexible in Australia. Weatherall *(n 1319)* 23.

[1409] 17 U.S.C. § 1201(d).

[1410] TPP IP Chapter Article 18.68(1).

[1411] See 17 U.S.C. § 1201(e), (f), (g), (i), (j) (f). For explanation of these exceptions see; Chapter 3.

[1412] Michael Geist, 'The Trouble with The TPP's Copyright Rules*'* (Canadian Centre for Policy Alternatives) (July 2016) 11, available online at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/07/Trouble_with_TPPs_Copyright_Rules.pdf.

exceptions or limitations on the prohibition against circumvention, and does not include language to allow mandated unlocking.[1413]

Most of the academic literature on the issue points to a negative correlation between TPMs and freedom of expression.[1414] The problem is that TPMs may prevent both illicit and permitted acts.[1415] TPMs may operate to prevent users from reproducing or accessing works for permitted purposes such as scientific research, news reporting and educational and library uses, and can even be used to prevent reproductions of material that is in the public domain.[1416] It has also been noted that TPMs, in their current form, are not flexible enough to effectively accommodate copyright exceptions or freedom of expression considerations.[1417]

Recently, based on a series of interviews with key organisations and individuals involved in the use of copyright material and the development and

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[1413] Ibid.

[1414] Lucie Guibault et al., 'Study on the implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (iVIR, 2007), 133; Patricia Akester, 'The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture' (2010) 32(8) European Intellectual Property Review 376; Patricia Akester, 'The Impact of Digital Rights Management on Freedom of Expression - the First Empirical Assessment' (2010) 41(1) International Review of Intellectual Property and Competition Law 38.

[1415] Akester, 'The impact of digital rights management on freedom of expression - the first empirical assessment' *(n 1413)* 38.

[1416] Lee *(n 687)* 182.

[1417] Jacques De Werra, 'Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions' (2003) 25 Columbia Journal of Law & the Arts 251-252; Patricia Akester and R. Akester, 'Digital Rights Management in the 21st Century' (2006) 28(3) European Intellectual Property Review 161-162.

deployment of TPMs, Patricia Akester carried out an empirical study on the effects of TPMs on freedom of expression.[1418] She found that certain permitted acts - particularly certain beneficiaries of exceptions, such as the British Library, film lecturers and the students/researchers community - have been adversely affected; and this adverse effect has occurred notwithstanding the existence of technological solutions (enabling partitioning and authentication of users) to accommodate those permitted acts.[1419] The difficulty with these technological overrides, as Akester highlights, is that they provide copyright holders with additional technological and legal tools for the protection of their interests in the digital environment, without being counterbalanced by equivalent tools for the protection of the public's access to information and works.[1420] Lack of an adequate exceptions scheme to anti-circumvention rules, which could be at least similar to exceptions already found in substantive copyright law, significantly undermines certain users' right to utilise fair use or dealing principles in copyright in anti-circumvention. This disproportionately limits users' right to freedom of expression, specifically the right to receive and seek information.

Likewise, it is stated in General Comment No 21 that 'States parties should not prevent migrants from maintaining their cultural links with their countries of origin.'[1421] Immigrant families may need access to DVDs from their home countries to

[1418] Akester, 'The impact of digital rights management on freedom of expression - the first empirical assessment' *(n 1413)* 31-58.

[1419] Ibid 38-41.

[1420] Akester, 'The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture' *(n 1413)* 377-378.

[1421] General Comment No 21 para 34.

help teach their children their native language and culture.[1422] Relying on this general comment, Peter Yu makes a convincing case that region codes, one type of TPMs, can restrict the right to participate in cultural life. He argues that 'DVD region codes threaten to take away an individual's 'cultural choice,'' since the inability to access lawfully purchased material that is not coded to play in one's home jurisdiction represents a direct restriction to the right to access to cultural life and information.[1423] For Yu, when this happens, states may have the obligation to regulate the private sector to ensure such violations do not occur.[1424] Indeed, a study in 2011 by the British Film Institute estimated that more than a billion films are watched on DVD or Blu-ray in the UK per year.[1425] Although this estimate does not give the scale of the restriction deriving from region coding, it does certainly give an idea of the magnitude of the market and how severe the effects of such technological restrictions can be on the relevant market.

TPMs also adversely affect access to the public domain. TPMs do not expire when the term of copyright protection expires, thus they lock up the content perpetually through enforcing criminal or civil liabilities or through using technological measures. Thus, digital content in the public domain becomes inaccessible to future generations. This outcome will create damaging gaps in the cultural and scientific record. Those works may themselves then be subject to new rights, but that is a benefit not a burden of a rich public domain. Similarly, public domain content which is digitised and repackaged within commercial materials becomes subject to contract. In most

[1422] Yu *(n 983)* 226-227.

[1423] Ibid 228-229.

[1424] Ibid 229.

[1425] See; British Film Institute *(n 922)* 15-16.

countries licences and contracts are allowed to override copyright exceptions and limitations. If such content is prevented by contractual terms from being re-digitised and made available in an open access repository such as those that will be created through public programmes, it again risks being locked up perpetually by the TPMs that enforce the licence terms. The protection of TPMs thus have serious and detrimental effects on the preservation of cultural and scientific heritage in digital form. Consequently, these enforcement measures disregard the Internet users' right to the public domain which is protected under the right of access to and enjoyment of cultural heritage.[1426]

Several recommendations have been put forward to alleviate these concerns. Most important among those are making copyright exceptions mandatory, limiting the circumvention of TPMs to circumvention that is carried out for the purposes of infringing copyright, revising the scope of anti-circumvention laws – either through amending the law itself or through the application of the fair use-like doctrine even though such circumvention would not give rise to copyright infringement, such as where the work is in the public domain or where the user seeks to make a legitimate use of the work.[1427] It must, however, be noted that although these suggestions might lead the aforementioned problems to be solved to some degree, they might fall short of accommodating all requirements of cultural human rights and freedoms discussed in this thesis, as their application is unlikely to fully reflect all contours of those human rights.

[1426] General Comment No 21 para 50 and UNHRC, 'Report of the Independent Expert in the field of Cultural Rights on the issue of cultural heritage' *(n 602)* para 58.

[1427] Lee *(n 687)* 184-188.

In short, since the TPP requires similar provisions as US law as explained in Chapter 6,[1428] human rights concerns described there apply here as well.

5.5. Internet Service Providers' Liability

Among copyright protection obligations, the establishment of an internet service providers' (ISP) exemption from secondary liability stemming from copyright infringement - commonly known as a notice-and-takedown system - is another major issue in the TPP Agreement. Largely advocated by the US and other notice-and-takedown proponent nations,[1429] the TPP's notice-and-takedown system would allow an ISP to limit its secondary liability for unknowingly hosting content infringing a content owner's copyright when such an ISP removes such content upon the right holder's notification of alleged infringement.[1430] However, the goals of the US and Canadian governments in the negotiations were clear from the beginning: the U.S. wished to export the notice-and-takedown system in its DMCA to the rest of the TPP countries, while Canada wanted to preserve its newly created notice-and-notice system.[1431]

The TPP agreement provides a notice and takedown system as found in the DMCA with particular ambiguities, differences and omissions. The TPP's broad and

[1428] See Chapter 6, Case Study 2.

[1429] The US, Australia, and Singapore were reported to advocate the inclusion of the TPP's notice and takedown system based on leaks of the TPP IP Chapter negotiations released by Wikileaks. See; Wikileaks *(n 1427)*.

[1430] TPP IP Chapter Article 18.82(1).

[1431] Geist (*n 1411)* 12.

functionally-driven definition of 'Internet Service Provider' aligns with the DMCA.[1432] The TPP, like the DMCA, provides a safe harbour framework pursuant to which ISPs can escape liability for users' infringements by promptly removing or disabling access to allegedly infringing material upon acquiring knowledge of the material's existence on their systems.[1433] According to the TPP, such a safe harbour framework must include 'legal incentives'[1434] for ISPs to co-operate with copyright holders to deter the unauthorised storage and transmission of copyright-protected works, in exchange for precluding monetary relief for such ISPs hosting, storing and linking to infringing content.[1435] Thus, the legal benefits of the safe harbour (non-liability for money damages)[1436] and the covered technical functions (routing, caching, storage/hosting, linking)[1437] are the same.

As under the DMCA, the knowledge of infringement under the TPP can come from a copyright holder's notice of infringement or from another source, including 'red flags' of infringement.[1438] The TPP, like the DMCA, includes a no-duty-to-monitor rule that prohibits member states from conditioning safe harbour on an ISP's affirmatively monitoring its service for infringement.[1439] Again like the DMCA, the TPP requires

[1432] TPP IP Chapter Article 18.81.

[1433] Ibid Article 18.82(1), section 1.

[1434] 'Legal Incentives' are defined in the TPP Agreement as taking 'different forms'. See Ibid Article 18.82, section 1(a), n 149.

[1435] Ibid Article 18.82(1), section 1(a)(b).

[1436] Ibid.

[1437] Ibid Article 18.82(2).

[1438] Ibid Article 18.82(3).

[1439] Ibid Article 18.82(6).

member states to provide a judicial process by which a copyright holder can compel an ISP to identify an alleged infringer who is the ISP's customer.[1440]

Further, the TPP provides two specific exemptions from adopting the notice-and-takedown system based on two TPP member states' existing ISP safe harbour systems. First, the TPP permits Canada to maintain its alternative ISP copyright safe harbour system, subject to specific requirements. Unlike the US system, Canada adopted an ISP safe harbour system on 2 January, 2015, in which a Canadian ISP may qualify for a safe harbour for secondary liability for hosting infringing content by simply notifying their subscriber of the alleged infringing conduct instead of removing such content.[1441] This has been commonly referred as a notice-and-notice system.[1442]

In addition to Canada's notice-and-notice system exception, the TPP permits Chile to maintain its existing ISP safe harbour.[1443] Having rejected a strictly extrajudicial notice-and-takedown system in the US-Chile FTA,[1444] Chile has since adopted an expedited judicial-based ISP safe harbour where a copyright holder may submit an expedited judicial takedown petition to a court against a Chilean-based ISP to evaluate the alleged infringement of the copyright holder's works and obtain an

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[1440] Ibid Article 18.82(7).

[1441] Copyright Act 2012 (Can) ss 41.25–41.26 (Canadian Copyright Act).

[1442] Under the TPP, a Member State is not required to adopt the TPP's notice and takedown system if the TPP Member State had enacted legislation, such as Canada prior to the signing of the Agreement. See Annex 18-E of the TPP Copyright Chapter. However, since that date is now long passed (October 4, 2015), no other TPP country can implement the notice-and-notice system to meet its TPP obligations.

[1443] See TPP IP Chapter Annex 18-F.

[1444] See US-Chile Free Trade Agreement Chapter 17, Article 23(e), available online at https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file912_4011.pdf.

injunctive takedown order against the ISP.[1445] The other TPP countries may also utilise this exemption. To qualify for this exemption, the TPP provides that a TPP member state may simply implement Chile's expedited judicial ISP safe harbour system as detailed in the US-Chile FTA (expedited judicial system exemption).[1446] However, unlike the TPP's notice-and-notice system exemption, the expedited judicial system exemption provides no deadlines or additional requirements on any TPP member state in order to qualify.[1447]

The TPP expands notice-and-takedown systems to several new jurisdictions. Currently, five TPP member states, namely, Brunei Darussalam, Mexico, New Zealand, Peru and Vietnam, do not have notice-and-takedown systems enacted in their own legislation.[1448] These countries' potential adoption of the TPP's notice-and-takedown system could ultimately enhance copyright holders' ability to extra-judicially enforce rights to their works online in several new jurisdictions. Taken together, due to these similarities between the US DMCA and the TPP, the concerns in relation to the notice-and-takedown systems' negative impact on cultural freedoms, as mentioned in Chapter 3,[1449] are also applicable to the TPP.

[1445] See US-Chile Free Trade Agreement Chapter 17, Article 23(e), Law No: 20.435 (amending Law No:17.336 on Intellectual Property), 4 May 2010, Article 85R, http://www.wipo.int/wipolex/en/text.jsp?file_id=270205 .

[1446] See TPP IP Chapter Annex 18-F.

[1447] Ibid.

[1448] Lucas S. Michels, 'The Effectiveness of the Trans Pacific Partnership's Internet Service Provider Copyright Safe Harbour Scheme' (2016) 38(7) European Intellectual Property Review 412.

[1449] See Chapter 3 section 3.6.

Nevertheless, as Annemarie Bridy points out, the TPP is 'less speech-protective and more prone to over-enforcement and abuse.'[1450] For example, the TPP, unlike the DMCA, made it optional for member states to include a counter-notice and put-back system that would allow users to effectively challenge claims of infringement by requiring providers to re-post their content.[1451] An ISP in the US must provide both notice-and-takedown and counter-notice and put-back systems to completely avoid liability. Under the DMCA, potential abuse of notice-and-takedown by copyright holders is structurally controlled and balanced by the counter-notices system. The same is not necessarily the case for ISPs based in TPP member states, because the TPP's counter-notice protocol is not compulsory. Without a system of counter-notices, users are left without any protection for having wrongfully removed material subsequently restored.[1452]

Moreover, the TPP has fewer requirements for the contents of takedown notices as compared to the DMCA, with no requirement for copyright holders to include their good faith belief that the content in the notice infringes copyright. The TPP requires that notices contain only the identity of the work allegedly infringed, the location of the allegedly infringing material on the ISP's system, and 'sufficient indicia of reliability with respect to the authority of the person sending the notice.'[1453] The DMCA's required statement of a good faith belief provides a safeguard against abusive takedown notices that wrongfully target non-infringing or fairly used material.

[1450] Annemarie Bridy, 'A User-Focused Commentary on the Trans Pacific Partnership ISP Safe Harbors' (November 23, 2015) InfoJustice (http://infojustice.org/archives/35402/.

[1451] TPP IP Chapter Article 18.82(4).

[1452] Bridy *(n 1449)*.

[1453] TPP IP Chapter Article 18.82(3), n 157.

The absence of a good faith belief requirement is a major omission given that it has also played a role in litigation in the US where some copyright holders have misused the notice-and-takedown system. The Ninth Circuit's recent judgement in *Lenz v Universal*[1454] demonstrates how the DMCA's required statement of a good faith belief obliges copyright holders to act more responsibly.[1455] In *Lenz*, the court construed the DMCA's 'good faith belief' requirement to refer that notice senders must consider fair use before claiming that copyright-protected material be taken down. The court essentially held that a notice sender cannot form and affirm bearing a good faith belief that material is infringing without having first considered whether unauthorised use of the material was lawful as fair use or under some other copyright exception.[1456] The TPP exempts ISPs from liability for wrongful removals if they act in good faith in response to notices,[1457] but does not require copyright holders to attest that they are sending notices in good faith.

With regard to the relief available for users in cases involving takedown abuse, the TPP requires the adoption of monetary remedies for knowing material misrepresentation in takedown notices.[1458] Unlike the DMCA, however, the TPP does not have an express provision for the recovery of attorney's fees and litigation costs in such cases. Without such a provision, the prospect of user claimants to bring cases

[1454] 801 F 3d 1126 (2015).

[1455] For an academic commentary see; Marc J. Randazza, 'Lenz v. Universal: A Call to Reform Section 512(f) of the DMCA and to Strengthen Fair Use' (2016) 18(4) Vanderbilt Journal of Entertainment & Technology Law 743-782.

[1456] *Lenz (n 1453)*.

[1457] TPP IP Chapter Article 18.82(3)(b).

[1458] Ibid Article 18.82(5).

against abusive takedowns is, for all intents and purposes, foreclosed.[1459] Astonishingly, while the TPP requires member states to adopt statutory or exemplary damages for copyright claimants,[1460] it has no corresponding provision requiring that such damages be made available to user claimants in abusive takedown cases. Lacking enhanced damages to challenge abusive takedown practices, the TPP mirrors a recognised deficiency in the DMCA. User litigation against abusive notice-sending is exceedingly rare even under the more user-oriented provisions of the DMCA. It seems that it will be much rarer in countries that do not take further steps to discourage takedown abuse than the TPP minimally requires.

The TPP, on the other hand, lacks a provision requiring member states to condition safe harbour on an ISP's adoption and implementation of a policy to terminate the account of the so-called repeat infringers. This is one important respect which renders the TPP potentially more user-friendly and more freedom-of-expression-protective than the DMCA. Repeat infringer rules are especially problematic in notice-based enforcement regimes that lack a convenient means for users to contest notices that they believe are mistaken or abusive.

Ironically, the immigration of the most part of the DMCA notice-and-takedown system within the TPP came out when the US Copyright Office undertook a public study of the notice-and-takedown system's costs and burdens on copyright holders, ISPs, and the general public.[1461] One significant risk is that the TPP's approach may

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[1459] Bridy *(n 1449).*

[1460] TPP IP Chapter Article 18.74.

[1461] US, Federal Register, Section 512 Study: Notice and Request for Public Comment, Copyright Office, 2015 www.federalregister.gov/articles/2015/12/31/2015-32973/section-512-study-noticeand-request-for-public-comment.

mandate a particular enforcement model that would limit domestic reforms which would represent an enormous problem for all stakeholders, regardless of their perspective. Perhaps the most telling provision in this sense is Article 18.82(9), which states, 'The Parties recognize the importance, in implementing their obligations under this Article, of taking into account the impacts on right holders and Internet Service Providers.'[1462] There is no reference to users or the general public, as if those impacts simply do not matter. Consideration of potential impact on Internet users was apparently not a high priority for the TPP's negotiators. This reflects the TPP negotiating approach in which the broader public is not even an afterthought.

Thus, due to the high rate of falsely taking lawful material down from the Internet (as explained in Chapter 3[1463]), lack of compulsory counter-notice and put-back safeguards and litigation costs rules (lack of procedural fairness), and the absence of a good faith belief requirement, it is arguable that the TPP-mandated notice-and-take down mechanism is another disproportionate restriction on users' cultural freedoms which are nominally protected by the right to take part in cultural life and the right to freedom of expression.

5.6. The Extension of Criminal Liability

The provisions on criminal enforcement are one of the most problematic parts of the Agreement. In fact, the TPP reflects one of the persistent tendencies in international law-making, *i.e.* to strengthen criminal enforcement of intellectual

[1462] TPP IP Chapter Article 18.82(9).

[1463] See Chapter 3 section 3.2.6.2.

property rights.[1464] The Agreement dedicates Article 18.77 to criminal enforcement, which includes provisions on the 'general scope of criminal liability for counterfeiting and piracy,'[1465] 'camcording,'[1466] 'aiding and abetting,'[1467] 'criminal penalties: fines and imprisonment,'[1468] 'criminal remedies: seizure,'[1469] '*ex officio* criminal prosecution'[1470] and 'proceeds of crime'.[1471] The following section is dedicated to the legal framework for criminal enforcement in the TPP, concentrating on the most problematic aspects: 1) the definition of criminal offences, which sets the standard and preconditions for the application of all the provisions that follow; 2) the form and severity of penalty; and 3) the secondary or aiding/abetting liability.

Article 18.77 of the TPP rewrites international copyright law relating to criminal enforcement. The main thrust of this change is the lack of clarity in its provisions on individual criminalisation, namely the definition of 'commercial scale'. In essence, the TPP text provides a legal ground to backdoor the decision of the WTO Panel in *China – US Enforcement.*[1472] It is a step in the US effort to invalidate the effect of this decision

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[1464] See; Michael Blakeney, 'International Proposals for the Criminal Enforcement of Intellectual Property Rights: International Concern with Counterfeiting and Piracy' (2009) Intellectual Property Quarterly 1-2.

[1465] TPP IP Chapter Article 18.77(1)(2)(3).

[1466] Ibid Article 18.77(4). Recording films in theatres is criminalised.

[1467] Ibid Article 18.77(5).

[1468] Ibid Article 18.77(6)(a)(b).

[1469] Ibid Article 18.77(6)(c)(d)(e)(f).

[1470] Ibid Article 18.77(6)(g).

[1471] Ibid Article 18.77(7).

[1472] WTO Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*—Report of the Panel, WTO Doc WT/DS362/R (26 January 2009), [4.749]. For

and to curtail the discretion recognised for states in the adoption of criminal enforcement measures.

Article 61 of the TRIPs Agreement only requires criminalisation of wilful copyright piracy on a commercial scale. The US brought a complaint alleging that China failed to "provide for criminal procedures and penalties to be applied" in some cases of copyright piracy on a commercial scale, as required by Article 61. The main disagreement in the case was related to the meaning of 'commercial scale' in Article 61 of TRIPs.

The US argued that an infringement occurs on a 'commercial scale': 1) where an entity or person engages in commercial activities in order to make a 'financial return' in the marketplace; or 2) where an entity or person's actions, regardless of motive or purpose, have a sufficient extent or magnitude to qualify as 'commercial scale' in the relevant market.[1473] In other words, according to the US, even infringement occurring

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academic commentaries, see; Rogier Creemers, 'The Effects of World Trade Organization Case DS362 on Audiovisual Media Piracy in China' (2009) European Intellectual Property Review 568-577; Hong Xue, 'Enforcement for Development: Why Not an Agenda for the Developing World?' in Xuan Li and Carlos M. Correa (eds), *Intellectual Property Enforcement, International Perspectives* (Edward Elgar Publishing, 2009) 133-157; Hong Xue, 'An Anatomical Study of the United States Versus China at the World Trade Organization on Intellectual Property Enforcement' (2009) 31 European Intellectual Property Review 292; Daniel Gervais, 'China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights' (2009) 103 American Journal of International Law 549-555; Ruse-Khan *(n 1281)* 171-190; Peter K. Yu, 'Shaping Chinese Criminal Enforcement Norms Through the TRIPS Agreement' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property* (Edward Elgar Publishing, 2012) 286-309; Peter K. Yu, 'The TRIPS Enforcement Dispute' (2010) 89 Nebraska Law Review 1046-1131.

[1473] WTO Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 97 [7.480].

in small quantities would be on a 'commercial scale' if done for a commercial purpose. Commercial scale is also presumed to exist where an infringement is sufficient to have a significant impact on the copyright holder's markets.[1474] The US also recognised that some activity would be of trivial character so as not to be 'on a commercial scale', especially, incidental infringing acts of a purely personal nature carried out by consumers, or the sale of trivial volumes for trivial amounts.[1475]

China, on the other hand, argued that the phrase 'commercial scale' needed to be read together, and required criminal penalties only where there was a significant magnitude of infringement activity. China also argued strongly that the standard was a broad one, subject to national discretion and local conditions.[1476]

The WTO Panel rejected the US argument which concentrated entirely on the commercial nature of the activity. It emphasised that the TRIPs mentions the concept of 'commercial purposes' elsewhere in the agreement. The Panel further noted that '[i]f "commercial" is simply read as a qualitative term, referring to all acts pertaining to, or bearing on commerce, this would leave the word "scale" out of the text.'[1477] Consequently, it found that '[s]uch an interpretation fails to give meaning to all the terms used in the treaty and is inconsistent with the rule of effective treaty interpretation.'[1478] Commercial scale, therefore, must not only refer to the quality of

[1474] Weatherall *(n 1370)* 48.

[1475] WTO Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 97 [7.480].

[1476] Ibid, 98 [7.481]

[1477] Ibid [7.538].

[1478] Ibid.

being commercial or occurring in a commercial context, but also to the quantitative nature of an infringing act.

The Panel adopted a cautious interpretation of the concept of 'commercial scale', explaining that this referred 'to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market.'[1479] Thus, the Panel held that 'commercial scale' should take into account the circumstances of the case and the available evidence of commerciality, and added that the interpretation of the scope of the obligation depended on the nature of the product, on the market in question, as well as on the scale of the infringements.[1480]

The TPP text embraces the most extreme form of the rejected US argument utilised in the WTO dispute with China. It substantially broadens the meaning by shifting the emphasis from buying and on acts done for commercial advantage - which are not necessarily acts related to buying or selling. This seems far less flexible than the quantitative and market/product based interpretation of the WTO Panel.

Footnote 89 is relevant here. It states that 'a Party may treat "financial gain" as "commercial purposes"', which means that criminal liability must be applied to acts for commercial advantage or for commercial purposes.[1481] This softens the excessive

[1479] Ibid, para. 7.577.

[1480] Christophe Geiger, 'The Rise of Criminal Enforcement of Intellectual Property Rights . . . and Its Failure in the Context of Copyright Infringements on the Internet' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (CUP, 2014) 119.

[1481] Weatherall *(n 1370)* 49.

language, as 'financial gain' could arise even in non-commercial contexts.[1482] Such acts would not amount to being criminal under the TPP text.

Under the TPP, acts where profit directly derives from the infringement, or where the infringement is at the centre of a money-making enterprise or preparatory to a commercial act (e.g. camcording that moves into sale) would require criminal liability. However, Kimberlee Weatherall finds the implementation of the provision questionable for the acts (which might potentially be within the literal scope of the TPP text): 1) 'where infringement is part of a commercial object but not its primary object: eg an infringing photo included in the commercially published book'; 2) 'where infringement is part of commercial activity but perhaps not the object of that commercial activity: eg an infringing photo used in promotional material for tourism services'; 3) 'where infringement occurs in the course of commerce but does not contribute to commercial activity or profit: eg an employee infringes copyright in the course of their employment but not in any way that contributes to the commercial enterprise (they share a funny photograph in an employee newsletter).'[1483]

It is, in fact, unclear whether infringing acts with indirect commercial advantage (1,2) and within commercial activity without commercial purpose and advantage (3) would lead to criminal liability. This broad definition is highly problematic with regard to the principle of legal certainty and the legality of criminal offences.

Another concern derives from the type and severity of penalties in criminal liability. In terms of the international framework, the key change that the TPP introduces is the requirement of *both* fines *and* imprisonment rather than having these

[1482] For example, if a person copies a friend's CD and in doing so avoids buying the CD themselves, arguably they have made a copy 'for financial gain'.

[1483] Weatherall *(n 1370)* 49-50.

as options.[1484] It would be for a member state to decide what kinds of offences would constitute 'crimes of a corresponding gravity' depending on priorities within their criminal justice system. It would equally be open to a state to connect the size of the fine or length of the prison term to the value of goods infringed. Likewise, it is important to note that there is nothing in the TPP text that actually provides the length of the prison term or the level of the fine, provided that it is 'sufficient' to act as a deterrent.

The final questionable aspect is related to the creation of new penalties for 'aiding and abetting' intellectual property infringement.[1485] The TPP text disproportionately extends liability to aiding and abetting and allows legal persons to be criminally liable without prejudice to the criminal liability of the natural persons involved in the offences. It fails to clarify which acts fall into this category of secondary criminal liability. It has been noted that the kind of extension of criminal liability may also include 'companies such as Google or Facebook, for infringement by their members.'[1486] In fact, this is a real threat for online intermediaries, as the US government has charged online intermediaries with both direct criminal infringement and aiding and abetting criminal infringement.[1487]

[1484] Article 61 of the TRIPs Agreement allows a country to focus on one form of penalty as possible alternatives for a country to implement.

[1485] TPP IP Enforcement Chapter Article 18.77(5).

[1486] Margot E. Kaminski, 'An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement (ACTA)' (2011) 21(3) Albany Law Journal of Science and Technology 408–409.

[1487] Mike Masnick, 'Website Censored by Feds Takes Up Lamar Smith's Challenge: Here's Your 'Hypothetical'' TECHDIRT (January 10, 2012), available at http://www.techdirt.com/articles/20120110/11395317367/website-censored-feds-takes-up-lamarsmiths-challenge-heres-your-hypothetical.shtml. Most famously, the US charged Kim Dotcom and his associates with both direct criminal copyright infringement and accomplice liability, and forfeited

As Weatherall underlines, the TPP text is not clear for some circumstances in which the 'commercial scale' criterion is met. Likewise, no bottom and top thresholds of the sanctions are determined in the treaty. Furthermore, the TPP text does not prescribe acts which would amount to aiding and abetting. Therefore, as the TPP is not sufficiently clear in relation to these three circumstances to afford individuals an adequate indication of the circumstances where, and the conditions upon which, state authorities would apply criminal liability, the TPP arguably fails to satisfy the 'prescribed by law' (foreseeability, transparency and clarity) principle(s) in international human rights law, as previously outlined.[1488]

As a consequence of increasing penalties and expansive criminal enforcement mechanisms, the TPP's copyright regime also raises substantial disproportionate consequences for cultural human rights and freedoms. The criminal enforcement regime can be overbroad, can result in collateral censorship, can give rise to chilling effects, and can allow for prior restraints on cultural freedoms. In fact, in both 2011 and 2012, the Special Rapporteur La Rue expressed deep concern over

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their domain names. See Drew Olanoff, 'Here's the Full 72 Page Megaupload DOJ Indictment' THENEXTWEB (January 20, 2012), available at http://thenextweb.com/insider/2012/01/20/heres-the-full-72-page-megaupload-doj-indictment/. The UK. citizen Richard O'Dwyer was also charged with both conspiracy to commit copyright infringement, and criminal copyright infringement, for owning and operating TVShack.net and TVShack.cc. Both domain names were seized. See; Complaint, *United States v O'Dwyer*, No. 10 Mag. 2471 (S.D.N.Y. Nov. 5, 2010), available at http://www.scribd.com/doc/100259020/U-S-v-O-Dwyer-SDNY-1-SealedComplaint. Also see; 'Richard O'Dwyer 'Happy' U.S. Copyright Case Is Over' BBC NEWS (December. 6, 2012), available at http://www.bbc.co.uk/news/uk-england-20636626.

[1488] See Chapter 2 sections 2.4.2. and 2.4.4.

the criminalisation of online expression.[1489] The 2011 Special Rapporteur's report states that '[i]mprisoning individuals for seeking, receiving and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under [A]rticle 19 [of the ICCPR].'[1490] Indeed, criminalisation is problematic as an enforcement method since a state's restriction "must be proven as necessary and the least restrictive means required to achieve the purported aim."[1491]

There are at least four distinct constraints on cultural human rights and freedoms deriving from enforcing a standard for criminal copyright infringement that extends broadly enough to include non-commercial personal use. The first is related to process aspects of cultural freedoms: the TPP's criminal copyright enforcement measures have no protection from prior restraints; therefore, the government can use these measures to close digital platforms down *ex parte* and before trial.[1492] For instance, in the name of criminal copyright enforcement, the US has used pre-

[1489] UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 7th Session UN Doc A/HRC/17/27 (16 May 2011) (Frank La Rue) para 34; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 20th session UN Doc A/HRC/20/17 (4 June 2012) (by Frank La Rue) para 73 [hereinafter La Rue 2012] (referencing report A/66/290).

[1490] UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' 7th Session UN Doc A/HRC/17/27 (16 May 2011) (Frank La Rue) para 36.

[1491] Ibid para 69.

[1492] Mark A. Lemley and Eugene Volokh, 'Freedom of Speech and Injunctions in Intellectual Property Cases' (1998) 48(2) Duke Law Journal 158–169; Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 Yale Law Journal 553–555 (identifying other examples of speech protective limits of copyright).

indictment measures to seize the domain names of websites prior to trial.[1493] This is due to the combination of a low underlying criminal copyright standard and a lack of well-established constitutional scrutiny.[1494] The low standard of criminal infringement sets an equally low bar for the government's ability to obtain a warrant to seize an entire website domain.[1495] Such an action implicates the cultural rights of more than the accused; it also censors all other users who participate in cultural life or express their opinions or share cultural artefacts through the website, regardless of whether they are copyright infringers. This leads to the identical disproportionate restrictions on cultural human rights and freedoms that are affected by website blocking injunctions discussed in Chapter 3.[1496]

Since public interest objectives are central to criminal law, it is questionable whether 'commercial scale', a mainly economic concept based on a market approach, is the right criterion to decide what should be criminalised or not.[1497] As Christophe

[1493] See, *e.g.*, Mike Masnick, 'Breaking News: Feds Falsely Censor Popular Blog for over a Year, Deny All Due Process, Hide All Details . . .' TECHDIRT (December 8, 2011), available at http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censorpopular-blog-over-year-deny-all-due-process-hide-all-details.shtml.

[1494] Timothy B. Lee, 'How the Criminalization of Copyright Threatens Innovation and the Rule of Law' in Jerry Brito (ed), *Copyright Unbalanced: From Incentive to Excess* (2012) 55-74.

[1495] Margot E. Kaminski, 'Copyright Crime and Punishment: The First Amendment's Proportionality Problem' (2014) 73 Maryland Law Review 615.

[1496] See Chapter 3 sections 3.5. and 3.6.

[1497] Andrea Wechsler, 'Criminal Enforcement of Intellectual Property Law: An Economic Approach' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2012) 150: 'The solution of policy questions in the realm of the criminal enforcement of IP law requires not only regard to economic evidence but appropriate

Geiger questions, '[i]s it really appropriate that intellectual property legislation treats equally an Internet user who illegally downloads music files from the Internet and the activities of often mafia-like organisations that mass-produce counterfeit medicines involving major risks to public health?'[1498] Most national laws contemplate the same penalty for all types of infringement, no matter if it is the result of a single illegal download or of a more dangerous activity.[1499] In the Max Planck Institute's commentary on the unsuccessful Directive proposal on criminal enforcement in the EU, it was proposed that criminal enforcement should apply only 'to acts that are particularly dangerous from the viewpoint of public interest' and be used 'to regulate specific forms of IP infringement falling into that category separately.'[1500] Imposing differentiated penalties for those infringements that cause dramatic financial losses for the copyright holders and detrimental consequences in terms of innovation or that are carried out in the form of organised crime while decriminalising those that carry no significant harm seems more appropriate.

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consideration for moral, philosophical, sociological, and historical dimensions as Beccaria's statement of 1764 still holds true today: "The true measure of crimes is the harm done to society."'

[1498] Christophe Geiger, 'Of ACTA, "Pirates" and Organized Criminality – How "Criminal" Should the Enforcement of Intellectual Property Be?' (2010) 41 International Review of Intellectual Property and Competition Law 629.

[1499] Geiger *(n 1479)* 131.

[1500] Reto M. Hilty, Annette Kur and Alexander Peukert, 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and of the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights' (2006) 37(8) International Review of Intellectual Property and Competition Law 970-977.

The second restriction is collateral censorship. When governments go after the intermediaries, as the US has already done through criminal copyright enforcement, intermediaries often become overcautious and censor many lawful activities of Internet users.[1501] Likewise, overcriminalisation steers intermediaries into less transparent private ordering regimes with less due process for Internet users, which promotes privatised censorship.[1502] This would arguably create similar disproportional constraints on cultural human rights and freedoms that are affected by intermediary liability regimes discussed in Chapter 3[1503] and in this chapter.[1504]

The third is that criminalising low-level infringement impinges on an Internet user's right to receive information[1505] and right to access cultural life.[1506] While the right to receive information is linked to a right to personal intellectual breathing space,[1507] access is the right to 'know and understand his or her own culture and that of others through education and information', to 'receive quality education and training with due regard for cultural identity', to 'learn about forms of expression and dissemination through any technical medium of information or communication', and to 'benefit from

[1501] Kaminski *(n 1494)* 615-616.

[1502] Derek Bambauer, 'Orwell's Armchair' (2012) 79(3) The University of Chicago Law Review 863-944, 867–68.

[1503] See Chapter 3 sections 3.2.-3.6.

[1504] See above section 5.5.

[1505] Julie E. Cohen, 'A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace' (1996) 28 Connecticut Law Review 981.

[1506] Caterina Sganga, 'Right to Culture and Copyright: Participation and Access' in Geiger *(n 123)* 573.

[1507] Jed Rubenfeld, 'The Freedom of Imagination: Copyright's Constitutionality' (2002) 112 Yale Law Journal 34-35.

the cultural heritage and the creation of other individuals and communities.'[1508] Criminalising a *de minimis* level of infringement allows the state —in addition to private actors— to examine, monitor and oftentimes seize or block any content a user might have.[1509] Such criminal copyright enforcement, often used in US laws as a justification for state surveillance or network management,[1510] would contradict these two fundamental rights.

Lastly, it might be argued that these examples constitute 'scaremongering'[1511]; and that, for example, prosecutorial discretion can be counted on to ensure that trivial infringements are not prosecuted. However, the presence of criminal provisions can still have a chilling effect on cultural human rights and freedoms. An ambiguous statute designates 'basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'[1512] Broad criminal liability provisions have the identical practical outcomes. Everyone might become a criminal due to a trivial copyright infringement. The state can choose whom to prosecute at will. This discretion allows states to

[1508] General Comment no. 21, para. 15(b).

[1509] For a discussion of digital monitoring of individual reading habits for purposes of so-called 'copyright management' in cyberspace see; Cohen *(n 1504)* 981; for a discussion of the proper balance between ISP surveillance and user privacy see also; Paul Ohm, 'The Rise and Fall of Invasive ISP Surveillance' (2009) 5 University of Illinois Law Review 1452-1477.

[1510] Kaminski *(n 1494)* 617.

[1511] Weatherall *(n 1370)* 50.

[1512] *Grayned v City of Rockford* 408 U.S. 104, 108–09 (1972).

prosecute citizens for copyright infringement as punishment for other behaviour or expression that they cannot otherwise prosecute.[1513]

Why the intensity of the criminal prosecution? This can only be answered by understanding the new political economy of the information age. Criminal liability can be used to pressure individuals and could have serious implications. Thus, a low criminal standard permits arbitrary enforcement, which can be used to punish other kinds of cultural participation and expressions that the government does not like, and can cause chilling effects on cultural rights.

Consequently, it is arguable that the TPP's criminal copyright liability provisions represent a disproportionate restriction to the right to access cultural life and the right to freedom of expression.

5.7. Hypothetical Impacts of the TPP on Cultural Human Rights and Freedoms

From the previous discussion, an important next step is to summarise the hypothetical impact of the TPP on cultural human rights and freedoms. These hypothetical impacts should cover both positive and negative impacts on state

[1513] In the US, for instance, the prosecution of Aaron Swartz under the extremely broad Computer Fraud and Abuse Act ('CFAA') was viewed by many as retribution for his involvement in the Stop Online Privacy Act ('SOPA') protests (Jacob Sloan, 'Did the Government Target Aaron Swartz over His Role in Defeating SOPA?' DISINFORMATION (January 28, 2013), available at http://www.disinfo.com/2013/01/did-the-governmenttarget-aaron-swartz-over-his-role-in-defeating-sopa). Also see;Debora Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in A Globalized World* (Routledge, 2014) 1-2.

capacity to ensure cultural human rights and on individuals' enjoyment of human rights, as well as the impact of the process underlying negotiation of the TPP on human rights norms and principles such as the principles of participation or of non-discrimination. From a review of the considerable academic literature on the impact of trade on human rights,[1514] it is possible to identify six hypothetical impacts of the TPP on human rights as follows:

1. *The TPP complements cultural human rights and freedoms*: Either (a) the TRIPS-plus provisions of the TPP might strengthen the right to the protection of the moral and material interests of authors, including through the provision of a right to a remedy in the case of a breach; or (b) these provisions might promote production of cultural works in member states by giving incentives in the form of copyright protection and have a positive impact on creativity, thus improving participation in cultural life and freedom of expression.

2. *The TPP affects the capacity of the member states to respect, protect and fulfil the right to take part in cultural life and the right to freedom of*

[1514] Simon Walker, 'The United States –Dominican Republic – Central American Free Trade Agreement and Access to Medicines in Costa Rica: A Human Rights Impact Assessment' (2011) 3(2) Journal of Human Rights Practice 194-195; Simon Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Intersentia, 2009) 62-86; James Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' (2011) 3(2) Journal of Human Rights Practice 162–187; James Harrison and Alessa Goller, 'Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?' (2008) 8(4) Human Rights Law Review 587–615; Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover' (2002) 5(1) Journal of International Economic Law 111-132; Nora Götzmann, Tulika Bansal, Elin Wrzoncki, Cathrine Poulsen-Hansen, Jacqueline Tedaldi and Roya Høvsgaard, 'Human Rights Impact Assessment Guidance and Toolbox' (The Danish Institute for Human Rights, 2016).

expression: the TRIPS-plus provisions of the TPP could place additional legal constraints on the member states' capacity to enable their citizens to participate in cultural life and to exercise their right to freedom of expression through shifting their regulatory function from the protection of both copyright and human rights to heavily protecting the former. In keeping with the human rights framework, this relates to the impact on duty-bearers' capacity to meet their obligations under human rights law.

3. ***The TPP breaches the right to take part in cultural life and the right to freedom of expression of citizens in member states:*** the constraints on member states' capacity to fulfil cultural human rights might lead to the provision of cultural works of lower quantity and of lesser diversity or a reduction in public participation in cultural life and in public access to these works, leading to a disproportionate regression in enjoyment of the right to take part in cultural life and the right to freedom of expression. This could occur through obstructing citizens' capabilities to participate in cultural life and freely express their opinions – potentially and disproportionately at the expense of protection of copyright holders – or through significantly reducing their capabilities to enjoy these rights. In keeping with the human rights framework, this relates to the impact on rights-holders' capabilities to enjoy their rights.

4. ***Enforcement of the TPP is stronger than for human rights treaties and threatens to prioritise trade agreements over human rights where inconsistencies arise:*** The TPP has strong enforcement provisions which could skew judicial and quasi-judicial enforcement in favour of intellectual property protection over human rights.

5. ***The processes of negotiation, adoption and implementation related to the TPP have failed to respect the right to take part in the conduct of public affairs (decisionmaking).***

6. *The TPP's values threaten human rights values:* the TRIPS-plus provisions might promote the commercial interests of companies over the human rights interests of promoting the right to take part in cultural life and the right to freedom of expression for all.

5.8. What Tools for the Future?

5.8.1. Human Rights Impact Assessment

The conclusion of the TPP agreement requires a more careful and evidence-based assessment of its impact on human rights. At the systemic level, TPP member states can consider building the necessary infrastructure to promote the protection of human rights that aims to enhance human development. In addition to a hypothetical *ex ante* review provided in the previous section, a TPP member state can establish a mechanism of human rights impact assessments after the implementation of the TPP or the introduction of new legislation that seeks to implement it,[1515] although an *ex post* review is likely to be less effective than an *ex ante* review.[1516]

Impact assessments of law and policy have become increasingly common not only in the human rights field, but also in the areas of public health and biological diversity.[1517] Notwithstanding the growing popularity and wider adoption of human

[1515] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart Publishing, 2007) 233.

[1516] Yu *(n 152)* 1097.

[1517] See, e.g., General Comment No. 17 para 35 ('States parties should . . . consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions.'); Convention on Biological Diversity Article 14(1)(a), June 5, 1992, 1760 UNTS 143 (requiring contracting parties to '[i]ntroduce appropriate procedures requiring environmental impact

rights impact assessments, it is necessary to keep these developments in perspective. As James Harrison underscores: 'The fact that impact assessments have been undertaken does not mean . . . that governments will necessarily act to resolve any conflicts that are revealed in their international legal obligations.'[1518] It is also important to note that 'developing countries may not have the capacity or infrastructure to undertake assessments by themselves.'[1519]

Similarly, copyright protection has divergent impacts on human development, depending on the stage of development and cultural contexts of countries. Thus, the capabilities approach is an opportunity for countries to reconstruct their copyright laws in accordance with many more considerations, including improving the capabilities of individuals to participate in cultural life, increasing capabilities to access information and education, exercising human rights, protecting cultural heritage and enhancing capabilities to freely express opinions. In this respect, the capabilities approach provides useful paradigms to address the distributional and global justice problems

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assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures'); Comm'n On Intellectual Prop. Rights, Innovation & Pub. Health, World Health Org., Public Health, Innovation and Intellectual Property Rights 10 (2006) (stating that 'health policies, as well as inter alia those addressing trade, the environment and commerce, should be equally subject to assessments as to their impact on the right to health'); Harrison *(n 1514)* 228 ('Systematic environmental assessments of trade agreements are relatively common. Norway, the US and Canada all carry out reviews of the environmental impact of trade policies which include some international impact assessment, as do the United Nations Environment Programme and World Wildlife Fund.').

[1518] Harrison *(n 1514)* 233.

[1519] Ibid 234.

deriving from the deficiencies of copyright regimes. Additionally, in the absence of evidence-based assessments, the process of copyright reform is often a battle of ideas among competing interest groups putting forward 'conviction against conviction, argument against argument, assumption against assumption.'[1520] For that reason, our urgent attention is needed to nuance our engagement with copyright laws to correct unfair distributional and development affects by enabling access to cultural life and intellectual creations through empirical and sectoral comparative studies without abandoning copyright laws.

Therefore, what seems most obvious from the afore-mentioned discussions is that empiricism is needed to identify copyright's role in enhancing human development and shaping cultural policies. In this sense, Tania Burchardt and Polly Vizard's capability-based measurement framework, which has been developed as a basis for equality and human rights monitoring in twenty-first-century Britain,[1521] seems a good starting point for building a similar model to assess copyright law's impact on cultural human rights that are essential for human development. Their two-stage procedure basically aims at deriving a capability list.[1522] The first stage involves deriving a minimum core capability list from the international human rights framework.[1523] The method of human rights-based capability selection is formed in Vizard's works[1524] and

[1520] Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10(1) The Journal of Economic History 28.

[1521] Burchardt and Vizard *(n 471)* 91-119.

[1522] Ibid 91.

[1523] Ibid 100.

[1524] Poly Vizard, *Poverty and Human Rights: Sen's Capability Perspective Examined* (OUP, 2006); Poly Vizard, 'Selecting and Justifying a Basic Capability Set: Should the International Human Rights Framework Be Given a More Direct Role?' (2007) 35(3) Oxford Development Studies 225–250.

involves inductive reasoning[1525] which is utilised for the inference of 'a set of underlying (or implicitly defined) states of being and doing that viewed as being protected and promoted in international law' from 'the actual standards recognised in core international human rights treaties.'[1526] As Burchardt and Vizard put it:

> 'International human rights standards are viewed as providing evidence of a partial value ordering over freedoms and opportunities—where the freedoms and opportunities protected and promoted in international human rights law are attributed a positive value (but are not ranked) and all other freedoms and opportunities are zero weighted.'[1527]

Chapter 2 applies the method of hypothetical human rights-based capability selection. For example, international recognition of the human right to take part in cultural life under Article 27 of the Universal Declaration, Article 15 of the International Covenant on Economic, Social and Cultural Rights, is viewed as providing a basis for including the capability to achieve an adequate level of participating in cultural life as one of the basic capabilities.

The second stage of Burchardt and Vizard's methodology involves supplementing human rights-based capability selection with a process of deliberation and debate. In this stage, the general public and those at risk of discrimination and disadvantage are given a defining role in identifying and justifying the selection of

[1525] Burchardt and Vizard *(n 471)* 100.

[1526] Ibid.

[1527] Ibid.

central and basic capabilities.[1528] A range of mechanisms for deliberative consultation has been developed.[1529] However, group composition and recruitment, the amount and form of information provided, the degree to which the discussion is structured according to pre-defined questions, the duration of deliberation, and the analysis of results are all important methodological decisions that depend on the aims of the deliberative exercise and have implications for the interpretation of the findings. If applied to a copyright context, the deliberative consultation can be extended so as to include copyright industry representatives, intermediaries, collecting societies, copyright academics and barristers, intellectual property office experts, open access advocates, Internet user NGOs, librarians and creators of all kinds.

As shown in Chapter 4, some attributes of copyright have human rights status and there are remarkable overlaps between capabilities and human rights, which should also be considered at all stages. After identifying the human-rights-based indicators, the third stage that might be combined with Burchardt and Vizard's

[1528] Ibid 102.

[1529] There is considerable discussion about the merits and disadvantages of different approaches. For example, Julia Abelsona, Pierre-Gerlier Forest, John Eyles, Patricia Smith, Elisabeth Martin, Francois-Pierre Gauvin, 'Deliberations about Deliberative Methods: Issues in the Design And Evaluation of Public Participation Processes' (2003) 57(2) Social Science and Medicine 239–251; David A. Crocker, 'Sen and Deliberative Democracy' in Alexandar Kaufman (ed), *Capabilities Equality: Basic Issues and Problems* (Routledge, 2006) 155–197; David A. Crocker, 'Deliberative Participation in Local Development' (2007) 8(3) Journal of Human Development 431–455; David A. Crocker, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (CUP, 2008); James S. Fishkin and Robert C. Luskin, 'Experimenting with A Democratic Ideal: Deliberative Polling and Public Opinion' (2005) 40 Acta Politica 284–298; John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (OUP, 2006).

methodology is to empirically evaluate how these indicators are met after the implementation of the given trade agreement to assess the government's compliance with its obligations deriving from human rights instruments and copyright treaties. States often undertake such assessments when they file reports with the monitoring committees of the UN human rights bodies. As far as quantitative assessments are concerned, states can rely on these indicators as well as those provided externally by the UN, the World Bank, the OECD, or other intergovernmental and nongovernmental organisations.[1530]

In a full human rights impact assessment of the copyright provisions of any trade agreement or legislation, at least a lawyer, social scientist and economist would probably be needed. The social scientist would be particularly important if these assessments are to employ participatory data collection techniques.[1531] This group also could be expanded by the members of relevant NGOs and authors.

Thus, this method might provide useful insights into evaluating the impact of the implementation of the TPP agreement on individuals' development and thus would enable all to understand whether the law reforms objective have been met.

[1530] The UN indicators, compiled by the United Nations Statistical Division, are available at http://unstats.un.org/unsd/default.htm.The International Human Development Indications, compiled by the United Nations Development Programme, are available at Human Development Reports, http://hdr.undp.org/en/. The World Bank's World Development Indicators are available at http://data.worldbank.org/indicator.

[1531] Walker, 'The United States –Dominican Republic – Central American Free Trade Agreement and Access to Medicines in Costa Rica: A Human Rights Impact Assessment' *(n 1513)* 209.

5.8.2. Benefits of the Model

Taking into account the importance of a human rights assessment of intellectual property, the UN HRC recently published a report on how such an assessment might be carried out.[1532] Other guidelines on human rights impact assessment have been developed by scholars[1533] and international organisations.[1534] However, neither in US nor in EU law,[1535] the procedure to negotiate and conclude free trade agreements require a human rights impact assessment at any stage.

A human rights assessment of free trade agreements or domestic legislation would provide several benefits. Firstly, it would clarify areas of negotiation which are particularly sensitive for human rights, so that negotiators can take them into account. Secondly, since the free trade agreements would be binding and enforceable, the assessment would avoid later potential conflicts between international trade law and

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[1532] See; UNHRC, 'Report of the Special Rapporteur on the right to food: Addendum: Guiding principles on human rights impact assessments of trade and investment agreements' UN Doc No A/HRC/19/59/Add.5 (19 December 2011) (Olivier De Schutter).

[1533] Walker, *The Future of Human Rights Impact Assessments of Trade Agreements (n 1513)*.

[1534] World Bank, *Study on Human Rights Impact Assessments a Review of the Literature, Differences with other Forms of Assessments and Relevance for Development*, available at http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf.

[1535] Since external trade is now an exclusive competence of the European Union, negotiations are carried out mainly by the European Commission, the Council of Ministers and the European Parliament, which provides its consensus at the end of the process. In this procedure, the relationship between the free trade agreement and human rights law lacks an institutionalised method of assessment highlighting the trade clauses relevant to the realisation of fundamental rights. In particular, within the European Commission negotiations are mainly carried out by the Directorate General for trade: the Directorate Generals specialising in human rights and development cooperation have no role, or a marginal one, in the process.

human rights. This is particularly important since the *ex post* dispute settlement mechanisms enforcing free trade agreements take only trade law, and not human rights law, into account. Thirdly, the assessment could provide an institutional mechanism for countries which can contribute to the negotiation of the free trade agreement. The process would become more coherent, and allow states to develop valuable know-how on the interactions between international trade law and human rights. Finally, the assessment could be the occasion for obliging human rights groups and civil society to express their opinions in a structured and legal manner, identifying exactly the trade clauses that might be problematic for human rights protection.

Overall, a human rights assessment of free trade agreements has the potential to be beneficial to the negotiation process, bridging the gap between international human rights law and international trade law.[1536] At the same time, the assessment would increase the legitimacy of the free trade agreement smoothing the ratification process and reducing opposition to the trade deal present in civil society. Most importantly, it will be possible to delineate the boundaries between monopolistic intellectual property grant and human capabilities, which will ultimately lead the latter to be put into real practice.

5.8.3. Indicators

It is possible to propose a model set of indicators for cultural human rights and freedoms, which might be used after the first stage of the methodology explained above. These indicators include structural, process and outcome-related indicators. While structural indicators concern the legal structure of a given country to protect the

[1536] Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP, 2011).

relevant human rights, process indicators are related to the procedures through which these rights are exercised. Outcome-related indicators are merely about circumstances in which citizens of a given country are denied to use their relevant human rights. See the Table 5.1. showing this model set of indicators in Appendix 4.

5.9. A Normative Change for the Future

As has been argued throughout this thesis, there can be a key role for human rights and the capabilities framework in designing a wider approach to the international legislative copyright regime. This could be an impetus for the modification of copyright and its impact on society's cultural participation, and to contribute to the current debate as to the proper function of copyright at international level and how this could be achieved.

If the impact of copyright is to be recalibrated, it would be better for this to be done formally, transparently and within the established landscape. This refers to a normative adjustment of conflicting interests. As has been noted earlier in this chapter, there are circumstances which hypothetically indicate conflicts between the TPP's copyright rules, on the one hand, and international human rights and capabilities, on the other. To resolve these conflicts, it would be ideal to reflect the human rights and capabilities considerations through a normative adjustment provision. For instance, consider the following proposed amendments in capitals:

The first amendment would be an ideational shift from prominently an economic development model to a human development model in the objectives of the treaty:

Article 18.2 should read: Objectives

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~~ HUMAN DEVELOPMENT, and to a balance of rights and obligations.

A further amendment would be to posit the importance of human rights, cultural participation and human development explicitly at the beginning of the agreement to reflect this ideational shift more robustly:

Article 18.4 should read: Understandings in Respect of this Chapter

Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

(a) promote innovation and creativity;

(b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and

(c) foster competition and open and efficient markets,

(D) ENHANCE CULTURAL PARTICIPATION THAT IS CONDUCIVE TO HUMAN DEVELOPMENT,

through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users and the

public. WHEN PARTIES CONSIDER THESE OBJECTIVES and INTERESTS, THEY SHALL HAVE REGARD TO THEIR HUMAN RIGHTS OBLIGATIONS.

It might be argued that it would be too late to insert these amendments to the treaty. Nevertheless, the states can consider these normative adjustments, while implementing the treaty. The inclusion of these revisions and editions would contribute significantly to provide a legal base in resolving the conflicts identified in this chapter. This would lead the courts and legislators in the TPP states to take cognisance of these values when they interpret or apply the norms deriving from this kind of international copyright reform.

5.10. Conclusion

Regardless of whether the system itself still is 'under construction'[1537], in the post-TRIPs era, new intellectual property standards have prominently been negotiated in smaller country networks. They will not only bind members within these networks but also influence, directly or indirectly, countries outside of the networks. In this era, the intellectual property complex has also evolved in three dimensions. It has first changed institutionally. While the TRIPs legacy has been maintained, more recently other international legislative forms have mushroomed, including bilateral (the US and the EU PTAs and sinic agreements) and plurilateral sectoral, trade and investment

[1537] Margaret Chon, 'Global Intellectual Property Governance (Under Construction)' (2011) 12 Theoretical Inquiries in Law 349-380.

agreements (e.g. ACTA, TPP and TTIP,[1538] RCEP[1539]). Secondly, the intellectual property complex has grown thematically. Rather than simply building on the TRIPs legacy with 'TRIPs-compatible' commitments, the new era covers an increasing number of 'TRIPs-plus' issues. The third changing dimension of the intellectual property complex has been geographical. Until recently, intellectual property matters have been dealt with in bilateral circles by only a handful of countries aggressively pushing trade and investment agreements.

In today's intellectual property non-multilateralism, developed countries are putting considerable pressure on those who fail to join the network of agreements. Given the asymmetry in the international trading system, few less developed countries are able to refuse an offer to enter into an agreement with their more powerful trading

[1538] http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153020.7%20IPR,%20GIs%202.pdf.

[1539] The Regional Comprehensive Economic Partnership (RCEP) is another equally important regional trade and investment agreement in the Asia-Pacific region. It is currently being negotiated among Australia, China, India, Japan, New Zealand, South Korea, and the ten members of the Association of Southeast Asian Nations (ASEAN) [Regional Comprehensive Economic Partnership, Department of Foreign Affairs and Trade (Australia), http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx]. The ten current ASEAN members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. ASEAN Member Countries [See; Association of Southeast Asian Nations, http://asean.org/asean/aseanmember-states/]. Launched in November 2012 under the ASEAN+6 framework, the RCEP negotiations build on past trade and non-trade discussions between ASEAN and its six major Asia-Pacific neighbors [See ASEAN Plus Six, Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership (Nov. 20, 2012), available at http://dfat.gov.au/trade/agreements/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiationsfor-the-regional-comprehensive-economic-partnership.pdf].

partners.[1540] Many, in fact, fear that they will be ostracised, creating what Chad Damro described as the 'marginalisation syndrome.'[1541] This marginalisation syndrome, as a major political drive, urges policy-makers of those less developed countries to join negotiations and ultimately sign onto regional agreements that they might otherwise have ignored or avoided.[1542]

Nevertheless, what makes the current international property non-multilateralism unique and what separates it from the past involves another narrative. On the plane of recent occidental treaties which include intellectual property chapters, especially ACTA and TPP, there are other countries with lower income levels (*e.g.* Morocco, Mexico, New Zealand, Singapore and South Korea in ACTA, Brunei, Chile, Malaysia, Mexico, Peru, Singapore and Vietnam in TPP). The selection of these countries is not spontaneous. Nor is it random. They are not chosen solely for their geo-political positions either. For like-minded countries, these participants are remarkably diverse with regard to not only the size and composition of their economies but also their level of development and political regimes. They are included in the newly formulated equation for creating what can be called 'community or neighbourhood pressure.'[1543]

[1540] Peter K. Yu, 'The Non-multilateral Approach to International Intellectual Property Norm-setting' in Daniel J. Gervais (ed), *Research Handbook on International Intellectual Property Law* (Edward Elgar Publishing, 2015) 95.

[1541] Chad Damro, 'The Political Economy of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), Regional Trade Agreements and the WTO Legal System (OUP, 2006) 30.

[1542] Ibid 30.

[1543] In May 2007, a most-esteemed Turkish sociologist, Serif Mardin, was interviewed by a journalist about his newly published volume of articles, *Religion, Society, and Modernity in Turkey* (2006). In this interview, Mardin suggested that a major potential threat against the nurturing of a liberal environment

Community pressure might describe where this historical trajectory of contemporary international intellectual property law-making lies: at least in the westtern part of the world, where the intellectual property ratchet has become a legal orthodoxy, the middle-income countries are important actors in constructing 'the gazing collectivity.' The US with its TTIP negotiating partner the EU and their leading cadres have chosen a divisive strategy, pursuing marginalisation over compromise and a politics of duality over a legal culture of coexistence. With a political construct referring to the enforcement of communal norms through micro-level interaction, these developing countries are therefore good catalysts to more powerfully spread this pressure, as examples of good intellectual property governance, to cast 'the Others', 'the outsiders'[1544] - such as BRICS, civil society groups etc. - adrift. It remains to be

in Turkey was 'neighbourhood pressure ... which is a mood very hard to delineate by the social sciences.' See Rusen Cakir, *Prof. Şerif Mardin'in Tezlerinden Hareketle Türkiye'de İslam, Cumhuriyet, Laiklik ve Demokrasi Mahalle Baskısı* (Dogan Kitap, 2008) 17. With this term, Mardin sought to capture the unofficial, local, communal pressure on individuals to conform to religious-conservative norms in their everyday lives. The central element of this unofficial yet remarkably strong pressure was 'the gazing collectivity.' There are the translation options of 'mahalle baskisi,' what was originally said in Turkish by Professor Serif Mardin. The word 'mahalle' would literally be translated as 'neighbourhood' into English. However, given its sociological emphasis implying a group of people living together in some certain social setting, the word community would be a more appropriate equivalent.

[1544] See; Yu *(n 1319)* 1132.

seen how this historical trajectory will follow the 'America first'[1545] and bilateralism[1546] emphasis of the new administration in the US and Brexit in the EU.

What is more significant in today's international intellectual property norm-setting is creating 'the Other' not only from outside, but also from within. As Daniel Gervais underscores, today's international intellectual property law-making is becoming less participatory.[1547] Unlike the opportunities given at WIPO and to lesser extent at the WTO, civil society groups have faced with more and more closed doors in the recently negotiated or concluded intellectual property treaties. For example, from the very beginning, the ACTA and TPP negotiations were held in secret. Additionally, as this chapter has demonstrated, concerns about the legal implications of this political approach resonate strongly with the TPP, the epitome of this era. With its most contentious copyright provisions- namely copyright term extension, pre-established/statutory and additional damages, TPMs, the inflexible intermediary liability and the extension of criminal liability - it has done much to undermine the several cultural human rights and freedoms that serve to provide the legal basis for several capabilities that individuals may develop.

[1545] Julian Borger, 'In Pledging to Put 'America First' Trump Holds the World at His Mercy' (20 January, 2017) Guardian, available at https://www.theguardian.com/world/2017/jan/20/trump-inauguration-america-first-foreign-policy.

[1546] Shawn Donnan and Robin Harding, 'US Plans Fresh Push for Talks on Bilateral Trade Deal with Japan' (2 February, 2017) Financial Times, available at https://www.ft.com/content/052cf600-e95b-11e6-893c-082c54a7f539.

[1547] Daniel J. Gervais, 'Country Clubs, Empiricism, Blogs and Innovation: The Future of International Intellectual Property Norm Making in The Wake of ACTA' in Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age* (CUP, 2012) 323-324.

The new politics and legal dynamics of international intellectual property law-making raise some difficult questions about the future of the knowledge economy for both the US and the global community. If the global community cannot find a way to embrace the ideals of a free society, open debate, fundamental rights and freedoms, pluralistic legal culture, different levels of human development of individuals, different economic development levels and local needs of states and their autonomy and sovereignty, it will not just be a failure of democratic norm-setting, but it will be a failure of imagination and will. As Susan Sell explains: 'The United States' aggressive decades-long push to ratchet up intellectual property protections may come back to haunt it sooner than later. It is easy to imagine that in the not-too-distant future, US consumers will be paying more royalties to foreign rights holders.'[1548]

Intellectual property pundits have described this entire phenomenon as 'regime' or 'forum' shifting. However, this chapter has shown that instead of the shift between multilateralism and bilateralism, in order to enhance the copyright system, it is necessary to embrace an ideological shift in the international intellectual property lawmaking initiatives. This might be done through changing the focus of international lawmaking from economic development to human development. When the legal text of the TPP is examined from this perspective, it becomes clear that the treaty advocates some important copyright norms which represent disproportional limitations to the legal framework of the rights to take part in cultural life and freedom of expression. This renders the TPP less human-development-friendly and puts it systemically in conflict with the human rights described in this thesis. To alleviate these systemic tensions and to bring the law in conformity with human rights and human

[1548] Susan K. Sell, 'Everything Old Is New Again: The Development Agenda Then and Now' (2011) 3(1) WIPO Journal 18.

development, this chapter has suggested following two methods: an empirical and capability-based human rights impact assessment of treaty provisions and a normative amendment from a human development perspective. This chapter has proposed a set of indicators that might be used in the pre-empirical stage of human-right-based impact assessment of copyright provisions of an international trade treaty. It has also proposed a normative adjustment model that can be used within the TPP text or elsewhere. The models proposed in this case study are fundamentally for legislators. However, how can courts resolve the conflict between some legal norms that relate to copyright, human rights and human development? The next chapter essentially deals with this question.

CHAPTER 6

6. Writing A Legal Test for Conflict Resolution

6.1. Introduction

Martha Nussbaum, in supporting her argument that the cost-benefit-centred analysis has moral limits, suggests that individuals face two distinct questions in making a choice which might also be seen in public policy choices: the 'obvious question' and the 'tragic question.'[1549] For Nussbaum, in all situations of choice, individuals seek an answer to 'the obvious question': 'what ought we [to] do?'[1550] Sometimes, however, they come across a different question, namely 'the tragic question.'[1551] While the 'obvious question' denotes difficult choices that are forced by the situation, the tragic question refers to these difficult choices where any of the alternatives available to the individual is morally unacceptable.[1552] While a cost-benefit analysis helps find answers to the obvious question; it falls short of being able either to pose or to answer the tragic question, and it oftentimes 'obscures the presence of a tragic situation, by suggesting that the obvious question is the only pertinent question.'[1553]

From this perspective, should the protection of copyright have priority over the freedom of expression, allowing the digital platform providers to be punished? Or is it

[1549] Martha C. Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost- Benefit Analysis' (2000) 29 Journal of Legal Studies 1005–1036. See also; Nussbaum *(n 119)* 37-39.

[1550] Nussbaum *(n 1548)* 1005.

[1551] Ibid.

[1552] Ibid 1006-1007.

[1553] Ibid 1005.

the other way around? Should a new artistic interpretation of a photograph depicting a classical pose of a politician be banned, subordinating freedom of speech to property-based economic freedom? Can participatory citizens' rights to access culture be tied to the permission of copyright holders? These questions might fall into the 'obvious questions' category in Nussbaum's distinction. For the purpose of this thesis, however, the discussion of these questions and the cases in Chapters 1, 3 and 5, and the analysis of whether or not copyright is a human right in Chapter 4, suggest that a conflict between copyright and human rights to take part in cultural life and freedom of expression can arise at a fundamental level of rights, which are crucial to human development.

In terms of the capabilities approach, Martha Nussbaum also acknowledges that conflicts between two or more capabilities can exist and it is indeed a sign that 'society has probably gone wrong somewhere,' and that the system is probably not well designed.[1554] For Nussbaum, the existence of a conflict should initiate long-term planning efforts that will allocate resources away from supporting entitlements that are not fundamental and toward supporting a threshold level of capabilities that defines the conditions of justice.[1555] Conflict between the capabilities that Nussbaum seeks to protect as fundamental entitlements could be the basis for planning a future society that minimises or eliminates conflicts. How is it possible to reflect the political philosopher Nussbaum's *planning* paradigm as to the identification of the meaning of 'fundamental rights' within a situation which might involve many such rights, such that

[1554] Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 401. See also; Nussbaum *(n 1548)* 1005–1036.

[1555] Nussbaum *(n 1553)* 403.

decisions can then be made which are compatible with the obligations of the decision maker?

In their traditional conception, human rights function as, to use Ronald Dworkin's metaphor, 'trumps':[1556] even though most human rights are not absolute, they have priority over other claims.[1557] Yet in cases of a conflict between human rights, the 'trump' aspect no longer works.[1558] Although the issue of conflicts between fundamental rights is not new, it has prompted renewed interest in recent years, particularly due to the proliferation in the number of such conflicts that have been referred to national, European and international judges. Several reasons have been advanced to explain this increase.[1559] One reason is the continuous expansion of the 'list' of fundamental rights that are guaranteed in international and/or constitutional law. The catalogue of legally protected fundamental rights has grown constantly, not just as a result of adopting new provisions, but more especially through the extensive interpretation of existing texts.[1560] In current human rights theory and practice, public authorities are not simply required to *respect* fundamental rights by abstaining from acts that violate these rights; they are also required to protect fundamental rights in relationships between private individuals.[1561] This positive obligation to provide protection presupposes an obligation to *fulfil* human rights by the adoption of

[1556] Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron, *Theories of Rights* (OUP, 1984) 153–67.

[1557] Eva Brems, 'Introduction' in Eva Brems (eds), *Conflicts Between Fundamental Rights* (Intersentia, 2008) 2.

[1558] An exception to this rule is the *jus cogens* norms such as right to life.

[1559] Brems *(n 1556)* 2.

[1560] Ibid 2.

[1561] Ibid.

legislative, administrative, judicial and substantive measures and to *protect* individuals against the violation of their fundamental rights by other individuals.[1562] The wider recognition of the horizontal effect of human rights, that is to say, their application to relationships between private persons (whether individuals, groups, organisations or corporations) and not just solely between the state and its citizens, has also caused the number of conflicts to multiply.[1563] This leads necessarily to an increase in the number of actions founded on the violation of individual freedoms and as a result, to an escalation in the number of conflicts between fundamental rights.

Thus, both legislators and judges have regularly encountered the task of solving a conflict between fundamental rights. Different concerns occur when parties to a horizontal conflict invoke a human right to protect their interests. In such circumstances, where two fundamental rights conflict with one another, the principle of the indivisibility of human rights requires that both rights carry equal weight.[1564] Technically, judges and legislators do not deal with conflicting rights issues in the same manner. As has been demonstrated in Chapter 5 in the case of the TPP Agreement, a legislator can develop a fairly nuanced system in which both conflicting rights enjoy maximum protection, even though in some situations it might give priority to one right over another.[1565]

[1562] Ibid.

[1563] Ibid.

[1564] See World Conference on Human Rights, 14-25 June 1993 Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 (July 12, 1993) para 5 ('All human rights are universal, indivisible, and interdependent and interrelated.'); Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27(1) Human Rights Quarterly 303.

[1565] See Chapter 5 section 5.8.

Judges, on the other hand, must normally rule in favour of one party only, even though compromise solutions may occasionally be found. When studying the case law with respect to conflicting human rights, it is important to bear in mind that there are two different traditions in addressing the conflicts between human rights: balancing and proportionality.[1566] Although they have been used interchangeably in the literature and in practice,[1567] they are, notwithstanding similarities, historically, ideologically and analytically distinct concepts.[1568] For instance, proportionality was originally developed in German administrative law, and was related only peripherally to private law, while balancing arose in private law and was only later extended to public law in the US. Additionally, proportionality was devised as part of an attempt to protect individual rights against a background of little textual support for such protection, whereas balancing was designed for the exact opposite purpose — to control the overambitious libertarian protection of rights by the US Supreme Court grounded on a highly literal reading of the constitutional text. Finally, proportionality was developed in the course

[1566] The literature on proportionality is immense. See: David M. Beatty, *The Ultimate Rule of Law* (OUP, 2004); Robert Alexy, *A Theory of Constitutional Rights* (OUP, 2002); Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) Cambridge Law Journal 174-207; Mattias Kumm, 'What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement' (2006) New York University Public Law and Legal Theory Working Papers, Paper No: 46 1-46; Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72-164; Jud Mathews and Alec Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2010) 60(4) Emory Law Journal 797-876; Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) International Journal of Constitutional Law 263-286.

[1567] See Sweet and Mathews *(n 1565)* 74.

[1568] Cohen-Eliya and Porat *(n 1565)* 263-286.

of the formalistic and doctrinal jurisprudence of the German administrative courts and was not part of an antiformalistic legal philosophy, while balancing was part of the antiformalist revolution of the US progressives.[1569]

How can it be possible to devise a legal test that might be used when a court comes across a copyright case relating to human rights and human development? Yet what does balancing and proportionality really mean? To find answers to these questions, this chapter examines the hypothetical conflicts between copyright and human rights that are essential for human development. Building on previous research,[1570] this chapter begins with the introduction of the comprehensive and well-structured test proposed by Abbe Brown to resolve the conflicts between intellectual property rights and (other) human rights.[1571] To address these issues in a more elaborate manner through building on Brown's test, the chapter later presents a theoretical model that could be a useful and systematic tool for the development of transparent and coherent reasoning in these cases. The model presented in this chapter was initially discussed by Donna J. Sullivan,[1572] later elaborated by Eva Brems,[1573] and was finally recently implemented in relation to conflicts between

[1569] Ibid 266.

[1570] Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP, 2007); Lorenzo Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in Brems *(n 1556)* 19-37.

[1571] Brown *(n 123)*.

[1572] Donna J. Sullivan, 'Gender Equality and Religious Freedom: Towards A Framework for Conflict Resolution' (1991-1992) 24 New York University Journal for International Law and Politics 795–856,

[1573] Brems *(n 1556).*

freedom of expression and the right to reputation by Stijn Smet.[1574] This model is influenced in particular by the German Constitutional Court's (*Bundesverfassungsgericht)* method called '*praktische Konkordanz*' - implying a compromise with minimal restrictions of both rights,[1575] slightly adapted and blended with Brown's test for the purposes of this chapter which then applies this model to copyright cases, and offers concrete insights into how the model might assist in improving the legal reasoning of the courts in the jurisdictions that have so far been explored.

The examination of the model's practicality is illustrated by two case studies, with an eye toward developing an alternative model. The current chapter thus also serves as a testing ground for the model. However, because the scope of the research is limited to the specific conflict between copyright related human rights, any

[1574] Stijn Smet, 'Resolving conflicts between Human Rights: A Legal Theoretical Analysis in the Context of the ECHR' (2014) unpublished PhD thesis, Ghent.

[1575] Ibid 4; Stijn Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26(1) American University International Law Review 188.

conclusions drawn as to the practicability of the model will be limited to that specific conflict.[1576]

[1576] As a better understanding of conflicts will result in a better mechanism for resolution, before moving on to the question of how to resolve these conflicts, the first step is to understand what they are. Conflict of fundamental rights means the existence of one right is pushing another out of the picture. The classification of conflicts between fundamental rights recently proposed by Lorenzo Zucca, one of the rare scholars to have thoroughly studied the issue, appears to be a particularly useful paradigm (Zucca *(n 1569)* 19-37). Zucca's classification is based on the notion that legal reasoning has limitations when faced with certain conflicts of rights. Zucca especially focuses on a narrowly defined category of 'genuine conflicts', which he calls 'constitutional dilemmas'. In his view, these conflicts constitute an impossible choice where weighing is out of the question as preferring one right would inevitably extinguish another, thus they cannot be solved through legal reasoning (Ibid 20). However, Zucca believes that understanding constitutional dilemmas enables courts 'to concentrate on what legal reasoning can achieve and what it cannot achieve' and more importantly to formulate 'a typology of conflicts' (Ibid 24-25). Zucca's classification rests on four binaries. Firstly, in traditional constitutional theory a distinction is made between conflicts between two fundamental rights ('*stricto sensu* conflicts'), and conflicts between a fundamental right and other constitutional goods or interests ('*lato sensu* conflicts') (Ibid 20. For a more elaborate explanation see; Kamm *(n 426)*). Secondly, while some conflicts concern situations 'in which a right makes something permissible while a competing right makes it impermissible, thereby creating a joint incompossibility' and 'a normative inconsistency' ('genuine conflicts'), others derive from policy choices, such as the distribution of resources, rather than directly from another fundamental right's normative content ('spurious conflicts') (Zucca *(n 1569)* 25-26. Eva Brems similarly argues that 'fake conflicts' should be eliminated when dealing with a conflict of fundamental rights. See Brems *(n 1556)* 4). Thirdly, fundamental rights can compete in a manner in which the normative discrepancy can be a 'total' or a 'partial' conflict (Zucca *(n 1569)* 26). For example, the conflict between the right to privacy and the right to freedom of expression mostly constitutes a partial inter-rights conflict (Zucca, (n) 27). An example of a total inter-rights conflict is assisted suicide, as it conflicts the right to private life with the right to life, which embeds an absolute prohibition to kill (Ibid 27). One example of a total intra-right conflict is the Evans case, where a woman and her former

6.2. Limits of Legal Reasoning

Today, most of the world's constitutional courts employ a proportionality test when reviewing laws that implicate the protection of fundamental rights.[1577] Many take their roots from the German constitutional law tradition. According to German understanding, balancing constitutes one part of the more comprehensive principle of proportionality.[1578] This consists of the three sub-principles: those of suitability, necessity, and proportionality *stricto sensu* or 'balancing'.[1579] The German legal philosopher Robert Alexy, one of the most influential theoreticians of the proportionality paradigm, views the final principle of proportionality *stricto sensu* as a rule according to which 'the greater the degree of non-satisfaction of or detriment to one principle, the greater the importance of satisfying the other.'[1580] While necessity and suitability are concerned with what is factually possible, according to Alexy,

husband had fertilised her eggs with his sperm as she was diagnosed with cervical cancer and had her ovaries removed. After the couple split up, both individuals claimed their right to private life - Ms. Evans wanted biological children, and Mr. Evans did not want to become a father. This conflict could not be solved without one individual's right being completely disregarded, thus balancing was not possible (Ibid 27). For the details of the case see; *Evans v The United Kingdom* ECHR 2007-I paras 25-73. An example of partial intra-right conflict is the conflict between two groups claiming free speech (eg, a neo-nazi and a neo-communist group want to demonstrate in town at the same time) (Ibid 27). Fourthly, conflicts either lead to two fundamental rights to juxtaposed ones (inter-rights conflict), or they reflect tensions within the same right (intra-right conflict) (Ibid 26-28).

[1577] See Sweet and Mathews *(n 1565)* 74 ('By the end of the 1990s, virtually every effective system of constitutional justice in the world . . . had embraced the main tenets of [proportionality analysis].').

[1578] Cohen-Eliya and Porat *(n 1565)* 267.

[1579] Ibid; Alexy *(n 1565)* 102. See also; Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3(4) International Journal of Constitutional Law 572.

[1580] Alexy *(n 1565)* 102. See also; Alexy *(n 1578)* 573.

balancing focuses instead on the legal possibilities.[1581] Alexy calls this the 'Law of Balancing.'[1582] Thus, although proportionality, at least in its German conception, consists of three separate tests, balancing may be understood to constitute its essence, the heart of the legal optimisation discourse.[1583]

By contrast, American constitutional law, relying on the absolute nature of the US constitutional text, adheres to a categorical constitutional analysis in which the constitutional review begins and ends at the stage of identifying the infringement of a right. American constitutional doctrines focus on drawing complex categories and subcategories for identifying the kinds of rights infringements that merit constitutional review and the level of scrutiny that should apply to each one. The US uses a tiered system of review for rights violations.[1584] The court chooses which type of review to

[1581] Alexy *(n 1578)* 573.

[1582] Alexy *(n 1565)* 102.

[1583] Ibid. For Alexy, principles, such as those contained in rights provisions, are norms that 'require that something be realised to the greatest extent possible given the legal and factual possibilities.' Ibid 47. Thus, a conflict between principles places judges under a duty to balance and to optimise the legal possibilities.

[1584] Mathews and Sweet *(n 1565)* 836, 838.

apply: strict scrutiny,[1585] intermediate scrutiny,[1586] or rational basis review.[1587] Each tier contains elements of a balancing test; strict scrutiny, for example, requires that regulations be narrowly tailored to a compelling government interest.[1588] However, as the US tiered doctrine has developed, the tiers have become increasingly rigid.[1589]

[1585] Strict scrutiny is defined as follows: 'Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. A famous quip asserts that strict scrutiny is "strict in name, but fatal in practice." Accordingly, there exists a concern that an exceedingly rigid application of strict scrutiny will categorically invalidate legislation, while allowing courts to forego a true evaluation of a given laws purpose and value. For a court to apply strict scrutiny, the legislature must either have significantly abridged a fundamental right with the law's enactment or have passed a law that involves a suspect classification.' See; Wex Library at https://www.law.cornell.edu/wex/strict_scrutiny.

[1586] 'Intermediate scrutiny is a test used in some contexts to determine a law's constitutionality. To pass intermediate scrutiny, the challenged law must further an important government interest by means that are substantially related to that interest. As the name implies, intermediate scrutiny is less rigorous than strict scrutiny, but more rigorous than rational basis review. Intermediate scrutiny is used in equal protection challenges to gender classifications, as well as in some First Amendment cases.' See; Wex Library at https://www.law.cornell.edu/wex/intermediate_scrutiny.

[1587] 'Rational basis review is a test used in some contexts to determine a law's constitutionality. To pass rational basis review, the challenged law must be rationally related to a legitimate government interest. Rational basis is the most lenient form of judicial review, as both strict scrutiny and intermediate scrutiny are considered more stringent. Rational basis review is generally used when in cases where no fundamental rights or suspect classifications are at issue.' See; Wex Library at https://www.law.cornell.edu/wex/rational_basis. Also see; Mathews and Sweet *(n 1565)* 836.

[1588] *Citizens United v Fed. Election Comm'n* 558 U.S. 310, 340 (2010).

[1589] Mathews and Sweet *(n 1565)* 837.

These tests have also been used in attempts to address conflicts between copyright and other human rights, and to determine what is a legitimate and not excessive restriction on a human right. Examples of the use of balancing and proportionality tests can be seen from the decisions of the CJEU in *Promusicae,*[1590] *Scarlet Extended* and *Netlog,*[1591] *Telekabel*,[1592] of the ECtHR in *Smith Kline*,[1593] *Budweiser,*[1594] *Ashby Donald* and *the Pirate Bay;*[1595] and at national level in the UK in *Ashdown*[1596] and in the intermediary cases[1597]; and in the US in *Eldred*[1598] *and Golan.*[1599]

These courts have embraced different judicial techniques. The CJEU has followed an unsteady line of reasoning. As Christina Angelopoulos observes, in the CJEU's analysis '[b]alancing is…revealed as the process through which non-absolute rights are shuffled against each other, so that they can settle into their natural resting place, which will change in each instance depending on the particular circumstances of the individual case.'[1600] While in *Promusicae* it preferred self-restraint to hold that a 'fair balance' must be struck and deferred the actual proportionality test to national

[1590] See Chapter 3 section 3.4.

[1591] See Chapter 3 section 3.5.2.

[1592] See Chapter 3 section 3.5.1.

[1593] See Chapter 4 section 4.3.2.1.

[1594] See Chapter 4 section 4.3.2.3.

[1595] See Chapter 3 section 3.3.2.

[1596] See Chapter 1 section 1.4.2.

[1597] See Chapter 3 section 3.5.3 footnotes 924-928.

[1598] See Chapter 5 section 5.2.

[1599] See ibid.

[1600] Angelopoulos *(n 723)* 80.

level, in *Scarlet Extended and Netlog,* although again short on guidelines, it entered into the substantive questions and provided a concrete answer with respect to whether the measure in question struck a fair balance or not.[1601] Although the court's reasoning is not instructive, its definite rejection of the filtering mechanism under discussion is noteworthy.[1602] In *Telekabel,* the CJEU then retreated to pass the implementation of the 'fair balance' test further down the line, not even to the national authorities, but to the intermediaries themselves.[1603]

One conclusion seems inevitable from this line of case law: all these judgements enlightened only the individual cases to which they applied. For all the dry repetition of the vague dictum of 'fair balance', no substantial judicial tools are provided to help identify where this balance should lie, or how to find it.[1604] Although in each case the CJEU concluded which it declared had achieved the desired 'fair balance', it failed to provide an explanation as to why this was the case.[1605] Moreover, the lack of consistent application undermines balancing itself. Even if it is clear what balancing is intended to achieve in the CJEU's jurisprudence, little explanation is given on how this goal is reached.[1606] As Jonathan Griffiths bluntly puts it: '"the concept of the 'fair balance' is, without further elucidation, vacuous and unhelpful.'[1607] Consequently, no common standard is discernible for all intermediaries concerning their rights and

[1601] See Chapter 3 section 3.4.

[1602] See Chapter 3 section 3.5.2.

[1603] See Chapter 4 section 4.3.2.1.

[1604] Angelopoulos *(n 723)* 76.

[1605] Ibid.

[1606] Ibid 80.

[1607] Griffiths *(n 1121)* 74.

obligations, excepting those whose case bears identical features to those already tried in the twilight of the 'fair balancing' principle.[1608] This relatively superficial approach to fundamental rights law is also apparent in the Court's recent judgment in *Luksan*.[1609]

With respect to the ECtHR's case law, Alastair Mowbray suggests that the principle of 'fair balance' is used by the Strasbourg Court as a 'basis for assessing the proportionality of respondents' interferences with the Convention rights of applicants.'[1610] It is important to note that these conflicts are predominantly brought before the court from the perspective of one human right. The other stakeholders - *e.g.*, the domestic parties other than the complainants or the Internet users, whose human rights are also at stake, disappears into the background. The general approach in these cases has been 'preferential framing', in which the court addresses only the right invoked by the applicant and disregards to a lesser or greater extent any other right(s) involved.[1611]

Significantly, in the context of the ECHR the application of the principle of proportionality is tempered by the complementary principle of the margin of

[1608] Martin Husovec, 'Injunctions Against Innocent Third Parties: Case of Website Blocking' (2013) 4(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law116–29.

[1609] See Chapter 4 section 4.4.2.

[1610] Alastair R. Mowbray, 'A Study of The Principle of Fair Balance in The Jurisprudence of The European Court of Human Rights' (2010) 10(2) Human Rights Law Review 315.

[1611] Smet *(n 1574)* 185.

appreciation.[1612] More specifically in the intermediary cases, such as in *Delfi*[1613] and *MTE*,[1614] the ECtHR listed the relevant and substantive criteria, which have the advantage of providing some much needed structure to the court's previously abstract balancing test. At the same time however, it is not easy to ignore the fact that, despite the great similarity in the cases examined, the lists supplied and the results determined upon differ between the two judgments. Moreover, in these two cases the criteria are customised to conflicts between the freedom of expression and privacy and are inapplicable in other contexts.[1615]

Despite these shortcomings, Christina Angelopoulos suggests that the CJEU should follow this path, noting that: 'acknowledging both proportionality and the margin of appreciation that Contracting States enjoy, the Strasbourg Court has, in its recent case law, attempted to trace out factors that govern the balancing process, thus giving invaluable insights into its judicial reasoning.'[1616]

The ECtHR's proportionality analysis is more elaborate in the intermediary cases than before. The court opts equally for a hate-speech-free environment on the

[1612] For example, see; *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976). The margin of appreciation doctrine means that member states are conferred a certain amount of discretion in how they protect human rights. This is usually explained by the absence of any pan-European consensus on how such matters should be regulated. In particular, it has been found that member states must have a broad margin of appreciation with regard to the balancing of conflicting individual interests, since such cases are delicate ones for which the ECtHR cannot provide a definitive answer. See; *Chassagnou (n 643)*; *MGN Limited v the United Kingdom* App no 39401/04 (ECtHR, 18 January 2011).

[1613] See Chapter 3 section 3.2.6.1.

[1614] See ibid.

[1615] See; Smet *(n 1573)* 170.

[1616] Angelopoulos *(n 723)* 91.

Internet, and attempts to set the criteria for this goal. However, its proportionality assessment is far behind the CJEU's legal reasoning which at least takes into account diverse interests. Likewise, the ECtHR's preferential framing is problematic since it can lead to an unsatisfactory resolution of the conflict whereby an overemphasis on the right invoked causes the court to decide the conflict in favour of that right to the detriment of the other neglected right. This disparity hinders the ECtHR from building a constructive approach to conflicts between human rights, especially from the correct identification of the conflict and the accurate resolution through transparent and coherent reasoning that avoids considering one party's rights to the exclusion of the other's.

In *Ashby Donalds* and the *Pirate Bay,* which directly touched upon the copyright context, the ECtHR offered even less guidance as to how conflicts should be resolved between copyright and other human rights than those of the intermediary cases. Therefore, as in CJEU jurisprudence, in the case law of the ECtHR the precise contours of the relationship between the principle of proportionality and the principle of fair balance remain equally obscure.

At a national level, the United States, unlike the supra-constitutional regimes discussed above, uses a tiered approach to constitutional analysis and discusses copyright policies in the light of the First Amendment doctrine, namely the human right to freedom of expression. As a principle, speech is either categorically protected in the US or not protected at all.[1617] When speech falls into a category that is not protected,

[1617] See Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience' (2004) 117 Harvard Law Review 1767; Joseph Blocher, 'Categoricalism and Balancing in First and Second Amendment Analysis' (2009) 84 New York University Law Review 397

US courts effectively abstain from undertaking a judicial review of legislative sanctions.[1618] Focusing on the nature of the freedom of expression regime instead of copyright's judicial exceptionalism explains a notable feature of the US approach: in the US, once a category of speech falls outside of the First Amendment's protection, the legislature may apply any variety of sanctions, functionally unchecked by judicial scrutiny.[1619] The US First Amendment doctrine thus treats copyright policy with an evidently formalistic approach.[1620] The Supreme Court has held that principally copyright regulation is content-neutral and therefore is not scrutinised under the First Amendment.[1621] Functionally, in *Eldred* and *Golan*, it therefore put most copyright regulations outside of First Amendment protection, as though copyright questions were an unprotected category of expression.[1622] Instead, by functionally placing copyright outside of the First Amendment, the Supreme Court leaves all expression-related details for Congress to decide.[1623] The consequence of judicial deference to Congress's choices on copyright policy goals is that the economic, cultural and political aspects of copyright law-making remain unchecked by the judiciary in the US.[1624] Arguably, this might be called the 'margin of appreciation belongs to Congress'

(argueing that the First Amendment doctrine represents a combinration of categorical and balancing approaches).

[1618] Kaminski *(n 1494)* 588.

[1619] Kaminski *(n 1494)* 602.

[1620] Netanel *(n 595)* 170 (defining the interface of First Amendment and copyright doctrine 'judicial formalism at its worst').

[1621] *Eldred (n 158)* 193-194.

[1622] *Golan (n 159)* 890-891; *Eldred (n 158)* 193–94.

[1623] Kaminski *(n 1494)* 607.

[1624] Lemley and Volokh *(n 1491)* 174–75.

approach. Unchecked copyright law-making ultimately tends to disproportionately protect copyright holders at the expense of second-generation authors, intermediaries and Internet users.[1625] The categorical balancing paradigm under the First Amendment doctrine in the US, which is usually very expression-protective, has paradoxically created a substantive recession when it is juxtaposed against copyright regulations.

The Court of Appeal of the United Kingdom and Wales's judgment in *Ashdown* sits principally within the European proportionality tradition. However, it departed from the proposition that the protection to freedom of expression is provided through limitations and exceptions within copyright law. It did so by apparently imposing new conditions on the scope of the fair dealing defence under Section 30 of the Copyright Patent and Designs Act 1988. As a legal technique, the proportionality analysis of the Court of Appeal is also distinct from the other courts discussed above. It observed that, notwithstanding the limitations and exceptions contained in the CDPA, rare circumstances could arise where the right of freedom of expression came into conflict with the protection afforded by copyright; in these circumstances, it would be the duty of the court to apply the CDPA in a manner which accommodated the right to freedom of expression.[1626] In most cases of this type, it would be sufficient simply to decline the discretionary remedy of an injunction, which would leave the defendant still liable to any claim for damages or an account of profits;[1627] however, in the rare case where it would be in the public interest for the precise words used in a copyright work to be published by another person without sanction, the defence of public interest could be

[1625] Kaminski *(n 1494)* 607.

[1626] *Ashdown (n 161)* para 45.

[1627] Ibid para 46.

raised.[1628] Thus, in *Ashdown* the precedence of the rights protected under the ECHR was acknowledged.[1629] The duty of striking a balance between competing rights was left to the courts through requiring them to allow the use of copyrighted material by the defendant in exchange for ordering the traditional monetary remedies which copyright provides, in favour of the claimant. By contrast, in a later judgement in relation to the intermediaries' liabilities, the High Court of England and Wales held that copyright interests clearly outweigh the freedom of expression of the users of an internet service provider, and even more clearly outweigh the freedom of expression of the operators of this intermediary.[1630]

It is arguable that the judicial reasoning of the courts discussed above has diverged significantly and these courts have set unpredictable criteria with respect to the implementation of the proportionality test. As a former Circuit Judge of the US Court of Appeals for the First Circuit, Frank M. Coffin, observes with regard to the general attitude of the courts in implementing the proportionality test: '[a]ll too commonly in judicial opinions, lip service is paid to balancing, a cursory mention of opposing interests is made, and, presto, the "balance" is arrived at through some unrevealed legerdemain.'[1631] As a result, it is not easy to portray clear conclusions, let

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[1628] Ibid paras 47, 58.

[1629] Jonathan Griffiths, 'Copyright Law After Ashdown - Time to Deal Fairly with The Public' (2002) 3 Intellectual Property Quarterly 245.

[1630] *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch) para 200. This position was subsequently maintained in the following internet service provider cases. See; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* (2) [2012] EWHC 1152 (Ch) para 8; *EMI Records Ltd (n 928)* para 93.

[1631] Frank M. Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63(1) New York University Law Review 22.

alone construct a coherent theoretical framework on this opaque basis. Aside from the protean nature of the chosen criteria, the mode of their implementation is also unclear. Although Pieter van Dijk *et al* express their consternation with regard to the ECtHR's proportionality analysis, it is worth extending their dismay to all other courts' judicial techniques:

> 'Judgments typically contain a (sometimes extensive) listing of the factors to be taken into account, but then somewhat abruptly – without additional arguments as to the weight of the factors concerned – concluded, for instance, that [. . .] 'a proper balance was not achieved.'[1632]

This is one of the most common criticisms against proportionality. The main critique is that proportionality lacks rational standards that can allow its consistent implementation. The sociologist and philosopher Jürgen Habermas suggests that '[b]ecause there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.'[1633] According to this view, the very nature of 'rights' is irreconcilable with the idea of being superseded by counterbalancing factors: rights must be absolute, otherwise they are deprived of their normative strength, and reduced to mere factors among many others that decision-makers must consider.[1634]

[1632] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, Cees Flinterman, Aalt Willem Heringa *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2006).

[1633] Jürgen Habermas, *Between Facts and Norms* (Polity Press, 1996) 259.

[1634] Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' (2009) 1(1) Journal of Media Law 50-51. Thomas Scanlon advocates that *values* rather than

Robert Alexy counters this criticism well and argues that courts can make rational judgments about the intensity of the interference with a right and also about the respective importance in the context of competing rights or public policies.[1635] It is true that one of two competing rights loses its normative force against another. Because legislators all over the world do not always perfectly craft the legal norms, not every public policy decision is taken at a utopian level of correctness nor does every right holder use her right within its foreseen boundaries. Thus, a normative conflict can occur. This normative conflict can be handled by legislators at any stage, as shown in Chapter 5.[1636] However, once the conflict appears in a legal dispute before a court, it is inevitable that this assessment will be made by courts. Being trumped by another right is a context-specific question and often peculiar to this particular context.

It is generally agreed that proportionality as a legal tool is implemented only on a case-by-case basis in light of the particular circumstances of each dispute.[1637] In *EMI Records Ltd v British Sky Broadcasting Ltd*, Arnold J underscores that 'the proportionality of a blocking order is bound to be a context-sensitive question.'[1638] Is it only this factual context that matters? It might be argued that the relevant factors

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rights are balanced, and then the scope of the right is adjusted. See; Thomas Scanlon, 'Adjusting Rights and Balancing Values' (2004) 74 Fordham Law Review 477. The difficulty with Scanlon's argument is that it ignores the point that rights are invariably formulated and inextricably intertwined with the values underlying them. Proportionally might require reflection on these values, but it is rights which describes a normative force and should be considered while applying the proportionality test.

[1635] Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131.

[1636] See Chapter 5 section 5.8.

[1637] O. Fischman Afori, 'Proportionality – A New Mega Standard in European Copyright Law' (2014) 45(8) International Review of Intellectual Property and Competition Law 889-914.

[1638] *EMI Records Ltd (n 928)* para 100.

cannot be presented in an abstract or exhaustive list. Thus, this indicates that the real value does not only lie in listing the factors by the courts, but most importantly in the analysis of these factors. Christina Angelopoulos points out that this realisation reveals what the concept of 'fair balance' is: it is 'not as a myth applied by the courts to obfuscate their subjective assessments or as a scientific method capable of providing definitive answers, but as a metaphor for the exercise of a detailed dissection, comparison and ordering of the available options with a view of identifying the optimal outcome: a call for rational discourse.'[1639] Apart from the discursive power of rationality in judicial reasoning, the central question is how to transform this rational discourse into a rational reality.

It is ironic that even though proportionality, as noted, is the dominant judicial style of this era of fundamental rights litigation, it is seldom questioned invoking metaphor (of balancing), in the most general terms, to explain in any detail how this rational inquiry can be modelled. Before listing and describing the various steps in a fully realised proportionality process, it is vital to underscore three qualities that must permeate the process if proportionality is to enhance the quality of judicial decisions. The first condition is openness. What is necessary is that judges clearly expose their reasoning and the factors that led them through it to their ultimate decision. As Eric Barendt puts it, courts 'must give coherent and consistent reasons for their decisions. […] Rulings on fundamental rights need not be arbitrary and are no more unreasonable than they are in other areas of law such as the law of negligence or charitable trusts.'[1640] Unless real reasons are explained for the decision, there is no chance for a meaningful response or any useful social or political dialogue. The

[1639] Angelopoulos *(n 723)* 86.

[1640] Barendt *(n 1633)* 51.

second key condition is wariness: this means an artisan-like attention to detail at every phase of proportionality. This includes a constant alertness to the temptation to rely on simplistic assumptions, and a resistance to unjustified generalisation. The third condition is recognition of the many dimensions of human development. This means that a factual account should be broad enough to support the range of freedoms and rights analysed. All interpretations provided by the courts in this section remained indifferent to the impact of law on human development. This is a common problem in proportionality which only follows the vagueness of 'legislative facts', facts going beyond the actual happenings in the case, to help identify the interests and convey some idea of their importance and how they are threatened, or burdened by possible actions the court might take. Therefore, courts should take cognisance of what the conditions of life and work are, what people fear, expect, and hold precious, and what motivates them. A better factual base for identifying and describing several freedoms and rights would immeasurably improve balancing. This factor is critical in bringing the discourse to real life.

From this perspective, it becomes clear that proportionality is inseparably interwoven with the deliberative construction of a system of principles to guide decisions and achieve rational outcomes.[1641] The outcomes of the proportionality test determined by the courts discussed above are not 'arbitrary' and 'irrational' as suggested by some scholars. What is of course missing in this line of case law is a decision which outlines guidelines for the application of a balancing test and subsequently applying them in a coherent manner that can reveal the appropriate rationale. The mere pronouncement that a fair balance must be sought offers no

[1641] Angelopoulos *(n 723)* 87.

guidance as to where that balance might lie. If a fair balance may only be struck in practice, how can one do that?

6.3. A multiple proportionality test with a 'human rights emphasis'

Abbe Brown, in her recent book, propounds a somewhat different version of the 'nuanced assessment' approach.[1642] The 'nuanced assessment'[1643] of human and non-human rights attributes of intellectual property rights has been widely discussed by Peter K Yu, through which he posits a more structured framework for this interface. Notably, his framework brings two important neglected points into the discussion: 1) the human rights status of intellectual property rights, and 2) the nuanced assessment of the human and non-human attributes of intellectual property rights.[1644] According to Yu, one should first distinguish between the human rights attributes and the non-human rights attributes of intellectual property.[1645] Then he separates the conflicts between human rights and intellectual property rights into two sets of conflicts: 'external conflicts and internal conflicts'. While external conflicts may exist at the intersection of the human rights and intellectual property regimes, internal conflicts refer to conflicts within the human rights regime.[1646] After the identification of the human and non-human rights aspects of intellectual property, one can resolve external conflicts by letting the human rights attributes prevail over the non-human rights

[1642] Brown *(n 123)*.

[1643] This term was first used by Tanya Aplin and Jennifer Davis, see; Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (2nd edn, OUP, 2013) 10.

[1644] Grosheide *(n 1010)*.

[1645] Yu, 'Ten Common Questions About Intellectual Property and Human Rights' *(n 123)* 710–11.

[1646] Ibid 711.

attributes (the principle of human rights primacy).[1647] With respect to the resolution of internal conflicts, however, Yu argues that one has to adopt one or more of the three complementary paradigms: the just remuneration approach,[1648] the core minimum approach,[1649] and the progressive realisation approach.[1650] In this case, since all of the conflicting attributes have a human rights premise, the principle of human rights primacy is inapplicable.[1651] Secondly, Yu refuses to accept a non-uniform view of intellectual property rights. This argument suggests that all intellectual property rights cannot be deemed human rights. Therefore, intellectual property rights held by corporations, trade marks, trade secrets, works-made-for-hire, employee inventions, neighbouring rights, database protection, data exclusivity protection, and other rights that protect the economic investments of institutional authors and inventors should not be given human rights status.[1652]

Although it seems to have its roots in Yu's approach, Brown's theory is different in many respects. Unlike Yu's theoretical analysis, Brown approaches this discussion from a more practical angle. She depicts four very helpful intellectual property case scenarios that are likely to arise in the United Kingdom or the European Union. She also brings competition law into the rights discussion, which is a rarely considered aspect of that interface. What aligns her theory to Yu's approach? Her

[1647] Ibid 711.

[1648] For a discussion of the just remuneration approach, Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework'*(n 123)* 1095–1105.

[1649] For a discussion of the core minimum approach, ibid 1105–1113.

[1650] For a discussion of the progressive realization approach, ibid 1113–23.

[1651] Yu, 'Ten Common Questions About Intellectual Property and Human Rights' *(n 123)* 712.

[1652] Ibid 727-730.

proposed framework first involves identifying the competing human rights and competition attributes of different intellectual property rights.[1653] Once all the EU fundamental rights have been identified, each right should be evaluated 'on the basis of the facts of the case, the assertation made and the outcomes and remedies sought, in the light of its restrictions or permitted exceptions and the need for balance and proportionality.'[1654] If one intellectual property holder in the case of any dispute owns one or more fundamental human rights according to existing case law, he or she will take a numerical value of plus one for each fundamental human right. A numerical value of minus one will be given to those taking part in the infringing side of the dispute or other stakeholders, such as patients, if they have one or more fundamental human rights on the other side of the equation. If the various limits on those fundamental rights are justified, then they will be subtracted as numerical values of minus one from that rights holder's side so as to make an adjustment to the balance between competing rights.[1655]

Brown also diverges from Yu's argument on whether all intellectual property rights can be elevated to the level of human rights, since she takes existing case law regarding human rights as a given. Brown makes it clear that this should not be seen as a simple 'adding up exercise' but rather as a carefully 'structured legal test' to assess the complex interrelationship of rights in order to determine whether there is a 'human rights emphasis' in favour of or against the intellectual property owner.[1656] Further, Brown addresses the controversial relationship between the WTO and human

[1653] Brown *(n 123)* 124.

[1654] Ibid 125.

[1655] Ibid 125-126.

[1656] Ibid 123, 126.

rights and proposes a possible normative adjustment to the TRIPS agreement which might clarify these issues.[1657] She also considers the possible impact of other international proposals, including the proposed Access to Knowledge Treaty and the Anti-Counterfeiting Trade Agreement (ACTA).[1658]

To be certain, Brown's legal test is a new formulation of the '*ultimate balancing test'* or, what Hugh Collins terms '*a double proportionality test*'.[1659] The application of a double proportionality test can most obviously be seen in the context of the conflict between the right to freedom of expression (Article 10 ECHR) and the right to respect for privacy (Article 8 ECHR). Here is a clear tension between the right of the press to publish information and pictures about an individual and the right of that individual to keep personal information about himself or herself secret and away from public scrutiny. Since the tension between the competing rights is unquestionable in such cases, courts have to devise a method for resolving the issue. In a similar case relating to restrictions on media publication of court proceedings, Lord Steyn argued that the following approach would be appropriate:

> 'First, neither Article has *as such* precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with

[1657] Ibid 197.

[1658] Ibid 195-196.

[1659] For an explanation of the double proportionality test see; Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law: XXII/2* (OUP, 2014) 50.

> or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the *ultimate balancing test.*'[1660]

One major drawback of Brown's legal method is the uncertainty in the balancing adjustment side of the equation. The ambiguous nature of existing limitations to human rights and intellectual property rights, their varying types from one legal regime to another, and their weights in those regimes render the value of the balancing adjustment in Brown's framework questionable. One limitation for example can exist in one legal regime, while there is no sign of that limitation in another . Similarly, the normative contents of limitations can be broad or narrow, the impacts of which on the equation rest on the legal culture of each state. Brown, perhaps for that reason, acknowledges the possibility of a different outcome, if a different approach is employed.[1661]

Another limitation with Brown's theory is that it does not explain whether a company and its investors can have a human right to property on the same patent. Under Scenario A of her legal test, Brown portrays a classic example of a patent infringement case. According to this scenario, Company A holds a pharmaceutical patent for the treatment of cancer in the UK and US and refuses to conclude a licence agreement with anyone in the UK. Company B is a newly established pharmaceutical wholesaler in the UK. Company B sells some products, which are bought from the US market and are identical to those sold in the UK by Company A, in the UK at a fairly lower price. Company A sues Company B for patent infringement in the UK. Company

[1660] *Re: S (Identity: Restrictions on Publication)* [2004] UKHL 47, para. 17. (Emphasis added)

[1661] Brown *(n 123)* 131.

B asserts that the refusal to licence and this case are an abuse of a dominant position.[1662] Do Company A and its investors have a human right to property on the patent in question separately, as Brown suggests?[1663] Is Brown's suggestion giving a human right to property to the investors of Company A at odds with the fundamental concept of company laws of various states[1664]: separate corporate personality?

Investment in a company intrinsically has the potential for financial loss as well as economic gain. Any matter influencing a company's legal situation, like patent infringement in Scenario A, may ultimately affect the value of the shareholder's investment. These stakes can be called the shareholder's 'indirect interests' in the company.[1665] It is equally true that such shareholder interests are linked to the legal situation of the company. However, the concept of a separate corporate personality requires that the shareholder's interests are different from the shareholder's rights. Shareholding rights, which are considered as property rights for the purposes of Article 1 of Protocol No 1 of the ECHR,[1666] are also different from those interests. Only when a breach of the company's rights has a direct influence on the shareholder's property

[1662] Ibid 126-127.

[1663] Ibid 128-131.

[1664] For a comparative analysis of this concept see: Lucien J. Dhoog, 'Human Rights for Transnational Corporations' (2007) 16(2) Journal of Transnational Law & Policy 216-227. Also, see; Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) Human Rights Law Review 511–43 (suggesting many recognised human rights—the right to life, freedom from slavery and torture— "presuppose . . . the material fact of human embodiment" and are thus apparently incompatible with disembodied legal entities created for the purpose of capital accumulation).

[1665] Emberland *(n 1244)* 73.

[1666] *Bramelid and Malmström v Sweden* App no 8588/79 (1982).

rights, will the shareholder be able to claim his or her right independently.[1667] This logical path suggests if a company's right has been infringed, its shareholders' economic interests might be affected, but not necessarily their rights. This principle was also endorsed by the ECtHR in the case of *Agrotexim Hellas SA and Others v. Greece.*[1668] In the *Agrotexim,* the ECtHR distinguished the alleged violation of the company's right to the peaceful enjoyment of its possessions from the allegedly adversely affected financial interests of the shareholder applicants.[1669] The court then refused to recognise the 'victim' status of the shareholders in such a violation of the right to property, while rendering its inadmissibility decision.[1670] Although the judgement ostensibly concerns procedural matters of commencing a case before the Court, its repercussions exclusively resonate in the substantive content of the human right to property: the denial of holding a moral stand and therefore the denial of separate ownership of the human rights to property. However, this does not mean that the ECtHR comprehensively rejects the victim status of shareholders. In fact, the Court is prepared to pierce the corporate veil in order to provide remedies for shareholders in exceptional circumstances when it considers it appropriate. First, when it is clear that it is "impossible" for the company to initiate a case through its organs or liquidators, the ECtHR goes beyond the corporate veil.[1671] Second, the Court disregards the

[1667] Emberland *(n 1244)* 73.

[1668] *Agrotexim Hellas SA and Others v Greece* Series A 330-A (24 October 1995). For an extensive analysis of this case see; Emberland *(n 1244)* 76-94.

[1669] *Agrotexim Hellas SA and Others v Greece (n 1667)* para 62.

[1670] Ibid.

[1671] *GJ v Luxembourg* App no 21156/93 (7 November 2000) para 24. For an extensive analysis of this exception see; Emberland *(n 1244)* 95-99.

corporate personality to confer “victim” status to the applicant shareholders when the company whose rights have been infringed is the “vehicle” of its shareholders' business venture.[1672] But in each case, only shareholders are given victim status. The company itself does not have a standing under these circumstances.

Marius Emberland crucially underlines that the Court's autonomous interpretation of ‘the corporate veil and modifications of the construct of the separate legal personality’ denote ‘a type of pragmatism in which micro and macro considerations go hand in hand but are carefully balanced.’[1673] On one side of the corporate veil, individual human rights protection of shareholders continues to be a suitable and acceptable consideration for the Court, while effective human rights protection will not subrogate current macro-economic and legal considerations by anomalous interpretation, on the other.[1674]

Turning back to Scenario A, given the judgement in the *Agrotexim,* there is no victimhood and thus no human rights to property on the patent in question for the investors of Company A, since interests flowing from the patent are in effect indirect interests for the benefit of its investors. Likewise, the shareholding rights of the investors of Company A are not subjected to any alleged violation, since it is the patent right of Company A which is at stake. For that reason, contrary to Brown's analysis, the numerical value of plus one given to the investors of Company A should be subtracted from the equation and therefore the result would be a draw. This result reveals another weakness of Brown's test: What impact will ‘Human Rights Emphasis’

[1672] *Pine Valley Developments Ltd and others v Ireland* App no 12742/87 (09 February 1993). For an extensive analysis of this exception see; Emberland *(n 1244)* 99-108.

[1673] Emberland *(n 1244)* 109.

[1674] Ibid 109.

have, when a case regarding intellectual property has been neutralised by divergent fundamental rights?

6.4. A Way Forward: A Model for Conflict Resolution

The proposed model for the resolution of conflicts between human rights involves three stages comprising the identification, quantification and comparison of the interests protected by said rights. The first and second stages are quite similar to Brown's framework which qualitatively distinguishes and then quantifies human rights in a given legal dispute. With regard to the third stage, in most cases, a course of action that upholds both human rights to the extent possible should be preferred over a situation in which one right is eliminated for the sake of the other. To avoid this elimination, several authors have emphasised the possible implementation of the doctrine of practical concordance ('*Praktische Konkordanz*') developed by the German Constitutional Court ('*Bundesverfassungsgericht*') for the resolution of conflicts between human rights.[1675] The doctrine was developed by the constitutional law scholar and former judge of the German Constitutional Court, Konrad Hesse.[1676] Hesse envisioned it both as an interpretative method and as an instrument to impose limitations on fundamental rights in general.[1677] Likewise, practical concordance is not only intended as an optimisation principle to balance conflicting rights, but also to

[1675] Brems *(n 1556)* 4; Thilo Marauhn and Nadine Ruppel, 'Balancing Conflicting Human Rights: Konrad Hesse's Notion Of "Praktische Konkordanz" and The German Federal Constitutional Court' in Brems *(n 1556)* 273-296; Smet *(n 1574)* 188-189.

[1676] Marauhn and Ruppel *(n 1674)* 278.

[1677] Ibid 279.

balance rights with other interests.[1678] In Germany, its implementation was later limited to fundamental rights.[1679] The international appeal of practical concordance may not lie so much in these formal aspects (limitation clause or not) nor in the examples of its application in specific cases, but rather, as Eva Brems stresses, in its underlying idea: the optimisation of both equally valuable rights.[1680] This doctrine thus essentially involves a judicial search for a compromise in which both human rights yield to each other and a solution reached keeps both rights intact to the greatest extent possible.[1681] Although no direct reference was made to this doctrine, *Ashdown* displays the ideology of practical concordance, as it enabled both copyright and freedom of expression to continue to exist.[1682] To resolve conflict and to accommodate the right to freedom of expression, the Court of Appeal embraced the 'just remuneration approach'[1683] by noting that courts should decline discretionary injunctive relief in the event of a conflict between copyright and human rights.[1684] It has been argued that in *Ashdown* 'the appellate court opened the possibility for the future creation of human rights-based compulsory licenses.'[1685]

[1678] Ibid 280-281.

[1679] See cases; Ibid 284-293.

[1680] Brems *(n 1556)* 10.

[1681] Olivier De Schutter and Françoise Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' in Brems *(n 1556)* 203.

[1682] *Ashdown (n 161)* para 45.

[1683] For a discussion of the just remuneration approach Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1095–1105.

[1684] *Ashdown (n 161)*.

[1685] Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' *(n 123)* 1098.

Nevertheless, in the majority of cases, a compromise cannot be achieved and the court needs to determine which right deserves priority over the other.[1686] It would be helpful to delineate a catalogue of all relevant criteria that could guide this exercise.[1687] 'Particularised facts' discerned through these criteria, concerning the impact of the rights involved on one another and on their underlying principles, can provide a framework for conflict resolution.[1688] To this end, it is worth returning to and enriching the elements highlighted by scholars in order to facilitate the management of conflicts between fundamental rights in general and the assessment of their relevance when it comes to resolving conflicts between copyright and another human right.

The first criterion is the impact, or the severity, of the infringement. The 'impact criterion' could be used to determine the extent to which both rights would be undermined by allowing the opposing right to take priority. The rationale behind this criterion is the following: Individual A has right X. Individual B has right Y. Presume a conflict arises between these two. If the implementation of right X of A would give rise to a serious impairment of right Y of B, while the opposite case would have only minor consequences for right X of A, the protection of right Y could be more appropriate.[1689]

The second criterion is the core/periphery distinction. In applying the 'core/periphery criterion,' the court could decide whether the aspects of the rights that are in conflict belong to the core or the periphery of the human rights in question. Using

[1686] Brems *(n 1556)* 5.

[1687] Ibid.

[1688] Sullivan *(n 1571)* 821.

[1689] Smet *(n 1574)* 189.

the above example, this criterion entails that where a conflict arises between a core aspect of right X and a peripheral aspect of right Y, right X would be given priority.[1690]

The third criterion is the involvement of additional rights. When the conflict is not limited to two human rights, but also involves other rights, the 'additional rights criterion' could be used to assess the strength of both parties' positions. To make a more comprehensive assessment, the court could take into account the additional rights involved. Turning back to the above example, for instance, if the use of right X by A would not only affect the right Y of B, but would also negatively impact right Z of B, B's legal position could be presumed to be stronger than A's position by the involvement of right Z.[1691] The same reasoning applies when the indirect involvement of a third party's right weighs in favour of one of the conflicting rights.

The fourth criterion is the close involvement of a general interest, which could strengthen the position of one of the human rights in the conflict. If A invokes her right X and this would not only impair right Y of B, but would also have a negative impact on a general interest, while the same would not hold true for the exercise of right Y by B, then the protection of right Y could be more suitable.[1692]

[1690] Ibid 189-190; Brems *(n 1556)* 5; Peggy Ducoulombier, 'Conflicts Between Fundamental Rights and The European Court of Human Rights: An Overview' in Brems *(n 1556)* 239-240; Ignacio García Vitoria, 'Environment Versus Free Enterprise: A Conflict Between Fundamental Rights?' in Brems *(n 1556)* 482-489; Janneke H. Gerards, 'Fundamental Rights and Other Interests: Should It Really Make A Difference?' in Brems *(n 1556)* 686-690. For an opposite view which denies that a core/periphery distinction may facilitate an approach to conflicting rights based on balancing see; Gerhard van der Schyf, 'Cutting to The Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective' in Brems *(n 1556)* 131-147.

[1691] Smet *(n 1574)* 190; Brems *(n 1556)* 5

[1692] Smet *(n 1574)* 190.

The fifth criterion is the 'purpose criterion.' This criterion can be used when a right is exercised in a way contrary to the very objective it is designed to achieve. In these circumstances, this right is to be accorded lesser weight.[1693] The rationale here is related to the 'abuse of rights' concept, which emerged from the case law of several civil legal systems in the 19th and 20th centuries. This concept was first adopted to limit the exercise of a right in cases where the holder used it with the intention of harming others, and, subsequently, to limit the use of this right when the advantage procured as a result of exercising it was disproportionate or minimal in relation to the harm caused.[1694] This element of the model can be also called the 'responsibility criterion.'[1695] This denotes that a person choosing to exercise her right bears the responsibility for the manner in which she chooses to exercise it. This criterion does not call for a direct comparison between rights, but instead offers flexibility to determine whether one right has been exercised responsibly.[1696]

The final element of this model is the distinction between positive and negative obligations. Eva Brems questions whether direct interference by a government authority (negative obligation to respect rights and freedoms) can prove more serious

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[1693] Ibid 190. Stijn Smet notes that '[t]his criterion can for instance be applied in the context of a conflict between the right to education of a child and the right of parents to freely choose the education of their children. When the exercise of the parental rights would undermine the child's right to education, the application of the purpose criterion would lead to Court protection of the child's right because the parental rights are closely linked to—and a condition for—the fulfillment of the child's right'. Ibid 190-191.

[1694] See; Marlies Galenkamp, 'Towards a Socialisation of Fundamental Rights' in Brems *(n 1556)* 158–160. For an abuse clause in a human rights treaty see for example; Article 17 of the ECHR.

[1695] Ibid. Smet *(n 1574)* 190; Brems *(n 1556)* 191.

[1696] Smet *(n 1574)* 191.

than the absence of such interference (positive obligation to protect rights and freedoms), so that the former is perceived in a more critical light than the latter, within the framework of a conflict between fundamental rights.[1697]

The proposed model should not be seen as a static catalogue. Rather, it is flexible in that its application will be entirely dependent on the circumstances of the case, to which certain criteria might not be relevant or fail to offer a clear solution. However, adhering to the elements of the model would allow for the delivery of more consistent and transparent judgements.

6.5. Case Studies

This section uses the guiding criteria identified above to analyse two known instances of digital copyright enforcement measures. The case studies include: (1) Notice-and-stay-down procedures as applied in Germany, and (2) Technical protection measures as applied in the US. Each of these case studies corresponds to a court case in which different actors engaged, or will engage, in practices of copyright enforcement in ways that implicate various fundamental rights. The assessment in this section is made according to the law that can be applied within the jurisdiction where these cases are overseen.

In the first case study, two recent decisions from Germany concerning YouTube's liability for third-party copyright infringements, where the courts ruled that YouTube could be held liable, whether for primary or secondary copyright

[1697] Brems *(n 1556)* 5.

infringement.[1698] The implementation of notice-and-stay-down is discussed in the first case study. Although GEMA and YouTube struck a deal as of writing this part of thesis on licencing, it is probable not to see any further legal controversy about YouTube, but this liability principle has been used, and will possibly be used in the future, to impose further digital copyright enforcement measures on other hosting service providers in copyright cases. These cases are chosen for three strategic reasons. Firstly, notice-and-stay-down enjoys some popularity in the EU Member States, particularly France and Germany.[1699] This approach eventually caught on in a limited way in the UK as well.[1700] The German approach of *Störerhaftung* – although crafted in much more detailed terms, was limited only to the issue of injunctive orders by courts and not the imposition of *ex ante* liability for damages.[1701] Secondly, there has been a noticeable judicial dialogue between the UK and German courts through their reasoning of the

[1698] See the District Court of Munich (Landgericht (District Court) Munich I, 30 June 2015, 33 O 9639/14) and the Court of Appeal of Hamburg (Oberlandesgericht (Court of Appeal) Hamburg, 1 July 2015, 5 U 87/12.

[1699] For an academic discussion of notice-and-stay-down system see; Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (2016) PhD Thesis, Amsterdam paras 3.2.3.2. and 3.3.1.

[1700] In *EMI Records Ltd v British Sky Broadcasting Ltd*, Arnold J established the liability for the authorisation of infringement of three peer-to-peer file-sharing websites, KAT, H33T and Fenopy, due to the insufficiencies of their notice-and-take-down regime. In *EMI Records Ltd* paragraphs 68 and 69 of the judgement implies an idea that the websites in question were not only liable for notified content that was not taken down, but should have implemented notice-and-stay-down procedures, incorporating permanent filtering measures of such as kind as to necessarily require the monitoring of all content posted by all users, as a preventive measure and exclusively at the cost of the intermediary, *i.e.* general monitoring of the *Netlog (n 904).*

[1701] Angelopoulos *(n 1698)* 125.

implementation of the blocking orders, which might potentially evolve into a convergence towards judge-mandated notice-and-stay-down system. Arnold J, who has recently set the standards in these cases in the UK, referred to *Störerhaftung* in great detail in both of his decisions[1702] and scholarly articles.[1703] In a recent case, the German Federal Supreme Court (*Bundesgerichtshof*-BGH),[1704] where three global music companies, Universal Music, Sony and Warner Music Group sought an injunction against Telefonica's O2 Deutschland to block access to 'goldesel.to' - part of the eDonkey network, a peer-to-peer file-sharing network for music - cited[1705] Arnold J's decision in a trade mark case against the UK's biggest Internet service providers.[1706] There is a tendency towards the adoption of the notice-and-stay-down

[1702] *L'Oreal SA v eBay International AG* [2009] EWHC 1094 (Ch) paras 455–465.

[1703] Arnold J pointed to *Störerhaftung* as the comparable legal solution for granting website blocking orders against the Internet intermediaries in copyright and trade mark cases. See; Richard Arnold, 'Website-Blocking Injunctions: The Question of Legislative Basis' (2015) 37(10) European Intellectual Property Review 629-630.

[1704] Bundesgerichtshof (Goldesel) (I ZR 174/14) unreported 26 November 2015. See also, Bundesgerichtshof (I ZR 3/14) unreported 26 November 2015.

[1705] BGH, I ZR 174/14 — Goldesel at [47].

[1706] *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch) para 173. In *Cartier,* the claimants (collectively, 'Richemont') were the proprietors of a number of UK and international trade marks registered in relation to certain luxury goods, including Cartier, Mont Blanc, IWC and other brands. The defendants (British Sky Broadcasting Ltd, British Telecommunications plc, EE Ltd, TalkTalk Telecom Ltd and Virgin Media Ltd) are the five largest ISPs in the UK, between them having a market share of approximately 95% of UK broadband users. The case concerned a claim for an injunctive blocking order against the defendant Internet service providers, which was ultimately upheld. See *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch). For a

system in the US as well. The US government has undertaken a public study on the effectiveness of the DMCA 'safe harbour' provisions. In the notes to their ongoing consultation on DMCA 'safe harbours', the US Copyright Office underlines that the recorded entertainment industry in America has supported a 'notice-and-stay-down' approach.[1707] Thirdly, given that there is an upsurge of cases and considerations with regard to the human rights questions surrounding Internet intermediaries' position before human rights courts[1708] and institutions,[1709] it is highly likely that they might be subjected to human rights litigation in the near future. In fact, it has been argued that '[d]efendants in new German *Störerhaftung* cases may invoke [some of the current intermediary cases] to oppose monitoring demands.'[1710] When it is the case, these digital enforcement measures would inevitably encounter the same question of prioritisation of human rights.

In the second case study, the US TPMs rules will be examined on the basis of the case of *Green v US Department of Justice*,[1711] in which these rules are subjected

commentary on the case see; Eloise Preston, 'Site Blocking and the Future of Online Brand Protection' (2015) 26(2) Entertainment Law Review 64-66.

[1707] US Copyright Office, 'Section 512 Study: Notice and Request for Public Comment' (Docket No: 2015–7, 31 Decemeber, 2015), available at https://www.gpo.gov/fdsys/pkg/FR-2015-12-31/pdf/2015-32973.pdf

[1708] *Ahmet Yildirim (n 945)*; *Delfi (n 787)*; *MTE (n 792)*.

[1709] Special Rapporteur on Freedom of Expression Report *(n 783).*

[1710] Daphne Keller, 'Litigating Platform Liability in Europe: New Human Rights Case Law In The Real World', available at http://cyberlaw.stanford.edu/blog/2016/04/litigating-platform-liability-europe-new-human-rights-case-law-real-world (Brackets are mine).

[1711] *See* Complaint for Declaratory and Injunctive Relief, *Green et al v US Department of Justice, et al,* No. 1:16-cv-01492 (DDC, 21 July 2016).

to constitutional review. At the international level, TPM systems are protected by the WCT and the WPPT, covering both technological measures for protection of copyright and rights management information. In Europe, this has been achieved by means of the Information Society Directive. This provides the TPMs with a universal protection. For that reason, the examination of TPMs from a human rights perspective would provide valuable insights into understanding their role in the enhancement of cultural participation.

Against the background of a rigorous analysis of the relevant legal frameworks, the assessment of the legality and proportionality of the enforcement measures used in these selected case studies aims to elucidate the legal issues and problems involved for the benefit of ongoing policy discussions on relevant matters. The analysis can also be used to illustrate the way to carry out such an assessment in future cases, on the basis of the criteria developed in the study. In other words, it further develops the list of guiding criteria for the assessment of digital copyright enforcement measures that are relevant to cultural participation and human development.

6.5.1. Case Study 1: Notice-and-stay-down in Germany

6.5.1.1. Legal and Factual Background

Before the identification of the human rights involved, it is necessary to present the factual and legal background of the notice-and-stay-down measure as applied to YouTube cases in Germany. In the Internet intermediary cases involving either copyright or trade mark infringement, the German courts have embraced a proactive approach and provided the claimants with injunctive relief based upon a distinctively

German remedial doctrine called *Störerhaftung.*[1712] This is usually, and somewhat inaccurately, translated into English as 'interferer', 'disturber' and 'accessory' liability or even sometimes as 'breach of a duty of care.'[1713] This concept is by analogy generated from an article in the German Civil Code entitling proprietors to claim that any disturbance which results in detrimental effects to their property be removed and prohibited in the future.[1714] This liability is a strand of objective liability standards and thus no fault or negligence needs to be shown.[1715] Proving detrimental effects is sufficient unless the disturbance must be tolerated by the proprietor for specific reasons.[1716] The doctrine of *Störerhaftung* thus allows cease and desist orders to be imposed not only on the immediate wrongdoer and any participants in the wrongdoing, but also on the so-called *Störer*, namely "disturber", who knowingly and causally contributes to an infringement by another.[1717]

For claims against a disturber to be admitted two main conditions must be met:[1718]

[1712] Graeme Dinwoodie, 'Secondary Liability for Online Trademark Infringement: The International Landscape' (2014) 37 Columbia Journal of Law & the Arts 484.

[1713] *L'Oréal SA v eBay International AG* [2009] EWHC (Ch) 1094 para 455 (Arnold, J.) (Eng.); Angelopoulos *(n 1698)* para 3.3.1. The word 'disturbers' is used for the legal concept of *Störer* in the rest of the chapter.

[1714] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGB] I page 42, as amended, § 862 and § 1004 (Ger.)

[1715] Angelopoulos *(n 1698)* para 3.3.1.

[1716] Ibid.

[1717] Ibid.

[1718] Alexander Bayer, 'Liability 2.0 – Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany' in Martin J. Adelmann et

a) *A deliberate and adequately causal contribution to a legal violation*: the disturber must have, in same way, knowingly, sufficiently and causally contributed to the creation or maintenance of a legal wrong, including through taking advantage of infringements committed by others.

b) *The breach of a reasonable duty to review*: This is essentially a duty to check (inquire into) whether infringements have occurred.[1719] This duty does not arise spontaneously, but is triggered only by a clear notice of an existing infringement. It operates continuously from the moment of receipt of notification, so that the intermediary may operate under obligations to monitor and forestall future predictable infringements.[1720] This may include using filter software or, if necessary, manual follow-up checks.[1721] The duty to review is not limited only to identical copies or copies offered by the same person, but extends to all easily identifiable future unlawful acts of an essentially similar nature.[1722] Thus, once an Internet intermediary has been alerted to an infringement, as long as its business operations are not unreasonably

al., Patents and Technological Progress in a Globalized World (Springer, 2009) 365. A third condition of the legal and factual possibility of preventing infringement is sometimes also identified, see e.g. Matthias Leistner, 'Common Principles of Secondary Liability?' in Ashar Ohly (ed), *Common Principles of European Intellectual Property Law* (Mohr Siebeck, 2012) 128.

[1719] Adolf Dietz, 'Germany' in Lionel Bently, Paul Edward Geller and Melville B. Nimmer, *International Copyright Law and Practice* (Matthew Bender/LexisNexis, 2013) § 8[1][c][i].

[1720] Ibid.

[1721] Angelopoulos *(n 1698)* para 3.3.1.1.b.

[1722] Joachim Bornkamm, 'E-Commerce Directive vs. IP Rights Enforcement – Legal Balance Achieved?' (2007) GRUR Int 642. This is called '*Kerntheorie*', according to which the infringements must be similar in their core (*Kern*). Angelopoulos *(n 1698)* para 3.3.1.1.b.

impaired, it is expected to proceed with blocking obvious re-occurrences without waiting for a right-holder notification.[1723]

Furthermore, the concept of *Störerhaftung* does not provide a basis for damage claims or other sanctions beyond removal of the actual disturbance and the prevention of any such further disturbance.[1724] This follows from the fact that the interferer is not liable for primary or secondary infringement according to general tort rules.[1725] Culpable breach of an injunction constitutes contempt of court and is punishable with a disciplinary fine.[1726] Since *Störerhaftung* allows right holders only to

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[1723] In Germany, the notice-and-take-down regime is confined to cases where there had not previously been any similar infringement on the same platform. Bayer *(n 1717)* 365. Jan Bernd Nordemann suggests that infringements are of the same type if: a) the same work is infringed through the communication to the public of the same copy or another just as obviously infringing copy; b) other works of the same kind are infringed, provided the infringements originate from the same perpetrator and do not require a new legal assessment. This refers to the case of 'repeat infringers'; and c) other works of different types are infringed by a different infringer, provided the service is particularly susceptible to infringements and the provider is aware of this. This will be the case for example, where the provider advertises the infringing capabilities of the service or where otherwise neutral services happen to be predominately used for infringing purposes. Jan Bernd Nordemann, 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach' (2011) 2(1) Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC) 42-43.

[1724] Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 15, 1957, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 352, 1957 (Ger.).

[1725] Ibid

[1726] Gerald Spindler, 'Country Report – Germany for Study on the Liability of Internet Intermediaries' (2006), available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/germany_12nov2007_en.pdf.

obtain injunctions,[1727] it has been applied by German courts regardless of whether the activities of the Internet intermediaries are covered by the safe harbour rules in the E-Commerce Directive.[1728]

The German Federal Supreme Court implemented the principle in relation to an auction site's liability, where it refused the full liability claims (both primary and secondary).[1729] Nevertheless, the Federal Court granted injunctive relief essentially mandating takedown, but potentially requiring some pro-active filtering for infringements absent specific and concrete knowledge of the allegedly infringing acts.[1730] The potential range of obligations emanating from the concept of *Störerhaftung* was further clarified in two recent copyright cases concerning the services of RapidShare, where the Federal Court ordered extensive monitoring duties against the intermediary.[1731] As a result, Rapidshare was obliged to take preventive

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[1727] Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 15, 1957, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 352, 1957 (Ger.).

[1728] Annette Kur, 'Secondary Liability for Trademark Infringement on the Internet: The Situation in Germany and Throughout the (2014) 37(4) Columbia Journal of Law & the Arts 533.

[1729] Bundesgerichtshof [BGH] [Federal Supreme Court] Mar. 11, 2004, 36 INT'L REV. OF INTELL. PROP. & COMPETITION L. 573, 2005 (Ger.) (*Internet Auction I*); Bundesgerichtshof [BGH] [Federal Supreme Court] Apr. 19, 2007, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 708, 2007 (Ger.) (*Internet Auction II*); Bundesgerichtshof [BGH] [Federal Supreme Court] Apr. 30, 2008, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 702, 2008 (Ger.) (*Internet Auction III*). All three cases were cited in *L'Oréal SA v eBay International AG* [2009] EWHC (Ch) 1094 paras 455-461 (Arnold, J.) (Eng.).

[1730] Kur *(n 1727)* 535.

[1731] Bundesgerichtshof [BGH] [Federal Supreme Court] July 12, 2012, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 370, 2013 (Ger.) (*Alone in the Dark*) BGH, Rapidshare I, 12 July 2012, I ZR 18/11; Bundesgerichtshof [BGH] [Federal Supreme Court] Aug. 15,

measures in addition to expeditious removal. In particular, according to the German Federal Supreme Court, Rapidshare should have implemented a word filter to recapture and remove all infringing files already in its system; this automated filtering should additionally have been supplemented with a subsequent manual reassessment for avoiding over-blocking.[1732] In addition, the German Federal Supreme Court held that Rapidshare is under a general market monitoring duty to search, by use of general search engines 'such as Google, Facebook or Twitter' through suitably formulated search questions 'and possibly also through the assistance of so-called web-crawlers', for further illegal links to its service with regard to all relevant copyrighted works.[1733]

In YouTube cases, the lower courts have followed the path opened by the German Federal Supreme Court. In 2012, the Hamburg *Landgericht* (Hamburg district court) in *GEMA v YouTube* concluded that YouTube was not liable via the general liability rule '*Täterhaftung*', that is by actually having committed the infringing acts itself, but could only be held liable via the principle of disturber liability (*Störerhaftung*).[1734] According to the Hamburg Court, the defendant had breached its duty of care for eight out of the twelve music titles in question, as it took YouTube seven months to remove the copyright infringing videos after the GEMA had informed it about the copyright infringements. The Court found that such a period of time did not qualify as 'without

2013, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 1030, 2013 (Ger.) (*File-Hosting-Dienst*) BGH, Rapidshare III, 15 August 2013, I ZR 80/12. For a case comment on Rapidshare III case see; 'The Federal Supreme Court (Bundesgerichtshof): 'Rapidshare III'' (2014) 45(6) International Review of Intellectual Property and Competition Law 716-719.

[1732] BGH, Rapidshare III, 15 August 2013, I ZR 80/12 para 64.

[1733] BGH, Rapidshare III, 15 August 2013, I ZR 80/12 para 67.

[1734] LG Hamburg, 20 April 2012, 310 O 461/10.

delay'. The court therefore recognised YouTube as an interfering party, or 'disturber', ordered the popular video-hosting platform to delete completely the eight titles from its website and imposed a fine of up to 250,000 euros or a term of imprisonment of up to six months if further copyright infringement was notified.[1735]

As regards the defendant's further control duties the court stressed that it was reasonable after having been alerted to a copyright infringing act to prevent future uploads of the same musical work and that YouTube did not fulfil its duty to ensure that further copyright infringement would not recur. The court further articulated clear guidelines for YouTube to follow in order to fulfil its duty of care. YouTube was obliged to undertake automated filtering of its platform, so as to uncover any future infringement of content whose previous infringement had already been submitted to its attention. This meant that YouTube is obliged to use its Content-ID software itself for further infringements, instead of expecting the copyright holder's notification each time, as is its usual practice. The Content ID system essentially works in this way: the system creates an ID file for copyright-protected audio and video material whose owners have signed up for participation and stores it in a database. When a video is uploaded onto the platform, it is automatically scanned against the database. If a match is found, the video is flagged as a potential copyright infringement. The content owner then has the choice of muting the video, blocking it from being viewed, tracking the video's viewing statistics or monetising the video by adding advertisements.[1736] It has been noted that while the system is functional in finding copyright infringement in the audio tracks of videos, it could be easily obstructed and is not receptive enough to

[1735] LG Hamburg, 20 April 2012, 310 O 461/10.

[1736] YouTube, 'How Content ID Works', available at:https://support.google.com/youtube/answer/2797370?hl=en

detect useful meta-information, such as repeat infringers.[1737] Thus, YouTube was asked to continuously filter all content which is related to the claimant's copyrighted material on its platform.

In addition, YouTube is also said to be under an obligation to install a word-based filter designed to examine the title of the video and the artist concerned. This last measure was deemed necessary because YouTube's Content-ID programme can only identify audio recordings that are identical to the reference file but does not detect modified versions of the same musical work such as a live version. The court also suggested that fundamental rights were not relevant to the discussion, as YouTube did not handle end-users' personal data (a controversial idea, as personal data is a broader concept than that of sensitive private information), while any risk to freedom of expression would be eliminated by the appropriate application of the measures ordered.[1738] In July, 2015, the Hamburg Court of appeal confirmed the ruling.[1739]

Thus, German courts may impose three types of measures on host-providers like YouTube in copyright infringement cases: 1) prompt removal of infringing content upon the receipt of a notification; 2) using Content-ID software to filter for future infringements; 3) adopting a word-base filter for future infringements.

[1737] Electronic Frontier Foundation, 'Testing YouTube's Audio Content ID System' (April 23, 2009), available at: https://www.eff.org/deeplinks/2009/04/testing-youtubes-aud.

[1738] LG Hamburg, 20 April 2012, 310 O 461/10. For academic commentaries on the decision see; Gregoire Marino, 'YouTube is not GEMA's main offender' (2012) 7 (9) Journal of Intellectual Property Law & Practice 644-646; Angelopoulos *(n 1698)* para 3.3.1.1.b; Jan Bernd Nordemann, 'YouTube is a hosting provider, but one with extensive duties of care, say two German Courts' (6 November, 2015), Kluwer Copyright Blog, available at http://kluwercopyrightblog.com/2015/11/06/youtube-is-a-hosting-provider-but-one-with-extensive-duties-of-care-say-two-german-courts .

[1739] Angelopoulos *(n 1698)* para 3.3.1.1.b.

6.5.1.2. Identification of Rights

Courts and human rights institutions should begin by singling out the human rights which may be pertinent to the case which is before them. It is possible for the same, or very similar, right to exist in more than one relevant instrument which can be considered by the decision maker.[1740] When this is so, each right should only be taken into account once. It should then be considered if these rights are indeed relevant to the dispute so as to be taken into account in the court's analysis on the basis of a human rights assessment.[1741]

In the light of the decisions in *Smit & Kline,*[1742] *Balan,*[1743] *Budweiser,*[1744] *Dima,*[1745] *Ashby Donald,*[1746] and *the TBP*,[1747] the right to enjoyment of property of the members of the GEMA, within Protocol 1 Article 1 of the ECHR will be engaged with respect to its objection to communicating its members' musical works to public, which is an infringing act within almost every jurisdiction. This is also related to the requirement in Article 17(2) of the EU Charter, stating 'intellectual property shall be protected'. Also, as in *Promusicae*, *SABAM* and *Telekabel*, the right of YouTube to

[1740] For example, the right to freedom of expression and information (Article 10 ECHR and Article 19(2) ICCPR) and rights to property including intellectual property (Protocol Article 1 ECHR and Article 17(2) EU Charter).

[1741] Brown *(n 123)* 124.

[1742] See Chapter 4 section 4.3.2.1.

[1743] See Chapter 4 section 4.3.2.2.

[1744] See Chapter 4 section 4.3.2.3.

[1745] See Chapter 4 section 4.3.2.4.

[1746] See Chapter 3 section 3.3.2.

[1747] Ibid.

conduct a business as it wishes by providing video-hosting platform and other related services to its users either free or through differentiated remuneration schemes all over the world, including the UK and the EU, will be engaged within Article 16(1) of the EU Charter. The reflection of this uniquely EU-centred right in the ECHR context is YouTube's right to enjoy and manage its business assets within, once again, the meaning of Protocol 1 Article 1 of the ECHR and article 17(1) of the EU Charter, which should be considered as well. Consistent with *the TBP, Delfi, MTE,* and *Cengiz,*[1748] YouTube's right to freedom of expression within Article 10(1) of the ECHR will be involved, as it acts as a host of an enormous amount of knowledge, imparting information to its users. Arguably, this function of YouTube's services, providing an online platform of diverse and huge numbers of cultural materials which enable its users to participate in cultural life, puts itself in a position to contribute to cultural life, the restriction of which would require involvement of the protection of right to take part in cultural life within Article 15(1)(a) of the ICESCR.

With regard to YouTube's users that are not party to the case, in the light of *Cengiz*, *Yildirim* and *Akdeniz*,[1749] it could be argued that Article 10(1) of the ECHR and Article 19(2) ICCPR right to expression and information (access to knowledge) will be engaged. From cultural participation perspective this is further relevant to Article 15(1)(a) of the ICESCR's right to access cultural life is engaged, as YouTube's technology provides them with a new and more cost effective means of participation in cultural life. Due to immediate and one-sided removals of content from YouTube through its Content-ID software and given the empirical data showing the high fallacy

[1748] See Chapter 3 sections 3.2.6.1., 3.3.2. and 3.5.4.

[1749] See Chapter 3 section 3.5.4.

rate in implementation of take-downs by YouTube's owner company Google,[1750] there would appear to be evidence that the users, including the alleged copyright infringers, would be deprived of the further transformative and creative uses of the copyrighted material, and thus their right of artistic and creative expression within Article 10(1) of the ECHR, Article 19(2) ICCPR and Article 15(1)(a) of the ICESCR. The right to protect material and moral interests of the author within article 15(1)(c) ICESCR could apply to GEMA with respect to its members' initial creations. The exegesis from General Comment No 17[1751] suggests, however, that it is unlikely that this right can be held by a company. Given that the right to property which serves to protect a similar interest is engaged, it is unlikely that a decision maker would be take this right into account.

It could also be argued that the users' right to contribute to cultural life in Article 10(1) of the ECHR, Article 19(2) ICCPR and Article 15(1)(a) of the ICESCR through expressing themselves in various ways, who utilise YouTube's discussion board, upload their personal videos or vlogs -which is combined with copyrighted materials- are engaged. From *SABAM* cases, it is possible to think that a word-based filter would create privacy concerns on the part of YouTube users.[1752] However, as all content is shared publicly, privacy concerns would be omitted by a decision-maker. As, unlike *Telekabel*, the standards of appealing the judgement for the allegedly infringing users are not explained by the German courts (the right to access to a court), and as these users are afforded a reasonable opportunity to present their defences (the right of equality of arms and the right to be heard), also engaged is the users' right

[1750] See Chapter 3 section 3.2.6.2.

[1751] See Chapter 4 section 4.2.3.

[1752] See Angelopoulos et al., *(n 899)* 69.

to a fair trial under both Article 6(1) of the ECHR[1753] and Article 47 of the EU Charter.[1754] Finally, as the copyright enforcement measures would affect works that are in public domain, the users' right to access their cultural heritage under Article 15(1)(a) of the ICESCR would be relevant.

6.5.1.3. Analysis and Combination of Rights

The Impact Criterion: YouTube is generally defined as a host platform for video-sharing. As accepted in *Cengiz,*[1755] it performs many roles in cultural and political life that transcend this general perception. It acts as a global and huge repository of educational, cultural, political and artistic materials, which are necessary for a robust public debate in a democratic society, for creating an interactive and effective learning and teaching environment, for entertaining (*e.g.*, sharing personal videos, commenting below the video clips like social networking sites, listening to music, watching films, TV programmes, documentaries, and *etc*.), for v-logging and thus sharing stories, and in total for participating in cultural and political life.[1756] It is

[1753] *Ankerl v Switzerland* (2001) 32 EHRR 1; *J J v The Netherlands* App no 21351/93 and *Ferreira Alves v Portugal* App no 25053/05.

[1754] Also the CJEU noted in a different context that 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his points of view known'. See; Case 17/74 *Transocean Marine Paint Association v Commission of the European Communities* [1974] ECR I-01063 para 15. In addition, the CJEU explicitly requires in its pre-Charter case law that public authorities adopting a decision must provide the affected persons a possibility to be heard, because the right to be heard is the essence of the due process guarantees. See; Case C-315/99 *Ismeri Europa Srl v Court of Auditors* [2001] ECR I-05281.

[1755] *Cengiz (n 959)* para 51.

[1756] Ibid.

further a media outlet on which many TV channels, radios, and institutions broadcast live or share their programmes and news with their audience.[1757] Even general public contributes to public debate through citizen journalism.[1758] Although the measures ordered in Germany aimed to stop YouTube using copyright-protected materials of GEMA's members, these measures might affect the content which might be political, commercial, artistic, and other types of expressions, as they are unable to distinguish the character of expression.

To evaluate this criterion, the first matter that should be assessed is the nature and severity of the copyright enforcement measures in question on the part of YouTube. The targeted and specified notice-and-take-down measures might seem necessary for the protection of copyrighted-materials of GEMA's members, suitable and legitimate for this aim pursued and as a proportional restriction, as was accepted in *Delfi* and *MTE*. However, it could be argued that a continuous filtering through Content-ID and word-filter software clearly goes beyond the protection of copyright, as it might be implemented on public domain works or legal activities other than those GEMA complained of. This accordingly could profoundly curtail YouTube's business model and its important and legitimate roles mentioned above, and would ultimately have an adverse impact on YouTube's function to impart information. Such wholesale filtering, despite not being as severe as the blanket blocking of YouTube as in *Yildirim*, is open to rendering large amounts of information inaccessible, thus substantially restricting the rights of Internet users and having a significant collateral censorship effect. There is no reason why this notice-and-take-down system could not be seen as sufficient. Indeed, while the German courts held that filtering was necessary in

[1757] Ibid 52.

[1758] Ibid.

addition, as stated in *MTE,* this would amount to 'requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.'[1759] Thus, the interference with freedom of expression does not adequately advance the 'interests' pursued and goes further than is necessary to meet the said 'social need'. In addition, the lack of a certain time frame for the implementation of enforcement measures (sunset clause as in *Telekabel*) in German courts' judgements further brings the filtering measures close to the line of a disproportional restriction on freedom of expression. While GEMA is secured a sufficient, if not ideal, degree of protection for its members' copyright through the notice-and-take-down and Content-ID measures already in place in YouTube's business scheme (as in *MTE*), imposing the additional and continuous filtering measures on YouTube has a more profound impact on its legal status, remarkably diminishing the protection provided by the right of freedom of expression.

The core/periphery criterion: The rights of reproduction and communication to the public of GEMA's members lie at heart of copyright. Until *Smith & Kline,* intellectual property had not been seen as a core element of the human right to property. However, after this judgement it has ome to be seen so.[1760] Likewise, YouTube's right to impart information is a core right within the right to freedom of expression.[1761] The core/periphery criterion does not help elevate one right over the other.

The purpose criterion: The analysis performed so far has not revealed any direct applications of the purpose criterion in the case, as there is no evidence

[1759] *MTE (n 792)* para. 82.

[1760] See also *Balan (n 1091), Dima (n 1074), Ashby Donalds (n 166), The TBP*.

[1761] See; *Cengiz (n 959).*

indicating that any party exercises its rights contrary to the very objective it is designed to achieve.

The responsibility criterion: Unlike *the TBP,* YouTube does not establish its business model on inducing users to infringe copyright or directly infringing it. On the contrary, just like *MTE,* it designed Content-ID software to identify and cease potential infringements. This supports YouTube's position in the proportionality analysis.

The additional right criterion: If this criterion applied, YouTube's right to freedom of expression would be strengthened because it is supported by another right, namely the right to property. Although the ordered measures would not financially strangle YouTube as mentioned in *Ashby Donalds*, it could be argued that the German courts' order to change its already settled business model in a profound way not just for the protection of GEMA's copyright in eight musical works, but also for all works in its platform, could amount to an immense restriction to its business. This puts YouTube in a position which requires it to change its entire business model so as to act as a warden of copyright infringements not just for the materials at stake but also for all material on its website. Although one might make a case, though a relatively weak one, that the German remedial doctrine could be enough to qualify the 'prescribed by law' principle, it is arguable that this could clearly not pass the necessity test due to the fact that there are already fewer restrictive protection measures in place applied by YouTube. Besides, the absence of an order which partly or completely compensates YouTube for any expenses it might incur in implementing such large scale filtering measures for the protection of others rights could be a disproportional restriction on YouTube's property rights in its business. It is difficult to argue that it is in the public interest and proportionate for restrictions to be placed on YouTube's right

to property to enable GEMA to benefit from the YouTube's wholesale active policing of all copyright infringements on its platform.

The general interest criterion: The prevention of infringing uses provides support for GEMA's position in terms of the general interest criterion, as it is equally in the public interest to provide incentives to copyright holders. On the other hand, the relevance of a general interest is evident in almost every freedom of expression case in which the role of the intermediary as a press or resource of information is a pertinent factor. In such cases, the applicant's freedom of expression is strengthened by the general interest a democratic society has in guaranteeing a free press or a free intermediary fulfilling a press-like function and an open debate on matters of public interest.[1762] In this respect, it has been consistently held that the public also has a right to receive such information.[1763] This invites all users' rights to be assessed in a proportionality analysis. As in *Cengiz,* the restriction of the lawful users' rights to take part in cultural life and freedom of expression (including sub-rights to access to culture, freedom of artistic and creative expression, the right to contribute to cultural life and the right to access to cultural heritage) should be considered not to be met, as their acts do not cause any harm to GEMA's members' copyright but would likely be adversely affected by the filtering measures ordered. This weighs against GEMA. Yet given the uncertainty on the proportion of lawful and infringing uses and absent a direct complaint from any lawful user unlike *Cengiz*, it would be proportionate for this

[1762] *Radio France v France* ECHR 2004-II125, 149 (explaining that, although the press must stay within certain boundaries, it has a duty to disseminate information on matters of social concern). See also the *MTE and Cengiz* cases.

[1763] *E.g., Lingens v Austria* 103 Series A 14, 26 (1986); *Ivanova v Bulgaria* App no 36207/03 (ECtHR 14 February 2008) para 58. See also the *MTE and Cengiz* cases.

assessment to proceed on the basis that the general interest criterion should be evaluated whether a proper appeals procedure against the court order has been defined for injured users. Given the ineffective counter-notification system of Content-ID software and the lack of such a counter-notification system in word-filtering measure would enable us to make a strong case to argue that the users' rights to take part in cultural life and freedom of expression are disproportionately restricted.

If the interpretation in *Telekabel* were adopted, the due process rights of non-infringing users would also be elevated over those of copyright holders.

The human rights of infringing users would be neutralised, or even omitted, as it is proportionate to introduce measures to protect copyright holders' rights against their unlawful acts.

The positive and negative obligations criterion: The analysis here has not revealed any direct applications of this criterion in the case.

6.5.1.4. The Legal Status of the ICCPR and the ICESCR Rights Engaged

The ECtHR considered the practice of interpreting the convention provisions in the light of other international texts and instruments. It held that it, 'in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in

specific cases.'[1764] In addition to resorting to the aforementioned rights that are laid down in the ICCPR and the ICESCR to interpret the rights in the ECHR, they can be used to establish grounds to identify a European consensus[1765] on the matter. This is particularly important in animating cultural human rights and freedoms, which are protected in the ICCPR and the ICESCR, within the ECHR, as the existence of a European consensus on subject-matter is normally accompanied by a narrow margin of appreciation accorded to the state in question.[1766] The ICCPR and the ICESCR can accordingly be referred to as a resource of interpretation of the contents of the rights in the ECHR.

Under EU law, a right to take part in culture could be considered as forming part of the common constitutional orders of the member states, because it fulfils all three criteria established by the CJEU (former European Court of Justice, ECJ) for the identification of common constitutional traditions: recognition in a number of constitutional orders, connection with the structural principles of the EU and recognition in international and European human rights instruments.[1767] Firstly, access to culture, an essential element of the right to participate in cultural life, is recognised

[1764] *Demir and Baykara v Turkey* para 85. 'In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. […]' Ibid para 86.

[1765] The 'European Consensus' standard is a generic label used to describe the Court's inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the Member States.

[1766] *Rasmussen v. Denmark*, judgment of 28.11.1984.

[1767] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1980] ECR I-3727 para 32; Opinion of Advocate General Kokott in Case C-550/07, *Akzo Nobel Chemicals Ltd and Akross Chemicals Ltd* [2007] ECR I-8301 (delivered on 20 April 2010) paras 93-113.

in several national constitutions,[1768] whereas other member states safeguard the right to participate in cultural life for all[1769] or for specific groups, such as minorities[1770] and young people.[1771] Secondly, participation in cultural life can be seen as being closely connected to the idea of cultural diversity whose protection and promotion has been elevated to constitutional status under EU law. Thirdly, the right to participate in cultural life is recognised by a wide range of international and European human rights instruments. Thus, given that the CJEU has broad discretion in determining the common constitutional traditions, an express recognition of right to the participate in cultural life as a common constitutional tradition of the member states could arguably be possible.[1772]

This discussion has revealed that from a human rights perspective it would be proportionate to prefer YouTube's, as well as non-infringing user's rights, over the copyright holders'. See Table 6.1 below.

[1768] Czech Republic: Article 34; Romania: Article 33; Slovak Republic: Article 43; Poland: Article 6.

[1769] Belgium: Article 23; Poland: Articles 73 and 78.

[1770] Austria: Article 8; Cyprus: Articles 2 and 108; Czech Republic: Article 25; Estonia at p. 49-50; Finland: Articles 17 and 121; Latvia: Article 114; Lithuania: Articles 37 and 45; Macedonia: Article 48; Slovakia: Article 34; Sweden: Instrument of Government 2.

[1771] Croatia: Article 63.

[1772] For an opposite view see; Romainville, The Right to Participate in Cultural Life under EU Law *(n 519) 145.*

6.5.2. Case Study 2: TPMs in US

6.5.2.1. *Green et al v US Department of Justice, et al:* Legal and Factual Background

On July 21, 2016, the Electronic Frontier Foundation ('EFF'), an international non-profit digital rights group based in the US, filed a lawsuit[1773] against various agencies and members of the US government, namely the US Department of Justice, Library of Congress and Copyright Office and the heads of the agencies, over Section 1201 of the DMCA.[1774] The EFF argues that this law is overbroad and is in violation of the First Amendment, the constitutional right to freedom of expression.[1775]

The lawsuit is filed on behalf of Matthew Green, an Assistant Professor at the John Hopkins Information Security Institute, and Andrew 'Bunnie' Huang, an electrical engineer, inventor, and owner of audiovisual media company, AlphaMax. It highlights how both Green and Huang have abstained from working on various projects that in no way target the reproduction copyright-protected content, but both of which involve circumventing TPMs. Green carries out tests on computer security measures and electronic systems, and he counsels manufacturers of internet-based vulnerabilities and how to fix them. Green's work has discovered serious flaws in anti-theft systems used in the automotive industry and in encryption powering various websites. He has been writing a book in which he explains how to circumvent security systems and find weaknesses in the coding of devices used in everyday life. Huang and his company, AlphaMax, research and devise tools to legally capture and edit videos. The technology allows users to save content to view at a later time, or move content to

[1773] *See Green et al (n 1710)*.

[1774] 17 US Code § 1201.

[1775] *Green et al (n 1710)*.

another device or format. In order to produce this device, Huang needs to circumvent certain pre-existing technologies, most notably Intel's HDMI system. The claimants have been hindered from conducting their projects due to fact that they would be exposed to fines of $500,000 and up to five years imprisonment imposed by the DMCA.[1776]

The lawsuit points out that the Supreme Court has long stated that fair use is the 'safety valve' that precludes copyright law from violating the First Amendment in regulating freedom of expression.[1777] However, fair use is not an allowable defense under section 1201 of the DMCA. Thus, the lawsuit claims that Section 1201 has an adverse impact on freedom of expression and lists multiple activities for which applicants have been denied exemptions.[1778] This includes extracting excerpts of motion pictures by 'narrative' filmmakers for use their films, educational uses by students and instructors outside of a school environment, educational uses by museums, libraries and nonprofits, format shifting, space shifting and creation of 'non-commercial' films using more than short clips.[1779]

The lawsuit states that the law is overbroad and 'burdens a substantial range of protected speech that is disproportionate to its legitimate sweep.'[1780] The case's

[1776] 17 US Code § 1204(a)(1).

[1777] *Green et al (n 1710)* para 22.

[1778] Ibid paras 23-24.

[1779] Ibid paras 38-39.

[1780] Ibid para 117. For the recommendation of the register of copyrights see; US Copyright Office's 'Section 1201 rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights' available at http://www.copyright.gov/1201/2015/registers-recommendation.pdf; For the adopted exceptions in the sixth triennial rulemaking proceeding under the DMCA see; US Copyright Office and Library of

main contention is built on how the law fails to properly balance the interests of copyright and the First Amendment law by considering the application of the doctrine of fair use. Furthermore, it argues that the triennial exemption process is unfair for two reasons: firstly, the rulemaking defendants have imposed 'a variety of onerous requirements on applicants seeking exemptions under this procedure'[1781] which does not exist in the DMCA; and secondly, expiration after three years has meant that exemptions have failed to be renewed, including 'an exemption to research Internet block lists and an exemption to test certain TPMs for malicious software.'[1782] One significant example of this is the defendants requiring evidence that there is a widespread impact on non-infringing uses, rather than a simple showing of impact on the applicant's personal speech.

On September 29, 2016, the government defendants submitted its motion to dismiss the lawsuit and that motion is pending.[1783] The primary arguments are that there has been no threat of prosecution against the claimants so they currently lack standing and that the DMCA as drafted and applied does not violate the constitution.[1784]

Congress, 'Final Rule on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies' 37 CFR Part 201 [Docket No. 2014–07] 80 Federal Register at 65944.

[1781] Ibid para 33.

[1782] Ibid para 35.

[1783] Memorandum in Support of Defendants' Motion to Dismiss, *Green et al (n 1710)*.

[1784] Ibid.

On the same day, the EFF applied to the court to seek an order that would prevent the government from prosecuting Green for publishing his book on computer security.[1785]

6.5.2.2. Identification of Rights

The right to access to information within the freedom of expression of the claimants in the First Amendment to the US Constitution and Article 19(2) of the ICCPR is engaged. As the case further relates to the publishing of their findings in the form of books, also engaged is the right to creative expression of the claimants on the basis of the First Amendment to the US Constitution, Article 19(2) of the ICCPR and Article 15(1)(c) of the ICESCR. The claimants' right to share in scientific progress in Article 15(1) (b) ICESCR will be also relevant with respect to their ability to continue to develop their research which it has based on the previous copyright-protected material.

What of the rights of those who are non-party and would like to use the TPM-implemented material? Possibly relevant groups relate to: 1) 'narrative' and 'non-commercial' filmmakers (for the latter: using more than short clips) and their right to artistic and creative expression in the First Amendment to the US Constitution, Article 19(2) of the ICCPR and Article 15(1)(a) of the ICESCR; 2) students' and instructors' right to access to information in the First Amendment to the US Constitution and Article 19(2) of the ICCPR and their right to take part in cultural life in Article 15(1)(c) of the ICESCR with respect to access to cultural life and material, access to cultural heritage (when the material in question is in the public domain) and students' right to education

[1785] Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction on Behalf of Plaintiff Matthew Green Pursuant to Fed. R. Civ. P. 65(a), *Green et al (n 1710)*.

in Article 13 of the ICESCR with respect to greater access to educational material; 3) museums', libraries' and nonprofits' right to impart and access to information in the First Amendment to the US Constitution and Article 19(2) of the ICCPR and their right to take part in cultural life in Article 15(1)(a) of the ICESCR with respect to access to cultural life, access to cultural heritage (when the material in question is in the public domain) and contributing to cultural life as they convey cultural information to public; 4) users' (who are denied space and time shifting exceptions) right to access to information in the First Amendment to the US Constitution and Article 19(2) of the ICCPR and their right to take part in cultural life in Article 15(1)(a) of the ICESCR with respect to access to cultural life, access to cultural heritage (when the material in question is in the public domain); 5) users' right to take part in cultural life in Article 15(1)(a) of the ICESCR with respect to participating in decision-making in relation to cultural matters.

Article I, Section 8, Clause 8 of the US Constitution, known as the Copyright Clause[1786] and reflected in Article 15(1)(c) of the ICESCR, of copyright holders with respect to their dealings with their copyright will be engaged.

6.5.2.3. The Legal Status of the Rights Engaged

Although the US is a party to several human rights treaties,[1787] these are rarely referenced in domestic court decisions, and in some cases, the treaties have been

[1786] This clause empowers the US Congress: 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'

[1787] These include the following Conventions: Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (entered into force 12 January 1951, ratified 25 November 1988);

modified at the moment of ratification to deny them any domestic legal effect. Of the human rights treaties ratified by the US, the ICCPR has the widest scope in terms of the number of rights recognised. The ratification, however, was made subject to a number of reservations, including an exceptionally broad one designed to prevent individuals from invoking the rights recognised by the Covenant in US courts.[1788] While the US has not ratified the ICESCR, Article 15 of that covenant is in almost identical terms to Article 27 of the Universal Declaration of Human Rights (1948),[1789] many of whose provisions have become customary international law, and comprises a core international commitment to all members of the human family.

Judith Resnik suggests a more complex account of the interaction between international human rights norms and the US legal order, noting multiple ways that

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Convention (No. 105) Concerning the Abolition of Forced Labour 320 UNTS 291 (entered into force 17 January 1959 ratified 25 September 1991); ICCPR (entered into force 23 March 1976, ratified 8 June 1992); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, UN GAOR, 39th Session, Supp No 51, UN Doc A/39/51 (10 December 1984) (entered into force 26 June 1987, ratified 21 October 1994); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, Annex, U.N. Doc. A/6014 (Mar. 12, 1966) (entered into force Jan. 4, 1969, ratified Oct. 21, 1994); Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 2133 UNTS 161 (entered into force 19 November 2000, ratified 2 December 1999). For an updated listing of U.S. human rights treaty ratifications, visit Human Rights Library, University of Minnesota, Ratification of International Human Rights Treaties – USA, http://www1.umn.edu/humanrts/research/ratification-USA.html.

[1788] US Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781–01, at Part III.1 (daily ed., April 2, 1992), http://www1.umn.edu/humanrts/usdocs/civilres.html

[1789] UDHR Article 19.

internationally accepted human rights norms infiltrate American legal discourse and impact domestic law-making beyond the direct application of human rights treaties by the courts.[1790] Likewise, Melissa Waters points to a current trend in common law jurisdictions to incorporate international human rights norms into domestic law through a variety of mechanisms, leaving out the formalist distinction between binding and non-binding instruments.[1791]

Does this make the rights in the ICESCR binding on US law? Whether a human right has attained a binding status is to be assessed on a case-by-case basis of state practice and *opinio juris* (the conviction that a conduct constitutes a legal obligation under international law). With regard to the right to education, while the US Supreme Court held that the state did not have the right to interfere with the right to acquire knowledge,[1792] it later concluded that education is not a fundamental right that is explicitly or implicitly guaranteed by the US Constitution.[1793] This means that the right to education is pertinent to assessment, as long as its protection lever remains within the boundaries of the right to access to information. As in *Eldred* and *Golan,* all other rights in the ICESCR should be taken to be engaged only if they are related to the right to freedom of expression.

[1790] Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2006) 115 Yale Law Journal 1564.

[1791] Melissa A. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties' (2007) 107 Columbia Law Review 628 (2007).

[1792] *Meyer v Nebraska* 262 US 390 (1923).

[1793] *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).

6.5.2.4. Analysis and Combination of Rights

The impact criterion: Critically, the Supreme Court has given guidance on this question in two rulings, *Eldred* and *Golan*, explaining how copyright law itself is constitutional even though it places limits on free speech; copyright is, after all, a law that specifies who may utter certain combinations of words and other expressive material. The Supreme Court held that through copyright's limits, such as fair use, it accommodates the first amendment. The fair-use guarantee is joined by the 'idea/expression dichotomy', a legal principle that says that copyright only applies to expressions of ideas, not the ideas itself.

Under *Eldred* and *Golan's* definitional balancing mandate, fair use copying should enjoy an absolute privilege against liability under the DMCA. This clearly denotes a right to utilise fair use is considered to be an element of American-type freedom of expression. The DMCA declares that nothing in the anti-circumvention provisions 'shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.'[1794] The First Amendment would obviously invalidate any statutory diminution of the constitutional right of freedom of speech or of the press regardless of that statutory declaration. The question then would be whether the Librarian's triennial rulemaking and consequent three-year exemption from the anti-circumvention prohibition as needed to engage in fair use are adequate for First Amendment purposes. Must a First Amendment-mandated fair use defense to the anti-circumvention prohibitions be recognised, or does the triennial rulemaking serve as an adequate substitute? Yet the proportionality assessment of whether there is a fair use defense to the anti-

[1794] 17 USC § 1201(c)(4) (2006).

circumvention provisions for the DMCA to pass the First Amendment hurdle must also consider the statutory background for the Register's finding.

The answer arguably could be that the triennial rulemaking does not suffice. Firstly, the Librarian's rulemaking is necessarily restricted to a generalised determination concerning categories of uses of entire classes of copyrightable works.[1795] In providing a three-year exemption, the Librarian decides that a given type of use of a particular class of work is primarily fair use and that the anti-circumvention provisions adversely affect persons' ability to make such non-infringing uses. However, fair use requires an individualised determination. There may be several instances which need to be circumvented in order to engage in fair use that do not fall within one of the exempt classes.

Secondly, the triennial rulemaking only exempts the act of circumvention. The DMCA's device prohibitions remain in full force regardless of any determination by the Librarian that circumvention is needed to engage in fair use. As a result, even persons legally entitled to circumvent might be unable to do so because it remains illegal to manufacture or distribute software and other devices that users need to circumvent regardless of whether the user is exempted from the anti-circumvention prohibition.

Thirdly, the limited exemptions that are granted from the anti-circumvention prohibitions expire within three years, with no certainty or even presumption of renewal. In fact, the rulemaking institutions have failed to renew several exemptions. However, there is no such time limit for resorting to fair use doctrine. If a person needs

[1795] Elizabeth F. Jackson, 'The Copyright Office's Protection of Fair Uses Under the DMCA: Why the Rulemaking Proceedings Might Be Unsustainable and Solutions for Their Survival' (2011) 58 J Journal of the Copyright Society of the USA 531 (2011).

to acquire a circumvention exemption that goes beyond the three-year time limitation, the triennial rulemaking is no guarantee.

Presume that Green published his book and one company whose encryption defects revealed in his book sued him. Under this scenario, it could be argued that Green's work would qualify as a fair use, while it would fail anti-circumvention provisions. Very similar points can be made in relation to Huang and his company's work, despite the fact that his case would be considered as a commercial use.

Putting together the need to circumvent and make digital copies in order to engage in fair use, First Amendment protection for using technologies of expression, and the inadequacy of the triennial rulemaking in enabling all fair uses that require circumvention to be effective, the DMCA relevant provisions appear to be in conflict with the First Amendment following *Golan*. At the very least, Golan strongly suggests that US courts must adopt an appropriate fair use defense to violations of the DMCA anti-circumvention and device prohibitions.

The core/periphery criterion: The rights to copy, reproduction and communicate to public of copyright holders is a core element of US Constitution's Copyright Clause. Likewise, the claimants' right to access to information and express their opinions are core rights within the First Amendment. The core/periphery criterion does not help here.

The purpose criterion: The analysis performed so far has not revealed any direct applications of the purpose criterion in the case, as there is no evidence indicating that any party exercises its rights contrary to the very objective it is designed to achieve. However, if third parties sue the claimants because the claimants reveal the flaws in their software, then this criterion will be utilised to strengthen the claimants' position in an actual case.

The responsibility criterion: This criterion does not create any difference in human rights assessment.

The additional right criterion: Since the claimants right of sharing in the benefits of science within Article 15(1)(b) ICESCR is not directly recognised by US Constitutional law, it would at best act as an additional factor in a proportionality exercise which is blended into First Amendment considerations. Thus, this criterion does not help here either.

The general interest criterion: The anti-circumvention provisions provides another layer of protection for copyright holders which strengthens their position in terms of the general interest criterion. However, the general interest criterion is equally apparent for the protection of the above mentioned rights of non-party users to provide them a wider access to culture, science and information while enabling them to express themselves freely. This requires all users' rights be assessed in the proportionality assessment. The recognition of some exceptions is a neutralising factor for their rights. However, a very similar line of argument as in the claimants' rights can be made for the users that are denied being exempted.

The positive and negative obligations criterion: The analysis here has not revealed any direct applications of this criterion in the case.

In the light of *Golan*, given the absence of an individualised dispute, it would be fair for this assessment to accept that the rights engaged are all neutralised in a balancing exercise, but a narrow margin could be recognised in favour of the claimants due to the problematic aspects of the triennial rulemaking. What should a court do in this position? The German practical concordance doctrine would be one solution. Instead of giving a complete priority over another, the US Supreme Court could repeal the problematic triennial rulemaking provisions, as they lie at the centre of the problem.

This would allow the optimisation of both equally valuable rights, while keeping them intact with their positive aspects. This could also remedy 'America's broken digital copyright law'.[1796] The summary looks as shown in Table 6.2 below.

6.6. Conclusion

The legal method proposed in this chapter provides a deconstructive and nuanced test for the identification of human rights engaged in contemporary copyright-related cases. This model is not just to resolve, in Nussbaum's words, 'obvious questions' in these cases in a more structured way, but also to enable making sense and taking cognisance of underlying rights and freedoms that give valuable choices to individuals to flourish. The value of this test is that it, as a method of legal reasoning, integrates, and disintegrates, 'the consideration of all relevant rights, and making decisions on them within the facts, irrespective of the forum in which the issue arises.'[1797]

As Brown warns, the broad approach to human rights supported in this chapter, covering also the rights of non-parties and the rights to sharing in benefits of scientific progress, education, a fair trial which does not provide relevant exceptions and normative structure, does not always weigh against copyright holders.[1798] Brown importantly points out that:

[1796] Cory Doctorow, 'America's Broken Digital Copyright Law Is About To Be Challenged In Court' (21 July, 2016) Guardian, available at https://www.theguardian.com/technology/2016/jul/21/digital-millennium-copyright-act-eff-supreme-court.

[1797] Brown *(n 123)* 142.

[1798] Ibid 141.

> ‘This arises from the recognition which the process (and existing case law and policy views) accords to the positive arguments which can be made regarding IP’s role in encouraging innovation [and cultural participation] and also the human rights which support it. As or if new attitudes to IP and access develop, courts may reach different decisions on the same questions within the assessment of the Human Rights Emphasis.’[1799]

This legal test compiles the different findings of all previous chapters for the development of the nuanced proportionality assessment of human rights to underline the importance of cultural participation in a political society where market economy prevails. Accordingly, within a situation this can provide an important tool in identifying if there is a necessity to allow individuals to build their capabilities on the cultural human rights and freedoms discussed above in their effort to seek remedies to obtain such outcomes. The approach embraced here would allow the construction of a copyright law on a fair culture by the use of laws’ own methods of dealing with conflicts arising at the junction of the production of cultural artefacts and participation in the cultural life which these artefacts produced.

[1799] Ibid 141-142 (Brackets are mine).

CONCLUSIONS

C.1. Introduction

This research project questioned the economic-development-oriented projections of copyright law; a feature common to most western intellectual property frameworks and certainly found in all the jurisdictions under study in this analysis, *inter alia* the UK (within the larger context of the EU) and the US. As copyright law is 'perhaps more accurately portrayed as a product of a crisscross, cross-border network of reciprocal international obligations'[1800], the scope of this project also included policies and legal norms adopted at global and regional levels as expressed in international conventions and the framework of the EU.

This thesis explored the existence and depth of the interfaces among copyright, culture, human development and human rights. The main objective was to identify how contemporary copyright law perceives culture (its social, political and economic context) and development (its objective), whether there are divides and connections between the reality and the perceived, and if there is a divide how it appeared in legal narratives. This analysis aimed to uncover both these discrepancies and remedies that can be drawn from the aforementioned copyright models and human rights regimes to which they are attached.

This thesis is thus built on three main themes: how the 'culture-as-a-commodity' and 'economic-development-oriented' philosophies in copyright law can be expanded by 'culture-as-a-way-of-life' and 'human-development-oriented' views; the examination of the extent to which greater participation could be attained in cultural

[1800] Graeme W. Austin, 'Does the Copyright Clause Mandate Isolationism?' (2002) 26(1) Columbia Journal of Law & the Arts 50.

life for the realisation of human development; and how the interface between copyright, human development and human rights can and must be blended to create the opportunity for the first two objectives to be achieved. This thesis mainly argued that economic-oriented macro-development and culture considerations within copyright laws should be complemented through micro-development projections and methodological individualism[1801] offered by capabilities approach with a view to take into account emerging aspects of contemporary culture and this should be supported by the human rights frameworks. Without repeating comments made in previous chapters, this conclusion summarises the theoretical and practical implications the findings entail. Finally, suggestions for future research with the view to further the contribution of this work will close its concluding remarks.

C.2. Overview and Findings

This thesis began with a discussion of how the spirit of copyright law has been formed in the last three decades, especially after the adoption of TRIPs. It noted that in this era, at international policy level, there has been an overwhelming emphasis on the economic development on copyright, although the contribution of copyright law in economic development is quite context-dependent. This thesis further underlined

[1801] One should distinguish between ethical individualism and methodological (and ontological) individualism. While ethical individualism postulates that only individuals must be the units of moral concern in evaluative exercises and decisions, methodological individualism is generally the term employed for explanatory individualism, the view that everything can only be explained by reference to individuals and their properties. Thus, ontological individualism claims that all social entities and properties can be identified by reducing them to individuals and their properties, namely the nature of human beings and the way they live their lives and their relation to society. See; Ingrid Robeyns, 'Capability Approach: A Theoretical Survey' (2005) 6(1) Journal of Human Development 107-108.

that international law-making initiatives have been maintained to increase the protection of copyright. These have culminated in the adoption of bilateral and non-multilateral agreements, such ACTA, TPP - one of the main themes of this work, which has increased the power of the copyright holder along with the potential for the enforcement of their rights to have an adverse effect on the capabilities of others. The current dominant economic-development-oriented discourse is helpful as a basis to promote copyright law policies, but it is limited in extent to promote other diverse aspects of human development. Although there have already been built-in exceptions and further counteractions to foster flexibilities, they have not changed the central construction of copyright, nor have they addressed the increasingly growing restrictions due to the intellectual property ratchet-up.[1802]

The thesis also revealed that these one-sided politics and philosophical focus of copyright with its inadequate flexibilities have alienated its policies from the existing texture of its eco-system, namely culture. By relying on *the marula tree*, *Fairey*, *Linda*, *Ashby Donald*, *Re: Rosas*, *Buffy the Vampire Slayer*, *Heather Lawver*, *Harry Potter in Calcutta* and other cases, it demonstarted that copyright should not be detached from culture's structural formation (participatory, converging, remix, blogging, dance and democratic culture and culture as a site of human development). It further argued that Amartya Sen's and Martha Nussbaum's capabilities approaches and interdisciplinary definitions of culture (as given in cultural studies, anthropolgy and philisophy) are better frameworks to initiate such an ideational shift from a culture-as-a-commodity-and-economic-development-oriented model to a culture-as-a-way-of-life-and-human-development-oriented model.[1803]

[1802] See Introduction sections I.3., I.4. and I.5.

[1803] See Chapter 1.

To realise this, this thesis looked beyond copyright law to elsewhere within a legal framework, to human rights. This field was chosen for three reasons: 1) it can identify essential objectives as it has a more fundamental nature than copyright law, although copyright and human rights are now part of national legislation and international treaties; 2) because human development concerns arising from the enforcement of copyright could be better described in the language of human rights, as they could be a helpful starting point to animate the capabilities in Amartya Sen's framework and Martha Nussbaum's list; and 3) the synergies and overlaps between the capabilities approach and cultural human rights and freedoms would be a useful basis to provide a moral and legal normative force to approximate copyright law to the emerging forms of culture.[1804]

Through making 'realisation-focused comparisons', this thesis examined the popular digital copyright enforcement measures (namely notice-and-take-down systems, notice-and-disconnect systems, website blocking orders, filtering and monitoring orders). The main reason for this choice was the fact, as this thesis demonstrated, that these are the most pertinent themes as they are the areas that the tension between cultural human rights and human development, on the one hand, and copyright, on the other, has become more acute.[1805]

This thesis additionally investigated whether copyright has some human rights attributes that are protected within the UN human rights regime, the ECHR, the EU Chapter and the US Constitution. It was shown that copyright's relationship with human rights, and accordingly with human development, is complex and changes from

[1804] See Chapter 2.

[1805] See Chapter 3.

one regime to another. Furthermore, it not only poses limitations to human rights and therefore human development, it also has some attributes that support them.[1806]

Again from a 'realisation-focused' perspective, this thesis enquired into the TPP and the political climate that gave birth to it as a case study. It argued that the TPP with the current international copyright law-making initiatives is highly politicised and has certain priorities in their approach and content. It concluded that the TPP's selected copyright provisions – namely, the extension of copyright terms, the provisions on pre-established/statutory and additional damages, the anti-circumvention provisions, the inflexible intermediary liability provisions and the extension of criminal liability - represent significant restrictions on cultural human rights and freedoms that are essential for human development. This thesis further suggested that solving this problem should be possible with a structured capability-based human rights impact assessment (*systemic adjustments*) and with well-designed *normative adjustments* within the deal or the domestic legal systems of the member states.[1807]

This thesis also designed a deconstructive multi-proportionality test for national and international (constitutional and human rights) courts to engage with a conflict of norms between human rights and copyright, which would be helpful to increase the practicality of human development emphasis in such cases. The notice-and-stay-down measures as applied in German Law and the American anti-circumventions rules were explored as two case studies to elaborate how this legal test can be implemented.[1808] As was shown, the 'epoch of incredulity' is not only peculiar to norm-setting initatives, but also to norm interpretation and implementation.

[1806] See Chapters 4 and 6.

[1807] See Chapter 5.

[1808] See Chapter 6.

As this epoch of incredulity lingers, and as the gap between legislators' and courts' understanding of human rights widens, new problems arise. Increasing and contradicting bodies of rules and their interpretation at both national and supranational levels have brought about new perplexities: the fragmentation of international law, legal reasoning and global legal pluralism.[1809] The emergence of plural legal norms and interpretations concerning copyright among the jurisdictions examined in this thesis is one significant example in this sense. Different narratives which define, delineate and resolve legal problems offered by multileveled normative orders and reasoning methodologies have evoked criticism from several scholars, arguing that there is a *regime complex – 'an array of partially overlapping institutions governing a particular issue-area.'*[1810]

Accordingly, this thesis aimed to open a discussion and sought multiple ways to address this regime complex, with maintaining plural values but looking into common grounds, on the interface between copyright law, on the one hand, and cultural human rights that are essential for development of individuals' participation in cultural life in the post-TRIPs era, on the other.

C.3. Theoretical and Practical Implications

This thesis advocated for a structured framework for courts and legislators to consider the range of human rights which can be relevant when participation in cultural life for human development is sought. This framework is built on the three main human rights regimes that affect jurisdictions mentioned above. This framework is two-

[1809] International Law Commission *(n 174)*; Teubner and Fischer-Lescano *(n 174)*; and Berman *(n 174)*.

[1810] Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58(2) International Organization 279.

pronged. In the first pillar of the framework, this thesis used a capability-based human rights impact assessment to show more concretely how copyright law affects human development and proposed a model of indicators for the assessment and resolution of conflicts between the two regimes to point to a healthy direction for the future treaty and law-making with respect to it. To create a wider benefit concerning the relationship between copyright, human development and human rights, the thesis further argued that it is worthwhile for pressure and action to continue with the aim of bringing about changes to the international legal landscape most effectively through the amendment of treaties regulating intellectual property in addition to the assessment of its impact on human rights and human development. This would help entrench a balanced tripartite relationship of copyright, human development and human rights. Other ongoing regional trade agreements, such as TTIP, are signals that the international copyright law and the global culture that it shapes are becoming multifaceted and involve many and different powerful actors. It is important to note that that greater participation in culture and a better human development will not come about because it can be argued to be ideal. This part of the framework proposed here can enhance the prospects of this being done in relation to changing policies of copyright enforcement.

From a practical perspective, the second pillar of the framework aimed to complete this thesis with the introduction of a legal test for national and international courts to engage with a conflict of norms between human rights and copyright, when such a conflict is encountered, which will make them take cognisance of a human development paradigm. This will give birth to a human development emphasis, and the contribution of this was explored through the deconstruction of the copyright-related cases which set out different copyright, factual contexts and remedies sought.

The thesis argued that national and supranational courts must have regard to human rights when making decisions. This approach, which was argued to be structured from the established principles of international human rights laws, would move copyright law beyond its inert system which has been detached from culture, human development and human rights issues and which only reflects the utilitarian and commercial focus of the intellectual property industries. This is to make a new call for a human development approach to copyright enforcement, to give rise to a new focus on achieving outcomes consistent with international human rights, and to dissolve the virtual isolation between the two regimes.

C.4. Future Research and Unresolved Questions

The research undertaken by this thesis could be furthered in many ways. Firstly, whether or not the model can also be used for the resolution of other conflicts between human rights will need to be examined in further research. This research could thus be enhanced by expanding its thematic scope through including other enforcement measures, such as hyperlinking, and/or other human rights, such as the right to education, the right to a fair trial. It is also possible to extend this research to other fields of intellectual property law, especially traditional knowledge and patent law as the marula tree case illustrates. Secondly, its limited comparative analysis could be improved by expanding its scope so as to cover other national jurisdictions, such as other Anglo-Saxon countries (Canada and Australia), or other human rights regimes (the American Convention on Human Rights and the African Charter on Human and Peoples' Rights). Comparing the present findings with these jurisdictions could thus complement the extent of this study.

The present argumentation could also be strengthened by including

empirical research. Such empirical research could be conducted to understand emerging forms of culture and copyright's impact on them in their relevant contexts. For instance, YouTube has emerged as a global repository of an enormous amount of knowledge which provides a tremendous terrain for cultural participation and human development. Thus, copyright enforcement against YouTube deserves closer empirical scrutiny in terms of human rights and human development. Empirical research could also be extended to collect data that shows which capabilities are affected by strong copyright enforcement through sectoral analyses. For instance, the music sector could be chosen, a balanced group of stakeholders in the industry, from singers to collecting societies, hosting platforms to Internet users, could be asked how they envision copyright's position in the enhancement of human development and what kind of development copyright should be promoted through structured surveys or interviews. For that reason, research could be crafted to nuance the engagement with copyright laws to correct unfair distributional affects by enabling access to copyright-protected works through empirical and sectoral comparative studies.

The proposals made are essentially based on existing case law, legislation and international regulatory practice and also on the normative importance of human rights and the capabilities approach. This analysis is mainly restricted to the interface among three human rights - namely the right to property or right to the protection of interests in intellectual creations or Copyright Clause concerning protection of copyright holders and the right to take part in cultural life and freedom of expression of other stakeholders. It is further confined to specific regulatory[1811] and court[1812] practices. Therefore, the issues that do not have a human rights dimension have

[1811] *e.g.* TPP. See Chapter 5.

[1812] *e.g.* the UK Supreme Court, The US Supreme Court, the ECtHR and the CJEU.

mostly left unexplored. One significant example mentioned in this thesis is licencing practices in music sampling. The framework proposed sought resolutions outside. One may prefer to seek them within copyright law. For enabling a greater participation in culture and expanding individuals' capabilities, one may point out the creation of new legal mechanisms within copyright, such as creation or expansion of new exceptions,[1813] compulsory licensing,[1814] blanket licensing,[1815] Creative Commons licences,[1816] voluntarily business practices allowing creative secondary uses,[1817] imposition of a 'non-commercial use levy',[1818] a system of government rewards to be

[1813] Lessig has argued, for instance, that all non-commercial transformative works produced by amateurs should be exempted from the scope of copyright regulation. Lessig *(n 315)* 254-255. In the UK, the Gowers Review contained a proposal for a new exception that would enable users to produce creative, transformative or derivative works. Gowers Review *(n 365)* 68. This proposal was not taken up by the subsequent Hargreaves Review, which also rejected the suggestion that a more open-ended US-style fair use exception might be adopted in the UK. Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (HM Treasury, 2011) 5 ('Hargreaves Review').

[1814] Lawrence Lessig, 'Free(ing) Culture for Remix' (2004) Utah Law Review 973. See also Emily Harper, 'Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm' (2010) 39(2) Hofstra Law Review 442; Joanna E. Collins, 'User-Friendly Licensing for a User-Generated World: The Future of the Video Content Market' (2013) 15(2) Vanderbilt Journal of Entertainment & Technology Law 437-438.

[1815] Joshua Crum, 'The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground' (2008) BYU Law Review 964; Harper *(n 1813)* 442-443.

[1816] Harper *(n 1813)* 443; Lawrence Lessig, *(n 1813)* 973; Collins *(n 1813)* 431-434

[1817] Vera Golosker, 'The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights' (2012) 34 Hastings Communications and Entertainment Law Journal 398.

[1818] Netanel *(n 1160)* 1.

paid to authors in lieu of copyright.[1819] Further research would have to be undertaken in order to assess whether these resolutions are indeed suitable options to advance human development. To this end, more research on their construction and management would have to be carried out.

C.5. Original Contribution of the Research

There are several aspects of this study which make its contribution to literature significant. This thesis offers an original contribution to the literature by providing the first in-depth theoretical analysis of the relationship between copyright, human development and human rights at the national, regional and international level. In the past, some scholars have discussed either the interface between copyright and human rights, particularly concerning participation in culture,[1820] or the interface between copyright and human development.[1821] While they offered a general analysis of the whole institution by adopting 'transcendental institutionalism' in their analyses, this thesis focuses on detailing the substance of the most contentious issues that are relevant to copyright and human rights discussed in the previous chapters. It thus deconstructs the development and human rights aspects of the selected themes.

This thesis is one of a few studies which adopt a critical cultural approach to copyright law.[1822] In intellectual property discourse, culture is generally thought to be related to the protection of traditional knowledge or cultural heritage. Following Sunder's line of explanation, this thesis goes beyond these conventional thoughts

[1819] Ibid 80-82.

[1820] Shaver and Sganga *(n 120)*.

[1821] Sunder *(n 1)*.

[1822] See Sunder *(n 1)* and Combe *(n 240)*.

about culture and uncovers its multi-faceted features: culture is not only a marketplace to merchandise copyright-protected works, but also a site of human development, politics, democracy. This study also introduces the lost continent of thought, the capabilities approach, into copyright theory. Combining these eclectic social traditions, it draws parallels between different fields of social sciences to pave the way for critical thinking about copyright law.

This thesis will also be one of the first studies to examine the copyright provisions of the TPP Agreement from a cultural freedoms and human development angle. Although the agreement is unlikely to be ratified, it still represents an important model to reflect recent intellectual property norm-setting initiatives. Previous research either focused on detailing the substance of rights in such agreements[1823] or assessed other intellectual property provisions in terms of other human rights.[1824] This research revisits the need for intellectual property frameworks and models to update their standards by making reference to human development paradigms.

Finally, the legal test that it draws will be an important contribution to current legal practice. It takes Abbe Brown's 'Human Rights Emphasis' model as a starting point. It expands Brown's test by classifying conflict types and adding seven new criteria to nuance the legal reasoning concerning the conflict of norms. The present analysis bridges this gap in knowledge by relying on an extensive interdisciplinary comparative study of four human rights models which included the jurisdictions listed

[1823] For TPP see: Weatherall *(n 1319)* and *(n 1370)*. For ACTA see; Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (CUP, 2015).

[1824] For the chapter entitled 'Assessment of CAFTA: The Impact of Intellectual Property Protection On The Right To Health And Related Rights In Cost Rica' see; Walker *(n 1513)* 123-186.

above. The findings of this thesis thus develop a structured discussion on conflicts of norms to diminish the state of fragmentation that the current practice has delved in.

Ultimately, this research offers a critical lens through which to analyse current copyright laws with a view to find ‘ubuntu’ to draw better insights for future forms of creative expressions, cultural participation and human development.

APPENDICES

APPENDIX 1

A.1. The Capabilities Approach

A.1.1. Sen's Capability Approach

It is necessary to understand what the 'capabilities approach' is before considering its various dimensions within copyright. The prevailing criteria of evaluation of development favour economic measures such as Gross Domestic Product (GDP), or per-capita income. This paradigm was challenged in 1979, when Amartya Sen gave the Tanner Lecture on Human Values entitled '*Equality of What*?' at Stanford University.[1825] As an alternative to traditional development measures, Sen proposed the concept of the advancement of 'basic capability' whereby capabilities represent what choices or opportunities an individual has to achieve what one wants

[1825] Amartya K. Sen, 'Personal Utilities and Public Judgements: Or What's Wrong with Welfare Economics?' (1979) 89 The Economic Journal 537–558; Amartya K. Sen, 'Equality of What?' in S. M. McMurrin (ed),*The Tanner Lectures on Human Values* (University of Utah Press, 1980) 195–220; Amartya K. Sen, 'Rights and Capabilities' in Amartya K. Sen, *Resources, Values and Development* (Harvard University Press, 1984) 307–324; Amartya K. Sen, *Commodities and Capabilities* (OUP, 1985) Sen, 'Well-being, Agency and Freedom' (n 442); Amartya K. Sen, 'The Standard of Living' in Geoffrey Hawthorn (ed),*The Standard of Living* (CUP, 1987); Amartya K. Sen, 'The Concept of Development' in H. Chenery and T.N. Srinivasan (eds), *Handbook of Development Economics* (Elsevier Science Publishers, 1988); Amartya K. Sen, *Inequality Re-examined* (OUP, 1992); Amartya K. Sen, 'Capability and Well-being' in Martha C. Nussbaum and Amartya K. Sen (eds), *The Quality of Life* (OUP, 1993) 30–53; Sen *(n 132)*; Amartya K. Sen, *Rationality and Freedom* (Harvard University Press, 2002); Amartya K. Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) Philosophy & Public Affairs 315–56; Amartya K. Sen, 'Human Rights and Capabilities' (2005) 6(2) Journal of Human Development 151–66; Sen *(n 135)*.

to be or to do. Rather than focusing on an individual's economic resources, the capabilities approach focuses on the totality of human life by concentrating on the *'actual opportunities* of living'.[1826] For Sen, '[e]xpansion of freedom is viewed […] both as the primary end and as the principal means of development,' hence, development as freedom.[1827] Sen's main objection to the measuring of human development is that incomes or monetary metrics disregards 'conversion factors'.[1828] He draws attention to the fact that the same amount of income will do less for a female (in almost any country), a chronically ill person, a visually impaired person, a pregnant woman, an elderly person, or someone living in an area with a high-crime rate or epidemiological atmosphere or a severe climate than the same amount will do for a healthy, young, able-bodied male persons to help achieve the goals that they value.[1829] Sen also critiques other tools which have been proposed to assess equality between individuals and groups, such as Rawlsian primary goods,[1830] a rights-based libertarianism,[1831] Ronald Dworkin's resources,[1832] utilitarian interpersonal preferences and the other

[1826] Sen *(n 135)* 233 (emphasis in original).

[1827] Sen *(n 132)* xii.

[1828] Sen, *Inequality Re-examined (n 1824)* 113.

[1829] ibid.

[1830] These include: 1) basic rights and liberties; 2) freedom of movement and choice of occupation; 3) powers and prerogatives of offices and positions of authority and responsibility; 4) income and wealth; and 5) the social bases of self-respect. See; Rawls *(n 653)* 54, 386.

[1831] See; Nozick *(n 440)*.

[1832] See; Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10 Philosophy and Public Affairs 283–245; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000).

income baskets of economists.[1833] Sen argues that they are too crude, because they do not take into account the conversion factors (which is the case with primary goods[1834] and resources[1835]) or they are too narrow (the frailty of libertarianism[1836]) or they cannot be evaluated (which he thinks is the case for interpersonal preferences[1837]).

In the broadest sense, as Ingrid Robeyns defines, 'the capability approach is a broad normative framework for the evaluation and assessment of individual well-being and social arrangements, the design of policies, and proposals about social change in society'.[1838] The main characteristics of the capability approach are its highly interdisciplinary character, and the focus on plural or multidimensional aspects of well-being.[1839] This approach distinguishes means from ends, and substantive freedoms ('capabilities') from outcomes ('achieved functionings').[1840] Its main challenge to the standard utilitarian-based economic frameworks for development is the critique that the classic way of measuring development by making reference to GDP, utility or income alone is not capable of capturing the multidimensional nature of human well-being.[1841] Sen's capability approach looks beyond income measures and access to

[1833] For others see; Sen, *Inequality Re-examined (n 1824)* 74.

[1834] Sen *(n 135)* 52-74.

[1835] Ibid 264-268.

[1836] Ibid 84-85.

[1837] Ibid 277.

[1838] Robeyns *(n 1800)* 93.

[1839] Ibid 93. Nussbaumm thinks that capabilities are plural and not specific for human beings. See Nussbaum *(n 119)* 18.

[1840] Robeyns *(n 1800)* 93.

[1841] Sen *(n 135)* 67–70.

commodities to focus on how human beings are able to 'function'.[1842] Accordingly, the core element of this alternative human development approach is to link well-being to the enhancement of capabilities, instead of other paradigms of well-being such as utility (happiness, desire fulfilment) or opulence (income, commodity command).[1843]

Sen argues that our assessments and policies should focus on what people are able to do and be, on the quality of their life, and removing obstacles in their lives so that they have more freedom to live the kind of life that, upon reflection, they have reason to value.[1844] Sen's own account of the human development perspective gives a central role to the concept of 'development as freedom'.[1845] The freedom in this sense is the freedom to develop one's capabilities into the types of actual functionings. In other words, the key idea of the capability approach is that social arrangements should aim to expand people's capabilities, namely their freedom to promote or achieve what they value doing and being.[1846] However, instead of concentrating the evaluation of human well-being on achieved functioning, which refers to active realisation of one of more capabilities, the notion of freedom to choose is embraced in

[1842] Ibid 74-75.

[1843] For an extensive analysis of the dimensions of human development from thirty nine different disciplines see; Sabina Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (OUP, 2002) 25-84.

[1844] Sen *(n 135)* 227.

[1845] Given that the term 'freedom' is open to many broad interpretations, it is important to understand how Sen nuances the 'perspective of freedom' in different contexts (see Sen *(n 132)* 13–34), in particular his treatment of 'capability as a kind of freedom' (ibid 75).

[1846] Sabina Alkire and Séverine Deneulin, 'The Human Development and Capability Approach' in Séverine Deneulin with Lila Shahani, *An Introduction to the Human Development and Capability Approach Freedom and Agency* (Earthscan, 2009) 31.

the capability approach. Sen's formulation of the capability approach has three elements: functioning, capabilities (opportunity freedoms) and agency. As he puts: 'The concept of 'functionings', which has distinctly Aristotelian roots, reflects the various things a person may value doing or being…A person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles).'[1847]

Functionings for example are being nourished, literate, employed, and in good health.[1848] Capability, on the other hand, refers to freedom to enjoy various combinations of these functionings.[1849] Thus, in Sen's terminology, a capability means a capability set, which comprises potential functioning.

The third core concept of the capability approach is agency. Agency refers to a person's ability to pursue and realise goals that she values and has reason to value. An agent is 'someone who acts and brings about change'.[1850] Therefore, one of the central goals of human development is enabling people to become agents in their own lives and in their communities. As Sen argues, in development activities 'the people have to be seen … as being actively involved – given the opportunity – in shaping their own destiny, and not just as passive recipients of the fruits of cunning development programs.' [1851] The opposite of a person with agency is someone who is

[1847] Sen *(n 132)* 74-75.

[1848] Ibid 75.

[1849] Alkire and Deneulin *(n 1845)* 32.

[1850] Sen *(n 132)* 19.

[1851] Ibid 53.

forced, oppressed or passive.[1852] Sen accordingly notes that individual advantage can be assessed in at least four different spaces: *well-being achievement*, *well-being freedom*, *agency achievement*, or *agency freedom*.[1853] It is arguable that Sen sees freedom as the key to both the micro-development of human well-being and the macroeconomic development of whole nations and regions.

This shift from using GDP or other measures to capabilities as an *informational focus* for evaluating quality of life has inspired researchers and practitioners in many disciplines throughout the world. An important repercussion of Sen's approach on development was the adoption of his ideas by the United Nations Development Programme (UNDP). In 1990, The UNDP embraced Sen's capability approach as the conceptual framework for its annual *Human Development Report* (*HDR*),[1854] which was launched at the initiative of the economist Mahbub ul-Haq, a leading scholar in human development and a colleague of Sen. Likewise, the *HDR's* influential Human Development Index (HDI), for which Sen also served as a consulting expert, provides a ranking of countries derived from indicators of capabilities rather than the usual economic factors. Over the years, the approach has

[1852] For a good illustration of these concepts on an example see; Robeyns *(n 1800)* 102–103.

[1853] Sen *(n 132)* 286-290.

[1854] UNDP, *Human Development Report 1990* (OUP, 2003).

been significantly further developed by the political and feminist philosopher Martha Nussbaum[1855] and a growing number of other scholars.[1856]

A.1.2. Nussbaum's Capabilities Approach

Martha Nussbaum's capabilities approach also deserves a closer look, since she provides more valuable insights in terms of legal theory. Martha Nussbaum diverges from Sen on a number of issues, although their approaches are very closely related. Her emphasis is on legal, moral and political rather than socio-economic

[1855] Martha C. Nussbaum, 'Nature, Functioning and Capability: Aristotle on Political Distribution' (1988) 6 Oxford Studies in Ancient Philosophy 145–84*;* Martha C. Nussbaum, 'Human Functioning and Social Justice*'* in *Defense of Aristotelian Essentialism* (1992) 20(2) Political Theory 202–246; Nussbaum *(n 144)*; Martha C. Nussbaum*,* 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2/3) Feminist Economics 33–59; Martha C. Nussbaum*, Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006); Nussbaum *(n 119).*

[1856] See particularly; Alkire *(n 1842)*. See the collection of essays in Flavio Comim, Mozaffar Qizilbash and Sabina Alkire (eds), *The Capability Approach: Concepts, Measures and Applications* (CUP, 2008); Reiko Gotoh and Paul Dumouchel (eds), *Against Injustice: The New Economics of Amartya Sen* (CUP, 2009); Ingrid Robeyns and Harry Brighouse (eds), *Measuring Justice: Primary Goods and Capabilities* (CUP, 2009); Kaushik Basu and Ravi Kanbur (eds), *Arguments for a Better World: In Honor of Amartya Sen* (OUP, 2009). See also, Sabina Alkire, 'Why the Capability Approach?' (2005) 6 Journal of Human Development and Capabilities 115-135; Kaushik Basu, 'Functioning and Capabilities' in Kenneth Arrow, Amartya Sen and Kotaro Suzumura (eds), *Handbook of Social Choice and Welfare*, Volume 2 (North-Holland, 2011) 153-187; David A. Crocker, *Ethics of Global Development: Agency, Capability and Deliberative Democracy* (CUP, 2008); Robeyns *(n 1800)* 93–114.

aspects of human development; and her definitions of capabilities and functionings are somewhat distinct.[1857]

Extending the capability approach, Nussbaum specifies 'central human capabilities' which should provide the basis for 'constitutional principles that should be respected and implemented by the governments of all nations' and international comparisons of quality of life.[1858] She defines human capabilities as 'what people are actually able to do and to be'.[1859]

Nussbaum identifies three kinds of capabilities: basic, internal, and combined. *Basic capabilities* are 'the innate equipment of individuals that is the necessary basis for developing the more advanced capabilities and a ground of moral concern'—for example, seeing and hearing, and the capability for speech, language, love, gratitude, practical reason, work.[1860] *Internal capabilities* are 'the states of the person (not fixed, but fluid and dynamic)'[1861] which are 'trained and developed traits and abilities, developed, in most cases, in interaction with the social, economic, familial and political environment'[1862] — such as bodily maturity, capability for sexual functioning, religious freedom, freedom of speech.[1863] *Combined capabilities* are

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[1857] For discussion of these differences see; David A. Crocker, 'Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part 2' in Martha Nussbaum and Jonathan Glover (eds) *Women, Culture and Development A Study of Human Capabilities*. (OUP, 1995) 153–99; Nussbaum *(n 144)* 11–15; Robeyns *(n 1800)* 103-105; Alkire *(n 1842)* 32.

[1858] Nussbaum *(n 144) 5.*

[1859] Nussbaum *(n 119)* 20.

[1860] Nussbaum *(n 144)* 84.

[1861] Nussbaum *(n 119)* 21.

[1862] Ibid 21.

[1863] Nussbaum *(n 144)* 84.

internal capabilities *combined with* the external social, political and economic conditions in which functioning can be chosen.[1864] If one lives in a country that has a high rate of political participation, then one can well extend her political capabilities.

Despite the fact that Sen illustrates examples of 'essential capabilities' in his works, he always abstains from giving a full list of capabilities as objectively valid.[1865] According to Sen, value selection and discrimination are an intrinsic part of the capability approach, so that *a priori* specifications of capabilities should be avoided.[1866] Rather than endorsing a universal list of essential capabilities, Sen argues that societies should develop their own lists based on a democratic process of public reasoning and debate.[1867] Nussbaum, by contrast, articulates a list of 'central capabilities', the lack of which makes it difficult for an individual to be functioning in a 'truly human way'.[1868] Her list has been revised several times; the following 10 categories refers to the 2011 version[1869]: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species; (9) play; and (10) control over one's environment.[1870] Nussbaum proposes this list of 'central capabilities', so that "any minimally just society will make available to all citizens a threshold level of ten central capabilities, as core political

[1864] Nussbaum *(n 144)* 84-85; Nussbaum *(n 119)* 22.

[1865] Sen, 'Capability and Well-being' *(n 1824*) 47.

[1866] Ibid.

[1867] Ibid.

[1868] Nussbaum *(n 144)* 72.

[1869] The explanation of each capability can be found in Table 1 below.

[1870] Nussbaum *(n 144)* 72; Nussbaum *(n 119)* 33-34.

entitlements".[1871] The idea of this list is not to constrain the broad and evolving range of human capabilities within limits, nor to assign weight to each capability, but to offer a framework for constitutional reforms within a country to facilitate human development.[1872] Nussbaum's aim is 'to provide the philosophical underpinning for an account of core human entitlements that should be respected and implemented by the governments of all nations as a bare minimum of what respect for human dignity requires'.[1873] It has been argued by Des Gasper that Nussbaum's list 'consciously builds a basis for core rights, as parts of a legal constitution, to give a set of entrenched priorities without which we would leave too much open to domination by the powerful.'[1874]

[1871] Martha C. Nussbaum, 'The Capabilities Approach and Ethical Cosmopolitanism: The Challenge of Political Liberalism' in Maria Rovisco and Magdalena Nowicka (eds), *The Ashgate Research Companion to Cosmopolitanism* (Ashgate, 2011) 406.

[1872] Nussbaum sees a close relationship between her notion of core capabilities and human rights as understood in contemporary international discussions. See, Nussbaum *(n 144)* 97.

[1873] Nussbaum, 'Frontiers of Justice: Disability, Nationality, Species Membership' *(n 1855)* 70.

[1874] Des Gaspers, 'Human Well-being: Concepts and Conceptualizations' (2004) UNU World Institute for Development Economics Research Discussion Paper No. 2004/06, 27.

TABLE 1. Nussbaum's capabilities list
1. Life. *Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.*
2. Bodily Health. *Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.*
3. Bodily Integrity. *Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.*
4. Senses, Imagination, and Thought. *Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.*
5. Emotions. *Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)*
6. Practical Reason. *Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)*
7. Affiliation.

1. *Being able to live with and toward others, to recognize and show concern for other humans, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)*

2. *Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and species.*

8. Other Species. *Being able to live with concern for and in relation to animals, plants, and the world of nature.*

9. Play. *Being able to laugh, to play, to enjoy recreational activities.*

10. Control over one's Environment.

1. Political. *Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.*

2. Material. *Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.*

Source: adapted from Nussbaum (2011) 33-34.

APPENDIX 2

A.2. TABLE 2.1. Human Rights-based Capability List (ICCPR, ECHR, ICESCR)

TABLE 2.1. Human rights-based capability list (dimensions of freedom and opportunity that are protected and promoted in international human rights law)		
Instrument*	**Internationally recognised human rights**	**Underlying states of being and doing (10 domains of freedom and opportunity)****
ICCPR **ECHR**	Article 6 ICCPR right to life Article 2 ECHR right to life	Life
ICCPR **ECHR**	Article 7 ICCPR freedom from cruel, inhuman or degrading treatment or punishment Article 3 ECHR Prohibition of torture	Bodily integrity
ICCPR **ECHR**	Article 8 ICCPR abolition of slavery and the slave trade, prohibition on servitude, abolition of compulsory labour Articles 9–10 ICCPR, Article 13 ICCPR liberty and security, prohibition of arbitrary arrest and detention, regulation of conditions of detention and expulsion Articles ICCPR 14–15 equality before the courts and fair judicial process Article 16 ICCPR recognition of personhood before the law Article 24 ICCPR right of child to protection of law, to registration and a name, and to nationality Article 26 ICCPR equality before the law/equal protection of law Article 4 prohibition of slavery and forced labour Article 5 right to liberty and security Article 6 right to a fair trial Article 7 no punishment without law	Legal security
ICCPR/ICESCR **ECHR**	Article 17 ICCPR prohibitions on arbitrary interference with privacy, home, correspondence, family, honour, reputation Article 10 ICESCR/Article 23 ICCPR right to marriage and family life; marriage by free consent; equality during marriage and at dissolution Article 8 Right to respect for private and family life	Individual, family and social life
ICCPR/ICESCR	Article 19 ICCPR right to opinion and expression	Identity, expression and self-respect

ECHR	Article 18 ICCPR freedom of thought, conscience and religion Article 20 ICCPR prohibition of advocacy of national, racial or religious hatred Article 27 ICCPR, Article 15 ICESCR right of minorities to cultural life, religion and language Article 9 freedom of thought, conscience and religion Article 10 Freedom of expression	
ICESCR **ECHR Pro 1**	Article ICESCR 13 right of everyone to education Article ICESCR 14 right to compulsory and free primary education Article 2 right to education	Education and learning
ICESCR	Article 12 ICESCR right to the highest attainable standard of physical and mental health	Health
ICESCR	Article 11 ICESCR right to an adequate standard of living, including adequate food, clothing and housing Article 9 ICESCR social security Article 10 ICESCR protection and assistance for families with dependent children, and special measures for the protection and assistance of mothers and children	Adequate standard of living
ICESCR	Article 6 ICESCR right to work; Article 7 right to just and favourable conditions of work	Productive and valued activities
ICCPR/ICESC **ECHR**	Article 21 ICCPR peaceful assembly Article 22 ICCPR freedom of association Article 25 ICCPR participation in public affairs, free and fair elections, equal access to public service ICESCR Article 8 right to form and to join trade union Article 11 freedom of assembly and association	Participation, influence and voice

Source: Adapted from Tania Burchardt and Polly Vizard (2011) 101.

Note: This table is indicative and does not provide a complete mapping of the relevant articles in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). A number of articles can be mapped to more than one domain. The table is based on the final Equality Measurement Framework domain headings.

* The source of the table does not include the ECHR.

** The source of the table does not match the listed human rights with Nussbaum's list.

APPENDIX 3

A.3. TABLE 2.2. Human Rights-Based Capability List (UDHR)

TABLE 2.2. Human rights-based capability list (dimensions of freedom and opportunity that are protected and promoted in the Universal Declaration of Human Rights)		
Instrument	**Types of human rights**	**Underlying states of being and doing (Nussbaum's ten central capabilities)**
UDHR	Article 3 right to life, liberty and security of person	Life Bodily Health Bodily Integrity (1-3)
UDHR	Article 4 right to freedom from all forms of slavery or servitude	Life [Bodily Health]* [Bodily Integrity] Practical Reason (1, [2,3] 6)
UDHR	Article 5 prohibition of torture or degrading treatment or punishment	Bodily Integrity Senses, Imagination, and Thought Emotions Affiliation (3,4, 5, 7.2)
UDHR	Article 6 right to legal personality Article 7 right to equality before law Article 8 right to an effective remedy for violation of fundamental rights Article 9 right to freedom from arbitrary arrest, detention, or exile Article 10 right to a fair trial in criminal cases Article 11 presumption of innocence and no retroactive criminal laws and penalties	Emotions, Affiliation Control over one's Environment (5.2, 7.2, 10.1)
UDHR	Article 12 right to privacy	Senses, Imagination, and Thought Emotions Affiliation and Control over one's Environment (4, 5, 7.1, 10.2)
UDHR	Article 13 right to freedom of movement	Bodily Integrity (3)
UDHR	Article 14 right to ask for asylum in other countries	Life Bodily Integrity (1, 3)
UDHR	Article 15 right to freedom from arbitrary deprivation of a nationality	Bodily Integrity Affiliation

		Control over one's Environment (3, 7, 10.1)
UDHR	Article 16 equal right in marriage and family	Bodily Integrity Emotions Affiliation (3, 5, 7)
UDHR	Article 17 right to property	Control over one's Environment (10.2)
UDHR	Article 18 right to freedom of thought, conscience and religion	Senses, Imagination, and Thought Practical Reason (4, 6)
UDHR	Article 19 right to freedom of opinion and expression	Senses, Imagination, and Thought Control over one's Environment (4, 10.1)
UDHR	Article 20 right to freedom of peaceful assembly and association	Affiliation (7)
UDHR	Article 21 right to participate in government, directly or through freely chosen representative, right to equal access to public service, and right to vote in periodic and genuine elections	Control over one's Environment (10.1)
UDHR	Article 22 right to equal pay for work and social security	Control over one's Environment (10.2)
UDHR	Article 23 right to just and favourable remunerations for workers, right to form and join trade unions	Affiliation Control over one's Environment (7, 10.2)
UDHR	Article 24 right to leisure and holidays with pay	Play (9)
UDHR	Article 25 right to adequate standard of living for health and well-being, right to health care and right to special care during motherhood	Bodily Health Affiliation (2, 7)
UDHR	Article 26 right to education	Senses, Imagination, and Thought (4)
UDHR	Article 27 right to participation in culture	Senses, Imagination, and Thought Emotions (4, 5)
Source: adapted from Morsink 2009 170-171. * Brackets are mine.		

APPENDIX 4

A.4. TABLE 5.1. Human Rights Indicators

Table 3. Human Rights Indicators		
Right to take part in cultural life – Article 15(1)(a) ICESCR Right of freedom of expression – Article 19 ICCPR		
Structural	❖ International human rights treaties, relevant to the right to take part in cultural life and the right of freedom of expression, ratified by the State (S1) ❖ Date of entry into force and coverage of the right to take part in cultural life and the right of freedom of expression in the Constitution or other forms of superior law (S2) ❖ Date of entry into force and coverage of domestic laws for implementing the right to take part in cultural life and the right of freedom of expression (S3) ❖ Time frame and coverage of national policy on access to culture (S4) ❖ Legal protections against discrimination (S5) ❖ Number of active civil society organisations involved in the promotion and protection of the right to take part in cultural life and the right of freedom of expression (S6) ❖ Existence of structures for the use of parallel importing of copyrighted works and compulsory licensing of these works (S7) ❖ Existence of grievance mechanisms in relation to the right to take part in cultural life and the right of freedom of expression (S8) ❖ Existence of mechanisms in relation to the right to take part in decision-making concerning cultural matters (S9) ❖ Existence of mechanisms to enable artists and authors to maintain an adequate standard of living (S10) ❖ Existence of mechanisms to protect artists and authors' right to protect moral interests in their creations (S11) ❖ Rating of the national human rights institution (NHRI) by International Coordinating Committee of NHRIs (S12)	
Process	❖ Proportion of received complaints on the right to take part in cultural life investigated and adjudicated by the courts, national human rights institution, human rights ombudsperson, or other mechanisms, and the proportion of these responded to effectively by the government (P1) ❖ Per capita government expenditure to enable individuals to access to culture (P2)	

	❖ Proportion of cultural creations sourced through the compulsory licensing mechanism to ensure affordability (P3) ❖ Identification of individuals who are vulnerable in accessing cultural life (P4) ❖ Proportion of state budget devoted to provision of access to culture for vulnerable groups (such as poor persons or persons with visual disabilities) (P5) ❖ Proportion of state budget for enabling artists and authors to take risks with creative content and ideas (P6) ❖ Proportion of the professional participation of vulnerable groups (*e.g.*, disabled people) in the cultural industries (P7) ❖ Proportion of different segments of society in accessing the Internet (P8)	
Outcome	❖ Incidence of persons being rejected to take part in cultural life without a lawful reason (O1)	

APPENDIX 5

A.5.TABLE 6.1: CASE STUDY 1

Rights Engaged	Value	Deduction	Total
Enjoyment of Property (Art 1 Pro 1 ECHR, Art 17(2) EU Charter) (**GEMA's members**)	Plus 1		Plus 1
Enjoyment of Property/Conduct Business (Art 1 Pro 1 ECHR, Art 16(1) and Art 17(1) EU Charter) (**YouTube**)	Minus 1		Minus 1
Freedom of Expression (Sub-right of freedom to impart information) (Art 10(1) ECHR, Art 19(2) ICCPR, 11(1) EU Charter) (**YouTube**)	Minus 1		Minus 1
Freedom of Expression (Sub-right of freedom to access information) (Art 10(1) ECHR, Art 19(2) ICCPR, 11(1) EU Charter) (**YouTube's non-party non-infringing users**)	Minus 1		Minus 1
Take part in cultural life (Sub-right to contribute to cultural life) (Art 15(1)(a) ICESCR) (**YouTube**)	N/a (Maybe Art 10 ECHR and/or11(1) EU Charter)		N/a
Take part in cultural life (Sub-right to access to cultural life, freedom of artistic and creative expression, right to cultural heritage) (Art 15(1)(a) ICESCR, Art 19(2) ICCPR) (**YouTube's non-party non-infringing users**)	N/a (Maybe Art 10 ECHR and/or11(1) EU Charter)		N/a
Freedom of Expression (Sub-right of freedom to access information) (Art 10(1) ECHR, Art 19(2) ICCPR, 11(1) EU Charter) (**YouTube's non-party infringing users**)	Minus 1	Plus 1	0
Take part in cultural life (Sub-right to access to cultural life, freedom of artistic and creative expression, right to cultural heritage) (Art 15(1)(a) ICESCR, Art 19(2) ICCPR) (**YouTube's non-party infringing users**)	N/a (Maybe Art 10 ECHR and/or11(1) EU Charter)		N/a
Due Process (Sub-right to access to court and equality of arms) (Art 6(1) ECHR, Art 47 EU Charter) (**YouTube's non-party infringing users**)	Minus 1	Plus 1	
		TOTAL	**Minus 2**

APPENDIX 6

A.6. TABLE 6.2: CASE STUDY 2

Rights Engaged	Value	Deduction	Total
Freedom of expression (Sub-right to access to information) (the First Amendment to the US Constitution and Art 19(2) of the ICCPR) **(The Claimants: Matthew Green and Andrew 'Bunnie' Huang)**	Plus 1		Plus 1
Take part in cultural life (Sub-right to artistic and creative expression) (Art 15(1)(a) ICESCR) **(The Claimants: Matthew Green and Andrew 'Bunnie' Huang)**	N/a (Maybe the First Amendment to the US Constitution and Art 19(2) of the ICCPR)		N/a
Right to share in scientific progress (Art 15(1) (b) ICESCR) **(The Claimants: Matthew Green and Andrew 'Bunnie' Huang)**	N/a (Maybe the First Amendment to the US Constitution and Art 19(2) of the ICCPR)		N/a
Freedom of Expression - (Sub-right to artistic and creative expression) (the First Amendment to the US Constitution, Art 19(2) of the ICCPR and Art 15(1)(a) of the ICESCR (**Narrative and non-commercial filmmakers**); - (Sub-right to access to information) (the First Amendment to the US Constitution and Article 19(2) of the ICCPR (**Students and instructors**) - (Sub-right to impart and access to information) (the First Amendment to the US Constitution and Art 19(2) of the ICCPR) (**Museums, libraries and nonprofits**) - (Sub-right to access to information) (the First Amendment to the US Constitution and Art 19(2) of the ICCPR) (**Users who are denied of space and time shifting exceptions)**	N/a (Maybe the First Amendment to the US Constitution and Art 19(2) of the ICCPR)		N/a

Right to education (Art 13 of the ICESCR) (**Students and instructors**)	N/a		N/a
Take part in cultural life - (Sub-rights to access to cultural life and material, access to cultural heritage) (Art 15(1)(c) of the ICESCR) (**Students and instructors**) - (Sub-rights to access to cultural life, access to cultural heritage and contribute to cultural life Art 15(1)(a) of the ICESCR) (**Museums, libraries and nonprofits**) - (Sub-rights to access to cultural life and access to cultural heritage (Art 15(1)(a) of the ICESCR) (**Users who are denied of space and time shifting exceptions**) - (Sub-right to participate in decision-making in relation to cultural matters (Art 15(1)(a) of the ICESCR) (**TPM-protected material users**)	N/a		N/a
Right to copyright (Article I, Section 8, Clause 8 of the US Constitution and Art 15(1)(c) of the ICESCR) (**non-party copyright holders**)	Minus 1		Minus 1
		TOTAL	**0**

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