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REINVENTING COPYRIGHT

The scope, the depth and the edges of copyright protection through the idea/expression dichotomy

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Abstract

Copyright is in the line of fire; if our times are in the hands of digital (r)evolution more than ever before, the abolishment of all barriers as no longer relevant to the end of conventionality, doubts or even contests the substance of traditional legal regimes. Uniquely encircling and enveloping creativity with the mantle of law, thus preserving its own existence and continuity, copyright has to *remind* its very essence as reflected in its own philosophy, structure and development. If everyone asks (or questions) “*what*” is to be protected, “*why*” is this protection afforded, and “*how*” shall the line be drawn, idea/expression dichotomy is this principle -as the fundamental axiom of copyright law- that will unambiguously and effectively response. Founded on the core of copyright, it draws around its periphery a number of concentric circles that demonstrate its profound significance; its twofold purpose as serving both the creator and the public, the rights of the *one* and the rights of the *others*, “translated” into the legal monopoly conferred upon the author, and the principle of access. Embracing the conflicts arising and imposing the primordial propitiatory limitation, this essential division is voicing the pursue of fairness, the balance that copyright remarkably achieved and that constantly fights to achieve, even if “tormented” by diverging perceptions.

This research is not only an exploration of idea/expression dichotomy; it is an investigation on the real physiognomy of copyright law in both theoretical and judicial contours, forming a comparative analysis between the civil law and common law copyright traditions, while further deepening in the case - law of the United States, since demonstrating the two principal issues: Abstraction and the “How Much” question. Seeking a “fair interaction”, a “fair balance”, a “fair dealing”, or a “fair use”, the scope, the depth, and the edges of protection are signified through idea/expression dichotomy in all its magnificent (and difficult) dimensions. This is not the end of copyright, it is only its reinvention; and if we return to its roots, we may find the consensus needed and eventually go forward.

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Preface

Law is strict and rigid, predictable and consistent, establishing boundaries and drawing lines in order to strike a balance between opposing aims and conflicted interests; it demands for respect, it requires the consideration of the others, it is the “us” that prevails the ego. Creativity as Art, as Creation, as any Expression, is tolerant and malleable, changeable and unlimited, carved by shapes and forms that break the rules as the “most ungenerated act of freedom”. It is neither demanding, nor “punishing”, it is the celebration of individuality as uniquely and independently expressed. Hence, Law and Creativity are not separate paths that run in parallel, only momentarily crossing one another. They are meld like rivers which flow on the same sea, integrated into an indivisible entirety; and it is Copyright law that draws this circular completeness, that does not merely construct a crossroad, but, in effect, builds a new route of unity and harmony between these apparently contradicting aspects of human existence.

Intended and devoted to encouraging creativity, copyright law counted on the “fair interaction” between the individuals as the organs of the society, and society itself, continuously struggling to reconsider, to predict, or at least, to respond to the unceasingly changeable individual and collective needs and demands, as broadly construed under the norm of “opposing or competing rights and interests”. However, it has been intensively regarded as not sufficient, or vigorous, or effective enough to achieve the “fair balance” that it always sought to reach, especially in the light of the digital era. In this sense, the problematics of divergency and inconsistency that had admittedly “tormented” copyright law, became the most forceful argumentation against its own validity and significance, and idea/expression dichotomy -as its most fundamental principle- could not avoid this “inevitable fate”.

For all these reasons, a return to the roots of copyright and its substantive axioms that have both influenced and have been themselves affected by the intertemporal objective to encompass and respond to the challenges carved by the sign of the times, illustrated idea/expression dichotomy as the most fundamental principle of reason, structure and development of copyright law, under which the scope, the depth and the edges of copyright protection are determined. The theoretical investigation into each of its substantive pillars and their intersection, along with the case – study on its implementation among different jurisdictions, in both civil law and common law copyright traditions, was nothing less than a fascinating task under this research. The motivation was transfigured into a question posed: Is there a fault in Copyright law, or it shall be invented anew?

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Introduction

Copyright is founded on two substantive and solid pillars that “embody” its monumental desire to develop and maintain the protection of the rights of the authors, along with the profound recognition of the need to reach, sustain and preserve a balance between the creators and the “larger public interest”¹; if the appropriate form of protection as offered to the authors has been actualized through the granting of absolute and exclusive rights over their works, the rights and interests of the public, coincided with the principle of “public benefit”, are realized through the right to access copyrighted resources. And this constitutes the fundamental objective of copyright law, consisting simultaneously, though, the conflict that agonizes copyright law since its conception and traverses its whole existence and formulation. Idea/expression dichotomy, as inexorably intertwined with originality, consists the “backbone” of copyright law as the most “substantial and concrete form of protection”², providing for all the answers sought. Indeed, the division between an idea and its particular conceptualization as independently, individually and uniquely expressed has formed (and still forms) the sharp line of demarcation between the unprotected elements of a work of authorship and the subject - matter of copyright protection; between the “common property” and the private right to intellectual creation; between the public interest in terms of social progress, and the individual concern and inherent need for self-expression, actualization and fulfillment.

Chapter I explores the philosophy of copyright law, the rationale behind its proprietary nature, the misconception of the deriving principle of exclusivity, and the role of idea/expression dichotomy as drawing the line between the “body” and the “soul” of a copyrighted work. Moreover, the concept of “exceptions and limitations” and its effective power in the structure and evolution of copyright law is explored, since demonstrating its twofold motivation that profoundly lays the foundations on which idea/expression dichotomy rests.

¹ Aligned, in particular, with the realms of “education, research and access to information, as reflected in the Berne Convention”. Preamble of 1996 WIPO Copyright Treaty (WCT).

² Stamatoudi, Irini, “Copyright and Multimedia Products, A Comparative Analysis”, Cambridge University Press, 2001, p. 6

Chapter II deepens in the norms of “idea” and “expression”, further presenting the codification of the dichotomy around the world as a rule of law, while focusing on the example of Greece, as a judicially formulated concept. Furthermore, the diverging copyright traditions between the civil law and common law systems are analyzed, reflecting, as such, the principle of territoriality, which had inevitably affected the status and implementation of the division between an idea and its expression; in this regard, the requirement of fixation as contradicting with the principle of copyright’s automatic protection, and the interconnection and interdependence of idea/expression dichotomy with the fundamental doctrine of originality, intends to shed light on the reasoning behind any judicial determination of copyright infringement, as interwoven with the scope and very essence of copyright. Chapter III emphasizes on “*where*” and “*how*” has the line been drawn, while setting the “problematic” of idea/expression dichotomy as the “root” of the legal uncertainty observed around the copyright world. Exploring the methodologies and the tests adopted for the identification of the protectable and non-protectable elements of a work, the differentiated standards and definitions applying, along with the results reached on a case-by-case determination, the outcome reached is that notwithstanding the diverging or even contradicting perspectives from which the civil law and common law copyright traditions originate, they both seek “fairness” as the reflection of the balance that copyright is destined and intended to reach; and as such, the ending of the thread unrolled “meets” again its beginning...

I. THE PHILOSOPHY AND PHYSIOGNOMY OF COPYRIGHT LAW

1.1. Copyright as “Property” and the Exclusivity Debate

Copyright exists, grows and evolves within the realm of Intellectual Property³, identified as the most powerful and effective mechanism in order to build and preserve the so-called *creative advantage*; this (content -in terms of copyright-) advantage is further construed as the starting point for achieving a *breathing* (economic) space that in turn operates and succeeds through the recognition of a *legal monopoly*, namely through the establishment of absolute and exclusive proprietary rights to intellectual property owners.⁴

³ Since copyright consists a significant installment of the Intellectual Property system, as inextricably aligned with “culture, knowledge, digitisation projects, online markets and new technologies”. Stamatoudi, Irini and Torremans, Paul, “EU Copyright Law: A Commentary”, Edward Elgar Publishing: Elgar Commentaries Series, 2014, p.1

⁴ Pike, Christopher G., “Virtual Monopoly: Building an Intellectual Property Strategy for Creative Advantage--From Patents to Trademarks, From Copyrights to Design Rights”, Nicholas Brealey Publishing, 2001. Indeed, it has been realized since the establishment of the 1886 Berne Convention for the Protection of Literary and Artistic Works (consisting the first multilateral treaty in the area and as a consequence, the origins of any later legislative initiative), that the “effective and uniform” manner through which the authors of qualified as copyrighted works will be adequately protected, is the *exclusive character* of the rights that shall be attributed to them (articles 8, 9, 11, 11bis, 11ter, 12, 13, 14). Being further recognized (in the convention’s preamble) as the animus of all contracting parties, this rights-based approach has been construed as “one of the fundamental cornerstones of the modern intellectual property system”, on which every modern legislative instrument in the area also focuses on. Ricketson, Sam, “The Berne Convention: The Continued Relevance of an Ancient Text”, in “Intellectual Property and the New Millennium: Essays in Honour of William R. Cornish”, Vaver, David and Bently, Bionel (Eds), Cambridge University Press, 2004, p. 221. Remaining in the international level, the exclusive control granted to authors over their creations has been further implemented in 1996 WIPO Copyright Treaty (WCT, articles 6-8), while the “effective” protection desired (and afforded) to performers and producers of phonograms (as related rights holders) has been also realized through the recognition of exclusive rights under the 1999 WIPO Performances and Phonograms Treaty (WPPT, articles 6 – 14). Moreover, in the regional level, the 2001/29/EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter “Infosoc Directive”) has also clearly stated that member – states shall provide to both copyright and related rights holders the “exclusive right” to authorize or prohibit the further exploitation of their works as specifically defined under the scope of the law (articles 2 – 4). Despite the diverging copyright traditions in civil law and common law jurisdictions, the principle of exclusivity has been implemented in both legal systems: for example, Copyright Law of the United States (a common law system) has dictated that “the Congress shall have Power... 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*”. In the national level, Greece (a civil law jurisdiction), provides under Copyright Act No. 2121/1993 that “intellectual authors shall have, with the creation of the work, the right of copyright over that work, which includes, *as exclusive and absolute rights*, the right to exploit the work (economic right) and the right to protect their personal connection with the work (moral right) (article 1§1).

In terms of copyright, if “absolute” means a right that belongs only to the author (or more accurately, to the copyright holder), “exclusive” signifies a rightful control exercised towards all, meaning that it is asserted against anyone, and actually or potentially, directly or obliquely violated by anyone. This virtual in nature -thus deriving from the intangible character of all intellectual property rights⁵- and moreover, temporarily sustained and self – limited⁶ exclusivity has been characterized as a “delicate balancing act”⁷ under the scope of encouraging creativity, consisting the rationale behind and the solid foundations on which copyright law has been worldwide structured and developed⁸. Deepening in this pivotal objective, its implementation has outlined the principle of exclusivity as its central axis, defined as the right of the author to *exclude the others from something that he owns*.⁹

⁵ Thus, protecting the “*creations of the mind*” which further fall within two divided branches, respectively consisted from i) the copyright and related rights’ field of protection and ii) the industrial property classification in which trademarks, trade-secrets, industrial designs, geographical indications and technical inventions (as patents) are included. Read more about the IP’s general framework at: “What is Intellectual Property”, WIPO Publication No.450(E), online available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf, and with regard to industrial property at: “Understanding Industrial Property”, WIPO Publication, 2nd ed., 2016, online available at: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_895_2016.pdf, as accessed in October 2017.

⁶ Thus, granted to the copyright owner for a limited timeframe (during his lifetime and usually seventy (70) years after his death); after the expiration of this time-limit, copyright expires *per se*, thus falling within the public domain regime. Moreover, the heart’s content of copyright may be itself narrowed by a number of exhaustively provided exceptions and limitations for the sake of public interest.

⁷ Reflecting the dual motivation of copyright law to protect and reward the author, while concurrently “advancing the public welfare”. As a result, the legal monopoly conferred upon the author of a copyrighted work shall incentivize the further creation and distribution of works, while not unduly increasing the “cost of public access or impede the work of future creators”. Garfield, Alan, “Copyright Law’s Delicate Balancing Act”, Delaware Lawyer, Vol. 35, Issue 3, 2017

⁸ 1996 WIPO Copyright Treaty (WCT) underlines (in its preamble) the “outstanding significance of copyright protection as an incentive for literary and artistic creation”, while in EU Copyright law, the “Infosoc Directive” emphasizes on a high level of protection of intellectual property which “will foster substantial investment in creativity and innovation”, contributing as such to the smooth functioning of the internal market. This *high level of protection is further coincided with the protection of the authors’ rights* which are “crucial to intellectual creations”, ensuring as such the “maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large”. It should be mentioned that, in this context, intellectual property has been recognized as an “integral part of property”.

⁹ The right to exclude the others -described as the very essence of the “bundle” of rights integrated into property- has been characterized as the “*sine qua non*” of property right, applying correspondingly to copyright. This attribution stands on the premise that if denying someone the exclusion right, “they do not have property” at all. Merrill, Thomas W., “Property and the Right to Exclude”, Nebraska Law Review, Vol. 77, Issue 4, Article 7, 1998, p. 730, online available at: <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1492&context=nlr>, as accessed in October 2017.

Shaped as, affected by and, in any case, interrelated with property law in a schematic analogy¹⁰, the intellectual property system “borrows”, *inter alia*, the concept of ownership to a physical object to transfigure it to the notion of authorship to an intangible article, construed, in both cases, as the exclusive right to control access to what derives from and belongs to the private sphere¹¹. However, this *erga omnes* application of the right to exclude, as uniformly recognized in copyright law notwithstanding its diverging origins¹², has been often misconstrued as installing a concealed *absolutum dominium* that is further argued to have been implicitly (and unacceptably) accepted.

¹⁰ As the (intangible) rights conferred upon to copyright holders are “analogous to the rights of ordinary property owners”, consisting as such the “intellectual property equivalents” of the rights belonging to (tangible) property owners. In this sense, a copyright owner is “similar” or “equal” to the owner of a tangible property, as they both share the exclusive entitlement over their “assets” and the coincided right to exclude, as provided by the property regime; this similarity is also apparent in the assignment and value of copyrighted works, and in the provisions governing the transfer of copyright which respectively require for a voluntary transaction that is only valid if conducted in a written form and accompanied by the transferor’s signature. Liu, Adrian, “Copyright as Quasi-Public Property: Reinterpreting the Conflict between Copyright and the First Amendment”, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Vol. 18, Issue 2, 2008, pp. 384, 405-406. In addition, this analogy is profound if considering the whole “bundle” of property rights -beyond the right to exclude- which applies in both tangible and intangible resources (under a differentiated, though, type and degree). Thus, the rights “commonly associated with property” are the right to use, to transfigure, to transfer (during life) and to devise upon death. See n.5, pp. 741 – 744. Similarly, copyright is the absolute and exclusive right to *use* a “work”, namely to authorize or prohibit any further exploitation (reproduction, distribution, making available to the public etc.) of an intangible resource, including the right of *adaptation* as the right to control any modification, transformation or alteration of a work. In addition, the copyright owner’s economic rights may be analogously transferred or licensed to third – parties, or inherited after the author’s death, while his moral rights are also descendible to his heirs, displaying, though, the difference that they cannot -in principle- be waived or transferred *inter vivos*.

¹¹ As “intellectual rights are private rights”, Preamble of the Trade-Related Aspects of Intellectual Property Rights Agreement (1994 WTO TRIPS Agreement).

¹² Under the “romantic” conception of copyright as enhanced in the civil law “*droit d’auteur*” systems -considered as “more favorable” to authors-, the bottom-line of the exclusive character of the rights afforded to copyright holders is based on the recognition of authorship and individual creativity, being further actualized through the establishment of an *economic return*, namely the *rewarding* of the author for his own intellectual creations. In contrast, copyright’s utilitarian perceptive “treats a work like a fenced property or possessed object”, thus applying to copyright the traditional title of ownership and the relevant right to exploit the asset’s economic value. In both cases, however, the underlying purpose remains the same, namely to incentivize the author to create further, contributing, as such, to the benefit of society, while the essence of the legal rights afforded to the copyright owner is the exclusive character of the right to control any dimension of the “circle of life” of a work. Rice, David A., “Copyright as Talisman: Expanding ‘Property’ in Digital Works”, *International Review of Law, Computers & Technology*, Volume 16, 2002, pp. 114 - 116

From that standpoint, if copyright is property, and if property is coincided with the right to exclude, then copyright holders become “despotically” dominant over “each and every possible use of a work”, consisting as such the root cause of the alleged copyright’s overexpansion. Consequently, it has been suggested that “intellectual property” should be reinvented as “intellectual policy”, thus considering (or disregarding) the whole property theory as a mere defense to intellectual theft, while also insisting that copyright does not (or should not) consist a property but a policy¹³, even alleging that its existing realm “threatens” the free flow of information and democratic dialogue in a broader sense.¹⁴ However, this point of view not only neglects the philosophy and essence of copyright as a system of rules, but also circumvents the scope and the fundamental structure of the law per se. If everything comes and evolves from a “why”, law is not just a simple question; it is the “*question of balance*” that has (each time) to be appropriately answered as a policy-making decision. Correspondingly, the state of the law is a “state of equilibrium”; it is not just the voice of people, it is also the voice of those who cannot be heard. It is not only the statutory formulation of a social will but for most, it is the actualization of a “*social order* which could only be achieved through a balance between opposing interests”. As a result, law is founded on the principle of balance and respectively, *copyright is built in flexibilities*. And this crucial framework inherently incorporates the recognition that “there cannot be an absolute right which could be exercised in a totally selfish manner with no consideration for the consequences its exercise involves”.¹⁵

¹³ Forming, in addition, the “Property Problem”, issued by the so-called internet exceptionalists with respect to digital copyright; under this perceptive, the application of traditional property entitlements on the internet endangers the digital era’s inherent freedom and “creative potential”, thus considering the new forms of expression in digital media as a “common culture” that is unjustifiably restricted by the authors’ virtual monopoly over their works. Mossoff, Adam, “Is Copyright Property”, San Diego Law Review, Vol. 42, Issue 1, 2005, pp. 29-31, 33.

¹⁴ Vaidhyanathan, Siva, “Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity”, New York University Press, 2001

¹⁵ It is the fundamental “concept of balance”, as the organizational structure and the structural strength of the law (and copyright law) per se, that dictates that there are no selfish or despotic rights but only rights which are “relativized” by the rights of the others and “the well-being and general interest” of society. This profound doctrine consists simultaneously the rationale behind the exceptions imposed as limitations to exclusive rights. Kotsiris, Lambros, “Some Reflections on the Copyright’s Path To-Day”, in “Copyright and the Digital Agenda for Europe: Current Regulations and Challenges for the Future”, Stamatoudi, Irini (Ed.), P.N. Sakkoulas, 2015, pp. 165-166

If the public's access to a copyrighted work consists the principal interest affected by a copyright holder's exclusivity, copyright -as property right- is not the *raison d'être* of such an outcome but the solution provided in this implied controversy. Hence, property regime and its intrinsic values as espoused by copyright law, should not constitute a target state of coercion; in effect, they represent a conscious choice among the options offered by the law, enshrined into the copyright regime, adjusted -as a tailor-made modification- to its objectives and "used" as the operational tool through which a "careful balance" between the principles of *exclusivity* and *access* will be eventually achieved. As a result, the proprietary nature of copyright operates complementary to (and not against) the fulfillment of the purpose of the law, under which the rights of the authors will be effectively afforded, safeguarded and -when necessary- enforced, while simultaneously the "multiplicity, the independence and the survival of the communication" in a democratic society will be supported and guaranteed.¹⁶

1.2 Idea/Expression Dichotomy as an Arrow in the Quiver or a Shield?

Conniving at the origins and physiognomy of copyright as a balance - seeking policy, this assertion against the establishment of copyright system on a property basis has also employed the demand for the free circulation of ideas as the grounds on which such a rejection could be justified. Under this argumentation, the exclusivity privilege afforded to a copyright holder is inadmissible, based on the manifestation that an idea cannot be stolen¹⁷, thus consisting the raw material of following creations, information and spread of knowledge in general, and forming, as such, the pillar of democratic speech. And indeed, it is. And this is exactly the reason why copyright *does not protect ideas but only expressions and not any expression but only to the extent it is original*. It is the fundamental principle of idea/expression dichotomy, further aligned with originality doctrine, that consists one of the most (if not *the* most) significant flexibilities that copyright protection offers as to where to draw the necessary, decisive and pivotal line.

¹⁶ *Ibid*, pp. 167 - 168

¹⁷ See n. 11, p. 15

In other words, this essential division between an unprotected (by copyright) idea and its protectable expression is exactly a *policy* (in itself), adopted in order to achieve an *effective balance*, under which copyright -as *property right*- confers upon the author of an original expression of an abstract and free exchangeable idea, the right to be rewarded for his intellectual contribution.

1.2.1 The “Body” and the “Soul” of a Work: Fixing the Boundaries

Consisting either a “minimum” *quid pro quo* under the common - law perception of copyright as a creation of statute, or the right to the absolute exploitation of the whole economic value of a work under the property theory¹⁸ -enveloping, as such, copyright with the mantle of human rights’ protection¹⁹-, the operative event of the “author’s reward” remains, in both cases, the “birthing” of a creative outcome, defined as the expression of an intellectual creation²⁰, which shall be originated with the author. Here, a clear distinction needs to be made, as unambiguously determined in both theoretical and judicial contours.

¹⁸ Selsky, Eileen L. “Is Copyright a Property Right or a Creation of Statute”, Entertainment and Sports Law Journal, Volume 2, 1984

¹⁹ As the right to property consists a fundamental human right -aligned with the “dignity and worth of the human person”-, established by the 1948 Universal Declaration of Human Rights which provides, in article 17, that “everyone has the right to own property alone as well as in association with others”. The 1952 Protocol to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, has further specified the right to property as the “peaceful enjoyment of one’s possessions”, while dictating that “no one shall be deprived” of his property “except in the public interest” (article 1); this fundamental declaration has been respectively adopted in the Greek Constitution (article 17). In this sense, it could be argued that this “limitation” to the human right to property for the sake of public interest- as established by the milestones documents in both international, regional and national level-, has been *pro rata* enshrined in copyright law, where the absolute and exclusive right of the author is respectively narrowed under the same purpose; this foundational objective is further pursued and achieved, *inter alia*, through the division between an idea and its expression.

²⁰ The definition of the protectable subject – matter of copyright protection as the “author’s own intellectual creation” has been introduced as an institutional directive criterion (throughout the European community) with regard to photographs, software and databases (2006/116/EC Directive on the term of protection of copyright and certain related rights, 2009/24/EC Directive on the legal protection of computer programs and 96/9/ Directive on the legal protection of databases). The Court of Justice of the European Union has later elaborated both on the notion per se and its scope of application, declaring that it uniformly and autonomously applies *to all types and every single work*.

Copyright protection applies on the creation of a work, and not to the physical carrier that “contains” this creation, as copyright does not protect a work as an “external object in and of itself” but as “the embodiment of the author's interiority or personality”, externalized and manifested as “oeuvre”²¹. It is exactly this clear and functional separation between the materiality and the essence of a work that, beyond implementing a required and appropriate division between copyright and property law (as concentrated on differentiated subject - matters), it principally demonstrates the core of copyright protection; starting from the premise that copyright does not bind “every aspect of an author’s work”, and if a work is segregated between its corporeality and “psyche”²² -or the medium and the spirit “captured” within it-, *copyright does not protect a work as a thing but as an expression*.²³ Consequently, the substance of this link and its protection by copyright as the *author’s right to an original expression*, demonstrate the consolidation of both originality as the “sine qua non” of copyright²⁴ and “idea/expression” dichotomy as its very essence.

²¹ Drassinower, Abraham, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law”, Canadian Journal of Law and Jurisprudence Vol. XVI, No.1, 2003, p. 13

²² As one may implement, in copyright law, the “theory of the soul” under its philosophical analysis; in this sense, “psyche” existed before and will survive the body within which it had been only temporarily living, transfusing it, though, its immortality as “grasped by the Mind”. Indeed, “psyche”, as dominantly governing the body during their “symbiosis”, is present and active in “all cognitive operations”, leading, as such, to its reconsideration as the principal feature through which a “man’s or woman’s personality” will be eventually characterized. Solmsen, Friedrich, “Plato and the Concept of the Soul (Psyche): Some Historical Perspectives”, Journal of the History of Ideas, Vol. 44, No.3, 1983

²³ See n. 20

²⁴ As “copyright protection applies only in relation to a subject – matter which is original, in the sense that it is the author’s intellectual creation”, thus the embodiment of his creativity and the reflection of his personality as originally *expressed*. Under this context, the author shall exercise creative freedom -by making free and creative choices- in the production (i.e. creation) of a work, stamping as such the creative outcome with his “personal touch”. Consisting a qualitative and not a quantitative assessment, where varying levels of protection are also inadmissible, originality -as uniformly and autonomously construed throughout the European community-, consists the “sole criterion for copyright protection”. Stamatoudi, Irini, “Originality under EU Copyright Law”, in “Research Handbook on Copyright Law: Second Edition”, Paul Torremans (Ed), Edward Elgar Publishing, Cheltenham (UK) - Northampton (US), 2017, pp. 57 - 84

As a result, the property – rights’ “infusion” in copyright law does not solely or merely imply a “monopoly privilege” to its holder (under the oversimplification formulated by its abolitionists), but it is the legal recognition of the “substantive relationship between a person and a thing” under its classical identification as the right to use, acquire or dispose of (any) property²⁵. Correspondingly, the incorporeal and even deeper and stronger personal bond that inextricably aligns a creator with his intellectual creations as an inherent and “parental” nexus, should be indisputably “honored” with an equivalent (to property) protection system under copyright law.

In its traditional conception, as a corporeal control over tangible objects, it involves the right to physically exclude non-owners from the owner’s property. In its intangible transubstantiation, it is the right of the copyright owner to control and not to lose the ability to control his own *intellectual property*²⁶, actualized by the “bundle” of absolute and exclusive rights that the author -as the initial rightholder- *deserves* on his copyrights; it is the rule of the author’s prior authorization and the right -in its economic transfiguration- to derive financial reward from the use of copyrighted works by third-parties²⁷. However, there is no exclusionary rule without an impeachment exception; and in the field of copyright, the rule is not only tested but is, in effect, recrafted by its exception...

²⁵ See n. 7, pp. 37-38, 40.

²⁶ In terms of copyright, this intangible property is defined as an intellectual creation, a product of the mind that supersedes the boundaries of a common idea, crafted independently from its author and transmuted to a particular expression that bears his individuality, fulfilling as such the originality prerequisite. Furthermore, the norm of expression implies by nature an externalization process, conceived as the way that is communicated to the public through a specific order, selection and arrangement. Stanton, Laurence A., “Expression and Originality in Copyright Law”, Washburn Law Journal, Vol. 11, Issue 3, 1972, pp. 401 – 402. One could argue that this interpretation constitutes an alternative implementation (or the origins) of the communication to the public right (as one of the copyright owner’s exclusive rights over his works), while the specificity requirements, namely the distinct order and arrangement as an expression’s component elements, resemble to the definition adopted towards the copyrightability of databases as provided in article 3 of the 96/9/EC Directive on the legal protection of databases. The same requirement of “revelation” is also adopted in Greek copyright law, under which a work has to be manifested (namely communicated to the public) in any way, taking the form of “either an embodiment in or on some solid material” or consisting “an act that only momentarily makes the work accessible to the senses, especially to human sight or hearing”. Stamatoudi, Irini and Koumantos, George, “Greek Copyright Law”, P. Sakkoulas Editions, Athens, 2014, pp. 21 - 22

²⁷ Consisting the statutory expression of “economic rights” as the one type of rights conferred upon to the copyright owner by copyright; in parallel, copyright protects the author’s moral rights over his intellectual creations (in varying degrees between the common law and civil law copyright traditions).

1.3 Exceptions and Limitations to Copyright: Reconstruction by Restriction

In effect, *copyright is all about restricted acts*, namely potential uses of a copyrighted material that fall under the rightholder's prudential acquiescence and consent, as the means through which he will be effectively rewarded²⁸ for his intellectual creations. Simultaneously, though, it is also copyright per se that is (self)limited due to the prevailing nature and overriding character of *public interest*, forming, as such, the legitimate grounds for the justification of the thresholds imposed²⁹ on the exercise of the author's rights (as -intellectual- property rights).

²⁸ The author's reward has been considered as to be motivated under two differentiated conceptions that signify the diverging policies adopted in the common law and civil law traditions on copyright; according to the "utilitarian" perceptive, it consists a "kinitron" for the production of creative works for the benefit of society", thus converting copyright into an "opt-in system" under which authorization for the further exploitation of a work will be affirmatively provided; in contrast, its "romantic" interpretation aligns the recognition of the author's reward with the principle of creativity per se, considering it as an expressive dimension of authorship. Torremans, Paul, "Exceptions and Limitations in the Digital Era", in "Copyright and the Digital Agenda for Europe: Current Regulations and Challenges for the Future": See n.17

²⁹ The interrelationship and alleged overlapping between the rights of the author and those defined by the norm of "public interest" constitute -especially under the common law perception of copyright- an intertemporal debate on where this limit should be fixed. According to this view, the exclusivity afforded to copyright holders constitutes the "unfettered ability to exclude others from using the copyrighted work, no matter the social utility of the use", allegedly circumventing the social goal of encouraging creativity -especially in the light of online environment-, while even disputing the competency of the law -described as "static legal rules"- to address the current needs and demands of society with respect to the dynamic technological innovations. Patry, William, "Limitations and Exceptions in the Digital Era", Indian Journal of Law and Technology, Vol. 7, Issue 1, 2001, pp. 2-7. Moreover, with regard to artistic creations, it has been contented that a "portion of all copyright activity is derivative", while appropriation is exclusively (and rather paradoxically) perceived as increasing the "flow of new creations"; in this context, even the incentive provided by copyright law for creating further, consists an implicit "obligation" to share this creation with the public, while the later is considered as unreasonably weighed by the "heavy burden" to prove a non-infringement. Ruiz, Nicholas, "Copyright's Paradox: The Public Interest and Private Monopoly", Intellectual Property Law Bulletin, Vol. 18, Issue 2, 2014, pp. 212 – 215. However, these approaches disregard both the self-limited character of the legal monopoly granted to the author, as well as the role of exceptions in limitations as a policy-making decision towards the achievement of an effective equilibrium between the author and the public. Moreover, the manifestation of a work or an intellectual creation -as an act of companionship and sociability- constitutes, either way, the *sine qua non* of copyright protection, while comprising -in the field of arts- a self-evident quality of an artistic creation as there is no art without the public. Thus, inspiration per se and the opportunity to build upon previous works is starkly recognized by copyright law, especially through the exclusion of ideas from the scope of protection.

Consisting the key rationale behind the fundamental concept of “exceptions and limitations” that forms, in turn, a “central element of copyright policy equation”³⁰, while inherently linked with the history and substance of copyright law per se as its main objective, the principle of public interest is neither the reasoning for the recognition (and establishment) of the protection granted to the author by the law, nor the dialectic for the exclusion of specific subject - matters from his entitlement over his intellectual creations; *it is both*, as in the case of copyright, public good and the claims of individuals are essentially indissociable -or at least, compatible-, while the interests of the authors (and rightholders in general) fully coincide with those of the public.³¹

However, this philosophical train of thought is sharply barreled down the railway tracks, if recalling and reconsidering the conception and structure of copyright law. If copyright “has always sought to reflect a balance between protection and access” -even since its earliest stages and initial formulation-, while being, in parallel, vibrated by its circling -as a perpetual- interconnection with human rights, then the equilibrium to be reached presupposes, entails and depends on a conflict between competing rights, interests and subsequent claims.

³⁰ Gervais, Daniel, “Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright”, *Journal of the Copyright Society of the U.S.A.*, Vol. 57, Issue 3, 2010, p. 500

³¹ As they both share -in its very essence- a common objective, the (further) production of creative content. Encompassed by copyright law under the notion of “encouraging creativity” -as the two words incorporating its own aim and scope-, the means through which this goal will be achieved forms concurrently the “heart” of the balance sought by copyright law, and the core of the dispute between the interested parties, since adopting a completely differentiated approach. In one hand, authors are entitled to control the further exploitation of their works (including dissemination as the “heart” of the communication to the public right), while, on the other hand, public seeks wider dissemination of copyrighted materials, on the basis of the right to access. Peters, Marybeth, “Copyright Enters the Public Domain”, *Journal of the Copyright Society of the U.S.A.*, Vol. 51, Issue 4, 2004, pp. 703 - 70

Indeed, the stakes involved are extraordinarily high if considering that they form a labyrinthine system of battles and controversies between, on the one hand, the right to (intangible) property, to subsequently control and exclude, and the right not be copied³², and on the other hand, the right to access (and use) as a dimension of the right to information and participation in cultural life, the freedom of expression and the right to privacy³³, along with the interference of competition law.³⁴ Hence, the inquiry of an effective balance between the creator and society at large, or -in explicit terms- the copyright owners and copyright users, comes profoundly at copyright law's "most basic levels".³⁵

³² Following the proposition that "original", in terms of copyright and as rigidly interconnected with the norm of expression, does not mean novel but "simply not to be copied from another work" -under the United States copyright law. Drassinower, Abraham, "What's Wrong with Copying?", Harvard University Press, 2015

³³ Operating as fundamental rights established "either under international human rights law or as constitutional rights on the national level", human rights, and for most, freedom of expression constitutes an extrinsic factor -since falling outside the normative sphere of copyright-, but still a direct and compressive force towards the identification and redetermination -by potential limitation- of copyright's subject – matter and scope of application. Gervais, Daniel J., "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations", University of Ottawa Law & Technology Journal, Vol. 5, 2008

³⁴ Based on the doctrine of the prohibition of the abuse of (any) right, the conflicts arising between copyright and competition law allegedly derive by virtue of the copyright owner's exclusivity over its copyrighted expressions and the contented "misuse" of copyright -in cases of licensing (or refusing to license) a copyrighted material-, since allegedly "destroying" or at least, "restricting" the marketplace of the expression's underlying ideas. Cross, John T. and Yu, Peter K., "Competition Law and Copyright Misuse", Drake Law Review, Vol. 56, Issue 2, 2008, pp. 433 – 437. However, the Court of Justice of European Union has stated that the exercise -by an owner of intellectual property rights- of his exclusive rights, and in particular, a refusal to grant a license to third – parties "cannot in itself constitute an abuse of a dominant position", since an obligation to the contrary would "lead the proprietor to be deprived of the substance of his exclusive right", *C 238/87 Volvo v. Veng [1988], judgment of 5th October 1988, ECR 6211*. Moreover, this conflict between the exclusivity of rights and free competition is only one aspect of the interface between the two fields of the law, as inherently operating complementary to each other; in this sense, if the remuneration provided by the exclusive rights conferred upon the author is not produced by exclusivity per se, but it is clearly depending on the "customers' willingness to pay", then it is the "proactive" role of competition law that actually produces such a reward by "creating and maintaining efficient distribution channels and copyright-related markets", while eradicating, as such, unauthorized uses and illegal copies. Max Planck Institute for Intellectual Property and Competition Law, "Copyright, Competition and Development", Munich, 2013, pp. 4 – 6

³⁵ It is through the identification of the "coverage" that the monopolistic set of rights confers upon a copyright holder, namely the determination of the boundaries of an eligible -for copyright protection- subject- matter, that the "costs" imposed on the society will be simultaneously "reversed" by a common benefit, realized through the "plentiful supply and wide dissemination" of intellectual creations. Abrams, Howard B., "Originality and Creativity in Copyright Law", Law and Contemporary Problems, Vol. 55, Issue 2, 1992, pp. 3-5.

Therefore, it could be argued that the concept of exceptions and limitations on the author's economic rights³⁶, and in particular, its formulation, evolution and subsistence per se have been deeply affected³⁷ by the effective conflicts between the competing rights and opposing interests of copyright holders and the public³⁸, as being always oscillated -due, *inter alia*, to their dynamic nature- between attraction and repulsion, between trust and suspicion.

³⁶ Under which, neither a prior authorization, nor the payment of the relevant remuneration are required.

³⁷ In this context, the doctrine of exceptions and limitations has been treated rather reluctantly in the institutional level, thus mostly providing for optional exceptions and limitations -leading as such to inconsistency or legal uncertainty- under specific, though, requirements. Thus, 1886 Berne Convention provides for "*possible*" exceptions to the right of reproduction (article 9), declaring that "it shall be a matter for legislation in the countries of the Union" to permit the reproduction of literary and artistic works under three, though, prerequisites: i) *in certain special cases*, which ii) *do not conflict with a normal exploitation of the work* and iii) *do not unreasonably prejudice the legitimate interests of the author* (the "three – step test"), while also providing (in article 10) for certain free uses of works, where only the quotations exception is dictated as mandatory (under the "shall be permissible" wording). The same requirements for the confinement of exclusive rights, as afforded (again) by its members, has been adopted in the TRIPs Agreement (article 13), considered as the actual implementation of the "three-step test" in the international level, while a similar impact has been attributed to "Infosoc Directive" which introduced the "three-step test" (as such) in the European level (article 5§5). Although it has been construed as a "filter" towards the legitimacy of the potential use of any copyrighted work, the test has been explicitly provided in relation to software (under the 2009/24/EC Directive on the legal protection of computer programs (article 6§3)), under the 2006/115/EC Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property (article 10§3) and towards databases (under the 96/9/EC Directive on the legal protection of databases (article 8§2)). However, the wording and the scope of "Infosoc Directive" have been regarded as the "most significant" expansion of the role of the "three-step test", as exhaustively specifying the cases and uses where such an exception could be adopted by member – states. In addition, "Infosoc Directive" has further illustrated the scope of exceptions and limitations under EU Copyright law as serving the public interest (providing for the general framework of educational and teaching purposes), while also imposing the principle of "fair balance" of rights and interests between the different categories of rightholders (copyright and related rights holders), as well as between rightholders and users. Although stating that there should be a reassessment of the concept of exceptions and limitations as the existing differences and diverging implementations in the national law "have direct negative effects on the functioning of the internal market of copyright and related rights", while also duly reflecting their "increased economic impact" especially in the light of the "new electronic environment", the desired harmonization has been argued to have failed under this legislative initiative, while a limitation on the limitations (i.e. a restrictive rather than a liberal interpretation) has been only provided as a suggestion with respect to the digital era (recitals 14, 31 and 44). In the national level, Greek copyright law, as one of the most comprehensive -and favorable to the authors- copyright systems, has included the "three -step test" as a clause for the general application of limitations under article 28C.

³⁸ As the two more significant developments of the last decades -the technical in nature and the evolution of legal policies- have altered the triangular relationship (and subsequent balance sought) between the "three protagonists in the field of copyright", namely the authors, the related right holders and the public, shifting now the interest (and consequently the relevant debate) on the "public's claim for a free access to information which would allegedly justify more exceptions to copyright". Lucas-Schloetter, Agnès, "Is There a Concept of European Law? History, Evolution, Policies and Politics and the Acquis Communautaire", in "EU Copyright Law: A Commentary", See n.1, pp. 15 - 16

1.3.1. Right to Access and Freedom of Expression: Limiting or Limited?

In our days, the eventful fate of the right to access and the right to exclusivity -as its denial-, constitute the two pillars of copyright strategy that have been dramatically affected by the vast explosion, the rapid maturation and concurrent “resurrection” of the digital (r)evolution, due to the uncounted possibilities offered or the threats endangered. Furthermore, this new reality has challenged the character of copyright per se, along with its underlying policies³⁹, which had to be reinvented (or at least, modernized) in order to “stay fit for purpose in the digital context”⁴⁰. As digitalization and the development of technology lie “at the heart” of the current debate between the proponents of a wider and more intense protection scheme afforded to copyright owners (even including private and personal uses), and the “advocates of the public domain”⁴¹ who seek the implementation of a pro bono or (at least) cost – reduction strategy towards the use of protected copyright resources, the balance between the various stakeholders’ interests undoubtedly “needs to be recalibrated”⁴².

³⁹ In this sense, the World Economic Forum’s Global Agenda Council on the Intellectual Property System has launched seven Digital Copyright Principles “intended to serve as a framework for policymakers, copyright owners, and content consumers to *ensure that the value of intellectual property embodied in creative content continues to be appropriately recognized*”: online available at: http://www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf, as accessed in November 2017.

⁴⁰ In the European level, the focus is shifted on the facilitation of the cross-border access to online content by increasing its availability and subsequent choice-making (establishing -in this context- a mandatory exception for the benefit of blind, visually impaired or otherwise print-disabled persons), on the creation of a fairer digital marketplace by enforcing the rightholders to negotiate and be remunerated for the online exploitation of their works, on the digital preservation of cultural heritage and wider use of cultural material, and on the reassessment of the (yet) optional exceptions under EU law in order to be appropriately adapted in “today’s technological realities”: “Modernization of the EU copyright rules”, online available at: <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules#marketplace>. See also “Copyright for Creativity: A Declaration for Europe”, online available at: <http://copyright4creativity.eu/declaration-english-version/>, as accessed in November 2017. In this regard, it has been argued that the new “Digital Copyright Law” should be comprehensively reviewed and even thoroughly revised, as a *pro rata* application of copyright’s traditional rules in the digital context may not satisfy the objectives pursued; thus, a new “much more simplified” copyright system has been suggested, where even the “bundle” of rights conferred upon a copyright holder would be replaced by the single right to “control the dissemination of exploitation” of a copyrighted work, since the alleged neutrality of such a right is considered as an effective -and unaffected by digitization- response to the constantly emerging challenges. In addition, the introduction of an International Copyright Code has been proposed as a solution to the problems arising by the inconsistency in copyright national laws and traditions (operating as a barrier to an effective copyright protection especially in the digital environment), while the so-called “copyleft” movement proclaims the construction of licensing models, under which the “collaborative and open” exploitation of digital works will be allowed. Stokes, Simon, “Digital Copyright: Law and Practice”, 4th edition, Hart Publishing, 2014.

⁴¹ Griffiths, Jonathan, “The “Three-Step Test” in European Copyright Law - Problems and Solutions”, Queen Mary School of Law Legal Studies Research Paper No. 31/2009, p.1

⁴² <http://www.wipo.int/copyright/en/limitations/>, as accessed in November 2017.

It is true that the interface between copyright and digital technology did not (and does not) merely constitute a fertile soil in which a constructive dialogue could grow and bear fruit, providing, as such, consensual solutions to the new conflicts arising. Instead, it has formed an “increasingly heated and polarized debate” over the scope and the edges of copyright protection; on the one side, copyright is considered as “too broad” or even “unnecessary” in specific applications (the so-called copyright’s “overexpansion” or “overprotection” argument). On the other side, copyright claims encompass the concern of the current framework’s insufficiency to provide both effective protection and right incentives for the creation of new works”.⁴³

How, though, are new works created? It is indisputable that any intellectual creation -even the most radically original- depends upon the “cultural heritage” or “cultural tradition”, thus accessing, leveraging and inevitably including spiritual elements implied by intellectual life and history.⁴⁴

⁴³ It is under the functionalistic approach of law and economics to copyright, perceived as the “means to an end” and not as an inherent right, that the current controversy is not merely focused on the -necessary- reconsideration and revision of traditional copyright rules in the light of the digital era, but also includes the battleground between the “nonexclusive” nature of information (and ideas) as a “public good”. Neglecting that facts are ideas are, in any case, excluded from the scope of copyright protection, this argumentation provides that they are, moreover, not rivalrous in the sense that “one person’s use does not affect the value of any other person’s use”, and, as such, the authors’ exclusive rights, since merely considered as the means to “recover the fixed costs of creation” or to “appropriate the benefits of investment in the production of information products”. Sag, Matthew J., “Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency”, *Tulane Law Review*, Vol. 81, Issue 1, 2006, pp. 188 - 196

⁴⁴ At this point, a purely artistic dialectic may interfere; it has been argued that there is nothing 100% original, since the entirety of a creative process is built upon what already existed; as any artist realizes that nothing comes from nowhere, he starts (or should start) “copying” in order to realize what makes him different, to magnify it, to give it a form, and through this process, to eventually, become who he actually is [mine translation]. Kleon, Austin, “Steal Like an Artist: 10 Things Nobody Told You About Being Creative”, Key Books, 2013, pp. 15 – 51. It is what Pablo Picasso said: “Good artists copy, great artists steal”. Even though in its aesthetic conceptualization, “copying” is considered as an automatic, mechanical interaction with the original, a mere imitation which implies no (critical) thinking. In the contrary, “stealing” presupposes a conscious choice of what Austin Kleon describes as “worthy stealing”, simply operating as a sparkle of inspiration, a daring of imagination, or as an exercise for someone to discover and express his own creativity, forming, as such, the grounds for new art to be created. It is what T.S. Eliot wrote: “Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets *make it into something better, or at least something different*. The good poet *welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn*; the bad poet throws it into something which has no cohesion”. Eliot, Thomas, Stearns, “The Sacred Wood: Essays on Poetry and Criticism: Main Edition”, Faber & Faber, 1997. Still though, the boundaries between inspiration, imagination, imitation, copying, or stealing, are covered in dense fog; similarly, these borderlines -within the legal interpretation of art- seem even more difficult to be fixed, and idea/expression dichotomy illustrates exactly this tension, under a substantially different, though, appreciation.

In this sense, if copyright -as an exclusive right- provided the rightholder with the authority to govern and bind the components of a work in their entirety, excluding, as such, their “exploitation” by other means -meaning their integration into new works with differentiated intellectual or aesthetic content-, then this monopoly would end up imposing a restriction to the continuity of any intellectual creation, crossing, in parallel, the threshold of freedom of expression as profoundly implicated. However, this ascertainment illustrated the need to rebuff the consideration of a work as a cohesive and indivisible state of aggregation, and instead, to *dichotomize* it between its copyrightable elements and those which shall be excluded from copyright protection; in other words, the expression versus the idea dichotomy.

Since an intellectual creation is dimidiated between the (form of) expression⁴⁵ as the subject - matter of copyright protection, and the underlying idea as the liberalized -from the author’s exclusivity- content, and provided that freedom of expression -as enshrined in international and regional human rights instruments⁴⁶- includes and presupposes the right to access, determined, though, as receiving and imparting “information and *ideas*”, it is profound that the subject-matter of freedom of expression falls outside the scope of copyright protection.

⁴⁵ It has been said that the theory of idea/expression dichotomy had -soon after its realization- faced its first difficulty, as inherently interrelated with the norm of “exceptions” and its effects to copyright; strictly speaking, if it was merely the form of a work that would be eligible for copyright protection, then a number of uses that are widely (both under the law and according to the common perception) realized as copyright infringements, should be reconsidered as “exceptions” to copyright. These exceptions, though, would be so significant -both in quantitative and qualitative terms- that they would eventually “dissolve” the general rule per se. As a result, the notion of “form” (coincided with the terminology of the Greek work “morphy”, leading, as such, to the implementation of the dichotomy under the Greek law as the distinction between the “morphy” of a work and the “idea”), as conceptually coincided with expression, has been broadened and dichotomized *ex novo* between its extrinsic and intrinsic substance; the first one corresponds to the external features of a work as commonly perceived (i.e. the wording, the melody, the instrumentation, the pattern, the colors combination, the dimensions etc.), while the intrinsic form includes, *inter alia*, the plot or the story of a work, the sequence of thoughts and images, and the melodies’ structure and formulation; since these intrinsic elements will “survive” even after a work’s potential translation or adaptation, they constitute the protectable components of a work, and concurrently the subject - matter of potential uses that would infringe an author’s copyright. [mine translation] Koumantos, George, “Pneumatiki Idioktisia: 8th Edition”, Sakkoulas Ant. N., 2002, pp. 113-115.

⁴⁶ Universal Declaration of Human Rights: article 19; European Convention of Human Rights: article 10; International Covenant on Civil and Political Rights (article 19§2)

As a result, not only copyright law does not interfere with the exercise of human rights, and for most, freedom of expression⁴⁷, but instead, it strikes itself the equilibrium demanded, adopting and providing -for this purpose- *intrinsic balancing mechanisms*, where idea/expression dichotomy constitutes the cornerstone of this infrastructure⁴⁸; if the conflicts arising between copyright and freedom of expression are resolved through the principle of “*fair balance*”⁴⁹, based exactly upon the division between an idea and its expression, the limitations imposed are mutually applicable, and, as such, they could be defined as “fair limitations”.

⁴⁷ However, a differentiated argument has been developed, on the basis of an allegedly “narrow understanding” of freedom of expression; in this sense, it has been said that there are not always sufficient alternatives -in relation to the use of copyrighted material- in order to “convey exactly the same message”, or even if such alternatives exist, a potential infringer may not always be able to discover them; in this regard, the use of the copyrightable elements of a work usually operates as the “evidence” for the persuasiveness of free speech, and as a result, the qualification of idea/expression dichotomy as an effective means to prevent copyright from impinging on freedom of expression is “problematic”, “erroneous”, or at least, “unpersuasive”. Burrell, Robert and Coleman Allison, “Copyright Exceptions: The Digital Impact”, Cambridge University Press, 2005, pp. 21-24. However, such an argument is contradictory, *inter alia*, to the judicial determination -under U.S. case-law- of the dichotomy as *already serving to accommodate* the competing interests of copyright and freedom of expression (*in Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. 562 F.2d 1157 (9th Cir. 1977)*), leading, as such, to the conclusion that “because copyright protects only the expression of an idea and not the idea itself, there is no conflict between copyright laws and the First Amendment” (See n.51). *Schnapper v. Foley, 471 F. Supp. 426 (D.D.C. 1979)*.

⁴⁸ Thus, operating along with the “fair use” doctrine (under the United States copyright system) as the principal tools in order to achieve one of the most crucial balances in the field of copyright law, since it has been considered as *prima facie* competitive and confrontational with the First Amendment to the United States Constitution, under which the freedom of expression has been established (providing that “Congress shall make no law (...) abridging the freedom of speech”) [mine translation]. Athanasopoulos, Evangelos Sp., ““The Idea/Expression Dichotomy”: A comparative study of the “idea/expression dichotomy” under the U.S. Copyright Act and the N. 2121/1993”, Nomiki Bibliothiki, 2017, pp. 15 – 19. Moreover, Professor Nimmer has regurgitated idea/expression dichotomy as the borderline between copyright and the guarantee of freedom of speech, thus introducing the famous “definitional balancing test”; under this test, “*ideas per se fall on the free speech side of the line, while the statement of an idea in specific form, as well as the selection and arrangement of ideas fall on the copyright side of the line*”. Nimmer, Melville B, “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press”, UCLA Law Review, Vol. 17, Issue 6, 1970, p. 1190. Furthermore, the significance and effect of idea/expression dichotomy for copyright’s compatibility with free speech interests has been also complemented by the identification of copyright as a “public-quasi property”, thus incorporating and safeguarding the public interest; in this context, it has been said that if the exercise of freedom of speech -operating as a defense in copyright infringement claims- is deemed as violating or misappropriating the *copyright owners’ property rights* (rather than conflicting with copyright’s conduct per se), then the balance required may be more easily achieved and the conflicts arising may be more appropriately resolved. See n. 6, pp. 386, 389 – 391, 396, 401

⁴⁹ A conflict emerging, *inter alia*, in the key-issue of the right to parody under EU Copyright Law, as explicitly provided under the so-called “parody exception” under the “Infosoc Directive” (article 5(3)(k)), and fundamentally identified as an “appropriate way to express an opinion” in accordance with specific, though, requirements, under the landmark ruling of the Court of Justice of European Union *in Case C-201/13 Deckmyn v. Vandersteen [2014], judgment of 3 September 2014*.

1.3.2 The Nature and Underlying Purpose of the Idea/Expression Dichotomy

Indeed, the objective of “fair balance” does not merely apply to the conflicts arising between copyright and freedom of expression⁵⁰. Since the concept of “exceptions and limitations” incorporates the whole philosophy behind and within the “limited nature”⁵¹ of copyright law, thus actualizing its scope and motivation to encourage and safeguard the individual rights and interests of the authors, along with the collective “demand” to access and use copyrighted works, the relationship formed between the authors, as the originators and “providers” of intellectual creations, and the public as the “recipients” and beneficiaries of such creations, is governed, in its entirety, by the principle of “*fair balance*” as emphatically outlined by the Court of Justice of European Union⁵².

⁵⁰ In this sense, it has been argued that copyright, under its three-dimensional purpose to serve production functions (as an economic incentive), structural functions (as supporting a sector of authors) and expressive functions (as “encouraging new, original contributions to the public discourse”) has a constitutive role as an effective “engine of free expression”, when “narrowly” tailored to this purpose, namely when minimizing the “copyright’s speech burdens”. Netanel, Neil Weinstock, “Copyright’s Paradox”, Oxford University Press, 2008, pp. 81-153

⁵¹ *Theberge v. Galerie d’art du Petit Champlain, 2002 SCC 34*

⁵² The concept of “exceptions and limitations” has been regarded by the Court of Justice of European Union as falling within the general principle of “strict interpretation”, in full compliance with the letter and spirit of the “three-step test” (*Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009], judgment of 16 July 2009, ECR I-656*). Recognizing that the rights of the users of protected works who wish to avail themselves of those works (especially in the light of new technologies), constitute the subject - matter of “exceptions and limitations” and copyright law per se, the court dictates that they should be *fairly balanced* with the rights of copyright holders (*Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Karen Murphy [2011], judgment of 4 October 2011, ECR I-9083*), further imposing -with regard to the reproduction right- that the exception to the author’s exclusive right “must be the subject of a restrictive interpretation under which such an exception cannot be extended beyond what is expressly imposed by the provision at issue” (*Case 277/10 Martin Luksan v. Petrus van der Let [2012], judgment of 9 February 2012, ECDR 5*). It should be noted that this “unification process” has been characterized as initiating the current debate and controversy on the concept of “exceptions and limitations”, since “forcing” member - states to amend their copyright legislations; however, this point of view circumvents the aim of harmonization as manifested in any legislative instrument in the EU level, thus signified as the means through which the objectives of European Union per se will be achieved. In this sense, the Court of Justice, through its landmark rulings, has been argued to have shifted the center of copyright harmonization throughout the community from the legislative to the judicial competency, forming as such “an activist agenda of harmonization by interpretation”. Hugenholtz, P. Bernt, “Copyright in Europe: Twenty Years Ago, Today and What the Future Holds”, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Vol. 23, Issue 2, 2013, pp. 513 - 516. And this contribution to legal certainty which, in turn, regularizes and normalizes the function of the internal market for new products and services -as promoted and protected by copyright law-, “in compliance with the fundamental principles of law and especially of property, including intellectual property, freedom of expression and the public interest” (Preamble of the “Infosoc Directive”), is nothing less than profoundly significant.

Since the principle of “fair balance” constitutes the epitome of the solution provided in any conflict emerging between the opposing rights and interests in the field of copyright law, it necessarily determines the outcome of the intertemporal controversy between “idea” and “expression”, and for most, the critical decision as to where shall the line be drawn. If further considering that “any copyright case is a case about the equality of the litigants as authors”, idea/expression dichotomy operates as its *principal affirmation* since identifying simultaneously the edges of the plaintiff’s copyright over his work, while permitting the defendant to “avail himself of ideas”⁵³ as an exercise of his own “expressive capacities” through which he will eventually construct his own authorship over the new work created; as a result, if the relationship between the author, the work and the public (emphasizing on the capacity and eligibility of a potential user as an author) is based on the fundamental conditions of *freedom* and *equality*, then their interaction -as governed by the idea/expression dichotomy- shall be defined as a “fair interaction”⁵⁴. Hence, idea/expression dichotomy inherently incorporates the same concerns and motivations that shape, influence and inevitably determine the role and substance of exceptions and limitations to copyright as enclosed in the principle of “public interest”⁵⁵; and this is the reason why it constitutes the principal realization and fundamental implementation of such exceptions and limitations, thus *limiting copyright by exempting ideas from the scope of copyright protection*.

⁵³ With regard to artistic creations, it has been said that copyright “does not prevent one from doing what creative people what always have done -to stand on the shoulders of giants”, since it seems *fair* to follow and modify the ideas -not to merely copy them- as set forth by “writers, artists, thinkers or researchers”. It is this fairness that copyright law -through the distinction between the idea and its expression- aims to preserve, by protecting only the *specific form of a work*, namely “the *specific sequence* of words with which the (capable of being stolen) idea was first presented”. Tamn, Ditlev, “Art and Copy – A Legal Historian’s Reflection on Copyright”, in “Art and Law: The Copyright Debate”, Rosenmeier, Morten and Teilmann, Stina (Eds.), DJØF Publishing, 2005, pp. 159-160

⁵⁴ Drassinower, Abraham, “Capturing Ideas: Copyright and the Law of First Possession”, *Cleveland State Law Review*, Volume 54, Issue 191, 2006, pp. 197-198

⁵⁵ Construed as calling *itself* for “adequate encouragement and protection” of the creators -as the “disseminators of materials”-, as a reward for their assistance or contribution to achieve the goals pursued by copyright law; simultaneously, though, “public interest exceptions” to copyright “should not be reduced or put at risk in the absence of a cogent case to the contrary”, since the consideration of public interest (in a broader sense), shall not be subordinated. Mason, Anthony, “Public-Interest Objectives and the Law of Copyright”, *Journal of Law and Information Science*, Vol. 9, Issue 1, 1998, pp. 8-9

II. IDEA/EXPRESSION DICHOTOMY UNDER THE MICROSCOPE

2.1 Idea and Expression: Deepening in the Two Sides of the Line

If in the state of nature, public domain means what is common to all men, identified as the right to *common use* “inasmuch is enough and as good left for others”, the right to self-preservation -by the maintenance of goods in the commons- is only limited by the same claim-right as exercised by everyone else.⁵⁶ Although there is not “inasmuch” in ideas, they analogously fall within the realm of “res communes”, as they can be neither owned, nor (re)possessed or occupied by anyone, since, *inter alia*, any acquisition as property on ideas -as previously unowned “holdings”- would contradict the inherent dictum that such a claim shall never be made to “worsen the situation of others by depriving them of what they would otherwise possess”⁵⁷.

Indeed, if ideas, conceptions, knowledge and verified truths, as the “noblest of human productions”⁵⁸, are the “common denominator for the progress of mankind”⁵⁹, and if creativity (or freedom of expression) per se is rooted in those “ideal forms”, then it is self-evident that they belong (even if considered as some kind of “property”) to “common property”, in order to be freely used by anyone, just like the fresh air, the running water and the sea.⁶⁰ It is this abstract, invisible and transcendent nature of ideal forms, as distinguished from the “immanent, visible and concrete” phenomenal creatures, through which philosophy segues into law; if the *phenomenal* derives from the *ideal* as its “primary cause”⁶¹, expression is the perceived and detailed form that derives from an abstract and indefinite idea.

⁵⁶ Reaffirming, as such, the qualification of “public domain” as the domain of “fair interaction”. Pontes, Leonardo Machado, “Reconciling Lockean Copyright with the Human Right to Education”, in “Property and Human Rights in a Global Context” (Human Rights Law in Perspective), Xu, Ting and Allain. Jean (Eds.), Hart Publishing, 2016, p. 144

⁵⁷ Wengraf, Andrew, “Property in Ideas”, Legal Studies Forum, Vol. 13, Issue 4, 1989, p. 344

⁵⁸ *International News Service v. Associated Press*, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211, 1918 U.S.

⁵⁹ Horwitz, Lester, “Copyright Law - Rights in Ideas”, University of Kansas City Law Review, Vol. 24, Issue 4, 1955-1956, p. 263

⁶⁰ Rosati, Eleonora, “Illusions Perdus: The Idea/Expression Dichotomy at Crossroads”, Annual Conference of the Society for Economic Research on Copyright Issues (SERCI), Berkeley (CA), 2009, pp. 2 - 8

⁶¹ Demos, Raphael, “Note on Plato's Theory of Ideas”, Philosophy and Phenomenological Research, Vol. 8, No. 3, 1948, p. 456

It is what Vincent van Gogh wrote to his beloved brother in 1882: *“It seems to me that a painter has a duty to try to put an idea into his work”*; if lapsing into the conventional, a creator does not even go that far than creating a work without any particular expression. If, on the contrary, he leaves an “indelible mark”⁶² on the work created, it enables it to be identified. If this mark is, moreover, unique, individual, and, as such, original, it permits this work to be protected from being repeated, and moreover, property to be determined; since the ideas’ “unfettered availability to all shall be assiduously nurtured”⁶³, the expressive contribution of the author shall be diligently safeguarded; and this is the rule, the rationale behind, and the scope of copyright, as manifested through idea/expression dichotomy.

2.2. Expression as Authorship and Ideas as a Claim of Joint Authorship

Determining, as such, the subject - matter of copyright protection, the distinction between an idea and its expression simultaneously dictates the status of authorship, and consequently, (initial) copyright ownership; since an idea shall be distinguished from expression, and it is this author’s expression that is copyright protected to the extent it is original (even under its differentiated treatment between common law and civil law copyright traditions), it is profound that a component of a work cannot be copyright protected if not entailing authorship.⁶⁴ At the same time, though, the contribution of ideas, thoughts and suggestions as a valuable material integrated and embedded into a work, consists an argument towards the attribution of joint authorship on the basis that such contribution equally “deserves” the protection afforded by copyright law. However, copyright does not (and cannot) protect any creative potential as inspired or even supplemented to a work by a creative thinker or a purported author. The line is drawn as a circle including only the author’s -original- expression, leaving ideas (and their contributors) outside its contour.

⁶² Sherman, Brad and Bently, Lionel, *“The Making of Modern Intellectual Property Law: The British Experience, 1760 – 1911”*, Cambridge University Press, 1999, p. 54

⁶³ See n.59

⁶⁴ Buccafusco, Christopher, *“A Theory of Copyright Authorship”*, Virginia Law Review, Vol. 102, Issue 5, 2016, p. 1233

In works created or argued to have been created jointly, the attribution of authorship may display diverging requirements in the diverging copyright traditions⁶⁵; however, the division between a copyrightable expression and an unprotected idea serves as the meeting point for such disputes resolutions. For instance, UK jurisprudence has repeatedly demonstrated that “there is no copyright in an idea”⁶⁶; as a result, a person who supplies or contributes to the creation of a copyrighted work a number of ideas, such as a design for a system that would classify and select the tracks to be played on a radio station, “secures no part in copyright”.⁶⁷

In a recent judgment concerning a joint authorship claim over the screenplay of the film “Florence Foster Jenkins” -based on the allegedly independent contribution of textual inputs to the dialogues of six particular scenes-, the “separate” principle of copyright law under which “mere ideas are not protected” has been demonstrated as the decisive factor for the resolution of the dispute, dismissing, as such, the relevant claim since the inputs were found to be “limited to *suggestions* of technical musical language”.⁶⁸ Moreover, it has been reaffirmed that a joint author in a literary work must do more than contributing ideas to the author, as he “must participate in the writing” -consisting an author (or co-author) himself-, and “share responsibility” both for the form of expression as incorporated in a work, as well as for any relevant decision; as a result, neither the thinking of the plot, nor the suggestion for a (comic) routine to be included into a work, were found to attract copyrightability or establish joint authorship.⁶⁹

⁶⁵ For example, under section 10(1) of the 1988 Copyright, Designs and Patents Act of the United Kingdom, “a work of joint authorship means a work produced by the collaboration of two or more authors in which the *contribution of each author is not distinct from that* of the other author or authors.” Greek Copyright Act No. 2121/1993 defines a work of joint authorship as “any work which is the result of the direct collaboration of two or more authors”, who share equally, as co-authors, the rights afforded by copyright. Moreover, Greek law identifies the terms of “collective works” (as the works “created through the independent contribution of several authors acting under the intellectual direction and coordination of one natural person”), and “composite works”, as a work composed by separately created parts.

⁶⁶ *Brighton & Anor v. Jones* [2004] EWHC 1157 (Ch)

⁶⁷ *Tate v. Thomas* [1921] 1 Ch 503

⁶⁸ The court found that the alleged contributions consisted of musical expressions of a technical nature, together with some minor editing changes, along with some non-textual contributions which “never rose above the level” of mere ideas. *Martin & Anor v. Kogan & Ors* [2017] EWHC 2927 (IPEC)

⁶⁹ *Robin Ray v. Classic FM plc* [1998] FSR 622. The widely - cited case has determined that copyright does not exist in ideas but in their written expression.

2.3 Idea/expression Dichotomy as a Rule of Law

Following the traditionally hierarchical structure and relationship between the international, the regional and the national law, the dichotomy between an idea and its expression has been generally perceived as (very) recently established in the international level; focusing, however, on the wording of the first legislative instrument in the area (the “Berne Convention”), it could be argued that it has been, since 1886, adopted, even via an implicit reference. Thus, the first international copyright treaty has obliquely declared that a protected -by copyright- (literary and artistic) work is inextricably intertwined with the *mode or form of its expression*⁷⁰. Nevertheless, it was only one hundred years later that the scope -and concurrently the borderlines- of copyright protection have been forcefully identified by WIPO Copyright Treaty, as (exclusively) applying to “*expressions and not to ideas, procedures, methods of operation or mathematical concepts as such*”⁷¹; a determination which has been further correspondingly adopted under the TRIPs Agreement.⁷²

In the regional level, EU Copyright Law has implemented the international law proviso with regard to computer programs, setting out that (copyright) protection shall apply to *expression in any form*, while expressly dictating that “*ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright*”⁷³.

⁷⁰ “The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, *whatever may be the mode or form of its expression*” (article 2§1), further declaring that in addition, “translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works *without prejudice to the copyright in the original work* (para 3).

⁷¹ 1996 WIPO Copyright Treaty (WCT, article 2), which also declared that computer programs are protected as literary works, “whatever may be the *form or mode of their expression*”.

⁷² TRIPs Agreement further stated -with regard to compilations of data or other material-, that such compilations, “whether in machine readable or other form, constitute intellectual creations “by reason of the selection or arrangement of their contents” and shall be protected as such”; consequently, copyright protection “shall not extend to the data or material itself”, implying as such the “symbiosis” of idea/expression dichotomy with facts/expression dichotomy (articles 9§2 and 10§2). This provision has been implemented, in the EU level, under the 96/9/EC Directive on the legal protection of databases, thus attaching copyright protection to the structure -as the contents’ selection and arrangement- of a database (consisting, as such, an intellectual creation), and which shall not extend to the contents as such (recitals 15, 27, 35, article 3§1,2).

⁷³ Directive 2009/24/EC on the legal protection of computer programs (recital 11, article 1§1).

2.3.1 Focusing on National Law: The Example of Greece

In the domestic level, the legislative recognition of idea/expression dichotomy has been characterized either as a “laconic statement”, or it is rather implicitly provided, or it constitutes a judicially formulated principle.⁷⁴ Greek Copyright Act provides that the term ““work” shall designate any original intellectual literary, artistic or scientific creation, *expressed in any form*”⁷⁵; in this sense, the norm of “intellectual creation” has been defined as any “product” of the human spirit that has a form accessible to the senses and differs -due to its particularity- to any preexisting creations as to its content or form, respectively qualifying photographs⁷⁶ and humorous designs⁷⁷ as copyright protected works. Moreover, the term “form” in a musical composition has been identified as the particular instrumental connection and arrangement of its individual elements, consisting, as such, the *specific expressive application* of the relevant idea from which the author’s creation was originated.⁷⁸

⁷⁴ With regard to the copyright law of the United Kingdom, it has been said that notwithstanding the fact that it does not provide for a statutory basis for idea/expression dichotomy, the doctrine has received both “judicial consideration and guided support from time to time in UK law”. Stokes, Simon, “Art and Copyright: Second Edition”, Hart Publishing, 2012, p. 59 – 65. In this sense, the definition provided by *Hollinranke v. Truswell*, 3 Ch. 420 (1894) has been described as the origins of the terminology later used: “Copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied, the copyright is not infringed”, in Rosati, Eleonora, “Illusions Perdus: The Idea/Expression Dichotomy at Crossroads” (See n.62, p. 5); In *Ireland*, “idea/expression dichotomy” constitutes a statement under the law, under which “copyright protection *shall not extend to the ideas and principles which underlie any element of a work*, procedures, methods of operation or mathematical concepts, and, in respect of original databases, shall not extend to their contents and is without prejudice to any rights subsisting in those contents”: 2000 Copyrights and Related Rights Act (s.17(3)). Moreover, Czech Republic provides both an affirmative and an illustratively negative definition of the subject – matter of copyright protection, thus stating that the items that are *not works* “shall include, but are *not limited* to the theme (subject) of a work as such, the news of the day and any other fact as such, *an idea*, procedure, principle, method, discovery, scientific theory, mathematical and similar formula, statistical diagram and similar item as such”,. Moreover, a “work” is defined as a “literary work or any other work of art or a scientific work, which is a *unique outcome of the creative activity of the author and is expressed in any objectively perceivable manner* including electronic form, permanent or temporary, *irrespective of its scope, purpose or significance*”. 2000 Copyright Act: articles 2(1,6). The same principle of copyright’s neutrality is also provided under French Intellectual Property Code, which provides that the authors are entitled over “all works of the mind, whatever their kind, *form of expression*, merit or purpose”, thus implicitly excluding ideas from the scope of copyright protection (article L112-1).

⁷⁵ Greek Law No.2121/1993 on Copyright, Related Rights and Cultural Matters (article 2§1)

⁷⁶ Court of Appeals, Athens, Decisions No. 2648/2010

⁷⁷ Court of Appeals, Athens, Decision No. 6193/2006

⁷⁸ Court of Appeals, Athens, Decision No. 5190/2014

Since the distinction between idea and its (form) of expression lays on the manifestation that ideas constitute a “common property”, being, as such, free and accessible to anyone, while the particular form to which they have been metamorphosed⁷⁹ belongs exclusively to the author, it has been stated that it is only if such a “metamorphosis” interferes that this creative outcome is copyright protected, to the extent it is original. Introducing, as such, the idea/expression dichotomy in the Greek law, it has been emphatically recognized as the substantial rule for the determination of the subject – matter of copyright protection, since it constitutes the basic criterion on which the protectable elements of a work are distinguished from those that fall outside the scope of protection; this distinction is necessary for the reason that works are typically based on and leverage previous elements which had either become a common property, or they were not qualified as original, or they originated from free sources.

In this regard, a monograph on the history of Thessaloniki’s electrification incorporating archives, excerpts of scientific works, and relevant press releases, along with testimonies, photographs and complementary textual analysis, was qualified as a copyrighted work, since the selection and arrangement of the various sources was originated with the author⁸⁰; in addition, an instruction manual for disease prevention including material from journalistic investigation was qualified as similarly attracting copyright protection since it displayed originality with regard to its form and structure, as well as towards the selection and study of its thematic issues.⁸¹ On the contrary, a literary work on learning difficulties and dyslexia was found to lack originality (and as such, copyrightability), since its content and in particular, its theme and conceptualization, along with its indexing and overall expression were found to merely rely upon (and repeat) scientific data gathered by the relevant bibliography.⁸²

⁷⁹ Originating in the Greek verb “metamorphono”, the etymology of the work is comprised by two synthetics, “meta” and “morphy”, where the first means -in a broad sense- the medium, or the action that implies a medium, or the reason of such an action, while the word “morphy” is the Greek translation of the notion of “form”. As a result, “metamorphono” means the gradual transition from one status to another, and in this context, it is the transition from the intangible state of an idea, to its tangible form.

⁸⁰ Court of Appeals, Thessaloniki, Decision No. 1929/2007

⁸¹ Court of First Instance (Multimember Panel), Athens, Decision No. 1701/2015

⁸² Court of Appeals, Athens, Decision No. 2969/2012

Correspondingly, the common approach of human relationships that the broadcasted-on a-daily-basis television series usually display -further defined as the “intertemporal cliché” that the relevant plots (even in various versions) almost identically present-, was considered as reducing to a minimum any possibility of original expressive contributions into the intrinsic elements of a screenplay which had not been visualized into an audiovisual work; as a result, neither the plot, nor the characters, or the dialogues, or the number of protagonists are eligible for copyright protection components since they come closer to the commonplace of ideas.⁸³ Further elaborating on the notion of “idea”, defined as the stimulus for the creation of a work (in the lack of which a form cannot exist), and the term of “expression” as the form through which this idea is externalized, it has been stated that the expression of the (common) conception of the idea to create and incorporate waxworks into a museum’s restoration and refurbishment, constitutes its (common) implementation in practice, thus including the construction of the artworks, along with the selection of the theme, character and style that each waxwork would represent, the choice of the materials to be used, and the decision – making on the scenic environment of each artistic composition, together with their configuration into the exhibition context.⁸⁴ Concluding, Greek case law has recognized that the rationale behind this fundamental distinction between an “idea” and its “form of expression” performs the same function in all legal systems, thus allowing the access of the public to the information or the idea embodied into a work, while granting to the author the absolute and exclusive right to exploit the particular form through which this information or idea have been expressed.

⁸³ Court of Appeals, Athens, Decision No. 2932/2006

⁸⁴ Court of First Instance (Multimember Panel), Ioannina, Decision No. 134/2013

2.3.2 The Common Law Approach of Copyright and the Role of Dichotomy

It is true that idea/expression dichotomy is inextricably aligned with the differentiated requirements applying in relation to the qualification of a “work” as copyright protected. Although the “Berne Convention” has explicitly dictated that “the enjoyment and exercise” of copyright “shall not be subject to any formality”⁸⁵, many common law copyright systems have incorporated deposit or registration requirements which, nonetheless, are optional⁸⁶ in order to run in compliance with the treaty’s proviso. Still, the prerequisite of fixation, as adopted across the common world, evidences its discrepancy in relation to the civil law “author’s inherent integrity” approach; however, it could be argued that the two copyright traditions are in sync towards the recognition of idea/expression dichotomy as a principal doctrine, even if deriving from contradictory backgrounds.

In this sense, the codification of the dichotomy under the United States copyright law in 1976⁸⁷, consists the most notable example, since it has been said that its realization as a “central axiom” traversing the determination of copyright’s subject - matter has been strongly stimulated since the 19th century, as respectively incorporated and gradually developed by the case law.

⁸⁵ Further imposing that such exercise and enjoyment “shall be independent of the existence of protection in the country of origin of the work” (under article 5(2)).

⁸⁶ Under 1976 U.S. Copyright Act, a notice of copyright “*may be placed*” on publicly distributed copies, phonorecords of the sound recordings and on separate copies of collective works, while “the owner of copyright or of any exclusive right in the work *may obtain registration* of the copyright claim by delivering to the Copyright Office the deposit”, as specified under the law. (s. 401, 402, 404, 408). Moreover, under the Canadian Copyright Act, “the Register of Copyrights is *evidence* of the particulars entered in it”, while “a certificate of registration of copyright is *evidence* that the copyright subsists and that the person registered is the owner of the copyright”. The same applies in the cases of an assignment of copyright or of a license granting an interest in a copyright. Copyright Act, R.S.C., 1985, c. C-42, s. 53(1,2).

⁸⁷ “*in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work*”: 1976 U.S. Copyright Act: Title 17. U.S.C., section 102(b).

As a result, the implementation of the doctrine by the constitutional proviso has been regarded as not introducing an innovation, but as solemnly proclaiming that the principal distinction between the expression and an idea remains unchanged, thus consisting an intrinsic guarantee provided by copyright law per se.⁸⁸ However, idea/expression dichotomy is rather interconnected and as such, affected by the overall designation and the rationale behind the U.S. copyright law⁸⁹, under which the “overriding priority” is the “public’s ultimate benefit from creativity”⁹⁰ (in contrary with the civil law copyright tradition under which the rights of the author of a copyrighted work and the rights of the public shall be equally pursued and as such, fairly balanced), while providing, in addition, the requirement of fixation, according to which a work is eligible for copyright protection only if the expression (of an idea) is physically incorporated into a tangible medium.⁹¹

⁸⁸ Athanasopoulos, Evangelos Sp., See n.47.

⁸⁹ In this context, American copyright law, compared with the civil law *droit d’auteur* copyright systems and for most, with French law -perceived as more favorable and thus, more protective of authors’ rights (with regard to both their economic and moral aspects)-, has been characterized as incorporating and overall reflecting a rather “utilitarian” and “materialistic” approach; described as a purely “economic legislation” or as a “mere tool of capitalism”, the purpose of American copyright law is widely considered as primarily centered to protect “the authors’ pecuniary and exploitative interests”, in contrast with French jurisprudence that considers copyright as a natural right deriving from the author’s own personality. However, it has been argued that both French and United States copyright systems are “equally fair” in terms, *inter alia*, of copyright’s subject matter; in this sense, the recognition of the distinction between an idea and its expression, under United States copyright law, constitutes a prominent defense. Piotraut, Jean-Luc, “An Author’s Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared”, *Cardozo Arts & Entertainment Law Journal*, Vol. 24, Issue 2, 2006, pp. 550 - 555

⁹⁰ In this context, the author’s rights and interests are “secondary” to those of the public, and as a result, the property rights afforded to copyright owners are “limited” in relation to other copyright jurisdictions (including the United Kingdom’s copyright law, but for most, the civil law tradition). Kearns, Paul, “Freedom of Artistic Expression: Essays on Culture and Legal Censure”, Hart Publishing, 2013, pp. 135 - 149

⁹¹ 1976 U.S. Copyright Act (s.102(a)) provides that “copyright protection subsists in original works of authorship fixed in any *tangible medium* of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”.

Indeed, fixation constitutes the central prerequisite for the subsistence of copyright protection in common law jurisprudence⁹², generally perceived as the transfiguration of an intangible idea into its tangible form. Consequently, it is also implicated in the identification and assessment of copyright infringement, since a work is *capable of being copied, provided that it was embodied in a physical form*; musical compositions constitute a characteristic example of this requirement since they fall within the copyright regime if the individual performer arranges or adapts a musical score (in ordinary notation) into a particular rendition, that is further copyrightable if captured upon a physical object that can be made to reproduce it.⁹³ In this context, a copyrightable work “cannot come into existence” -and copyright cannot be either protected or violated- without fixation in a required and appropriate form⁹⁴, and this principle counts exactly on the separability and copyrightability of an expression in contrast with the secluded -by copyright law- idea, even if implicitly dictated. However, common law goes one step further, since it coincides the protectable expression with a *physical carrier*, consisting, as such, the crucial point of deviation with *droit d’auteur* tradition, while also contradicting with the very essence of intangible property and immaterial nature of copyright per se.

⁹² The 1998 UK Copyright, Designs and Patents Act defines the eligible for copyright protection literary, dramatic and musical works, requiring that they should be respectively “written, spoken or sung” and “intended to be sung, spoken or performed with the music”, while explicitly declaring that copyright does not subsist in such a work, “*unless it is recorded, in writing or otherwise*” (s.3). This *reducing into a material form* consisted the prerequisite and the means through which a non-protectable idea would be eligible for copyright protection since the 1911 Copyright Act. An identical provision, concerning, in addition, the requirements imposed for the copyright protection of databases, is found under the 2000 Copyright and Related Rights Act of Ireland (s.18(1)). In Canada, the prior fixation of a work into a material form -towards the identification of the performance of an artistic, dramatic or musical work- is not considered as a prerequisite for its qualification as a copyrightable work. However, according to the relevant case law, copyright in a work subsists when “*expressed, to some extent, in some material form* capable of identification, and having a more or less permanent endurance”; *Canadian Admiral Corp. v. Rediffusion, Inc., Ex. C.R. 382, 20 C.P.R.75 (1954)*. Last, Australia deems, under 1968 Copyright Act, a literary, dramatic or musical work as “made” at the time when or the period during which “the work was first reduced to writing or to some other *material form*” (s. 22).

⁹³ *Capitol Records v. Mercury Records Corp., 221 F.2d 657, 664 (1955)*. See also n.12.

⁹⁴ Adeney, Elizabeth, “Authorship and Fixation in Copyright Law: A Comparative Comment”, *Melbourne University Law Review*, Vol. 35, Issue 2, 2011, p. 679

Presupposing the “physical rendering of the copyrightable work in some (tangible) form”⁹⁵, the “interference” of fixation as the core binding factor that distinguishes a mere creative conduct from a copyrighted work, and the author -as the copyright holder- from a mere contributor, does not merely entail the distinction between an idea and its expression, but it further requires the transition of a work from intangibility to corporeality.

In contrast, such a prerequisite is completely irrelevant in civil law copyright jurisprudences⁹⁶, where “expression” is construed as the manifestation of a work -as the *externalization of an intellectual creation and its protection by copyright law to the extent that such an expression is original-*, and not as its transubstantiation to a corpus as such, thus following the line of the reasoning behind the abolishment of any kind of formalities, and the inversely proportional establishment of *automatic copyright protection*⁹⁷ in all over the world.

⁹⁵ Loren, Lydia Pallas, “Fixation as Notice in Copyright Law”, Boston University Law Review, Vol. 96, Issue 3, 2016, p. 947

⁹⁶ Greek Copyright Law No. 2121/1993 has explicitly dictated that it is “*with the creation of a work*” (emphasis added) that intellectual authors shall have the right to copyright over that work (article 1). Moreover, French Intellectual Property Code has stated, that the author of a work of the mind shall enjoy in that work, *by the mere of its creation*, an exclusive incorporeal property right which shall be enforceable against anyone [mine translation] (L 111 – 1)].

⁹⁷ Dictated by the “Berne Convention” and described as the “most important and advantageous provision of the Union”. Foster, Robert W., “International Copyright Protection”, South Carolina Law Quarterly, Vol. 3, Issue 1, 1950, p. 69

Indeed, if “history has shown that formalities in copyright law are just plain wrong”⁹⁸, the absorption of fixation seems to profoundly clash with the doctrine of automatic copyright protection⁹⁹, under which copyright is afforded automatically “*with a creation of a work*” (even if unfinished), and which is moreover defined, determined and eventually qualified on an ad-hoc basis determination, under the fundamental principles of idea/expression dichotomy and originality as inexorably intertwined.¹⁰⁰

⁹⁸ In relation to the “rigid” registration requirements as adopted in the U.S. copyright law in 19th century and which have been gradually -especially since the 1976 Act- eliminated. Levine, Arthur, “The End of Formalities: No More Second-Class Copyright Owners”, *Cardozo Arts & Entertainment Law Journal*, Vol. 13, Issue 2, 1995

⁹⁹ Further aligned with the principle of territoriality in copyright law, under which the protection afforded, sought and enforced by copyright owners is based on (or limited to) a country-by-country basis, as a “country’s prescriptive competence ends at its borders”. Territorial protection of copyright means that there are *as many copyrights as the countries that ratified the “Berne Convention”*, where national copyright laws govern every aspect of the protection afforded to copyright holders, and for most, the exceptions and limitations provided -since they are, in any case (according to the international and regional legislative instruments in the area which only demand the application of the “three-step test”) subject to the national lawmaker’s decision and competency. This principle is determinative in international copyright cases, especially in relation to infringing -to copyright- acts and uses which take place in another country (or more than one countries) since the author is protected only under the relevant national legislation; in our days, the principle of territoriality is profoundly relevant, due to the cross-border nature of the internet and the “increased global use of digital transmission networks”. Goldstein, Paul, “International Copyright: Principles, Law and Practice”, Oxford University Press, 2001, pp. 65 – 67. Read more about the principle of territoriality in EU Copyright law and the need to be revisited in the light of the invasion and the challenges imposed by the digital environment, at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568348/EPRS_BRI\(2015\)568348_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568348/EPRS_BRI(2015)568348_EN.pdf), as accessed in December 2017.

¹⁰⁰ Stipulating that an expression shall be isolated from the idea, the criterion for respectively distinguishing the protectable component of a work from the non-protectable elements, can be nothing else than originality, construed as the author’s personal creative contribution. Elaborating on this definition, it has been said that those elements of a work which descend from pre-existing free sources (i.e. the nature, the life, the ideas that freely circulate, the totality of cultural heritage), remain free even after their integration into an intellectual creation. In contrast, the components that fall within the author’s exclusive control are those which have been, for the first time, created by the author and are, as such, appended to the first ones. In this sense, the norm of originality displays a twofold significance: not only does it allow the distinction between the copyrightable works and the “intellectual articles” which are not protected by copyright (as they cannot even be qualified as “works”), but it also constitutes the decisive criterion for the division between a work’s protectable and non-protectable components, thus between the expression and the idea. See n.57, p.116

2.4 The Interface between the Idea/Expression Dichotomy and Originality, and the Implication of the Merger Doctrine

Although implicitly but rather paradoxically incorporating the division between an idea and its expression, it could be argued that the fixation requirement is, in addition, contradictory to the recognition and establishment of originality as the “sole prerequisite for copyright protection” under (and after) the landmark rulings of the Court of Justice of the European Union.¹⁰¹ Identifying or more accurately, re-establishing the norm of originality, while bringing an end to the differentiated interpretations of all concepts of European law -thus providing for their “uniform and autonomous” application-, the court manifested that *no other criteria* -with regard to all types and every single work- shall apply in order to determine the eligibility for (copyright) protection.

¹⁰¹ The cornerstone “*Infopaq*” case laid the foundations on the determination of copyright protection throughout the European Union, stating that “copyright is liable to apply only in relation to a subject-matter (*any* subject – matter and not only photographs, databases and software) *which is original*, in the sense that *it is its author’s own intellectual creation*”, further extending copyrightability to the parts of a work insofar “they share the originality of the whole work”, while also dictating -with regard to isolated elements of a work such as words- that it is “only through the choice, sequence and combination that the author may *express his creativity in an original manner* and achieve a result which is an intellectual creation”: *Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening* [2009], judgment of 16 July 2009 ECR I-656; Therefore, the notion of creativity was defined as the “*creative freedom*” which is “necessary for the purposes of copyright”, excluding, as such, sporting events and in particular, football matches from the scope of copyright protection since they are “subject to the rules of the game”: *Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Karen Murphy*, judgment of 4 October 2011, [2011] ECR I-9083; Whereupon, “*Painer case*” further elaborated on the notion of originality, underlying that a work “is to be considered original if it is the author’s own intellectual creation reflecting his personality”. For this purpose and qualification, an author shall stamp the work with his “*personal touch*” and express “*his free and creative choices*” in the production of the work; in addition, the court stated that “no other criteria such as merit or purpose” shall be taken into account: *Case C-145/10 Eva-Maria Painer v. Standard VerlagsGmbH and others* [2013], judgment of 7 March 2013 (nyr); it was then in “*Football Dataco*” that the court examined the common law criteria of copyrightability (i.e. the skill and labour judgment and its relevancy in the assessment of copyright protection to databases, if significant) and their potential success in the “EU originality” test. The answer was negative, as the court declared that for the purpose of assessing copyrightability to a database, “any intellectual effort and skill on the creation of data” is irrelevant (since a database may attract copyright protection by virtue of its structure, namely the selection or the arrangement of its contents and not the contents as such), while also providing that “the significant labour and skill required for setting up a database *cannot, as such, justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains.*”: *Case C-604/10, Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others* [2012], Judgment of 1 March 2012 (nyr).

Preempting, as such, the copyright perception of Anglo-Saxon legal systems¹⁰², while also reaffirming the principle of copyright's *neutrality* under which any aesthetic judgments or moral considerations are (or should be) irrelevant in copyright adjudication¹⁰³, the three -plus one- prerequisites that have to be cumulatively fulfilled for the qualification of a work as copyright protected, constitutes a fully harmonized concept in European copyright law that could be sententiously described as: i) requiring for an *intellectual creation*, ii) from the fields of *words, art or science* -falling, in practice, within any realm of intellectual processing and induction-, iii) that is further *expressed in some form* -construed as its capability of being perceived by the human senses and not as its physical incorporation into a tangible medium-, which should, in turn, iv) satisfy the originality criterion as specifically identified and uniformly applying. As a result, it is the assessment of originality that respectively engenders copyrightability or provokes a copyright infringement; "but that a line is drawn, at a level of abstraction, *where the "idea/expression" line is crossed*"¹⁰⁴. But what if such a line cannot be crossed?

¹⁰² Including -beyond the fixation requirement - the so- called "pedestrian" approach of originality under the "skill and labour judgment" which provided that a work is original (and thus copyrightable) if exhibiting or resulting from the author's "own skill, labour, judgment and effort", linking as such originality with the investment made on the production of a work (considering that it is by virtue of that investment "against unfair competition" that the author should be rewarded under copyright). Rahmatian, Andreas, "Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure", *International Review of Intellectual Property and Competition Law*, Volume 44, Issue 1, 2013. This conception of originality in the UK's copyright system -and in all legal systems adopting and focusing on "instrumental justifications" of copyright- is regarded as a "minimum" criterion for assessing copyrightability to a work, merely depending on the "effort expended to produce the work, and not (on) the features of the work itself", consisting an -over a century- dominant position that has been interpreted in varying levels, resulting, as such, to contradictory outcomes. Manning, Colin, "English & Continental Tests of Originality: Labour, Skill, and Judgement versus Creations of the Mind", 2016, p.4, online available at: <https://ssrn.com/abstract=2782052>, as accessed in December 2017.

¹⁰³ Copyright law has designated a tailored -under its scope- framework for the judicial interpretation of copyright rules and principles, under which copyright protection is granted to a *work irrespective of its value, destination or investment made*, illustrating as such the neutral character of copyright that has been further incorporated in national law provisions (Greek Copyright Act No. 2121/1993: article 2§4; French Code de la Propriété Intellectuelle: art. L. 112 – 1). Moreover, as copyright law is closely linked with art -forming the principal grounds of the controversies and disputes arising-, the interpretative principle, defined as the "doctrine of avoidance", provides that any "implicit aesthetic criteria" shall be avoided to judicial practice, characterized as "dangerous undertakings" that the courts are untrained or incompetent to address. Walker, Robert Kirk and Depoorter, Ben, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard", *Northwestern University Law Review*, Vol. 109, No.2, 2015

¹⁰⁴ Gervais, Daniel J., "Restructuring Copyright: A Comprehensive Path to International Copyright Reform" (Elgar Monographs in Intellectual Property Law), Edward Elgar Publishing, 2017

If originality lays on the distinction between an idea and its expression, the “merger doctrine” precludes the interference and application of the dichotomy (and as such, copyrightability), thus providing that if there is essentially only one way to express an idea, as in the case of a “bald statement of fact”¹⁰⁵, then this expression *merges* with the idea itself, becoming a non-protectable work for the purposes of copyright. It is by virtue of this “narrow” subject - matter¹⁰⁶ -such as a “straightforward and simple” rule for a sales promotional contest of the "sweepstakes" type involving the social security numbers of the participants-, as necessarily requiring “only one (or, at best), a limited number of forms of expression”, that copyrighting cannot be permitted, since, otherwise, all the possibilities of future use of its substance would be exhausted.¹⁰⁷

Indeed, “if an idea and the expression of the idea are so tied together”, they are consolidated to form one, and in particular, to the “ideal form” that shall be free to be used by anyone. As a consequence, “by denying protection to an expression that is merged with the underlying idea”, as in the case of real estate ownership topographical maps, a monopoly over an idea is prevented, and inversely, copying is not prohibited¹⁰⁸ since there is no copyright to infringe. Similarly, a design of jewelry bee pins that “copied” the size and the form of bees in nature consists the “sole way” of expressing the underlying idea, being, consequently, incapable of attracting either creativity, or originality. Indeed, a differentiated outcome would inadmissibly grant exclusivity over this bare idea of the mind, preventing, as such, anyone else from feasibly using bees as a motive for the creation of any (copyrightable) work.¹⁰⁹

¹⁰⁵. *Consumers Union Inc. v. Hobart Manufacturing Co.*, 199 F. Supp. 860, 861 (S.D.N.Y. 1961)

¹⁰⁶ Operating complementary to the “merger doctrine”, the “scènes à faire doctrine” provides, in addition, for a “common theme” -such as the Vietnam war, or a setting of a dinosaur zoo or an adventure park- from which “a sequence of events that necessarily result from the choice of a setting or situation, do not enjoy copyright protection”: *Davis v. United Artists Inc.*, 547 F. Supp. 722 (S.D.N.Y. 1982); *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996). More specifically, “scènes à faire” includes tock images, tried and true story lines, fables and folklore, scenes of nature, common visual and cultural references, all of which fall under the title of “scenes that must be done”, and they are not copyrightable since falling within the public domain. Murray, Michael D., “Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works”, *Baylor Law Review*, Vol. 58, Issue 3, 2006, pp. 781-782

¹⁰⁷ As it has been stated, notwithstanding the fact that a particular form of expression does not derive from the subject – matter per se, if “permitting the copyrighting of its expression”, then the subject – matter would be appropriated. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967)

¹⁰⁸ The maps displayed copyright notices, pictorially portraying the location, size, and shape of surveys, land grants, tracts, and various topographical features within Montgomery County. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir. 1992)

¹⁰⁹ *Herbert Rosenthal Jewelry Corp v. Kalpakian*, 446 F. 2d 738 (1971). The court ruled that, in this case, “making an expression exclusive, makes the idea exclusive”.

III. “Where” and “How” Shall the Line be Drawn: Setting the “Problem”

Despite its universal recognition as the “essence of copyright”, idea/expression dichotomy has been “targeted” as insufficient, incapable, or even inappropriate to serve as a “fundamental determinant for deciding what is protectible under copyright law”, allegedly consisting not the solution to the problem, but the root of the problem itself.¹¹⁰ It has been even suggested that the dichotomy should be abandoned in the adjudication of copyright infringement claims, either because it has been criticized and questioned, or by virtue of its terminology which is considered as not serving the creation of “market conditions” -which are considered as encouraging themselves the production of works of art and science-, or due to its vagueness which comprises the most “fertile” ground for this assumption.¹¹¹ Nonetheless, idea/expression dichotomy does not only “interfere” in the judicial reasoning and subsequent decision-making; it constitutes the central axiom that the courts “time and again have continued to embrace”¹¹², even if it probably constitutes the “most difficult concept”¹¹³ of copyright law.

¹¹⁰ Based on a rather oversimplification of the notion of “idea”, regarded as incapable of existing “apart from some expression”. Jones, Richard, “The Myth of the Idea/Expression Dichotomy in Copyright Law”, *Pace Law Review*, Volume 10, Issue 3, 1990, p.552. However, it is the pivotal prerequisite of originality that could operate as a forceful defense, especially in the light of European copyright law, since under U.S. jurisdiction is aligned with the “necessary modicum” or the “minimal degree” of creativity (In *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L.Ed.2d 358 (1991): See n.155). Moreover, it should also be noted that under U.S. jurisdiction, a certificate of copyright’s registration is not only considered as *prima facie* evidence of the validity of copyright, but also of originality, profoundly contradicting with the European approach. *Judi Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001)

¹¹¹ Under this perceptive, the distinction between an idea and its expression is not a dichotomy but a “metaphor”, since its substantive terms do not constitute “mutually exclusive aspects of a work”; under the concept of “metaphor”, “ideas” would be defined as the non-protectable elements of a work, and “expression” would (merely) imply the “compilation and arrangement of the unoriginal materials”, allegedly comprising a “clear” distinction that the “dichotomy” term cannot serve. Wilde, Edward C, “Replacing the Idea/Expression Metaphor with a Market-Based Analysis in Copyright Infringement Actions”, *Whittier Law Review*, Vol. 16, Issue 3, 1995, pp. 793-803

¹¹² Jain, Sankalp, “The Principle of Idea-Expression Dichotomy: A Comparative Study of US, UK & Indian Jurisdictions”, 2012, p.2, online available at: <https://ssrn.com/abstract=2229628>

¹¹³ *Plix Products Ltd v. Frank M. Winstone (Merchants) Ltd* [1986] F.S.R. 63 (New Zealand: High Court), affirmed [1986] F.S.R. 608 (New Zealand: Court of Appeal), in http://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf, p.27, as accessed in December 2017

Since the “subject – matter questions are prior to scope questions”, and consequently the identification on “what gets on the balance” precedes the consideration of the equilibrium sought between the entitlements of the authors and the users over the subject - matter at issue¹¹⁴, idea/expression dichotomy as the “more basic or more often repeated” axiom than a single copyright principle¹¹⁵ -thus determining *what is and what is not protected* by copyright law-, has not been (and will not be) abandoned since there is “no better way” to “reconcile the two competing societal interests that provide the *rationale for the granting of and restrictions on copyright protection*”.¹¹⁶

However, it is true that although copyright poses one of the “most fundamental, deep questions in human understanding”¹¹⁷, the answers given in the national level reflect -under the principle of territoriality- the differentiated underlying policies as integrated in national copyright legislations. In this sense, if “any attempt to distinguish protected from unprotected elements within a copyrighted work requires a consideration of the scope of copyright”¹¹⁸, civil law copyright tradition and, especially, European copyright law, provides that the sole prerequisite for copyright protection (and inversely for the assessment of copyright infringement) is the criterion of originality of the primary work; on the contrary, common law copyright systems and foremost, copyright law of the United States focuses on whether the defendant’s copying should be called a protectable expression of its own, or an unprotected idea. In this context, idea/expression dichotomy seeks all possible sources of determination; and if it is the lawmaker that builds the framework of legal rules and principles, putting the canvas on the easel, the “hand” that holds the pen and draws the line belongs to the judge.

¹¹⁴ Drassinower, Abraham, “From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law”, *Journal of Corporation Law*, Vol. 34, Issue 4, 2009, p. 997

¹¹⁵ Samuels, Edward, “The Idea-Expression dichotomy in Copyright Law”, *Tennessee Law Review*, Vol. 56, Issue 321, 1989

¹¹⁶ *Durham Industries, Inc., Plaintiff-appellee, v. Tomy Corporation, Defendant-appellant*, 630 F.2d 905 (2d Cir. 1980)

¹¹⁷ Burk, Dan L., “Expression, Selection, Abstraction: Copyright's Golden Braid”, *Syracuse Law Review*, Vol. 55, Issue 3, 2005, p.61

¹¹⁸ Kurtz, Leslie A., “Speaking to the Ghost: Idea and Expression in Copyright”, 47 *U. Miami L. Rev.* 1221, 1993, p.1233

3.1 The Issue of Substantial Similarity (Or Not Just Copying)

Considered as broadening the scope of copyright protection by “relocating” the boundaries imposed by idea/expression dichotomy, the (extremely) narrow perception of a copyright infringement as an “exact or slavish copying”, has been complemented -under the United States jurisdiction- by the principle of “substantial similarity” between the allegedly infringed and the infringing work, since the later may consist of *anything not close* to a “word-for-word, line-for-line, or note-for-note” fraudulent reproduction¹¹⁹. In this context, it is not only the exact duplication of the copyrighted work that would constitute a violation of the author’s (exclusive but not absolute¹²⁰ -under the common law perceptive-) rights, but also the “abduction” of a *substantial amount* of the author's original¹²¹ expression, which, in turn, leads to the *realization*¹²² of the secondary work as *substantially similar* to the primary one, consisting -only under this determination- an infringing work. Seeking for an exploratory methodology for the determination of substantial similarity, copying was evaluated towards improper appropriation, and abstraction was compared to particularity, involving -the first- the issue of access, and the second, the gradual identification of the distinct elements of a copyrightable work, as the two most influential tests deriving from two cornerstone cases in the area.

¹¹⁹ Samuelson, Pamela, “A Fresh Look at Tests for Nonliteral Copyright Infringement”, *Northwestern University Law Review*, Vol. 107, Issue 4, 2013, p.1822

¹²⁰ Brenner, Lee S. and Rohrer, Allison S., “The De Minimis Doctrine: How Much Copying Is Too Much”, *Communications Lawyer*, Vol. 24, Issue 1, 2006, p.9

¹²¹ The perception of originality -under the U.S. jurisprudence- is profoundly different with the relevant determination under the EU Copyright law, although it has been similarly recognized as the “sine qua non” of copyright.

¹²² This “realization” has been specified into the so – called “Ordinary Observer Test”, under which an infringement may be established on the grounds that the “ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and *regard their aesthetic appeal as the same*”: *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 124 USPQ 154 (1960). This test has been further developed into a more “discerning” ordinary’s observer’s inspection which is demanded in cases when a work includes both protectable and non-protectable components, while an additional variation is considered as applying the general rule of the “intended audience’s” appreciation -namely the members of the audience to which the two works address- as fairly represented by the lay “public” and which shall decide on the subsistence of substantial similarity: *Dawson v. Hinshaw Music* 905 F. 2d 731 (4th Cir. 1990). In this context, the “type” of observer has been, moreover, defined as the “lay average observer” (in *Ideal Toy Corporation v. Fab-Lu, Ltd.*, 261 F. Supp. 238 (S.D.N.Y. 1966) and *Werlin v. Reader's Digest Ass'n, Inc.*, 528 F. Supp. 451 (S.D.N.Y. 1981), which further stated that “*the trier of fact must be mindful of the rule that copyright protection extends to the author's expression of an idea, but not to the idea itself*”.

3.1.1 The Interference of Access and the Elements of Infringement

Deriving from the widely-cited *Arnstein v. Porter*¹²³, the attribution of “substantial similarities” between the allegedly infringed and infringing musical compositions has been specified in the light of its interconnection -under varying levels of reliance- with the principle of *access*¹²⁴, and the defense of independent creation that “unintentionally” resulted to a *coincided similarity* with the primary work. However, both considerations in this judicial reasoning relied upon a “two-steps” test that the court implemented, under which “infringing” does not mean “copying”; it means improperly appropriating the author’s expression since the court stated that the question at issue was whether the defendant took from the plaintiff’s compositions “so much of what is pleasing to the ears of the audience¹²⁵ for whom such popular music is composed”, wrongfully appropriating, as such, the financial returns which belong to the plaintiff.

In this context, if there are no similarities at all, any amount of evidence of access is irrelevant and insufficient to prove copying. If similarities exist, along with (some) evidence of access, then they must be *sufficient enough* to prove copying. If evidence of access is absent, then the similarities between an allegedly infringed and infringing work must be *so striking* as to preclude the possibility that the plaintiff and the defendant *independently arrived at the same result*.¹²⁶ As a result, the similarities must be profoundly *extensive and striking* in order to suffice per se (meaning without any consideration of access) for the justification and establishment of both copying and improper appropriation as a “double-service” evidence.

¹²³ 154 F.2d 464, 468 (2d Cir. 1946).

¹²⁴ Further construed as basing upon “circumstantial” evidence since direct proof of copying is -in most cases- inherently difficult or even impossible.

¹²⁵ Thus, if the issue of unlawful appropriation of the author’s expression arises, expert testimonies and dissection analysis have been determined as “irrelevant” for the assessment of infringement.

¹²⁶ One may argue that the norm of “coincided similarity” as a defense towards a copyright infringement claim resembles to the formulation of originality as adopted under Greek copyright case law, defined as the “statistically unique criterion” and which is still -along with the EU originality criterion- applying in copyright infringement cases. According to the “statistically unique” perception of an eligible for copyright protection work, “a work meets the requisite criteria of protectability if another author, under similar circumstances and with the same aim in mind, *would not reasonably reach the same creative outcome*, or if the work at issue presents an individual particularity or modicum of creativity such that *the work can be distinguished* from everyday productions” or *from other similar or known works*”. See n.24, p.23

Hence, the court proceeded to a further distinction with regard to the relevance and significance of similarities, as merely “*alone standing*” conditions, for the assessment of copying *or* improper appropriation, thus consisting two separate steps in order for an infringement to be asserted. In this sense, if copying is otherwise evidenced, then the “proof of improper appropriation need not consist of similarities which, *standing alone*, would support an inference of copying”; in other words, even if similarities are found, they unquestionably *do not constitute themselves* the determinative standard attachment for copying. Yet, if enough evidence of access can be provided¹²⁷ “to permit the case to go to the jury”, then these similarities are *sufficient* so that the “jury may properly infer that the similarities *did not result from coincidence*”, reaching, derivatively, the conclusion that the secondary work constitutes a *copy* of a copyrighted work.

This outcome, though, does not suffice for the assessment of copyright infringement, since “copying may be permissible” if coincided with the borrowing of the non-protectable (by copyright) ideas of a copyrightable work. However, since U.S. Copyright law requires a “minimal degree of creativity” in order for originality, and as such, copyrightability to be attributed over an intellectual creation, “original” is merely construed as “not copied from previous works”; consequently, even “closely identical or even identical works” may attract per se “valid copyrights”. In this sense, a chart copying utilized sketches and textual material, depicting and explaining certain exercises performed in a multi-station machine, was found as featuring the same -with the primary chart- idea, since the only similarities found between the two works at issue consisted of the use of the same stick figures and their corresponding positions for each exercise. As a result, it has been ruled that “substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement”.¹²⁸

¹²⁷ In relation to computer programs, it has been stated that a plaintiff can establish that the defendant had copied his work by providing either direct proof of copying, or (since such a proof is even more difficult in software cases), *indirect evidence* showing that *the defendant had access* to the copyrighted program, and that there are probative similarities between the copyrighted and the copied material. *Gates Rubber Company v. Bando Chemical Industries Limited Usa R*, 9 F.3d 823 (1993)

¹²⁸ *Universal Athletic Sales Co v. Salkeld E Pinchock*, 511 F. 2d 904 (1975)

Moreover, the copying of a children's book story line of a lost child to which "the familiar face of the mother is the most beautiful face, even though the mother is not, in fact, beautiful to most" was not found as infringing copyright, thus identified as an idea that falls within the public domain¹²⁹, a photograph displaying the same angle, pose, background, composition, and lighting with the original photograph was found as permissibly copying the author's overall conception which -as a "cousin" of concept- was considered as resembling to a non-protectable idea¹³⁰, and since "nothing commands that a copyrighted matter be strikingly unique (or novel), "mezzotint" copies¹³¹ were qualified as copyrightable "versions" of works in the public domain, thus owing their origin to their author even if displaying unintentionally a "sufficiently distinguishable variation".¹³²

As a result, a violation to copyright is only assessed if a mere copying (consisting the first "copying-step") went "so far" as to constitute an illicit copying, thus an improper appropriation of the author's expression¹³³; in this context, the court -after listening to the playing of the compositions in question, found that the likeness between them was not -on the issue of misappropriation- substantially "trifling" in order for copyright infringement to be asserted.

¹²⁹ Stating, in particular, that the book and the allegedly infringing illustrative story (published in a monthly periodical) merely present the same idea, and as such, "no infringement as to protectable expression occurred". *Reyher v. Children's Television Workshop*, 533 F. 2d 87, 190 U.S.P.Q. 387 (1976)

¹³⁰ *Mannion v. Coors Brewing Co.* 377 F.Supp.2d 444 (S.D.N.Y. 2006). Furthermore, the court contended that the idea/expression dichotomy "breaks down" in the visual arts in general, since "it is impossible, in most cases, to speak of the particular "idea" captured, embodied, or conveyed by a work of art, because every observer will have a different interpretation", while an artist's idea has been construed as, in any case, depicting a "particular subject in a particular way".

¹³¹ Namely copies that reproduce the primary work by engraving its tracing onto a printing plate.

¹³² In this sense, the author is entitled to a copyright "if he independently contrived a work" even if such a work is completely identical with "what went before"; similarly, he has "no right to prevent another from publishing a work identical with his, if not copied from his". *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951)

¹³³ If the comparison of the works at issue "reveals that their similarity exists only at a level of abstraction too basic to permit any inference that defendants wrongfully appropriated any expression of plaintiff's ideas", a violation to copyright cannot be determined. *Giangrasso v. Columbia Broadcasting Sys.*, 534 F. Supp. 472 (E.D.N.Y. 1982)

As a result, the assessment of substantial similarity requires a *close consideration* of which aspects of the work are copyrightable¹³⁴, and moreover, whether the defendant's copying substantially appropriated (and not just copied) these protected elements; for example, the unauthorized recreation and incorporation in a film of a photograph displaying a blond girl in a pink coat riding piggyback on her father's shoulders, was not found to violate copyright, thus the subject – matter of the original work was identified as featuring a scene from “reality” -or an “independently existing fact”- which cannot be copyrighted by the photographer since he had no role in creating it.¹³⁵ Similarly, the general likeness between a film and a novel depicting the violence and urban decay of a New York City Police Department (consisting a “chronicle of true events”), was outweighed -notwithstanding the fact that the “same story” was presented¹³⁶- by radical differences in the plot, pace, and dramatic structure of the works in question, since the story lines of the film imparted a “continuity and suspense entirely missing from the book”; correspondingly, the plaintiff failed in proving ownership of a valid copyright¹³⁷ over the (protectable elements) of the allegedly infringed work, as five years later *Feist* would unambiguously establish as the prerequisites to be fulfilled for the assessment of copyright infringement.

¹³⁴ Namely the author’s expression and not the ideas, theories and facts conveyed by a copyrighted work, thus becoming at the moment of publication “instantly available for public exploitation. *Golan v. Holder*, 181 L.Ed.2d 835, 132 S.Ct. 873 (2012)

¹³⁵ *Harney v. Sony Picture Television, Inc*, 704 F.3d 173 (1st Cir. 2013). In an inverse identification, if similarities concern the “ideas or treatments” included in the primary work, identified “at the level of expression, as either too general or too insignificant to be protectible”, the claim of copyright violation is meritless”. *Smith v. Weinstein*, 578 F. Supp. 1297 (S.D.N.Y. 1984).

¹³⁶ Since the settings were identical, and police officers were the central characters in both works; However, the setting consisted of “real places known to the public through media reportage, and accordingly, the notion of telling a police story that takes place there cannot be copyrightable”. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir.), cert. denied, 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 721 (1986)

¹³⁷ Regarded as “commonly proved by production of the copyright registration certificate”: See n.79. Indeed, notwithstanding the optional, thus voluntary, registration under 1976 Copyright Act, several “incentives” were created for a copyright owner to register his copyright, the most significant of which, is the right to *enforce a copyright* in an infringement action (under 17 U.S.C. § 411(a)); consequently, the mere question arising is when registration occurs, where two diverging approaches have been adopted by U.S. jurisprudence. A recent decision stated that an application alone is insufficient for registration, since it is the Register of Copyrights Office which, after examining the material deposited, will *determine whether does it constitute a subject – matter of copyright protection: Fourth Estate Public Benefit v. Wall-Street.com, LLC*, No. 16-13726 (11th Cir. 2017). However, in its petition for certiorari, Fourth Estate argued that copyright exists *by the virtue of the creation of the work, thus making it independent* of an affirmative government grant” (implying, as such, the principle of automatic protection of copyright). Masters, Robert M., DeFosse, Jonathan R., Cremen, Timothy P. and Ryan, Kevin A., “Intellectual Property Outlook: Cases and Trends to Follow in 2018”, 2018, pp. 11 - 12

3.2 Abstracting Idea from Expression through Comparison and Filtration: The Test

It has been said that copyright protection is divided into five levels: the identification of its subject – matter (involving the classification of copyright works¹³⁸), the levels of abstraction (where idea/expression dichotomy is implicated), the exceptions and limitations applying to copyright, the expiration of the term of protection (following which the work falls under the public domain), and the types of restricted acts, forming simultaneously the intrinsic and extrinsic boundaries of copyright.

Focusing on the “levels of abstraction” and its precise content, it has been described as the process through which the “details of a copyrighted work are filtered and conceptually removed and replaced with generalities”. Comprising the procedure of the comparative analysis in order to identify substantial similarity in copyright infringement cases¹³⁹, this methodology -defined as the “Abstraction-Filtration-Comparison” test¹⁴⁰- is developed upon different levels of abstraction -built on a pyramid-shaped structure-, moving from the lower level of the *most detailed components* of a work to the higher level, where these elements “become more *general and common*”.¹⁴¹

¹³⁸ Displaying an additional differentiated perceptive between civil law and common law copyright systems; under the United Kingdom’s copyright legislation, described as the “best representative of the common law tradition”, a work, for the purposes of copyright, “needs to be a literary, dramatic, musical or artistic work and also needs to be fixed” (1998 UK Copyright, Designs and Patents Act (s.1). This classification scheme is provided as a prerequisite for copyrightability, as if a work does not fall within one of those realms, it cannot be copyright protected, and as a result, originality constitutes only the second level of consideration: see n.22, p.82. In contrary, in civil law tradition and in particular, under Greek copyright law, such a classification could only be potentially and on an ad hoc basis implicated, in the case when special rules are applicable to specifically classified subject – matter and which further provide a higher level of protection, or in other words, a “better or more appropriate and effective protection”. Stamatoudi, Irini, “Are Sophisticated Multimedia Works Comparable to Video Games?”, *Journal of the Copyright Society of the U.S.A.*, Vol. 48, Issue 3, 2001, pp. 467-468

¹³⁹ Which although “not perfect, could be linked to the separation drawn by copyright law between protected expression and unprotected ideas. *Yankee Candle Co. v. The Bridgewater Candle Co.*, 259 F.3d 25 (1st Cir. 2001)

¹⁴⁰ Applying at both literal (the “tangible and sensate parts” of a work as embodied in a physical medium”) and non-literal (the “intangible and conceptual”) components of a copyrightable work. Dennis W. K., “Copyright Doctrines, Abstraction and Court Error”, *Review of Law and Economics*, Vol. 3, Issue 3, 2007, p. 720

¹⁴¹ For example, under the Nimmer and Nimmer’s (1985) comparison between “Romeo and Juliet” and “West Side Story”, the components of the two works have been filtered according to this process, indicating that “at a lower level of abstraction, thirteen elements of dramatic structure can be found to be similar in both stories. Beyond that, specific incidents in the stories make them different from each other”. *Ibid*, pp. 716, 720-723.

In this context, the substantive elements of a copyrightable work “drift” -in a graduated conceptualization- from the particular (eligible for copyright protection) expression to the commonplace of (abstract, thus non-protectable) ideas. Considered as adopting a quite similar -but still differentiated- infringement analysis to *Arnstein, Nichols v. Universal Pictures Corporation*¹⁴² introduced the “patterns of abstractions” concept in order to decide whether a play presenting a Jewish family living in prosperous circumstances in New York was infringed by a motion picture play in which two families (Jewish and Irish) live side by side in a state of perpetual enmity in the poorer quarters of New York. Stating -and simultaneously overtaking- the inherent difficulty that the distinction between an idea -as the elements of a work that fall within the “commons”- and expression demonstrates, via the (rather misunderstood) declaration that “nobody has ever been able to fix that boundary, and nobody ever can”, the court manifested that it nonetheless comprises the question that *courts must answer in nearly all cases*, concluding, as such, that *there is no excuse for not drawing* this “arbitrary” line.

Within this framework, the court stated that “*there is a point* in this series of abstractions where (a great number of patterns of increasing generality in a literature work) are no longer protected, since otherwise the playwright *could prevent the use of his ideas, to which, apart from their expression, his property is never extended*”. Although described as an implicitly demonstrated suggestion, the court’s premise that the defendant took *no more* than copyright law allowed (if assuming that he has taken “anything at all”), has been considered as dictating that even if similarities are found, they must reach a too high level in the “abstraction hierarchy” in order to “touch” the author’s protectable expression¹⁴³; moreover, for the purposes of the qualification and identification of such an expression, the qualities of *particularity* and *individuality* have been signified as its substantive features, which the indefinite formation of the concept of idea is profoundly incapable of defending.

¹⁴² 45 F.2d 119 (2d Cir. 1930)

¹⁴³ With respect to the court’s decision, it has been argued that this crucial point at the levels of abstraction which would simultaneously fix the boundary required between the protectable expression and an excluded -from the scope of copyright protection- idea, was not specified, since the court merely reaffirmed -in an emphatic, though, declaration- the general principle as encompassed in idea/expression dichotomy, while, moreover, indicating that “only relatively high-level abstractions are beyond the scope of copyright protection”. See n.101, p.1836

Comparing the “alone standing” protectable elements of the plays at issue, the court found that their plot and overall structural plan, the main characters, the settings, their “most predominant themes”, as well as their *total concept and feel*¹⁴⁴ are not substantially similar to the “average reasonable reader and spectator”, but in contrast, they do substantially differ, stating that “when the works are similar *at only an abstract level*, the defendant’s work does not infringe *because it is not the ideas but only their techniques of expression that the copyright law protects*”. In an inverse affirmation, McDonald’s advertising campaigns copying the characters of a children’s television show were not only found to remove the characters from the original physical setting, but they did also dissect to analyze the “clothing, colors, features, and mannerisms” of the characters, which had developed specific personalities and particular ways of interacting with one another and their environment.¹⁴⁵ In addition, copyright in a doll face with an “upturned nose, bow lips, and widely spaced eyes” -described as the elements that fall within the public domain of an “idea” of a certain type of doll faces -, shall not prevent a competitor from making dolls with the exact same characteristics, insofar the author’s expression, defined as *particularly emphasizing* the underlying idea¹⁴⁶, has not been copied; as a result, the very essence of infringement lies in taking “not a general theme, but its *particular expression through similarities of treatment, details, scenes, events and characterization*”.¹⁴⁷

¹⁴⁴ Consisting per se a distinct approach and widely-applied step in infringement determinations, as introduced by *Roth Greeting Cards v. United Card Company*, 429 F. 2d 1106 which dictated that “all elements of a work shall be considered *as a whole*”, comprising, as such, the “source” of copyright on which the infringement test shall be concentrated; thus, the ordinary observer must be able of recognizing substantial similarities with regard to the “total concept and feel” of the works at issue. In this context, the “total concept and feel” of a work, along with the theme, plot, sequence, pace, setting and characters, constitute the protectable -under copyright law- elements of a literature: In *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996), the interest was shifted from a specific investigation of the plot and character development to the identification of the works’ “total concept and feel”, thus operating as a more appropriate test when a work addresses to children.

¹⁴⁵ Applying the “intrinsic-extrinsic” test for the purposes of determining substantial similarity between the author’s expression and the copied material, *Krofft* (See n.52) reaffirmed, *inter alia*, the *Arnstein’s* “restriction” of testimonies by experts and dissection analysis as ancillary supporting the trier of the facts only within the “extrinsic step”, since it will be the average spectator that will response -in the “intrinsic step”- to the question of substantial similarity. Notwithstanding the fact that the court fell “prey to defendants’ invitation to dissect the works”, it reminded that it is the “combination of many different elements which may command copyright protection because of its *particular subjective quality*”.

¹⁴⁶ *Mattel, Inc. v Azrak-Hamway Int’l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983)

¹⁴⁷ *Reyher v. Children’s Television Workshop*: See n.135

3.2.1 A “Successive Filtering Method” and a Significant Outcome

Since copyright law is the “most widely used form” for the legal protection of computer programs, the application of idea/expression dichotomy for the determination of the subject - matter of copyright protection -applying to their literal elements, including the source code, the object code and the assembly language-, has confronted the “inherent utility” that these types of works display, along with the increasing value and subsequent protection afforded even to their nonliteral and as such, non-protectable elements, such as the structure, sequence and organization of the literal code and user interfaces.¹⁴⁸ For this reason, the “Abstraction – Filtration – Comparison” test was adopted as a three-step methodology for the separation of protectable elements from non-protectable material, determining, in parallel, the “magnitude and scope” of the distinction between an idea and its expression¹⁴⁹. Considered as modifying and extending the idea/expression dichotomy in the realm of copyright law, *Computer Associates v. Altai* case¹⁵⁰ described this process as the examination of the structural components of a computer program at each level of abstraction, in order to determine “whether their particular inclusion at that level was *idea*, or dictated by considerations of efficiency so as to be *necessarily incidental to that idea*, or required by factors *external to the program itself*, or taken from the *public domain*”, consisting, as such, a non-protectable expression.¹⁵¹

¹⁴⁸ Computer programs are copyright protected as literary works “whatever may be the mode or form of their expression”: 1996 WIPO Copyright Treaty (article 4); See also n.61. Under the U.S. copyright law, computer programs were explicitly provided as a subject – matter of copyright protection in 1980, while specific limitations were also issued to the relevant exclusive rights (Title 17, s.101, 117). However, the scope of protection was judicially formulated, thus extended (in 1986) in order to additionally cover the nonliteral aspects of a computer program; as a result, the issue of identifying and segregating the copyrighted protected elements in order for a copyright infringement to be determined, became the principal concern. Martyniuk, Andrew O., “Abstraction-Filtration-Comparison Analysis and the Narrowing Scope of Copyright Protection for Computer Programs”, University of Cincinnati Law Review, Vol. 63, Issue 3, 1995, pp. 1334-1336.

¹⁴⁹ See n.92, p.5

¹⁵⁰ Which applied the test in the field of software, recognizing that computer programs may consist -as any given work- of a “mixture of numerous ideas and expressions”. *982 F.2d 693, 1992 U.S. App. LEXIS 33369, 119 A.L.R. Fed. 741, 92 Cal. Daily Op. Service 10213 (2d Cir. N.Y. Dec. 17, 1992)*

¹⁵¹ More specifically, once the first step of abstraction is completed, the non-protectable elements are filtered and consequently removed from the scope of copyright protection. As a result, the (remaining) protectable elements of a computer program are compared towards their substantial similarity.

Defining, as such, the scope of copyright protection, this test has been regarded as serving the very purpose of copyright law, since it, moreover, displays the flexibility required in order to be able to adapt to the differentiated circumstances, enabling, as such, the courts to “decide cases equitably”. What is (even more) significant, though, is that idea/expression dichotomy, although consisting a traditional copyright principle and in contrast with the relevant argumentation, is widely considered as “especially important” also in the realm of computer science and information technology in general, since its “growth and advancement depends (exactly) upon the free access to already existing ideas and information, which is profoundly guaranteed by idea/expression dichotomy; as a consequence, the acceptance and recognition that this distinction between the protectable and the non-protectable elements in any copyright work constitutes a “difficult, fact-sensitive determination”¹⁵², does not mean that its significance should be neglected or even underestimated; it only means is that it “needs to be handled with care”.¹⁵³

One may argue that under the “substantial similarity” doctrine, the dichotomy between an idea and its expression -as a “useful analytical tool”¹⁵⁴ through which copyright infringement (and inversely copyright protection¹⁵⁵) is asserted-, involves three stages: since an idea undoubtedly comprises an unprotected -by copyright law- component, it must be distilled from the author’s particularized expression.

¹⁵² Eland, Stephen H., “The Abstraction-Filtration Test: Determining Non-Literal Copyright Protection for Software”, Villanova Law Review, Vol. 39, Issue 3, 1994

¹⁵³ *Designers Guild Ltd v. Russell Williams (Textiles) Ltd (t/a Washington DC)*, (2000) F.S.R. 121

¹⁵⁴ Notwithstanding its “imprecise” character; moreover, the court determined that copyright law “has the capacity both to augment and diminish the prospects of creativity”, since its promotion and fostering constitutes its “fundamental objective”. Analyzing the effects of this process, it has been stated that “by assuring the author of an original work the *exclusive benefits* of whatever commercial success his or her work enjoys, the law obviously promotes creativity; simultaneously, though, copyright law can “*reter the creation of new works* if authors are fearful that their creations will too readily be found to be *substantially similar* to preexisting works”. Since this extending or limitative -in nature- capacity has been conceptualized under idea/expression dichotomy, considered as enabling courts to “adjust the tension between the competing effects of copyright protection”, its profound significance is reaffirmed. *Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 239-40 (2d Cir.1983)

¹⁵⁵ Since the protectable component of a copyrighted work as the “author’s original expression” is determined through the assessment of copyright infringement; and it is exactly this inverse qualification of the subject – matter of copyright protection, by virtue of which idea/expression dichotomy has been characterized as a “post-factum” qualification.

Moreover, this expression shall be original in order to attract copyright protection, since it is only the author's individual and original way of expressing the "instantiating idea" that is protected under copyright law, allowing, as such, or at least, not preventing others from expressing it in their own way".¹⁵⁶ Following this qualification and segregation of copyrightability towards the distinct elements of a work, what must be proved is substantial similarity between the allegedly infringed and infringing work, with regard, though, to their protectable elements¹⁵⁷, assessed either affirmatively or negatively.¹⁵⁸

Yet, the examination of substantial similarity as the necessary determination for the assessment of copyright infringement is *both qualitatively evaluated and quantitatively measured; in effect, it is through the quantitative measurement*¹⁵⁹ *that the qualitative attribution subsists*, comprising a reciprocal, overlapping and as such, indissociable interconnection. Under this perception, it is only if an illicit copy -as the unlawful appropriation of the author's expression- is substantially similar to the primary work, that it constitutes an offensive -to copyright- use. In order, though, for this decision to be made, a quantitative threshold is imposed, referring to the *amount* of the copyrighted work that has been disproportionately used. And this conclusion, leads us to the most crucial question as repeatedly posed: *how much is too much?*

¹⁵⁶ See n.72, p. 601

¹⁵⁷ In this context, these three stages consist simultaneously the three defensive arguments that may be analogously raised: first, it could be contented that the similar elements found between the works at issue are the non-protectable ones (falling as such within the public domain). Secondly, that the isolated protectable elements are, in essence, dissimilar and as such, substantial similarity does not subsist. And last, a defendant may argue that he had the right to use the portion taken under the merger or the "scène a faire" doctrines, operating, as such, as affirmative defenses. Wallace, Rachael, "Framing the Issue: Avoiding a Substantial Similarity Finding in Reproduced Visual Art", Washington Journal of Law, Technology & Arts, Volume 10, Issue 2, 2014, pp. 107 - 108

¹⁵⁸ For example, *Williams v. Chrichton* (See n.150) stated that *dissimilarity* between some elements of the works *will not automatically relieve the infringer of liability*, since it is "*only when the similarities between the protected elements of the allegedly infringed and infringing work are of small import either quantitatively or qualitatively, that the defendant will be found innocent of infringement*".

¹⁵⁹ In contrast with European copyright law, under which even 11 words were found to suffice for the assessment of copyright infringement under the landmark "Infopaq case": See n.63. In this sense, "even small extracts of works (or even only one word under Greek copyright tradition) may qualify for copyright protection as long as they contain elements, which are the expression of the intellectual creation of the author of the work". See n.5. As a result, the comparison of any "substantial" portion taken is completely irrelevant and moreover, inadmissible, as there shall not be taken any part at all (if that part is qualified as an original expression).

IV. SO FAR TO BE SUBSTANTIALLY SIMILAR, SO MUCH TO INFRINGE

Reconsidering the aim pursued under the American copyright law, under which copyright primarily serves the public purpose of access to the *products* of the authors' *genius*, the segmentation of the protectible elements of a copyrightable work -actualized through the "levels of abstractions" test- is, in effect, achieved when this consecutive procedure arrives at a point "*so far removed from the author's original creation as to strip that creation of expression and yield an unadorned idea*"¹⁶⁰; yet, this demarcation primordially constitutes the means for promoting "social welfare", and as a consequence, idea/expression dichotomy constitutes an "economic cost-benefit calculation".¹⁶¹

In this sense, the U.S. Supreme Court has determined that the making of individual copies of television shows for the (qualified as) nonprofit and non-commercial purposes of "time-shifting" (namely the recording of a program in order to be viewed at a later -from its initial broadcast programming- time, which has been further considered as the practice principally exercised by the average member of the public which uses home videotape recorders) does not constitute a copyright infringement; as it has been stated, if a differentiated outcome would be concluded, the scope of the statutory monopoly granted to copyright owners would be unduly enlarged, permitting, as such, a copyright privilege over the control of articles of commerce, which is neither the subject, nor the scope of copyright protection.¹⁶²

¹⁶⁰ In other words, at the point where in a series of progressive abstractions expression ends, and idea begins". Reznick, Allan E., "Synercom Technology, Inc. v. University Computing Co.: Copyright Protection for Computer Formats and the Idea/Expression Dichotomy", Rutgers Computer & Technology Law Journal, Vol. 8, Issue 1, 1980, pp. 69-70

¹⁶¹ In this vision, the required equilibrium between the rights and interests of the authors (seeking a narrower interpretation of the concept of ideas as traversing the non-protectable elements within their works) and those of the public (aiming at a restricted qualification of protectable expressions), is achieved by the economic analysis and subsequently "economic interpretation" of both originality and idea/expression dichotomy doctrines. Yen, Alfred C., "The Interdisciplinary Future of Copyright Theory", Cardozo Arts & Entertainment Law Journal, Vol. 10, Issue 2, 1992, pp. 426-427

¹⁶² *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984). Consisting an "unprecedented attempt" to impose copyright liability upon the distributors of copying devices, Sony was accused as a "contributory" copyright infringer due to the manufacture and marketing of VTR's, through which consumers recorded (copyright protected) television programs exhibited on the public airwaves.

Moreover, the exclusion -beyond ideas- of raw facts and information as explicitly provided in the Berne Convention¹⁶³, seems *prima facie* as featuring (at least, more) transparency or clarity, since “there is nothing in copyright law that denies the public the use of concepts or facts brought out in the copyrighted materials”.¹⁶⁴ However, if originality (and as such, copyrightability) could be conferred upon white pages of a telephone directory, why is the standard of protectability lowered in fact-based works? Is there an “implied license to use”¹⁶⁵ the facts and information incorporated in a copyrightable work by virtue of their “social utility”, or does their own nature and idiosyncratic characteristics preclude the substantial similarity as required (also) in quantitative terms?¹⁶⁶

4.1 Uncopyrighting Facts and the Issue of Compilations

Drawing the line between the uncopyrightability of names, towns and telephone numbers (as facts), and the potential protectability of factual compilations¹⁶⁷, in particular, of white pages listings that have been used without the owners’ prior authorization, *Feist*¹⁶⁸ took a step backward, forming, as such, the way forward.

¹⁶³ Providing that “the protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information” (article 2(8)).

¹⁶⁴ Marke, Julius J., “Copyright and Intellectual Property”, Albany Law Review, Vol. 32, Issue 1, 1967, p. 50

¹⁶⁵ Wei, George, “Certainty of Subject-Matter in the Development of Intellectual Property: Please Sir, I Want Some More”, Singapore Journal of Legal Studies, Vol. 2009, Issue 2, 2009, p.487

¹⁶⁶ As *Nichols* has dictated “we have to decide how much” from the copyrightable work fell to the public domain, since copyright does not cover everything that might be drawn from it.

¹⁶⁷ As provided by TRIPs Agreement (article 10(2)): See n.69

¹⁶⁸ *Feist Publications* (See n.100); Rural and Feist involved into a litigation when the first (the sole telephone service provider in Kansas, granted with a monopoly status as the only certified public utility under this scope of activities) refused to provide Feist (a publishing company specialized in area-wide telephone directories) its white pages listings, under the “unlawful purpose to extend its monopoly in telephone service to a monopoly in yellow pages advertising” (*Rural Telephone Service Co. v. Feist Publications, Inc.*, 737 F. Supp. 610, 622 (Kan. 1990)), since, moreover, both entities were found to “vigorously compete for yellow pages advertising”. Feist used Rural’s white pages listings without its consent; despite a number of modifications applied, the fact was that 1,309 of the 46,878 listings in Feist’s 1983 directory were identical to listings in Rural’s 1982-1983 white pages. Rural brought a lawsuit alleging copyright infringement while Feist alleged that the subject - matter of copying was not protectable under copyright. The District Court ruled in Rural’s favour, recalling previous case law that has determined telephone directories as a copyright protected subject - matter. The Court of Appeals affirmed. Thus, the Supreme Court had to determine whether the names, towns and telephone numbers copied by Feist are covered by Rural’s copyright in its directories.

Posing the question on *why* facts are not copyright protected, the answer was found in the identification of originality, determined as laying upon two solid axes: i) independent creation (meaning not-copied from pre-existing works), and ii) minimum degree of creativity, setting, as such, an extremely low standard of originality as even a “slight amount of creativity will suffice”.¹⁶⁹ Still though, facts are merely discovered, while works are created, and as a consequence, “facts” are not “works”. Since facts *do not owe their origin to an act of authorship, no one can claim originality as to facts*, whether scientific, historical, biographical, or news of the day; in this regard, the story life and death of a notorious gangster (as incorporated in a script) was found to lack originality, thus comprised of historical (or contemporary) facts, or previously published fictional material, while material traceable to “common sources, the public domain, or folk custom” is similarly incapable of attracting originality, and as such, copyrightability.¹⁷⁰

However, if facts indisputably belong to the public domain, their compilation as a *choice* that determines their selection or arrangement, implicates both independent creation and some (minimal) degree of creativity as exercised by the author. If, moreover, this particular manner in which the compiler has selected and arranged the raw facts -consisting the “only conceivable expression”- is qualified as original, then it is this selection and arrangement that meets the constitutional minimum for copyright protection. Nonetheless, even if a factual compilation may consist a copyrightable work, and irrespective of the degree of originality (or “how much original authorship”) it may feature, the protection afforded is *limited* as never extending -even through their association- to the facts themselves.¹⁷¹

¹⁶⁹ Moreover, *Feist* clarified that originality shall not be confused with novelty, since original does not mean new. A work may be qualified as “original” even if it resembles to a preexisting one, unless this similarity is a result of copying.

¹⁷⁰ Since in the case when the material that is similar is not original with the author, there is no infringement. *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978)

¹⁷¹ Reaffirming, as such, that since *ideas and information are by no means original with the author*, “it is only the *means of expression* of these ideas and themes, or the *manner of use and development* of those characters that such an intellectual creation may be (copyright) protected. *Fuld v. National Broadcasting Company, Inc.*, 390 F. Supp. 877 (S.D.N.Y. 1975).

As a result, in the same vein as ideas, facts become free to be taken, used, “restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas”. In this context, the court ruled that the contentious white pages incorporated basic information as provided by its subscribers, further arranged in alphabetical order; consisting a “too mechanical”, or a “routine” listing as to preclude any creativity, the (indisputably) substantial portion of the data taken by Feist did not amount to a copyright infringement, since there were essentially more than one ways for the arrangement or coordination of such data.¹⁷²

Characterized as a cornerstone case in the area, *Harper & Row v. Nation*¹⁷³ concerned a copyright infringement claim based upon the unauthorized use and publication of an article including 300 – 400 words from President Ford’s previously unpublished memoirs, defined as a “historical narrative or autobiography” intended to induce the creation of new material of potential historical value. Stipulating that “no author may copyright facts or ideas”, it has been stated that the required distinction to be made in works including reports of news events or factual developments in general, shall be centered upon the “substance of the information” and “the particular form of collocation of words in which the writer has communicated. Further specifying “expression” as the “author’s analysis or interpretation of events, the way he structures the material and marshals the facts, his choice of words, and the emphasis he gives to particular developments”, it has been manifested that what is protected by copyright law is the particular manner of expression that “displays the stamp of the author’s originality”.¹⁷⁴

¹⁷² *Feist Publications* (See n.174); this material did not “owe its origin” to Rural but to the public domain, consisting, as such, a non-protectable -by copyright- subject matter.

¹⁷³ 471 U.S. 539, 556 (1985)

¹⁷⁴ One may argue that this case did not only apply the “balancing definitional test” between the author’s expression and the free communication of ideas in order to achieve the required equilibrium, but also declared “how much” is allowed or not to be taken, adopting, for this purpose, a definition of originality that resembles to the EU originality criterion as formulated by the Court of Justice of European Union.

4.1.1 Facts v. Expression: Between Compliance and Divergency

However, if the lack of originality to historical or contemporary facts emphatically dictates their exclusion from the scope of copyright protection, since they fall within the “common sources”, why wouldn’t this ascertainment suffice per se for the determination of the subject - matter of copyright protection, further implying the need to “preconceive” the intended purpose of the author of an historical work, and to subsequently afford him with a “lowered” level of protection?

It is true that the threshold imposed on the author’s monopoly over facts and information, limiting, as such, copyright only to a particular form of expression¹⁷⁵, serves as a self-evident act of preserving the principal objective of social welfare under common law copyright systems, actualized by the public’s free access and use of such non-protectable components of a work. However, even if the result reached runs in compliance with the civil law copyright tradition¹⁷⁶, the investigation and determination of the author’s purpose as aiming “to add to the knowledge possessed by the reader and, perhaps in the process, to increase the sum total of human experience and understanding”, “compelling”, as such, or at least, allowing the “wider use of a historical work than a novel”¹⁷⁷, is completely contradictory with the qualification of a work -by and of itself- as copyright protected, along with the abolishment of differentiated levels of protection under EU copyright law; moreover, the fundamental principle of copyright’s neutrality is circumvented, thus providing that the purpose of the author, his personality, the content of a work, his aesthetic value or any moral implications, are (or shall be) completely irrelevant to the protection afforded by copyright law; after all, one may argue that it is by virtue of the axiom of copyright’s impartiality, that its validity and reliability are profoundly ensured.

¹⁷⁵ *Ice TV Pty. Ltd. v. Nine Network Australia Pty. Ltd.* [2009] HCA 14

¹⁷⁶ Since both copyright traditions inherently incorporate and serve the principle of “public interest” for the establishment of “idea (or facts, or information)/expression dichotomy”, which is “translated”, across the common world, as “rooted in the social utility”.

¹⁷⁷ *Ravenscroft v. Herbert and New English Library Ltd.* [1980] R.P.C. 193 (Ch. D.)

4.2 The Utilitarian Aspects of a Copyrighted Work: Methods, Function, Technology

Back in 1879, the origins of idea/expression dichotomy can be traced to *Baker v. Selden*¹⁷⁸, which distinguished a literature work analyzing a bookkeeping system with the *art* intended to illustrate or the *manufacture* described therein.¹⁷⁹ Declaring that “the novelty of the art or the thing described or explained has nothing to do with the validity of the copyright” -thus, being interrelated only with the protection granted by patent law-, the court held that the lines and figures incorporated in a book are the “mere language employed by the author to convey his ideas more clearly”, converting, as such, the author’s expression to the idea expressed which is not copyright protected.¹⁸⁰ As a result, if an author seeks exclusivity over such a work, “he must obtain a patent for the mixture as a new art, manufacture, or composition”; if not, the art described or illustrated is open and free to the use of the public, and an infringement to copyright may only subsist on a “direct copying from the pages of the book”.

Similarly, the “protection for the aesthetic” towards a work of fine arts which incorporates and features, as its intended purpose, mechanical or utilitarian aspects - such as statuettes used as bases for fully equipped electric lamps-, is not beauty *and* utility in cumulative terms; it is only art for copyright, defined as the form of an original expression that meticulously delineates the model or mental image, or conveys its meaning by modernistic form or color¹⁸¹, and the invention of new ornamental designs - as a novel idea- for patent law. Thus, the functional portions of a work shall be capable of being physically or conceptually separated from its artistic aspects, in order for the later to attract copyright protection per se as the only protectable -by copyright- elements.

¹⁷⁸ 101 U.S. 99 (1879)

¹⁷⁹ The subject - matter of this copyright dispute was the qualification of a book entitled "Selden's Condensed Ledger or Bookkeeping Simplified," written by Charles Selden, as copyright protected; the book consisted of an introductory essay explaining the bookkeeping system and to which certain forms or banks were annexed to, further consisting of ruled lines and headings that illustrated the system and showed how to be used and carried out in practice. Baker then produced and published a book that utilized a similar system, being consequently charged for copyright infringement. Baker denied the complaint alleging that Selden’s work does not consist a lawful subject of copyright.

¹⁸⁰ It has been said that under *Baker v. Selden*, the idea, in effect, merges with the expression by virtue of the fact that there if there is “no other way to practice the accounting method without the forms”, such forms become essentially the idea of this method.

¹⁸¹ *Mazer v. Stein*, 347 U.S. 201 (1954)

On the contrary, if functionality cannot be separated from the expression, the work becomes unprotectable “as a whole”, since “it is better to allow such copying rather than suffer the loss of future works that would have been developed based on those ideas”. However, this principle “does not mean that *any and all expressions* related, in particular, to a game rule or function are unprotectable¹⁸², and *Tetris*¹⁸³ constitutes an extremely interesting example. Considered as the precedent under which mobile games and computer programs could be effectively copyright protected, the reasoning behind the assessment of “Mino” game play as an infringing -to “Tetris”- work was based on the determination that it has copied “almost all” of Tetris’ expressive elements (i.e. its visual look), avoiding, as such, the “difficult task of developing its own take on a known idea.” In this regard, it has been stated that the “*style, design, shape, and movement of Tetris pieces are expression*, since they are neither part, nor essential, or inseparable from the ideas, rules, or functions of the game”. Comparing the audiovisual aspects of the works at issue, the court held that the underlying idea in “Tetris” is partially expressed through its rules, while it can be delineated by understanding the game at an abstract level, along with the concepts that drive the game¹⁸⁴; further focusing on their particular features (the style of the pieces, the way they move, rotate, fall and behave, as well as the brightness, shading and gradation of the colors used), the court found “substantially similarity” between the two games, as any differences were rather “slight and insignificant”.

¹⁸² Since it has been stated that such an exception to copyright would likely swallow any protection one could possibly have, as almost all expressive elements of a game are related in some way to the rules and functions of game play. In this sense, idea/expression dichotomy applies, in addition, to the field of online and video games, consisting the basis upon which the protectable -as expressive- components of such game plays, defined as their aesthetic appearance will be distinguished from the non-protectable (functional) aspects, such as the rules of the games. .

¹⁸³ *Tetris Holding, LLC v. XIO Interactive, Inc.*, 863 F.Supp.2d 394 (D.N.J. 2012).

¹⁸⁴ However, it has been argued that when the “comparison step” is circumvented -in the application of the “levels of abstractions” test-, protection is (inadmissibly) extended to the “intermediate levels of abstraction” (standing between the “most specific and highly protected level of pure expression” (within which the specific words, phrases, and sentences selected to convey ideas fall), and the lower level of unprotectable pure ideas), forbidding, as such, the production of new works which may utilize “substantially similar steps or organization”; as a result, if such an organization of a model’s process is qualified and “overprotected” as “expression”, a monopoly over an idea is “inadvertently” and improperly granted, removing, as such, the idea from the public domain, while suppressing simultaneously the progress desired in this field. McKinney, Adam, “Copyright Protection for Functional Works: Where Does the Fifth Circuit Draw the Line between Idea and Expression”, *Baylor Law Review*, Vol. 47, Issue 1, 1995, pp. 258-261

If it is not any expression related to a game rule or function that falls outside the scope of copyright, but *only the expression which is integral or inseparable from this function or idea*, the identification of the norm in the realm of computer programs has been identified as the “tangible, fixed form of an idea, whose purpose is “to convey information” or to transmit ideas, in one word, to communicate¹⁸⁵; in the European level, the relevant definition is more extensive, declaring that “any form of expression which permits the reproduction of a computer program in different computer languages is copyright protected” (including the source code and the object code), similarly, though, excluding the functionality of a computer program, along with its programming language and the format of data files -as merely serving the exploitation of its functions- from the scope of copyright protection.¹⁸⁶

4.3 The Limited Amount of Protectable Content and a “Thin” Copyright Protection

Implied in the measurement of the quantity of the portion taken from a copyrightable work for assessing liability for copyright infringement, the “de minimis rule” dictates that when the “appropriation of expressive elements is minimal”, such as “ordinary phrases and expressions conveying an idea *typically expressed in a limited number of stereotyped fashions*”, a secondary use falls within the realm of “borrowing” rather than “copying” the author’s expression.¹⁸⁷ Since the “rising above the de minimis” standard remarks the boundaries of “substantial similarity”, copyright protection per se is eventually “estimated” on the basis of a “thin” or “broad” application; if a “thin” copyright protection is afforded, then the appropriate standard for illicit copying is limited to “virtual identity”.

¹⁸⁵ Making, as such, a distinction between the purposes of “explanation” and “use” of an idea -according to the *Baker* reasoning-, in order to achieve a balance between the protection afforded to a “material” under copyright and under patent law respectively. *Apple Computer, Inc. v. Franklin Computer Corp.*, 545 F. Supp. 812 (E.D. Pa. 1982)

¹⁸⁶ *Case C-406/10, SAS Institute Inc. v. World Programming Ltd [2012], Judgment of 2 May 2012 (nyr)*

¹⁸⁷ *Narell v. Freeman Gp*, 872 F. 2d 907 (1989). In this context, the interdependence between the quantitative and the qualitative aspects of a “substantial portion” has been outlined, providing that “quantitatively insignificant infringement may be substantial only if the material is qualitatively important” for both the allegedly infringed and infringing works. A similar but rather more definitive approach has been adopted under the United Kingdom’s case law, since it has been emphatically dictated that the “quantitative test” is not correct, consequently suggesting that “substantiality depends upon quality rather than quantity”, emphasizing, as such, on the “overall impression” that the works at issue display (resembling to the “total concept and feel” criterion under American case law): See n.133

Such a conclusion was made with regard to the (degree of) copyrightability of two-sentences set - up jokes which displayed an *extremely limited amount* of humorous variations¹⁸⁸, thus based upon mere facts and elements that fall within the commonplace of ideas; notwithstanding the fact that (minimal) creativity and as such, originality were attributed to the plaintiff's jokes, the level of substantial similarity was compressed to the sufficiency of "objectively virtual identity" between the works at issue, attracting, as such, only a "thin" copyright protection. In an inverse determination concerning the copyrightability of the graphic depiction of Disney characters -where Mickey Mouse profoundly dominated-, it has been stated that "it would be easier to copy substantial portions of the expression as distinguished from the idea itself of the Disney works, but *the value of such labor-saving utility is far outweighed by the copyright interest in encouraging creation by protecting expression*". Moreover, both the quantitative and qualitative examination of Disney's characters concluded that they are protected by copyright law both as literary characters, and by virtue of their distinct component parts.¹⁸⁹ It is the incapability of "observing" the plaintiff's work into the secondary use by virtue of which an "incidental" or "trivial" copy that did not "steal" the "heart" of the copied work¹⁹⁰ may be not actionable, since "falling within the protective confines of "de minimis", in nature, use. This conclusion has been repeatedly reaffirmed in the relevant case law involving various types of works, such as (thumbnails of) photographs, television programs, advertising posters, terminology manuals, musical compositions and works of contemporary art, dictating that if the primary work is "plainly recognizable" into a secondary use, then the "de minimis" threshold is profoundly exceeded and a violation to copyright shall be determined.¹⁹¹

¹⁸⁸ Since "similarly constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm", as each joke begun with a factual sentence and then immediately concluded with another sentence providing humorous commentary on the preceding facts. *Kaseberg v. Conaco, LLC et al, No. 3:2015cv01637 - Document 131 (S.D. Cal. 2017)*

¹⁸⁹ *Walt Disney Productions v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972)*

¹⁹⁰ However, it has been ruled that if short sentences or brief portions are distracted from the "core" of the copied work, or if they constitute a significant portion, demonstrating, in addition, particular originality, they might "merit protection" even if they are quantitatively small, or even so small as a single word. Moran, Connor, "How Much is Too Much - Copyright Protection of Short Portions of Text in the United States and European Union after Infopaq International A/S v. Danske Dagblades", *Washington Journal of Law, Technology & Arts*, Vol. 6, Issue 3, 2011, pp. 248-251

¹⁹¹ See n.102

4.4 Seeking Fairness by Limiting the Right to Exclude

Since copyright creates a system of property rights, the existence and the scope of the entitlement afforded to copyright owners -in other words, the boundaries of exclusivity, consist the purpose of the distinction between idea and expression since determining the *locus* at which this crucial borderline shall be fixed. Although the core of the dichotomy has been clearly stated, it is considered as a standard posed and not as a clear rule, since the “periphery” of such barriers remains indefinite, imposing, as such, “significant informational burdens in a large number of unknown third-parties”¹⁹², while inevitably provoking uncertainty in relation to *how far could a given use extend*, and *how much shall be taken* from the primary work in order to be determined as a permitted use. For this reason, a number of restricted acts and uses of the author’s expression are exhaustively provided under the doctrine of exceptions and limitations¹⁹³ for the sake of public benefit, reflecting, as such, the “fair balance” sought by copyright law; one may argue that this *fairness* has been “translated” in the United States copyright system under the “fair use” doctrine, and in the United Kingdom copyright tradition under the “fair dealing” principle, where the “how much” question is determinatively interfering since they both refer to *substantial similarity as defined by the amount or the part taken from a copyrighted work*.

¹⁹² Liu, Joseph P., “Fair Use, Notice Failure, and the Limits of Copyright as Property”, Boston University Law Review, Vol. 96, Issue 3, 2016, pp.833-841

¹⁹³ Notwithstanding the fact that exceptions and limitations *may be provided* by member - states, European copyright law exhaustively indicates, in a numbered list, the specific cases within which such exceptions and limitations shall fall, including teaching and scientific research, reproduction by the press of published articles, criticism and review, and parody, caricature and pastiche. “Infosoc Directive” (article 5).

4.4.1 “Fair Dealing” with Copyrighted Material: An Issue of Quality or Quantity?

Considered “as old as copyright protection itself”, the doctrine of “fair dealing” -as a judge-made exception that was gradually transfigured in a policy-decision, codified and established as a statutory defense across common world-, has been considered as illustrating a “wise synthesis” of the rights of the author and those of the users over copyrighted resources, operating, as such, as a “safety valve, the function of which is to prevent the law of copyright from interfering unduly with the public interest” for the sake of “freedom of discussion”.¹⁹⁴ Since a “permitted” infringement would be probably paradoxically assumed, the unauthorized, but “to a limited extent”, reproduction of a copyrighted work that shall fall within specifically designated, “legitimate” purposes, is, more accurately, conceived as a “further limitation to the limited monopoly of a copyright owner”.¹⁹⁵ Simultaneously, though, it is “fair dealing” per se that is “confined” into specific enumerated purposes under the United Kingdom’s copyright legislation, designing, as such, the general framework of “intrinsically valuable activities that correspond to broader societal interests”¹⁹⁶, as analogously implemented in the copyright laws of New Zealand¹⁹⁷, Australia¹⁹⁸, and Canada¹⁹⁹.

¹⁹⁴ Griffiths, Jonathan, “Fair Dealing in the Law of Copyright”, Nottingham Law Journal, Vol. 8, Issue 1, 1999, pp. 57-58

¹⁹⁵ In this context, the rights of the copyright owners have been described as “not absolute”, since the public interest is always superseding. Puri, K. K., “Fair Dealing with Copyright Material in Australia and New Zealand”, Victoria University of Wellington Law Review, Vol. 13, Issue 3, 1983, pp. 278, 288-290

¹⁹⁶ Ong, Burton, “Fissures in the Facade of Fair-Dealing: Users’ Rights in Works Protected by Copyright”, Singapore Journal of Legal Studies, Vol. 2004, Issue 1, 2004, p.160

¹⁹⁷ Statutory established since 1962, the 1994 Copyright Act of New Zealand, provides the acts permitted in relation to copyright works, establishing the “fair dealing” exception for the purposes of criticism, review, and news reporting “if accompanied by a sufficient acknowledgement”, while the consideration of the “amount and substantiality of the part copied taken in relation to the whole work” applies to the purpose of research or private study (Part 3, s.42-43).

¹⁹⁸ 1968 Copyright Act provides (in Division 3) the non-infringing (to copyright) acts that fall within the realm of “fair dealing”, as designated for the purposes of research or study, criticism or review, parody or satire and reporting news, including also the purpose of judicial proceedings or professional advice. Moreover, it has been stated that the “amount and substantiality” factor shall be regarded in the cases where a work has been partially copied, or with regard to adaptations; focusing on the purpose of research or study, the “fair dealing” use only subsists if the portion taken is “reasonable”, while further specifically describing how much “copying” is allowed in relation to various types of works. (s. 40-43).

¹⁹⁹ 1985 Canadian Copyright Act provides, under the realm of exceptions to copyright, that “fair dealing for the purposes of research, private study, education, parody or satire does not infringe copyright”, if a number of acknowledgments complement the “non-commercial-user-generated” content that such uses shall incorporate (s.29).

In particular, copyright law of the United Kingdom provides for three categories of purposes under which a fair dealing with a work does not infringe any copyright in it: i) research and study, ii) criticism, review (including quotations) and news reporting, and iii) caricature, parody and pastiche.²⁰⁰ As a result, the copyst is weighed with a twofold burden of proof: that the “dealing” falls within one of these specific categories, and that such a qualified use is fair. Described as a “question of degree”, the circumstances to be examined and the considerations to be taken into account for the determination of “fairness”, relate to and rely upon the “*extent and proportion of the work used*” in relation to the primary work, and therefore, the *actual use made*; thus, the question is whether these portions were “too many and too long, to be too fair”.²⁰¹

In other words, it is the necessity (or not) to make a *liberal use* of a copyrighted material, as attached to the true purpose of the work, that will determine whether it is a “genuine piece” aiming to serve the purpose incorporating and illustrating, or if it is “the attempt to dress up the infringement of another’s copyright, and so profit unfairly from another’s work”. In this regard, the “fair dealing defenses” on the basis of news reporting exception, concerning, on the one hand, the publishing of pictures -from a security system of eight video films cameras- displaying Diana, Princess of Wales, and Dodi Al Fayed the night before they killed²⁰², and on the other hand, of verbatim extracts from previously unpublished minutes of secret political²⁰³, failed since it has been ruled that there were respectively *alternative -than infringing copyright- ways* to display such information, and that, in the second case, the material copied was *unjustifiably extended*.

²⁰⁰ Providing that the research shall not imply any commercial purpose, and that a sufficient acknowledgment accompanies the secondary work. 1998 Copyright, Designs and Patent Act (s. 29-30A).

²⁰¹ Further designated by the relevant case law as the nature of the work (providing that it shall be prior to the secondary use published), the legitimacy of the way it was obtained, the amount taken (including even the entirety of a work), the (transformative) use made -similarly to the prerequisite of alterations as dictated by the “de minimis rule”, the commercial benefit or inversely the non-commercial purpose of the use, the motives and consequences of the dealing -construed as the potential effects upon the market that the original work addresses to-, and the possibility and capability of achieving the same result by other alternatives. However, if these criteria apply in hierarchical order, the market impact is considered as the most significant factor in the United Kingdom. D’Agostino, Gluseppina, “Healing Fair Dealing - A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use”, McGill Law Journal, Vol. 53, Issue 2, 2008, pp. 337-344

²⁰² In *Hyde Park Residence Limited v. Yelland & Others* (2000)

²⁰³ *Ashdown v. Telegraph Group Ltd*, [2001] EWCA Civ 1142; [2001] 4 All ER 666; [2001] 3 WLR 1368

Since the issue of “how much” -from the original work was used in the creation of a new work- is decisive in the determination of a “fair dealing”, the apparently identical prerequisite of substantiality for copyright infringement under the copyright law of the United Kingdom²⁰⁴ was distinguished from the “amount” taken for the purposes of the concept of defense, in the sense that under “fair dealing” even if a substantial part has been copied (consisting a *prima facie* copyright infringement), still the secondary use may not, in effect, violate the author’s copyright if serving one of the purposes dictated by the “fair dealing” doctrine.

However, it is only “*may not*” and not “*does not*” escape liability for infringement; although it has been stated that “the major factor in determining the question of substantiality is the quality of what is taken in relation to the work as a whole, rather than the quantity”²⁰⁵, the amount of the portion taken, as proportionally calculated, weighs -in equal terms with its value- against the finding of a fair dealing²⁰⁶; as one may argue, it is an implicit reference and application of the “*de minimis*” doctrine as interfering in the investigation of the *real objective* of a challenging “dealing”, and which, eventually, constitutes the most determinative factor that eventually prevails substantiality, either qualitatively and/or quantitatively assessed.²⁰⁷

²⁰⁴ 1998 Copyright, Designs and Patents Act explicitly designates both the authors’ exclusive rights, as well as the acts infringing copyright, further stating that the restricted -by copyright- acts, relate to a copyrighted work either as a whole, or in any substantial part of it (s.16(3)). In other words, a copyright owner is protected from any unauthorized or unlicensed (re)production of his work from third - parties, in relation either to his work or to any substantial part thereof. However, it has been said that focusing on the proviso as such, the “true objective of historical British copyright law” is omitted, since aiming to reach a balance between the authors’ rights and those of general public; this aim has been signified by the judicial formulation of “fair dealing” -under which the authors’ rights are “subject to the limits of public interest”, even before its establishment and gradual evolution as a statutory defense. See n.87, pp. 314-315, 326-327

²⁰⁵ *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273, 276 [H.L.]

²⁰⁶ *Hubbard v. Vosper* stated that “the passages which have been taken from these various works are so substantial, *quantitatively so great* in relation to the respective works from which the citations are taken, that they fall outside the scope of “fair dealing”: [1971] EWCA Civ J1119-1, [1972] 2 QB 84

²⁰⁷ Described as a landmark decision in the adjudication of “fair dealing” defense, “Clockwork Orange” case (*Time Warner Entertainments Company LP v. Channel 4 Television Corporation plc and another* [1994] EMLR 1 (CA)) stated that a documentary program taking and displaying more than 12 per cent of the original film (amounting to a 40% of the secondary use) could fall within the scope of “fair dealing”, notwithstanding the fact that the “average person would be hardly pressed to say that such a use from the plaintiff’s film had been “fair””. Bradshaw, David, “Fair Dealing as a Defence to Copyright Infringement in UK Law: An Historical Excursion from 1802 to the Clockwork Orange Case 1993”, Denning Law Journal, Vol. 10, 1995

4.4.2 Conciliating Copyright and Freedom of Expression: The “Fair Use” Doctrine

If “fair dealing” is considered as conferring upon the users of a copyrightable work an “additional protection”, the doctrine of “fair use”²⁰⁸ has been described as a “*privilege in others* than the owner of a copyright to use the copyrighted material in a *reasonable manner without his consent*, notwithstanding the monopoly granted to the owner by the copyright”.²⁰⁹ Consisting an affirmative defense to copyright infringement which (if succeeding) reverses the assessment of “infringing” with the qualification of “permitted” -as a “fair”- use under the law, it has been described as the constitutional imperative of the right to access that limits the rights of the copyright owner over an original copyrighted work.²¹⁰

Considered as distinguishing the *use of a copyright* from the *use of the work itself*, as respectively reflecting the author’s exclusivity and the right of the public to access copyrighted resources, the statutory codification of the “fair use” doctrine is regarded as implementing the compromising character of copyright per se. In this context, the lack of the author’s prior consent shall not be construed as circumventing the legal monopoly granted under copyright law, but as necessarily restricting it in order to achieve the appropriate balance with the public interest.²¹¹ Encompassing, as such, both the “purpose” and the “function” of copyright law, the doctrine’s statutory codification provides for an “non-exhaustive list of purposes -*such as* criticism, comment, news reporting, teaching or research” - combined with a seemingly exhaustive list of factors” that *shall be considered* by courts on a case-by-case analysis”.²¹²

²⁰⁸ Similarly originating in the courtrooms “dating back nearly to the birth of copyright in the eighteenth century”. Smith, Gordon V. and Parr, Russell L., “Intellectual Property: Valuation, Exploitation, and Infringement Damages”, John Wiley & Sons Inc., 2005, p.744

²⁰⁹ Denicola, Robert C., “Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works”, *Art & the Law*, Vol. 6, Issue 4, 1980-1981, p.98

²¹⁰ Since to the extent that a work is not original, or to the extent that it falls within the public domain, it is “free for all to use without limitation”. Birch, Stanley F., “Copyright Fair Use: A Constitutional Imperative”, *Journal of the Copyright Society of the U.S.A.*, Vol. 54, Issues 2-3, 2007, pp. 156-160

²¹¹ In this context, the author’s consent is not actually disregarded but presumed by the law, consisting, as such, an implied authorization in relation only to reasonable and customary uses of a copyrighted work, under the “constitutional policy of promoting the progress of science and the useful arts”. In *Harper & Row*: See n.179

²¹² See n.110, p.314

This specified and numbered list includes the “purpose and character of the use” -described as the “heart” of the fair use inquiry-, the “nature of the copyrighted work”, the “amount and substantiality of the portion used in relation to the copyrighted work as a whole”, and the “effect of the use upon the potential market for or value of the copy”²¹³ -considered as the “most important consideration”-. Focusing on the “amount and substantiality” factor, it has been said that it does not merely rely upon a quantitative measurement -described as paradoxically “weighing intangibles”-, but it is inexorably intertwined with the significance of the material taken in qualitative terms on the basis of a “careful balance” sought between the “value” and “quantity” of the materials used in relation to the purpose of the copying; in this context, the copying of 353 pages of President Washington’s personal and official papers published in a two-volume work was not qualified as a fair use.²¹⁴ Indeed, a differentiated approach would “overemphasize” the importance of this mere factor “as a whole”²¹⁵, contradicting, as such, with the profound determination that “the four statutory factors (may) not be treated in isolation, one from another”, but they are “all to be explored and the results weighed together, in light of the purposes of copyright”. This principle was reaffirmed in a case concerning the "Niagara" painting by the contemporary artist Jeff Koons, consisted of fragmentary images collaged against the backdrop of a landscape; one of these images was adapted by a photograph taken from the plaintiff Andrea Blanch. Since there were *only some elements* copied from the original work and incorporated in the artist’s collage, which have been further *substantially modified*, the secondary work was qualified as a transformative use, allowed under the “fair use” doctrine, since, *inter alia*, the objectives sought by the two authors were determined as “sharply different”.²¹⁶

²¹³ Further providing that “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors”. 1976 Copyright Act, §107

²¹⁴ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)

²¹⁵ Despite the characterization of such quantitative measurements as a “temptation” or “trap” within which the courts fall, it has been suggested that the “amount and substantiality” factor, as closely interconnected with the “market effect” consideration, could set the “suitable standard” sought for the determination of the amount taken, if transfigured to the decisive question that shall be posed of “how much importance the potential audience for the underlying work would attach to the portions of that work that its users borrowed”. Dratler, Jay Jr., “Distilling the Witches' Brew of Fair Use in Copyright Law”, University of Miami Law Review, Vol. 43, Issue 2, 1988, pp. 309-312

²¹⁶ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006)

Notwithstanding the consensus on the qualitative, rather quantitative nature of the statutory inquiry, the extent of the copied material is, *inter alia*, counted in the fair-use analysis, implying, as such, a factual comparison²¹⁷ or a “functional distinction” of the works in question, as aligned with the pivotal definition of what actually constitutes an “invasion of the plaintiff’s market”²¹⁸. Respectively, the use of aspects of “Harry Potter” novels for the creation and distribution of an encyclopedia-like guide for the series, was not qualified as a “fair use”, since, *inter alia*, the defendants *took more* of the copyrighted works that was “*reasonably necessary*” in relation to the book’s purpose as a reference guide²¹⁹; similarly, a “fair use” concerning the posting on Georgia State University’s system of unlicensed portions of Cambridge University Press and other publishing houses’ works, for students to obtain them electronically, was found as an erroneous finding and continuing misuse of the defense, providing that the amount copied shall be measured in relation to the length of the primary work on a work-by-work basis, thus examining each excerpt individually in order to determine if it consisted a “reasonable” copy with regard to the aim pursued.²²⁰

²¹⁷ Concerning the material copied and the relevant paraphrases made from various articles as incorporated in a biography, it has been stated that the justification of a “fair use” as applied in particular materials, requires the identification of their own nature; in this regard, it was found that an historical or biographical work consists -by nature- a “valuable source for future biographers, historians or social scientists”, because of the public benefit to encourage the development and distribution of such works. In this sense, the interests of the copyright holder must be occasionally subordinated to the greater public interest, and the *finding of “fair use” was “replaced” by a comparison of the works at issue*, examining the issues of commercial gain, public interest, and independent research. *Rosemont Enterprises, Inc., Plaintiff-appellee, v. Random House, Inc. and John Keats, Defendants-appellants*, 366 F.2d 303 (2d Cir. 1966)

²¹⁸ Considering that copyright per se is, after all, about competition, thus regulating “fair competition in the marketplace” as a “known quantity”, consisting an extensively harmonized concept (at least, in the European level), in contrast with the seemingly legal uncertainty that traverses unfair competition law, the concern on the status of a secondary use and its impact on the primary market becomes an issue of prime significance. Kamperman Sanders, Anselm, “Do Whiffs of Misappropriation and Standards for Slavish Imitation Weaken the Foundations of IP Law?”, in “Research Handbook on the Future of EU Copyright”, Derclaye, Estelle (Ed.), Edward Elgar Publishing Inc., 2009, pp. 568-569; in this context, it has been said that the three major factors which justify the doctrine of “fair use”, namely its constitutional basis, the economic benefit (or potential damages) and the functional distinction between the works at issue, are segregated in the crucial (and decisive) question on whether does the secondary use lays in a “position of competition” with the primary work, and whether does the copy supersede the original. Holbrook, Lanny R., “Copyright Infringement and Fair Use”, *University of Cincinnati Law Review*, Vol. 40, Issue 3, 1971, pp. 534-547

²¹⁹ *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008); Reaching the same result, *Harper & Row* (See n.179) found that the portion used was neither inappropriate or *too extensive* “for the favored purpose of news reporting”.

²²⁰ *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014)

Beyond, though, its interconnection with the third statutory factor of the “market effect”²²¹, the amount and substantiality of the portion taken, and in particular, its *reasonable and necessary (or not) extent* -as explicitly provided with regard to the unauthorized use, by Google, of 170 lines of Java applications that was found as “technically necessary” for the use of the relevant code, qualified, as such, as a permitted copying²²²-, is inexorably intertwined with the *purpose* and the *character* of the secondary use, shifting, as such, the emphasis from the qualitative and quantitative composition of a work to its “transformative value”; a criterion that would eventually prevail even the copying of the “heart” of a work. In the end, if “parody exception” constitutes a right to parody deriving from the freedom of expression²²³, and if appropriation art -as the two most prominent “fair uses” that rely upon the “heart” of a copyrighted work- is about “borrowing” (for the purposes of new creations) rather than “stealing”, how much is allowed to be taken?

If a work has been copied in its entirety, we might think that it precludes the finding of a “fair use”; yet, it does not, still though, a *wholesale copying certainly militates against such a conclusion*²²⁴, demonstrating, as such, the divergency of the doctrine with the rule of “substantial similarities” which requires proof of copying.

²²¹ Defined as the usurpation of the demand for the protected work, thus operating as a “market substitute for the original or any potentially licensed derivative”: in *Campbell v. Acuff-Rose Music (92-1292)*, 510 U.S. 569 (1994). In this regard, the sufficiency and substantiality of the material copied have been regarded as harming, in effect, the “fair market value” of the original work, depriving, as such, its author not only from the fee he was entitled to exact of this particular use, but also from any compensation he would, otherwise, receive”. *Davis v. Gap, Inc.*, 246 F.3d 152, Second Circuit (2001)

²²² Centering upon the copyrightability of Java applications, developed and owned by Oracle but used - without a prior authorization- by Google for the creation of Android smartphone operating system, the court ruled that the finding of a “fair use” is supported only if the extent of the copyrighted material used (by Google) was the *necessary* to write in the Java language; if it exceeds the necessary one, then the use is not fair. *Oracle v Google*, Case 3:10-cv-03561-WHA (2016)

²²³ Originating from the Greek word “parodeia”, the concept of parody has been defined as “referring” to previous works, borrowing or adapting its elements under the context of satire. In the EU level, it has been qualified as an indisputably appropriate way to express an opinion, further requiring evoking an existing work while being noticeably different from it, and, constituting an expression of humor or mockery: *Case C-201/13 Deckmyn and VZW Vrijheidsfonds v. Vandersteen a.o.*, judgment of 3 September 2014.

²²⁴ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984); *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554 (N.D.N.Y 1995).

However, within the framework of “fair use”, the similarities are neither to be found, nor disputed; they are admittedly present, but they allegedly fall within an intended purpose that may justify this similarity (or even an identical duplication). In this regard, the abduction of the “heart” of the “Oh, Pretty Woman” song was qualified as a fair use on the basis of parody, since “that heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim”²²⁵; moreover, a “*far more than merely a de minimis* taking” was not found as violating copyright, even if it was the “heart” of the original musical composition taken²²⁶, while a *great deal* copied from the plaintiff’s original video was determined as “plainly necessary and reasonable in order to accomplish the transformative purpose of critical commentary”.²²⁷

Moreover, if what is critical is the “proportion of the original work used, and not how much of the secondary work comprises the original”, the “transformation” and “alteration” of classic portraits of Rastafarians in Jamaica with a new expression, found to display an entirely different aesthetic and a dissimilar character, resulting, as such, to “distinctive creative and communicative results”, consisted a (rather paradoxical) determination of a “fair use”.²²⁸ On the contrary, an alleged spoof of parody of the famed novel “Gone With The Wind” failed, since the extent to which the defendants have drawn on the copyrighted work was *far more extensive* from what is permissible to conjure up the subjects or characters parodied.²²⁹ Nonetheless, if any transformation amounts to a permitted -by the law-adaptation of the original work, could ever such an interference (or invasion) to copyright, “touch” the core of a copyrighted work, namely the author’s own expression?

²²⁵ *Campbell v. Acuff-Rose Music*: See n.221

²²⁶ *Elsmere Music Inc., v National Broadcasting Company Inc.*, 482 F. Supp. 741 (U.S. Dist. 1980)

²²⁷ *Matt Hosseinzadeh v. Ethan Klein and Hila Klein No. 16-CV-3081 (S.D.N.Y. Aug. 23, 2017)*

²²⁸ *Cariou v. Prince (714 F.3d 694, 710 (2d Cir. 2013))*. Implying some rather unusual aesthetic, economic or related to prestige considerations, the court held that the crucial line of the “market effect” shall be drawn on whether the secondary use usurps the market of the original work, and such an usurpation is only possible when the infringer’s target audience and the nature of the infringing content is the same as the original. In the case at issue, the court stated that Prince’s target audience is very different from Cariou’s, and moreover, that there is “no evidence that Prince’s work ever touched -much less usurped- either the primary or derivative market for Cariou’s work”.

²²⁹ As the court dictated that “it is not the sort of original critical comment meant to be protected by the fair use defense, but rather a predominantly derivative or adaptive use of the copyrighted film and novel “Gone With The Wind”. *Metro-Goldwyn-Mayer, Inc., v Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351 (U.S. Dist. 1979)

In *Rogers v. Koons*²³⁰, the court demonstrated that ideas and concepts “found in the common domain are the inheritance of everyone”. What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes. Thus, the focus must be on the similarity of the expression of an idea or fact, not on the similarity of the facts, ideas or concepts themselves. The court held that Koons did not copy the idea but used the *identical expression of the idea* that Rogers created, thus copying “nearly in toto” the essence of the Rogers’ “Puppies” photograph. Moreover, insofar as the subsequent work (the “String of Puppies” sculpture) was not qualified as a parody, it was stated that “beyond the factual subject - matter of the photograph”, it was the “very expression” of the original work that was incorporated in the sculpture, deducing that “no reasonable jury could conclude that Koons *did not exceed a permissible level of copying* under the fair use doctrine”.

Again, Koon’s identical copying of a Garfield comic character was “so obvious that no reasonable factfinder could conclude otherwise”, consisting, as such, a *virtual and exact reproduction of both the appearance and expression of the original work*.²³¹ In 2017, a French Court found that the Koon’s “Naked” sculpture infringed the legitimate owner’s copyright over the original photograph, thus counterfeiting its “atmosphere of kindness and purity that shows the *imprint of the author’s personality*”.²³²

²³⁰ 960 F. 2d 301 (1992)

²³¹ *United Feature Syndicate, Inc. v. Jeff Koons*, 817 F. Supp. 370 (1993)

²³² in examining the differences and similarities between the allegedly infringing and infringing work, the court held that in Koon’s sculpture one could “recognize and identify the models and the pose chosen by the photographer”, which therefore consist “essential components” of the copyrighted work. *Bauret v. Koons*, *Tribunal de grande instance de Paris (3e ch. 4e sect.)*, 9 mars 2017, *Consorts Bauret c/ J. Koons, société Jeff Koons, Centre national d’art et de culture G. Pompidou*, No. 15/01086.)

On the contrary, in a case concerning the appropriation of the unique attributes of “Superman”, the court found that the allegedly infringing work indeed copied elements which are uniquely associated with the original character rather than with the idea of a superhero in general. Nonetheless, comparing the two works at issue, they were found so different that “substantial similarity” was precluded, and in any case, the secondary work fell within the “fair use” realm as a parody. Still though, the court declared that the plaintiffs' copyrights “do not entitle them to protection of the idea of a character with superhuman powers who battles the forces of evil”, and as a result, what must be shown is that the “concrete expression of the Superman idea has been appropriated”.²³³

Ultimately, it has been concluded that it would be “convenient” to define a “fair use” by simply saying that “others may “copy” the “theme”, or “ideas”, or the “like”, of a work, though not its expression”. In this regard, the similarities between the allegedly infringed play and the infringing picture have been stated in detail, in order to decide whether the limits of “fair use” have been crossed or not²³⁴. Declaring that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate”, the court held that the dramatic significance of the scenes of the works at issue was the same, *almost to the letter*. What we shall always remember is that even if a “second comer” is *entitled to use not only all that had gone before, but even the plaintiffs' contribution itself*, there is a fundamental line drawn therein. He has the right to draw from the original work *only the more general patterns*; that is, that any second comer’s interference and interaction with a copyrighted work shall *always keep clear of its “expression”*.²³⁵

²³³ *Warner Bros. Inc., v. American Broadcasting Companies Inc., & Ors, 523 F. Supp. 611 (U.S. Dist. 1981)*

²³⁴ The court proceeded to parallel step-by-step and scene-by-scene examinations of the works at issue, stating that “in its broader outline a plot is never copyrightable, for it is plain beyond peradventure that anticipation as such cannot invalidate a copyright”. Although reaffirming that a play *may be pirated without using the dialogue*, and as such, there would not be a piracy in a pantomime since there cannot be -by nature of the work- any dialogue, the court held that a pantomime constitutes a “drama” since a play may lapse into a pantomime again and again “at its most poignant and significant moments”; indeed, a nod, a movement of the hand, a pause, “may tell the audience more than words could tell”. Concluding, it has been declared that “if the picture was not an infringement of the play, there can be none short of taking the dialogue”.

²³⁵ *Sheldon v. Metro-Goldwyn Pictures Corp, 81 F.2d 49, 55-56 (2d Cir. 1936)*

EPILOGUE

It seems that copyright law had to “shoulder” the whole burden of constructing, formulating and regulating the interface between Law, Art and Economy; a “symbiosis” vibrated by complexity, divergency and as such, inconsistency due to the differentiated policies, approaches, aims and scopes, as infused into the law of copyright. But even if we are all different, we are all the same, and copyright uniquely and generously encompasses our continuously changeable and even unpredictable needs and demands, both as individuals and as members of society, intended to strike a fair balance between our opposing or competing rights and interests. In this sense, idea/expression dichotomy is not only the “heart” of copyright law; it is the manifestation of its humanitarian character and nature. If targeted as irrelevant or inappropriate, copyright law per se is victimized, and the fundamental principles on which our existence per se is rooted, is doubted.

From originality as the sole prerequisite for the qualification of the author’s expression, to substantial similarity between the expressive components of a copyrighted work and its unlawful (or not) repetition, and from the principles of quality to quantity of the portion taken as the decisive criteria for the assessment of copyright infringement to their exceptions, the contradiction on the results achieved is a risk that copyright consciously decided to undertake, since committed itself to respect and encompass our differences as reflected into the law, despite the onus and the duty that consequently fell on it. In any case, it is not a fault. Deepening, though, even on these undoubted diversities and the outcomes deriving from their implementation, the rationale behind them and the aim pursued were inherently the same; the need to draw a line between the right and its violation. Notwithstanding the extensive or restricted barriers imposed, the “terra” preserved was always the author’s individuality and uniqueness, as celebrated through the expression of his own self.

Copyright counted on our fair interaction. And it did not disappoint us, but we rather sidelined, disregarded, or at least, misunderstood the law and the essence of copyright. The current (and any) debate relies on our expectation, our need or even demand to assert more freedom, and copyright is perceived as “favoring” either the “one” or the “whole of us”. However, it does not. It protects equally both. And the line drawn is a line of reciprocal limitations in order to achieve harmony and symmetry. Indisputably, copyright needs to change. But this does not mean that it should be circumvented. It only needs to remind its own scope, depth, and edges, as signified by the dichotomy between an idea and its expression. And as such, it will be comprehended, and eventually reinvented.

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