To Re-Imagine the Boundaries of Copyright Protection

University of Lapland
Faculty of Law
Master's Thesis
Titu Rautjärvi, 0465409
Spring 2023

University of Lapland
Faculty: Faculty of Law
Title: To Re-Imagine the Boundaries of Copyright Protection
Author: Titu Rautjärvi
Degree: Master of Laws
Type of Work: Pro gradu -tutkielma/Master's Thesis_X_ Lisensiaatintutkimus__
Pages: III+84
Year: 2023

Abstract:
Copyright protection has, throughout its 200 year journey, been a divisive topic. Simultaneously too strong yet too weak, never enough to satisfy the needs of both the rightsholders and the public. Regulating the ever developing creative field has proven to be a difficult challenge, further aggravated by the shift into the digital online environment, where previously solid boundaries began to waver and shift. And in that online environment copyright protection has found in 'piracy' its most resilient opponent.

This thesis aims to begin the process of re-imagining these boundaries of copyright protection by reflecting on their 200 year journey and the call for ever stronger protection, through one of the latest expansions to their scope, the 2019 CDSM-Directive. Through this journey it is revealed that these modern boundaries are built on an inherently unequal and unbalanced foundation that stands to be rebuilt, re-imagined, into something new. This rotten foundation has too long enabled the unfair exploitation of authors and the global South in the name of a profit oriented economic model that is both unsustainable and unethical. To re-imagine these boundaries means to elevate and honor fundamental rights, moral rights, the author and the pursuit of innovation on a global scale and to even re-evaluate 'piracy'. Lest a bell will toll on creativity.

TABLE OF CONTENTS

SOURCES

LITERATURE

Aguiar L., Claussen J. & Peukert C. (2018), Catch Me if You Can: Effectiveness and Consequences of Online Copyright Enforcement. Information Systems Research 29(3)

Alexander I. (2010), Copyright Law and the Public Interest in the Nineteenth Century, Hart Publishing, Oxford and Portland, Oregon

Beiter K. (2021), "Not the African Copyright Pirate Is Perverse, But the Situation in Which (S)he Lives, Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization 'From Below' in IP Law." PIJIP/TLS Research Paper Series no. 65.

Bottomley A. J. (2015) 'Home taping is killing music': the recording industries' 1980s anti-home taping campaigns and struggles over production, labor and creativity, Creative Industries Journal, 8:2, pp. 123-145

Cerda Silva, A. (2012), Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright. PIJIP Research Paper no. 2012-08 American University Washington College of Law, Washington, D.C.

Chancel L., Piketty T., Saez E., Zucman G. et al. (2022), World Inequality Report 2022, World Inequality Lab wir2022.wid.world

Cutler, A. C. (2005). Gramsci, Law, and the Culture of Global Capitalism. Critical Review of International Social and Political Philosophy, 8(4), 527–542.

Dobusch, L., & Schüßler, E. (2014), Copyright reform and business model innovation: Regulatory propaganda at German music industry conferences, Technological Forecasting & Social Change 83, pp. 24-39

Donne J. Collected Poetry, Penguin Books Ltd, Year: 2012

Drahos P. & Braithwaite J. (2002), Information Feudalism: Who Owns the Knowledge Economy, Contemporary Sociology 32(5)

Dusollier S. (2020), The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition. Common Market Law Review, 57 (4), pp. 979-1030.

Elkin-Koren N. (2017), Fair Use by Design", 64 UCLA Law Review pp.1083-1100

Ervasti K. (2017), Lakimies, oikeus, yhteiskunta: Oikeus yhteiskunnallisena käytäntönä. Edita Publishing Oy.

Geiger C., Frosio G. F., & Bulayenko O. (2018), Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data? IIC - International Review of Intellectual Property and Competition Law, 49(7), pp. 814–844.

Frosio G. F. (2017), Resisting the Resistance: Resisting Copyright and Promoting Alternatives, 23 Rich. J.L. & Tech. 4

Frosio G. F. (2014), Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness? 13 J. MARSHALL REV.INTELL. PROP. L. 341 pp. 343-395

Goldstein, P. (2001), International copyright: Principles, law and practice. First Edition Oxford: Oxford University Press.

Goldstein, P., *Hugenholtz P. B.* (2019), International Copyright: Principles, Law, and Practice. Fourth Edition. Oxford: Oxford University Press.

Grolleau G. & Meunier L. (2022), Doing more with less: Behavioral insights for anti-piracy messages, The Information Society, 38:5, pp. 388-393

Haggart, B. (2018), Copyfight: The Global Politics of Digital Copyright Reform. Toronto: University of Toronto Press.

Husa, J., Mutanen, A., & Pohjolainen, T. (2008). Kirjoitetaan juridiikkaa: Ohjeita oikeustieteellisten kirjallisten töiden laatijoille (2. uud.p.). Talentum.

Husovec, M. & Quintais, J. (2021). How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms. GRUR International.

Isaak J. and Hanna M. J. (2018), User Data Privacy: Facebook, Cambridge Analytica, and Privacy Protection," in *Computer*, vol. 51, no. 8, pp. 56-59

Karaganis J., Flynn S., Primo N., Lloyd L., Sezneva O., Mizukami P. N., Castro O., Moncau L. F., Lemos R., Cross J. C., Stobart H., Liang L. Sundaram R., Balázs B., (2011), Media piracy in emerging economies, Social Science Research Council

Laux J., Wachter S., Mittelstadt B. (2021) Taming the few: Platform regulation, independent audits, and the risks of capture created by the DMA and DSA, Computer Law & Security Review, Volume 43, 105613

Leblebici H., Salancik G. R., Copay A., & King T. (1991). Institutional Change and the Transformation of Interorganizational Fields: An Organizational History of the U.S. Radio Broadcasting Industry. *Administrative Science Quarterly*, *36*(3), pp. 333–363.

Leskinen, M. (2022), De lege ferenda -tutkimuksesta metodina ja tieteenä. Lakimies 7-8/2022, pp. 1158–1185.

Lewandowsky, S., Smillie, L., Garcia, D., Hertwig, R., Weatherall, J., Egidy, S., Robertson, R.E., O'connor, C., Kozyreva, A., Lorenz-Spreen, P., Blaschke, Y. and Leiser, M. (2020) Technology and Democracy: Understanding the influence of online technologies on political behaviour and decision-making, EUR 30422 EN, Publications Office of the European Union, Luxembourg

Litman, J. (1990), The Public Domain, 39 EMORY L. J. pp.965-1023

Margoni, T., & Kretschmer, M. (2021), A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology. Zenodo.

Matteson, J. D. (2018). Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It, 35 Santa Clara High Tech. L.J. 1

Merges, R. P. (2000). One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000. California Law Review, 88(6), pp. 2187-2240

Mirghani S. (2011), The War on Piracy: Analyzing the Discursive Battles of

Corporate and Government-Sponsored Anti-Piracy Media Campaigns. Critical Studies in Media Communication, 28(2), 113–134

Mittelstadt B., Allo P., Taddeo M., Wachter S. & Floridi L., (2016) The Ethics of Algorithms: Mapping the Debate, BIG DATA & SOC'Y, July–Dec.

Patry W. (2009), Moral Panics and the Copyright Wars, Oxford: Oxford University Press.

Patry W. (2003), The United States and International Copyright Law: From Berne to Eldred, 40 HOUS. L. REV. pp. 749-762

Pech L. (2021), The concept of chilling effect, Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU, Open Society European Policy Institute

Penney J. W. (2019), Privacy and Legal Automation: The DMCA as a Case Study, 22 STAN. TECH. L. REV. pp. 412-486

Perel (Filmar), M. and Elkin-Koren, N. (2016), Accountability in Algorithmic Copyright Enforcement,19 Stan. Tech. L. Rev. pp.473-533

Perzanowski A. and Schultz J. (2016) The End of Ownership: Personal Property in the Digital Economy. Cambridge, MA: MIT Press

Peukert, A., Husovec, M., Kretschmer, M. et al. (2022). European Copyright Society – Comment on Copyright and the Digital Services Act Proposal. *IIC* **53**, 358–376

Poort J. and Quintais J. and van der Ende M. A. and Yagafarova A. and Hageraats M., (2018) Global Online Piracy Study Amsterdam Law School Research Paper No. 2018-21, Institute for Information Law Research Paper No. 2018-03

Ray R. S., Sun J., and Fan Y. (2009), Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty, 62 Vanderbilt Law Review pp.1667-1746

Ricoeur P. (2004) The Rule of Metaphor The creation of meaning in language, University of Toronto Press via Taylor & Francis e-Library

Romero-Moreno F. (2020), 'Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market, International Review of Law, Computers & Technology, 34:2, 153-182

Schumpeter J. A. (2003), Capitalism, Socialism, and Democracy, Routledge via Taylor & Francis e-Library

Sell S. K. (2003), Private Power, Public Law The Globalization of Intellectual Property Rights, (Cambridge Studies in International Relations). Cambridge: Cambridge University Press.

Senftleben M. (2019), Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market

Silbey, J. (2014), The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property, Stanford University Press

Spindler G. (2019), The Liability system of Art. 17 DSMD and national implementation – contravening prohibition of general monitoring duties? 10 JIPITEC 344-374

Story A. (2003), Burn Berne: Why the Leading International Copyright Convention Must Be Repealed, 40 Hous. L. Rev. pp.763-801

Trúchliková M. & Kmety Bartekova M. (2020). Analysis of market concentration in creative industry. SHS Web of Conferences. 83.

Turner J. D. C. (2015), Intellectual Property and EU Competition Law Second Edition, Oxford University Press

Urban J. M., Karaganis J. & Schofield B. L. (2016), Notice and Takedown in Everyday Practice, UC Berkeley Public Law Research Paper No. 2755628

Wachter S. and Mittelstadt B. (2018), A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI Columbia Business Law Review, 2019(2)

LEGISLATION

Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C to the Agreement Establishing the World Trade Organization, Marrakesh, April 15, 1994, 33 I.L.M. 1, 83-111 (1994).

Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2012/C 326/02)

CONVENTION DE BERNE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES (1886)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013, OJ No. L 181/15, June 29, 2013, replacing Council Regulation (EC) No. 1383/2003

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

The Statute of Anne; April 10, 1710

WIPO Copyright Treaty

H.R.2589 - Copyright Term Extension Act 1998

THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

US copyright law section 107. Limitations on exclusive rights: Fair use

CASE LAW

Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:297

Case C-360/10, SABAM v. Netlog, EU:C:2012:85

Case C-128/11, UsedSoft GmbH v. Oracle International Corp., ECLI:EU:C:2012:407

Opinion of Advocate General Saugmandsgaard Øe in Case C-401/19

OFFICIAL SOURCES

A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change Political Guidelines for the next European Commission Opening Statement in the European Parliament Plenary Session. 15 July 2014

COM(2015) 192 Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions, A Digital Single Market Strategy for Europe

COM(2015) 626 Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions, Towards a modern, more European copyright framework

COM(2017) 555 Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions, Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms

Commission's calculations based on data in 'Annex — On-demand audiovisual markets in the EU', a report by the European Audiovisual Observatory for DG CONNECT, April 2014

Commission Recommendation of 24 Aug. 2006 on the digitization and online accessibility of cultural material and digital preservation, 2006/585/EC

Commission Recommendation of 27 Oct. 2011 on the digitization and online accessibility of cultural material and digital preservation, 2011/711/EU

Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC (first reading) – adoption of the legislative act – statements (2019)

European Commission, Guidance on Art. 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final

European Union Agency for Fundamental Rights
https://fra.europa.eu/en/joinedup/about/what-are-fr

Flash Eurobarometer 411 — Cross-border access to online content', August 2015

Neelie Kroes European Commission Vice-President for the Digital Agenda A digital world of opportunities Forum d'Avignon - Les rencontres internationales de la culture, de l'économie et des médias Avignon, 5th November 2010
https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_619

Office for Harmonization in the Internal Market, 'European citizens and intellectual property: perception, awareness and behaviour', November 2013
https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf

Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market

Parliamentary Assembly Resolution 2125 (2016) on transparency and openness in European Institutions.

Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making and explanatory memorandum
https://rm.coe.int/legal-regulation-of-lobbying-activities/168073ed69

Standing Committee on Copyright and Related Rights Forty-first Session Geneva, June 28 to July 1, 2021, STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS
https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_3.pdf

The Digital Markets Act: ensuring fair and open digital markets
https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

The Digital Services Act: ensuring a safe and accountable online environment https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

THE ELEPHANT IN THE ROOM Lobby meetings in the European Parliament, Transparency International EU https://transparency.eu/wp-content/uploads/2022/12/MEP_lobby_brief_2022.pdf

The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic works from 1886 to 1986 WIPO PUBLICATION No. 877 (E), Geneva, 1986 https://www.legalanthology.ch/t/wipo_berne-convention_1986.pdf

Understanding Copyright and Related Rights WIPO publication 2016 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf

OTHER SOURCES

2001 IFPI Music Piracy Report p.2 https://www.crb.gov/proceedings/2006-3/riaa-ex-c-102-dp-amended.pdf

750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy, Ars Technica. http:// arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars. (last visited 8.2.2022)

16-01008 UFC QUE CHOISIR c- VALVE https://cdn2.nextinpact.com/medias/16-01008-ufc-que-choisir-c--valve.pdf (last visited 10.2.2022)

"Art is dead Dude" - the rise of the AI artists stirs debate https://www.bbc.com/news/technology-62788725 (last visited 12.2.2022)

Amazon Erases Orwell Books from Kindle, New York Times, July 17, 2009, http://www.nytimes.com/2009/07/18/technology/companies/18amazon .html (last visited 5.2.2022)

Amazon Prime Video Terms of Use https://www.primevideo.com/help/ref=atv_nb_lcl_en_US?_encoding=UTF8&nodeId=202095490 (last visited 2.2.2022)

Case 2:20-cv-00848-KJM-KJN Amanda Claudel v. Amazon.com, inc https://docs.reclaimthenet.org/amazon-lawsuit-video.pdf (last visited 4.2.2022)

Case 2:20-cv-00848-KJM-KJN Amanda Claudel v. Amazon.com, inc, Order to show cause https://cases.justia.com/federal/district-courts/california/caedce/2:2020cv00848/372604/37/0.pdf (last visited 4.2.2022)

Copyright Directive: how competing big business lobbies drowned out critical voices https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices#footnote1_nedpm14(last visited 8.2.2022)

Epic Games store End User License Agreement https://store.epicgames.com/en-US/eula(last visited 5.2.2022)

EU Copyright Reform: Evidence on the Implementation of the Copyright in Digital Single Market Directive (Directive (EU) 2019/790)
CREATe Centre: University of Glasgow & reCreating Europe
https://www.create.ac.uk/cdsm-implementation-resource-page/(last visited 12.2.2022)

Google (2017) Section 512 Study: Request for Additional Comments. p.4-5
https://regmedia.co.uk/2017/ 02/23/google-section-512.pdf

HBO Max Is Reportedly Removing Content To Save Money, IGN, August 19, 2022 https://www.ign.com/articles/hbo-max-is-reportedly-removing-content-to-save-money-heres- what-that-means-for-you(last visited 14.2.2022)

How Much Data Is Created on the Internet Each Day?
https://dzone.com/articles/how-much-data-is-created-on-the-internet-each-day(last visited 10.2.2022)

Lawrence Lessig (Apr. 18, 2011), The Architecture of Access to Scientific Knowledge: Just How Badly We Have Messed This Up, Address at CERN Colloquium and Library Science Talk,
http://cdsweb.cern.ch/record/1345337 (last visited 13.2.2022)

MEP interviews concerning contact attempts concerning the CDSM-Directive
https://www.gramex.fi/meppien-vastaukset/(last visited 21.1.2022)

Neil Gaiman speaks to Rich Millington from ORGZine about books, piracy, copyright and the internet
https://zine.openrightsgroup.org/features/2011/video:-an-interview-with-neil-gaiman(last visited 14.2.2022)

Ofcom report 2019, Use of AI in Online Content Moderation
https://www.ofcom.org.uk/__data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf

Over thirty thousand DMCA notices reveal an organized attempt to abuse copyright law

https://www.lumendatabase.org/blog_entries/over-thirty-thousand-dmca-notices-reveal-an-organized-attempt-to-abuse-copyright-law (last visited 13.2.2022)

Perils of DRM: What Happens to Your Digital Content if the Provider Goes Out of Business? CEPro, June 5, 2009, http://www.cepro.com/article/print/what_happens_to_your_digital_content_if_the_provider_goes_out_of_business/(last visited 10.2.2022)

Rewarding creativity: fixing the value gap, Global music report 2017: annual state of the industry (Referenced 29.1.2023) https://www.ifpi.org/downloads/GMR2017_ValueGap.pdf

Software Management: Security Imperative, Business Opportunity BSA GLOBAL SOFTWARE SURVEY JUNE 2018

Steam Subscriber Agreement https://store.steampowered.com/subscriber_agreement/ (last visited 5.2.2022)

The World Bank Group Global Economic Prospects January 2023 https://openknowledge.worldbank.org/bitstream/handle/10986/38030/GEP-January-2023.pdf

Twitter copyright policy https://help.twitter.com/en/rules-and-policies/copyright-policy (last visited 30.1.2022)

UFC-Que Choisir vs Valve : la justice consacre la vente d'occasion des jeux dématérialisés !, NextImpact, September 19, 2019 https://www.nextinpact.com/article/29653/108209-ufc-que-choisir-vs-valve-justice-consacre-vente-doccasion-jeux-dematerialises (last visited 13.2.2022)

YouTube Copyright Transparency Report H1 2022

YouTube's first Copyright Transparency Report 2021 – A step towards "factfulness" https://copyrightblog.kluweriplaw.com/2022/01/20/youtubes-first-copyright-transparency-report-2021-a-step-towards-factfulness/ (last visited 26.01.2023)

YouTube Help Counter Notification Basics https://support.google.com/youtube/answer/2807684

Warner Bros. Discovery Takes $825M Write-Down on Content Following High-Profile DC Axings and TBS-TNT Cancellations, The Hollywood Reporter, August 5, 2022 https://www.hollywoodreporter.com/business/business-news/warner-bros-discovery-takes-825m-writedown-on-content-1235192629/ (last visited 14.2.2022)

1 INTRODUCTION

1.1 Introduction to the subject

The last few years have brought with them drastic changes in both copyright legislation and in the creative field, with even more changes on the horizon. The ever shifting digital landscape has proven itself a challenge to be tamed and overcome, as plenty of copyright legislation remains stuck in the past, holding onto old values and the old status-quo. New threats emerge with advancements in technology and artificial intelligence, while older threats must evolve to keep up or face oblivion. All the while legislation concerning copyright protection itself has remained an immutable and an inflexible construct of the past, stuck in a framework that is rapidly losing relevance despite its attempts to cling on to power.

It has become more and more apparent as time goes on, that the world needs a more modern, a better equipped framework of copyright protection, to meet the needs of the public. However, the direction the current policies, like the CDSM-Directive, are taking is controversial and divisive, and they might not be what is actually needed. Stronger copyright protection does not necessarily improve the system, as the strength of protection is not all there is to copyright. The issue is much more complicated than that, but nearly everything in new policies revolves around that strength of protection as if it were a lifeline.

This accumulation of strength and the expansion of the boundaries of copyright protection brings discord with it. In lieu of aggressive lobbying, grassroots organization attempts and general loud fear mongering one way or the other. One is subject to rhetorical warfare with one side painting apocalyptic images of what could happen with stronger protection and another side basing their claims for stronger protection on nothing but outdated research and clever phrasing. The world of copyright at the moment of writing is awash with controversy and debate. Oft characterized by reliance on rhetoric and marketing, rather than actual evidence, which in terms of law, is quite ironic.

As laws and regulations do not exist in a vacuum, they are affected by politics and the socio-economic conditions surrounding them. What has been seen with the drafting and approval of the CDSM-Directive is history repeating itself, the same issues repeated and the very same industries yet again turning in a profit while the public carries a heavy burden.

In order to re-imagine the boundaries of copyright protection, first there must be thorough understanding of the current dimensions of copyright protection and its place in the system, it must be picked apart piece by piece to identify its parts and build and only then can there be an attempt at redefining those boundaries, re-imagining them into something that could stand to benefit and improve the system. Therefore, the later chapters of this thesis aim to theorize on the redefining of current copyright protection to create a more equal and a more accessible system of protection.

1.2 Methodology

The methodology of this research mainly consists of analyzing different aspects of existing copyright legislation and observing those laws in their socio-economic context. Therefore, one of the primary methods is of legal dogmatics, which concerns itself with the analysis of existing legislation.[1] At the core of this thesis is the analysis of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (the CDSM-Directive), which is examined through the lens of its Article 17, that concerns the use of protected content by online content-sharing service providers. The Charter of Fundamental Rights of the European Union (the Charter) also plays an important role in this analysis, as through case law and theoretical approaches the conflicts between fundamental rights and the CDSM-Directive are evaluated.

[1] J. Husa, A. Mutanen, & T. Pohjolainen (2008). Kirjoitetaan juridiikkaa: Ohjeita oikeustieteellisten kirjallisten töiden laatijoille (2. uud.p.). Talentum. p. 20-22.

The other primary method concerns itself with the analysis of law through its socio-economic context, law as a facet of society.[2] As has been since the very first iterations of copyright legislation, current copyright systems are as well a target of much political and societal intrigue. Influenced by lobbying and public figures, twisted around economic interests and operating from a limited perspective, the global state of copyright is in turmoil beyond the legislative process. It would do these laws a disservice to separate them from their socio-economic context and purely focus on the legislative text. Even though it is a reoccurring element of legal research to de-politicize issues and look at them through a purely mechanical and technical lenses regardless of the controversy surrounding them in their societal context.[3]

The focus of this research is on mostly EU based legislation with some nods towards the legislation in the United States of America (the US), as copyright protection in the global digital online environment and on its many platforms, oft in their terms of service(ToS) directly reference US legislation, but it is not the intention to substantially pore into matters of comparative law.

Finally in the later chapters additional methodology comes in the form of an approach typical to *de lege ferenda*,[4] as this research aims to present arguments concerning the further application and development of copyright legislation in the future.

1.3 Limitations of the research

In terms of limits this thesis has a couple. The first and the biggest one is that this thesis is focusing its analysis on a single facet of the copyright system at large. From the trifecta of protection, enforcement and infringement, the focus is mainly on just the protection aspect, with the two others discussed primarily through their connections to it.

---

[2] K. Ervasti (2017). Lakimies, oikeus, yhteiskunta: Oikeus yhteiskunnallisena käytäntönä. Edita Publishing Oy. p.9

[3] A. C. Cutler (2005). Gramsci, Law, and the Culture of Global Capitalism. Critical Review of International Social and Political Philosophy, 8(4) p. 532

[4] M. Leskinen (2022) De lege ferenda -tutkimuksesta metodina ja tieteenä. Lakimies 7-8/2022, p. 1158

Also, as this thesis deals partially with ongoing legislation efforts and new developments in the field of copyright protection, with the potential of updates and changes down the road, time, is another limitation. Both the Digital Services Act (DSA) and the Digital Markets Act (DMA) are only afforded a surface level glance and not delved into that deeply.

1.4 Goals of the research

The goal of this research is to offer a structured breakdown on copyright protection and its boundaries, digging into their inherent power structures and biases; From there through the lens of the law in its socio-economic context, see what is required to improve upon modern copyright protection and how the current system of protection could take steps into that direction. To truly re-imagine the boundaries of copyright protection, means going beyond its 200 year legacy and find something to tie together the principles of creativity, innovation and preservation with economic benefits and ownership, without forgetting the role of fundamental rights and the ideals of a more equal global creative field.

It must be noted that the ideas of re-imagining and renewing aspects of copyright legislation to a radical degree are far from being unique to this thesis. Regardless of all that has been written before this topic remains relevant, as for all the developments and changes that have happened within copyright, at its core it remains unchanged. The critiques aimed at the unequal and unbalanced scope of copyright protection from decades ago still stand against the test of time today, providing this thesis perspective and insight, as those critiques continue to go unheard and unanswered.

2 COPYRIGHT PROTECTION: A shield and a spear

To begin this breakdown of copyright protection it is vital to understand that the existence of copyright as a concept is not a requirement for creativity, or for creative works to exist. It is not the thing responsible for the creation of artistic and

expressive works nor what allows the creation of such works.[5] Copyright is to aid and protect these creative works and encourage their creation, but it is not a requirement, nor is it supposed to be a gate preventing entry. It is supposed to be a protective shield, but far too often engages as a spear, fast and ruthless, first in line. But that is not the intended purpose.[6] This chapter aims to break down the existing system of protection to its parts and pick apart the foundations that lie at the core of copyright protection. These foundations will provide both the keys to improvement and the pitfalls threatening to tear down the system entirely.

2.1 The foundations of modern copyright protection

Modern copyright protection in the EU has a strong foundation in principles that have in some shape or form been present since the very first piece of copyright legislation. This foundation is largely formed by the Statute of Anne (1710) and eventually the Berne Convention. These two form the focal point that allow for reflection and analysis on the early configurations of copyright protection, and the establishing of core terminology and concepts.

The Statute of Anne, also known as the Copyright Act of 1710, an act passed by the Parliament of Great Britain, set the ground by laying out some comprehensive yet simple pillars to function as a foundation for copyright legislation. To provide protection, to foster creativity and to encourage the creation of new works. Its full title offers a rather concise explanation for its purpose; An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned. The full title also contains one of core principles of copyright protection; Copyright, in part, exists to encourage learning (8 Anne, c. 19 (1710) (V)). In modern copyright policy this usually presents as exceptions for the usage of copyright protected material in teaching and in classroom settings.[7]

---

[5] J. Silbey, (2014), The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property, Stanford University Press p.10

[6] G. F. Frosio (2014), Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness? 13 J. MARSHALL REV.INTELL. PROP. L. 341 p.378

[7] *For example,* The CDSM-Directive covers this in its Article 5

In itself, the Statute of Anne was made to solve a problem of unauthorized printing, reprinting, and publishing that was seen as a growing threat to authors and their families, and also to encourage the production of new works (8 Anne, c. 19 (1710) (I)). Its purpose was not to be a foundational piece of copyright legislation, but simply an answer to a problem, a transfer of power from the publishers monopoly to the authors. This shift allowed room for public interests as no longer was copyright governed by private entities but instead by the state.[8]

The main feature of the Statute of Anne was undoubtedly the rights it gave to the author. The protection the author would need against unauthorized and uncompensated use of their works. In the Stature of Anne unauthorized and uncompensated use was described as being to the author's great detriment and too often leading to their ruin; "-to the ruin of them and their families" (8 Anne, c. 19 (1710) (I)) is a rather colorful expression for a legal text by today's standards. But it goes to show how serious of an issue unauthorized use was considered to be, strong enough to destroy authors and their families, if something were not done in order to stop it. This functions as a principle number two; Copyright exists to protect the author against unauthorized and uncompensated use of their work.

The Statute of Anne granted authors of books not yet printed or published exclusive rights for a period of 14 years, and if the author was still alive at the end of the first 14 year period, the term of exclusive rights was extended by another 14 years (8 Anne, c. 19 (1710) (II),(XI)). Making the term of protection to be at maximum 28 years. The Stature of Anne had a retroactive quality in the sense that, if at the time of the legislation an author or an owner already had a book that was in print, they were provided with the same exclusive rights, but for a single 21 year term (8 Anne, c. 19 (1710) (II)). This is the third principle; copyright is not eternal but concerns a specific window of time. In the eyes of modern copyright legislation, the lengths of the terms of protection seem very short, as the current standard length

[8] P. Goldstein (2001), International copyright: Principles, law and practice. First Edition Oxford: Oxford University Press. Edition p. 5, 6
Interestingly enough publishers have always had a strong presence in matters relating to copyright, they are one the strongest factions on the playing field, and through the ages have always resisted any leniency shown towards modern developments and inventions. Afraid that they may lose any of the power and station they have always held. *See chapters 2.2 and 2.3 for further discussion*

of copyright protection is over twice as long.[9] The term of protection in certain cases can even reach 120 years in length given the legislation that exists in the US.[10]

In order to qualify for copyright protection in times of Anne the books and writings need not be published or printed but they must be composed, a written form is a requirement (8 Anne, c. 19 (1710) (II)). This lays down yet another principle; a fixed form is a requirement and therefore not everything is copyrightable.

To summarize, the statute of Anne is a skeleton upon which the more modern system of copyright laws has been built. The core principles introduced in it have stayed roughly the same. The duration of copyright protection is to be limited, and not everything is copyrightable, a fixed form is required therefore ideas alone do not qualify. But for what qualifies, the copyright holder must be protected against unauthorized and uncompensated use. And of course, the notion that copyright is to serve public interests as well as private, namely it needs to foster creativity, innovation and to encourage learning (8 Anne, c. 19 (1710) (I), (II),(V)). Due to its place as a foundational piece of copyright history, and regardless of the existence of more modern regulation the Statute of Anne still has held its place in modern courts as it is brought up as an embodiment of the foundations of copyright law.[11]

The way the Statute of Anne presents the author's rights is by current standards a mix of mostly economic rights with some aspects of moral rights but the focus very clearly being on providing economic protection. This reflects the circumstances of its creation and the surrounding economic realities. To survive and avoid 'ruin' came first.

The other foundational piece of copyright legislation that has played the biggest role in defining and further clarifying the principles presented by the Statute of Anne, is the Berne Convention for the Protection of Literary and Artistic Works. This

[9] Berne Convention in its 1908 Berlin revision, already extended it to life of the author plus 50 years (Art.7(1))

[10] H.R.2589 - Copyright Term Extension Act, in Section 102 the terms of copyright protection were extended across the board including anonymous or pseudonymous works or works made for hire where the term of protection extended from 100 years to 120

[11] I. Alexander (2010), Copyright Law and the Public Interest in the Nineteenth Century, Hart Publishing, Oxford and Portland, Oregon, p. 17

multilateral treaty first introduced in 1886, that has since then, gone through multiple revisions, the latest of them happening in 1979, is still present at the core of many newer agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS). The ideology behind the Convention was noble and admirable, the preface of the first edition stating that the Berne Convention was born from a shared wish of heads of states to protect the rights of authors of literary and artistic works in a uniform and an efficient manner.[12] The way it is phrased is almost idealistic and filled with promise. And for over 100 years the Berne Convention has been a steadfast foundation on which all more recent iterations of copyright policy have been built upon. Continuing its legacy and attempting to serve the interest of both the public and the rightsholders.[13]

The Berne Convention continued the legacy of the Statute of Anne and solidified three other core principles as stated in article 2 of the Convention (1886), the principles of national treatment, automatic protection and independence of protection.[14] National treatment demanding equal and unified treatment of creative works, by and in, any of the contracting states. Automatic protection keeping copyright free of any formalities, there is no application process or required registry in order to qualify for copyright protection. Independent protection ensures the possibility of protection regardless of if protection existing in the work's country of origin. These fundamental principles have carried through the numerous revisions, through which the Berne Convention effectively defined what copyright stands for, in Europe and its colonies.[15]

---

[12] Berne Convention 1886 preface

[13] The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic works from 1886 to 1986 p.5

[14] CONVENTION DE BERNE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES (1886)
https://www.wipo.int/wipolex/en/text/278701

[15] Many countries of the global South were under colonial rule when the Berne Convention came into force. Therefore, when the colonial powers of Europe, such as France, Germany or the United Kingdom signed the Convention the countries under their rule became held under the Convention's obligations as well.
P. Goldstein (2001), International copyright: Principles, law and practice. First Edition p. 22
The ramifications of this are further discussed in chapter 4.2

Alongside the principles the Convention also brought forth the concept of moral rights, the Statute of Anne had been concerned primarily with economic rights, due to the socio-economic realities surrounding it. The addition of moral rights into international copyright consciousness was a welcome addition as matters concerning authorship and the integrity of creative works are highly important and together with economic rights, create a better rounded, more accurate reflection on the nature and utilization of creative works. The balance and dynamics of economic and moral rights are further analyzed in chapter 2.1.1.

However, unfortunately the legacy of the Berne Convention is not spotless, there is a multitude of critiques that can be aimed at it, and for all the great things it has achieved there are plenty of times where it falls short on its promises of offering protection. Firstly, it must be stated that Berne does work as intended but only when it is used between relative equals.[16] If the parties involved have any sort of imbalance in their relative statuses, primarily in cases of economic disparity, the situation gets more challenging, and the ideals of unified national treatment end up working counter to its intended effect. Even when Berne works as intended there are still some issues of balance. One major one is there being no upper limit for the length or amount of protection that can be afforded. Only having a minimum without a maximum, has left the situation unchecked from the other end. Forcing others to comply with a limitless expansion of copyright protection, without means to properly counter it.[17] Another major thing is that even amongst largely western countries or West-European countries, there are cultural differences and Berne takes none of that into consideration, artistic and literary works are an inherent part of cultural heritage and thus it should be reflected in their treatment, instead of forcing them into a unified economics oriented mold. It is not that surprising, that considerations for cultural context are confined within special provisions for developing countries, given that Berne was intended to function as a global copyright convention, but in the drafting of its first iteration was built by a handful of primarily West-European

[16] A. Story (2003), Burn Berne: Why the Leading International Copyright Convention Must Be Repealed, 40 Hous. L. Rev. p. 782

[17] A. Story (2003), Burn Berne p.789

countries with barely any regard for other potential approaches to copyright.[18] The only countries outside of Europe present since the very beginning being just Haiti, Liberia and Tunisia. It could be argued for Tunisia to be excluded from this list as it was at the time under French colonial rule and thus an accessory to France.[19]

The legacy of both the Statute of Anne and the Berne Convention is a vital part of the history of copyright protection, but in the current day both as institutions and pieces of legislative text are outdated and frankly should be retired. Especially in the case of Berne that was rigorously updated till 1979 but since left to stagnate as the base and core of newer agreements, the time for retirement is nigh. There is no purpose to create a new revision to bring it to the 21st century. As what already exists is a matryoshka of legislation, getting more and more complex as more layers are added on top. It would be better to start over with a cleaner slate, taking along the lessons learned and principles proven functional. And next time, that a convention or a treaty intended to be global is drafted, may the hopes for globality and intersectionality be reflected in those drafting it, lest another law be drafted by those not impacted.

2.1.1 Economic right vs Moral right

As briefly discussed before, the rights given by copyright protection can be divided into two categories, economic rights and moral rights. Most copyright legislation is a mix of the two, as both of them are fundamentally part of the prevailing principles. However, they are hardly ever equally represented in any given piece of copyright legislation but instead a preference given to one over the other.[20] That preference showcasing the priorities of the parties involved in the drafting process, reflecting the values and the socio-economic realities of those times. That preference has in most

[18] A. Cerda Silva (2012), Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright. PIJIP Research Paper no. 2012-08 American University Washington College of Law, Washington, D.C. p. 3

[19] Tunisia came under French rule in 1881, just five years before the Berne Convention was enacted.

[20] P. Goldstein, P. B. Hugenholtz (2019), International Copyright: Principles, Law, and Practice. Fourth Edition. Oxford: Oxford University Press. p.8

cases favored economic rights and which shows in modern copyright legislation as well.[21]

Quickly to define these two concepts before diving deeper into the implications of this division. The economic rights within the scope of copyright, make it so that copyright is alienable from the original author and can be bought or sold just as any other form of property. The economic rights govern distribution, compensation and production.[22] As a moral right copyright is concerned with rights to attribution, integrity, disclosure and withdrawal. To define the moral rights in more detail, they generally consist of the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation, this is for example reinforced by the Berne Convention.[23]

The origins of copyright as a purely pragmatic economic right can be found in the UK, the Statute of Anne (1710) as discussed before can be considered one of the first instances of systematic copyright protection and its focus was concentrated on the distribution and reproduction aspects of copyright. Continental Europe, especially France,[24] has been more focused on the moral rights, or as they call it, author's rights, as a part of human rights[25].

In the US copyright and other intellectual property rights are deeply interwoven with trade issues due to aggressive lobbying during the 1970s and 1980s as the US felt threatened by other rising IP powerhouses like Japan and considered that a strong international IP policy would help them maintain their market dominance.[26] This linkage between IP and trade further ties them with economic

---

[21] A. Story (2003), Burn Berne p.776

[22] Understanding Copyright and Related Rights WIPO p.9, 10, 14

[23] B. Haggart (2018), Copyfight: The Global Politics of Digital Copyright Reform.Toronto:University of Toronto Press. p.73

[24] *See* P. Goldstein, P. B. Hugenholtz (2019), International Copyright: Principles, Law, and Practice. Fourth Edition. p.140
See France, Intellectual Property Code Art. L 111–4

[25] In the Universal Declaration of Human Rights, the author's moral rights are stated in article 27. According to it, both moral and material rights are by default included for the author.

[26] P. Drahos & J. Braithwaite (2002), Information Feudalism: Who Owns the Knowledge Economy, Contemporary Sociology 32(5) p. 92, 106
B. Haggart (2018), Copyfight p. 46

rights and that link is impossible to sever now. It was not a natural evolution of copyright and IP protection; it was a decision based on a perceived exaggerated threat; an aggressive panic response due to the potential that the US might have to concede some of the power they wield in the global field of IP. The EU is not immune to the ramifications of this development and the stronger push for better protection for specifically economic rights can be observed.

Copyright law is a balancing act in multiple ways. One of them being a balancing act between the rightsholders' exclusive rights and public interests. Economic and moral rights interact with this balance in different ways as the parties involved do not share a unified preference for one or the other, and instead act on varying different interests. In this balancing act moral rights have oft been dealt a poor hand. This was the case with the World Trade Organization and TRIPS, as to follow TRIPS is a requirement to being part of the WTO. It meant that following the rules laid out by the Berne convention also became a requirement. Though an exception was made. The rules laid out by the Berne convention need not be followed when it comes to moral rights.[27] The conclusion that can be drawn from this wording implies the moral rights to be less important than their economic counterparts, as they are left optional instead of being reinforced as binding. The economic values dominate and are given priority over moral ones. Creating a hierarchy that any currently existing global copyright policy has not departed from. To show preference for moral rights over economic ones invites the ire of those more concerned with the economic rights, as departure from the norm implies a potentially weaker economic protection to those interacting with a system that shows preference for moral rights.[28]

2.2 Copyright and financial power

[27] P. Goldstein, P. B. Hugenholtz (2019), International Copyright: Principles, Law, and Practice. Fourth Edition. p. 69
A. Story (2003), Burn Berne p.776

[28] B. Haggart (2018), Copyfight p. 79-80 *also,11, 26*
The US for example does punish anyone who does not concede to their demands, generally with economic pressure and blacklisting

As copyright governs economic rights it creates a direct link between copyright and its role as an aspect of financial power. The world at large is far from free of the discrepancies of wealth and the power it's capable of bringing.[29] This means that any tool, any policy that governs wealth and property has a chance of both shifting the scales towards balance or further tipping them in someone's favor. With copyright this can be seen when equality in treatment does not translate into equity in treatment.[30]

Uneven wealth distribution is simply another form of inequality, one that is continuously getting worse, especially now at the cusp of another recession.[31] It is a major issue, that naturally exists beyond copyright and intellectual property. But within this very narrow scope of intellectual property, it still is a type of property[32] and therefore a type of wealth. There is a need to interrogate what this means and how the modern copyright system and the over-expansion of the boundaries of copyright protection contributes to and encourages uneven wealth distribution. The norms governing copyright protection as they are currently known are prominent parts of the global capitalist system, and they are products of that system.[33] As parts of an inherently unequal system the copyright norms of the past and the present contribute to global inequality and can function as gatekeepers, mostly benefitting those who already hold status and influence.[34]

Strong, ever expanding copyright protection has enabled the industries operating on those terms, such as the creative industry, to contain massive powerhouses that have grown to the potential of dominating markets and distorting

---

[29] L. Chancel, T. Piketty, E. Saez, G. Zucman *et al*. (2022), World Inequality Report 2022, World Inequality Lab wir2022.wid.world p.3 foreword

[30] *See chapter 4.2 for further discussion*

[31] L. Chancel, T. Piketty, E. Saez, G. Zucman *et al*. (2022), World Inequality Report 2022 p.27,37
The World Bank Group Global Economic Prospects January 2023 p. 3

[32] W. Patry (2009), Moral Panics and the Copyright Wars, Oxford: Oxford University Press. p. 103, 109, 112
The status of intellectual property as property could be brought into question, as it is far removed from physical property in function, limitations and exclusions.

[33] *S. K. Sell* (2003), Private Power, Public Law The Globalization of Intellectual Property Rights, (Cambridge Studies in International Relations). Cambridge: Cambridge University Press. p.24
A. C. Cutler (2005). Gramsci, Law, and the Culture of Global Capitalism p.833-835

[34] A. Story (2003), Burn Berne p.792-793

competition.[35] It has not yet fully actualized, but similarly as within other intellectual property, copyright too is somewhat restrictive to competition when considering the aspects of production and distribution, but this is acceptable as it is to allow other forms of competition to exist, such as with innovation. There is a balance that needs to be maintained to avoid potential conflict.[36] This balance will be in jeopardy if the largest media conglomerates, these powerhouses, within the creative industry continue amassing more and more intellectual property rights under their wings.

The online environment functions as an open platform for mass collaboration without the artificial boundaries usually established by the powers normally in charge of publishing and distribution of copyrighted works. This lowers the threshold for participating in the global market for creative works. Allowing anyone the power to showcase their work to the public and potentially reach an immense audience. There are endless barrier breaking possibilities in these newer horizontal relationships between the creator and their audience. The creators and customers, or simply consumers and users, are within the same space and can reach each other easier without needing an intermediary to navigate these spaces and relationships. This naturally causes worry in those who had grown used to holding the powers of content distribution, like publishing houses. Viewing this as a threat to their continued existence and profits. It makes them want to protect the top-down consumer system where they sit at the very top of this business model that was created by vertical monopolization.[37] The idea of a horizontal and equal relationship between creators and consumers is for them a nightmare. However, as much as they fear losing power, at this time there is no true threat, as for that to happen there would need to be a binding systematic change, to spark a change in the industry's *modus operandi*, and for such a change to happen, is highly unlikely at this time.[38]

---

[35] M. *Trúchliková & M. Kmety Bartekova* (2020). Analysis of market concentration in creative industry. SHS Web of Conferences. 83. p.4-7

[36] J. D. C. Turner (2015), Intellectual Property and EU Competition Law Second Edition, Oxford University Press p.2

[37] W. Patry (2009), Moral Panics and the Copyright Wars, p.5-6, 26

[38] If such fall from grace were to happen, it would come be heralded by certain signs, some of which have already been seen. To avoid innovation and new pursuits, to fear progress, in favor of maintaining earlier status quo, will lead into the eventual failure of business practices built on restrictions, reducing profits earlier considered safe and guaranteed.

Independent publishing is a growing but still a small industry in comparison, very few even opting to compete for the traditional markets and distributors. They are not a replacement but simply an alternative. The creative field is diversifying in more than one way as traditional barriers of entry can be subverted. But this does not get rid of the influence that the traditional publishing industry still holds, and the markets they cater to. These two should be able to exists side by side furthering each other's development and driving innovation. There is power in having choices and that is what these alternatives are providing. These alternative means of publishing that are managing to break barriers however cannot change the fact that the systems they exist within are biased and unequal at a fundamental level. The power the publishing industry as an intermediary between authors and customers holds, must be kept in check.

As history repeats itself in circles and like the Statute of Anne in its time was a direct response to reign in the private publishing monopoly that actors, like the Stationer's Guild, held on copyright. Since then, the publishing industry has regained its footing, continuing to accumulate power and wealth, and thus stands to be reined in again, lest this ends in another monopoly.

There are several forces at play when it comes to copyright's role within financial power. Forces that work with it, and forces that work against it. Of the forces in opposition, piracy, is the most interesting. To regain, or for the first time take hold of that financial power, via illegal means, an act of anti-establishment resistance that is simultaneously overexaggerated but yet downplayed. A contradictory force that in the modern digital online environment is as unavoidable as advertisements.

2.3 Dissection of Piracy

This chapter aims to discuss the nature of 'piracy' and what it means for copyright protection. How it interacts with the trifecta of authors, rightsholders and consumers. To showcase its effects and the myths surrounding it. All in order to better

---

J. A. Schumpeter (2003), Capitalism, Socialism, and Democracy, Routledge via Taylor & Francis e-Library p.87

understand one of the driving forces behind the call for strengthening copyright protection; this nebulous piracy that is a threat to property, to ownership and to integrity; this wonderful piracy that is a source of opportunities, of innovation and the breaker of barriers, a force that stands before the overexpansion of copyright protection.

This thesis uses the word 'piracy' when discussing the phenomenon of especially media related copyright infringement and the culture surrounding it.[39] Namely to uphold consistency and clarity as that is the language sources discussing this phenomenon also use. But it brings with it the first point of order which is that the term 'piracy' in terms of copyright infringement is very poorly defined,[40] proper legislation uses that term rarely and when it is used, it functions as a nebulous catch-all that is vague and leaves room for imagination. It makes the word 'piracy' powerful in its own right as it comes with a multitude of connotations both good and bad. It can be used as a tool to shape expectations and guide perceptions.

Piracy itself is oft defined by its decentralized nature and the utilization of peer-to-peer(P2P) networks that facilitate the sharing of copyright protected content with minimal liability. The technological developments have enabled the use of cloud storage to hold large amounts of contents easily available for large audiences,[41] which on the audience part requires less of an active role than engaging in a P2P network. The third less common method that usually concerns games and software but is also applicable for other types of media, requires modification of a device to enable it to run, edit, and process third party content, effectively removing any limitations the manufacturer utilized to limit the device's use. This is also known as jailbreaking. These are not the only methods available, but they are the most prominent ones, and they are mentioned here to offer examples to those less familiar with the more recent modern ways of piracy.

---

[39] Another potential definition for piracy is offered by the Global Online Piracy Study p. 17 where it is defined as unauthorized distribution of content that happens in the online environment, but for the purposes of this thesis is both too vague and too limited to be utilized as is.

[40] J. Karaganis, et al. (2011), Media piracy in emerging economies, Social Science Research Council p. 2

[41] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study Amsterdam Law School Research Paper No. 2018-21, Institute for Information Law Research Paper No. 2018-03 p. 19

The methods and effects of piracy are varied in nature and so is the response to it. This dissection ahead focuses mostly on the role and concept of piracy within the entertainment industry as a part of the larger creative industry, as that is where the conversation surrounding it mostly resides, but piracy is a much larger phenomenon that reaches far beyond a singular industry.[42] But as piracy and copyright infringement permeate every nook of the online environment and continue to function outside it as well. The people and different industries are divided. The continued existence of rampant unbeatable copyright infringement has brought with it great opposition in what is colloquially dubbed as The War on Piracy.

2.3.1 The War on Piracy

The War on Piracy is the rather theatrical name for fighting copyright infringement that happens nowadays mostly online. In the same way as the War on Piracy the phrase Copyright War is also present when discussing the nature and status of copyright and the policies surrounding it.[43] Both terms holding a certain gravitas behind them. The choice to call this fight against copyright infringement 'the war on piracy' is deliberate. It is a rhetorical device to bring weight to an otherwise relatively minor offence. The Berne Convention and the Paris accords made sure to keep the concept of 'piracy'; An issue of copyright infringement where the goal is the reproduction and utilization of the expressive and creative content of a work, separate from that of counterfeiting; An issue of trademark law where the goal is the reproduction of a product resembling a more expensive branded good.[44] This distinction has been important as counterfeiting can be seen as the more serious offence of the two. Nowadays the two are further away from one another than they have ever been before, piracy having smoothly transitioned into a digital environment with physical pirated goods beginning to grow obsolete in many parts of the world but counterfeiting still very much an industry defined by physical production and distribution of goods. Regardless of this growing separation between

[42] A different perspective on piracy, more focused on its function in aiding fundamental rights and its role as an act of resistance and critique is discussed later in the thesis in the 4th and 5th chapters.
[43] W. Patry (2009), Moral Panics and the Copyright Wars, p. 2, 11
[44] J. Karaganis, et al. (2011), Media piracy in emerging economies p.3

the two, now more than ever the two are being conflated together, oft with the intention of elevating the potential harm of piracy. Piracy that is becoming more elusive as and decentralized now that it no longer is reliant on physical media. This is problematic for a multitude of reasons but mainly due to the inaccuracies it fuels.

One of the major arguments against piracy presented in this war against it, is that it is used to fund organized crime and terrorism. It is a bold claim and even though aspects of it can be somewhat proven, the claim is far from factual. It is a remnant from the late 90s and early 2000s, when media piracy was still reliant on physical media such as CDs and DVDs and therefore required organized manufacturing and distribution methods.[45] Due to streaming, other forms of digital distribution and a general drop of value surrounding physical media, the piracy of the 90s is practically dying and with it, piracy's connection to cross-border smuggling and organized crime.[46]

This alleged connection to organized crime draws a connection between the war on terror and the war on drugs, and the war on piracy becomes something more by association.[47] This association gives it a lot more weight and power it would not have without it. A certain image has been built for it. A quote that summarizes this kind of effect rather well goes as follows:

"Metaphor is the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality"[48] A reality redescribed to fit an agenda. The 'war on piracy' is a marketable phrase. And an insidious one at that, the act of aligning copyright infringement with serious acts of human rights violations and violent crime creates unreasonable implications. The use of piracy as a rhetorical device relies on the use of aggressive manipulative language that serves to obfuscate its otherwise more minor nature. It inspires fear and uncertainty, not only

---

[45] J. Karaganis, et al. (2011), Media piracy in emerging economies p.37-38
2001 IFPI Music Piracy Report p.2
https://www.crb.gov/proceedings/2006-3/riaa-ex-c-102-dp-amended.pdf

[46] J. Karaganis, et al. (2011), Media piracy in emerging economies p.38,40

[47] S. *Mirghani* (2011), The War on Piracy: Analyzing the Discursive Battles of Corporate and Government-Sponsored Anti-Piracy Media Campaigns. Critical Studies in Media Communication, 28(2), p. 116-119, 121, 124

[48] P. Ricoeur (2004) The Rule of Metaphor The creation of meaning in language, University of Toronto Press via Taylor & Francis e-Library p.5

discouraging acts of copyright infringement but also innocuous and casual information exchanges.[49] The War on Piracy has the potential to feed the so called "chilling effect", which can be defined as discouraging legitimate uses of fundamental rights, in this context primarily the freedom of expression and the freedom of speech, or the implication that their utilization is unfavorable.[50] To legitimize the use of the term piracy and the connotations like "the War on Piracy" that it brings with it, in the legal context and official pieces of legislation risks discouraging people from utilizing their rights in fear of retaliation or consequences.

The rhetoric surrounding piracy has found its way again into EU legislation as well.[51] When it comes to the CDSM-Directive the word piracy is mentioned once. A purposeful choice given its context. The mention appears in the preface in which it is stated that "--the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy." (CDSM-Directive, Recital 62). This is a serious issue of what can be considered layman's terms yet again finding their way into proper legislation. A better way to phrase the statement above would have been '--to facilitate copyright infringement' as opposed to the '--to facilitate copyright piracy' that was used. Another option could have been '--to facilitate unauthorized usage of copyright protected works'. Both of the options presented here stay true to the meaning and intention of the text and utilize already established language from the field of law. They would be more neutral and less controversial in their ways of expressing the sentiment against the violation of copyright.

2.3.2 Judging the effects of piracy

[49] S. *Mirghani* (2011), The War on Piracy p.120

[50] L. Pech (2021), The concept of chilling effect, Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU, Open Society European Policy Institute p. 2-5 The chilling effect is widely utilized in EU law but due to the scope of this thesis whenever it is talked about, it will be in reference to its effects on fundamental rights, namely freedom of expression, unless otherwise specified

[51] Before the CDSM-Directive, Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013, OJ No. L 181/15, June 29, 2013, replacing Council Regulation (EC) No. 1383/2003, was a product of the Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan, that also utilizes piracy as a convenient shorthand.

In order to understand the opposition and response to piracy, its effects must be interrogated in detail. A question that arises from the existence of this large scale 'War on Piracy' is how serious the issue behind it really is. How big of a problem 'piracy' really is? Is the threat it poses really worth the effort and potential consequences that come with strengthening copyright protection. Is this war actually worth fighting for?

In the beginning, few things are immediately obvious; firstly, most of the existing research is created by affected parties who have vested interest in the results. Plenty of research is sponsored by the entertainment industry, especially when it comes to statistics. The existence of industry sponsored research in itself would not be an issue, but it becomes one when it showcases clear bias, lacks sources and is veiled in manipulative language aiming to invoke guilt. They do not stand up to closer examination and fail to uphold the set standards of peer reviewed research. The statistics this industry sponsored research produces offer estimates on how many jobs lost are lost due to piracy, and have during their relatively short history, made extensive claims of annual losses with very little to no evidence.[52] It has proven difficult to procure sufficient evidence to make a ruling on whether piracy harms legal sales or not.[53] However, this lack of evidence has not hindered the war on piracy. The existence of this research is more to justify the efforts that go into fighting piracy and act as a tool of attempted enforcement, than to provide objective scientific data. There are myths about the impacts of piracy still in circulation, that have their origins in decades old guesses and speculations, that continue to be parroted back and forth between different industry affiliates.[54] This fear of piracy, especially online piracy is not a new phenomenon. The entertainment industry is quick to fear any change that has the potential to lower sales or alter the ways the industry operates with. From the 1950s to 80s and now the post 2000s, the industry

[52] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 4,6
[53] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p. 10
[54] "750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy."
Ars Technica. http:// arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war- on-piracy.ars.

continues to fear change. In the 50s the target of fear was radio airplay[55], in the 80s it was private copying in households[56] and in the 2000s and 2010s its online piracy in its various forms.

Excuses can be made for 'the end justifies the means' type of approach at least in the eyes of the industry as ending piracy, ending widespread copyright infringement, surely is a noble goal worth the effort and the questionable means. However, as is to be shown, most of the means most commonly used for fighting piracy can be disproven of as lacking in functionality or results, and even the end goal of eradicating piracy is not entirely positive, as the issue is much more complex and cannot be reduced into a black and white view with simple solutions.

To start breaking down effects of piracy, begins with noting that there are multiple different ways to approach the categorization of the varying forms of piracy, as the effects of it are prone to differ depending on the target. Audio-visual media and music react differently than games and books. All four of these categories audio-visual media, books, games and music are affected in different ways by their unauthorized usage and distribution, therefore it is not always wise to lump them together into a homogenous mass of content equally affected by piracy.[57] However lumping them together or making generalizations based on only some of the categories allows these industry sponsored statistics flexibility and a way of editorializing the information they provide.

Some of the issues with the older statistics are born of the one to one correspondence assumption, that effectively makes for the highest possible loss estimates. From evaluating the evidence on piracy's harm on legal sales, most of the literature agrees that there is a negative effect than can be observed. However, the

---

[55] H. Leblebici, et al. (1991). Institutional Change and the Transformation of Interorganizational Fields: An Organizational History of the U.S. Radio Broadcasting Industry. *Administrative Science Quarterly*, *36*(3), p.356

[56] *See in general:* A. J. Bottomley (2015) 'Home taping is killing music': the recording industries' 1980s anti-home taping campaigns and struggles over production, labor and creativity, Creative Industries Journal, 8:2
The idea that home taping is killing the recording industry did invite rather creative critique at times. The cassette for Dead Kennedys In God We Trust from 1981 had printed on its B-side "Home taping is killing record industry profits! We left this side blank so you can help."

[57] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p. 15

evidence also shows that the negative effect does not indicate a one to one correspondence. This indicates that in reality the negative, harmful effects of piracy are and have been smaller than what the industry sponsored statistics have implied.[58] Another layer of complexity that makes creating accurate statistics more challenging comes from the increased diversity of legal distribution. The same content distributed both in physical and digital forms, potentially multiple different physical forms and digital forms. The more iterations there are of a singular product, the more likely they are to cannibalize one another. This will lead to skewed statistics unless the statistics evaluate all legal, both digital and physical, sources, against all illegal ones.[59]

Another issue with the statistics used comes from the underlying cause of piracy. If the consumer has a choice between legal access and piracy it is easier to assume at least some amount of correlation between their usage. But if the consumer does not have that choice for example due to them being priced out or the legal methods of access not being available it cannot be assumed that every instance of piracy is a true loss, the correlation no longer stands as regardless of the consumer's wishes, they cannot purchase the legal goods.[60] From another perspective interrogating what a loss means to a company, the correlations become even harder to parse. This is something to consider especially when it comes to pirating digital goods and the loss calculations made of those. When a product lacks a physical form its reproduction and distribution is both cheaper and easier as it is not subject to the production costs of a physical product. The pivot to digital only releases with the new products highlights the benefit it provides for the companies, but further complicates telling apart the difference between a profit that was not made, and a loss. When phrased this way it opens up another way of interpreting the relationship between the rightsholder and a consumer. The rightsholder sees the consumer as a potential source of profit, but due to piracy for example, the consumer never buys the product and the rightsholder does not make a profit. There only ever was the

[58] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.24
[59] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.27
[60] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 65

potential of profit, therefore it is odd that the rightsholder acts as if profit was made and then lost, instead of the profit never actualizing in the first place, remaining as untapped and unutilized potential.

Especially when there is a different side to that unutilized potential and the actual losses. The other side of the coin comes as the consumer surplus, as it is in business another's loss is another's profit.[61] The consumer surplus refers to the positive effects piracy has for the consumer party. These positive effects can range from the surplus of an individual; money saved and then invested elsewhere improving the individuals quality of life; to the surplus of the consumer base as a whole; the overall savings and reinvestments improving the quality of life on a societal level. Taking a few lessons from the merger of law and economics the following sections get a bit theoretical and involve some speculatory elements. In order to keep it moderately simple the focus is fully on media and entertainment piracy.

If one considers piracy in the scope of a single national economy, piracy is a loss for specific industries and specific rightsholders but that does not equate it to being a loss at a national level. These are two completely different scales at which losses happen.[62] If the goods pirated are domestic, then what happens can be a transfer of income and not a loss. The money the consumer saved with domestic piracy will can be re-introduced into the economy by using it on something else, such as housing, utilities, public transportation, other entertainment or any other possible form of an expense. This in return generates for example tax revenue. This way the industry claims about jobs lost due to piracy has their flip side, jobs created by piracy.[63] For piracy to be truly harmful at the national level, as the industries claim, one must look at both the investment and losses of an industry and compare them to the consumer surplus gained by piracy. The true net impact on the national economy will be the difference between these two values. This is an unusual claim and very complex to address without entering the realm of advanced mathematics

[61] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 16, 34
[62] J. Karaganis, et al. (2011), Media piracy in emerging economies p.16
[63] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 17

concerning economy, which is far beyond the purpose of this thesis. However, it is enough to point out this possibility of a potential consumer surplus as generally that has been ignored by the industry sponsored research to which it is profitable that the losses the industry faces, transfer undiluted to the losses of the national economy,[64] which even if not entirely untrue, needs to be questioned as it is lacking part of the whole equation. Therefore, it must be pointed out that piracy can and most likely is at least somewhat beneficial to the society at large or by the very least beneficial to consumers.[65]

The claim that piracy harms the national economies has an additional facet that needs to be considered in order to better pass judgement on the matter. The calculations done to calculate losses will differ drastically depending on whether the products that are the targets of piracy, are imports or results of domestic production. In the case of the pirated products being imported and not being the result of domestic investments, which most often is the case if the domestic country is not the US, as they are the largest exporter of media and entertainment.[66] The result is that any legal purchase of non-domestic media transfers at least a part of that profit outside the national market, the revenue mostly flowing towards the US. The pirating of non-domestic goods however does not create such outflow but instead nets benefits at the national level. Reversing this reveals the effects for the domestic entertainment industry; The piracy of their products is more likely to cause harm on a national economy. Therefore, when considering both industry losses and the consumer surplus the net impact of piracy on the economy is more often likely to be a positive and not a negative virtually anywhere outside the US. For the best possible results for both parties, to maximize the benefits of the consumer surplus and minimizing the harm to the national domestic economy, the utilization of piracy

[64] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 16
[65] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 16
L. Aguiar, J. Claussen & C. Peukert (2018), Catch Me if You Can: Effectiveness and Consequences of Online Copyright Enforcement. Information Systems Research 29(3) p.23
Poorly managed enforcement efforts can lower the consumer surplus without managing to increase lawful consumption.
[66] B. Haggart (2018), Copyfight p.12 tables 1.1, 1.2

should be reserved for imported products, while supporting the local industry via legal channels.

Overall, the effects of piracy are fluid and dependent on a variety of factors. Statistics show that in the years of 2015 and 2016 online piracy was in a decline, the increased availability of entertainment provided by streaming services such as Spotify and Netflix incentivized people to pay for legal access.[67] However, this has also increased demand for more content that has led people to utilize online piracy to access the content they feel is lacking from the legal options they have available.[68] In addition, in recent years the fragmentation of streaming services has increased the costs of legal access, which is one of the reasons people are reverting back to piracy. Many continuing to pay for a single subscription based streaming service such as Netflix, but not investing in multiple ones. Networks continue to pull their series from other streaming platforms to create their own ones with exclusivity to that content. This fragmentation is bound to divide consumers, as all around costs of living are going up. Consumers cannot afford to double or triple the amount they spend on subscription services when the content they desire splits from one service to multiple ones.

The emergence of the subscription based streaming services solved the issue many had with television and purchasable additional channels, where costs were high, but the consumer was not guaranteed to get the content they wanted and still had to tolerate pervasive advertising. But by dividing the content available onto multiple separate subscription based streaming services the problem that was once solved has been re-invented again. Therefore, exclusivity will be beneficial in the beginning, especially for the first to make such claims, but as others will follow in search of profit; The exclusivity will herald the end of an era.

---

[67] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.23

[68] Office for Harmonization in the Internal Market, 'European citizens and intellectual property: perception, awareness and behaviour', November 2013 p.36.
Especially amongst young adults the acceptance for piracy and "illegal downloads" is over 40% if there is no legal alternative readily available
See also, S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition. Common Market Law Review, 57 (4), p.1003

This just goes to show that there are hardly any solutions to piracy that will hold up in the long run, as the markets change and fluctuate so will the appeal and popularity of piracy. Any means used to curb piracy must be able to adapt to the rapidly changing online environment and adopt a more reactionary approach that better targets the piracy trends, even if that means letting go off some of the earlier enforcement methods.

2.3.3 Curbing piracy

Curbing piracy can be divided into two distinct categories, enforcement and education. Enforcement encompasses measures provided by national laws, whether civil, administrative or criminal law.[69] Whereas education concerns itself with mainly public awareness campaigns, attempting to bring attention to the risks and consequences of piracy. Many of the campaigns holding a tone that is intended to instill in people the fear of being caught or targeted by the enforcement methods.

In general, the tactics both education and enforcement methods utilized for curbing online piracy are hardly effective, especially in the long run,[70] often they are costly and rely on extensive marketing campaigns or concentrated crackdowns, neither which are cheap to facilitate. Many of these tactics are bound to fail but instead of their lack of success being due to them being useless and misguided they are simply deemed insufficient.[71] This leads to the industries doubling down on their enforcement policies instead of working towards different solutions that could prove more efficient. Many enforcement methods do bring with them a temporary relief but piracy, especially in the online environment, is quick to bounce back and adapt.[72] It does not only adapt but it evolves as well. Enforcement measures can in their attempts at control create further fragmentation in the illegal market of pirated goods, making further enforcement measures progressively more time consuming and more

[69] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.20
[70] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.22
L. Aguiar, J. Claussen & C. Peukert (2018), Catch Me if You Can p. 29,30
[71] J. Karaganis, et al. (2011), Media piracy in emerging economies p.21
[72] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.28

expensive.[73] Unsurprisingly online piracy is at its most resilient when not driven by profits nor reliant on monetary gain. It allows it more flexibility and ways to avoid liability as plenty of the enforcement measures are aimed at commercial use.

It is also worth noting that recent research suggests that anti-piracy campaigns can sometimes lead to increased rates of piracy. Lumping together messaging of varying strengths, like in the infamous "You wouldn't steal a car," anti-piracy ad, that equated movie piracy with acts of physical theft, dilutes the goals and the messages themselves, leading to a weaker impact.[74] These awareness campaigns also introduce many to piracy who would not otherwise consider it. The more widespread the awareness campaign ends up being the more normalized piracy gets presented as, it no longer appears as a serious crime of the few, but instead as something many, probably even people one personally knows, participate in. The implications are that it is not as bad as it seems if many are participating in it, leading into online piracy being less of a taboo.[75] All this leading to the anti-piracy messages getting taken less seriously. As mentioned earlier in this thesis, anti-piracy campaigns are very fond of statistics and use them in their attempts to hammer home just how much piracy hurts the economy and those involved in the industry. However, the usage of these “x number of jobs lost due to piracy” might not be getting the wanted results as people fail to sympathize with purely statistical victims that are far removed from their personal circumstances.[76] Piracy is often seen as the crime of the people, it harms no one but faceless companies and benefits those who are lacking in wealth and power. The more piracy has become normalized and the barriers to engage with it have lowered, the more that sentiment has gained power. Piracy has a strong positive image nowadays, especially amongst the millennials and those of the middle and lower classes. The anti-piracy education campaigns are going against this positive image with a hard negative angle that is bound to incite immediate resistance. It does not help that most of the educational anti-piracy

[73] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.29
L. Aguiar, J. Claussen & C. Peukert (2018), Catch Me if You Can p. 32
[74] G. Grolleau & L. Meunier (2022), Doing more with less: Behavioral insights for anti-piracy messages, The Information Society, 38:5, p.4
[75] G. Grolleau & L. Meunier (2022), Doing more with less p.3
[76] G. Grolleau & L. Meunier (2022), Doing more with less p.2

campaigns repeat the mistakes listed above in various ways. It is never the same wording, but the intentions and sentiments behind the campaigns have stayed mostly unchanged from the early 2000s. They appeal to those who already agree with the message and reinforces the already existing anti-piracy mindset, but often fails to make an impact on those who do not already share any anti-piracy values. Much in the way of virtue signaling the campaigns are filled with excitable buzzwords and hollow rhetoric. Leading to many of the education campaigns coming across as detached from the realities of the online environment and out of touch with the demographics they are supposedly trying to reach.

But unfortunately, due to the very black and white moral framework constructed around piracy as a whole means that the only 'right' way to counter it is by increasing enforcement and strengthening protection as anything else would be a concession and giving ground for further erosion of copyright protection.[77] This is an exaggeration, but the fact remains that the current means of education and enforcement surrounding piracy are not producing the desired results. One does not need to be an expert on this field to notice that when a hammer does not solve the issue the next step is to try a different tool and not simply to hit harder. To effectively combat online piracy, one must interrogate its causes and work on solving issues at their roots, not just targeting the symptoms. Piracy in itself is a multifaceted symptom of intersecting societal issues ranging from poverty to access to education, to global inequality. Stronger enforcement efforts will at worst simply increase piracy; Increasing access barriers, shutting down providers or increasing fines will not remove the causes of piracy, it does not remove the needs that piracy is used to fulfill.

Piracy is a convenient scapegoat for the issues present in the copyright systems, it provides something to blame.[78] By focusing all efforts on piracy and piracy only, others are left without consideration. Therefore, when piracy is accused of the erosion of copyright, the line cannot end there but instead one must ask, what else is eroding copyright? That leads us to the final question of this section; what is

[77] J. Karaganis, et al. (2011), Media piracy in emerging economies p. 21
[78] W. Patry (2009), Moral Panics and the Copyright Wars, p.133, 138-139

the state of the freedoms of the consumers, of the internet users, when those operating with economic interests are also tasked with these enforcement and regulatory tasks?[79] This creates a massive conflict of interests to address. These platforms operating under economic incentives were never meant to play the role of a judge.[80] The clauses for the exceptions concerning copyright have long been under threat. The rightsholders are already quick to make accusations of piracy or equating these actions to be the likes of piracy for anything they consider to be an unfair use of their property even if that use is not illegal.[81] The protected categories, the clauses for fair use, the limits of the public domain and other exceptions and limitations are constantly pushed around, their erosion could be seen as the bigger threat for copyright than what piracy presents at this time.

Piracy as an unlawful, unregulated, decentralized force pushes back on the continuous expansion of copyright protection, but it is a double edged sword as it also drives the demand for copyright's expansion. There is a balance to be found in here. A balance between competing interests, between conflicting interests; a balance in the system. Piracy is a product of the copyright system; It is a direct response to the boundaries of copyright protection and can only exist within a system of copyright.

All in all, the call for stronger protection of copyright interests is impossible to evade and piracy has become an integral part of the conversations surrounding the future of copyright protection. Regardless of where one personally falls in this debate, there are both benefits and downsides to the prevalence of piracy and its effects, as it has become a stable element of the digital online environment, and at this point, is inseparable from it.

3 CURRENT DIRECTION: the relentless call for stronger

[79] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p.1020
[80] Opinion of Advocate General Saugmandsgaard Øe in Case C-401/19, para 197
[81] B. Haggart (2018), Copyfight p.52
S. *Mirghani* (2011), The War on Piracy p.114

protection

From directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society to directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (CDSM-Directive), nearly two decades passed between the two major updates to European copyright legislation.

The CDSM-Directive represents the newest expansion to the boundaries of copyright protection. Now it's being supported by two regulations: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (DMA) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (DSA). Together these two should work towards a safer online environment and an improved digital single market.[82]

The plans for this expansion lead by the CDSM-Directive began forming many years before its actualization. In 2014 Jean-Claude Juncker, a candidate for the presidency of the European Commission, gave guidelines to achieve a new start for the EU. In those guidelines one of the things, he advocated for was a change in copyright legislation.[83] The Digital Single Market Strategy COM(2015) 192 (DSMS) was the first step towards realizing that change. In the DSMS there are no direct references to the copyright directive that has now become reality. It simply insinuated that a more unified and a more European copyright framework is required.[84] The journey DSMS kicked off is still ongoing, the goals and aims of this ambitious copyright reform have shifted with each new step, with each new iteration

[82] The Digital Markets Act: ensuring fair and open digital markets https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en
The Digital Services Act: ensuring a safe and accountable online environment https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

[83] A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change Political Guidelines for the next European Commission Opening Statement in the European Parliament Plenary Session. 15 July 2014, page 5

[84] COM(2015) 192 DSMS page 7

of it. With it all coalescing into the CDSM-Directive which is now the EU:s response to the advancements of modern society that have left previous pieces of European copyright legislation outdated and unfit to meet the needs the ever growing digital environment has. This Directive is supposed to lead the EU into a new era of stronger and more comprehensive copyright protection. [85]

One can hope that the direction of the EU will not be the same one that the US is taking. Thus far the EU has not been as forceful in their push for stronger copyright protection as the US, and it would serve EU:s interests to view the copyright legislation of the US as a cautionary tale[86] above all.

3.1 Arguments for strengthening copyright protection

Hardly any of the arguments that exist for strengthening copyright protection are unique to a certain location or piece of legislation as this is very much a global phenomenon or at least a joint effort by the EU and the US, which are mostly on the same wavelength when it comes to enhancing copyright protection. However, as the CDSM-Directive functions as the core example and a base of analysis, the arguments presented and dissected in this chapter are EU specific, in the sense that they have been mentioned in official EU documents and can be seen effectively as part of the drafting process of the CDSM-Directive.

First arguments presented for the renewal and enhancement of copyright protection in the EU can be found in the DSMS, after Jean-Claude Juncker's statement that advocated for change appear. The strategy refers to the growing power of online intermediaries that facilitate the sharing of copyrighted works and the need for further and clearer regulation due to that growth in power. These intermediaries

---

[85] *See in general,* COM(2015) 626 Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions, Towards a modern, more European copyright framework

[86] Copyright laws have almost always been beholden to those who control the production and distribution of copyrighted works and the most glaring example of this are the copyright laws of the US. Especially the Copyright Term Extension Act (CTEA). It is known by many names including Sonny Bono Copyright Term Extension Act, or simply Sonny Bono Act. It is also often derisively referred to as the "Mickey Mouse-law" or the "Mickey Mouse Protection Act", named such after the character whose ownership and status that law was created to protect.
See, R. P. Merges (2000). One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000. California Law Review, 88(6), p. 2233-2235

and their growing involvement in content distribution given the current unclarity in the rules governing it, is seen as an issue for the continuation of content creation.[87] The challenges of the digital environment are highlighted by the lack of up-to-date legislation and in that nebulous uncertain space these online intermediaries that have been amassing power, appear as potential threats. The DSMS speaks in vague terms that leave a lot of room for imagination and speculation and this trend continues throughout the process.

The purpose of the DSMS was not to offer concrete solutions but to ideate and showcase different aspects of where current copyright policies fall short and how the digital environment is its own beast. The DSMS was a conceptual look at different potential strategies and possible aims and goals. It was a proposition for future action. Now looking back on it, the link between what was stated about 'online intermediaries' and what the new CDSM-Directive contains is obvious. The platforms shaping the online sphere are the primary targets, their continued rule of the online spere along with unfair advantages and unregulated operations was no longer acceptable. The future is now, or it should be and according to the DSMS it should include improvements to the state of the European IP market by the removal of borders and barriers, and by reducing fragmentation of the copyright legislation. The actions taken should also be tackling illegal content and its distribution more efficiently as the previous systems in place for reporting and removing illegal or unauthorized content were considered to be limited in both efficiency and transparency.[88]

However, the DSMS understood that careless combat against illegal content could have an impact on fundamental rights such as the right to freedom of expression and information, and that tackling illegal content and removing it must not make legal content an unavoidable casualty.[89] This was further reinforced by COM(2017) 555 Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms demanding "proper" and "robust" safeguards for all the

[87] COM(2015) 192 DSMS p.7
[88] COM(2015) 192 DSMS p.12
[89] COM(2015) 192 DSMS p.12

fundamental rights at stake.[90] This reminder continued to appear with all consecutive steps all the way through to the CDSM-Directive. Without it, the current situation would undoubtedly be worse as the initial proposals for the Directive were quite problematic in their approach.[91]

The DSMS highlighted the potential the EU has on a global scale and proposed means to turn that potential into reality. To make sure that the EU continues to develop as an attractive location for global companies, maintaining its status and improving its standing as an exporter of digital services.[92] These ideas of status and growth call for stronger and more comprehensive protection of copyrighted works with the promise that it would be one of the keys to a positive future standing for the EU. A future of confidence and growth. A future of potential profit. This is a rather big departure when compared with the words of Neelie Kroes, who was the European Commission's Vice-President for the Digital Agenda, who in one of her speeches stated that "--we must look beyond national and corporatist self-interest to establish a new approach to copyright.",[93] this statement is from 2010 only a few years prior to the DSMS but the tone and ideals are quite different. The strengthening of copyright protection tied to the concepts growth and profit, shows the preference for treating it as an economic right first, the moral rights appearing as an afterthought or vehicles that also need to benefit an economic angle.

This is highlighted by the existence of the value-gap arguments. The value-gap is its own beast entirely. A catchy concept to use as a tool to push for change. To push for the redistribution of power and wealth seemingly to the artists and creators but primarily to the publishers, collecting societies and other similar rightsholders. The term value-gap refers to the imbalance between the profits online content-sharing service providers (OCSSPs) vs. profits rightsholders receive from the copyrighted content hosted on an online platform provided by an OCSSP. The

[90] COM(2017) 555 p.3

[91] Many articles contained provisions that were considered highly controversial, but the most notable of them was the initial proposition for article 17 or as it was originally, article 13, that included mandatory requirements for upload filters

[92] COM(2015) 192 DSMS p.18

[93] Neelie Kroes European Commission Vice-President for the Digital Agenda A digital world of opportunities Forum d'Avignon - Les rencontres internationales de la culture, de l'économie et des médias Avignon, 5th November 2010

existence of the value-gap is oft treated as a fact regardless of the observed lack of economic evidence.[94] Many of the sources utilized for this thesis address it as a myth and an unproven concept and I do not find myself in disagreement. The lack of evidence combined with the term originating from the rightsholder parties, whom the adoption of the term into legal discourse is going to benefit the most, makes one doubt the validity of the claims or at least cast a critical look in their direction.[95]

Other commonly utilized arguments for stronger protection involve the moderation and better control of the digital online environment. In this form it is not only a matter of copyright discussion but instead primarily focuses on other kinds of illegal content available online.[96] Purely in regard to copyright; According to the CDSM-Directive due to the rapid technological developments that have transformed the way works are being created, produced, distributed and exploited, the Unions copyright framework must be adapted and supplemented to suit modern needs (CDSM-Directive, Recital 2). The adaptation to the digital online environment and responding to the chances happened in this sphere due to technological advancements is a valid cause for renewal of legislation. Outdated and impractical legislation not suitable for environment it is supposed to regulate has the potential to be useless or worse, directly harmful to those subject to it. Tackling illegal content online has presented a challenge as the outdated and fragmented legislation hinders co-operation and prevents a unified response. However, to update legislation to make it better applicable to the digital online environment does not necessitate using the update as a cause for simultaneously and purposefully strengthening the sphere of copyright protection beyond what is reasonable. Naturally it will expand the boundaries of copyright protection somewhat, as it brings the digital online

---

[94] M. Husovec & J. Quintais (2021). How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms. GRUR International. p. 4

[95] Rewarding creativity: fixing the value gap, Global music report 2017: annual state of the industry. This IFPI report showcases the terms usage in discussion during the drafting of the CDSM-Directive and how it was presented to the public. The reports publisher IFPI was a major lobbyist aiming and succeeding at influencing the direction of the Directive *see chapter 3.2.1*
This debate some of these rightsholder organizations participated in, casting blame at one another for failing to defend artists, finds a new dimension in a study released by WIPO, according to which no matter the streaming service whether YouTube or Spotify, they all fail artists. *See chapter 4.1.3, note 169*

[96] COM(2017) 555 p. 2

environment explicitly within those boundaries, bringing previously unregulated actors that have enjoyed a 'safe harbor' within the sphere of regulation.

Despite the fact that copyright protection has now existed for hundreds of years and arguments for strengthening it, only slightly younger; empirical research on the effects of copyright protection is quite rare.[97] The arguments in favor of strengthening copyright protection regardless of the critique they face or research they lack, continue to thrive despite the resistance. Copyright protection has achieved such status that its existence need not be questioned anymore. In this day and age, it is taken for granted. Its existence taken for an indisputable fact and an unchangeable reality. The ideals behind strengthening copyright protection are noble; Artists and creators should receive fair remuneration for their contributions for culture and the society at large, as art is an inseparable part of human nature and those responsible for its creation deserve to benefit from the fruits of their labor. However stronger copyright protection does not automatically translate into better compensation and better negotiation positions for the artists, but instead might further benefit various intermediaries that stand between art and its clientele.[98]

3.2 The CDSM-Directive

At the time of writing, it has been three years since the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC entered into force (CDSM-Directive, Article 31). Now the transition period has been over for nearly two years and EU member states are expected to have made the required changes into their copyright policies. Very few actually have

[97] R. S. Ray, J. Sun, and Y. Fan (2009), Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty, 62 Vanderbilt Law Review p.1671,1684-1685
And actually, limiting copyright protection was in their analysis a better way of incentivizing new creative ventures but even that was not a guaranteed success p.1708-1712
Worth to be noted that their research was conducted based on the US copyright system and thus not directly applicable for EU, however due to the number of similarities between the systems, it is unlikely that the results would be drastically different or fully contrary to theirs.

[98] WIPO Standing Committee on Copyright and Related Rights, STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS

made the required changes in time, most member states are still at a drafting phase in regard to altering their own legislation.[99]

The CDSM-Directive does a lot to expand upon and strengthen the existing boundaries of copyright protection and covering all of it within the scope of this thesis would be impossible therefore, the focus regarding the Directive will primarily be on its controversial Article 17 governing the use of protected content by online content-sharing service providers, as it provides one of most notable expansions to the boundaries of copyright protection, by ending the 'safe harbors' granted by earlier legislation. Such as the one from Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Which in accordance with its Article 14(1) it had ensured that service providers were free from liability over the information they hosted, as long as they were not aware of the existence of illegal activity or information, and if made aware of it, acts expeditiously to remove or disable access to it. In addition to Article 17, others such as Articles 3, 4, 5 and 6 are briefly touched upon due to their proximity to the fundamental right of freedom of the arts and sciences.

The road has been bumpy for this Directive even before the delays in national implementation. During the drafting process of the CDSM-Directive it received plenty of criticism for the ambiguous nature of its text. Expressions and definitions too vague for a precise interpretation. However, some of the criticism for the language used in the directive came from the other direction. In parts it was considered to be too technical in nature, which could have a negative impact in the development of new technology and new systems. These issues fed on each other. Fixing the issue of the text being too technical did in part contribute to the more ambiguous form it ended up taking.[100] The text has changed drastically from its first version, for better and for worse. It is undeniable that an effort was made to work

[99] EU Copyright Reform: Evidence on the Implementation of the Copyright in Digital Single Market Directive (Directive (EU) 2019/790) CREATe Centre: University of Glasgow & reCreating Europe https://www.create.ac.uk/cdsm-implementation-resource-page/

[100] Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, p.4

towards an acceptable solution. Many of the major issues were fixed or at least improved upon in its revisions, but the final end result, in its attempts to find balance between opposing criticisms, didn't satisfy anyone. The document detailing guidance to Article 17's interpretation provides some aid, alleviating some of the issues but not all.[101]

The text of the Directive was pulled in different directions as many agendas are in play at once. The contents of this Directive are going to define new rules by which everyone who wishes to deal in copyrighted goods with the EU has to play by. It stands to reason that intense competition for chances to influence its final form were had, but that raises questions about the integrity of the process and the result. The criticisms Neelie Kroes aimed at "corporatist self-interest"[102] more than appropriate as corporate lobbyists continue to fight over copyright protection.

3.2.1 Lobbying

Lobbying is sort of an open secret; it is an accepted part of the drafting process in its own way, but it can be a divisive topic and a common target for criticism concerning the legislative process and public decision making. Lobbying as is defined in the Recommendation CM/Rec(2017)2 means the promotion of specific interests achieved by communicating with a public official or public officials. In order for it to be considered lobbying the efforts to achieve promotion of specific interests must be part of a structured and organized action aimed at influencing public decision making.[103] Therefore not all communication with public officials even if done with underlying agendas of promotion qualify. But of those that do, not all forms of lobbying are acceptable. Some are contrary to accepted principles of morality, many of which were allegedly utilized during the drafting of the CDSM-Directive.

---

[101] European Commission, Guidance on Art. 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final

[102] Neelie Kroes European Commission Vice-President for the Digital Agenda A digital world of opportunities Forum d'Avignon - Les rencontres internationales de la culture, de l'économie et des médias Avignon, 5th November 2010

[103] Recommendation CM/Rec(2017)2 p. 7
It is worth noting that there is no universal definition for lobbying, but it is always slightly different depending on the context, as the Recommendation CM/Rec(2017)2 states on p.15.

Tactics that involve deceit or false pretenses fall under this category. For example, astroturfing, the act of disguising organized activity to resemble a spontaneous grassroots movement in order to obfuscate the origin of support or opposition to a cause. For a party with vested interests in a particular outcome it can be beneficial to manipulate the perception of their actions in such a manner, as that is oft done easier than to actually inspire and garner support at a grassroots level, especially in situations where there is a strong presence of already existing grassroots opposition. These kinds of tactics are not a new phenomenon, but they have grown increasingly more powerful in the digital age in the online environment where their utilization is easier and can easily cross global borders finding a larger audience.

The CDSM-Directive was subject to massive amounts of lobbying from varying interest groups. This is a point many of the sources utilized in the crafting of this thesis take time to mention, very few of them digging deeper into it, but it is noteworthy that it has been elected to be mentioned, multiple times across multiple sources.[104] The effects of the lobbying campaigns are not something to be forgotten and to be left unconsidered. All these various interest groups, engaging in lobbying efforts, hoping to influence the final shape of the legislative text to better protect their interests.[105] Not all of the efforts necessarily above board, many treading very fine lines of acceptability. There were accusations of the utilization of tactics contrary to accepted principles of morality, both astroturfing and the use of spambots, their use potentially influencing the effects gained by lobbying. These kinds of tactics can distort public debate and alter the perception of the public opinion. This leads to smaller, less influential, voices getting pushed out of the vital conversations. The conversations dominated by the loudest, richest and the most marketable voices, none of qualities necessarily making them qualified to be heard and listened to, while making decisions with far reaching consequences. This is not

---

[104] *See for example,* S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market. p. 979

[105] M. Husovec & J. Quintais (2021). How to License Article 17? p. 6,
Corporate Europe Observatory; Copyright Directive: how competing big business lobbies drowned out critical voices
https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices#footnote1_nedpm14

in line with the intentions laid out by the rules governing lobbying. The goal is to enable all kinds of groups affected by public policy making, including interest and pressure groups, not only corporate ones, to make their voices and opinions heard.[106] The misrepresentation of intentions of lobbying and lobbyists is what invites criticism and gives lobbying the controversial, near illicit image.

Due to this near illicit and controversial image and its effect on the public perception of lobbyists; Even as lobbying is legal and part of the process, part of the lobby battle is pointing out competing lobbyists. It is vital to point fingers and control the direction of negative attention. With the Directive, this meant publicly bringing attention to the big tech firms that were deeply engaged with the lobbying efforts. The negative attention these tech giants such as Google and Facebook received helped obscure the fact, that regardless of their massive lobbying efforts, they were not the actual biggest lobbyists. That role belonged to the collecting agencies, organizations from the creative industry and- publishers.[107] This information relies on the fact that all cabinet members, commissioners and director generals are required to publish a list of all of their lobby meetings. There is still room for uncertainty as these lists do not include any possible meetings the members of the European Parliament (MEP) may have had, as there is no rule in place for them to list their lobby meetings. Analysis of these lobby lists reveals that these tech giants are not even making the top 5 on the list of biggest lobbyists, Google is the biggest and only reaches 7th place. IFPI – Representing recording industry worldwide[108] takes the spot of the largest lobbyist by a mile with 10 more meetings than the next in line, the Federation of European Publishers. Even the US recording label giant Universal Music Group International is on the list before Google.[109] Collecting agencies, publishers and a variety of creative industry organizations clearly dominate the conversations and also have control over its presentation as they are not hounded for it, as are the tech giants. This dominance was gained with

[106] Recommendation CM/Rec(2017)2 p. 11
Parliamentary Assembly Resolution 2125 (2016) on transparency and openness in European Institutions. p.1
[107] Copyright Directive: how competing big business lobbies drowned out critical voices
[108] IFPI includes members such as Sony Music and Warner Music
[109] *See,* Copyright Directive: how competing big business lobbies drowned out critical voices, Table 1

aggressive and purposeful misleading based on maliciously interpreted data.[110] The reason why, is obvious when looking at the way news of supposedly large lobbying investments by the tech giants were received. Negative press on that large of a scale could not, not have had on impact on how the direction of the legislative process was perceived and reacted to.

This same pattern does repeat with MEPs as well, even though there was no rule for them to publicize their lobby meetings at the time of the Directive's drafting, but some still chose to do so in the name of transparency. Collecting societies and publishers engage with MEPs with clear national angles but it is difficult to make any true conclusions as the only information available is very limited and given by those who want to publicize it. The role an MEP plays in a legislative process as public and controversial as this one cannot be understated, they are the touchstone for citizens, companies and entire industries. The barrage of information and attempts to influence the vote coming from all sides is an intense force to face. And in the end MEPs were dealing with a lot of backlash from those unhappy with how the scales are weighted.

Naturally the situation gets more intense as it gets closer to its final phases. The utilization of tools like spambots and similar programs drastically intensified towards the end of the legislative process when time was running thin. Amongst others, one possibility is that US based platforms aiming to mobilize their userbase induced a wave of responses.[111] At its most basic, the idea to email MEPs and other representatives to show public response is functional but combine a mass panic across young internet users and no verification requirement on the emails. The result is unfavorable and far larger in scope than anticipated. It became and was perceived as a spambot issue. This mobilization campaign backfired, not because it did not gather enough momentum but because the momentum was poorly managed and targeted, instead of driving home the concern of users across Europe it made the

[110] Copyright Directive: how competing big business lobbies drowned out critical voices
[111] Copyright Directive: how competing big business lobbies drowned out critical voices

resistance aimed towards the Directive lose credibility. It made it easier to dismiss both the resistance movement and the criticism they presented.

There are lessons to be learned from this. The issues of lobbying are those of intentions and agendas, and transparency. The legislative process of the EU could be much improved upon on that front that much is for certain. The lobbying around the CDSM-Directive has highlighted the holes that exist within the legislative process regarding the matter. Therefore, better and stricter rules for lobbying are required. The public should not be relying on the goodwill of MEPs to receive information about the lobbying efforts they engage with, nor rely on speculation made with incomplete data around lobbying budgets. Unfortunately, the modern online era is filled with misinformation, whether spread accidentally or on purpose, and it makes finding reliable sources more labor intensive. This could be partially mitigated by increasing transparency and communication to the public within the legislative process. 2019 brought good news on this front as and update to the rules bound rapporteurs, shadow rapporteurs and committee chairs to similar rules of publicizing lists of lobby meetings, as is required of cabinet members, commissioners and director generals.[112] In addition to publicizing lists, when it comes to the companies involved, a more comprehensive requirement for publishing lobby budgets would come a long way in improving transparency. In this the US serves as a fine example, their system requires companies to disclose their budget individually for all laws they are hoping to influence via lobbying. The EU is currently only demanding a yearly budget on all lobbying targeting EU institutions and only as the total sum, not separated by targets or even institutions. The US system also acts faster as the budgets have to be disclosed every three months instead of only once per the financial year. This type of transparency would greatly benefit the EU as it would help illuminate the scope of various interests that lie within the potential lobby groups. The EU is currently operating much in the dark, unable to see the larger

[112] https://lobbyeurope.org/rules-and-regulations/
THE ELEPHANT IN THE ROOM Lobby meetings in the European Parliament p. 9, 11
Regardless of being required to publicize these meeting unfortunately many are lagging behind in their obligations to do so
https://transparency.eu/wp-content/uploads/2022/12/MEP_lobby_brief_2022.pdf

picture in detail. It is lacking valuable insights to make truly informed decisions and an increase in transparency would go a long way in fixing this knowledge gap.[113]

3.2.2 Resistance

To oppose the industry driven changes there has been a rising significance on the actions of the general population, individual people have been taking more of an interest on matters concerning copyright and have in the past successfully lobbied against the status quo. With the new EU copyright directive, it was yet again attempted, calling and emailing representatives, automated mailing lists, and articles encouraging people to act. But the people weren't successful, the industry lobbyists won. I witnessed the campaign firsthand as many did browsing the internet. At first the automated mailing lists, such as the one Coalition for Creativity (C4C)[114] provided for the Email your MEP -campaign, the tool appeared convenient, streamlining the process for an internet user who has the will to participate in a campaign but inadequate knowledge on how to do it. This would have been fine if the scope of the campaign and others like it had not grown so large. However, with the dimensions it reached, the ease and convenience of the online user not being required to put in any personal effort beyond few clicks of a button, resulted in a robotic and an impersonal campaign that failed to incite the response it wanted. Instead, it ended up fueling the support for the CDSM-Directive as its opposition, time and time again got presented as insincere and nebulous.[115]

But I would not go as far calling it a denial of service attack (DDOS), as the intentions never were to shut down any of the communication channels of MEPs.[116] If the intentions would have been to debilitate the MEP communication channels it would have been more than just a hinderance the email bots caused. The utilization

---

[113] EU Political Integrity
https://transparency.eu/priority/eu-money-politics/

[114] https://www.lobbyfacts.eu/datacard/copyright-for-creativity?rid=342464912839-08
https://coalition4creativity.org/about-us/

[115] https://www.gramex.fi/meppien-vastaukset/
Many MEPs interviewed about the resistance mention the impersonality of the resistance campaign, they complain of mass generated spam clogging their inboxes and making it harder to find the more genuine personal approaches.

[116] Copyright Directive: how competing big business lobbies drowned out critical voices

of the automated mailing list C4C provided and other similar services was perhaps misguided but not malicious, the intent was never harm but to create a convincing impact, and when it comes to grassroots movements, it all was done with the hope of fueling a change for the better. This does not absolve them of responsibility but at least these were not actions done in bad faith. The fact that no verification of any kind was required to be able to send emails to contact MEPs was an oversight that at this day and age should no longer happen, not at this level. There is a time and place for anonymity. An opportunity for anonymous participation is an important aide for both privacy and freedom of expression. Encouraging people to participate and voice even controversial opinions. However, a balance must be struck between the safety of anonymity for the users, and the functionality and safety of the services and people on the receiving end. But by the very least the authentication of the identity and validity of the user should not utilize means that effectively stop those living on the margins of society from participating, such as a phone number or an address. All in all, enabling anonymity should not encourage misuse of a system or create additional liabilities, which will be difficult.

The failure of this resistance was not all due to mismanagement of tactics and an uncontrollable response. It was also purposefully undermined by the publishing industry among others. As stated before, part of the lobby battle is to cast blame and sow seeds of discord. The publishing industry did this by, for example, supporting Netopia, a website that heavily criticized the resistance to the directive and especially the #SaveYourInternet campaign. This website was not an independent operator providing insight and information like a watchdog organization, instead its funding came from within the publishing industry, therefore the impartiality of their criticism could not be trusted. The claims they made were unsubstantiated and lacked hard evidence, but with the support of the publishing industry and key lobbyists they were hard to ignore and amplified the attention they received. [117]This kind of negative publicity contributed to the harsh reception the resistance campaigns received. They were already being painted as being anti-artist due to siding with the big-tech. The campaigns own missteps further aggravating those who already picked a side so to

[117] Copyright Directive: how competing big business lobbies drowned out critical voices

speak and driving away those who were on the fence about it. The campaign ended up coming across too radical to garner widespread public support.

However not all attempts of organized resistance against legislation pertaining to the online environment are doomed to fail. Other attempts have been made before this and some of them have succeeded. The times have changed, and different tactics need to appear in order to garner a positive, accepting response. The first time people engaged in organized resistance against the industry lobbyists, they had the element of surprise.[118] That element of surprise no longer exists, the internet is a known battleground. The power of the online masses was already known and understood, their resistance was predictable. Predictable and therefore easier to oppose, easier to calculate into the lobbying budget.

These lobbying and resistance efforts shaped the road for the CDSM-Directive. The push and pull of various intersecting and opposing interests weaved a colorful tapestry of new EU legislation. It promises stronger and more comprehensive protection for copyrighted works. The interests of the publishing industry and rightsholder organizations are well looked after but that does not guarantee improvement on all fronts.

3.3 Achieving the stronger system of protection

To achieve this stronger system of copyright protection the CDSM-Directive proposed a few means. They make references to industry standards and practices without defining them further. This is to be expected and could not be handled differently as the CDSM-Directive is not an authority when it comes to the operational side of the OCSSPs. It is not a custom to define what industry standards mean as that is for the industries themselves to regulate.[119] In the digital online environment, the concept of industry standards appears ambiguous. New technology and processes develop quickly in a constant race of development and improvement.

[118] B. Haggart (2018), Copyfight p. 250

[119] G. Spindler (2019), The Liability system of Art. 17 DSMD and national implementation -contravening prohibition of general monitoring duties? 10 JIPITEC p.364

This makes the industry standards equally prone to change, therefore even the notion of defining them via legislation would be doomed to fail before it would even be spoken out loud. There is no way to know what the high industry standards of professional diligence, that the Directive insists on, are going to entail. This is at least partially, a leap of faith.

3.3.1 The means proposed by the Article 17

The CDSM-Directive proposed a rather limited number of possible means for complying with Article 17:s requirements. The means are two-fold, either to obtain authorization via different licensing methods, such as direct licensing, which is the favored licensing method, or via collective or statutory licensing; Or to forgo obtaining authorization and comply with the exemption mechanism that can be found from Article 17 Section 4.

The purpose of this thesis is not to become overtly technical and delve deeply into the world of copyright licensing, therefore the chapters ahead act only as surface level introductions to offer what is necessary for discussing some of the overall issues when it comes to the boundaries of copyright protection due to the CDSM-Directive. There are many excellent articles written in depth about the licensing mechanics and their functionality[120] and I have nothing more to offer on that front, but it would serve this thesis poorly to leave the matter entirely undiscussed.

Of the two available means the focus is placed on obtaining authorization via licensing. This is the only option that is explicitly introduced and offered by CDSM-Directive. As seen from statements given by the Member States. In the European compromise, licensing is the method chosen to achieve the authorization goal under this provision.[121] The idea with licensing is for the OCSSPs to acquire any necessary authorizations beforehand, before the content is uploaded onto the service. The

[120] The paper European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Can We Make the New European System a Global Opportunity Instead of a Local Challenge? By M. Leistner was fundamental for my understanding of the matter and provided valuable insight into licensing practices.

[121] Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC (first reading) – adoption of the legislative act – statements (2019), in particular the Statement by Germany, para. 10.

licensing agreements would redistribute the profits generated by copyright protected content hosted by an OCSSP. This redistribution aiming to close the alleged value-gap between OCSSPs and rightsholders.[122] According to the Directive licensing should eventually after the mechanics of it improve and transaction costs are lessened result in positive changes to revenue for rightsholders and also to the platforms. Highlighting, that the increased bargaining position for authors and performers, and the increased control over copyright-protected content rightsholders will hold, will have a positive impact on copyright as a property right. Property right naturally being one of the fundamental rights protected by the Charter of Fundamental Rights of the European Union (the Charter).[123] Licensing should also be the pro-competition as it should in terms of copyright licensing follow a similar path to technology licensing, which has seen pro-competitive effects on that field.[124] Unless, if the larger players, due to their ability to engage with licensing more efficiently, end up with a competitive advantage, that can increase market concentration.[125] However, it is debatable how manageable licensing user generated content is going to be, as the scope which these licenses would have to cover is immense. In addition, the licenses would still be limiting the diversity of user generated content as it would have to the terms of the licensing agreement.[126]

The other option for complying with the demands of the directive would be to utilize different measures of content filtering. Not automated filtering as that goes counter to the wording of the CDSM-Directive, that in Article 17(8) states that "The application of this Article shall not lead to any general monitoring obligation.", but other un-automated, non-generalized options could be utilized.[127] To avoid filtering completely is not reasonable, at this point it has become unavoidable. The already

[122] M. Husovec & J. Quintais (2021). How to License Article 17? p. 4
[123] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market p.9
[124] J. D. C. Turner (2015), Intellectual Property and EU Competition Law Second Edition p. 230, and in general, this book oft conflates intellectual property licensing with technology licensing, considering them to be similar in function and effects.
[125] M. Senftleben (2019), Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market p. 5
[126] M. Senftleben (2019), Bermuda Triangle p. 4
[127] An automated general filtering system had already been rejected by the Case C-360/10, Sabam v. Netlog, EU:C:2012:85, para 45-47.

existing content filtering systems such as the ones utilized by Google or YouTube have been part of the industry's operations for years already. The issue now is making these systems originating from the industry and their operations into a legal standard and into a requirement.[128]

Neither of these options is perfect, both burdened with their own issues and limitations. Issues that must be recognized, examined and evaluated.[129]

For there is a clash on the horizon.

4 RISKS BORN FROM STRENGTHENING COPYRIGHT PROTECTION

Strengthening copyright protection does not come without a risk. It might not incentivize creativity, nor lead towards innovation.[130] But the more influential risks arrive in the form of fundamental rights conflicts and global inequality.

4.1 Probable risks to fundamental rights

Balance is the key with fundamental rights. Anything that threatens to affect that balance is subject to review and impact assessment. Copyright protection is not an exception, major changes in the field of copyright can have an impact on fundamental rights as the intersections between the two can be found in multiples. As fundamental rights are equal by default, there is no inherent order of importance between them. Therefore, when there is a conflict between them there is no simple clearcut way of resolving it. Instead, it is a matter of interpretation and weighing the potential outcomes that takes into consideration the circumstances surrounding the issue with the goal of finding a solution that does not undermine any of the rights party to the conflict, nor imbue any undue limitations on them not sanctioned by Article 52(1) of the Charter. To look at these intersections and potential conflict

[128] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market. p. 1016
[129] M. Senftleben (2019), Bermuda Triangle p. 18
[130] R. S. Ray, J. Sun, and Y. Fan (2009), Does Copyright Law Promote Creativity? p.1708-1712

situation between copyright and fundamental rights is the purpose of this analysis.

To clarify the use of terminology utilized in this analysis; In the EU the term fundamental rights is used to describe the obligations the EU and its member states have towards anyone within them. The term human rights could be used as well, the two are largely describing the similar sets or rules. But due to the traditional divide between the terms depending on the context; human rights when it is a matter of international law and fundamental rights when it is a matter of constitutional context, this thesis will be using the term fundamental rights throughout to maintain consistency with the language used by the EU on the subject.[131]

Risks for fundamental rights born out of the strengthening of copyright protection are not all necessarily due to there being a conflict between copyright and fundamental rights, but due to the misuse and abuse of tools designed for the use of copyright protection. It can turn the tools of copyright protection into vehicles that are attempting to bulldoze key fundamental rights such as the freedom of expression, often with political goals. Whether, removing content by falsifying ownership or by proxy of privacy concerns, silencing users, a stronger system of copyright protection can become liability, eroding the very foundations of the rule of law.[132]

The analysis of these intersections between copyright protection and fundamental rights is primarily focused on the role of the DMCA notice and takedown system as well as the role of the Article 17 of the CDSM-Directive. In regard to the CDSM-Directive; The earlier discussed DSMS recognized that by furthering copyright protection and strengthening other rights, there is a risk that those actions can negatively impact other fundamental rights. In order to maintain balance between rights a thorough examination of the possible effects must be conducted when it becomes relevant.[133] During the CDSM-Directive's implementation period several issues with a potential clashes with fundamental

---

[131] European Union Agency for Fundamental Rights
https://fra.europa.eu/en/joinedup/about/what-are-fr

[132] Over thirty thousand DMCA notices reveal an organized attempt to abuse copyright law
https://www.lumendatabase.org/blog_entries/over-thirty-thousand-dmca-notices-reveal-anorganized-attempt-to-abuse-copyright-law
See sections 4.1.1 and 4.1.2 for further information

[133] COM(2015) 192 DSMS p. 12

rights were raised, probably most notably, Republic of Poland v European Parliament and Council of the European Union Case C-401/19, in which in the end, the ruling was in EU's favor. This case is discussed in more detail in 4.1.1 in regard to the freedom of expression section as those were the grounds the case was built on.

In general, the CDSM-Directive maintains the same awareness of the potential risks to fundamental rights as the preceding documents. It is stated that the Directive respects the fundamental rights and observes the principles recognized in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles (CDSM-Directive, Recital 84). Regarding certain sections of Article 17, namely the exceptions and limitations clause of Article 17(7), it goes a bit more into detail on what fundamental rights are considered to be affected by it potentially enough to warrant action. Three are named in particular; the freedom of expression, the freedom of the arts, and the right to property, which includes intellectual property (CDSM-Directive, Recital 70). Based on the wording used in Recital 70, the freedom of expression would seem to be the most important fundamental right for the Directive to consider on this front, the protection of which would be vital to justify the limitations set by Article 17.

In addition to the three fundamental rights listed by the Directive that are connected by it to Article 17, the analysis ahead also includes the right to privacy that in the context of the Charter of Fundamental Rights of the European Union is a combination of two Articles, the Article 7 respect for private and family life, and the Article 8 protection of personal data. The CDSM-Directive does address data protection and sets necessary limits, but that does not guarantee for it to be free of issues regarding it. Especially in the light of data protection issues constantly surfacing on multiple platforms and the role OCSSPs have in that field. Therefore, it can be considered vital to take a closer look at how the right to privacy can be affected by even under the new Directive.

4.1.1 Freedom of expression

The right to freedom of expression and information is defined in article 11 of the Charter. It defines it to include the freedom to hold opinions and to receive and

impart information and ideas without interference by public authority and regardless of frontiers. As it is regardless of frontiers the digital online environment as a space previously lacking in legislation targeting its internal functions and enjoying a 'safe harbor' on multiple fronts, gave reason to worry that implementing new rules could negatively affect the previously enjoyed freedoms. The CDSM-Directive directly limiting the liability exemption of Article 14(1) of Directive (2000/31), making OCSSPs engage in more tangible enforcement efforts than just 'notice and takedown' (CDSM-Directive, Recital 65). This and the contents of CDSM-Directive Article 17, gave reason to believe that increased responsibilities and stricter liability for OCSSPs could have detrimental effects on the userbase's ability to exercise their freedom of expression as the new responsibilities and stricter liability could lead onto new limitations being placed on receiving and imparting information. Including both concerns for limitations to the means users have in their use to express themselves, such as limitations for communication through text, images or GIFs, and concern for policing the contents of those communications. These concerns were born due to the obligations stated in Article 17(4), especially subsection (b)'s "--to ensure the unavailability of specific works and other subject matter--", that has been interpreted to mean content filtering. There is very little room to interpret it in any other way, content filtering, regardless of it being removed as an explicitly named and mandated obligation from the final versions of the Directive, is still present in the spirit of the Article 17(4) and patches up the holes if licensing fails. The threat this presents is simple; It could have the potential of turning copyright law into a tool of censorship.[134] The Article 17(4) effectively flips the existing norms on to their backs, from a system that engages after the content has been found infringing to a system that can act as a preventative barrier on new content.[135]

Based on these concerns that enacting the rules in Article 17 of the Directive could lead to major detrimental effect on the freedom of expression, Poland sought action for annulment for the Article 17(4), point (b), and point (c) from the Court of Justice of the European Union (CJEU). The Parliament and the Council denied that

[134] M. Senftleben (2019), Bermuda Triangle p. 5
[135] N. Elkin-Koren (2017), Fair Use by Design", 64 UCLA Law Review, p. 1093

there would be any such limitations on the freedom of expression and maintained that even if it were to happen, that "--any limitation of that right, resulting from the implementation of that regime, cannot be attributed to the EU legislature.".[136] The case was eventually decided in the favor of the Parliament and the Council. It was recognized that according to the case law of the European Court of Human Rights (ECtHR), the nature and capacity of the internet enhances the dissemination of information in general, providing an unprecedented platform for users to exercise their right for the freedom of expression. This emphasizes the importance of taking due account for the importance of the internet, whenever regimes with the potential of impacting freedom of expression are implemented.[137] The CJEU agreed with Poland that due to the wording of Article 17(6) stating that "prior to the occurrence of a copyright infringement, 'make their best efforts in accordance with high industry standards of professional diligence' to prevent such infringements from occurring or reoccurring.", does de facto require the service providers to conduct prior reviews of user uploaded content.[138] These prior reviews depending on their scale would have to utilize automated content recognition(ACR) and filtering tools as there are no other options available to function as alternatives.[139] This kind of a restriction on dissemination of information does constitute a limitation on the use of the freedom of expression and unlike the defendant institutions claimed, this restriction is attributable to EU legislature.[140]

However, fundamental rights are not unrestrictable and in accordance with Article 52(1) of the Charter and the principle of proportionality they can be subject to restrictions to maintain balance with other conflicting rights.[141] The CJEU

---

[136] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 43

[137] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 46, 47

[138] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 53

[139] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 54
See also, Opinion of Advocate General Saugmandsgaard Øe in Case C-401/19, para 57-69

[140] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 55, 56

[141] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 65, 66

expands the scope of evaluation beyond Article 17(4), to also consider Article 17(7)-(10) of the CDSM-Directive, and Article 17(2) of the Charter concerning intellectual property, as this is not only a matter of freedom of expression. To balance this conflict, both sides were weighted, and their legality confirmed, and it was found that the safeguards in place in Articles 17(7) and 17(9) do satisfy the demands of the CJEU and are in line with the Article 52(1) of the Charter. Therefore, the resulting limitation on the freedom of expression does not go contrary to the intents of the Charter. This balance of the two conflicting fundamental rights necessitates that "--copyright protection must necessarily be accompanied, to a certain extent, by a limitation on the exercise of the right of users to freedom of expression and information.".[142]

The decision of the CJEU presents a reasonable evaluation on the balance between freedom of expression and property underlining the importance and existence of the safeguards built into the CDSM-Directive. However, it could argued that the risk for that balance to falter and freedom of expression to be limited beyond the principle of proportionality still remains. The OCSSPs are not impartial nor independent as they make decisions around ACR and filtering tools, responding to both demands from rightsholders and users, comparing potential sanctions for neglecting either responsibilities.[143] They will have to weight their options but finding balance in this kind of an instance is a heavy burden, and the OCSSPs were never meant, and are not supposed, to play the role of a judge.[144]

The automatic content recognition tools reliant on algorithms and AI cannot necessarily reliably differentiate between violations of copyright and the exceptions to copyright protection, as a mere surface level analysis of the uploaded content is often not enough. The exceptions to copyright protection are intricately tied to cultural, societal, political and historical aspects. To reliably navigate them requires a comprehensive understanding of the context of the potentially infringing works, therefore it is a matter of both contextual and cultural awareness that even humans

[142] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 69-84, 98
[143] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 1016-1017
[144] Opinion of Advocate General Saugmandsgaard Øe in Case C-401/19, para 197

can struggle with.[145] ACRs even more so are struggling to navigate the constantly developing and changing cultural context that lends itself to nuanced and subtle uses of the exceptions to copyright protection. In the CJEU case SABAM v. Netlog, the court found that imposing a general monitoring requirement on the service provider could negatively affect the user's freedom to receive or impart information and could even potentially undermine the freedom of information if mistakes are made between differentiating lawful and unlawful content.[146] ACR tools are capable of generalized monitoring, that much is for certain, but it is in regard to their more specific, more nuanced use, that more challenges appear and mistakes are bound to be made. The question then becomes, how many mistakes are acceptable? What percentage of false flags and restrictions to lawful content is acceptable?

These issues with ACR tools can be seen with the current filtering tools primarily based on the DMCA notice and takedown system, that are at this point largely automated due to their scope. As the internet is a global phenomenon and many of the popular online platforms originate or are based in the US, US based legislation, which DMCA is part of as well, is used in the platform's terms of service, bringing their terminology into wider use. Fair use is one such term, it is defined in the US copyright law section 107 titled Limitations on exclusive rights: Fair use, according to it using copyright protected content for the purposes of criticism, commentary, news reporting, teaching, scholarship, or research, is not an infringement of copyright.[147] In the CDSM-Directive the exceptions and limitations clause found in Article 17 is similar to fair use. According to them Member States must ensure that uploading and making available content that falls under the following categories: quotation, criticism, review; or the use of works for the purpose of caricature, parody or pastiche is not impeded by OCSSPs and rights-holders as those do not constitute as infringements of copyright or related rights (CDSM-Directive, Article 17(7)). Due to the similarities it is to be expected that

[145] Ofcom report 2019 Use of AI in Online Content Moderation p. 4, 33, 55
[146] Case C-360/10, SABAM v. Netlog, EU:C:2012:85, para 48, 50
[147] US copyright law section 107. Limitations on exclusive rights: Fair use. The section does contain factors by which judgement is passed on whether something falls under fair use or not. Therefore, not all use of copyright protected content, even if it's for the purposes listed, falls under fair use. Or more accurately its position as fair use can be contested.

these exceptions and limitations will run into the same issues as fair use. The ACR tools will make mistakes and the false flagging of content to be in violation of copyright resulting in its unavailability or restriction, even if for a moment, can result in major harm for the creator by tanking the reach and impact the work has, and disincentivize further production of similar works. The DMCA notice system has also been a subject to targeted attacks, the false reports generated to silence criticism, influence politics and in general to hinder the dissemination of information but even just within the copyright context the mistakes are piling up.[148] These mistakes, and purposeful misuse contribute to the chilling effect on the freedom of expression and also give rise to privacy concerns.[149]

For the CDSM-Directive and the EU, to move towards requiring the implementation of a similar largely automated filtering tools as provided by the DMCA is disappointing given the liabilities inherent in the systems. This was a valuable chance for the EU to safeguard user freedoms in regard to the freedom of expression, but instead made the safeguards of Article 17(7) to be just a "patronizing pat on the head" even if they are good on paper.[150] The additional guidance offered by the Commission offers some additional requirements and safety measures for these safeguards, which improves their station somewhat.[151] But it is to be seen how seriously they are taken by the OCSSPs. The move from direct requirements to

---

[148] Over thirty thousand DMCA notices reveal an organized attempt to abuse copyright law https://www.lumendatabase.org/blog_entries/over-thirty-thousand-dmca-notices-reveal-an-organized-attempt-to-abuse-copyright-law
For more details on the research based on the lumen dataset see for example, J. M. Urban, J. Karaganis & B. L. Schofield (2016), Notice and Takedown in Everyday Practice, UC Berkeley Public Law Research Paper No. 2755628 p. 95-97.
See also, G. Spindler (2019), The Liability system of Art. 17 DSMD and national implementation p.367
See *also*, S. Lewandowsky, L. Smillie,D. Garcia, et al. (2020) Technology and Democracy: Understanding the influence of online technologies on political behaviour and decision-making, EUR 30422 EN, Publications Office of the European Union, Luxembourg p.128

[149] J. W. Penney (2019), Privacy and Legal Automation: The DMCA as a Case Study, 22 STAN. TECH. L. REV. p. 464-467
See also, F. Romero-Moreno (2020), 'Upload filters' and human rights: implementing Article 17 Of the Directive on Copyright in the Digital Single Market, International Review of Law, Computers & Technology, 34:2 p.170-171

[150] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 1019

[151] *See,*European Commission, Guidance on Art. 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final p. 23

indirectly implying and imposing the use of such filtering tools on the OCSSPs[152] is underhanded and does not inspire trust as by the looks of it the situation in the end is very much the same regardless of the initial removal of the direct content filtering requirements. In the end, a machine potentially capable of limiting the freedom of expression of millions of users has been built and all that is required for it all to go south is one overreaction from a single OCSSP. If, and when, that happens it cannot be said there was no warning.

4.1.2 Privacy

The risks to privacy arise from issues with the respect for private and family life and protection of personal data, (CDSM-Directive, Recital 85). Respect for private and family life is defined in article 7 of the charter of fundamental rights of the European Union. It states the following: everyone has the right to respect for their private and family life, home and communications. Protection of personal data is defined in the next article, article 8. According to it, everyone is entitled to the protection of their personal data and such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone also has the right of access to data which has been collected concerning them, and the right to have it rectified. Article 17(9) of the CDSM-Directive does make a point of stating that it shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679. These exceptions allow for information such as contact details and information on remuneration, to be used by authors and performers in regard to the exploitation of their works and performances in accordance with Article 6(1)(c) of Regulation (EU) 2016/679 (CDSM-Directive, Recital 75). The privacy concerns that arise from the use of personal data and identifying individual users are therefore in conflict with the right to intellectual property defined in Article 17(2) of the Charter. Between the two a balance is to be found that satisfies both interests without undermining the other.

---

[152] Opinion of Advocate General Saugmandsgaard Øe in Case C-401/19, para 62

There are points of reference to be found in this conflict, as the processing of personal data in regard to copyright actions is an old problem, that can be found from the procedures initiating takedowns. The Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society brought into force the World Intellectual Property Organization Copyright Treaty, which allows people to utilize the Digital Millennium Copyright Act notices to initiate takedowns for content infringing on a copyright. The DMCA notice is included within the copyright policies of many OCSSPs such as twitter and begins the legal process to remove the infringing content.[153] It is US based legislation but can be utilized in the EU as well as long as there is existing comparable legislation. This requirement is covered by the aforementioned 2001 Directive and the WIPO Copyright Treaty(WCT).[154] The DMCA notice can only be submitted by the copyright owner or by someone acting on the behalf of the copyright owner and requires "Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted." (17 U.S. Code § 512, 3 IV). This information is initially given to the service provider, but often gets forwarded by the service to the actual infringer if one can be identified.[155] This results in private personal information ending up in potentially ill-intentioned hands. This is primarily a threat for smaller creators that have less separation between their public/business identity and their private one, such as operating from a home address with only a personal phone. The response to receiving a DMCA notice might be less than positive and can at worst lead to "doxxing" or otherwise harassing the notifier. The risk for a negative response grows for a marginalized creator, who already has a higher chance of facing targeted harassment due to their identity or work. Jonathon W. Penney phrased it perfectly, "Put another way, a prior victim of targeted abuse—which

---

[153] Twitter copyright policy https://help.twitter.com/en/rules-and-policies/copyright-policy
[154] https://www.copyright.gov/legislation/dmca.pdf
[155] *See for example,* YouTube Help Counter Notification Basics https://support.google.com/youtube/answer/2807684

include personal threats—may also be more impacted by targeted personal legal threats.".[156] Privacy related concerns contribute to the chilling effect also in the receiving end of a DMCA notice, as the implication is that a third party has been monitoring ones online activities and the information gained by that can now be utilized against them.[157] Concern over ones privacy even being a more deciding factor than the potential of legal consequences.[158] The exceptions in the CDSM-Directive concerning the use of personal data and information to identify individual users place users under similar risks as discussed above.

There are ways to protect one's personal information and still file a DMCA notice. Things such as an alternative address for example the use of a P.O box, having a secondary phone, using a VPN to conceal ones IP address or simply hiring a DMCA agent to function as an intermediary. However, the issue remains that by default one's personal information is at the whims of the person on the receiving end. The potential of harm cannot be eliminated system and the burden of safety being placed on the individual can only go that far. It would be unreasonable to expect that the potential of harm could be eliminated by strong enough legislation and proper policing. Instead, the issue lies in the fact that this potential of harm has been further legitimized by the CDSM-Directive by enacting policies that push OCSSPs more towards the extensive use of the DMCA notice and takedown system. Given the past violations by OCSSPs within the scope of data protection,[159] the threshold to trust them to have the users best interests or even legality in mind, is high. Given the earlier discussion on ACR and filtering tools their development presents a double edged sword; A more advanced filtering tool, as the technology behind them continues to develop further in regard to things such as pattern recognition, will become more reliable in recognizing the exceptions to copyright and reduce the risks for it to have a negative effect on the freedom of expression, however, a more

---

[156] J. W. Penney (2019), Privacy and Legal Automation p. 470
Women were found to be especially affected by the chilling effect, following that trend I am willing to assume other factors contributing to the marginalization of an individual would have similar if not even stronger effects.

[157] J. W. Penney (2019), Privacy and Legal Automation p. 445-448

[158] J. W. Penney (2019), Privacy and Legal Automation p. 449-450

[159] J. *Isaak and M. J. Hanna* (2018), User Data Privacy: Facebook, Cambridge Analytica, and Privacy Protection," in *Computer*, vol. 51, no. 8, p. 56-57

advanced filtering tool with heightened capabilities for pattern recognition will also be able to identify users easier. Unfortunately, it is frighteningly easy for OCSSPs to create models and profiles based on small, near inconsequential, data.[160] This data can be used for speculation of further identifiable private information, that the user has not even disclosed.[161] If these types of profiles are constructed over time through constant or near-constant surveillance methods, which they often are, that track online activities in the hopes of identifying copyright infringement committed at a commercial scale, the OCSSPs run into even further issues with the right to privacy.[162]

Whether one is a user or a private rightsholder, the new requirements of the CDSM-Directive pose tangible risks for misuse of personal data. It is one thing for a user potentially engaging in behavior infringing on a copyright, to have to make decisions balancing exploitation and privacy with only one of them pertaining to personal stakes. But for a private individual, who is an author or a performer, to be forced to choose between the protection of their privacy and personal safety, and the protection of their intellectual property is reprehensible. Therefore, the current situation only benefits larger corporate rightsholders who have enough separation between their operations and the individuals part of it, while leaving smaller individual rightsholders at risk. This results in the failure towards both the rights to privacy and the right to property.

4.1.3 Property

For both the freedom of expression and privacy, property has represented the other side of the coin. Defined in Article 17 of the Charter, a right to property entails ownership, usage, disposal and bequeathing lawfully acquired possessions. The

---

[160] S. Wachter and B. Mittelstadt (2018), A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI Columbia Business Law Review, 2019(2) p. 497-498
See also, S. Lewandowsky, L. Smillie, D. Garcia, et al. (2020) Technology and Democracy p.31,121
B. *Mittelstadt, P. Allo, M. Taddeo, S. Wachter & L. Floridi* (2016) The Ethics of Algorithms: Mapping the Debate, BIG DATA & SOC'Y, July–Dec. p. 1-2

[161] S. Wachter and B. Mittelstadt (2018), A Right to Reasonable Inferences p. 505-507

[162] F. Romero-Moreno (2020), 'Upload filters' and human rights p. 168-169

limitations to this need happen in the public interest or under the conditions provided for by law. The loss experienced due to these exceptions must be compensated. But in general, "The use of property may be regulated by law in so far as is necessary for the general interest."(Article 17(1) of the Charter). Article 17(2) simply states that intellectual property will be protected. In the context of the intellectual property to be protected; The clashes with the fundamental right of the right to property appear in two major forms. The first one is the rightsholders' rights of exclusion, being allowed to establish limits and boundaries to the use of their property, to exercise control over who can access the property, in what ways, when, and what is allowed to be done with the property. This works in tandem with Article 16 of the charter, the freedom to conduct a business, when the usage of property includes its commercial exploitation. The second one concerns public interest and user's rights due to the limitations on the exclusive rights.

Prior in the section concerning freedom of expression it was found that "--copyright protection must necessarily be accompanied, to a certain extent, by a limitation on the exercise of the right of users to freedom of expression and information.".[163] The CJEU stands in defense of property rights within the online sphere. These arguments have been discussed in the previous chapters and therefore the focus of this one is another different approach to the right to property.

For a moment, to look beyond the disputes of giants, both tech and rightsholder, it is time to ask; How fare the users' rights to property? The digital online environment promotes digital ownership over the traditional non-digital physical ownership.[164] Whether it is a book or an e-book both are property, with unique particular risks to how one might lose ownership of it. However, ownership confined within the online environment utilizing digital products is a lot less stable than its physical counterparts. One might question if in certain cases digital ownership is in fact closer to renting than actual ownership and often the answer is yes.

---

[163] Case C-401/19, the Republic of Poland v. European Parliament and Council of the European Union ECLI:EU:C:2022:297, para 69-84, 98

[164] A. Perzanowski and J. Schultz (2016) The End of Ownership: Personal Property in the Digital Economy. Cambridge, MA: MIT Press p. 169-170

This is an issue that has been present for more than a decade by now. In 2009 Amazon remotely removed purchased digital books from customers' Kindle devices when the service that provided them turned out to lack the required license.[165] This removal of digital content was carried out despite Amazon lacking the right to do so according to their own terms of service that state that they grant the user a "permanent copy of the applicable digital content.". The wording nowadays on the Amazon Prime Video terms of service defines a purchase to be for a "on-demand viewing over an indefinite period of time".[166] Potentially longer than a rental period, but far from being permanent. This marks a clear shift in the redefining of terms surrounding digital content and digital ownership. In 2020 a class action lawsuit was raised against Amazon based on the misleading nature of the division between a 'purchase' and a 'rental',[167] but it was closed due to the plaintiff's failure to prosecute and comply with court orders.[168] Regardless of the failure of this class action lawsuit it has served to spark further conversation on the nature of digital "ownership". Many of these digital goods available for purchase are protected under copyright; books, movies, music and video games amongst others, and they are exceedingly purchased online instead of in a physical format.[169] In fact when they are purchased, often one does not acquire actual ownership but is instead granted a license to use the purchased content.[170] Therefore the purchases made in the digital online environment are in fact lacking the permanence of their physical counterparts. This combined with the fact that digital-only releases are becoming more popular along streaming service exclusives, heralds a decline in the overall permanence of art and media. Large swatches of works that contribute to the modern cultural landscape

---

[165] "Amazon Erases Orwell Books from Kindle," New York Times, July 17, 2009, http://www.nytimes.com/2009/07/18/technology/companies/18amazon .html

[166] Amazon Prime Video Terms of Use https://www.primevideo.com/help/ref=atv_nb_lcl_en_US?_encoding=UTF8&nodeId=202095490

[167] Case 2:20-cv-00848-KJM-KJN Amanda Claudel v. Amazon.com, inc https://docs.reclaimthenet.org/amazon-lawsuit-video.pdf

[168] Case 2:20-cv-00848-KJM-KJN Amanda Claudel v. Amazon.com, inc, Order to show cause https://cases.justia.com/federal/district- courts/california/caedce/2:2020cv00848/372604/37/0.pdf

[169] A. Perzanowski and J. Schultz (2016) The End of Ownership p.3

[170] Steam Subscriber Agreement https://store.steampowered.com/subscriber_agreement/
Epic Games store End User License Agreement https://store.epicgames.com/en-US/eula

are one licensing disagreement or tax reduction decision away from facing oblivion.[171] In addition, content available digitally is reliant on the existing and continued server access provided by the purveyor of the goods, meaning that in the instance of bankruptcy or other causes that force them out of business, all of that digital content will disappear along with the servers.[172]

This type of licensing arrangements as discussed above, have been the norm in regard to software much longer than non-software products, therefore this new focus on licensing across the board is interesting. The licensing terms differ between providers, each user agreement tailored for their interests and purposes, which can lead into uncertainty amongst the users, who are most likely utilizing several services at once.[173] This change in approach could weaken the principle of copyright's exhaustion or the first sale doctrine as it is referred to in the US.[174] Established by the WCT, exhaustion of copyright is defined within the right of distribution, stating that after the initial transfer of ownership whether of the original or its copy, the right to control its distribution is exhausted (WCT, Article 6). This explicitly concerns only "fixed copies that can be put into circulation as tangible objects.". This principle was further reinforced by the Directive 2001/29/EC, and it can be seen in action in the CJEU case UsedSoft GmbH v. Oracle International Corp., where it was even expanded upon in line with the Directive 2009/24EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. The CJEU found that it made no difference whether the program was downloaded from the rightsholder's website or installed via a physical medium such as a CD-ROM, as

---

[171] A. Perzanowski and J. Schultz (2016) The End of Ownership p.172
For recent reporting on the matter see,
HBO Max Is Reportedly Removing Content To Save Money
https://www.ign.com/articles/hbo-max-is-reportedly-removing-content-to-save-money-heres- what-that-means-for-you
Warner Bros. Discovery Takes $825M Write-Down on Content Following High-Profile DC Axings and TBS-TNT Cancellations
https://www.hollywoodreporter.com/business/business-news/warner-bros-discovery-takes-825m-writedown-on-content-1235192629/

[172] Julie Jacobson, "Perils of DRM: What Happens to Your Digital Content if the Provider Goes Out of Business?" CEPro, June 5, 2009,
http://www.cepro.com/article/print/what_happens_to_your_digital_content_if_the_provider_goes_out_of _business/

[173] A. Perzanowski and J. Schultz (2016) The End of Ownership p. 7-8,

[174] A. Perzanowski and J. Schultz (2016) The End of Ownership p. 35-36

both resulted in the transfer of the right of ownership of that copy.[175] The Court states that "from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar." reinforcing the link between physical and digital goods.[176] If the two were to be treated differently it would allow the rightsholder to control the resale of digital copies and demand further renumeration on them regardless that the appropriate renumeration had already been received by their first sale. According to the Court this "--would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned.".[177] This ruling was in 2019 used by a French court to rule in favor of the consumer representative group UFC Que Choisir against the digital games storefront Steam.[178] The French judges followed the reasoning of the CJEU judgement in the Case C-128/11, UsedSoft GmbH v. Oracle International Corp., ruling that Steam users are entitled to the right to resell the games they have purchased.[179] Valve, the corporation responsible for Steam argued that the sale of the products on their part is a 'subscription' to the product instead of a license, but this was rejected by the judges.[180] Valve has appealed the decision.

The ruling of the French court is a win for the users' right to property. This kind of an approach would not only be for the benefit of the users and consumers but could translate into better renumeration for authors. The subscription models of streaming services and the concept of digital "ownership" has reduced the sales of other more permanent options, leading into a decline in royalties.[181] The streaming services themselves and rightsholder organization are enjoying massive profits but it does not translate into increased renumerations for the actual artists. This is further

---

[175] Case C-128/11, UsedSoft GmbH v. Oracle International Corp. ECLI:EU:C:2012:407, para 47
[176] Case C-128/11, UsedSoft GmbH v. Oracle International Corp. ECLI:EU:C:2012:407, para 61
[177] Case C-128/11, UsedSoft GmbH v. Oracle International Corp. ECLI:EU:C:2012:407, para 63
[178] 16-01008 UFC QUE CHOISIR c- VALVE
https://cdn2.nextinpact.com/medias/16-01008-ufc-que-choisir-c--valve.pdf
Reported via, UFC-Que Choisir vs Valve : la justice consacre la vente d'occasion des jeux dématérialisés !
https://www.nextinpact.com/article/29653/108209-ufc-que-choisir-vs-valve-justice-consacre-vente-doccasion-jeux-dematerialises
[179] 16-01008 UFC QUE CHOISIR c- VALVE p.65-66, 69
[180] 16-01008 UFC QUE CHOISIR c- VALVE p. 69
[181] WIPO Standing Committee on Copyright and Related Rights, STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS p.4

aggravated by the fact, that of the royalties paid, only those most popular benefit, while the rest remain poorly compensated; The system is, simply unsustainable for artists.[182]

The issues regarding the right to property are highlighted in the digital online environment as the ideas of contribution, compensation and ownership are diluted and bastardized in comparison to their counterparts regarding traditional physical methods of distribution. The problems of the earlier discussed 'value-gap' or what is in actuality a value transfer, are coming from within the industries. The giants can point fingers at one another over minor differences in their attempts to disregard accusations and criticism aimed at them[183], but in the light of the study released by WIPO it is clear that they are equally part of the problem, contributing into the systematic underpaying of artists and creators.[184] In its expansion of copyright protection the CDSM-Directive enables this system and continues to serve these intermediaries and not the artists, authors or performers, without whose creative labor this system could not exist in the first place.

4.1.4 Freedom of the arts and sciences

The freedom of the arts and sciences encompasses many of the problems discussed within the previous chapters. Defined in the charter, it is stated that, the arts and scientific research shall be free of constraint and that academic freedom shall be respected (Article 13 of the Charter). The key here is the word freedom, free of constraint and academic freedom are the two defining features of this right. Issues regarding freedom of expression, privacy and property can transform into issues for the arts and sciences as well, hindering this freedom. For example, limitations to freedom of expression can easily create constraints and impose undue limitations on

---

[182] WIPO Standing Committee on Copyright and Related Rights, STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS p.5,12

[183] *See note 50 of* the WIPO Standing Committee on Copyright and Related Rights, STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS p.12

[184] WIPO Standing Committee on Copyright and Related Rights, STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS p.49

arts or scientific research namely on making the products of such available to the public.

In its recitals the CDSM-Directive makes a case to protect and nurture freedom of the arts and sciences stating that, "--existing exceptions and limitations in Union law that are relevant for scientific research, innovation, teaching and preservation of cultural heritage should be reassessed." (CDSM-Directive, Recital 5). The measures taken to achieve that include exceptions regarding the use of text and data mining technologies, the use of illustration for teaching in the digital environment and for preservation of cultural heritage. As established earlier, fostering education is one of the core principles of copyright protection. The provisions provided by Article 5 of the CDSM-Directive concerning the use of works and other subject matter in digital and cross-border teaching activities, is an excellent step towards respecting that legacy. It re-affirms the exception included in the Directive 2001/29/EC, while expanding upon it and unlike in the 2001 Directive, makes it mandatory. However, it is an odd exclusion that unlike the 2001 Directive, the CDSM-Directive provisions are only in regard to teaching but not scientific research. This could cause uncertainty in national implementation and in the utilization of these provisions.[185]

The text and data mining (TDM) exceptions also leave things to be desired. The exceptions are too constrictive to allow for scientific research to reach its full potential. Data, similarly, to ideas, is not protected by copyright and therefore, their use should be excluded from the scope of copyright completely, but for the CDSM-Directive to make an exception for data mining implies that the act would otherwise be inherently infringing,[186] thus expanding the scope of copyright needlessly and limiting the potential of TDM for the use of research. Further the limitations of the TDM exception just for the use of "research organisations and cultural heritage institutions"(CDSM-Directive, Article 3(1)) effectively jeopardizes the potential of any other non-commercial research done outside these specific institutions, as it

[185] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 989
[186] T. Margoni, & M. Kretschmer (2021), A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology. Zenodo. p. 11, 13
Also, S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 985

leaves them with the general exception provided by Article 4 that is less than ideal[187]. Investigative journalism and reporting should by the very least also enjoy the less restrictive exclusion provided by Article 3 due to their fundamental importance for the function of democratic society.[188] In general, the scope of the TDM exceptions is disappointing, and a liability in regard to the freedom of expression.[189]

On a more positive note, the rights granted for cultural heritage institutions (CHI) in the Article 6 of the CDSM-Directive present a beautiful oasis in the midst of the encroaching harsh desert of unforgiving copyright protection. The rights to "--make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation." free CHIs to digitize and reformat their collections, ensuring both the improved quality, and increased accessibility and availability of the works within those collections, all these actions that would have prior engaged copyright and been subject to further barriers.[190] Whether for libraries, museums or archives, these new rights enable them to further improve upon the performance of their intended duties as institutions of learning, research and preservation, which has all along been the intention of the EU.[191] The decision to allow CHIs to utilize the help of other CHIs or more importantly even third parties across borders, in the interest of preservation if they lack the necessary technology or means to accomplish it themselves (CDSM-Directive, Recital 28), is vital to support a wide range of application and reach for

---

[187] T. Margoni, & M. Kretschmer (2021), A deeper look into the EU Text and Data Mining exceptions p. 25

[188] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 987

[189] C. *Geiger, G. F. Frosio, & O. Bulayenko* (2018), Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data? IIC - International Review of Intellectual Property and Competition Law, 49(7), p. 816, 828, 838

[190] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 991
Preservation is defined in Recital 27 of the CDSM-Directive as a process "to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter"

[191] Commission Recommendation of 24 Aug. 2006 on the digitization and online accessibility of cultural material and digital preservation, 2006/585/EC
Commission Recommendation of 27 Oct. 2011 on the digitization and online accessibility of cultural material and digital preservation, 2011/711/EU

the provisions of Article 6. However, one concern arises from this otherwise generous provision for preservation; As the concept of preservation is not explicitly defined by the Directive beyond Recital 27:s inconclusive wording, it leaves a grey area for preservation as general, preventative, method. How concrete does the threat of technological obsolescence or physical degradation have to be, for the measures taken to, for example, digitize a collection, be considered preservation?[192] In line with the Directive's intentions the concept of preservation should not be interpreted too narrowly to ensure the capability of the CHIs to prepare for even unpredictable threats concerning their collection. Acts of preservation are better done sooner than later as the unexpected or faster deterioration of the original can hinder or make impossible preservation later on due to the threat it presents for the original.[193]

As long as these exceptions and special provisions for the purposes of education and scientific research are respected, of the fundamental rights impacted by the expansion of copyright protection, the status of the freedom of the arts and sciences seems the most secure. Primarily coming under threat whenever one or more of the three others are also compromised. These exceptions provided for teaching and preservation present a tangible barrier against the overexpansion of copyright protection and their codification into legislation is an important step.

In conclusion, the threats presented for fundamental rights due to the expansion of copyright protection are multifaceted and many in numbers. It is an unfortunate reality to contend with but inescapable at this time. The balance is skewed towards property and economic interests but still manages to fail authors and performers in regard to it. This results in an unbalanced and unfair reality and system that fails those it vowed to protect, the effects of which can be felt on a global scale.

4.2 Global equality and balance

[192] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p. 993

[193] The acts of preservation such as digitation usually necessitate the handling of the original. For example, through scanning or photographing a text. This can lead into further deterioration or damage done to the original if not handled carefully

Global inequality is often also a fundamental rights issue. The existing inequality lays the foundation for further issues with fundamental rights which can further aggravate the already existing issues, leading into vicious never ending circle. As fundamental rights can be in conflict with one another they can also rely on one another, therefore issues with fundamental rights are rarely confined within a single one of them but instead involve multiple ones in varying degrees. This interconnectedness is both a blessing and a curse. To solve any of these issues means managing and solving multiple issues at once. The issues presented by copyright protection are a drop of water in an ocean of other more pressing concerns. However, that does not excuse the role copyright protection can play in these issues and the ways it stands to improve.

4.2.1 Copyright protection and global inequality

The concept of what copyright protection means is not a universal one,[194] the definition that modern policy revolves around is the work of the Berne Convention. It can be seen as a construction of norms borne from a rather specific set of economic and social conditions, those of western Europe.[195] It is undeniable, considering the history of copyright policy, that its modern iterations heavily relay on, that the current scope of copyright was designed with western Europe and now, with the US in mind. Everything else is an addendum. The global South is an addendum, the consideration of which is an afterthought, a revision and an additional clause. Many countries of the global South became part of the Convention under colonial rule having no choice but to comply with its rules. After gaining independence they were simply left with a system imposed on them by what was a foreign power.[196] This is still presented as a positive, as without copyright protection, the recovering countries of the global South would surely be losing economic benefits and not have the means for commercial exploitation of both national and

[194] P. Goldstein, P. B. Hugenholtz (2019), International Copyright: Principles, Law, and Practice. Fourth Edition.p. 4
[195] C. D. Hunter, Copyright and Culture (2000) cited in A. Story (2003), Burn Berne p. 768
[196] P. Goldstein (2001), International copyright: Principles, law and practice. First Edition p. 22

international markets.[197] This makes it so, that the clauses governing the specifics of the "national treatment" principle in the Berne Convention for example, do on the surface promote formal equality, but in actuality the utilization of these clauses leads to enforcing substantive inequality.[198] Equality means nothing if it is just treated as a concept, an ideal and a theory, without actually translating it into practice. Therefore, due to the presented illusory balance and illusory equality, the global south is left with a system that very much acts like a modern colonial force. Impeding their development while others reap the profits of their labor.[199] The countries for which the system was made, naturally benefitting the most of its rules,[200] turning the world of copyright into a playground for rich industrialized Western countries.

The way the legislative text of Berne addresses the global south is crude, condescending and due to its nature of being an afterthought appears hurriedly put together. The idea that Western copyright norms are the one and only proper solution to managing copyright protection and their implementation would be 'for their own good', as that could yield the best economic profits, is frankly insulting towards any system that has a non-conventional approach towards property and ownership.[201] The continued presence of Berne within the countries of the global South is a hinderance to the development of their own national legislation regarding copyright protection, resulting in a fragmented copyright framework that struggles to serve local national interests.[202]

There is a double standard between the Western countries and the global South. The developed Western countries are benefitting from a history of regulations created in their favor. Even before enjoying the benefits of a system designed in their favor, those young Western countries rising in status, such as the US, strategically

---

[197] Understanding Copyright and Related Rights WIPO p. 32
The assumption made here is that commercial exploitation must be the end goal, equating copyright protection to economic benefits without contemplating its other aspects

[198] A. Story (2003), Burn Berne p. 767, 777-779

[199] A. Story (2003), Burn Berne p. 769

[200] Global Economic Prospects and the Developing Countries 2002 p.129, 133 Table 5.1

[201] A. Story (2003), Burn Berne p. 774

[202] A. Cerda Silva (2012), Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright. p. 18-19, *see also p. 23-24*
See also, P. Goldstein, P. B. Hugenholtz (2019), International Copyright: Principles, Law, and Practice, Fourth Edition. p.68

committed copyright infringement to bolster their own status and to elevate national interests as that, for a young country, was in their best interests.[203] Nowadays a similar opportunity to benefit from copyright infringement is not being allowed in any shape or form for the young recovering[204] countries of the global South. Therefore, the ladder by which a climb upwards can begin is being kept inaccessible or at least being made harder to access. Some leniency in the modern copyright policies would go a long way for young and recovering countries that could benefit from a strong internal copyright policy. Elevating national creativity and fostering local talent. Prioritizing securing exported 'goods' while imported 'goods' take a backseat.[205] By the very least there would need to be recognition of this existing double standard. An acknowledgement of the unorthodox methods that were used to propel the current copyright powerhouses to the status which they hold.

To bridge this gap between the global South and the more financially stable Western countries begins with education, it begins with improved access to knowledge, information and education, free from the bounds of artificial scarcity.[206] Open access to research and scientific knowledge beyond the closed circles of universities and other similar closed institutions could begin to dismantle the hierarchies of knowledge, bringing it to the people instead of the very few and chosen.[207] The artificial scarcity perpetuated by copyright and this Western

---

[203] W. *Patry* (2003), The United States and International Copyright Law: From Berne to Eldred, 40 HOUS. L. REV. p. 750
S. K. Sell (2003), Private Power, Public Law The Globalization of Intellectual Property Rights p. 61

[204] Using the word 'recovering' instead of 'developing' pulls focus towards the reason why these countries are still in a developing phase. Because they are recovering from the years they spent exploited under colonial rule.

[205] W. *Patry* (2003), The United States and International Copyright Law:Eldred p. 750
A. Cerda Silva (2012), Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright. p. 32-33

[206] Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) Fourth Session Report p.6
G. F. Frosio (2017), Resisting the Resistance: Resisting Copyright and Promoting Alternatives, 23 Rich. J.L. & Tech. 4 p. 6,34
K. Beiter (2021), "Not the African Copyright Pirate Is Perverse, But the Situation in Which (S)he Lives, Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization 'From Below' in IP Law." PIJIP/TLS Research Paper Series no. 65. p.7

[207] G. F. Frosio (2017), Resisting the Resistance p. 37-38
Lawrence Lessig (Apr. 18, 2011), The Architecture of Access to Scientific Knowledge: Just How Badly We Have Messed This Up, Address at CERN Colloquium and Library Science Talk, http://cdsweb.cern.ch/record/1345337

knowledge monopoly, hinders the global South from developing and implementing public policies that would benefit education and access to knowledge.[208]

Due to this and the existing financial inequality[209], companies and people in the global South and other emerging economies are often forced to rely on unauthorized use of educational tools, software and other digital products as they are priced out of the legal versions.[210] Especially with software, there are certain products that can be considered to be industry standards on their fields, programs that dominate that industry such as the products of Microsoft or Adobe. Therefore, in order to participate in the industry on the global scale one must use those programs regardless of whether they can afford the licensing fees or not. One alternative is being provided by open-source software, open-source meaning that the software is developed and licensed in a manner that puts it within the public domain and allows its utilization usually for free, without rendering it unusable in a commercial setting.[211] Unfortunately in comparison to the software that is considered the industry standard, the open-source versions that could be accessed for free or with a cheaper license are often deemed unacceptable or would force a disadvantage. This essentially traps these economies into an inescapable circle of punishments. It is not enough that many, software companies for example, offer reduced licensing fees to entities operating from emerging economies as usually even with the reduced fees many are still priced out. As what seems like a hefty reduction in the western world rarely is enough to cover the financial disadvantage the emerging economy is suffering form.[212] True solutions to these kinds of issues are hardly simple, the changes made need to be systematic. EU and the rest of the Western highly industrialized countries must do their part and meet the global South and other

---

[208] A. Cerda Silva (2012), Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright. p. 6

[209] L. Chancel, T. Piketty, E. Saez, G. Zucman *et al*. (2022), World Inequality Report 2022 p. 56,57 The current levels of inequality corresponding with those of early 20th century paint a bleak picture of progress and development.

[210] J. Karaganis, et al. (2011), Media piracy in emerging economies p.18

[211] Software Management: Security Imperative, Business Opportunity BSA GLOBAL SOFTWARE SURVEY JUNE 2018 p.19

[212] J. Karaganis, et al. (2011), Media piracy in emerging economies p.63 Table 1.5

emerging economies on their terms, only then can the harm done be mitigated and a new better balanced more equal system of copyright protection be born.

5 TO RE-IMAGINE THE BOUNDARIES OF COPYRIGHT PROTECTION

5.1 For whom the bell tolls[213]

5.1.1 The issue with the current enforcement system

The current system in place for enforcing copyright is a 'notice and takedown' -system. With notice and takedown, the responsibility for taking action against copyright infringement is on the creator whose rights have been infringed upon, they have to both find and report the infringing material. The service provider does not need to react before they are notified. Their responsibility starts after they are notified of a potential copyright infringement.

As discussed in the earlier chapters, already the current notice and takedown system is open to abuse. False reports submitted about copyright infringement are a viable method of harassment. There is rampant misuse of the US copyright system, that most of the international platforms rely and operate on, the tools for reporting copyright infringement have also become tools of harassment.[214] The DMCA notice system the biggest offender on this front. The automation of the DMCA notice system has exposed in it a liability that goes beyond just utilization for copyright protection.[215] In lieu of the algorithmically and automatically sent reports by service providers in the name of efficiency[216], similar false reports are being generated in

---

[213] This title is referencing John Donne's work 17. Meditation, as the answer for that question is "it tolls for thee", in his writing it serves for a direct metaphor for death, that death comes for everyone regardless of action or inaction, and that humanity is inherently connected and the death of any single person affects another.
J. Donne Collected Poetry p. 326
In this thesis the use of this phrase serves as a
metaphor for the collective and inherently connected nature of the online environment where nobody can be considered safe from or unaffected by the developments that take place. The effects of every policy, every limitation placed upon it, ripple outward coming into contact with every single user sooner or later.

[214] G. Spindler (2019), The Liability system of Art. 17 DSMD and national implementation p.360

[215] J. W. Penney (2019), Privacy and Legal Automation p. 426

[216] J. M. Urban, J. Karaganis & B. L. Schofield (2016), Notice and Takedown in Everyday Practice

masse effectively attempting to limit the freedom of expression by silencing critique and minorities and influencing and limiting the posting of politically charged texts. A DMCA report can disable access to the material in question for up to 14 days as is mandated by the US law (17 U.S. Code § 512, G, 2). Which can effectively stifle time sensitive discussions.[217]

However not all is bad, on some fronts there have been improvements, recent research suggests that the situation is potentially better than was thought before at least on one platform.[218] The filtering systems of YouTube according to their own report data function with excellent accuracy given the amount of content they have to go through. It is worth pointing out, that out of the three filtering tools that the YouTube utilizes to fight against copyright infringement the one that has the highest accuracy and user satisfaction is their Content ID tool. The Content ID tool manages 98% of all copyright claims[219] and is mainly reserved for collecting societies, movie studios and record labels as for it to work the Content ID partners must provide YouTube with reference files including metadata for the properties they claim. Those references will then be used to train the program to automatically find and flag content that infringes on the partners property.[220] This is a functional working filtering system, but its functionality depends on a "high level of operational investment", that rules it out for working outside of its current purpose.[221] It is a tool made for the powerhouses of the creative industry and would not be possible without them. Of the other systems of detecting copyright infringement on YouTube, Webform, that is available to everyone and utilizes user generated reports sees high amounts of abuse. False copyright claims in attempt of censorship, stifling criticism

---

p.10

[217] M. Perel (Filmar) and N. Elkin-Koren (2016), Accountability in Algorithmic Copyright Enforcement p.489-490
J. D. Matteson (2018). Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It, 35 Santa Clara High Tech. L.J. 1 p.12-13

[218] YouTube's first Copyright Transparency Report 2021 – A step towards "factfulness" https://copyrightblog.kluweriplaw.com/2022/01/20/youtubes-first-copyright-transparency-report-2021-a-step-towards-factfulness/

[219] YouTube Copyright Transparency Report H1 2022 p. 4

[220] YouTube Copyright Transparency Report H1 2022 p. 3

[221] Google (2017) Section 512 Study: Request for Additional Comments. p.4-5
https://regmedia.co.uk/2017/ 02/23/google-section-512.pdf

or personal displeasure are common enough to be a problem.[222] A tool for everyone might work fine on a technical level but also presents a liability. When these systems as accurate as they are, mess up and wrongly flag content and cause a restriction, even if it ends up being momentary, the response is often instant and intense.[223]

Due to the sheer number of takedown notices even if the percentage of false flags and takedowns is small, it still means potentially millions of instances where a mistake has been made. Millions of mistakes that can constitute a limitation for freedom of expression.[224] It is difficult to tolerate these numbers beyond the percentage, it implies that the system relies on sacrificing or placing at risk fundamental rights of its users to guard the economic interests of others. As the amount of internet users, available content, and data being processed continues its fast explosive growth,[225] the numbers behind the percentages, the sacrifices made will also continue to grow. It is inevitable that a critical capacity will at some point be reached and the very function of this system will be threatened. The CDSM-Directive in its Recital 66 recognizes that it is not possible as of yet to completely move away form the 'notice and takedown' system. But how long will it last, before it threatens to crumble under the weight of its own machinations? What can be done then? The DSA and DMA package of regulations has the potential to mitigate the negative effects of this notice and takedown regime of the larger online platforms and by the very least increase transparency on its function.[226] However, it is not foolproof and still leaves blind spots, regardless and partially due, to its ambitious nature.[227]

---

[222] YouTube Copyright Transparency Report H1 2022 p. 5,6

[223] YouTube's first Copyright Transparency Report 2021 – A step towards "factfulness" https://copyrightblog.kluweriplaw.com/2022/01/20/youtubes-first-copyright-transparency-report-2021-a-step-towards-factfulness/

[224] J. M. Urban, J. Karaganis & B. L. Schofield (2016), Notice and Takedown in Everyday Practice p. 97

[225] Eric Schmidt, speech delivered at the Techonomy Conference, Lake Tahoe, 4–9 August 2010 cited in C. Geiger, G. F. Frosio, & O. Bulayenko (2018), Text and Data Mining in the Proposed Copyright Reform p. 814
How Much Data Is Created on the Internet Each Day?
https://dzone.com/articles/how-much-data-is-created-on-the-internet-each-day

[226] A. Peukert, M. Husovec, M. Kretschmer *et al.*(2022) European Copyright Society – Comment on Copyright and the Digital Services Act Proposal. *IIC* **53**, p.636

[227] J. Laux, S. Wachter, B. Mittelstadt,(2021) Taming the few: Platform regulation, independent

There are no quick easy solutions. No single decision, to turn this system into something better. In a society cruising on the information superhighway, dependent on the function of the digital online environment, strengthening copyright protection is liable to push it towards a crash. Continuing on the current path, at the current speed, one must not ask, "--for whom the bell tolls;" as the answer inevitably is "it tolls for thee.". If a crash happens on this information superhighway, no user can consider themselves unaffected, therefore it is a communal responsibility to aim for a shift away from the current system. The contributions of this system, reflected in the boundaries of copyright protection, are part of the existing legal fiction. These boundaries are not immutable, but pliable, ready to be molded for a different purpose.[228]

5.1.2 The problem with deregulation

Even as this thesis argues for the dismantlement and subsequent renewal of the system facilitating copyright protection, there are major risks involved in removal of any major legislative norms. Therefore, deregulation in itself is not the answer to any of the issues within the copyright system and the expansion of copyright protection, as it would only benefit those who already have an advantage within the current system of protection. Trying to remove any policies without seamlessly transferring to a new system is only going to lead to further exploitation of those left vulnerable in the current system. Dismantling the system of protection carelessly would create uncertainty and unaccountability that would translate directly and indirectly into risks for anyone working or interacting with the creative industry for example. Uncertainty and risks often affect investment decisions and innovation. Potentially bringing things to a halt out of fear of monetary losses or losses in market status.

---

audits, and the risks of capture created by the DMA and DSA, Computer Law & Security Review, Volume 43, 105613 p.3

[228] J. Silbey, (2014), The Eureka Myth p.10
W. Patry (2009), Moral Panics and the Copyright Wars p.112
In a similar fashion copyright cannot be claimed to be a natural property right and thus immutable
P. Drahos & J. Braithwaite (2002), Information Feudalism p.200
IPs should not be considered eternal

Even those, who by account of established status or monetary stability, could shoulder the risk of innovation oft abstain from it.[229]

5.2 Crafting a better system of copyright protection

It is time to move beyond copyright protection's 200 year old legacy and craft something fit for a new age. Fundamental rights and equality must be on the forefront of this renewal, without them copyright protection will continue to enable the unfair exploitation of the global South and remain a reflection of a very narrow set of Western European values. The concepts of creativity, innovation and the author must be elevated, while the intermediaries both tech and traditional stand to lose their undeservedly earned and protected status.

5.2.1 Fitting together copyright and other rights

Currently, to say that the copyright system is balanced in any way would be a misjudgment lacking understanding of major global power imbalances but also an indication of somewhat misplaced priorities. The keyword in the CDSM-Directive was balance but unfortunately, despite their efforts, they failed to facilitate it. In order to find balance within the boundaries of copyright protection, two separate aspects of that balance must be taken into question.

The first aspect deals with fundamental rights. As explored earlier, the boundaries of copyright protection are clashing with those of fundamental rights. This clash presents 'acceptable' sacrifices, concessions to be made primarily in the interests of economic benefits and copyrights position as property. The scales are too heavily weighted in favor of a very narrow definition of property that in the end disappoints even authors. To begin rectifying this unbalance one must being by internalizing, that in a conflict where cultural diversity and heritage bond with fundamental rights and face on the opposing side copyright as a private right; Cultural diversity and fundamental rights must prevail.[230]

---

[229] L. Dobusch, & E. Schüßler (2014), Copyright reform and business model innovation: Regulatory propaganda at German music industry conferences, Technological Forecasting & Social Change 83 p. 25

[230] A. Cerda Silva (2012), Beyond the Unrealistic Solution for Development Provided by the

The second aspect of balance to be considered comes with the conflict of economic and moral rights. Presenting a lesson to be learned from the actions of the past. The balance must shift away from benefitting the economic rights first while leaving moral rights optional. There needs to be a departure from this model that places economic ideals on a platform without due cause. As by placing economic interests at the forefront, copyright protection is rendered into nothing but a tool of financial power, vulnerable to abuse and misuse.

5.2.2 The tenets of improvement

To redefine the existing boundaries of copyright protection, there are a few important tenets that should function as a foundation, or by the very least be included in said foundation. It is impossible to create perfect boundaries that satisfy every need of those impacted, but there is plenty of room for improvement with the boundaries as they currently are. The purpose of this section is to briefly present a few tenets to improve on the current boundaries of copyright protection and realign the system with the prior established principles. The purpose is not to offer concrete solutions, but simply to ideate and indulge in the potential of a more idealistic future.

Improving availability and access

Improving both availability and access to information will not only be for the benefit of the global South but will also benefit those of the Western world unable to participate on the exchange of information due to financial or educational reasons. Textbooks and other similar tools are crucial in their support and contribution for the human right to education. Currently stifled by too strict copyright laws.[231] Similarly in other sections such as, technological development, food security and access to essential medicines, IP laws can stand as a barrier for development.[232] This upholds

---

Appendix of the Berne Convention on Copyright. p. 26
See also, P. Drahos & J. Braithwaite (2002), Information Feudalism p.200-201

[231] K. Beiter (2021), "Not the African Copyright Pirate Is Perverse" p.7, 23
P. Goldstein, P. B. Hugenholtz (2019), International Copyright: Principles, Law, and Practice. Fourth Edition.p. 380

[232] K. Beiter (2021), "Not the African Copyright Pirate Is Perverse" p.8

the existing knowledge and information hegemony making it difficult to rise beyond its boundaries.

In addition, improving accessibility is one of the actual functional means of curbing online piracy. As accessibility is one the causes of it, improving both availability and affordability can reduce the need for people to turn to piracy. Increasing access including free access to copyrighted works can even be used to boost legal sales.[233] The idea that if free access was readily available no one would want to pay for it anymore is outdated and relies on the assumption of inherent selfishness of humanity.

An important dimension to availability and access in the EU is the cross-border utilization of content distribution services and content available in other member states. The member states produce a wide variety of audio-visual and other forms of content but struggle in making them available all around the EU.[234] This has driven consumers towards the use of Virtual Private Networks or VPNs. A VPN allows the user to bypass limitations based on physical location and for example access content not available in their country.[235] They have presented a solution for accessing content distribution services across borders as their exclusivity for a limited location goes against the principles of free movement in the EU. The assumption for citizens is that they should be able to access content from other states and more than 50% attempt to cross these digital borders to do so, due to the unavailability of access in their own country.[236]

In addition, improved accessibility is a key to the pursuit of inspiration and the beginning by which the creation of something new can start. A well of creativity and innovation can be opened through accessibility.

---

[233] *As an example,* A famed author Neil Gaiman convinced his publisher to offer one of his books for free to see the effect on sales, the experiment had a positive effect on sales, even in countries whose primary language the book was not officially translated to, as those who took advantage and enjoyed free volunteer translations would also wish to support the author. https://zine.openrightsgroup.org/features/2011/video:-an-interview-with-neil-gaiman

[234] Commission's calculations based on data in 'Annex — On-demand audiovisual markets in the EU', a report by the European Audiovisual Observatory for DG CONNECT, April 2014

[235] This is not the only use that a VPN has, they are first and foremost privacy tools to enhance ones security while utilizing online services to ensure the protection of ones IP address and other important personal or private information

[236] Flash Eurobarometer 411 — Cross-border access to online content', August 2015

A stronger public domain

Another tenet of improvement comes in the form of the public domain. The public domain refers to works that are not protected by any intellectual property laws. Those works are by definition public and have no owner, therefore they are for anyone to use as they see fit. Most often the public domain is discussed as a 'what comes after' the protection offered by intellectual property laws expires.[237] This is in line with the traditional definition of the public domain, it simply meant the expiration of copyright and that is how it was used in the Berne Convention. Similar definition is in the CDSM-Directive as well, where the public domain is defined as "The expiry of the term of protection of a work entails the entry of that work into the public domain—" (Recital 53, CDSM-Directive). Considering the public domain only in the negative as something opposite to property and copyright, has brought negative connotations to it. The effect of it can still be seen in the arguments against the existence of the public domain that paint it as something where creative works meet their end, it is where things end up when they are no longer of use and have given everything, they have to offer[238].

The public domain establishes a relatively clear boundary to copyright protection. The notion that it can't last forever. If copyright is to protect the author of the work, then the notion of the public domain should not be an issue, as the work does not enter it within the author's lifetime. But it oft is perceived as an issue and as a threat. The lengths estates go through to try and hold on to their IPs for just a little longer are a popular genre of public discussion. It is no longer about the author who has been dead for decades at that point, it is about the power and profits the estate has while holding on to the IP in question.[239]

---

[237] *For examples of this see,* G. F. Frosio (2017), Resisting the Resistance p. 47

[238] There are prevalent ideas of everlasting copyright, most notably presented during the drafting of the CTEA, arguments for essentially infinite length of term were had in public discussion.

[239] The Doyle and Tolkien estates have often been at the forefront of such discussions
See also, P. Drahos & J. Braithwaite (2002), Information Feudalism p.211
The extension to terms of protection is more likely to benefit the publisher and other such actors than the author themselves

In regard to the CDSM-Directive, in its Recital 53 it considers the public domain to be important for the access and promotion it provides for culture and also the access it provides for creations important for cultural heritage. This access to culture and cultural heritage is apt for fostering creativity, innovation and the production of new creative works. It acts in strong support of the public interest aspect of copyright protection. In the end the CDSM-Directive makes no groundbreaking additions to already existing policies on the public domain, simply opting to reinforce the existing ones and create some clarity in the notion of reproduction. Member states are required to provide that upon the expiry of a term of protection any reproduction of that work is not subject to copyright or related rights, unless it results in a creation of an original due to being the author's own intellectual creation (CDSM Chapter 4, Article 14). The CDSM-Directive is on the correct tracks with the changes made to the utilization of the public domain. However, it is unfortunate that the Directive is choosing to apply it only to works of visual arts, while leaving other forms of art uncovered. The exclusion of works such as manuscripts, old documents, music sheets and maps is disappointing due to the role they can play in the collections of CHIs.[240] It is a rather needless limitation that hinders progress and divides the creative field.

The role of the public domain is not one of individualism and control. It does not fit in with the traditional ideas of property and ownership, instead highlighting the collective and cumulative nature of creativity and creation, and this is what makes it an important tenet. Makes its existence vital as a boundary to copyright protection. To quote Jessica Litman “A vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all.”.[241] The public domain is where the works that enter it, have a chance to be born again, to be renewed and go beyond what they were. Not necessarily become better, but simply something else, working as conduits for new creativity and ideas. It is a fertile soil from which new works will grow.[242] But if one

[240] S. Dusollier (2020), The 2019 Directive on Copyright in the Digital Single Market p.997
[241] J. Litman (1990), The Public Domain, 39 EMORY L. J. p.965, 977
[242] J. Litman (1990), The Public Domain p. 967

is to conflate the existence of a work with the ownership of the work, then losing control over it, as it transitions into the public domain, would make it feel as if it were dead instead of it simply being free.

Elevating authorship and, encouraging innovation and creativity

There is this prevalent idea in public discussion; Of an artist, a creator, an author, being pure and not creating for financial profit but only for passion, the tragic 'starving artist' depiction is unfortunately still influential and affects the perceived value of an author's work. They are underpaid, overworked, and to the corporate a 'tool'.[243] The needs and interests of the authors behind the creative labor of the creative industry, are rarely met as there is a disconnect in what copyright protection represents for the artist versus what it represents for the corporate. Highlighting that copyright protection is more than just an investment.[244] Within legal discussion this image of an artist is flipped. The assumption is that an artist works primarily for financial gain, to earn a living highlighting the economic incentives for creation.[245] Creativity is not reliant on copyright, or other similar concepts. Creativity and the wish to create are inherent parts of human nature.[246] To encourage and help facilitate that creativity to thrive, is not something that only the market and economic interests are able to accomplish.[247] Their capacity to thrive is also a matter of public policy and very much in the public interest.

There is an ever growing need for art. For illustration, for design, for creative talent of all kinds. To re-imagine the boundaries of copyright protection includes to elevate and further protect the authors, regardless of the scope of their contributions. Copyright protection should not facilitate a popularity contest driven by profits. As shown by the study discussed earlier, the current existing system has failed authors, only benefitting the already existing and distinguished, the most popular ones.[248]

---

[243] "Art is dead Dude" - the rise of the AI artists stirs debate https://www.bbc.com/news/technology-62788725
[244] J. Silbey, (2014), The Eureka Myth p.12
[245] J. Silbey, (2014), The Eureka Myth p. 27
[246] R. S. Ray, J. Sun, and Y. Fan (2009), Does Copyright Law Promote Creativity? p. 1718
[247] P. Drahos & J. Braithwaite (2002), Information Feudalism p.211-214
[248] WIPO Standing Committee on Copyright and Related Rights, STUDY ON THE ARTISTS IN

This can contribute to a stronger entry barrier that can discourage new and upcoming creators, which in turn would limit the scope of innovation and creativity to those already established within the industries. Therefore, elevating authorship and encouraging creativity go hand in hand. Strengthening copyright protection, however, is not the way to go about it.[249]

5.2.3 Re-evaluation of piracy

The effects of piracy on legal consumption and sales are not purely negative regardless how the 'War on Piracy' makes it seem.[250] The various neutral and positive effects piracy can have, hold a lot of potential. That is where this re-evaluation starts, by shifting focus towards the neutral and positive effects and away from the oft too emphasized negatives. This is to showcase how piracy can contribute to the improvement of the boundaries of copyright protection and by the very least interrogate the function of piracy as a watchdog against their over-expansion.

There are a multitude of ways in which to practice online piracy. They have changed over the years, also adapting to the evolving online environment. They are strongly reactive, responding to changes as fast as possible as their continued existence relies on their capabilities to adapt and mutate to whatever the change in the online environment is that renders their previous state non-functioning or too risky. The resilience of these operations is admirable.

For the average online user some of the means of online piracy are easier than others. Ranging from the use of VPNs to online streaming sites, to torrent downloads. But regardless of the method chosen; to engage in online piracy requires effort and the willingness to accept certain risks. Risks like potential computer viruses from downloads from unsafe sources, spam advertising, compromised personal data and of course the potential legal consequences if one is caught. The

See also, R. S. Ray, J. Sun, and Y. Fan (2009), Does Copyright Law Promote Creativity? p.1722-1723

[249] J. Silbey, (2014), The Eureka Myth p. 284

R. S. Ray, J. Sun, and Y. Fan (2009), Does Copyright Law Promote Creativity? p. 1721-1722

[250] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.10

willingness to take these risks speaks for the dedication and enthusiasm with which these copyright pirates consume and share copyright protected content whether it is for entertainment or for education. Therefore, it is not surprising that those who engage in online piracy also consume high amounts of legal content, showing that the two are not mutually exclusive.[251]

Piracy rarely is the easiest way to access certain content, but sometimes it is the only way, as discussed in tandem with global inequality. The potential piracy holds encompasses both its existence as an only viable option and its existence as a direct competition to legal alternatives. Examining this potential reveals some of the failings of copyright protection and where it stands to improve.

5.2.3.1 Piracy as a protest, as an implement of critique

The first different perspective to copyright infringement or 'piracy' is one where it is viewed as an act of resistance and a critique of the dominant market powers and their influence. It is a protest against a system of oppression. In this piracy is aligned with fundamental rights and human rights. A proponent of education and access to knowledge. Copyright infringement committed in academic circles is a direct response to artificial barriers placed on knowledge and information. On a global scale outside of the privileged academic university circles, where there is already access to a plethora of information but even then, people often find themselves lacking the specific things required for advancement of their careers and development, the access to knowledge and information is a necessity of a fundamental kind. Piracy allows people to circumvent these artificial barriers placed on information and tools of education.[252] Through this, piracy provides tools for the participation to the global markets and works to reduce the effects of global inequality.

5.2.3.2 Piracy and poverty

[251] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.11, 14 *See figures 4. And 5. on p.13*

[252] K. Beiter (2021), "Not the African Copyright Pirate Is Perverse" p. 68

The costs of living are constantly rising, and people are left with less and less of disposable income. Evidenced by this the buying power an average consumer has, in recent years dropped significantly.[253] Therefore, what were previously affordable sources of entertainment are now far more inaccessible luxuries. This leads into an increase in online piracy as people have to find alternative sources to access content now out of their legal reach.[254] Piracy, while providing consumers the goods they demand, can also positively affect the industries as it can function as the catalyst to fuel further market innovation, leading into the development of different lower cost models, that attract more customers. Last this was seen during the push towards digital content distribution and legal streaming services.[255] This makes piracy an important accessory to the 'supply and demand' equation. As discussed before, now that the market for online distribution is becoming oversatured and further fractured by the overabundance of available streaming services as they all compete for users via exclusivity and new content, a new catalyst is needed to incentivize collaboration and unity to prevent further fracturing of the market and introduce new legal low cost options.

This is vital with the world barreling towards another potential recession. Inflation is high near across the board.[256] Which is liable to further weakening the buying power of consumers. Thrusting more people towards poverty. Thrusting more people towards piracy. Piracy granting access to culture and art is not a moral failing, it is a beacon of hope.

6 CONCLUSIONS

6.1 The future of copyright protection

[253] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study p.8,14
[254] J. Poort and J. P. Quintais and M. A. van der Ende et al. (2018) Global Online Piracy Study 26,70 *See Figure 5.42 on p. 70*
[255] J. Karaganis, et al. (2011), Media piracy in emerging economies p.41
[256] The World Bank Group Global Economic Prospects January 2023 p. 3

The progress forward is going to be slow, and I doubt any radical changes are going appear any time soon if ever. Idealism was reserved for the section before it no longer exists here. Some of the sources utilized for the crafting of this thesis are from several decades ago and yet the insights and analysis they provided remains relevant. Unfortunately, the critique they provided remains relevant as well as it still goes unanswered; The global system of copyright protection remains much like before regardless of the changes the world has seen since its implementation. And the changes which have taken place have mostly pushed it towards ever stronger protection. Though, regardless of its strength it fails to protect the author from 'ruin'. Too often a spear, not enough a shield, and at times the arms should be put down entirely.

There are some interesting developments to be expected from the next couple of years that will continue to shape the sphere of global copyright protection and perhaps offer some new insights on the direction it is going to take. More provisions of the DMA will begin to apply later this spring of 2023 (DMA, Article 54), with the DSA following behind in 2024 (DSA, Article 93). The year 2024 will also tell if the US finally breaks free of the continuous cycle of lengthening copyright protection, or will they continue to shape their copyright legislation to appease the demands of a single company. The year 2026 will see the continued review of the CDSM-Directive (CDSM-Directive, Article 30) and hopefully by that point all, or at least enough of the member states, have implemented the Directive; to make the impact assessment cover as many of the member states as possible and not just a few. It should provide insight on the successes and failures of the Directive on the practical level beyond what has been mostly theory and speculation.

For now, European case-law has been well equipped to deal with new developments and respond to rising concerns. Not necessarily always in the ways one would hope, but in a choice between continued uncertainty and an unpleasant answer, the answer must be chosen in order to move forward. The ramifications of the answers shall be seen in time.

In the meantime, the bell shall continue to toll