

Facilitating access to creative works and fostering creativity online

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STATEMENT OF ORIGINALITY

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- 'Love is in the air for conscious copiers and online platforms in Australia' (2020) 15(11) Journal of Intellectual Property Law & Practice Volume 859
- 'An extended doctrine of implied consent, a digital mediator?' International Review of Intellectual Property and Competition Law 52(6) IIC 2021
- 'How helpful is initial interest confusion in finding double identity trade mark infringement in online marketplaces?' (2021) 43(5) European Intellectual Property Review 306
- 'Implied consent, a natural digital mediator of copyright interests' (Kluwer Copyright Blog 17 May 2021) < <https://copyrightblog.kluweriplaw.com/2021/05/17/implied-consent-a-natural-digital-mediator-of-copyright-interests/> >
- 'Thaler strikes again, down under: Artificial intelligence systems as inventors not ruled out (yet)' (2021) 16(12) Journal of Intellectual Property Law & Practice 1296

ABSTRACT

Free spaces within the European copyright system are necessary to support creativity and secure important fundamental rights such as freedom of expression. While the ability of spaces to support creativity, such as the delineation of exploitation rights or the availability of copyright exceptions and limitations, have long been the subject of intense critical review, this thesis proposes that a principle of implied authorisation ultimately reconciles these spaces in a proportionally balanced manner.

Though copyright interests are traditionally pit against each other to expand economic rights, this thesis proposes a different construct: Firstly, the existence of “exploiters”, those granted some extent of copyright exclusivity, secondly, the blurry line between authors and users online, and thirdly, the subsidiary role of both exploiters and platforms to support creativity online. Subsequently, the thesis uses the principles from the exhaustion doctrine, a traditional limiter of access to intellectual property rights, to contend that the principle of implied authorisation is an inherent and proportional balancing mechanism within European copyright law. The thesis tests the principle of implied authorisation by examining the exploiters’ narrative of European copyright law which involves reliance on burdensome contractual terms and technology to control access to works.

The construction of the principle of implied authorisation is then used to determine how the latest development of exploiters’ rights relating to user uploads on platforms, article 17 Digital Single Market Directive, should be implemented. Comparing national approaches, the thesis contends that the approach of the German legislator proportionally balances the interests of authors, users, exploiters and platforms in a similar manner to the principle of implied authorisation and safeguards creativity online. From this context, the thesis lastly proposes that the principle of implied authorisation could be constructed as an access right within European copyright law, neatly reconciling the fundamental spaces to support creativity online.

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ABBREVIATIONS

ARCOM	Audiovisual and Digital Communication Regulatory Authority
Charter	Charter of Fundamental Rights of the European Union
CJEU	European Court of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EULAs	End user licensing agreements
IP	Intellectual property
OCSSPs	Online Content Sharing Service Providers
TFEU	Treaty on the Functioning of the European Union
TPMs	Technological Protection Measures
TRIPS	Treaty on the trade-related aspects of intellectual property
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
UDHR	Universal Declaration of Human Rights

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INTRODUCTION

BACKGROUND AND PROBLEM DEFINITION

The advent of platforms has had a profound effect on creativity. It is now easier than ever before for platform users to create content, and share it instantaneously on the internet, sparking discussion and inspiring further content creation.¹ Platforms undoubtedly play a crucial role by reducing barriers of access, providing users with tools to create, and a participatory audience.² Users are no longer passive, but active; taking part in cumulative and collaborative creativity online, and essentially, becoming authors themselves.³

User-generated content (UGC) in particular,⁴ illustrates this phenomenon and is often linked to the moment Time magazine nominated ‘you’ as person of the year in 2006.⁵ However despite commentary commending the advent of “prosumers” in the first decade of the 21st century,⁶ users still reside in a weaker position,⁷ especially when compared to both copyright rightholders and platforms. This is due to the fact that European copyright law lacks a comprehensive infrastructure to support users online, especially those that create.

So, despite these monumental social and technological advances, the approach of EU legislators remains inherently conflicted. The introduction of the internet set the European copyright legislative regime on a path of “permissioned culture” where every use is considered actionable, and the application of copyright appears unlimited.⁸ Early on, copyright holders predicted that the ease of copying and distributing, afforded by the internet, could render

¹ Carmit Soliman, ‘Remixing sharing: Sharing platforms as a tool for advancement of UGC sharing’ (2011) 22 Alb. LJ Sci. & Tech 279.

² Xiaoren Wang, ‘YouTube creativity and the regulator’s dilemma: An assessment of factors shaping creative production on video-sharing platforms’ (2021) 32 Alb. LJ Sci. & Tech. 197.

³ Niva Elkin-Koren, ‘Copyright and its limits in the age of user-generated content’ in Eva Hemmungs Wirtén and Maria Ryman (eds) *Mashing up culture: The rise of users-generated content* (Department of ALM 2009) 16.

⁴ Marcelo Luis Barbosa dos Santos, ‘The “so-called” UGC: an updated definition of user-generated content in the age of social media’ (2022) 46 Online Information Review 95.

⁵ David Hesmondhalgh, ‘User-generated content, free labour and the cultural industries’ (2010) 10 Ephemera 267.

⁶ Yochai Benkler, *The wealth of networks: How social production transforms markets and freedom* (Yale University Press 2006); Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press: 2006).

⁷ Liron Simatzkin-Ohana and Paul Frosh, ‘From user-generated content to a user-generated aesthetic: Instagram, corporate vernacularization, and the intimate life of brands’ (2022) 44 Media Culture & Society 1235. Simatzkin-Ohana and Frosh discuss the status of “prosumers” generally and not specifically in relation to copyright law.

⁸ Lawrence Lessig, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (Penguin 2014) 254-9.

copyright obsolete.⁹ Thus following intense pressure from copyright holders at both an EU and international level, the law acquiesced to their concerns.¹⁰ Not only was copyright protection extended to the digital world, but also to the very technology used to prevent unlawful access and use of copyright works, technological protection measures (TPMs).

Over the years that followed, the combined approach of strong protection and the application of copyright alongside burdensome contractual terms for users meant that we no longer own copies of works, for fear of unlawful copying and distributing, but are licensed access by rightsholders for a fee.¹¹ The patchwork of copyright exceptions and limitations afforded by the EU legislator were ultimately unhelpful as, unless transposed differently by member states, they were not mandatory, meaning that they are often subject to contractual override. It means that we now live in a world where access is refused and prevented unless users are able to assert legitimate justifications which given the imbalanced relationship between rightsholders, and users is unlikely to be successful due to issues surrounding access to justice.

More recently the focus of copyright rightsholders has shifted to platforms. Like the internet before it, platforms presented a major risk to the exploitation of copyright works online. So much so that in 2019, amid intense pressure from copyright rightsholders, largely from the music industry, the European Parliament voted to introduce a bevy of new legislative provisions under the guise of ensuring “a well-functioning marketplace for copyright” within the DSM Directive.¹² Arguably the most controversial provision is art. 17 which directly corresponded with an argument of rightsholders that a “value gap” exists between the profits made by platforms and authors due to platforms monetizing uploads using copyright works without authorisation and failing to remunerate rightsholders.¹³

⁹ Hayleigh Boshier and Sevil Yeşiloğlu, ‘An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram’ (2019) 33 *International Review of Law Computers & Technology* 164.

¹⁰ We will explore these legal developments comprehensively in Chapter III. Also see, Jessica Litman, *Digital Copyright* (Prometheus Books 2006).

¹¹ Aaron Perzanowski and Jason Schultz, *The end of ownership. Personal property in the digital economy* (MIT Press, Cambridge 2016).

¹² Commission, ‘Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market’ COM (2016) 593 final; Giancarlo Frosio, ‘To filter or not to file?’ (2018) 36 *Cardozo Arts & Entertainment Law Journal* 331.

¹³ IFPI, ‘Rewarding creativity: Fixing the value gap’ (IFPI, 13 December 2018) < https://www.ifpi.org/wp-content/uploads/2020/07/131218_Rightsholders_unite_in_calling_for_an_effective_solution_to_the_Value_Gap_Transfer_of_Value_13_Dec_2018.pdf > accessed 31 December 2022.

The solution to this problem was a heavily debated and complex provision requiring, in lieu of a license from rightsholders, platforms to make best efforts to ensure that no unauthorised content using copyright works are uploaded, and if they are uploaded, upon notification, they must be taken down and stay down. However, the solution fails to comprehensively protect users as it is widely accepted that given the exponential amount of content on platforms such as YouTube or Instagram, if platforms are to comply, they must use algorithmic copyright enforcement technology which is currently unable to detect legitimate uses of copyright works justified by (now mandatory) exceptions, specifically parody, pastiche and caricature.¹⁴ Now a long period of clarification and implementation to determine exactly how art. 17 DSM Directive should be implemented to proportionally balance all copyright interests continues without any concrete guidance on how to avoid a fragmented implementation at EU level.

This new copyright enforcement mechanism, though aimed at platforms, unequivocally harms those that fall into both author and user categories. These are creators that should create and upload content that uses previous creative works and places them in a transformative and new context. Even though a court would find that these uses should benefit from a copyright exception, following an algorithm detecting use of a previous copyright work, these uploads would be removed or filtered before being reinstated after a complaint procedure. Often this delay is palpable for creators as content uploaded is time sensitive.¹⁵ Such an approach appears to dilute the force of freedom of expression against other fundamental rights that support strong protection of copyright exploitation rights online.

When creativity is viewed through the lens of freedom of expression, this mechanism additionally conflicts with the notion of authorship and the need for artists to have autonomy over the communication of their creations. The very essence of creativity involves an extent of creators building upon previous artistic communications and adding new elements to further discussion and critique of the initial work, but additionally to inspire the creation of new works.¹⁶ Creativity does not simply exist in a vacuum, and the creativity that is occurring and being discussed by communities online illustrates this reality quite clearly.

¹⁴ Giancarlo Frosio, 'Freedom to share' (2022) 53 IIC 1145.

¹⁵ Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70 GRUR International 517, 528.

¹⁶ Deva Marsiana and *et al*, 'Creative process in creating the creative content of "Roro Choreographer" through social media platforms' (2022) 11 Catharsis 1.

Hence, we can see that the position of the EU legislator, in its quest to hold platforms accountable within “a well-functioning marketplace for copyright”, neglects to reflect the cumulative and collaborative nature of creativity. Additionally, that this latest regulatory regime is merely an extension of a narrative calling for strong protection of rights online, to the detriment of users which today includes authors. This narrative spans back to the introduction of the internet, as well as other technological advancements for dissemination.

Against this backdrop, there is an urgent need to reconcile the tension mounting between creativity and the European copyright system. Despite the complex and intricate nature of EU copyright law, regulatory systems should strive to balance exploitation rights against wider social norms, such as creativity. Without such a wholistic and balanced approach, the European copyright system appears to risk the creativity necessary to create new works. It means that authors will become entrenched in a “permissioned culture” where lacking flexibility, authors must petition rightsholders for access, already justified by legislation, which is granted too late to meaningfully contribute to the shaping of creativity online.

This thesis examines the inherent issue of access and protection within the European copyright system. It explores a possible solution to reconcile the strong protection granted copyright alongside practical considerations of the cumulative and collaborative nature of creativity online. Though not calling for specific legislative reform, the thesis adopts a wholistic examination of the European copyright system. It asks how the fundamental free spaces that form integral parts of European copyright law, such as the copyright exceptions and limitations, can be neatly reconciled in a manner that facilitates and supports creativity online.

The thesis identifies that the most effective way to reshape European copyright law, considering technological developments and creativity online, is to focus on the legal concept of authorisation. This is because authorisation is the touchstone of the European copyright system: Without it, users are limited to relying on specific and often, weakly protected exceptions and limitations. Yet if a more inclusive and over-arching interpretation of authorisation is constructed, it can essentially act as a proportional balancing mechanism, allowing use in circumstances where it does not conflict with exploitation rights, nor the personality rights of the author. With this in mind, the thesis limits itself to discussing subsequent creative uses of copyright works uploaded on to platforms by authors.

Commentary have attempted to bridge the concept of authorisation to meet the demands of users online. Implied licences as a doctrinal vehicle for allowing uses without payment or

explicit justification characterise the commentary.¹⁷ However, often the use of implied licence discourse offers a strict interpretation, directly linked to its specific construction within case law. This thesis builds upon notions of implied licenses by adopting the lens of the doctrine of exhaustion. As will be discussed comprehensively throughout this thesis, its foundations are linked to the very contours of access and protection within the European copyright system. Essentially it provides a proportional balancing mechanism for when the application of an exploitation right should exhaust, allowing users access to and use of the copyright work.

The thesis also aims to build upon an increasing trend within European copyright commentary and European Court of Justice (CJEU) jurisprudence to invoke the protection of the European Charter of Fundamental Rights (Charter) when facing the problem of users' rights within the European copyright system.¹⁸ We will observe in detail later in this thesis the complex relationship between the Charter and European copyright law, or more simply: EU primary law versus EU secondary law. However, it suffices to note here that the approach of the thesis to reconcile authorisation, the doctrine of exhaustion and fundamental rights, from the perspective of creativity online, provides an original and wholistic construction of the European copyright system which supports its very crux, authors.

¹⁷ Poorna Mysoor, 'Exhaustion, non-exhaustion and implied licence' (2018) 49 IIC 656; Poorna Mysoor, *Implied Licences in Copyright Law* (Oxford University Press 2021); Afori O Fischman, 'Implied license: an emerging new standard in copyright law' (2009) 2 Santa Clara High Technol Law J 275; Ansgar Ohly, 'Economic rights' in Estelle Declaye (ed) *Research Handbook on the future of the EU Copyright* (Edward Elgar Publishing, Cheltenham 2009); Mihály Ficsor, 'GS Media and Soulier: may the hyperlink conundrum be solved and the "new public", "specified technical means", and "restricted access" theories be neutralized through the application of the implied license doctrine and the innocent infringement defense' (2017) 1 Auteurs média 18; Michael Grynberg, 'Property is a two-way street: personal copyright use and implied authorization' (2010) 79 Fordham L. Rev. 435; Monika Isia Jasiewicz, 'Copyright protection in an opt-out world: Implied license doctrine and news aggregators' (2012) 122 Yale Law Journal 837; Taina Pihlajarinne, 'Setting the limits for the implied license in copyright and linking discourse: The European perspective' (2012) 43 IIC 100; John S. Sieman, 'Using the implied license to inject common sense into digital copyright' (2006) 85 NCL Rev. 885; Georgia Jenkins, 'An extended doctrine of implied consent – A digital mediator?' (2021) 52 IIC 706.

¹⁸ Christophe Geiger, 'Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope' (2009) EIPR 115; Bernd Justin Jütte, 'The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe' (2016) 38 EIPR 11; Jonathan Griffiths (a), 'Taking power tools to the *acquis* – The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law' in Christophe Geiger (ed.) *Intellectual Property & the Judiciary* (Edward Elgar 2018); Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 4 EIPR 683; Jonathan Griffiths (b), 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 European Law Review 65; Christophe Geiger and Elna Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien, Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 IIC 282; Sabine Jacques, 'On the wax or wane? The Influence of Fundamental Rights in Shaping Exceptions and Limitations' in Eleonora Rosati (ed) *The Routledge Handbook of EU Copyright Law* (Routledge 2021).

HYPOTHESIS AND RESEARCH QUESTION

It follows that this thesis proposes that a broad construction of copyright authorisation has the potential to balance copyright interests and support creativity online. To examine this hypothesis, the thesis evaluates the following research question:

To what extent can the concept of authorisation be broadly construed to provide a wider right of access to platforms for the purposes of artistic communication online?

Before turning to methodology, there are some issues of terminology that need to be addressed. Firstly, the thesis routinely refers to notions of user creativity, specifically the concept of UGC. This refers to “content that is voluntarily developed by an individual or a consortium and distributed through an online platform”¹⁹. Additionally, the thesis refers to “creative reuse”. This refers to the unauthorised act related to the copyright author’s work. It stems from notions of lawful and legitimate use as well as unauthorised use, which is generally the subject of copyright infringement. However, we can also view the “creative reuse” as creative content or copyright works, in their own right.

Secondly, throughout the thesis the concept of “artistic communication” is used to describe the act of users uploading subsequent creative uses to platforms. As we will discuss later in the thesis, “artistic communication” links to a sub-category of freedom of expression. The term reconciles both the online exploitation right, the right to communicate to the public, with the idea that some forms of communication strike at the very heart of human integrity and autonomy. “Artistic communication” straddles both the European copyright system and human rights standards by asserting that the dissemination of creativity, online or not, is an integral part of an author’s self-determination and expression.

Lastly, the thesis often refers to “exploiters” as a copyright interest and the idea of an “exploiters’ narrative” dominating modern European copyright law. This term refers to any rightsholder granted exploitation rights including owners of licensed rights, publishers, holders of neighbouring rights, and lastly, really any entity granted some extent of copyright exclusivity.²⁰ To put it more colloquially, they are the middleman, existing in the vacuum between authors, platforms and users and controlling every single use of content.

¹⁹ Pamela J. McKenzie and *et al*, ‘User-generated content 1: Overview, current state and context’ (2012) 17 First Monday.

²⁰ Guido Westkamp, ‘The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making’ (2008) 56 J Copyright Soc’y USA 1; Guido Westkamp,

METHODOLOGY

When addressing the research question, the thesis predominantly relies upon approaches within legal theory to ground the hypothesis. Natural rights theories are utilised and challenged to determine whether the theoretical justification for allowing expansive extensions of copyright exploitation is warranted, or if a more flexible and inclusive approach of authorship should succeed. Additionally, when the thesis considers how European copyright law should be reshaped to reflect modern constructions of authorship online, it relies, to an extent, on complex systems theory as applied to the law as an example of a complex system, to justify the creation of a wider right of access.

While the thesis focuses on European copyright law, it also adopts a comparative law approach, by considering the approach of both Member States and non-EU members to illustrate instances where such jurisdictions have dealt with questions of creativity, users and platforms, notably Germany. From this perspective, the thesis carefully uses the “European Legal Method” which addresses how EU law should be applied and develop.²¹ Given the semi-harmonised nature of the European copyright system, which is a “dynamic multi-level system”, this approach prescribes a comparative approach under the umbrella of harmonisation.²²

Overall, the thesis applies a classical doctrinal legal approach and uses two main sources of reference: primary and secondary sources. Regarding the former, the thesis uses both CJEU and member state legislation, including any formal government guidance, and case law to determine the state of the law as well as to identify points of flexibility for reshaping the European copyright system. Lastly, the thesis relies upon legal literature and consultation documents to locate the thesis within a broader policy discussion of European copyright law and to inform the construction of a wider right of access to platforms for artistic communication online.

‘One or several super rights? The (subtle) impact of the digital single market on a future EU copyright Architecture’ in Kung-Chung Liu and Reto M. Hily (eds) *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer 2017).

²¹ Martijn Hesselink, ‘A European Legal Method? On European Private Law and Scientific Method’ (2008) 15 *European Law Journal* 20.

²² Martijn Hesselink, ‘The common frame of reference as a source of European private law’ (2009) 83 *Tulane Law Review* 91, 943.

OUTLINE OF THE THESIS

This thesis is divided into four main chapters to guide the reader through the over-arching argument that a broad construction of copyright authorisation has the potential to balance copyright interests and support creativity online.

The thesis begins with a roadmap of how the European copyright system should develop to respond to the legal issue of user creativity online. Chapter I introduces and delves into key concepts and issues, such as creativity and access, the prevalence of fundamental rights discourse, the doctrine of exhaustion and the exploiters' narrative. The chapter seeks to define these issues and locate them within the European copyright system. It also builds upon the contention that the current matrix of copyright interests online involves authors, users, platforms and exploiters, and that the line between authors and users is increasingly blurry as users upload creative content on platforms.

In Chapter II, the thesis builds upon Chapter I to address the status of the doctrine of exhaustion within modern European copyright law. It focuses on the legal concept of authorisation and compares its effect to key CJEU jurisprudence on implied licensing, to ground a broader construction of authorisation to benefit both authors and users online. It also expands on theoretical discussions in the previous chapter to determine whether a broader construction of authorisation should be rebuttable given the relationship between authors and their works, supported by personality rights.

Chapter III is designed to consider the main opposition to a broader construction of authorisation, exploiters. The chapter traces what it terms the exploiters' narrative and advances an argument that without intervention on behalf of authors and users, recent legislative efforts will continue to strengthen exploitation rights to the detriment of creativity. It also considers the extent to which exploiters could refute a broader construction of authorisation by examining the prevalence of commercial reuses of copyright works on platforms.

Chapter IV draws upon all previous chapters to consider whether a broad construction of authorisation is akin to a wider right of access to platforms. By examining member state options for implementing art. 17 DSM Directive, the thesis considers how the current European approach can be reshaped from within the system. The chapter also considers larger systemic issues of European copyright law and access, by reflecting upon both the doctrine of

exhaustion, as a key balancing mechanism of copyright interests, but also on the role of platforms generally.

This structure is envisaged to gently guide the thesis' argument by starting from a wider position, located within legal theory and literature, then narrowing in on specific legal issues relating to creative user uploads on platforms, utilising primary sources predominately, before broadening to consider relevant research, from a high-level stance, relating to European copyright law as a system in need of change.

LIMITATIONS AND SCOPE

This thesis is an examination of creativity and the European copyright systems in the context of user platform uploads. While the thesis contends that it reconciles the fundamental free spaces within European copyright law, this is not a task of identification and description of these numerous free spaces. Instead, the thesis uses the concept of authorisation as a central guiding principle of all free spaces, and assumes that, for example, the patchwork of copyright exceptions and limitations, form part of the concept of authorisation.

Additionally, the thesis does not provide a comprehensive examination of the concept of creative reuse from the perspective of aesthetics. It prefers to avoid any evaluation of which user uploads should be termed as artistic, by adopting an all-encompassing approach to user uploads that use previous creative works. This is done so that future forms of creativity are not excluded.

Lastly, this thesis does not discuss, in detail, algorithmic copyright enforcement technology. Instead, we will rely on commentary that has already evidenced that the use of filtering or blocking technology will have a stifling effect on creativity online through platforms regulating user uploads.

CHAPTER I: FACILITATING ACCESS TO CREATIVE WORKS AND SUPPORTING CREATIVITY ONLINE

1. INTRODUCTION

This thesis proposes that copyright, at its core, should support creativity. Though it has long been acknowledged that free spaces exist within copyright to support creativity,²³ the current European approach appears to focus on strengthening copyright enforcement online largely to the benefit of exploiters, such as publishers or producers.²⁴ In its wake, commentary has found that the free spaces enshrined, for example in copyright exceptions and limitations, have been left wanting.²⁵ It is from this context, that this thesis proposes a return to the foundation of copyright as a legal vehicle to support authors, specifically users' creativity online. The argument is that without adopting an approach that reflects cumulative and collaborative creativity occurring online, the current trajectory of European copyright law has the potential to stifle digital creativity to the detriment of authors' fundamental right to express themselves artistically.

²³ Sean Flynn and *et al* 'Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action' (2020) 42 EIPR 42, 7. Christophe Geiger and Franciska Schönherr, 'Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions' in T.-E. Synodinou (ed) *Codification of European Copyright Law, Challenges and Perspectives* (Kluwer Law International 2012) 133.

²⁴ Caterina Sganga, 'The Many Metamorphoses of Related Rights in EU Copyright Law: Unintended Consequences or Inevitable Developments' (2021) 70 *GRUR International* 821; Guido Westkamp, 'Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?' (2022) 53 IIC 62; P. Bernt Hugenholtz, 'Neighbouring Rights are Obsolete' (2019) 50 IIC 1006.

²⁵ Caterina Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice' (2020) 21 *ERA Forum* 31; Christoph Geiger, 'Flexibilising copyright – remedies to the privatisation of information by copyright law' (2008) 39 *Int. Instrum. Controls* 178; Lucie Guibault, 'Why cherry-picking never leads to harmonisation: the case of the limitations of copyright under directive 2001/29/EC' 1 *JIPITEC* 55; P.B. Hugenholtz & Martin Senftleben, 'Fair Use in Europe: in Search of Flexibilities' (2012) Amsterdam Law School Research Paper No. 2012-39, Institute for Information Law Research Paper No. 2012-33 <<http://ssrn.com/abstract=2013239>> accessed 31 December 2022; M Van Eechoud, *Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (Kluwer Law International 2009); Martin Senftleben and *et al*, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of EU Copyright Reform' (2018) 40 EIPR 149; Christina Angelopoulos, 'Study on Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Single Market' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800> accessed 31 December 2022; Stefan Bechtold, 'Deconstructing Copyright' in P. Bernt Hugenholtz (ed) *Copyright Reconstructed: Rethinking copyright's economic rights in a time of highly dynamic technological and economic change* (Wolters Kluwer 2018); Caterina Sganga, 'Digital exhaustion after Tom Kabinet: a non-exhausted debate' in T. Synodinou *et al* (eds) *EU Internet Law in the Digital Single Market* (Springer 2021) 312.

The starting point is that for authors to create, they not only require autonomy and self-determination over their creations, but control over how they communicate these works. Technology has improved the ability to communicate, however it also allows works, once communicated, with permission or not, to be exponentially copied and distributed online. As a result, exploitation rights, specifically the right to communicate to the public, have expanded, in both scope and application, to control the communication of works online. In addition, rightsholders subject users to burdensome licensing terms and conditions and technology which artificially ‘locks’ works, such as TPMs to embed control over access to and use of works online. This seems to evidence a growing trend that copyright holders believe that they should control all exploitations of works online, regardless of the purpose of the subsequent use.

Despite the protection that the European copyright system, contract law and technology provide, rightsholders, over the last few years, have set their sights on platforms. They have argued that a value-gap between platforms monetizing content and remunerating copyright holders exists online, particularly in the music industry.²⁶ Previously, platforms faced no liability because they were shielded by the e-Commerce Directive which included safe harbours for acting as a mere conduit, caching and hosting. These safe harbours excluded them from liability for the unlawful conduct of third parties using their services.²⁷ However in 2019, the European legislature introduced art. 17 DSM Directive. It requires member states to implement legislation to ensure that certain types of platforms make best efforts to secure authorisation for user uploads that infringe copyright and related works. To the extent that they are unable to secure authorisation, platforms must make best efforts to ensure that unauthorised and infringing content is removed and continues to stay down.

Yet this latter best efforts standard can only ever be met by using algorithmic copyright enforcement technology such as filtering, where upon the software detecting a match with a copyright work, the upload is removed or made inaccessible on the platform. Currently it is unlikely that this software can comprehend and even detect the application of exceptions such

²⁶ IFPI [n 13].

²⁷ Ibid; Stan Liebowitz ‘Economic analysis of safe harbor provisions’ (Prepared for CISAC, 2018) < <https://www.cisac.org/Newsroom/studiesguides/economic-analysis-safe-harbour-provisions>> accessed 31 December 2022; Ted Shapiro and Sunniva Hansson, ‘The DSM Copyright Directive: EU Copyright will indeed never be the same’ (2020) EIPR 404; Annemarie Bridy, ‘The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform’ (2020) 22 Vand J Ent & Tech L 323; Valentina Moscon, ‘Free Circulation of Information and Online Intermediaries – Replacing One “Value Gap” with Another’ (2020) 51 IIC 977.

as parody, pastiche and caricature,²⁸ particularly given the ambiguous nature of the last two. Thus, without further guidance, as we will observe in Chapter IV, the implementation of art. 17 DSM Directive could result in an outcome where users must complain and appeal a platform's decision to block or remove their content before it can be uploaded. Naturally, this delay will have significant repercussions on the production of future creativity online.

Additionally, these new platform obligations do not reflect the increasingly blurry line between authors and users, exemplified by art forms such as sampling or more broadly, UGC. Today, users reference, sample or are simply inspired by previous works to create new works. They become authors themselves and communicate these new creative works online by uploading them onto platforms for dissemination and discussion. However, as the commentary explains "legislators have engineered the law so that online gatekeepers have an incentive to block, filter and sanitize proactively ... digital creativity"²⁹. In light of this characterisation of art. 17 DSM Directive, this thesis contends that the European copyright system should be construed to support all forms of authorship by ensuring authors are compensated and that access to and use of previous creative works is protected online.

This chapter intends to provide a roadmap of how the European copyright system should facilitate access to creative works and foster creativity online. Firstly, it explores the growing trend of the EU legislature, CJEU, member states and literature to assert that the Charter should play a critical role in balancing copyright interests online.³⁰ As there seems to be no clear consensus on how fundamental rights should be reconciled online, section 1.1. reviews the link between self-determination and freedom of expression to support creativity online. Leaning upon natural rights theory and personhood theory, the section contends that freedom of expression includes the ability to access and reuse previous creative works, as well as the ability to communicate these new creative works to the public. From this perspective, the chapter considers whether authors' access to platforms, to fulfil these integral elements of creativity, is a necessary pre-condition for creativity online.

Secondly, the chapter proposes that the doctrine of exhaustion holds the key to fostering creativity online by providing a proportional balancing mechanism to guide access to and

²⁸ Martin Sentfleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) <<https://ssrn.com/abstract=3367219>> accessed 31 December 2022; Christophe Geiger and Bernd Justin Jütte, 'The EU Commission's Guidance on Article 17 of the Copyright in the Digital Single Market Directive – A Guide to Virtue in Content Moderation by Digital Platforms?' (2021) <<https://ssrn.com/abstract=3876608>> accessed 31 December 2022.

²⁹ Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) 51 IIC 709, 731.

³⁰ Geiger [n 18]; Jütte [n 18]; Griffiths [n 18a]; Sganga [n 18]; Griffiths [n 18b]; Geiger and Izyumenko [n 18]; Jacques [n 18].

protection of works. As we will observe in section 1.2., historically the doctrine of exhaustion has been categorised as a tool of European integration and harmonisation, used to balance internal market norms against national IP rights' systems. However, this section proposes that the doctrine of exhaustion has potential beyond the free movement of goods to be construed as an ultimate enabler of access to creative works. Drawing upon the link between autonomy and creativity from the previous section, section 1.2. proposes that a principle of authors' consent encompasses these constitutional and philosophical aspects of creativity and could function similarly to exhaust authors' claims against follow-on creativity so long as authors are compensated.

Thirdly, the chapter considers the position of exploiters, such as publishers and producers, whose investment is rewarded with extensive economic rights. Section 1.3. considers how the principle of authors' consent should be reconciled with exploiters' interests given the expansion of exploiters' rights at both the international and European level. It also addresses the relationship between the fundamental right to protect IP and freedom of expression. The section ultimately examines whether exploiters should play a supportive role relating to follow-on creativity.

Lastly, the chapter proposes that platforms play a fundamental role in ensuring that art. 17 DSM Directive is implemented in a way that adequately supports users. Section 1.4. explains that this can be achieved by construing art. 16 of the Charter, the freedom to conduct a business, as a subsidiary right to support users relating to access to creative works, the processing of personal data of authors, and new remuneration rights pursuant to the DSM Directive. Germany's approach to both implementing art. 17 DSM Directive as well as the country's decade-old contractual principles for authors to incentivise collecting bargaining are also used to illustrate how platform obligations relating to authors could finally answer the question of proportionally balancing fundamental rights relating to copyright online.

1.1. FUNDAMENTAL RIGHTS, SELF-DETERMINATION AND CREATIVITY

The CJEU and national courts have long held that authors should obtain an appropriate reward for the use of their work.³¹ Thus, "one of the first relevant acts accomplished by the author, after the creation itself, is to entrust someone else to commercially exploit her rights,

³¹ Cases 682 and 683/18 *Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google German GmbH & Elsevier Inc. v Cyando AG* [2021], ECLI:EU:C:2021:503503 ('*YouTube*') at [27]; citing C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018], EU:C: 2018:634 ('*Renckhoff*') at [18].

hence, to give up some part of control over her work”³². Though more avenues for exploitation have materialized in the digital environment, this has not always meant that authors are adequately compensated.³³ While some member states have detailed national provisions aimed at rebalancing the bargaining power between authors and exploiters, this section supports the commentary’s position that the EU has failed to adequately support authors in the digital environment.³⁴

Recently there has been a shift within European copyright discourse to address the issue of balancing copyright interests from the perspective of fundamental rights. In cases such as *Funke Medien*, *Spiegel Online* and *Pelham*,³⁵ the CJEU has outlined the relevance of fundamental rights when interpreting copyright exceptions and limitations.³⁶ The court held in all three cases that copyright exceptions and limitations, though interpreted strictly, confer rights on the users of works, and their effectiveness must be safeguarded, particularly when the exception or limitation aims to ensure observance of fundamental freedoms.³⁷ Yet despite the CJEU confirming the presence of users’ rights online, these cases also illustrate an attempt to ensure that rightsholders receive strong protection, meaning that there is a conflicted approach to the application of fundamental rights to the European copyright system.

³² Severine Dusollier, ‘EU Contractual Protection of Creator: Blind Spots and Shortcomings’ (2018) 41 Colum JL & Arts 435, 436.

³³ Jane C. Ginsburg, ‘Copyright and control over new technologies of dissemination’ (2001) 101 Columbia Law Review 1613; Yannis Paramythiotis, ‘Fairness in Copyright Contract Law: Remuneration for Authors and Performers Under the Copyright in the Digital Single Market Directive’ in Tatiana-Eleni and *et al*, *EU Internet Law in the Digital Single Market* (Springer 2021) 78.

³⁴ Dusollier [n 32] 436 explains that EU harmonization of key legal provisions protecting authors in exploitation contracts is severely lacking; Martin Kretschmer and Rebecca Giblin, ‘Getting creators paid: one more chance for copyright law’ (2021) 43 EIPR 279 where the authors actively encourage the ‘re-imagining’ of copyright law despite the boundaries of rigid international treaties; Paramythiotis [n 33] 78; Martin Senftleben, ‘More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands’ (2018) 41 Colum. J.L. & Arts 413, 421. Senftleben controversially explains that “‘creators of literary and artistic works only function as a dummy to conceal the industry’s insatiable appetite for continuously expanding exclusive rights’”.

³⁵ C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019], ECLI:EU:C:2019:623 (*‘Funke Medien’*); C-516/17 *Spiegel Online GmbH v Volker Beck* [2019], ECLI:EU:C:2019:625 (*‘Spiegel Online’*); C-476/17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019], ECLI:EU:C:2019:624 (*‘Pelham’*).

³⁶ In the first, the copyright works were Parliament briefings on the military activities of the German armed forces and despite unsuccessful attempts for information disclosures, a German daily newspaper’s website operator, Funke Medien, obtained a large proportion of them, publishing them online in part as the Afghanistan papers. In the second, a German internet news portal, Spiegel Online, was accused of copyright infringement by a retired German federal politician. Spiegel had published a manuscript written by the politician which when published was edited by the original publisher without consent. The third case is discussed in more detail throughout section 1.1.

³⁷ *Funke Medien* at [70]-[72]; *Spiegel Online* at [54]-[56]; *Pelham* at [32]-[35]. This confirms that the right to protect IP is not inviolable and must not be protected as an absolute right. See, C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011], ECR I-11959 at [43]; C-360/10 *SABAM v Netlog NV* [2012], ECLI:EU:C:2012:85 at [41]; C314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014], ECLI:EU:C:2014:192 at [61].

The CJEU attempts to strike this balance by limiting the application of fundamental rights to specific circumstances, the harmonised nature of the provision. For example, in *Funke Medien* and *Spiegel Online*, the court found that the news reporting and quotation exceptions were fully harmonised.³⁸ The CJEU explained that freedom of information and freedom of the press, pursuant to the Charter, are incapable of justifying a derogation from the author's exclusive rights of reproduction and communication to the public.³⁹ The argument being that the European legislature accounted for the balance between fundamental rights when determining the scope of both rights and copyright exceptions and limitations. Essentially fundamental rights do not serve as external limits to the grant of copyright protection as this would be detrimental to the internal market and harmonization goals of the EU.⁴⁰

However, in *Pelham*, the CJEU seems to adopt a more proportional approach when considering the balance struck by the EU legislator between creators and exploiters. Here, in addition to confirming *Funke Medien* and *Spiegel Online* relating to quotations, examined the phonogram right. The case involved Kraftwerk, a German band, claiming that a music producer infringed their copyright by sampling approximately two seconds of a rhythm sequence from their song 'Metall auf Metall', using it in a continuous loop in a song called 'Nur mir'. Despite finding that the phonogram right was fully harmonised, the CJEU stated that:

*"...where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to use it, in a modified form unrecognisable to the ear, in a new work, it must be held that such use does not constitute 'reproduction' within the meaning of Article 2(c) of Directive 2001/29."*⁴¹

The CJEU explain that following the Information Society Directive's aim to safeguard a fair balance between copyright interests, supported by both the right to protect IP and freedom of expression, sampling by users is allowed so long as the use taken is "unrecognisable to the ear",⁴² as it is not a "reproduction" according to the ordinary meaning of the term.⁴³ In this case, the CJEU also notably acknowledged that sampling does not interfere with the producer's

³⁸ Information Society Directive, arts. 5(3)(c) and (d) respectively.

³⁹ *Funke Medien* at [73]-[74]; *Spiegel Online* at [47]-[49].

⁴⁰ Commentary explains that the CJEU has internalized the application of fundamental rights in a "relatively liberal way". Further, that such an approach could conflict with the requirement European Court of Human Rights (ECtHR) case law which requires a case-by-case approach. See, Stavroula Karapapa, 'The quotation exception under EU copyright law: Paving the way for user rights' in Eleonora Rosati (ed.) *The Routledge Handbook of EU Copyright Law* (Routledge: 2021) p. 256; citing Geiger and Izyumenko [n 18]; Griffiths [n 18].

⁴¹ *Pelham* at [31].

⁴² *Ibid* at [32]-[36].

⁴³ *Ibid* at [37].

opportunity to realize satisfactory returns on their investment.⁴⁴ This appears to indicate that if a subsequent creative use does not interfere with the foundation of the exploitation right, it does not infringe given the need to communicate artistically, supported by the Charter.

However, despite the restrictive interpretation of the phonogram right, overall, there is still ambiguity on precisely how a balance should be struck between fundamental rights,⁴⁵ and the degree to which they are applicable within the European copyright system. *Pelham* evidences that blanket statements ascribing a harmonised status to legislative provisions are incapable of responding to and reconciling the relationship between primary and secondary EU law. This reality is clear when considering how the German courts, particularly the constitutional court, first dealt with conflicting copyright interests supported by conflicting constitutional rights in *Pelham*.⁴⁶

We must first note, that before *Pelham*, the German Copyright Act contained a “free use” exemption which allowed adaptations to be qualified as independent creations, supported by artistic freedom⁴⁷, enshrined in the German constitution⁴⁸. It meant that while a “tiny sound particle” could invoke the phonogram right, the free use exemption could be applied to “protected phonograms to enable cultural follow-on innovation on the basis of sound sampling”⁴⁹. While available for uses where the derivative work reflects a high degree of new and fresh originality, compared to the original creative work,⁵⁰ it was unavailable if the producer of the derivative musical work could produce the sound herself. However, following the CJEU judgment, the free use exemption was found to conflict with the Information Society Directive which provides the exhaustive list of copyright exceptions and limitations.

Despite this, there are crucial points regarding the German Constitutional Court’s findings that illustrate the potential to reconcile primary and secondary EU law from the perspective of creativity. Firstly, the Court found that the violation of Kraftwerk’s rights didn’t result in substantial economic disadvantages.⁵¹ While this point was affirmed by the CJEU, in

⁴⁴ Ibid at [39].

⁴⁵ *Funke Medien* at [38], & [42]-[43]; *Pelham* at [84]-[86]; *Spiegel Online* at [27]-[28]. Particularly due to the unharmonized nature of copyright exceptions and limitations.

⁴⁶ BVerfGE 142, 2016, 74 - Metall auf Metall.

⁴⁷ Fabian Böttger and Birgit Clark, ‘German Constitutional Court decides that artistic freedom may prevail over copyright exploitation rights (*‘Metall auf Metall’*)’ (2016) 11 JIPLP 812.

⁴⁸ Art. 5 German Basic Law.

⁴⁹ Martin Senftleben, ‘Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, *Pelham*’ (2020) 51 IIC 751, 753.

⁵⁰ Ibid.

⁵¹ Ibid 756.

the German case this was a significant factor for balancing fundamental rights. The German Constitutional Court also discussed the position of artists that sample, finding that previous German legal tests requiring a test of equivalent self-production, to benefit from the “free use” exemption, unreasonably risked freedom of art.⁵² Hence the Court found that either free use should include sampling, or that the phonogram right should be curtailed.⁵³ On the facts, the Court held that due to the limited size of the sample, the small impairment of phonogram producer rights, and the impact of freedom of art, the infringement claim should not succeed.

The comparison between the approach of the CJEU and the German Constitutional Court highlights the need for fundamental rights balancing to consider the doctrinal foundation of relevant rights and interests. Once these boundaries are constructed, this thesis proposes that a more proportional and balanced outcome is achievable that is reflective of the dichotomy between exploiters on the one hand, and authors and users on the other. This is demonstrated by the German Constitutional Court identifying the lack of economic harm to the holders of exploitation rights, meaning that it could narrow the application of the phonogram right to its purpose, investment. Only at this point could the Court find that the imbalance between interests and relevant fundamental rights required the protection of sampling.

Unfortunately, as demonstrated by the CJEU’s judgment in *Pelham*, the Court has refused to adopt a similar approach. Instead, it fixates on a narrow and arbitrary standard where the use must be “unrecognisable to the ear” to avoid infringement. Comparably, the German Constitutional Court’s approach in *Pelham* arguably reflects the doctrinal foundation of the doctrine of exhaustion, discussed in the following section, where the boundaries of exploitation rights exhaust their application to use of copyright works that do not strike at the core subject matter of the right nor its existence. However, in this section, in view of this lacking flexibility and general uncertainty, we will now examine the foundation of authorship to explore whether the fundamental relationship between self-determination and freedom of expression could bolster the notion of artistic communication.

Self-autonomy requires authors to be able to shape their own life, and alongside it, how they ultimately express themselves and communicate with those around them.⁵⁴ Authorship is

⁵² Ibid 755.

⁵³ Ibid 756.

⁵⁴ Alexios Arvanitis and Konstantinos Kalliris, ‘A self-determination theory account of self-authorship: Implications for law and public policy’ (2017) 30 *Philosophical Psychology* 763.

granted to ensure artists have control over the work which “stems from the act of moulding the work to the author’s vision”⁵⁵. This notion of creative autonomy is grounded in the idea that:

*“Artistic creation becomes the paradigm mode in which people can come to self-definition. The artist becomes in some way the paradigm case of the human being, as agent of self-definition. Since about 1800, there has been a tendency to heroize the artist, to see in his or her life the essence of the human condition, and to venerate him or her as a seer, the creator of cultural values.”*⁵⁶

While we will challenge the concept of the individual artist later in this section, it is worth reflecting on the relationship between self-determination and creativity, through the lens of freedom of expression. Natural rights theory is helpful here to further define this relationship as it aims to reconcile the public interest with laws introduced that are intended to curtail and restrict it to benefit private rights.⁵⁷ For Kant, an author’s work is an extension of their inner self and the execution of their will, thus the control they exert of their work is a fundamentally personal right, not a property right.⁵⁸ It follows that how authors communicate both their thoughts in making a work and the work itself are integral to self-determination and autonomy.⁵⁹

However, commentary contends that there are limits to an author’s autonomy when subsequent authors require the initial work to make a new work.⁶⁰ Kant’s principle of autonomy states that there is a duty for others to “respect claims over objects that are bound up with the exercise of an individual’s will”⁶¹. Kant also appears to identify that there may be uses where,

⁵⁵ Jane C. Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’ (2003) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=368481> accessed 31 December 2022.

⁵⁶ Charles Taylor, *The Ethics of Authenticity* (Harvard University Press 1991) 62.

⁵⁷ Generally, there are arguments found in Locke, Kant, and Rawls literature that assert that freedom of expression can be constructed as a natural right including the ability to reuse creative works to create future works for the sake of human flourishing. See, Amy Lai, *The Right to Parody: Comparative Analysis of Copyright and Free Speech* (Cambridge University Press 2019); Robert Merges, *Justifying Intellectual Property* (Harvard University Press 2011); Adam Mossoff, ‘Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory’ (2012) 29 *Social Philosophy and Policy* 283. Not that others reject the natural law approach to copyright and state that it violates Locke’s “No-Spoilage” Proviso. See, Carys Craig, ‘Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law’ (2002) 28 *Queen’s Law Journal* 1.

⁵⁸ Neil Netanel, ‘Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation’ (1993) 24 *Rutgers LJ* 347, 374.

⁵⁹ *Ibid* 403.

⁶⁰ Merges [n 57] 72.

⁶¹ *Ibid*

lacking explicit consent, it would injure the author.⁶² However, commentary assert that Kant's Universal Principle of Right requires individuals' freedom of expression to coexist with each other.⁶³ This lays the foundation to assert that "Kant arguably would not deny people the freedom to appropriate copyright works to express themselves"⁶⁴. Such a perspective helps ground the argument that copyright is not an absolute right and must include space for future creativity which builds upon previous creative works.

The German Constitution adopts a similar approach to self-determination by including the freedom to protect the autonomy of individual communication.⁶⁵ Commentary explains that in combination with other provisions, such as freedom of expression,⁶⁶ the German Constitution protects "individual's personality, integrity and autonomy and to establish a separation between society and the state to preserve a free society"⁶⁷. This 'general personality right' is also viewed as a 'framework right', meaning that it encompasses many other rights, notably those in the context of privacy and data protection such as the right to a private sphere and the right to informational self-determination.⁶⁸

Commentary already provides the constitutional foundation for a general right of autonomy relating to artistic communication by asserting that the German constitutional right to informational self-determination extends not only to "the right to create one's own 'self-image', but to communicate and maintain this image to the outside world".⁶⁹ This could also extend to include freedom to reuse creative works, produce new creative works and communicate them to the public. This extension would ultimately reflect the position that the European copyright system must make adequate space beyond copyright exceptions and limitations for future creativity given the constitutional significance of autonomy and the role of artistic communication to preserve authors' self-determination.

Commentary explains that these types of constitutional personality rights reflect the deep connection between authors and creative works which requires "giving them a degree of

⁶² Ibid; Kant states that "another's use of it without my consent would thereby injure me".

⁶³ Lai [n 57] 42.

⁶⁴ Ibid 43.

⁶⁵ German Constitution, art. 2.

⁶⁶ Ibid, art. 5.

⁶⁷ Johannes Eichenhofer and Chritsoph Guys, 'Courts, privacy and data protection in Germany: Information self-determination in the digital environment' in Maja Brkan and Evangelia Psychogiopoulou (eds) *Courts, Privacy and Data Protection in the Digital Environment* (Edward Elgar Publishing: 2017).

⁶⁸ Ibid 102.

⁶⁹ Johannes Eichenhofer, 'The Constitutional Protection of Images' in Thomas Dreier and Tiziana Andina (eds.) *Digital Ethics – The Issue of Images* (Nomos, Baden Baden 2022).

ongoing control over these works”⁷⁰. While this is normally the domain of moral rights, commentary proposes that a fresh outlook on personhood theory could validate the “heuristic experience of engaging with creative works” and could promote the concept of personality which necessarily requires access of pre-existing creative works.⁷¹ We can observe that in order for the EU copyright system to bolster authorship this also requires bolstering users by safeguarding access to and creative use of previous works as well as the ability to subsequently communicate these new works online.

Such an approach would accurately reflect the digital reality that the line between authors and users online continues to blur more than ever before. Indeed, when considering the definition of UGC, it crystallises, as indicated above, that users have become authors themselves. By providing these safeguards for users, it would likewise protect a central feature of UGC communities, the communication of new works and their discussion online which normally would infringe copyright. This section proposes that such an approach challenges the traditional construction of copyright interests by reconciling authors and users as equally necessary components of creativity. Thus, this thesis contends that, at least in the context of creative works online, ‘authors’ encapsulates users that create works and vice versa based on the premise that authorship is a by-product of self-determination, specifically artistic communication.

An extension of this approach would also acknowledge the reality that creativity is increasingly community based, not the product of singular authors.⁷² Commentary proposes that cultural theory may be better placed, particularly online, to strengthen the access-side of the copyright paradox and support creators, not investors.⁷³ While cultural theorists do not disagree with rights granted to authors, they opine that “copyright law has become over-extended and over-broad and that this has a chilling effect on downstream creativity”⁷⁴. This perspective confirms a long-held view within copyright discourse that copyright law disregards users, consumers and large-scale groups of collaborators.⁷⁵ Hence a broader approach to

⁷⁰ Christopher S. Yoo, ‘Self-Actualization and the Need to Create as a Limit on Copyright’ (2021) Faculty Scholarship at Penn Law 2041.

⁷¹ Ibid.

⁷² Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity: The Third Paradigm* (Edward Elgar Publishing 2018) 367.

⁷³ Frosio [n 29] 733.

⁷⁴ Susan Corbett, ‘Creative Common Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?’ (2011) 74 *The Modern Law Review* 503.

⁷⁵ Ibid; Julie E. Cohen, ‘The Place of the User in Copyright Law’ (2005) 74 *Fordham L Rev* 347, 349; J. Tehranian, ‘Parchment, Pixels and Personhood: User rights and the IP (Identity Politics) of IP (Intellectual Property)’ (2011) 82 *University of Colorado Law Review* 1, 6.

authorship which is inclusive of users and the increasing trend for community-based creativity and interaction online could rebalance the relationship between access and protection in the digital age to support the core of copyright, creativity.

Building from personhood theory, this section contends that it could be extended to encompass the creative interaction of users online as well as the natural rights perspective that users must have access to and be able to reuse creative works, as well as communicate them online. Extended personhood theory would connect the self-autonomy that creativity requires with community-based creativity by providing the theoretical foundation to propose that there are some acts, such as artistic communication, that necessarily fall outside of the remit of exploitation rights. Some suggestions in the commentary focus on the need for a general right for access and reuse of previous creative works to include limitations to balance the interests of authors and users. These include a reasonable royalty damage award or a compulsory licence.⁷⁶ Additionally they suggest that users' motives should be a factor into the right to ensure protection against free riding which does not benefit the public.⁷⁷ While we will discuss these limits in the following chapter, note that such an approach would not be absolute, but dependent upon relevant factors, comparable to the German Constitutional Court in *Pelham*, to ensure that both authors and users are equally protected and supported.

It is clear that the ability to access, reuse and subsequently communicate works based on previous creative works is central to fostering future creativity online. The question that remains is how such an approach could be realized particularly given the closed list of copyright limitations and exceptions and the expansion of economic rights supported by technological measures that control every single use of a work online. This thesis proposes to reconcile these conflicting norms by using an age-old metaphorical doctrinal vehicle, the doctrine of exhaustion. By focusing on a broadened concept of authorship as the functional and moral crux of the normative copyright framework, including the extended concept of personhood, the doctrine of exhaustion can draw a line in the sand between both primary EU law norms and national norms found in legislation and constitutional guarantees to provide space for creativity online.

⁷⁶ Ibid.

⁷⁷ Lai [n 57] 40.

1.2. THE DOCTRINE OF EXHAUSTION AS AN ENABLER OF ACCESS

As illustrated in the previous section, creativity requires engagement with creative works and can include the reuse of previous creative works as well the subsequent communication of these new creative works. We can observe that online, the creative process occurs at an exponential rate given the ease of distribution and community discussion, sparking future creativity. Yet despite the role of authorship within these creative online communities, the European copyright system fails to adequately support users' creativity online. This section seeks to examine how European copyright law balances questions of access and protection both relating to copyright law and IP law generally through the doctrine of exhaustion. It proposes that although the doctrine has traditionally been used to strike a balance between free trade against national IP rights in Member States, it has the potential to guide European copyright policy in a way that facilitates access to creative works and fosters creativity online.

The doctrine of exhaustion is historically linked to norm-balancing in European copyright law. At first, it was conceived as the solution to ease the tension between both IP rights and competition law, and the relationship between national Member State legislation and primary EU law (such as the Treaty on the Functioning of the EU (TFEU) or the Charter). In sum, Member States retain national legislated IP rights which means that their territorial nature will naturally frustrate the internal market. Arts. 34-36 TFEU attempt to reconcile this conflict by detailing the contours of justified restrictions on intra-EU trade.⁷⁸ However, the balance that should be struck between the free movement of goods and national IP monopolies was unclear, so the CJEU was frequently asked during the internal market's formative years for guidance. The result was Community-wide exhaustion.

First, the CJEU concluded that that national IP rights can be curtailed by adopting the existence/exercise dichotomy principle.⁷⁹ It was held that while the TFEU cannot curtail the

⁷⁸ Commission, 'Guidance on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance)' (2021) C 100/03. This derogation is also bolstered by article 22 TFEU which gives Member States room to decide what they shall protect as intellectual property and states the treaty "will in no way prejudice the rules in Member States governing the system of property ownership". It is also reflected in ss. 102 and 102 TFEU case law. See, Pablo Ibanez Colomo, 'Article 101 TFEU and Market Integration' (2016) 12 J Comp L & Econ 749, 750.

⁷⁹ Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ECLI:EU:C: 1966:41 ('*Consten*'). There are conflicting views on the function and result of the existence/exercise test. See, Alain Strowel and Hee-Eun Kim, 'The balancing of general EU law on European intellectual property jurisprudence' in Justine Pila and Ansgar Ohly (eds) *The Europeanization of intellectual property law: Towards a European Legal Methodology* (Oxford University Press, Oxford: 2013) pp. 130; D Keeling, *Intellectual Property Rights in EU Law: Volume I: Free Movement and Competition Law* (OUP, Oxford: 2003) pp. 61. Pablo I. Colomo & Andriani Kalintiri, 'The evolution of antitrust policy: 1966-2017' (2020) 83:2 Modern Law Review 321, 338.

existence of IP rights, it can influence the exercise of national IP rights.⁸⁰ This was groundbreaking as it sparked a “dramatic evolving relationship between the supranational European Economic Community Treaty law and the national law of the member... [states]...”.⁸¹ Essentially the CJEU carefully trod a fine line between respecting national member states’ legislation and maintaining the internal market. Ultimately, this distinction served to chart the difficult territory between balancing primary EU law and secondary national IP rights.⁸²

It also laid the foundation for Community-wide exhaustion. The CJEU subsequently held that while the derogation in art. 36 TFEU justifies restrictions to safeguard rights which constitute specific subject matter of IP, an exercise of IP rights could be repugnant to the essential purpose of the Treaty which is to unite national markets into a single market.⁸³ This meant that that IP could not be safeguarded as it would partition the internal market⁸⁴ and result in arbitrary discrimination or disguised restrictions on trade between Member States.⁸⁵ As we will discuss in the following chapter, the CJEU were able to exclude the application of distribution rights by examining the consent of the relevant rightholder.⁸⁶ The outcome was that an IP right could be exhausted by the sheer fact that its exercise conflicts with the freedom of movement of goods which is a fundamental principle of the internal market.

Beyond the free movement of goods, this thesis proposes that the doctrine of exhaustion reflects the underlying tension in copyright law between control and access. It is a doctrinal vehicle which enables the balancing of these norms, and its principles are reflected throughout the European copyright system. Whether it is the term of protection, the availability of exceptions and limitations, the threshold test for originality, the question of fixation or the ambit of economic rights, these elements of copyright comprise the boundaries of European copyright law. They are questions of access that have, through the EU legislature, or additionally, with the aid of the CJEU, been constructed and construed to strike a balance between copyright access and protection.

⁸⁰ *Consten* at [345].

⁸¹ Lawrence F. Ebb, ‘The *Grundig-Consten* case revisited: Judicial harmonization of national law and treaty law in the common market’ (1967) 115 *American Law Register* 855; Note that it was also the first judgment of a series of cases to deal with the legitimacy under Treaty law of exclusive distributorship agreements which had previously been before national courts and the Commission. See, Ebb [n 81] 855-6.

⁸² Case 24/67 *Parke Davis and Co. v. Probell, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55 (‘*Parke Davis*’); *Sperry Rand*, EEC Bull 8/1969, 40-1. These cases would confirm and cement the existence/exercise dichotomy principle as a means of balancing wider EU and national norms.

⁸³ Case C 78/70, *Deutsche Grammophon Gesellschaft mbH, Hamburg v Metro-SB-Grossmärkte GmbH & Co. KG* ECLI:EU:C:1971:59 at [12] (‘*Deutsche Grammophon*’).

⁸⁴ *Deutsche Grammophon* at [12].

⁸⁵ *Ibid* [12]-[13].

⁸⁶ *Ibid*.

Though the doctrine of exhaustion refers to the principle that following consent to put a good on the market, the copyright holder's ability to control distribution disappears, it also confirms the reality that copyright is not absolute, there are limits to its reach. Simply, it is the ultimate form of facilitating access to copyright works. This section contends that theories of the exhaustion doctrine such as reward theory⁸⁷, property or ownership theory⁸⁸ and market and legal certainty protection theory⁸⁹ and social function theory support this construction of exhaustion as an inherent enabler of access.

Firstly, reward theory, hailing from the work of German legal theorist Josef Kohler in 1880,⁹⁰ focuses on the rights that fall outside of IP rights protection and are 'exhausted', meaning that the IP holder is unable to reap any profits from those exhausted acts.⁹¹ Modern commentary often reflect on reward theory's requirement to compensate copyright holders to facilitate access when considering the implementation of digital exhaustion.⁹² As we will observe in the following chapter, in *UsedSoft*⁹³, which involved the resale of end user software licences, the CJEU relied upon reward theory to find that the copyright holder cannot control further resale of copies downloaded from the Internet as they have already been remunerated.⁹⁴ This seems to reflect the free movement origins of exhaustion where so long as authors were remunerated, control over the work is curtailed and other rights and freedoms prevail,⁹⁵ and access is facilitated.

⁸⁷ Simon Geiregat, 'Digital exhaustion of copyright after CJEU judgment in *Ranks and Vasiļevičs* (2017) 33 Computer Law & Security Review 521.

⁸⁸ Ibid 322; Antoni Rubí Puig, 'Copyright Exhaustion Rationales and Used Software' (2013) 4 JIPITEC 159,162.

⁸⁹ Puig [n 87] 162; Aaron Perzanowski and Jason Schultz, 'Digital Exhaustion' (2010) 58 UCLA Law Review 889; Aaron Perzanowski and Jason Schultz, *The end of ownership. Personal property in the digital economy* (Cambridge 2016).

⁹⁰ Péter Mezei, 'Meet the unavoidable – the challenges of digital second-hand marketplaces to the doctrine of exhaustion' in Taina Pihlajarinne, Juha Vesala and Olli Honkkila (eds) *Online Distribution of Content in the EU* (Edward Elgar Publishing 2019) 62; Guido Westkamp, 'Exhaustion and the Internet as a distribution channel: the relationship between intellectual property and European law in search of clarification' in Irene Calboli and Edward Lee (eds) *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar Publishing 2016); Stavroula Karapapa, 'Exhaustion of rights on digital content under EU copyright: positive and normative perspectives,' in Tanya Alplin (ed) *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2019).

⁹¹ Puig [n 87] 162.

⁹² Andres Wiebe, 'The economic perspective: exhaustion in the digital age' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 324 & 327; Francesco Rizzuto, 'The European Court of Justice rules in Tom Kabinet that the exhaustion of rights in copyright has little place in the age of online digital formats' (2020) 26 CTLR 108, 114; Karapapa [n 90] 7; Geiregat [n 87] 532; Alexander Ross, 'CJEU puts UsedSoft back in the Kabinet with ebook ruling' (2020) 31 Ent. L.R. 115, 117.

⁹³ ⁹³ Case C-128/11, *UsedSoft GmbH v Oracle International Corp*, EU:C:2012:407 ('*UsedSoft*').

⁹⁴ *UsedSoft* at [63].

⁹⁵ Caterina Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law' (2018) 9 J Intell Prop Info Tech & Elec Com L 211, 228 at [58].

Secondly, property or ownership theory links to the notion of alienability, meaning that exhaustion “provides the purchaser with a copy of a work which encompasses the bundle of rights that [are] ordinarily assigned to property”⁹⁶. The doctrine of exhaustion is said to curtail the distribution right where it would interfere with the copy owner’s right to alienate property by selling or transferring ownership incorporated in personal property.⁹⁷ Though commentary argues this theory is now abandoned due to the prevalence of copyright exceptions and limitations,⁹⁸ as well as the close ties between alienability and tangible property, the theory preserves the autonomy of personal property owners.⁹⁹ Some commentary even propose that these rights comprise repair, adaption, modification, display and performance of lawfully acquired copies.¹⁰⁰

UsedSoft reflects an extension of property or ownership theory to intangible copies. Here the CJEU found that purchasers (and any future purchasers) of software licence keys were lawful acquirers who could benefit from the doctrine of exhaustion to curtail the ambit of the distribution right so long as they made the original copy unusable for example by employing technical means. This approach counters the increasing reliance on licensing as a means of distribution for copyright works and the ability to licence users out of ownership.¹⁰¹ However, in *UsedSoft*, the CJEU was able to carve out access for users through defining the original licence as a sale, indirectly relying on the property and ownership theory.

Thirdly, commentary explains that curtailing distribution rights “serves to protect legal and economic exchanges and to prevent transaction costs that would arise if acquirers of a copy had to negotiate a new licence or authorization every time they envisaged a new form of use for the copy”¹⁰². Additionally, a clear boundary of distribution rights promotes legal certainty in that users know what they can do with their own copies.¹⁰³ It also prevents market hold-ups where copyright holders may “abuse their bargaining position and try to extract the whole surplus created by the new allocation of rights – i.e. the results of specific investments made by users in gathering information about new uses of the copies or work”¹⁰⁴. Arguably, this perspective is also evident in *UsedSoft* as the clear rules relating to used software have spawned

⁹⁶ Puig [n 87] 160.

⁹⁷ Poorna Mysoor, ‘Exhaustion, Non-exhaustion and Implied Licence’ (2018) 49 IIC 656, 661.

⁹⁸ Puig [n 87] 160.

⁹⁹ Mysoor [n 97] 664.

¹⁰⁰ Aaron Perzanowski & Jason Schultz, ‘Digital Exhaustion’ (2011) 58 UCLA L Rev 889, 912.

¹⁰¹ Péter Mezei, ‘Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment’ (2015) 6 JIPITEC 23, 39.

¹⁰² Puig [n 87] 162 at [19].

¹⁰³ Puig [n 87] 162 at [19].

¹⁰⁴ Ibid.

a second-hand market in the EU to the dismay of software manufacturers,¹⁰⁵ but to the benefit of consumers, “allowing the proliferation of businesses”¹⁰⁶.

While not specifically listed as a theoretical base of the doctrine of exhaustion, social function theory would also support application of the doctrine to facilitate access to creative works online and foster creativity. Commentary draws upon several CJEU cases which sit at the intersection of digital copyright and fundamental rights to develop a social function of copyright to assist the court in filling the gaps between both areas of law.¹⁰⁷ Using national experiences, they suggest that “the application of constitutional property clauses to copyright has represented an occasion to emphasize the social function of author’s rights and the need to pursue an effective balance”¹⁰⁸.

We can draw upon the discussion from the previous section relating to *Pelham* when the German Constitutional Court interpreted the phonogram right restrictively by balancing exploitation rights against freedom of arts guaranteed in the German Constitution. Commentary explains that when the Court balanced producers and authors’ rights, it noted the legislator’s ability to “frame the property right to ensure that its social function as enshrined ... [within the German Constitution] ... is maintained”¹⁰⁹. This means that the constitutional protection of property in Germany can be limited to simply an adequate remuneration for phonogram producers, not all “means of exploitation of the exclusive right of the phonogram producer”¹¹⁰. While we will build upon this perspective in both Chapter III and IV to determine the extent to which there is a wider right of access to support creativity online, it is clear at this junction that

¹⁰⁵ Lazaros G. Grigoriadis, 'The Distribution of Software in the European Union after the Decision of the CJEU *UsedSoft GmbH v. Oracle International Corp. (UsedSoft)*' (2013) 8 J Int'l Com L & Tech 198.

¹⁰⁶ Sven Schonhofen, 'Usedsoft and Its Aftermath: The Resale of Digital Content in the European Union' (2016) 16 Wake Forest J Bus & Intell Prop L 262, 269.

¹⁰⁷ Caterina Sganga, 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots' (2015) in R. Caso and F. Giovanella (eds.) *Balancing Copyright in the Digital Age. Comparative Perspectives*. (Springer 2015); Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' in G.B. Dinwoodie (ed) *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2014). Others suggest revising art. 11, 13, or 17 Charter in more comprehensively incorporate moral and cultural values relating to IP generally. Christophe Geiger, 'Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights' in Gustavo Ghidini and Valeria Falce (eds) *Innovation law and Policy, Which Reforms for IP Law?* (Edward Elgar 2022). While some propose a new EU copyright misuse doctrine to temper the ambit of exclusive rights, resulting in conflicts with other interests. Caterina Sganga and Silvia Scalzini, 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48 IIC 405

¹⁰⁸ Sganga [n 107] 22.

¹⁰⁹ Marc D. Mimler, 'Metall auf Metall' - The German Federal Constitutional Court Discusses the Permissibility of Sampling Music Tracks: Bunderverfassungsgericht BVerfG 1 BvR 1585/13 - 'Metall auf Metall' (2017) 7 Queen Mary J Intell Prop 119, 123.

¹¹⁰ Mimler [n 109] 123.

the social function theory of copyright mirrors the application of the doctrine of exhaustion in *UsedSoft* to restrict exploitation rights to benefit users.

These theoretical justifications of the doctrine of exhaustion also help to guide its potential application online as an inherent and proportional enabler of access. Notions of remuneration, personal property and alienability, as well as both market and legal certainty can be achieved through the element of consent. It is a key concept for both authors and exploiters to benefit from the grant of copyright and is reflected in the wording of the economic rights outlined in the Information Society Directive which provide the exclusive right to authorise related acts. These rights mirror the wording of the Berne Convention which confirms that authors of literary and artistic works shall enjoy the exclusive right to authorise these economic rights,¹¹¹ and additionally, their digital implementation in art. 8 of the WIPO Copyright Treaty (WCT).

As the next chapter will demonstrate, early exhaustion doctrine cases, characterised by the impact of national IP systems on the principle of free movement of goods, centred upon the rightsholders' consent. There was a view that when the right holder decided which member state to put the goods on the market in, they were making an informed decision of where to first sell the goods to secure the most advantageous exploitation. It was believed that as these rights holders had already benefited from the internal market, it was impossible for the TFEU to grant IP holders the same power again. Hence consent emerged as a practical mediator of free trade tension within the EU and carefully reconciled national IP rights with wider EU norms.

Also referred to as authorisation, a comprehensive construction of consent forms the basis of perhaps the most polarizing economic right in the digital environment, the communication right.¹¹² Its ambiguous nature and lacking legal certainty have certainly resulted in an inane amount of CJEU referrals as member states seek to delineate its meaning and boundaries online. A significant amount of these referrals focused on what the commentary has named an implied licence.¹¹³ This jurisprudence highlights the long-standing question

¹¹¹ art. 11*bis* (1)

¹¹² Stavroula Karapapa, 'The requirement for a "new public" in EU copyright law' (2017) 1 European Law Review 63; João Pedro Quintais, 'Untangling the hyperlinking web: In search of the online right of communication to the public' (2018) 21 J World Intellect Prop. 385; Justin Koo, 'The EU right of communication to the public – Still looking for a good link' in Eleonora Rosati (ed.) *The Routledge Handbook of EU Copyright Law* (Routledge 2021).

¹¹³ Mysoor [n 97]; Taina Pihlajarinne, 'Setting the Limits for the Implied License in Copyright and Linking Discourse: the European Perspective' (2012) 43 IIC 700; Mihály J. Ficsor, 'Svensson: honest attempt at establishing due balance concerning the use of hyperlinks – spoiled by the erroneous "new public" theory'

which has plagued copyright law throughout the ages, the extent to which access and use should be permitted, or more simply, where the line between lawful use begins and infringing use ends. In the next chapter, we will traverse the boundaries of consent in a more detailed manner, but it suffices to note in this section that consent has traditionally acted as the gatekeeper of copyright infringement.

Despite the significance of authorship and consent, the role or status of the author in these conversations appears to have been increasingly misplaced in the digital environment. Commentary has even remarked that at best, they have a “cameo appearance as victims of monopolist “content owners”.¹¹⁴ This relationship between exploiters and authors will be explored in the following section, however, here, this thesis suggests that given this lacking support for authors, particularly online, a broader construction of consent could be helpful to reflect the intertwined relationship between authors and users online. While discussed in Chapter II more comprehensively, termed the principle of implied authorisation, operating on a more abstract level, it reflects the framework of the European copyright system which includes both the boundaries of economic rights as well as the available exceptions and limitations to copyright.

This construction of consent would confirm the inherent space within the grant of copyright for the reuse of previous creative works to create future works and their subsequent communication online. It also echoes the construction of authorship from the previous section which relates to the fulfilment of self-determination relating to creativity and supported by an extended concept of personhood theory online. This is aided by the fact that authorship resides at the functional and moral centre of the normative copyright system. This thesis contends that such an approach to authors, users and creativity has the potential to facilitate access to creative works and foster creativity online.

1.3. EXPLOITERS, PERMISSIONED CULTURE AND CREATIVITY

The modern trajectory of European copyright law has been shaped by rightsholders navigating the challenges and opportunities of the digital environment. Though authors theoretically remain at the centre of the European copyright system, the advent of exploiters,

(2014) <https://nanopdf.com/download/spoiled-by-the-erroneous-copyright-see-saw_pdf> accessed 9 August 2022; Mira Burri, ‘Permission to Link. Making available via hyperlinks in the European Union after Svensson’ (2014) 3 JIPITEC 245; Jenkins [n 17].

¹¹⁴ Jane C. Ginsburg, ‘The author’s place in the future of copyright’ (2008) 45 Willamette Law Review 384, 382.

those rightsholders with exploitation rights such as publishers or producers, has shifted its focus. Exploiters' concerns regarding the ease that users could copy and disseminate works without consent nor payment online, have resulted in a world characterised by "permissioned culture" where every use, regardless of its purpose or relation to copyright, is protected.

Indeed, the very nature of being a user online conflicts with exploiters' interests. Whether users are browsing, downloading, streaming, uploading or hyperlinking, all these basic necessities of online communication, involve a degree of use of a copyright work, such as reproduction and communication, and thus have the potential to trigger copyright infringement. Systemically, the problem for users, is that there is almost a presumption that all these types of activities are unlawful unless an exception or limitation applies. Thus, the fundamental free spaces for users, given their specifically targeted nature, are narrow and unable to provide users adequate support online.¹¹⁵

In the context of online creativity, users' status as potential infringers, not creators, makes it difficult to preserve their artistic creativity and self-determination despite its philosophical and constitutional foundation. As we saw in *Pelham*, despite balancing the right to protect IP against freedom of expression and arts, the CJEU affirmed that the simple licensable nature of a creative work means that protection is afforded beyond the threshold of traditional copyright law. The current predicted course of infringing the phonogram right means that every single use, no matter how small, will infringe. When interpreting the scope of exploitation rights, it appears that there will be no contemplation of the purpose or use of the snippet.¹¹⁶ This is quite jarring, as at least authorial works, following *Infopaq*,¹¹⁷ require the substantial part to meet the threshold test of creativity linked to the creative choices made by the author. Yet for exploitation rights, there fails to be any hint that it will be interpreted in line with their justification, investment.¹¹⁸

¹¹⁵ Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 J. Intell. Prop. Tech. & Elec. Com. L 147.

¹¹⁶ This is of course outside of the potential application of copyright exceptions and limitations which as we will discuss later, in relation to parody, pastiche and caricature, remain conflicted in scope and application.

¹¹⁷ *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C:2009:465.

¹¹⁸ Note that post Brexit, the UK appears to be interpreting the broadcasting right restrictively by linking the substantial part taken to the investment made. See, *ECB v Tixdaq* [2016] EWHC 575 (Ch). See, Westkamp [n 24] 64. Westkamp that similarly suggests that phonogram producer rights should be limited to their objective: "to circumstances in which a substantial part of the investment has been copies or when the copying prejudices the investment". See, Lionel Bentley and *et al*, 'Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in Case C-476/17, *Pelham GmbH v. Hütter*' (2019) 50 IIC 467. Bentley and *et al*, compare the originality threshold noting that copyright is "limited to original parts of works, leaving mere notes, sounds and words unprotected". Bernd Justin Jütte and Joao Pedro Quintais, 'The *Pelham* Chronicles: sampling, copyright and fundamental rights' (2021) 16 JILP 216. Quintais and Jütte additionally remark that the focus on merely fixation also means that it would be granted stronger protection than creative works.

Even if copyright exceptions and limitations are available, tension between authors and exploiters will naturally increase when they are relied upon.¹¹⁹ Whether it is due to a refusal to authorize a use or simply because the exploiter asks for too high a price, creativity will be stifled. As we will discuss in Chapter III, this preoccupation with licensing as a means of access, rather than ownership, in combination with the modern status of exploiters within the European copyright system, entrenches users, and to the extent that they create content and share it online, places authors in a position subject to the will of exploiters. Empirical research suggests, when examining the terms of end user licensing agreements (EULAs), that not only is the language over complicated, but voidable, in some member states, due to their unreasonable language.¹²⁰ This seems to indicate that the hold exploiters have over users extends beyond the black and white letter of the law.

Clearly there is a question whether this is compatible with notions of self-autonomy and creativity discussed in the first section.¹²¹ Though there is a push within academia for fundamental rights to fill this gap, as we will observe in Chapter IV, whether their current incorporation in the European copyright system is sufficient to equalize this imbalance between users and exploiters is unclear. Such circumstances may mean that fundamental rights should be applied in an overarching manner to the role that platforms play to facilitate communication online, regardless of its creative contents.

Yet exploiters were not always the recipients of tremendous influence within the European copyright system. When the Berne Convention was agreed, the initial threshold for copyright protection was initially quite high. It meant that, subject to some caveats, “the doors were firmly shut against a number of ‘value-adders’ in the literary and artistic production chain, notably phonogram producers, performers, and broadcasters” because they were not ‘authors’ and their productions were not ‘works’”.¹²² So, how were these value-adders able to change their copyright fortune? According to commentary, the Samedan Committee, which almost unanimously receives a very small footnote in copyright literature, laid the foundations, just before the outbreak of World War II, for the relationship between authors’ and related rights

¹¹⁹ Guido Westkamp, ‘The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making’ (2008) 56 J Copyright Soc’y USA 1,4.

¹²⁰ Péter Mezei and István Harkai, ‘End-user flexibilities in digital copyright law – an empirical analysis of end-user licensing agreements’ (2022) 5 Interactive Entertainment Law Review 2.

¹²¹ Indeed, this has also been discussed pursuant to the ECHR, where the ECtHR found that European states have an obligation to protect freedom of expression where there is a substantial public interest involved. See, ECtHR, *Ashby Donald and Others v. France*, No. 36769/08, 10 January 2013, unreported, see this issue of IIC at doi:10.1007/s40319-014-0180-4.

¹²² Sam Ricketson, ‘Rights on the Border: The Berne Convention and Neighbouring Rights’ in Ruth L. Okediji (ed) *Copyright Law in Age of Limitations and Exceptions* (Cambridge University Press 2018) 341.

in Switzerland, leading to the adoption of the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations in 1961.¹²³

Also known as the Rome Convention, it introduced “a set of minimum rights lasting 20 years from fixation, performance or broadcasting”¹²⁴. Later, the WCT and WPPT would attempt to wrestle with the challenges that the millennium would undoubtedly bring, specifically the internet, and would add the rights of rental and of making available, and extend the duration of neighbouring rights to 50 years.¹²⁵ In the EU, this then marked the beginning of a period of copyright harmonization which commentary has described as the:

“[S]tandardization and merging of the definitions of the key exclusive rights conferred on performers, phonogram producers, film producers and broadcasting organizations with the definition of the same rights as granting to authors, hinting at a trend towards the equalization of the status and treatment of all categories of rightsholders”¹²⁶.

Today neighbouring rights relating to broadcasts and phonograms are said to be “triggered by specific investments from market players who develop their business models mostly based on pre-existing works”¹²⁷. Phonogram producer rights specifically are said to be “grounded in the large investments that were commonly involved in the production of sound recordings at the time the [Berne Convention] was adopted”, including “investment in recording studios, technicians, mastering, record manufacturing and distribution” against the increasing threat of piracy.¹²⁸ However, digitisation has arguably revolutionised the music industry as “many of the most successful genres, such as hip-hop and electronic dance music, no longer require large and expensive recording studios”¹²⁹. It appears that the economic argument for such rights, investment in technology to produce phonograms, is no longer valid and can probably be extended to other neighbouring rights such as the broadcaster’s right and Europe’s film producer right.¹³⁰ Unfortunately, following *Pelham*, exploiters’ expansive rights have been affirmed and arguably echo the protection that TPMs receive, despite no real link to

¹²³ Ricketson [n 122].

¹²⁴ Sganga [n 24] 822.

¹²⁵ Ibid.

¹²⁶ Ibid 832.

¹²⁷ Valentina Moscon, ‘Neighbouring rights: in search of a dogmatic foundation. The press publishers’ case’ in Taina Pihlajarinne, Juha Vesala and Olli Honkkila (eds) *Online Distribution of Content in the EU* (Edward Elgar 2019) 57.

¹²⁸ P. Bernt Hugenholtz [n 24].

¹²⁹ Ibid.

¹³⁰ Ibid.

originality, as well as the dominance of contractual override which we will explore in Chapter III.

It is difficult to reconcile this broad approach to exploitation rights, which entrenches exploiters' bargaining position against both authors and users, with the fundamental free spaces within the European copyright system. Today, creeping copyright protectionism is illustrated at an EU-wide level through the implementation of art. 17 of the DSM Directive. Much has been written about art. 17 ranging from its chequered legislative journey including a referral to the CJEU which confirmed its validity¹³¹, but most controversially for authors is the likelihood that it will reduce access to works and "create an indubitable menace to creativity"¹³².¹³³ The fallout is that platforms are incentivised to "license their users' content where[ever] possible"¹³⁴. Other solutions, which fall both within and outside copyright law, aiming to provide a system of recognition and remuneration for authors, are also discounted before they can even show their merit.¹³⁵ Instead, platforms, as we will observe in Chapter IV, are the gatekeepers of artistic communication, and are forced to submit to a framework almost resembling private censorship.¹³⁶

It seems that copyright licensing and the control of access to and use of previous creative works has diminished the status of authorship within the European copyright system. In the digital environment, the inherent link between authors and users regarding future creativity means that there are only really three options to counter the powerful influence of exploiters: the closed list (and often unhelpful) of exceptions and limitations¹³⁷, the copyright originality threshold and simply waiting for the expiration of copyright protection. Yet "creeping copyright protectionism"¹³⁸ and the notion that every single use must be controlled and accounted for has resulted in the dominance of contract law despite lacking originality.

¹³¹ Case C-401/19 Poland v Parliament and Council [2022], ECLI:EU:C:2022:297 ('Poland').

¹³² Westkamp [n 24] 64.

¹³³ João Pedro Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 42 EIPR 28; Frosio [n 29] 709.

¹³⁴ Martin Husovec and Joao Pedro Quintais, 'Too Small to Matter? On the Copyright Directive's bias in favour of big right-holders' in Tuomas Mylly and Jonathan Griffiths (eds) *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive rights* (OUP 2021).

¹³⁵ Neelie Kroes, 'Who feeds the artist?' (2011), Speech at the Forum d'Avignon - Les Rencontres Internationales de la Culture, de l'Économie et des Médias, Avignon, France, SPEECH/11/777 (19 November 2011) < <http://commentneelie.eu/speech.php?sp=SPEECH/11/777> > accessed 1 January 2023.

¹³⁶ Christophe Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combination' (2018) 8 UC Irvine L Rev 413, 431.

¹³⁷ Christina Angelopoulos & Joao Pedro Quintais, 'Fixing Copyright Reform' (2019) 10 J Intell Prop Info Tech & Elec Com L 147, 151.

¹³⁸ Jessica Litman, 'Fetishizing copies' in Ruth L. Okediji (ed) *Copyright Law in Age of Limitations and Exceptions* (Cambridge University Press 2018).

It is also linked to the ‘propertization’ of European copyright,¹³⁹ this phenomenon finds support in art. 17(2) of the Charter, the right to protect IP¹⁴⁰. Though we will discuss propertization more comprehensively in Chapter III, particularly the notion that Charter protection requires exploitation rights to be balanced against other fundamental rights such as freedom of expression and is not an absolute right,¹⁴¹ we can note that the constitutional foundation provided by the right to protect IP has engrained the dominance of exploitation rights online. This is illustrated by previous discussion on *Pelham*, *Spiegel Online* and *Funke Medien* where we observed that fundamental rights cannot be applied externally to the interpretation of copyright exceptions and limitations. It is challenging to reconcile these rulings with fundamental rights balancing as art. 17(2) of the Charter remains somewhat of a mystery, one whose boundaries the CJEU has failed to delineate on “the basis of its qualification as a property right”.¹⁴²

This ambiguity leads to the conclusion that both EU legislators and the CJEU have reserved this interpretative flexibility to consider the conflict of copyright interests informed by the Charter on a future, case-by-case basis. This is certainly what we have witnessed in *Pelham* where the court found that when interpreting both the phonogram right and the quotation exception, there is a fundamental rights-driven limitation to their application.¹⁴³ Naturally this approach opens the door to very subjective assessments evidenced in *Pelham* by quotation requiring the new work to have “intended to enter into a dialogue” with the quoted work. This is also mirrored in the *Polish* CJEU referral relating to the validity of art. 17 DSM Directive.¹⁴⁴

In the *Polish* referral, the CJEU found that not only should the implementation of art. 17 DSM Directive be scaffolded by sufficient safeguards to minimize the impact of the content filtering activities on users’ freedom of expression,¹⁴⁵ but that art. 17 already provides such

¹³⁹Geiger [n 18]; Caterina Sganga, *Propertizing European Copyright* (Edward Elgar Publishing 2018); Guido Westkamp, ‘Licensability as Property?’ in Gustavo Ghidini and Valeria Falce (eds) in *The Future of IP — Reform Proposals* (Edward Elgar 2022); Frosio [n 37]; Alexander Peukert, ‘Intellectual Property as an End in Itself?’ (2011) 33 EIPR 67.

¹⁴⁰ Geiger and Izumenko [n 18] 282.

¹⁴¹ Jonathan Griffiths and Luke McDonagh, ‘Fundamental rights and European IP law – the case of art 17(2) of the EU Charter’ in Christophe Geiger (ed.) *Constructing European Intellectual Property* (Edward Elgar Publishing 2013).

¹⁴² Caterina Sganga, ‘Multilevel constitutionalism and the propertization of EU copyright: an even higher protection or a new structural limitation’ in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights*, (Oxford University Press, 2021).

¹⁴³ Bernd Justin Jütte and João Quintais, ‘The Pelham Chronicles: Sampling, Copyright and Fundamental Rights’ (2021) 16:3 JIPLP 213,219.

¹⁴⁴ *Poland*.

¹⁴⁵ *Ibid*.

safeguards.¹⁴⁶ Though discussed in more detail in Chapter IV, the surrounding uncertainty of how to implement art. 17 DSM Directive in combination with these ‘sufficient’ safeguards confers member states considerable flexibility in which licensing framework they effect. In this space, it is likely that exploiters’, unless challenged, will exert considerable influence on a framework which consolidates the permissioned culture of access to and use of copyright works online. This is despite the confirmation by the CJEU that the mandatory exceptions required by art. 17 DSM Directive confer “user rights”.¹⁴⁷ Similarly to the quotation exception, the interpretation of implemented safeguards and the question of whether they meet this undefined threshold will likely occur on a case-by-case basis, subject to the CJEU’s examination which appears to continue to affirm the status of exploitation rights.

Despite these concerns, this thesis proposes that art. 17 DSM Directive can be implemented in a manner which supports authors, users and creativity overall. It attempts to fill in the gaps left by both the EU legislator and CJEU by reflecting on the European copyright system as a whole. Earlier in this chapter, the argument was proposed that from a philosophical and constitutional perspective, authors impliedly consent to creative access to and reuse of previous creative works, and the subsequent communication of the new creative work. Similar in effect to the doctrine of exhaustion, the thesis suggested that consent could act as a balancing mechanism to allow artistic communication, termed the principle of implied authorisation. While Chapter III defines the principle’s parameters extensively, before moving to the final section of this chapter, the thesis will prematurely identify possible issues related to the conflict between artistic communication and features of the European copyright system that support the dominance of exploiters.

As with all copyright exceptions and limitations, the Berne Convention requires that they meet the criteria of the three-step test. The test permits reproduction in (a) certain special cases, provided that (b) such reproduction does not conflict with a normal exploitation of the work and (c) does not unreasonably prejudice the legitimate interests of the author.¹⁴⁸ Art. 10 WPPT confirmed the application of the three-step test to “new exceptions and limitations which are

¹⁴⁶ *Poland* at [93], [96] & [98].

¹⁴⁷ *Ibid* at [87].

¹⁴⁸ Berne Convention for the Protection of Literary and Artistic Works, Paris Act art. 9(2), July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (‘Berne Convention’); WIPO Copyright Treaty art. 10, Dec. 20, 1996, 36 L.L.M. 65. Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’). Not that the first two landmark international treaties here define interests differently: the Berne Convention refers to the interests of authors, and the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) refers to the interests of the right holder.

appropriate in the digital network environment”¹⁴⁹. Despite predicted exploiters’ concerns, this thesis suggests that it is possible that artistic communication complies with the three-step test.

It is envisaged that the principle of implied authorisation would be relegated to circumstances of artistic communication where users reuse previous creative works, placing them in a new and transformative context, communicating them online to spark discussion and future creativity. Additionally, so long as it involves some form of equitable remuneration to authors for such use there is some flexibility supported by the commentary.¹⁵⁰ Specifically, the last prong of the three-step test relating to unreasonable prejudice can act as a proportionality test where “the legitimacy of interests invoked by authors and right holders are to be weighed against the reasons justifying the use privilege”, to which “the payment of equitable remuneration allows refined solutions in this context”.¹⁵¹

There are also parallels here with the doctrine of exhaustion, as the three-step test was implemented to (a) protect existing markets for particular works and (b) ensure that authors would receive an equitable remuneration, particularly regarding the private copying exception.¹⁵² Commentary explains that at first, art. 9(2) Berne Convention “was intended to preserve the author’s market under the requirement of normalcy of exploitation”.¹⁵³ As we will see in the following chapter, the doctrine of exhaustion relies on the criterion of consent to determine the boundaries of market control by rightsholders. Similarly, to the three-step test, it ultimately resembles a balancing and proportionality assessment of the relevant rights.

Yet the three-step test was later extended to include other rights holders at the international level, and eventually was reflected in European copyright directives. The expansion meant that exploiters could “rely upon the general reservation of each new market that can be hypothetically opened” to continue to expand both rights and enforcement.¹⁵⁴ Additionally, the test’s exclusion when courts interpret limitations meant that if free spaces within the normative copyright framework are to be protected, legislators “must weigh the effects of the limitation not in light of the effects on the author, but in light of the generalised

¹⁴⁹ Agreed Statements Concerning the WIPO Copyright Treaty, art. 10 (Dec. 20, 1996), <http://www.wipo.int/treaties/en/ip/wct/statements.html>.

¹⁵⁰ Martin Senftleben, 'How to Overcome the Normal Exploitation Obstacle: Opt-out Formalities, Embargo Periods, and the International Three-Step Test' (2014) 2014 BTLJ Comment 1,4 & 6.

¹⁵¹ Ibid 8.

¹⁵² Westkamp [n 119] 5.

¹⁵³ Ibid.

¹⁵⁴ Ibid at [14].

allocation of markets”¹⁵⁵.¹⁵⁶ Though there is potential for artistic communication, if constructed carefully, to comply with the three-step test, the overall dominance of exploiters within the European copyright system and the focus on markets as opposed to creativity lessens the likelihood of its application. While the position of exploiters will be discussed in detail in Chapter III, we can note that the characterization of the European copyright system as a framework for exploiters compels a broader discussion relating to the limits of the system, ultimately discussed in Chapter IV.

However, despite the EU Commission’s overwhelming push to incentivise and support exploiters’ online business models and services, authorship remains the moral and functional centre of the European copyright framework. This is given its fundamental relationship between self-determination and freedom of expression, supported by both personhood theory and natural rights. Both the three-step test and the doctrine of exhaustion have the potential to form intrinsic balancing vehicles to answer:

“[W]hether there exists an acceptable trade-off between the objectives undergirding the rights granted to authors/(related) rightholder and the public interest or legitimate user interests and this requires one to grapple with the question why “the rights of authors” are privileged in the first place”¹⁵⁷.

Exploiters may have occupied an influential position within the European copyright system to date, but a refreshed outlook on both the system and online creativity could reconcile digital copyright interests in a proportional and balanced manner where the application of exploitation rights is limited, allowing artistic communication online.

1.4. THE ROLE OF PLATFORMS TO FACILITATE ARTISTIC COMMUNICATION

As already indicated in this chapter, art. 17 DSM Directive is the result of fierce and sustained lobbying by rightsholders, specifically exploiters, drawing upon the value gap allegory to extend and strengthen economic rights online. Unsurprisingly platforms have finally come into focus. From the exploiters’ perspective, the very essence of platforms’ business structures consolidates their gatekeeper role to oversee the distribution of and access

¹⁵⁵ Westkamp [n 119] 14.

¹⁵⁶ This was reinforced by the WTO Panel in a decision relating to US public performance exceptions’ compliance with TRIPS. Here the Panel “emphasized the potential harm to the economic position of the rightholder, while paying scant attention to underlying policy objectives”. See, Daniel Jongsma, ‘The nature and content of the three-step test in EU copyright law: A reappraisal’ in Eleonora Rosati (ed) *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 341.

¹⁵⁷ Ibid 342.

to works online. Thus, according to exploiters, any monetization by platforms of copyright related content should require a licence or remuneration.

This section, however, seeks to examine the relationship between platforms with authors and users, specifically their role to facilitate artistic communication online. It maintains that as authors inherently comprise users that upload creative content on platforms which can reuse previous creative works, platforms have an obligation to support both authors and users to respect creative autonomy and self-determination principles. As we will discuss in Chapter IV, given the significance of platforms to facilitate artistic communication, platforms should safeguard access to platforms for authors and users.

While this chapter has so far reflected on the conflict between both exploiters with authors and users as well as the right to protect IP against freedom of expression, this section introduces an additional fundamental right, freedom to conduct a business pursuant to art. 16 of the Charter. Though most criticism of art. 17 DSM Directive and platform obligations turn upon whether the framework requires general monitoring,¹⁵⁸ this section proposes that it can be construed as a secondary right to support users generally. This would mean that absent more guidance on the implementation of art. 17 DSM Directive, these new platform obligations would be adhered to in a manner that facilitates and supports creativity online.

Traditionally, freedom to conduct a business covers the freedom to exercise any economic or commercial activity, freedom of contract and free competition. National authorities, especially courts, must ensure that any filtering frameworks requested of online intermediaries respect the fair balance of fundamental rights. The freedom to conduct a business means that alongside other constitutional norms, national courts must take into consideration the practical reality that platforms must be able to rely on clearly outlined laws regarding liability.¹⁵⁹ If the freedom to conduct a business is viewed as a supportive right however, it would mean that without legal certainty, platforms would have less incentive to invest and innovate at the expense of users,¹⁶⁰ particularly for uses with no commercial impact. There would be no lawful digital access to works outside the exploiters' own distribution channels which, as we will adduce in Chapter III, can be attached to burdensome licensing terms overriding copyright exceptions and limitations, technological lock-in and high access fees.

¹⁵⁸ Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70 GRUR International 517.

¹⁵⁹ Ibid.

¹⁶⁰ Westkamp [n 18] 82.

Given the integral role of platforms to facilitate artistic communication, construing freedom to conduct a business in this manner, as a “right subservient to user interests” will ensure the highest degree of creative communicative freedom.¹⁶¹ Though it has traditionally been interpreted as a ‘new’ right,¹⁶² whose weak nature consistently reinforces the position of exploiters,¹⁶³ reliance on it in blocking injunctions jurisprudence emphasizes an underlying ratio that overburdensome legislative obligations reduce incentives for platforms to enter the market and compete by innovating.¹⁶⁴ While we will discuss the exploiters’ narrative in more detail in Chapter III, we can note that the construction of freedom to conduct a business as a secondary right could balance long-held views that all uses of copyright works must be controlled and remunerated. This approach bolsters the role of platforms, not only as a gatekeeper, but as a necessary safeguard for users, given that exploiters have always “strategically targeted users... to achieve a maximum discouraging effect”¹⁶⁵ when enforcing copyright online.¹⁶⁶

¹⁶¹ Westkamp [n 18] 70.

¹⁶² Ibid.

¹⁶³ C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* ECLI:EU:C:2014:192 para 49; C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28, para. 46; T-587/13 *Miriam Schwerdt v Office for Harmonisation in the Internal Market* [2015] ECLI:EU:T:2015:37, para. 55; C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] ECLI:EU:C: 2013:82, Opinion of AG Villalón, para. 49; Christophe Geiger, Giancarlo Frosio & Elena Izyumenko, ‘Intermediary Liability and Fundamental Rights’ in Giancarlo Frosio (ed.) *Oxford Handbook of Online Intermediary Liability* (OUP: 2018) p. 149; Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, ‘Weak right, strong Court – the freedom to conduct business and the EU Charter of Fundamental Rights’ in Sionaidh Douglas-Scott and Nicholas Hatzis (eds) *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017). Its alleged weak nature finds its origins in the accompanying text in the Charter that it must be exercised in accordance with European Union law and national laws and practices. The argument being that the freedom to conduct a business must comply with the “limits and requirements dictated by the specific normative expressions – possibly varying from one to another constitutional order – of the ‘general interest’” which invariably includes the right to protect IP and the EU Commission’s laser focus on foster exploiters’ online business models and services relating to copyright works. See, Gustavo Ghidini and Andrea Stazi, ‘Freedom to conduct a business, competition and intellectual property’ in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 416. Note that such a limited construction of the freedom to conduct a business arguably harms creativity online as it doesn’t reciprocally support users, including authors.

¹⁶⁴ Geiger, Frosio & Izyumenko [n 163] 149.

¹⁶⁵ Westkamp [n 24] 83, citing Peter K Yu, ‘Digital copyright enforcement measures and their human rights threats’ in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) p. 455; Jonathon W. Penney, ‘Privacy and Legal Automation: The DMCA as a Case Study’ (2019) 22 *Stan. Tech. L. Rev.* 412.

¹⁶⁶ As we have already noted, art. 17 DSM Directive merely entrenches this narrative as algorithmic copyright enforcement technology is currently unable to detect permitted and mandatory uses such as parody, pastiche and caricature. See, Maxime Lambrecht, ‘Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive’ (2020) 11 *J Intell Prop Info Tech & Elec Com L* 68; João Pedro Quintais and Martin Husovec, ‘How to license article 17 of the Copyright in the Digital Single Market Directive? Exploring the implementation options for the EU Rules on content-sharing platforms,’ (2021) 70 *GRUR International* 325. Quintais and Husovec explain that the DSM Directive merely provides the normative framework to ensure strong legal protection for online business models in a specific field.

The processing of users' personal data provides such an example, particularly when reflecting upon platform obligations pursuant to art. 17 DSM Directive.¹⁶⁷ A strict implementation could allow exploiters to claim disclosure of this data under the Enforcement Directive,¹⁶⁸ and result in damages for users uploading creative content to platforms which reuse previous works.¹⁶⁹ Even more generally, when the DSM Directive was being debated by the EU legislature, the German Federal Data Protection Commissioner noted that “the use of so-called filters presents a threat of a few large providers of such technology gathering even more data concerning the users of many Internet platforms and services”¹⁷⁰. This is despite art. 17(9) DSM Directive requiring member state implementation to not lead to “the identification of users or the processing of personal data, except in accordance with the ePrivacy Directive and the General Data Protection Regulation (GDPR)”^{171, 172}.

However, commentary contends that autonomy over personal data can be conceptualised as “the ability of the individual to dictate when, how, and to what extent information about them is communicated to other parties”¹⁷³. It comprises a “form of information management, where control is achieved through the expression of an individual’s preferences”¹⁷⁴. There are clear parallels between this autonomy over personal data and the concept of self-determination and artistic communication. It follows that a construction of freedom to conduct a business as a secondary right to support users should form part of the principle of implied authorisation. This would respond to the concern that the processing of personal data of users that reuse previous works to create new works and share them online, pursuant to art. 17 DSM Directive, could deter creative uploads.

¹⁶⁷ Giovanni Buttarelli, ‘Comments of the European Data Protection Supervisor on Article 13 of the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market’ (3 July 2018) <https://edps.europa.eu/sites/default/files/publication/18-07-03_edps_formal_comments_copyright_en.pdf> accessed 2 January 2023.

¹⁶⁸ Gerald Spindler, ‘Copyright Law and Internet Intermediaries Liability’ in Tatiana-Eleni Synodinou and *et al* (eds) *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer 2020).

¹⁶⁹ Westkamp [n 18] 65.

¹⁷⁰ Florian Mueller, ‘Germany's Federal Data Protection Commissioner: EU copyright reform poses risks to data protection’ (26 February 2019) FOSSPATENTS <<http://www.fosspatents.com/2019/02/germanys-federal-data-protection.html#translation>> accessed 2 January 2023.

¹⁷¹ Quintais [n 133].

¹⁷² Such a requirement is based on general monitoring jurisprudence which holds that filtering systems can contravene users’ right to protection of their personal data and their freedom to receive or impart information under the Charter. See, Martin Senftleben, ‘Institutionalized Algorithmic Enforcement - The Pros and Cons of the EU Approach to UGC Platform Liability’ (2020) 14 FIU L Rev 299, 310.

¹⁷³ Henry Pearce, ‘Could the doctrine of moral rights be used as a basis for understanding the notion of control within data protection law?’ (2018) 27:2 Information & Communications Technology Law 133, 137; Christophe Lazaro and Daniel Le Métayer, ‘Control over Personal Data: True Remedy or Fairy Tale?’ (2015) 12:1 SCRIPT-ed 1, 6.

¹⁷⁴ Pearce [n 173].

A wider construction of freedom to conduct a business could also require platforms to pay authors when a user uploads creative content, that to an extent, reuses the author's work. Though the DSM Directive introduces new remuneration rules for authors and performers,¹⁷⁵ the broad and ambiguous nature of the Directive could result in varied approaches across member states. This is due to the location and sector specific nature of collective licensing which likely differs from member state to member state. Some commentary opines that "what is being mandated... is a sort of infrastructure where collective right managers in each sector will be the protagonist of this price or tariff setting mechanism on a sector-by-sector basis"¹⁷⁶. Additionally, these new remuneration rules fail to clarify the boundaries of a fair remuneration to the detriment of authors,¹⁷⁷ particularly as authors carry the burden of "proving that a contractually agreed remuneration falls short of the statutorily guaranteed fair remuneration"¹⁷⁸. Comparably, freedom to conduct a business could be construed to not only require platforms to support authors and users in relation to processing personal data, but also to fairly compensate authors, providing depth to the new remuneration rules outlined in the DSM Directive.

Though we will discuss, in more detail, how member states can implement art. 17 DSM Directive in a manner that reconciles digital copyrights interests in Chapter IV, we can sketch in this section, the approach of the German legislator. Germany strikes a balance between authors, users, exploiters and platforms by adopting ex-ante safeguards against over blocking through the legislative construct of presumed legal use¹⁷⁹. Essentially user uploads can be presumed to be authorized by law at upload stage.¹⁸⁰ It also requires platforms to pay

¹⁷⁵ DSM Directive, arts. 18-23.

¹⁷⁶ Ted Shapiro and *et al*, '3A Copyright Law Session. EU Copyright Reform' (2021) 28th Annual Intellectual Property Law & Policy Conference, Fordham Intellectual Property Law Institute.
<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1006&context=ipli_conf_28th_2021> accessed 10 July 2022. Indeed, similar rules were introduced two decades ago in Germany. See, Timm Neu, 'The Fair Pay Revolution: German Copyright Law's International Reach' (2018) 26 Mich St Int'l L Rev 445, 481. Commentary maintains that they have not improved authors' income given the reluctance of authors to rely on them in court. See, Sentfleben [n 12] 422; Tristan Azzi "General Report: Mechanisms to Ensure Adequate Remuneration for Creators and Performers" in Silke von Lewinski (ed) Remuneration for the Use of Works: Exclusivity vs Other Approaches (De Gruyter, Berlin, 2017) 85, 89.

¹⁷⁷ Sentfleben [n 34] 423.

¹⁷⁸ Ibid.

¹⁷⁹ Urheberrechts-Diensteanbieter-Gesetz vom 31. Mai 2021 (BGBl. I S. 1204, 1215) (Act on the Copyright Liability of Online Content Sharing Service Providers) ('UrhDaG'), ss. 9 – 11. A translation in English is available from

https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/UrhDaG_ENG.pdf?__blob=publicationFile&v=3.

¹⁸⁰ UrhDaG, s. 7(2).

compensation to collecting societies for presumably authorized uses,¹⁸¹ which specifically includes quotations, parodies and pastiches pursuant to the German Copyright Act.¹⁸²

The text assumes that authors benefit from limitations coupled with claims for remuneration and authors have a non-monetary and ideational interest to benefit from a broader public domain.¹⁸³ It also clarifies the significant gatekeeper role that platforms play in relation to artistic communication by requiring platforms to remunerate authors given the value-gap argument. This approach arguably reflects the wider construction of freedom to construct a business by incentivising platforms to facilitate creative uploads and deter the use of algorithmic copyright enforcement that will surely flag all user uploads, regardless of their purpose, as infringing.

Notably, in comparison to the first German draft, commentators suggest that this compensation scheme has far less bite.¹⁸⁴ Previously, authors via collecting societies would also be compensated for “*de minimis* (“technically verifiable”) uses and for uses falling within the remit of the pastiche exception (“technically non-verifiable uses”)”¹⁸⁵. Yet this approach was argued to violate EU law, specifically the closed-list principle under art. 5 Information Society Directive. Thus, the final German text amends the status of such uses and deems them a rebuttable presumption.¹⁸⁶ This allows rights holders to challenge the permission to use small parts, particularly snippets which use “commercially valuable portions of works and subject matter” or works used by “commercial users” which are excluded.¹⁸⁷

Reliance on a rebuttable presumption not only demonstrates the dominant status of exploiters within the European copyright system, but it illustrates their capacity to reshape European copyright law to expand contractual rights. Essentially rights holders will continue to reference the value gap as a reason to strengthen copyright, but only in circumstances where their interests in addition to authors are in peril. Controversially, the first German draft text linked the interests of authors and users in a way that truthfully and practically reflects the reuse and cyclical nature of creativity. Commentators reflect that this change means that the significance of technological control mechanisms has only increased,¹⁸⁸ as the pressure on platforms to conclude licences with collective licensing organisations has considerably waned.

¹⁸¹ UrhDaG, ss. 5(3) & 12(1).

¹⁸² Ibid s. 5(2).

¹⁸³ Westkamp [n 24] 66.

¹⁸⁴ Westkamp [n 24] 68-69.

¹⁸⁵ Ibid 68.

¹⁸⁶ UrhDaG, s. 10.

¹⁸⁷ Westkamp [n 24] 69.

¹⁸⁸ Ibid.

Still the current German implementation of art. 17 DSM Directive, provides a proportional approach to balancing the interests of authors, users, platforms and exploiters by incentivising the identification of presumably authorised uses, such as quotation, parody and pastiche, and by exempting liability for platforms. As per the text of art. 17 DSM Directive, platforms can still escape liability by demonstrating best efforts to obtain authorisation for the communication to the public of creative works subject to a requirement of reasonable terms and conditions.¹⁸⁹ Commentary frames this two-pronged approach as a “central collision clause” ultimately prioritizing creativity. The approach implements measures which bolster authors and users through payment for “a loss of control rights... because that new sources of income can ultimately build pressure on exploiters to agree to widespread platform licensing”.¹⁹⁰

This thesis proposes that the current German implementation of art 17 DSM Directive forms part of a broader construction of the freedom to conduct a business as a secondary right requiring platforms to support authors and users. This approach has the potential to provide a more proportional balance between all copyright interests as well as a framework for supporting the crux of the European copyright system, authorship, online. As we will see in Chapter IV, this could include the requirement for platforms to pay authors for creative uses, creating a licensing scheme which excludes exploiters as it does not conflict with their distribution markets. Further, there could be an obligation upon platforms to ensure that the processing of authors’ personal data does not result in disclosure to exploiters for infringement proceedings. Lastly, it could lay the necessary foundation to practically realize the remuneration rights listed in the DSM Directive, supporting the concept of authors’ consent.

1.5. CONCLUSION

This foundational chapter sets out the framework necessary to facilitate access and foster creativity online. First it locates the discussion within both the CJEU and literature to define the relationship between European copyright law and fundamental rights. Recent CJEU case law has evidenced the uncertainty regarding the balance between fundamental rights, mainly the freedom of expression and the right to protect IP, that should be struck within the European copyright system. Specifically, regarding online creativity, we have witnessed both the

¹⁸⁹ UrhDaG, s. 2.

¹⁹⁰ Guido Westkamp, ‘Digital Copyright Enforcement after Article 17 DSMD. Platform Liability between Privacy, Property and Subjective Access Rights.’ (2022) 14 Zeitschrift für Geistiges Eigentum - Intellectual Property Journal.

categorisation of copyright exceptions and limitations as user rights as well as the extension of protection for rights despite lacking originality such as phonogram rights.

The approach of the German Constitutional Court in *Pelham* however, is illustrative of how freedom of expression and arts, at a national level, can be construed to bolster the necessary free digital spaces specific to sampling to foster creativity online. The German free use exemption, though now invalid, evidences a wider ambit for freedom of expression and arts to play when considering the culture of sampling which necessitates references if not simply reuse of previous creative works. This chapter contends that such a role finds its foundation in the notion of self-determination which ultimately, from a natural rights theory perspective, means that within the grant of copyright there is space for future creativity which builds upon previous creative works.

We also observed in this chapter that the relationship between online creativity and self-determination can be explained using personhood theory. Again, the German Constitution is helpful as it protects personality, integrity and autonomy as a general personality right with scope to encompass other rights. Arguably, this perspective of self-determination could extend to also include artistic communication online, particularly because as we have witnessed throughout this chapter, the line between authors and users continues to blur. This is supported by both an extended concept of personhood theory in tandem with cultural theory which helps to ground the collaborative and cumulative creativity that occurs online.

Next, the chapter contends that authors' consent can be realized by using the doctrine of exhaustion as a metaphor for balancing the core copyright EU norms, access and remuneration found in constitutional guarantees, legislation and both European and national case law. Theories of exhaustion including reward theory, property and ownership theory and market and legal certainty theory confirm this construction of the exhaustion doctrine as an ultimate enabler of access. Social function theory, which appears to be gaining more ground within the literature, also offers an additional perspective to the utility of copyright in a community setting. This mirrors the relationship between self-determination and creativity which forms the core of the European copyright system. It is from this basis that the chapter proposes that consent affirms the inherent space within the grant of copyright for the reuse of previous creative works to create future works and their subsequent communication online.

Regarding the controversial position of exploiters, the chapter discusses the introduction of exploitation rights in the EU which has led to their meteoric rise where even a snippet, with no discussion of originality, as seen in *Pelham*, merits stronger protection than the traditional copyright threshold for creative works. The Rome Convention and in particular, the TRIPS

agreement is identified in this chapter as the start of emulating authors' rights for exploiters. The chapter then reflects that the arguments, such as technological investment, are today irrelevant particularly in the music industry where the production of phonograms no longer requires heavy investment. Despite this reality, the chapter confirms that the creeping pattern of copyright protectionism continues with the exploiters' latest instalment: art. 17 DSM Directive. We observed that the desire to control platforms' distribution of works online, a logical development of exploitation rights, means that platforms are incentivised to licence every aspect of their users' content. Additionally, the long-standing strategy of contractual and technological override reinforces this hierarchy of copyright interest where exploiters reside at the apex.

The clear absence of the EU legislature and CJEU to truly grapple with the reality of online creativity is representative of their approach to safeguarding the right to protect IP by, at all costs, reinforcing strong protection for exploiters' rights. However, in such ambiguity there is opportunity, particularly in relation to what we observed relating to the *Polish* referral. If fundamental rights must be balanced proportionally, this chapter has introduced the ability of consent to provide the doctrinal foundation to balance both authors and users' rights with exploiters. Termed the principle of implied authorisation, this construction of consent echoes both the doctrine of exhaustion and the three-step test in effect and has the potential to facilitate and support creativity online without interfering with exploiters' interests.

Lastly, the chapter explored the position of platforms which are currently obligated by exploiters to submit to a framework almost resembling artistic censorship. However, the thesis proposed that the freedom to conduct a business should be construed as a secondary right to support authors and users online. Despite the freedom's construction by some as a weak right and its current limited relevance regarding general monitoring, this chapter contends that without such a construction, creativity online will be stifled by exploiters' expansionist ambitions relating to creative works.

We observed that this is due to a strict implementation of art. 17 DSM Directive almost incentivising the use of algorithmic copyright enforcement which will most likely find all creative reuse uploads unlawful. Additionally, we noted concerns regarding the processing of personal data relating to creative uploads as well as issues related to the new remuneration rules. However, the chapter proposed that if freedom to conduct a business, construed as a secondary right, forms part of the principle of implied authorisation, platforms could be obligated to safeguard artistic communication. The chapter also identified that the German

legislation, to an extent, mirrors this construction by placing platforms into a position to support creativity online through the introduction of ex ante safeguards.

As suggested in the introduction, this foundational chapter aims to provide the doctrinal and philosophical framework to protect the free digital spaces online relating to authorship by suggesting how fundamental rights should be balanced specific to online creativity. Consent has emerged as a copyright doctrine comprising the balance struck between access and remuneration in the European copyright system with the potential to better support creativity in the digital environment. In the chapters that follow, the thesis will begin to flesh out the parameters of the principle of implied authorisation and understand its relationship to technological and contractual override, as well as wider questions of access to platforms for the purposes of creativity.

CHAPTER II: THE PRINCIPLE OF IMPLIED AUTHORISATION

2. INTRODUCTION

The free digital spaces in copyright necessary to foster online creativity have yet to be properly categorised. From statutory exceptions and limitations, to defences, to the latest CJEU instalment of ‘user rights’, copyright jurisprudence alongside academia have struggled to clarify how non-infringing uses should be contained within the law. Ultimately this discussion links to a broader question relating to the aim of copyright, which as we have observed in the previous chapter, in relation to the digital environment, seems to have become subsidiary to the motivation of exploiters to expand their exploitation rights connected to creative works through contractual and technological means. The question is whether there are mechanisms within the European copyright system that have the potential to support both author’s and users’ creativity online.

This thesis proposes that the doctrine of exhaustion holds the normative answer as it provides the foundation to balance these free spaces against exploitation rights when the subsequent use is creative. The thesis refers to this proportional balancing mechanism as the principle of implied authorisation. This chapter is designed to locate the principle within the European copyright system, drawing upon CJEU and national case law alongside legislation. Grounding the principle within existing copyright principles and doctrines allows the thesis to assert that there is no reason for creative reuses to be characterised as infringing copyright. Such a statement has heavy implications for copyright platform liability, specifically art. 17 DSM Directive which will be addressed in Chapter IV.

The first section focuses on the CJEU’s treatment of the most essential element of the doctrine of exhaustion, consent. It starts from the premise that consent reflects an essential function of copyright, to support creativity by providing access to and use of works. The section subsequently traces internal market case law where the CJEU adopted a broad interpretation of consent to trigger exhaustion. By viewing consent as a question of choice and control on behalf of the copyright holder, the section introduces notions of reasonableness, proportionality and flexibility to the assessment of consent in the context of access to and use of works.

Building upon the construction of consent as reflective of a balancing exercise of interests and rights, the second section addresses the elephant in the room, “digital exhaustion”. The aim is to reflect on the status of the doctrine of exhaustion within the digital environment as secondary EU legislation, specifically the Information Society Directive and Software

Directive, include contrasting, and to some extent controversial, exhaustion provisions, especially when we consider relevant CJEU jurisprudence. This section is helpful to understand why it is unlikely that the EU Commission will legislate ‘digital exhaustion’, but also to distinguish exhaustion based on copyright directives from the characterisation of exhaustion as the ultimate limiter of IP rights generally, despite the increasing strength of the right to communicate to the public.

Thirdly, this chapter seeks to outline how the principle of implied authorisation can take effect to support creativity by providing access to and use of previous copyright works online. Section three follows the interpretation of the right to communicate to the public, specifically the “new public” criterion, to include implied consent on behalf of the alleged copyright infringer. The section focuses on the parallels between CJEU case law authorising uses online, lacking copyright holder authorisation, with the principle of implied authorisation allowing creative reuses. The aim is to use the synergies to outline the boundaries of the principle of implied authorisation.

Lastly, the fourth section considers whether an author, by claiming artistic reputational harm, can withdraw consent from future creative exploitation of their work. Following an overview of CJEU jurisprudence relating to implying authors’ consent and the requisite balancing of interests, the section considers the characterisation of artistic reputational harm as a negative construct. The parameters of a negative association due to a subsequent creative use are then addressed by referring to a wide-range of reputational-based rights both within the European copyright system but also aspects of unfair competition. These approaches are then reconciled to structure a limit upon the principle of implied authorisation and the section subsequently considers how the limit should be balanced against competing fundamental rights of the subsequent author.

By considering the theoretical foundation of the doctrine of exhaustion as reflective of the balancing and proportional mechanisms with the European copyright system, that results in the free digital spaces outlined above, this chapter contends that the principle of implied authorisation is a natural extension to support creativity online.

2.1. BUILDING FROM EXHAUSTION: A QUESTION OF CONSENT, CONTROL AND AUTONOMY OVER DISTRIBUTION AND DISSEMINATION

As suggested in Chapter I, from a European context, the doctrine of exhaustion is intrinsically linked to the establishment and maintenance of the internal market. Naturally,

national IP rights posed a threat to the free movement of goods enshrined in primary EU law, such as the TFEU, as these monopolies had the potential to shape divisions within the internal market based on IP legislation in member states. Community-wide exhaustion was thus introduced to balance the free movement of goods against national IP rights.

Yet, this section offers a different construct of the doctrine of exhaustion. The section proposes that consent is a concept supporting creativity online through regulating access to and use of works, as well as to facilitate appropriate remuneration for authors. This characterisation of consent as a meta-exception, operating throughout the European copyright system to balance interests and support creativity, is essential to allow creative reuses of copyright works. This section builds upon internal market jurisprudence to present consent as an arbitrator of control over creative works online which necessarily comprises the ability of users to create new works by accessing and reusing previous creative works, and subsequently communicating these online.

The construction of consent as a question of control over the distribution of IP-protected goods is grounded in internal market jurisprudence. At first, common origin theory was used by IP holders to circumvent Community-wide exhaustion.¹⁹¹ IP holders would argue that there was no link between the first circulation of the protected product and themselves, as they had not directly consented to the first sale. The CJEU focused on whether the good being controlled by IP rights was the same good distributed in different member states. Though common origin theory was short-lived, it laid the foundations to consider the parameters of consent. This would play out in subsequent cases through the specific subject matter principle outlined in *Deutsche Grammophon* to define the extent to which the exercise of an IP right is justified.¹⁹² In these cases, there seemed to be a perception that once an IP holder had placed the good on the market, they could not continue to benefit from free movement in the EU while restricting the distribution of that good.

Sterling Drug Inc. is one such case where the CJEU considered circumstances which challenge the construction of consent on a national member state basis.¹⁹³ Here, the CJEU balanced free trade norms against national IP rights by finding patent holders to have consented

¹⁹¹ C-40/70 *Sirena S.r.l. v Eda S.r.l. and others* ECLI:EU:C:1971:18; C-192/72 *Van Zuylen Freres v Hag* ECLI:EU:C:1974:72; Domenico Sindico, 'On Parallel Importation, TRIPS and European Court of Justice Decisions' (2002) 5 J World Intell Prop 505, 508.

¹⁹² C-15/74 *Centrafarm BV and Adriaan De Peijper v Sterling Drug Inc.* ECLI:EU:C: 1974:114 ('Sterling Drug'); C-119/75 *Terrapin v Terranova* ECLI:EU:C: 1976:94 ('*Terrapin*'); C-187/80 *Merck & Co. Inc. v Stephar BV* ECLI:EU:C: 1981:180; Valentine Korah, *An introductory guide to EC competition law and practice* (9th ed.) (Hart Publishing, Oxford, 2007) p. 339; Hans Smit, 'The Relation of Intellectual Property Rights to Cross-Border Trade in the EEC' (1986) 11 Can-US LJ 69, 76.

¹⁹³ Korah [n 192] 11.

to a drug's entry into the Dutch market. Commentary explains that the CJEU was clearly not prepared to allow patent holders to have a "second bite of the cherry when its drug entered the Netherlands, where it was more highly valued," particularly as such a restriction was not necessary when considering the essence of the parallel patents' exclusive rights.¹⁹⁴ We can observe that consent seems to be tied to the very boundaries of the relevant economic rights also known as the function of the IP right.¹⁹⁵

Later in *Music Vertrieb* this approach was confirmed in relation to copyright law.¹⁹⁶ Here, the question was whether national copyright legislation can prevent importation, despite first sale, for the purposes of remuneration.¹⁹⁷ The ruling focused on the legal consequences of the copyright infringement and the ability of the German collective licensing body, GEMA¹⁹⁸, to seek damages pursuant to the applicable national legislation. GEMA argued that the exercise of these economic rights was not to prevent marketing of records and cassettes in Germany, but to ensure the equality of the royalties paid for any distribution of those sound recordings on the German market. The right to remuneration, from the perspective of GEMA, was legitimate regardless of the extent that the work is distributed and meant that artists should receive royalties equal to those paid in the country in which the recorded work is marketed.¹⁹⁹

However, the CJEU held that such an approach would partition the internal market, even though it virtuously aimed to charge a levy on imported products from other member states.²⁰⁰ If such a restriction was allowed it would amount "to allowing a private undertaking to impose a charge on the importation of sound recordings which are already in free circulation in the Common Market on account of their crossing a frontier; it would therefore have the effect of entrenching the isolation of national markets which the Treaty seeks to abolish."²⁰¹ The court emphasised the consent of the copyright owner, remarking that they had chosen to first put those products on the market in that member state which is a key feature of the internal market: the choice of where to put the product in circulation first.²⁰²

¹⁹⁴ Korah [339] 12.

¹⁹⁵ C-15/74 *Centrafarm BV and Adriaan De Peijper v Winthrop BV* ECLI:EU:C:1974:115 ('*Winthrop*'). Centrafarm had imported English pharmaceutical products bearing English trade marks and distributed them in the Netherlands for half the price.

¹⁹⁶ Joined cases C-55/80 and 57/80 *Musik-Vertrieb membran GmbH and K-tel International v GEMA* - ECLI:EU:C:1981:10 ('*Musik-Vertrieb*').

¹⁹⁷ *Ibid* at [8]-[9].

¹⁹⁸ GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) is a German government-mandated collecting society and performance rights organization.

¹⁹⁹ *Musik-Vertrieb* at [16].

²⁰⁰ *Ibid* at [18].

²⁰¹ *Ibid*.

²⁰² *Ibid* at [25].

This choice is made according to the IP holder's best interests, which involve remuneration as well as other factors, and is clearly enhanced by the free movement of goods.²⁰³ This approach would later be followed in *Nungesser* relating to plant varieties, and in *Miller* in relation to records where the CJEU emphasized the IP holder's ability to control the goods,²⁰⁴ specifically the choice of member state to initially market them. This focus on control by assessing the relevant surrounding circumstances of putting a product on the market continued as the CJEU examined the application of Community-wide exhaustion to services. The *Coditel* cases would confirm that this broad construction of consent alongside the specific subject matter of the IP right at stake remained the balancing tool for reconciling free trade against national IP rights.²⁰⁵ Here a Belgian company, the exclusive Belgian licensee of the performing right on the movie *Le Boucher*, sued Coditel for the rebroadcasting of the film in Belgium which they had taken from the signal of a German television channel, who was the exclusive German assignee of the broadcasting right.

The CJEU first considered whether the distribution agreement partitioned the internal market and a prohibition against restrictions on the freedom to provide services.²⁰⁶ However, the CJEU had an additional characteristic to consider when analysing consent. At the time, copyright holders would licence the performance rights of a film and base the licensing fees on the actual or probable number of performances. This meant that they would only authorise television broadcasts of the film after they were exhibited in cinemas for a certain period. This licensing strategy was derived from the essential function of exploitation rights which comprised the ability to licence repeated performances,²⁰⁷ essentially the ability to control and profit from each performance of a broadcast.²⁰⁸

The court held that freedom to provide services could not restrict these licensing agreements even though they included geographically based terms which coincided with member state borders.²⁰⁹ Hence an exclusive licensee for a performing right in a film for the

²⁰³ *Musik-Vertrieb* at [25].

²⁰⁴ Case 258/78, *LC Nungesser KG and Kurt Eisele v. Comm'n*, ECLI:EU:C:1982:211; C-19/77 *Miller v Commission* ECLI:EU:C:1978:19 and was confirmed in Case C-9/93, *IHT Internationale Heiztechnik GmbH, Uwe Danziger v Ideal-Standard GmbH, Wabco Standard GmbH* ECLI:EU:C:1994:261 relating to trade marks.

²⁰⁵ Case C-62/79 *SA Compagnie gindrale pour la diffusion de la television, Coditel, and others v Cine Vog Films and others ('Coditel I')* [1980] ECR 1-0881; Case C-262/81 *Coditel v CinA/og FilmsI (Coditel II)* [1982] ECR 1-3381 (*'Coditel II'*).

²⁰⁶ Art. 56 TFEU.

²⁰⁷ *Coditel I* at [14].

²⁰⁸ *Ibid.*

²⁰⁹ Sganga [n 95] 223. Also see, P. Bernt Hugenholtz, 'Chapter 1: Copyright without frontiers: the problem of territoriality in European copyright law' in Estelle Derclaye (ed.) *Research Handbook on the future of EU copyright* (Edward Elgar 2009) 12. Hugenholtz explains that television broadcasting then was organised based

whole of a Member State may rely on it against broadcasts of the film that were received from a television broadcasting station established in another state, without infringing the internal market.²¹⁰ They can even rely on it where the original broadcast was picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.²¹¹

However, the performance and broadcasting rights were of course, not absolute. Later in the judgment, the Court maintained that the assignment of performance or broadcasting rights are not in themselves prohibited by the TFEU. However, the CJEU explained that it is for national courts to determine whether the exercise of these rights falls within these prohibitions by having regard to the economic or legal circumstances that restrict film distribution to an appreciable degree or distort competition on the cinematographic market.²¹² Though the CJEU had confirmed the strength of performance and broadcasting rights, these specific characteristics evidenced an approach which is open to balancing and proportionality assessments.²¹³ Hence a general rule of non-exhaustion of performance or communication rights would be unwarranted.²¹⁴

Here the characteristics of the cinematographic industry and its markets in the EU were reasonable factors to find that overall, such an exclusive licence was not, in itself, such as to prevent, restrict or distort competition.²¹⁵ The CJEU left the door open for national courts to find that the copyright holder's conduct departed from the protection conferred by broadcasting and performance rights if its specific subject matter could justify exhaustion in the case of services. In the context of *Coditel*, there is a strong argument that films should be protected at each new public showing. Though the performance right should not be exhausted along the same reasoning as goods,²¹⁶ this does not mean that a performance right cannot be exhausted under the specific subject matter test. Note that both the Information Society Directive's

on state monopolies. This meant that in relation to performance rights, the TFEU could not restrict licensing agreements based on national frontiers due the practical reality of broadcasting.

²¹⁰ *Coditel I* at [17].

²¹¹ *Coditel I* at [18].

²¹² *Coditel II* at [17]-[20].

²¹³ Westkamp [n 90] 511; Christopher M. Stothers, 'The European internal market: exhaustion plus' in Irene Calboli and Edward Lee (eds.) *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar: 2016) 181-182; Sganga [n 95] 223 at [41].

²¹⁴ Hugenholtz [n 209] 21.

²¹⁵ *Coditel II* at [16]. Particularly the need for dubbing and subtitles, possibilities of television broadcasts, and the system of financing EU cinematographic productions.

²¹⁶ Yves Gaubiac, 'The exhaustion of rights in the analogue and digital environment' (2002) 4 Copyright Bulletin 9.

exclusion of exhaustion pursuant to the communication right and the CJEU's interpretation of the right challenge the application of exhaustion and the specific subject matter test.²¹⁷

Eventually the CJEU was asked the same question regarding rental videos. In *Warner Bros & Metronome v Christiansen*, Warner Brothers, the copyright holder of the film 'Never Say Never Again' in the UK, assigned the management of video production rights in Denmark to Metronome.²¹⁸ A video rental shop owner in Denmark purchased a copy of the film in London and planned to hire it out in Denmark, importing it for that purpose. Following *Coditel*, the CJEU considered the emergence of a specific market for the rentals of these recordings, distinct from their sale. The Court found that the exercise of the rental right was justified due to various industry-specific factors. The rental market for video cassettes was said to reach a wider public and offer high levels of revenue for filmmakers.²¹⁹ Despite the consent argument outlined above as well as in *Musik-VetrieB*, the CJEU found that if a member state does not provide specific protection for rentals, it should not have consequences on a right in another member state to constrain rentals.²²⁰

Some commentary asserts that this harmonisation and codification on exhaustion largely reflects the prevailing case law and thus, confirms that exhaustion is limited to the distribution of goods, not services.²²¹ Further, they suggest that the goods versus services divide sits at the heart of non-exhaustion, meaning that the right to communicate to the public and the making available right should be regarded as services.²²² Such an interpretation over simplifies the case law.²²³ The *Coditel* cases in conjunction with *Warner Brothers* reveal that the analysis is a facts-dependent assessment which requires the Court to balance the free movement of goods principle with the specific subject matter of the right at play. Overall, these cases illustrate that where specific conduct based on exercising national IP rights conflicts with the aims of the

²¹⁷ We will discuss this more comprehensively in section 2.3.

²¹⁸ Case C-15/86 *Warner Brothers and Others v Christiansen* ECLI:EU:C:1988:242 ('*Warner Brothers*') at [14]. These included improved manufacturing for video cassettes which increased their long-term use, the occasional viewing of video cassettes by purchasers, and their relatively high purchase price

²¹⁹ *Ibid.*

²²⁰ *Warner Brothers* at [17]-[18]. This was later codified a few years later as rental and lending rights were harmonised. Art. 1(2) of the Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property states that "the rental and lending rights are not exhausted by any sale or other act of distribution of originals and copies of copyright works."

²²¹ Poorna Mysoor, 'Exhaustion, non-exhaustion and implied licence' (2018) 49 IIC 656, 674.

²²² *Ibid.*

²²³ Westkamp [n 223]; Stothers [n 213].

internal market, such rights are open to balancing and proportionality assessments regarding the application of exhaustion.²²⁴

This construction could not have been clearer in the subsequent joined cases *Football Association Premier League* and *Murphy*.²²⁵ The cases concerned the broadcasting of the English Premier League matches and the various exclusive distribution licences granted for their distribution across the EU. Licensees were required to encrypt the broadcasts, meaning that if subscribers wanted to watch the matches, they required a decoder card. According to British legislation, these decoder cards could not be supplied by licensees outside their own territory²²⁶. However, QC Leisure sold Greek decoder cards to pubs and bars in the UK. Karen Murphy, a pub landlord, purchased and used the Greek decoder card. Subsequently, both QC Leisure and Karen Murphy were the subject of civil and criminal actions relating to the use of the decoder cards, including copyright infringement. They raised a variety of defences including the principle of free movement and the prohibition against restrictions to competition.

Following a request for a preliminary ruling, the CJEU held that the British legislation constituted such a restriction unless it could be objectively justified, despite no caveat or derogation existing in art. 56 TFEU. The Court explained that a restriction can only be justified if it “serves overriding reasons in the public interest” and is “suitable for securing the attainment of the public interest objective” but does not “go beyond what is necessary in order to attain it”.²²⁷ *Coditel* and *Musik-Vertrieb* were then cited as examples where such a restriction is justified on the grounds of intellectual property.²²⁸ A justified restriction must also flow from the specific subject-matter of the IP which includes licensing in return for remuneration.²²⁹ However, the Court reasoned that the specific subject-matter does not extend to guaranteeing right holders the opportunity to demand the highest possible remuneration, only an appropriate remuneration for each use of the protected subject-matter.²³⁰

²²⁴ Westkamp [n 223] 511. Valerie Laure Benabou, ‘Chapter 21: European Competition Law and Copyright: Where do we stand? Where do we go?’ in Estelle Derclaye (ed) *Research Handbook on the future of EU copyright* (Edward Elgar 2009) 546.

²²⁵ Joined cases C-403/08 *Football Association Premier League and Others v QC Leisure and Others*, and C-429/08 *Karen Murphy v Media Protection Services* ECLI:EU:C:2011:631 (*‘Football Association Premier League’*).

²²⁶ Not only were the commercial licenses for public venues expensive, but licences in some member states were cheaper than others (notably, in Greece, compared to the UK).

²²⁷ *Football Association Premier League* at [93], citing C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* ECLI:EU:C:2009:124 at [25].

²²⁸ *Football Association Premier League* at [94].

²²⁹ *Ibid* at [107].

²³⁰ *Ibid* at [108].

Similarly to *Coditel*, what is reasonable depends on the economic value of the service provided as well as the actual or potential number of persons who enjoy or wish to enjoy the service.²³¹ The CJEU held that the premium paid to right holders would result in artificial price differences between the partitioned national markets and meant that it was not an appropriate remuneration as it went beyond what was necessary.²³² Hence the British legislation could not be justified.²³³ Notably, the court factually distinguishes *Football Association Premier League* from *Coditel*, finding that in the latter the right holders neither authorised the subsequent communication, nor were they remunerated.²³⁴

The CJEU emphasized that it was the additional obligations to ensure compliance with the exclusive broadcasting licences, specifically that broadcasters do not supply decoding devices enabling access outside their licensed territory, that should be called into question.²³⁵ These clauses were said to eliminate any competition between broadcasters in the fields of those services because a provision prohibiting cross-border provision of services relating to those matches effectively grants each broadcaster absolute territorial exclusivity in their licensed area.²³⁶ There seemed also to be a burden upon the Football Association Premier League to evidence that these restrictions were not liable to impair competition, which they did not.

While the earlier internal market cases demonstrate a literal interpretation of consent within the bounds of the exhaustion doctrine, focused on whether the original proprietors were legally and economically independent from the subsequent distribution, these later cases, turn on the contextual factors of the initial distribution or dissemination of the work. The specific subject-matter of the relevant IP as well as its essential function have been used in a balancing and proportionality assessment to determine whether, in certain circumstances, the non-exhaustion of an exploitation right is justified. However, as we will observe in the following section, recent cases on the application of the doctrine of exhaustion to digital copies has abandoned teleological criteria such as specific subject-matter or the essential function of copyright. Commentary asserts that this recent trend has “contributed to the loss of the systemic

²³¹ *Football Association Premier League* at [109].

²³² *Ibid* at [111]-[116].

²³³ *Ibid* at [117].

²³⁴ *Ibid* at [119].

²³⁵ *Ibid* at [141].

²³⁶ *Ibid* at [142].

consistency shown by the CJEU's decisions that have since then ruled directly or indirectly upon digital exhaustion".²³⁷ One reduced to its smallest expression".²³⁸

This section contends that a return to the construction of the exhaustion doctrine as a balancing and proportionality assessment, involving the specific subject-matter principle, the essential function of the relevant IP, and contextual factors of the initial authorisation, such as remuneration, is warranted.²³⁹ Hence consent comprises all aspects which balance interests within the European copyright system. It marks a return to the idea that the grant of copyright is not absolute and must be linked to the very contours of exploitation rights. As we observed in the previous chapter, natural rights theory, particularly Kant, extended personhood theory as well as cultural theory, support the construction of copyright protection as inclusive of free digital spaces to foster creativity. This section has illustrated how these foundational Community-wide exhaustion cases support an interpretation of the doctrine of exhaustion as an enabler of access which can balance the boundaries of protection against circumstantial factors which call for an exploitation right to be exhausted through the element of consent. Thus, this section supports the hypothesis that a broader construction of consent, termed the principle of implied authorisation, should both provide access to and use of works as well as provide appropriate remuneration to authors.

2.2. THE LIMITS OF A 'DIGITAL EXHAUSTION' APPROACH

So, how could the doctrine of exhaustion facilitate access and foster creativity online? The idea of extending it beyond the analogue world, referred to as digital exhaustion, has captivated the attention of many scholars within modern copyright law.²⁴⁰ As we will observe in this section, the exhaustion doctrine, in its current format under secondary EU law, specifically the Information Society Directive and the Software Directive, remains conflicted. On the one hand, there is the argument that it should be restricted to a goods-based legal

²³⁷ Sganga [n 95] 223 at [43]. Sganga explains that following these cases, only the strict material-only construction of exhaustion as well as the exclusion of services was inherited.

²³⁸ Benabou [n 224] 546.

²³⁹ Westkamp [n 90] 511.

²⁴⁰ Sganga [n 95]; Perzanowski & Schultz [n 100]; Sganga [n 18]; Wiebe [n 92]; Rizzuto [n 59]; Karapapa [n 90]; Simon Geiregat, *Suppling and Reselling Digital Content* (Edward Elgar Publishing: 2022); Ross [n 59]. Christina Angelopoulos, 'The digital exhaustion of copyright' (2020) 79 Cambridge Law Journal 227; Ansgar Ohly, 'Chapter 9: Exhaustion of rights: a concept for the digital world?' in Dana Beldiman (ed) *Innovation, Competition and Collaboration* (Edward Elgar 2015); Péter Mezei, *Copyright Exhaustion* (Cambridge University Press: 2022); Reto M Hilty, 'Chapter 4: "Exhaustion" in the digital age' in Irene Calboli and Edward Lee (eds.) *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar Publishing 2016); Stavroula Karapapa, 'Reconstructing copyright exhaustion in the online world' (2014) 4 I.P.Q. 307.

doctrine, and on the other, demonstrated by the latter, there is an argument that a modern doctrine of exhaustion should not be subject to these strict tangibility requirements. The debate began with the Information Society Directive implemented to effect the WIPO Internet Treaties. Yet both the WCT and WPPT leave the question of exhaustion in the digital environment to the contracting states to determine.²⁴¹ The Agreed Statement provides more clarification and explains that the terms ‘copies’ and ‘original copies’, the subject of both the distribution right and rental right, refer exclusively to fixed copies that can be circulated as tangible objects.²⁴² It seemed that on an international level, exhaustion was restricted to both the distribution right and to analogue copies.

However, some commentary has persisted and proposed that the doctrine of exhaustion could still be extended. They suggest that the Agreed Statement should be construed as requiring the copy to be potentially fixable on a material support.²⁴³ Others have concluded that it is possible that the WCT merely harmonised the right of distribution as applied to tangible copies, leaving it to the contracting parties to determine the exhaustion regime applicable to intangible copies,²⁴⁴ particularly as the impact of digital distribution at the time was far from clear for policymakers.²⁴⁵ Nevertheless, art. 4(2) of the Information Society Directive confirmed the exhaustion rule as follows:

*“The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that **object** is made by the rightholder or with his consent.”*

The question of tangibility, and by extension, goods versus services, seemed to be answered by linking “original or copies” to an “object”, hence requiring exhaustion to only apply in relation to works in material form.²⁴⁶ Guidance was given in the recitals, explaining that the distribution right relates to works incorporated in tangible articles, that services, specifically online services, are excluded from exhaustion, and any acts relating to the latter require authorisation unlike IP incorporated on a material medium.²⁴⁷ This seemed to confirm

²⁴¹ WCT, art. 6(2); WPPT, arts. 8(2) & 12(2).

²⁴² The Agreed Statement.

²⁴³ Sganga [n 95]; F Ruffler, ‘Is trading in used software an infringement of copyright? The perspective of European law’ (2007) 6 EIPR 380.

²⁴⁴ Eleonora Rosati, ‘Online copyright exhaustion in a post-Allposters world’ (2015) 10 JIPLP 673, 675.

²⁴⁵ Sganga [n 95] 211 at [6].

²⁴⁶ Green Paper p. 47.

²⁴⁷ Information Society Directive, recitals 28, 29 and 32.

the opinion of some commentary that *Coditel* had already explicitly restricted exhaustion to the physical dissemination of copyrighted goods, without extending it to intangible forms of commercial exploitation such as cross-border re-transmission of a film.²⁴⁸ Nevertheless, the implementation of exhaustion in the Software Directive, would prompt even further discussion. Art. 4(2) provides that:

*“The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that **copy**, with the exception of the right to control further rental of the program or a copy thereof.”*

The absence of the term “object” alongside the emphasis on “copy” in art. 4(2) Software Directive has resulted in a remarkably different outcome. It was first addressed by the German courts in *OEM-Software*,²⁴⁹ but the CJEU would consider the relationship between exhaustion and computer programs more comprehensively in *UsedSoft*.²⁵⁰ Here, Oracle developed and marketed client-server computer software which was stored on a customer’s server and accessed by users from their individual workstations. Usually, customers downloaded the software on to their server, though in some cases the software was distributed by Oracle on physical media (CDs). Customers were required to purchase a licence from Oracle to use the software, which was sold in bundles of 25 users for a single fee. UsedSoft marketed used software licences including the Oracle user licences. To this end, UsedSoft would acquire from Oracle’s customers such user licences, or parts of them, where the original licences were bundled together. UsedSoft customers could then download a copy of the program directly from Oracle’s website once they purchased a used user licence from UsedSoft.

Significantly, the CJEU categorised the bundled software user licences as a sale, even though the license was described as:

²⁴⁸ Guiseppe Mazzioti, ‘Is geo-blocking a real cause for concern in Europe?’ (2016) 38 *European Intellectual Property Review* 365, 367.

²⁴⁹ BGH, GRUR 2000, 153 (‘*OEM-Version*’); Lothar Determann and Aaron Xavier Fellmeth, ‘Don’t Judge a Sale by Its License: Software Transfers under the First Sale Doctrine in the United States and the European Community’ (2001) 36 *USF L Rev* 1, 5. Microsoft alleged that a German distributor marketing Microsoft products labelled ‘original equipment manufacturer’ (“OEM”) but had sold them as stand-alone products to the general public, contrary to Microsoft’s license restrictions. Commentary explains that “by offering the discounted OEM versions as stand-alone versions, the German distributor was able to undercut prices set by its competitors”. However, the Federal Court in Germany held that no authorisation was required as the distribution right was exhausted when Microsoft transferred the software copies to a distributor from whom the German distributor acquired them from.

²⁵⁰ Case C-128/11, *UsedSoft GmbH v Oracle International Corp*, EU:C:2012:407 (“*UsedSoft*”).

*“an unlimited period a non-exclusive non-transferable user right free of charge for everything that Oracle develops and makes available to you on the basis of this agreement.”*²⁵¹

A sale pursuant to the Software Directive was defined as an agreement where “in return for payment, a person transfers to another person ownership in an item of tangible or intangible property belonging to her.”²⁵² This broad approach focused on whether there was a transfer of ownership occurring between the parties. It considered factors such as the “inseparable unity” between the downloaded copy and the user licence which allowed the software to be used by its possessor,²⁵³ and the circumvention of exhaustion which would reduce competition significantly and impact the free movement of goods.²⁵⁴

However, there were limits to the application of exhaustion to computer software. Firstly, if the licence acquired by the first acquirer relates to a greater number of users than she needs, the acquirer cannot divide the licence and resell only the user right for the computer program corresponding to several users determined by her. Secondly, a lawful acquirer must, to avoid infringing the reproduction right, make her copy unusable at the time of its resale. Thirdly, even if an acquirer of additional user rights did not carry out a new installation — and hence a new reproduction — of the program on a server belonging to her, the effect of exhaustion of the distribution right would not extend to such user rights.²⁵⁵

UsedSoft also considered the position of those buying the used software and whether they infringed Oracle’s exclusive right of permanent or temporary reproduction of computer programs pursuant to art. 4(1)(a) of the Software Directive. While the licence stated that the right to use the programs is ‘non-transferable’, it was an open question whether Oracle’s customers are not entitled to transfer to third parties the right of reproduction of those programs. The answer depended on whether *UsedSoft*’s customers, who rely on the exhaustion of the distribution right, were lawful acquirers pursuant to art. 5(1) of the Software Directive. This exception allows, in the absence of specific contractual provisions,²⁵⁶ certain acts to not require

²⁵¹ *UsedSoft* at [23].

²⁵² *Ibid* at [42].

²⁵³ *Ibid* at [44]-[45].

²⁵⁴ Robert Clark, ‘Exhaustion, geographical licensing restrictions and transfer prohibitions: Two surprising decisions,’ (2013) 8 *Journal of Intellectual Property Law & Practice* 460, 465.

²⁵⁵ *UsedSoft* at [69] – [72].

²⁵⁶ Liliia Oprysk, ‘The CJEU judgement in *Ranks and Vasilevičs*: You can buy a used license, but will a copy follow?’ in C. Holm (ed.) *Secure Digitalisation. Nordic Yearbook of Law and Informatics* (Poseidon 2019).

authorisation where they are necessary for the use of the computer program in accordance with its intended purpose, including for error correction.

Obviously if used software customers could not benefit from this protection, it would render the marketability of used software meaningless.²⁵⁷ So, the CJEU held that as the distribution right was exhausted, notwithstanding the existence of contractual terms prohibiting a further transfer, the rightsholder can no longer oppose the resale of that copy²⁵⁸. This is so long as the original acquirer makes their own copy unusable at the time of resale which can be supported through TPMs such as product keys,²⁵⁹ and that the new lawful acquirers use the program in accordance with its intended purpose.²⁶⁰ Later in *Ranks*, the CJEU would exclude exhaustion from backup and other non-original copies, even if the user loses or destroys the copy it originally acquired from the right holder, the right to transfer is lost.²⁶¹

Despite the promise and potential of *UsedSoft* to radically balance the relationship between rightsholders and users online, the *lex specialis* nature of the Software Directive would ultimately lay the foundation to limit the application of exhaustion pursuant to the Information Society Directive. As we will observe in the following chapter, the stark contrast between the treatment of exhaustion pursuant to the Information Society Directive versus the Software Directive would be most apparent relating to video games, which arguable comprise both code as well as visual and auditory factors. Indeed, the *lex specialis* nature of the Software Directive also means that as more and more copyright works are shared and enjoyed online, the glaring inconsistency between the two approaches will become more decisive.

This became clear in the case law that followed *UsedSoft*, as the CJEU embedded the significance of the distinction of goods and services when deciding the fate of exhaustion. In *Art & Allposters International BV v Stichting Pictoright*,²⁶² Allposter marketed posters and other reproductions online depicting the works of famous painters by selling the images on canvases. This required a laminate to be first applied on a paper poster of the work. Then, through a chemical process, the image on the poster was transferred from the paper to a canvas.

²⁵⁷ *UsedSoft* at [30].

²⁵⁸ *Ibid* at [77]. The court also referred to recital 13 which states that ‘the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired ... may not be prohibited by contract’.

²⁵⁹ *Ibid* at [78].

²⁶⁰ *Ibid* at [85].

²⁶¹ Case C-166/15 *Ranks and Vasilevičs* EU:C:2016:762; Caterina Sganga, ‘Digital exhaustion after Tom Kabinet: a non-exhausted debate’ in T. Synodinou et al (eds) *EU Internet Law in the Digital Single Market* (Springer 2021) 312.

²⁶² Case C-419/13, *Art & Allposters International BV v Stichting Pictoright*, EU:C2015:27 (“Art & Allposters”).

Finally, the canvas was stretched over a wooden frame. Pictoright alleged that these sales infringed copyright, and the Dutch Regional Court of Appeal rejected Allposter's argument that distribution right was exhausted. The court relied on the *Poorvliet* doctrine where if there is a new publication and is distributed in another form, there are new opportunities for exploitation not accessible to the rightsholder.²⁶³ Such an approach is reminiscent of the specific subject-matter principle where an exploitation right could fail to be exhausted which protects new markets for copyright works.

On application to the CJEU, the court considered this characterisation of exhaustion by focusing on whether such a major alteration and subsequent circulation of a work would prevent exhaustion. In line with the Dutch courts, the CJEU emphasized the requirement that authors should have control over the initial marketing in the EU of their work, imputed from the use of the terms "tangible article" and "that object".²⁶⁴ As the canvas transfers effectively created a new work, to which the rightsholder had not benefited, consent excluded such major alterations and distribution. Additionally, the focus by the CJEU on whether "the altered object itself, taken as a whole, is physically, the object that was placed onto the market with the consent of the rightholder" strengthens the tangibility requirement for exhaustion.²⁶⁵

Later in *VOB v Stichting Leenrecht*,²⁶⁶ the focus on tangibility by the CJEU was consolidated when draft Dutch legislation was challenged on the basis that electronic books lent by public libraries do not benefit from an exception that requires remuneration via collecting societies so long as the digital copy was put into circulation according to exhaustion principles under art. 4(2) of the Information Society Directive. It was argued that intangible objects and non-fixed copies, such as digital copies, are excluded from the right of rental.²⁶⁷ If "lending" per the Rental Directive includes digital copies of books, alongside limited access measures, then electronic books could benefit from the exception. However, the CJEU found that as the Rental Directive did not specify whether the term 'copies of copyright works' include copies not fixed in a physical medium nor defined 'lending' as also covering intangible objects, copies of electronic books could not benefit from the exception.²⁶⁸ This meant that lending of copies of electronic books requires licensing agreements with rightsholders,

²⁶³ *Art & Allposters* at [19].

²⁶⁴ *Ibid* at [37].

²⁶⁵ *Ibid* at [46].

²⁶⁶ Case C-174/15, *V.O.B. v Stichting Leenrecht* EU:C:2016:856 ("*V.O.B.*") at [35].

²⁶⁷ *Ibid* at [34].

²⁶⁸ *V.O.B.* at [44].

particularly as the court also held that art.4 (2) of the Information Society Directive leaves intact and in no way affects the rental right and lending right.²⁶⁹

In these cases that followed *UsedSoft*, we can observe that digital exhaustion did not progress beyond the Software Directive largely due to the emphasis on goods and tangibility throughout European copyright jurisprudence. This fixation to categorise digital consumption online using arbitrary doctrinal structures, whether it be the *lex specialis* nature of the Software Directive or the dogmatic construction of the term “copies”, reflects the EU Commission and CJEU’s overarching view that the communication to the public right is the applicable right online. Scholars remark that this approach seems to indicate that European policy opines that the online delivery of digital works should be treated as analogous to broadcasting; the making available to the public for an infinitely (repeatable) performance.²⁷⁰ It is this presumption that non-tangible goods should automatically be classified as services which sits “at the very beginning of the codification of the exhaustion doctrine in the EU”.²⁷¹

The result is that the distribution right is seen merely as the ability to control tangible articles. In comparison, the right to communicate to the public is said to involve the control of a work through intangible means.²⁷² However, current methods of consuming content have been described by the literature as blurring the borderlines of this “fundamental dichotomy”.²⁷³ While works can be downloaded by users, there exists a hybrid distribution method where “basic elements of a contract of sale and a provision of services are present.”²⁷⁴ Given the broad nature of digital content consumption, it is unsurprising that this has given way to what the commentary refers to as ‘copy fetishism’²⁷⁵ and the strengthening of the communication to the public right to the benefit of exploiters.

Commentary explains that there is a “conviction, not grounded in either law or history, that copyright owners should be able to control, or [at] least collect royalties from, *all uses* of

²⁶⁹ *V.O.B.* at [56].

²⁷⁰ Eric Tjong Tjin Tai, ‘Exhaustion and online delivery of works’ 5:25 EIPR 207, 208.

²⁷¹ *Ibid*; Yet online delivery is not analogous to broadcasting as it is directed at one person, not the public. A more reasonable approach would involve classifying digital content as a full spectrum of digital goods – from pure goods to pure service. See, Jana Hojnik, ‘Technology neutral EU law: Digital goods within traditional goods/services distinction,’ (2017) 25 International Journal of Law and Information Technology 63, 65. See, Lynn G Shostack, ‘Breaking free from product marketing,’ (1977) 41 *Journal of Marketing* 73.

²⁷² Tatiani Eleni Synodinou, ‘Chapter 3: Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’ in Arno R Lodder and Andrew D. Murry (eds.) *EU Regulation of E-Commerce* (Edward Elgar 2017) 77.

²⁷³ *Ibid*.

²⁷⁴ *Ibid*.

²⁷⁵ Litman [n 138] 107-131.

their works.”²⁷⁶ Further, that while its “never been true, either in fact or law... representatives of copyright owners have gotten used to arguing that it should be true.”²⁷⁷ This has meant that:

*“every appearance of any part of a work anywhere should be deemed a “copy” of it, and that every single copy needs a license or excuse, whether or not anyone will ever see the copy, whether or not the copy has any independent economic significance, whether or not the so-called copy is incidental to some other use that is completely lawful.”*²⁷⁸

This is perhaps best illustrated by art. 8 WCT and WPPT which set the minimum protection for copyright holders regarding the making available of copyright works. While all WTO members, in principle, agreed that “the transmission of works and objects of neighbouring rights on the Internet and in similar networks should be subjected to an exclusive right of authorisation of the owners of the rights,”²⁷⁹ the members struggled to find a workable solution. The EU supported a ‘reproduction plus Berne’s communication to the public’ approach and conversely, the US backed a ‘reproduction plus distribution’ approach.²⁸⁰ In the face of this conflict, the members agreed to a compromise: an ‘umbrella solution’ which would attempt to close the gaps between communication to the public and distribution while also providing flexibility for contracting parties on implementing it into national law.²⁸¹ The text reads as follows:

“Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any

²⁷⁶ Litman [n 138] 109.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Mihály Ficsor, ‘Copyright for the Digital Era: The WIPO “Internet” Treaties’ (1997) 21 Columbia-VLA journal of law & the arts 197, 207.

²⁸⁰ Gaetano Dimita, ‘The WIPO right of making available’ in Paul Torremans (ed) *Research Handbook on Copyright Law* (Edward Elgar 2017) 136.

²⁸¹ See WIPO, ‘Guide to copyright and related rights treaties administered by WIPO and glossary of copyright and related terms’ (2003) <https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf> accessed 3 January 2022, 207–08. This flexibility was particularly important for the United States. At the 1996 Diplomatic Conference, the US delegation, ‘stressed the understanding [...] that those rights might be implemented in national legislation through application of any particular exclusive right [...] or combination of exclusive rights, as long as the acts described in [the treaty] Articles were covered by such rights. WIPO, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2–20, 1996, Summary Minutes, Main Committee I, WIPO Doc. CRNR/DC/102 (Aug. 26, 1997) <http://www.wipo.int/edocs/mdocs/diplconf/en/crn_r/crn_r_dc_102.pdf> accessed 3 January 2023, 4; United States Copyright Office, ‘The making available right in the United States’, 2016 <http://www.copyright.gov/docs/making_available/making-available-right.pdf> accessed 3 January 2023.

communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”²⁸²

Art. 3(1) and (2) Information Society Directive largely copies art. 8 WCT and WPPT and provides authors with the exclusive right to authorise or prohibit any communication to the public. As hinted in the previous section, art. 3(3) excludes the application of exhaustion to the communication right. From the perspective of users generally, the CJEU has been asked in a variety of circumstances whether subsequent uses are lawful if the protected work has already been communicated to the public by the copyright holder or with their consent, clearly parallel to the effect of the exhaustion doctrine.

The final straw would come from *Tom Kabinet* where this online services mindset would be displayed in full force. Here a Dutch collective management organisation for publishers commenced an infringement action against Tom Kabinet, a provider of used e-books in the Netherlands.²⁸³ The used e-books themselves were subject to a digital lending control where copies were watermarked to confirm that it was a legally acquired copy. Unlike the previous cases, the CJEU were asked to consider whether the sale of used e-books contravened the distribution right. This was because if it did, the exhaustion doctrine pursuant to art. 4(2) Information Society Directive could be applicable. The CJEU rephrased the question to consider whether the supply by downloading, for permanent use, of an e-book constitutes an act of distribution or whether it is covered by the communication right.

The court referred to the agreed statement of arts. 6 and 7 WCT to hold that:

*“the expression of ‘copies’ and ‘original copies’, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects”*²⁸⁴

This meant that art. 6 excludes the distribution of intangible works such as e-books. They also reference the explanatory memorandum of the proposal for the Information Society Directive to explain that the art. 3 essentially reproduces art. 8 WCT which includes the making available

²⁸² WCT, art. 8.

²⁸³ C-263/18 *Nederlands Uitgeversverbond and Others v. Tom Kabinet Internet and Others* EU:C: 2019:1111 (*‘Tom Kabinet’*).

²⁸⁴ Ibid at [40].

to the public in a place and time chosen by them and reflects the negotiation preceding the Directive to ensure it involved “interactive activities”.²⁸⁵

The court also focused on the statement in the explanatory memorandum that the Information Society Directive was proposed to give “an opportunity to provide a coherent level playing field for the electronic and tangible distribution of protected material and to draw a clear line between them”²⁸⁶. This was said to be reflected in the explanatory memorandum by the Commission adding that:

“the expression ‘communication to the public’ of a works covers acts of interactive on-demand transmission, thereby confirming that the right of communication to the public, while stating that it was generally accepted that the distribution right, which applies to the distribution of copies, does not cover such transmission”.²⁸⁷

The explanatory memorandum also confirmed that the communication right covers interactive on-demand entertainment and any communication “other than the distribution of physical copies”²⁸⁸ which was supported by the preamble and arts. 3(1) and 4(1) Information Society Directive.²⁸⁹

Thus, the sale of used e-books is an act to communicate to the public as Tom Kabinet made the works available to its members by download from a place and time individually chosen by them. The communication was made to a public because any person is able to become a member and there were no technical measures on the club’s platform to ensure that: (1) only one copy of the work could be downloaded in the period when the user of a work has access to the work and (2) after that period expired, the downloaded copy could no longer be used by that user.²⁹⁰ The CJEU echoed *Svensson* and this online service mindset by explaining that the communication was made to a public that was not already taken into account by the rightsholders.²⁹¹

²⁸⁵ *Tom Kabinet* at [41].

²⁸⁶ *Ibid* at [42].

²⁸⁷ *Ibid* at [43].

²⁸⁸ *Ibid* at [44].

²⁸⁹ *Ibid* at [46] – [51]. The CJEU cites recitals 2, 4, 5, 9, 10, 23, 25, 28 and 29.

²⁹⁰ *Tom Kabinet* at [69]. Note that some commentators in the wake of *Tom Kabinet* maintain that second-hand e-books are still possible if the seller adheres to these requirements. Angelopoulos [n 240] 230. Though Angelopoulos questions whether under such circumstances the reproduction right would “step in to re-open the gap between digital and physical copies”.

²⁹¹ *Tom Kabinet* at [70]-[71].

Regarding the overarching relationship between the Information Society Directive and the exhaustion doctrine, the CJEU first mirror *Art & Allposters* and restrict exhaustion to material mediums. Despite the inconsistency with the Software Directive,²⁹² the court merely note that an e-book is not a computer program and thus cannot benefit from the *UsedSoft* ruling pursuant to the *lex specialis* nature of the Software Directive.²⁹³ Further, the CJEU contend that in comparison to the Information Society Directive, the EU legislature made it abundantly clear that tangible and intangible copies of computer programs should be treated the same pursuant to the distribution right.²⁹⁴ They also state that e-books and books on a material medium are not functionally or economically equivalent as the former do not deteriorate with use and are perfect substitutes for new copies,²⁹⁵ meaning that a parallel secondary market would absolutely affect the interests of copyright holders in obtaining appropriate reward for their works.²⁹⁶

Regarding the *lex specialis* nature of the Software Directive, the CJEU explained that it can be distinguished from the Information Society Directive due to a differing intention expressed by the EU legislature,²⁹⁷ and specifically relates to both tangible and intangible copies of a computer program. This includes “copies of programs which, on the occasion of their first sale, have been downloaded from the internet into the first acquirer’s computer”²⁹⁸. Despite the “functional equivalence” argument supported by *Football Association Premier League*, that concepts used in both Directives must in principle have the same meaning and should not be interpreted in a legal vacuum,²⁹⁹ the Court held that if exhaustion was strictly limited to copies of computer programs sold on a material medium, it would go beyond what

²⁹² *Tom Kabinet* at [53]. The court states that while the application of 4(2) does not exclude copies of computer programs on a material medium, it also does not specify the “sale ... of a copy of a program” which according to *UsedSoft* means that the provision “makes no distinction according to the tangible or intangible form of the copy”.

²⁹³ *Ibid* at [54]-[55]. Later in the judgement at [59] the CJEU explain that even if an e-book were considered a complex matter under *Nintendo*, it would only be incidental in relation to the work contained in such a book.

²⁹⁴ *Ibid* at [55]-[56]. Apparently, the EU legislature sought a clear distinction between the electronic and tangible distribution of protected material.

²⁹⁵ *Tom Kabinet* at [57]-[58].

²⁹⁶ *Ibid*. However, this seems to conflict with the treatment of digital copies, commentators submit that in *VOB*, discussed earlier, the CJEU found that regarding “the public lending of books, digital copies have essentially similar characteristics to print ones” which supports the counterargument to the CJEU that second-sales should not be any different. *VOB* at [51]; Angelopoulos [n 240] 228.

²⁹⁷ *UsedSoft* at [51] & [56].

²⁹⁸ *Ibid* at [59].

²⁹⁹ *UsedSoft* at [60].

is necessary to safeguard the specific subject-matter of copyright which is the objective of the principle of exhaustion.³⁰⁰

The strengthening of the communication to the public right would also continue in *VG Bild-Kunst*,³⁰¹ this time focusing on the relationship between the communication right and technical measures. Here, a digital library website contained links to content stored on the internet portals of participating institutions, and additionally a collection of thumbnails which linked to the content. The copyright holder contended that the licence with the digital library should contain the condition that when the licensee uses the works, they must implement effective technological measures against the framing by third parties of the works displayed on the digital library's website. The assumption being that where embedding circumvents protection measures against framing adopted or imposed by the copyright holder, it will contravene art. 3 Information Society Directive.

The court recalibrated the communication right assessment and held that while previous case law found that if an author gives prior, explicit and unqualified authorisation without making use of technological measures to restrict access of that work from other websites, that author has communicated the work to all internet users. Thus, the right must be tailored to the individual case.³⁰² The CJEU explained that if a clickable link allows users to circumvent restrictions to protect a work, the link then constitutes an intervention that without which the users would not have been able to gain access.³⁰³ Further, that all those users that subsequently gain access are deemed a new public.³⁰⁴

One of the arguments used by the CJEU to support this interpretation was that:

“if it were to be held that the embedding, in a third party page, by means of framing, of a work previously communicated on another website with the authorisation of the copyright holder, though that right holder adopted or imposed measures to provide protection for framing, does not constitute an act of making that work available to a new public, that would amount to creating a rule on exhaustion of the right to communicate”³⁰⁵.

³⁰⁰ *UsedSoft* at [63].

³⁰¹ C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* ECLI:EU:C:2021:181 (*‘VG Bild-Kunst’*).

³⁰² *Ibid* at [38]-[39].

³⁰³ *Ibid* at [40].

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid* at [52].

This would mean that the copyright holder would be unable to claim an appropriate reward for the use of the work which would also conflict with the specific purpose of intellectual property, to ensure rights holders can exploit commercially the marketing or the making available of the protected subject matter by the grant of licences in return for payment of an appropriate reward for each use.³⁰⁶

Despite pressure to apply the doctrine of exhaustion to digital copies, beyond the Software Directive, this section has evidenced that it has largely been unsuccessful. Even though *UsedSoft* provided a template for structuring a secondary market for digital goods such as e-books, *Tom Kabinet*, to an extent, closed the door on the doctrine of exhaustion. Part of the reasoning centres upon the artificial divide between digital copies that are considered computer programs and those that fall under the Information Society Directive. However, this section contends that the more dominant reasoning centres upon the notion that a copyright holder should control future forms of exploitation, regardless of public policy reasoning such as in *VOB v Stichting Leenrecht*. Coupled with the expanding application and strength of the communication right, which we observed in *Tom Kabinet* and *VG Bild*, it seems highly unlikely the trajectory of modern European copyright law will consider the doctrine of exhaustion when it is still firmly rooted in the physical distribution of goods. Hence, similarly to Community-wide exhaustion, this analysis must move beyond secondary EU legislation and wholistically ground the principle of implied authorisation within the European copyright system and consolidate the status of consent as an overall meta-exception for the necessary free digital spaces for creativity.

2.3. THE PRINCIPLE OF IMPLIED AUTHORISATION

Authorisation is the gatekeeper of the European copyright system. From the economic rights which allow rights holders to authorise or prohibit specific uses, to the emphasis within the DSM Directive to incentivise platforms to obtain authorisation for third-party uploaded uses, the notion of consent ensures that authors and exploiters can control the use of works. However, there are also negative spaces in copyright law. These spaces sit outside the boundaries of rights and support certain uses of creative works and authorise them by law, providing a limit to the ambit of economic rights. These include the closed list of exceptions and limitations pursuant to the Information Society Directive, the recently added mandatory exceptions in the DSM Directive as well as legal constructs such as the doctrine of exhaustion.

³⁰⁶ *VG Bild-Kunst* at [53].

Though as we observed in the previous section, currently the latter is limited, in the context of the Information Society Directive, to tangible goods in the EU.

Building upon the characterisation of consent as a meta-exception, the principle of implied authorisation neatly reconciles these spaces where consent is authorised by law within the European copyright system. This thesis proposes that the principle takes form as a balancing and proportional assessment of access to and use of copyright works online. This section will first outline the foundation of the principle by tracing the development of the doctrine of implied consent alongside the development of the right to communicate to the public. The section will focus on the public policy considerations for when both the CJEU and national courts, specifically German courts, have implied consent in certain circumstances supported by fundamental rights balancing. Lastly, the section will use these factors to outline the boundaries of the principle of implied authorisation to support future creativity online.

The doctrine of implied consent corresponds to the idea that given certain factors, a communication of a protected work is lawful, similar to an implied license. It finds its origins at EU level in *Edega* regarding the retransmission of broadcast signals to private hotel rooms.³⁰⁷ Pursuant to the Satellite and Cable Directive, the *Edega* opinion extended a communication to television reception equipment to include access to a televised programme to anyone that might be present. The argument was that the hotel's broadcasting licence did not cover programmes transmitted to third parties, especially for profit as this communication would reach a "new public" and require authorisation.³⁰⁸ The "new public" test meant that any communications that fell outside the direct users, intended by the right holder, required separate authorisation.³⁰⁹

However, by the time the CJEU considered *SGAE*,³¹⁰ the right to communicate was introduced pursuant to art. 3 Information Society Directive, following the WCT and WPPT. In this case, the court considered the use of a television set and the playing of ambient music within the hotel owned by Rafael. It was held that pursuant to recital 23 Information Society Directive, the communication right should be interpreted broadly to establish a high level of

³⁰⁷ Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa) (Case 293/98) [2000], ECR I-629 ('*Egeda*').

³⁰⁸ Ibid at [20].

³⁰⁹ Ibid; P. Bernt Hugenholtz & Sam C. Van Velze, 'Communication to a new public? Three reasons why EU copyright law can do without a "New Public"' (2016) 47 IIC 797, 803. Commentators explain that while the CJEU did not follow the *Edega* opinion because it did not consider it competent to interpret the notion of "public" in view of the SatCab Directive, they did acknowledge that this might change after the Information Society Directive entered force.

³¹⁰ C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* EU:C: 2006:764 ('*SGAE*').

protection of authors, allowing them to obtain an appropriate reward of the use of their works.³¹¹ Mirroring *Edega*, the CJEU referred to the Berne Convention Guide to reason that if the communication is directed to a larger audience, possibly for profit, a new section of the receiving public hears or sees the works, it no longer constitutes simple reception, but an independent act through which the broadcast work is communicated to a new public.³¹²

Commentators³¹³ explain that the “new public” concept had a ripple effect at the time as the CJEU confirmed its application in relation to customers in a public house³¹⁴, such as a bar or restaurant, if a work is broadcast via a television set; patients of a spa when they watch a broadcast work in a private room³¹⁵, and a rehabilitation centre where television sets are in waiting and training rooms³¹⁶. Eventually in *ITV Broadcasting*, it was extended to internet broadcasting services which allow users to receive, via the internet, live streams of free-to-air television broadcasts, including those without authorisation.³¹⁷ Though the alleged infringers argued that it ensured users could only access content that they were legally allowed to in the UK through a TV licence and could refuse access when these conditions were not satisfied, the CJEU found that due to the retransmission differing from the specific technical means of the original communication, it was a communication to the public, without considering if it was made to a new public.³¹⁸

Here we can see two separate threshold tests: the “new public” and the “different means of transmission”. In *Svensson*, the CJEU would refine both by outlining that if a subsequent communication of the same works also uses the technical means that differ to the initial communication, it is directed at a “new public”.³¹⁹ The court explained that under these circumstances, the subsequent communication would be directed to “a public that was not taken into account by the copyright holders when they authorised the initial communication to the

³¹¹ *SGAE* at [36] & [41].

³¹² *Ibid* at [41].

³¹³ Hugenholtz & Velze [n 309] 804.

³¹⁴ *Football Association Premier League* at [197].

³¹⁵ C-351/12 *OSA — Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* [2014], ECLI:EU:C:2014:110 at [32].

³¹⁶ C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* ECLI:EU:C:2016:379 at [60]–[61].

³¹⁷ C-607/11 *ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd* ECLI:EU:C:2013:147 (*‘ITV Broadcasting’*).

³¹⁸ *Ibid* at [26].

³¹⁹ C-466/12 *Nils Svensson and Others v Retriever Sverige AB* EU:C: 2014:76 (*‘Svensson’*).

public”³²⁰. However, the court factually distinguished *ITV Broadcasting*, and held that the making available of the works through a clickable link, does not contravene the communication right.³²¹ This is because:

“The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all internet users could therefore have free access to them”.³²²

The subsequent linking was not directed to a new public because the users already had access to these works regardless of this communication, and they formed part of the potential recipients of the initial communication considered by the copyright holders initially.³²³ It is only when a clickable link makes it possible for users to circumvent restrictions used for the initial communication to restrict public access that the subsequent linking constitutes an intervention without which those users would not have been able to access the works transmitted.³²⁴ In these circumstances, the provision of a link which circumvents technical restriction involves users that do not form part of the potential recipients of the initial communication considered by the copyright holder initially.³²⁵ This approach resulted in what has been referred to as an implied licence for hyperlinking.

Subsequently in *BestWater*, the characteristics of subsequent uses of works that could benefit from the “new public” concept were outlined.³²⁶ In this case BestWater manufactured and sold filtered water systems. As part of the company’s marketing plan, they created a two-minute-long video on water pollution and made it available on YouTube. The defendants allegedly infringed Bestwater’s copyright by making the video available on their website through framing, an embedded internet link also known as inline linking, as users could watch the video on water pollution on their site without being redirected to BestWater. The CJEU affirmed *Svensson* and held that embedding or framing does not in itself constitute a communication to the public as the work is neither reproduced for a new audience nor uses a special technical process that differs from that of the original reproduction.³²⁷

³²⁰ *Svensson* at [24].

³²¹ *Ibid* at [25].

³²² *Svensson* at [26].

³²³ *Ibid* at [27]-[28].

³²⁴ *Ibid* at [31]; *VG Bild-Kunst*.

³²⁵ *Ibid*.

³²⁶ C-348/13 *BestWater International GmbH v Michael Mebes, Stefan Potsch* ECLI: EU: C: 2014: 2315.

³²⁷ *Ibid* at [19].

Later in *GS Media*, the CJEU refined the “new public” criterion further.³²⁸ Here, the CJEU considered whether the presence of a profit-making intention or knowledge of unlawful access impacted the liability of those that subsequently communicated the protected work. In this case the unlawful use related to a website publishing an article with a Playboy magazine photo and hyperlinks to other similar photos without authorisation. Upon receiving a request to remove the photos from the copyright holder, the website published an additional announcement which included the hyperlink to access the photos without authorisation. Once removed, the website published a final article again containing the hyperlink to the photos. The CJEU held that a subsequent use will contravene art. 3 where a person knew or ought to have known that the hyperlink provides access to a work illegally placed on the internet.³²⁹ Further, that if the subsequent use is carried out for profit, knowledge can be presumed.³³⁰

The effect of the CJEU examining the presence of both direct knowledge of unlawful access and a profit-making intention was to incorporate a proportional approach to the assessment of infringing the communication right. The court emphasized the need to assess the linking on a case-by-case basis, drawing upon several complementary criteria which are not autonomous or interdependent.³³¹ Criteria include both the indispensable role played by the user and the deliberate nature of the intervention. The Court also introduces the fair balance that must be maintained between the protection of intellectual property against freedom of expression and of information in the Charter.³³² The judgement holds that the internet is of particular importance to the latter as hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in a network characterised by the availability of immense amounts of data.³³³

This proportional approach is evident in *Filmspeler*.³³⁴ In this case, the CJEU considered whether pre-installed add-ons linking to protected works were made available without authorisation. Filmspeler had sold, via several websites, including his own, various models of a multimedia player installed with an open-source software. The court referenced *GS Media* to hold that *Filmspeler* had full knowledge of the consequences of his actions, without which

³²⁸ C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* EU:C: 2016:644.

³²⁹ *GS Media* at [49].

³³⁰ *Ibid* at [50].

³³¹ *Ibid* at [30]-[32]. This meant that they are applied both individually and in their interaction with each other.

³³² *Ibid* at [31].

³³³ *Ibid* at [45].

³³⁴ C-527/15 *Stichting Brein v Jack Frederik Willems*, also trading under the name Filmspeler ECLI:EU:C:2017:300 (*‘Filmspeler’*).

users would not have been able to access the works unlawfully.³³⁵ Regarding the profit-making intention presumption, the court held that it cannot be disputed that the multimedia player was sold with the intention of making a profit as the reason customers bought it was to obtain direct access to protected works available on streaming devices without copyright holders' consent.³³⁶

Overall, these linking cases evidence the possibility of implying a licence for specific uses of copyright works online.³³⁷ While the earlier cases such as *Svensson* and *BestWater* fail to discuss the impact of linking from both a fundamental rights and economic perspective, they provide the theoretical foundation as so long as the use is not made to a "new public" or through different technical means, the linker can benefit from an implied licence. *GS Media* and *Filmspeler*, conversely, develop the boundaries of the implied licence by considering the economic interests at stake as well as relevant fundamental rights. The result is a proportional and balanced approach for determining when a copyright holder's consent is implied based on public interest arguments.

However in *Renckhoff*, the CJEU limited the ambit of the implied licence in copyright law, by finding that posting directly onto a website without authorisation amounts to a communication to the public.³³⁸ In this case, a student's presentation was posted on their school's website. The presentation included a photograph taken by Mr Renckhoff that the student had downloaded from an online travel portal and used without authorisation. Notably the online travel portal did not use any technical measures to restrict it from being downloaded. The CJEU held that the posting of a work protected by copyright on one website other than on the one where the initial communication was made with consent must be treated as making

³³⁵ *Filmspeler* at [31], [41] & [49]-[50].

³³⁶ *Ibid* at [51].

³³⁷ Jane C. Ginsburg, 'Hyperlinking and infringement: The CJEU decides (sort of)' (17.03.2014), available at <<https://www.mediainstitute.org/2014/03/17/hyperlinking-and-infringement-the-cjeudecides-sort-of/>> accessed 14 July 2021; Emanuela Arezzo, 'Hyperlinks and making available right in the European Union – What future for the internet after *Svensson*?' (2014) 45 IIC 524; Stavroula Karapapa, 'The requirement of a "new public" in EU copyright law' (2017) 42:1 European Law Review 63, 73; Mysoor [n 17]; Taina Pihlajarinne, 'Chapter 3: Linking and copyright – a problem solvable by functional-technical concepts?' in Taina Pihlajarinne, Juha Vesala and Olli Honkkila (eds) *Online Distribution of Content in the EU* (Edward Elgar 2019) 34; João Pedro Quintais, 'Untangling the hyperlinking web: In search of the online right of communication to the public' (2018) 21 J World Intellect Prop. 385; Poorna Mysoor, *Implied licences in copyright law* (Oxford Scholarship Online: 2021); Jenkins [n 17]; c.f. see, Liliia Oprysk, 'Reconciling the material and immaterial dissemination rights in light of the developments under the EU copyright *acquis*' (DPhil thesis, University of Tartu) 305. Oprysk submits that while implied consent theory could be helpful, ultimately, the purpose of the authorisation criterion is clearly broader, relying on *Coditel I*.

³³⁸ C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* EU:C: 2018:634.

such a work available to a new public.³³⁹ Here the court explained that it is irrelevant that the copyright holder does not limit how internet users could use the photograph.

The court factually distinguishes the case from the previous linking cases in the following ways: (1) Unlike hyperlinks which are said to contribute to the sound operation of the internet by enabling the dissemination of information, the direct posting does not contribute to this objective;³⁴⁰ (2) Conversely to direct posting, hyperlinking allows the author to retain control over the work as they can remove the work from the initial communication to which the subsequent use links to;³⁴¹ and (3) direct posting requires a decisive role by the user to intervene to make the work available to a public not taken into account by its author when they consented to the initial communication.³⁴² Thus, the “new public” concept was limited in *Renckhoff* to exclude direct postings of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.³⁴³

Despite this limitation, national jurisprudence is helpful in demarcating the boundaries of the linking implied licence. German jurisprudence offers a notable comparison, as its national doctrine of implied consent gained traction from the *Vorschaubilder* cases.³⁴⁴ The focus in these cases is not simply the existence of factors, but also circumstances when the copyright holder has failed to take positive steps to prevent the communication. The German Federal Supreme Court confirmed in both *Vorschaubilder I* and *II* that implied consent can be inferred from a copyright holder failing to implement technical barriers to prevent reproduction once an image is uploaded on the internet.³⁴⁵

The Court explained in *Vorschaubilder II* that as the copyright holder consented to the images being displayed as thumbnails:

*“a third party, as a holder of a simple licence under Article 19a [German Copyright Act] ... was equally able to provide such implied or simple consent, unless this was expressly excluded in the licensee agreement”*³⁴⁶.

³³⁹ *Renckhoff* at [35].

³⁴⁰ *Ibid* at [39]-[43].

³⁴¹ *Ibid* at [44].

³⁴² *Ibid* at [45]-[46].

³⁴³ *Ibid* at [47].

³⁴⁴ BGH, GRUR 2010, 628 – *Vorschaubilder I*; BGH, GRUR 2012, 602 – *Vorschaubilder II*; BGH, GRUR 2018, 178 – *Vorschaubilder III*.

³⁴⁵ Birgit Clarke(a), ‘Copyright: Google Image Search does not infringe copyright, says Bundesgerichtshof’ (2010) 5 JIPLP 533; Birgit Clarke(b), ‘Google Image Search still does not infringe copyright, reaffirms Bundesgerichtshof’ (2012) 7 JIPLP 788.

³⁴⁶ Clarke [n 345b] 789.

Though the copyright holder maintained that no exploitation rights were granted to third party website owners, the Court emphasized that it was:

“common knowledge that search engines searched the internet in an automated way for images and could not differentiate between images that have been published by legitimate or unauthorized sources”.³⁴⁷

While copyright holders could directly sue the party that published the images initially without permission, search engine providers were said to benefit from implied consent and escape liability. However, as seen in two later cases, the moment intermediaries begin to reproduce photos and communicate them on their platforms for their own economic interests, the implied consent doctrine begins to weaken.³⁴⁸

In *Vorschaubilder III* the German Federal Supreme Court considered the doctrine of implied consent in the wake of *GS Media*. Here photos uploaded to a password-protected area of a website were taken and allegedly and illegally uploaded onto a freely accessible website. The court relied upon the requirement that the threshold test for a communication to the public requires an individual test, specifically the special significance of search engines. It was found that an obligation for search engines to check every listing before listing would be unreasonable. However, the doctrine of implied consent is only available up to a certain extent. Relying upon previous German case law relating to platform due diligence obligations, the court explained that such due diligence obligations only exist from the point that knowledge is obtained, specifically regarding filtering software obligations.

Though commentary critique this approach quite harshly, namely based on the adage that assigned exploitation rights must be explicit, meaning that an implied license in this context would raise too much uncertainty for copyright holders, this thesis contends that in relation to online creativity, the *Vorschaubilder* cases raise a helpful construct. Here, as in *GS Media*, implied consent depended upon the characterisation of hyperlinks as being integral to the internet and fundamental freedoms and rights in the Charter, such as freedom of expression and information. Yet, one fundamental right absent in this assessment is the right to conduct a business, outlined in art. 16 Charter. In *GS Media*, the CJEU does not consider the impact that copyright liability pursuant to the communication right will have on platforms for example.

³⁴⁷ Clarke [n 345b] 789.

³⁴⁸ Jenkins [n 17]; Carsten Bildhäuser, ‘User rights to photos: copyright as a weapon in e-commerce’ (2015) 10 JIPLP 709.

This is surprising given the central role that platforms to facilitate freedom of expression and informational online.³⁴⁹

As we have seen from the previous chapter, platform liability for copyright infringement is now generally addressed through art. 17 DSM Directive. However, the DSM Directive stands apart from the Information Society Directive in that if a platform falls outside the definition of a particular type of platform, an “online content sharing service provider” (OCSSP), it can still be liable pursuant to the communication right under the Information Society Directive. This limb of copyright platform liability is best outlined in *YouTube/Cyando*.³⁵⁰ The case involved the making available of unlawful content from a video-sharing platform by uploading the content, without consent, on to a file-hosting and sharing platform. Though Chapter IV will discuss platform liability in more detail, the case arguably adopts a more flexible approach for finding liability.

The CJEU remark that it is necessary to consider all the factors characterising the situation³⁵¹. These include: whether the operator knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform; whether they refrain from implementing appropriate technological measures to be expected from a reasonably diligent operator in its situation to counter infringements on that platform; and if the operator participates in selecting protected content illegally communicated to the public by providing tools on its platform intended for illegal sharing or that it knowingly promotes such sharing, apparent from its financial model.³⁵²

Regarding the requisite knowledge, the CJEU factually distinguished the case where a platform operator knows, in a general sense, that protected content is made available illegally on its platform from the case where the operator, despite receiving a warning from the rightholder of unauthorised content, refrains from expeditiously taking the measures necessary to make that content inaccessible.³⁵³ While the latter would certainly contravene art. 3, the latter would not.³⁵⁴

³⁴⁹ Cengiz and Others v Turkey nos. 48226/10 and 14027/11 (ECtHR, 29 March 2016). The ECtHR emphasized the role of platforms to disseminate information and foster freedom of information.

³⁵⁰ Joined cases C-682/18 and C-683/18 *Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google German GmbH & Elsevier Inc. v Cyando AG* ECLI:EU:C:2021:503 (*YouTube/Cyando*’).

³⁵¹ Ibid at [83].

³⁵² Ibid at [84].

³⁵³ Ibid at [85].

³⁵⁴ Ibid.

They also further clarified that the mere fact that a platform operator has the aim of making a profit neither establishes that its intervention in the illegal communication was deliberate, nor gives rise to such a knowledge presumption as per *GS Media*.³⁵⁵ However, the court restricted the impact of *GS Media* by asserting that the knowledge threshold of an intermediary is quite different from the knowledge of a person posting a hyperlink who, at the time of posting, knows the content to which that link is supposed to lead. The court then passed the buck to national courts to categorise allegedly infringing platforms among the criteria listed above.³⁵⁶ Yet, the CJEU add that national authorities and courts are to do so by striking a fair balance not simply between the right to protect intellectual property and freedom of expression and of information, but to consider the right to the freedom to conduct a business enjoyed by service providers, such as platforms.³⁵⁷

It is from this foundation, that the section proposes that there is an inherent principle of implied authorisation in the European copyright system, a mechanism mirroring these implied licences dependent on balancing enforcement against fundamental rights, namely freedom of expression and information online. The principle of implied authorisation, in the context of creative reuses, implies consent through a proportional and facts-dependent assessment of the relevant fundamental rights, specifically by structuring freedom to conduct a business as a secondary right to support both authors and users online, as discussed in Chapter I. This platform obligation manifests through an adequate remuneration of authors when a creative reuse is uploaded on their platform.

Drawing upon the characterisation of consent as a mechanism to control access to and use of works, as discussed in section one of this chapter, it includes the decision by the author to communicate to the work to the public, and to seek a remuneration that is reasonable. Though discussed in more detail in Chapter IV, the German implementation of art. 17 DSM Directive meets this balance by supporting both authors and users through a mandatory direct claim of compensation from platforms for creative reuses, specifically parody, caricature and pastiche. Exploiters' interests, supported by the right to protect IP, are excluded as the subsequent use does not conflict with a normal exploitation of the work. Hence, the combined elements of adequate remuneration and creative reuse, would exhaust the author's consent, their control of future creative exploitation of the work.

³⁵⁵ *YouTube/Cyando* at [86]-[88].

³⁵⁶ *Ibid* at [141]-[142].

³⁵⁷ *Ibid* at [138].

Despite the creep of copyright protectionism and the tendency of copyright holders to control every use of a work online by enforcing the right to communicate to the public, this section has reconciled the free spaces within the European copyright system through the principle of implied authorisation. Starting with *Svensson* through to *GS Media*, the CJEU outlined circumstances where authorisation is implied to bolster the role that the internet plays, as facilitated today by platforms, on freedom of expression and of information. Additionally, the *Youtube/Cyando* platform liability approach reflects this flexibility to consider fundamental uses as authorised because a platform liability is dependent on the application of a multi-factor balancing test that is facts driven.

While not a complete defence to unauthorised uses of copyright material online, illustrated by *Tom Kabinet* and *Renckhoff* in the previous section, the convergence of the implied consent doctrine in the linking cases, coupled with *YouTube/Cyando*'s balancing test, reflects the longstanding balance between protection and access in the European copyright system. This approach to the communication right also reflects the proportionality requirement evident in cases related to the knowledge of platforms of unlawful behaviour, specifically the prohibition on general monitoring. As will be discussed in the previous chapter, these cases consider the impact that court-mandated copyright enforcement policies on platforms through the freedom to conduct a business.

This section proposes that the addition of the right to freedom to conduct a business is crucial to maintain a balance of copyright interests which supports creativity online. It results in a payment obligation upon platforms for uploads by users that are creative reuses, rooted in the concept of artistic communication discussed in Chapter I. Following payment, the author's ability to control future creative exploitation is exhausted and future authors of creative reuses are supported as freedom of expression is proportionally balanced. As these creative reuses do not conflict with a normal exploitation of a work, as addressed in Chapter I, approaches such as Germany's implementation of art. 17 DSM Directive are practical examples of the principle of implied authorisation at work.

The right to freedom to conduct a business, which will be discussed in detail in Chapter IV, becomes a central element of the principle of implied authorisation as without it, platform liability obligations could become too burdensome for platforms to support and allow subsequent creative works online. Though copyright exceptions and limitations, particularly parody and pastiche, traditionally serve to allow these types of uses and have become

mandatory when interpreting the obligations of platforms under art. 17 DSM Directive, this thesis proposes that the principle for implied authorisation online reflects these spaces as well as those under-utilised pursuant to the Information Society Directive. This section contends that if the European copyright regime is characterised as a balance between protection and access, from the perspective of creativity online, the positions of authors, exploiters, users and platforms can be reconciled in a practical manner that reflects the creation and expression of art online. It follows, that the principle of implied authorisation, at its core, comprises the elements to achieve this online equilibrium of creativity.

2.4. THE IMPACT OF ARTISTIC REPUTATIONAL HARM

However, given the relationship between authors and artistic communication, detailed in Chapter I, it is important to also consider whether the principle of implied authorisation can be rebutted by authors when the creative reuse of their work impacts the reputation of themselves and/or their work. Imagine the situation where a person uses an authors' work in a way that conflicts with the author's expression of art. We do not have to look too far for examples such as Donald Trump playing "It's the End of the World as We Know It" as part of an election campaign and REM responding that he should not use their music "for your moronic charade of a campaign". Or more recently on the other side of the pond, Michael Pickering expressing his disgust for Liz Truss' using "Moving on Up" without consent. Arguably, these unauthorised uses impact the author's relationship with their work and so the question arises as to the extent to which authors can prevent future exploitation of works, based on the principle of implied authorisation, through personality rights.

The position of the author becomes more difficult to support when the subsequent use is done for the purposes producing new creative works. Though authors can find creative subsequent uses offensive or harmful, should this allow authors to withdraw consent for future exploitation, regardless of its artistic intention? In effect, this could be construed as a limitation on the scope of the principle for implied authorisation. Simply, can artist prevent the creation of future creative reuses on the basis that the message communicated does not align with their politics? In *Pelham*, even though Kraftwerk may despise the link created by Moses Pelham sampling the snippet, are artistic reputational concerns sufficient to prevent any future sampling?

What about the case where the original author is no longer here. Consider the famous Australian anthem 'Down Under' by Men at Work. The latter sampled the well-known

children's song 'Kookaburra Sits in the Old Gum Tree' and was found liable for copyright infringement.³⁵⁸ The successors in title, with no direct link to its creation, enforced economic rights against a subsequent use that many felt, in the musical and broader communities, was "trivial and artistically acceptable"³⁵⁹. Such was the discontent, that in a later case, a judge on the Australian Full Federal Court remarked that this outcome means that changes in the law might be appropriate.³⁶⁰ Given the continuing conflict between authors and the cycle of creativity, this section reflects on how the implied principle of authorisation should distinguish between acceptable uses by authors and those that warrant the withdrawal of consent to future artistic exploitation.

It focuses on the artistic reputational tension between authors and subsequent authors and considers whether it can be resolved from a broad definition of author's personality rights. First, the section explains the doctrine of author's consent, evidenced in CJEU jurisprudence, which sets the parameters for consenting to future creative exploitation. Secondly, the section traces the development of reputation-based rights in both IP law and human rights, specifically those found in copyright and trade mark law, and identifies how this could be used to fill out the parameters of a negative construct of freedom of expression. Lastly, the section considers how the author's perspective, bolstered by this negative construct of freedom of expression, should be balanced against other fundamental rights, namely freedom of expression, freedom of information and the freedom to conduct a business.

The starting point is the doctrine of author's consent which emphasizes the author's central role within the European copyright system. It was first discussed in *Soulier and Doke* where newly implemented French legislation vested collecting societies with the right to authorise the digital reproduction and representation of out-of-print books published in France before 2001.³⁶¹ Authors were given the option to oppose the digital exploitation pursuant to certain conditions. The CJEU held that the exclusive and preventative nature of economic rights in the Information Society Directive means that authors must consent to third-party uses of their works. If consent is implied, a strict interpretation is required so as not to deprive "the very principle of the author's prior consent"³⁶².

³⁵⁸ *Larrikin Music Publishing v EMI Songs Australia Pty Ltd* [2010] FCAFC 47 ('EMI').

³⁵⁹ Elizabeth Adeney, 'The Sampling and Remix Dilemma: What is the Role of Moral Rights in the Encouragement and Regulation of Derivative Creativity' (2012) 17 Deakin L. Review 335, 341.

³⁶⁰ EMI at [98] & [100].

³⁶¹ Case C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* ECLI:EU:C:2016:878 ('*Soulier and Doke*').

³⁶² *Ibid* at [37].

Consent was described to include notice by the third party and the opportunity of the author to prohibit the use if they wish.³⁶³ However, the withdrawal of future consent cannot conflict with those whom the author has already given prior authorisation.³⁶⁴ On the facts in *Soulier and Doke*, this meant that the only authorised exploitation was the agreement with the publisher for exploitation in a printed format. The CJEU also remarked that there is no required formality for withdrawing future consent.³⁶⁵ The decision not only emphasizes that the Information Society Directive intends to grant authors a high level of protection, but the inherent requirement in European copyright law that authors have the possibility to express their consent.

The boundaries of author's implied consent were later further defined in *Spedidam*, in relation to performers' rights.³⁶⁶ In this case, the French institute for conserving and promoting national audio-visual heritage, INA, marketed online video recordings and phonograms of a late musician without authorisation from the musician's successors in title. These video recordings and phonograms were then broadcast by national broadcasting companies. The successors successfully sued INA to obtain compensation for the infringement of the performers' right which they held. Pending appeal, a preliminary ruling to the CJEU asked whether the French legislation which provided a rebuttable presumption that a performer had authorized the fixation and exploitation of the performances conflicted with the Information Society Directive.

In reference to *Soulier and Doke*, the CJEU explained that performers are additionally entitled to a high level of protection and that the Directive requires performers to obtain appropriate remuneration for the use of fixations of their performances in order to enable them to continue their creative and artistic work.³⁶⁷ The Court clarified that the French rebuttable presumption for implied consent of a performer stands when: (1) They involve themselves in the making of an audio-visual work for the express reason that it will be broadcast by national broadcasting companies; and (2) They are present at the time of recording, and are aware of the envisaged use of their performance.³⁶⁸ The Court held that such involvement authorises the

³⁶³ *Soulier and Doke* at [38].

³⁶⁴ *Ibid* at [49].

³⁶⁵ *Ibid* at [50].

³⁶⁶ Case C-484/18 *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam), PG, GF v Institut national de l'audiovisuel (INA)* ECLI:EU:C:2019:970 ('*Spedidam*').

³⁶⁷ *Spedidam* at [37]-[39].

³⁶⁸ *Ibid* at [42].

fixation of that performance and its exploitation.³⁶⁹ It appears, in comparison to *Soulier and Doke*, that *Spedidam* adopts a more practical outlook on the fundamental requirement of authors' consent.

The focus is on the impact that a stricter interpretation of author's implied consent would have on the fair balance of interests prescribed by recital 31 Information Society Directive. The Court explains that as INA did not have the performers' or their successors' written authorisations in its archives, it would be impossible for them to exploit its collection.³⁷⁰ This would have a detrimental impact on the interests of other copyright interests, such as the rights of the directors of the audio-visual works in question, the producers of those works, or other performers that performed in connection with the production of the same works. This did not mean that the fundamental requirement of authors' consent was ignored, but rather the CJEU constructed a practical test for evaluating implied consent.

As *Spedidam* opened the door to consider the fair balance of rights and interests when implying authorial consent, this thesis contends that such an approach ultimately justifies the inclusion of fundamental rights. On the facts, the CJEU emphasize that the author's consent in *Spedidam* would restrict the application of recital 10 which explains that for authors or performers to continue their creative and artistic work, they need to receive an appropriate reward for use, similarly for producers' investment. While not explicit, one can infer that this proportional balancing assessment is supported by fundamental rights particularly freedom of expression and the right to protect intellectual property. Though it is uncertain whether fundamental rights can be directly applied to author's consent without the national legislative intervention being the subject of scrutiny,³⁷¹ one could make the argument that if the author is deprived of the ability to control future exploitation it could be contrary to the right to protect intellectual property on behalf of the author, similarly to *Luksan*.³⁷²

In Chapter I, this thesis clarified the role that fundamental rights in bolstering creative reuses of works online. If we return to *Pelham*, fundamental rights were balanced to interpret the scope of the phonogram right to specifically take into account the cultural significance of referential uses within hip hop as a genre. However, how such uses can be balanced against the author when they find them harmful, or offensive is less clear. Building upon personhood

³⁶⁹ *Spedidam* at [42].

³⁷⁰ *Ibid* at [44].

³⁷¹ Caterina Sgana and Magali Contardi, 'The new Italian press publishers' right: creative, fairness-oriented... invalid? (2022) 17 *JIPLP* 421, 426.

³⁷² Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] ECR 65.

theory, which supports creativity due to the integral connection between the author and their art, it is submitted that harmful or offensive subsequent uses, regardless of the art produced, strike at the very core of personhood theory. Significantly in *Pelham*, the expression of the author, Kraftwerk, is not comprehensively explored from a *Soulier and Doke* and/or *Spedidam* perspective and the case does not consider whether Kraftwerk were given the opportunity to withdraw their consent subject to fundamental rights balancing.

This section examines the original author's freedom of expression as a limitation to the principle of implied authorisation. It asks whether the author has a right to prevent use based on what can be described as a negative construct of freedom of expression.³⁷³ This could take form as the original author's freedom not to be linked to or associated with the subsequent authors' work. The section does not focus on the grant of economic rights, but on the reputational artistic harm produced by the creative reuse. From the lens of notions of unfair competition evident in EU trade mark law and author's personality rights, the section examines the application of the right of integrity to creative reuses and the presence of derogatory treatment or connotation.³⁷⁴ As we will observe in the analysis that follows, often the conflict between either author's personality rights and unfair competition with creative reuse is reconciled by applying a balancing test of fundamental rights, specifically freedom of expression.³⁷⁵ But less clear, is the role that artistic reputational harm plays in this assessment.

Author's personality rights, in the European tradition of *droit d'auteur*, protect authors from the perspective of reputation at member state level.³⁷⁶ In France, authors' rights are treated as personal rights, discussed on the level of human rights. French authors enjoy the right to respect their name, authorship and work as well as its publication including the right to

³⁷³ Christophe Geiger and Elena Izyumenko, 'Designing a Freedom of Expression-Compliant Framework for Moral Rights in the EU: Challenges and Proposals' in Ysolde Gendreau (ed) *Research Handbook on Intellectual Property and Moral Rights* (Edward Elgar: forthcoming<https://www.researchgate.net/profile/Christophe-Geiger/publication/352827635_Designing_a_Freedom_of_Expression-Compliant_Framework_for_Moral_Rights_in_the_EU_Challenges_and_Proposals/links/610cf17c0c2bfa282a27e81e/Designing-a-Freedom-of-Expression-Compliant-Framework-for-Moral-Rights-in-the-EU-Challenges-and-Proposals.pdf> accessed 3 January 2023).

³⁷⁴ Guido Westkamp, 'Intellectual property and human rights: Reputation, integrity and the advent of corporate personality rights' in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 391.

³⁷⁵ Ibid; A. Dietz, 'The Moral Right of the Author: Moral Rights and the Civil Law Countries' (1995) 19 *Colum-VLAJL& Arts* 199; A. Dietz, 'Germany' in: G. Davies and K. Garnett (eds), *Moral Rights* (Sweet & Maxwell 2010) 416; Elizabeth. Adeney, *The Moral Rights of Authors and Performers* (OUP 2006) 251–2.

³⁷⁶ Information Society Directive, recital 19 states that "the moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive".

correct or retract.³⁷⁷ Significantly personality rights are separated from economic rights under the French system, forming a dualist system where the former cannot be assigned. Comparatively, the German Constitution specifically protects human dignity³⁷⁸, the right to free development of one's personality³⁷⁹ and crucially, the right to protect personal honour³⁸⁰. This is reflected in the unitary theory of German copyright law which views moral and economic rights as part of a single indivisible entity, meaning that only economic rights are assignable.³⁸¹

At the international level, personality rights are protected in art. 27(2) of the Universal Declaration of Human Rights which guarantees everyone "the right to the protection of the moral and material interests resulting from any scientific or artistic production of which he is the author". Threats to artistic reputation can also be supported through freedom of expression as well as the right to protect intellectual property in the Charter, with the former also reflected in art. 10 of the European Convention in Human Rights (ECHR). Additionally, art. 8 ECHR protects rights in personal honour and reputation. Lastly, the Berne Convention defines the right of integrity as the right of the author to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation"³⁸².

While we saw in *Pelham*, from the perspective of the economic rights such as the phonogram right, a quotation defined as the user having the intention of entering into a "dialogue" with the work,³⁸³ whether a creative reuse conflicts with the integrity right largely depends on the treatment of the work. In the context of sampling, some suggest that it is unlikely to fall foul of the integrity right, as structured in the UK as it is not a derogatory treatment of the original work.³⁸⁴ They propose that the integrity right would be contravened where lyrics were altered and result in the original song being associated with the revised message of the song which could be prejudicial to the honour or reputation of its original

³⁷⁷ French Code de la propriété intellectuelle (version consolidée au 30 juin 2022), ss. 1, 6 and 19.

³⁷⁸ Grundgesetz (Basic Law of the Federal Republic of Germany), art. 1.

³⁷⁹ Ibid art. 2(1).

³⁸⁰ Ibid art. 5(2).

³⁸¹ Simon Newman, 'The development of copyright and moral rights in the European legal systems' (2011) 33 EIPR 677.

³⁸² Berne Convention, Art. 6bis(1).

³⁸³ *Pelham* at [71].

³⁸⁴ Sabine Jacques, 'Mashups and mixes : what impact have the recent copyright reforms had on the legality of sampling?' (2016) 27 Ent. L.R. 3, 8; *Harrison v Harrison* [2010] EWPCC 3 at [84]–[85].

author.³⁸⁵ However, given the unharmonized nature of personality rights, it is difficult to assess a standard European threshold for future artistic exploitation of previous works to result in artistic reputational harm.

The *Deckmyn* judgement provides some guidance as it considers the scope of artistic reputational harm from the perspective of the parody exception pursuant to the Information Society Directive.³⁸⁶ In this case, Johan Deckmyn, a political party member, distributed a calendar at the City of Ghent's New Year's party. The calendar's cover depicted a drawing resembling a *Suske en Wiske* comic book, a well-known comic series in Belgium and the Netherlands created by Willy Vandersteen. The calendar portrayed Vandersteen's original characters as wearing veils and being persons of colour. The question was whether this was discriminatory, meaning that the parody exception was unavailable. Pushing the parodic elements to one side, the CJEU explained that as freedom of expression supports the parody exception, national courts must strike a fair balance of fundamental rights by undertaking a proportionality assessment.

This assessment includes the legitimate interest of right holders to ensure that a work protected by copyright is not associated with a harmful message, such as the discriminatory and racist message in *Deckmyn*.³⁸⁷ Many within the commentary argue that this has broadened the application of the integrity right³⁸⁸, and even has the potential to exclude the application of copyright exceptions to personality rights³⁸⁹. A strict interpretation of an author's legitimate interests could also unduly threaten freedom of expression on behalf of parodists.³⁹⁰ This was recently evidenced in a Belgian parody case about the unauthorized use of the popular

³⁸⁵ Maree T. Sainsbury, 'Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights' (2007) 18 Australian Intellectual Property Journal 149. Note the discussion within the literature regarding whether the meaning of or the message of the work should be protected and controlled by authors. See, Oğulcan Ekiz, 'Copyright and public appearance: a review of the relationship between parody and moral rights in the UK' (2020) 3 I.P.Q. 204, 218; Treiger-Bar-Am, 'Christo's Gates and the Meaning of Art' (2005) 27 E.I.P.R. 389.

³⁸⁶ Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132 ('*Deckmyn*').

³⁸⁷ *Deckmyn* at [31].

³⁸⁸ Christophe Geiger and Elena Izyumenko [n 373]. Geiger and Izyumenko contend that *Deckmyn* introduces a "quasi-integrity right".

³⁸⁹ See CJEU, Opinion of Advocate General Szpunar in *Pelham and Others*, C-476/17, 12 December 2018, EU:C:2018:1002 at [97]; CJEU, Opinion of Advocate General Szpunar in *Spiegel Online*, C-516/17, 10 January 2019, EU:C:2019:16 at [55]. This "legitimate interest" was also affirmed by the Advocate General in both *Pelham* where copyright exceptions were suggested to be inapplicable to the right of integrity and in *Spiegel Online*, where economic rights were said not to adversely affect moral rights.

³⁹⁰ Kelly Breeman and Vicky Breeman, 'Imagining interdisciplinary dialogue in the European Court of Justice's *Deckmyn* decision: conceptual challenges when law and technology regulate parody' (2022) 35 HUMOR 447; Christophe Geiger and Elena Izyumenko [n 373].

children's cartoon character *Maya the Bee*.³⁹¹ Greenpeace had created a campaign using Maya to promote smoking cigarettes to children. The campaign was intended to emphasize the copyright holders' licensing agreements for Maya to promote meat products to children which had allegedly similar health risks. While the Belgian judge found that the use of Maya satisfied the parodic elements, given the disproportionate harm to the copyright holder, the parody defence was unavailable to Greenpeace.

Despite this questionable application of *Deckmyn*, the proportionality test for artistic reputational harm including the requirement to consider the author's legitimate interest, to not be associated with the subsequent use's message, is a helpful construct for delineating the scope of the principle of implied authorisation. In the *Le Point* case, we can observe *Deckmyn* being applied by the French Supreme Court in a manner which strikes a proportional balance between both the original artist and subsequent artist.³⁹² The case related to a bust of Marianne, the symbol of the French Republic, which was used in a photomontage by an article to illustrate the decline of France. The reproduction of the bust came under the headline "Untouchable corporatists, killers of reform and pro-Le Pen trade unionists – Wreckers – France is sinking but that's not their problem". The use was found not to disproportionately prejudice the legitimate interests of the author and his heirs as it was part of a special issue, no longer for sale, and did not conflict with a normal use of the work.

Similarly in *Fat-Cropped*,³⁹³ the German Federal Supreme Court considered the limits of the legitimate interest factor, holding that not every harm caused by the parody is significant. Here, a news site reported on a competition online for the most realistic edited photo of a celebrity to make them look as obese as possible. The photographer of the original photo argued that the defendant's use was unauthorised and a disfigurement of his photographic work. The court found that whether the parody targets something external and not the original should be considered in the context of a fair balance.³⁹⁴ On the facts, the Court held that the adaptation

³⁹¹ Commercial Court of Brussels, 4 April 2019, A/18/03379 – Maya the Bee; Commercial Court of Brussels, 4 April 2019, A/18/03379 – Maya the Bee;

Commercial Court of Brussels, 4 April 2019, A/18/03379 – Maya the Bee; Dirk Voorhoof, 'Studio 100 and Greenpeace both satisfied with Maya the Bee verdict' (2 May 2019)

<<https://www.apache.be/gastbijdragen/2019/05/02/studio-100-en-greenpeace-beide-tevreden-met-maya-de-bij-vonniss>> accessed 3 January 2023; Jacques [n 18]; Christophe Geiger and Elena Izyumenko [n 345].

³⁹² Cass. Civ, 22 May 2019, no. 18-12718 - *Le Point* ('*Le Point*'). For a detailed overview in English, see '*Le Point – Marianne*' (2020) 51 IIC 386; Pierre Sirinelli and Alexandra Bensamoun, 'Case law section' (October 2019) RIDA 262 <<https://www.la-rida.com/article-rida-en/3500/?lang=en>> accessed 3 January 2023.

³⁹³ BGH, GRUR 2016, 1157 – Auf fett getrimmt (*Fat-cropped*).

³⁹⁴ '*Fat-Cropped*' (2017) 48 IIC 474 at [38]; Daniel Jongsma, 'Parody after *Deckmyn* – a comparative overview of the approach to parody under copyright law in Belgium, France, Germany and the Netherlands' (2017) 48 IIC 652.

did not particularly harm the legitimate intangible and personal interests of the photographer,³⁹⁵ and highlighted the importance of freedom of opinion against a restrictive reading of parody for the purposes of political correctness³⁹⁶.

Where freedom of expression is balanced against personality rights by national courts, the focus is on the artistic or transformative nature of the use,³⁹⁷ not the association of the message. In *Malka v Klasen*,³⁹⁸ the French Supreme Court focused on the alleged infringer, Peter Klasen, and his inability to sufficiently explain the use of appropriated material as part of his creative process. Though Klasen's art intended to use advertising images to provoke reflection by the public, the Court found that as the photographer did not consent to this use, Klasen had an obligation to establish the "extent to which a fair balance between the protection of his rights and those of the original work's right-holder should be sought to justify his failure to obtain authorization for use of that work".³⁹⁹ The same analysis is also evident in the recent *Koons v Franck Davidovici*, where the Paris Court of Appeal fails to consider the perspective of the photographer, instead finding that the use is not saved by freedom of expression due to its commercial nature.⁴⁰⁰ Lastly, in *Swedish scapegoats*,⁴⁰¹ the Swedish Supreme Court found that the transformative nature of a subsequent use, undoubtedly supported by freedom of expression, excludes infringement.⁴⁰²

However, in *Helene Fischer*,⁴⁰³ the German Federal Court considered the impact that a nationalist political party's use of a song has on the personality rights of a performer.⁴⁰⁴ The Court affirmed the approach at first instance, holding that there was an indirect mutilation

³⁹⁵ 'Fat-Cropped' (2017) 48 IIC 474 at [38].

³⁹⁶ Ibid at [39].

³⁹⁷ 1993 TGI Paris, 15 October, 155 RIDA 225 – Godot; Cass. Civ, 28 May 1991, 149 RIDA 197 (1991) – Asphalt Jungle; 1995 CA Versailles, 10 December, 164 RIDA 256 - Turner Entertainment Company; Cass. Civ, 12 July 2012, nos. 11-15.165 and 11-15.188 - La société Google France and Others v. La société Aufeminin.com and Others. Also see, Jonathan Griffiths, 'Not such a timid thing: The United Kingdom's Integrity Right and Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds) *Copyright and Free Speech* (OUP 2005).

³⁹⁸ 2018 CA-Versailles, 16 March 2018, RG 15/06029 – Malka v Klasen.

³⁹⁹ Christophe Geiger, 'Contemporary Art on Trial – The Fundamental Right to Free Artistic Expression and the Regulation of the Use of Images by Copyright Law' in Thomas Dreier and Tiziana Andina (eds.) *Digital Ethics – The Issue of Images* (Nomos, 2021).

⁴⁰⁰ Ibid.

⁴⁰¹ Alan Hui and Frédéric Döhl, 'Collateral Damage: Reuse in the Arts and the New Role of Quotation Provisions in Countries with Free Use Provisions after the ECJ's *Pelham*, *Funke Medien* and *Spiegel Online* Judgments' (2021) 52 IIC 852; Senftleben [n 49].

⁴⁰² Ibid.

⁴⁰³ OLG Jena, 2015, 2 U 674/14 – Helene Fischer.

⁴⁰⁴ Helene Fischer relied on s.75 German Copyright Act which protects her moral rights as a performer. It mirrors s. 14 German Copyright Act for artists' moral rights.

because the political party played the song during a campaign event.⁴⁰⁵ The Court held that it was irrelevant that the music was not used as a “theme song”, but significant that as the song conveys a sense of unity, it served to attract the audience.⁴⁰⁶ Focusing on the nature of artistic harm from the perspective of the performer, the Court held that it should be assessed through the eyes of “an unbiased average consumer”.⁴⁰⁷ Hence a use is harmful if the average consumer cannot exclude the possibility that there is a connection between the political party and the artist.⁴⁰⁸ This could result in the average consumer of the artist believing that they share the political party’s ideas and beliefs, as well as have a prejudicial effect if fans of the artist, who do not share such a similar political perspective, learn of the alleged connection.⁴⁰⁹ Particularly as the decision to disclose political beliefs must be reserved for the individual.

From this context, the Court then balanced the relevant interests, the intensity and the impact of the mutilation, the economic interest, and the level of creativity.⁴¹⁰ The political party argued that constitutional privileges pursuant to art. 21(3) German Constitution safeguard equal opportunities for each political party. However, the court found that such privileges are not affected by the inability to use that song for political campaigning, nor does it restrict the political party’s freedom of expression as the song is used to raise attention and entertain, not inform. On balance, Fischer’s personality interests were found to outweigh the political party’s freedom of political speech given the fact that a singer’s performance is closely intertwined with the performer’s persona, honour and reputation.

The approach of the German Federal Court reflects the requirement in *Deckmyn* that national courts must consider the legitimate interests of the holder for a work protected by copyright to not be associated with a damaging message. Alongside the perspective of the average consumer of the artist in defining the association, both seem to reflect unfair competition concepts in trade mark law, particularly the doctrine of dilution.⁴¹¹ It was first discussed by German jurist Frank Schechter who advocated protection against “injury to a trade mark owner going beyond injury caused by use of an identical or similar mark in relation to

⁴⁰⁵ Stefan Michel, ‘You Can’t Always Get What You Want? A Comparative Analysis of the Legal Means to Oppose the Use of Campaign Music’ (2018) 18 J. Marshall Rev. Intell. Prop. L. 169, 190.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (‘TDM’), arts. 5(2) & 10(2)(c).

identical or similar goods or services causing confusion as to origin”⁴¹². The Trade Mark Directive defines such harm as when a use takes unfair advantage of or is detrimental to the mark’s distinctive character or reputation without due cause.⁴¹³

First, a trade mark holder must also prove that the mark has a reputation and that the allegedly infringing use gives rise to a link between the sign and the trade mark in the mind of the average consumer (despite no confusion). However the reputation criterion is, in the words of the commentary, “ridiculously low”⁴¹⁴ as the assessment requires a degree of certain knowledge on behalf of the average consumer, which can be a specific sector.⁴¹⁵ The national court is to specifically consider the market share held by the trade mark, the intensity, geographical extent and duration of use and the size of the investment made by the undertaking in promoting it.⁴¹⁶

As outlined in *Adidas/Fitnessworld*⁴¹⁷, once a use calls to mind a mark with reputation, all that is left is for the trade mark holder to prove that the mark’s reputation suffered harm which requires a global assessment that takes into account all factors relevant to the circumstances of the case⁴¹⁸. In *Helena Rubinstein v L’Oréal*, the CJEU elaborated that one must simply evidence a future risk which can be deduced from considering normal practice in the sector as well as the circumstances of the case.⁴¹⁹

In the context of harm detrimental to the mark’s reputation, the trade mark holder must prove tarnishment.⁴²⁰ It can arise from circumstances where the subsequent use involves goods or services that possess a characteristic or quality which is liable to have a negative impact on the image of the mark.⁴²¹ This type of infringement protects against uses of marks that are “in

⁴¹² Opinion of Advocate General Robin Jacobs delivered on 10 July 2003 Case C-408/01 *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.* ECLI:EU:C:2003:404 (*‘Adidas Opinion’*) at [37]; Frank I. Schechter, ‘The rational basis of trademark protection’, (1927) *Harvard Law Review* 813.

⁴¹³ TDM arts. 5(2) & 10(2)(c).

⁴¹⁴ Martin Senftleben, ‘Trade Mark Protection – A Black Hole in the Intellectual Property Galaxy’ (2011) 42 *IIC* 383, 384.

⁴¹⁵ Case C-375/97 *General Motors v Yplon* ECLI:EU:C:1999:408 (*‘Chevy’*) at [23]-[26].

⁴¹⁶ *Ibid* at [27].

⁴¹⁷ Case C-408/01 *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.* ECLI:EU:C:2003:582 at [29] and [38].

⁴¹⁸ Case C-487/07 *L’Oréal SA and Others v Bellure and Others* ECLI:EU:C:2009:378 (*‘L’Oréal v Bellure’*) at [44].

⁴¹⁹ Case C-100/11 *Helena Rubinstein SNC and L’Oréal SA v Office for Harmonisation in the Internal Market (OHIM)* ECLI:EU:C:2012:285 at [95].

⁴²⁰ Note that this section does not discuss dilution or blurring as it would be less likely that the average consumer of the artist would be unable to identify the artist’s work due to a subsequent blurring their artistic expression.

⁴²¹ *L’Oréal v Bellure* at [40].

some way unwholesome or that might create unfortunate associations in the mind of consumers”⁴²². More than the presence of a link is required, there is an added requirement of a “transfer of negative associations that causes consumers to think differently about the plaintiff’s mark, with adverse consequences” to the trade mark holder.⁴²³ Reliance on reputation alone, even if exceptional, is insufficient.⁴²⁴

Tarnishment cases generally consist of two categories: Firstly, those relating to poor quality goods or services, or a category of goods or services that convey meanings or symbolism antagonistic to the owner’s reputation. Secondly, those where the mark is consciously used to refer and comment upon the trade mark holder through the critique of parody. The *Helene Fischer* case would likely fall into the first category as the context of the use directly conflicted with the performer’s values associated with the song. The conflict between tarnishment and parodies is clearer as the latter implies criticism which is detrimental in principle to a trade mark.⁴²⁵ Yet if interpreted strictly, it can also have severe implications on freedom of expression and information, sometimes referred to within copyright as “targeted parodies”. Now we will consider cases where trade marks have been used to critique their holders.

Danone, a yogurt and dairy merchant, was parodied through a website with the domain name “jeboycottedanone.com” alongside text on the website which read “human beings are not yogurts” to critique the company’s employment policy. Here, the Paris Court of Appeal found that such use did not tarnish the mark as enforcement conflicted with freedom of expression. The same court also found that an anti-smoking campaign depicting a dying camel was a parody and not infringement.⁴²⁶ However, on appeal to the French Supreme Court, despite the intentions of the campaign, the court found that the use was detrimental to the trade mark’s reputation. Comparably, German courts have found the use of the Mars trade mark on a condom advertisement detrimental⁴²⁷, but not the play on a national newspaper, the *Bild*’s slogan “Bild

⁴²² Robert Burrell and Michael Handler, ‘Reputation in European trade mark law: a re-examination’ (2016) 17 ERA Forum 85, 86.

⁴²³ Michael Handler, ‘What Can Harm the Reputation of a Trademark: A Critical Re-Evaluation of Dilution by Tarnishment’ (2016) 106 Trademark Rep 639, 672.

⁴²⁴ Case C-673/15 *The Tea Board v OHIM* ECLI:EU:C:2017:702 at [88].

⁴²⁵ Ana Ramalho, ‘Parody in trade marks and copyright: has humour gone too far?’ (2009) 5 C.S.L.R 58.

⁴²⁶ Ibid.

⁴²⁷ Ibid; BGH GRUR 1994, 808 – Markenverunglimpfung I.

dir deine Meinung!” (“Form your own opinion”) with “Bild Dir Keine Meinung” (“Do not form your own opinion” as the latter was found to be a parody⁴²⁸.

Despite these national cases and a few EUTM appeals to the General Court, tarnishment cases are lacking at CJEU level where it has been pleaded as the sole basis for infringement. Often much of what can be gleaned from the case law are famous illustrations such as the situation where “Coca Cola” is used for “low-grade engine oils or cheap paint strippers”⁴²⁹. Advocate General Sharpston explains in *Intel* that “in each case of tarnishment, it will be necessary to compare the connotations of each mark, in relation either to the goods or services covered or to the broader message which they may convey, and to evaluate the damage entailed”⁴³⁰. Comparisons to defamation are then helpful to understand when a negative and derogatory connotation is implied by subsequent use,⁴³¹ in that it could serve as an over-deterrent.⁴³²

The second relevant form of trade mark reputational harm, unfair advantage, is a wider category of harm than tarnishment. It deems uses which ride on the coat-tails of earlier marks with a reputation as benefiting from the earlier mark’s power of attraction (reputation and prestige) without compensation, and exploiting the marketing investment in maintaining the image of the mark, thus taking advantage unfairly of the repute of the mark.⁴³³ It can be invoked even when the central function of a trade mark, indicating origin, is not affected as well as circumstances where there is no identical use nor confusion present.⁴³⁴ Though similar to dilution by blurring, unfair advantage lacks any requirement to prove a change in the economic behaviour of the average consumer.

Yet what “unfair” means is left undefined by the CJEU and legislation. Some commentary contend that the foundation of reputation-based harm is really a notion of “image transferability”.⁴³⁵ While the alleged infringer benefits from the positive image transfer in an

⁴²⁸ Ramalho [n 425].

⁴²⁹ Opinion of the Advocate General Sharpston delivered on 26 June 2008 Case C-252/07 *Intel Corporation Inc. v CPM United Kingdom Ltd*. ECLI:EU:C:2008:370 at [81].

⁴³⁰ Ibid.

⁴³¹ Westkamp [n 374] 391.

⁴³² Lord Neuberger, ‘Harold G. Fox Memorial Lecture 2015 Trade-mark Dilution and Parody’ (2015) 28:1 *Intellectual Property Journal* 1.

⁴³³ *L’Oréal v Bellure* at [49].

⁴³⁴ Ibid.

⁴³⁵ Apostolos Chronopoulos and Spyros Maniatis, ‘Property Rights in Brand Image: the Contribution of the EUIPO Boards of Appeal to the Free-Riding Theory of Trade Mark Protection’ in EUIPO (ed.) *20 years of the Board of Appeal at EUIPO, Celebrating the Past, Looking Forward to the Future* (Liber Amicorum 2017); Westkamp [n 374] 399.

unfair advantage case, tarnishment evidences a negative image transfer to the earlier mark through a negative association. The result of unfair advantage is that the average consumer of those goods or services now expects that alleged infringer's product is of the same quality or offers the same characteristics as the earlier mark's products.

Given the ambiguity surrounding the scope of tarnishment and the broad nature of unfair advantage, the requirement for the relevant public to establish a link between the trade mark holder and alleged infringer is paramount as a limitation. Recently in *Rich Prada*,⁴³⁶ the EU General Court found that the well-known fashion house, Prada, had failed to prove the link between itself, and a Balinese four-star hotel named Rich Prada. Before the General Court, Prada argued that the possibility of brand extension, where the relevant public is now more accustomed to seeing luxury brands used in different sectors, was a relevant factor. However, the General Court viewed this argument as a blunt tool used to achieve a "vast but illegitimate trade monopoly" and that "there was nothing to suggest that the transfer of image to a mark covering goods and services not of that nature".⁴³⁷

Similarly in *Helene Fischer*, where it has become common for celebrities, artistic or not, to support or critique political campaigns, the potential for brand extension by a well-known trade mark holder is insufficient to prove that the relevant public would associate the two businesses together. Comparable arguments can also be made in the context of creative collaboration where it has become the norm for artists to work together creatively. It is more likely that a heavy evidentiary burden is required for early artists to prove that such a link could occur, particularly when considering the implications on freedom of expression and future creativity. In the context of the principle of implied authorisation, if authors can withdraw consent for any future creative exploitation without considering a balance of fundamental rights, creativity will certainly be stifled.

Early in this section, we detailed the doctrine of author's consent which sets the parameters for authors to object to future creative exploitation and requires interests to be balanced, opening the door to consider the balance of relevant fundamental rights. The question that this section has sought to answer refers to the extent to which artistic reputational harm should play a role when applying the principle of implied authorisation. This factor builds upon

⁴³⁶ Case T-111/16 Judgment of the General Court (Second Chamber) *Prada SA v EUIPO* ECLI:EU:T:2018:328.

⁴³⁷ Ibid [54].

the earlier construction of the doctrine of exhaustion as an inherent balancing and proportionality assessment in the European copyright system, detailed in the previous section.

Authors' personality rights, specifically the right to integrity, when viewed through the lens of *Deckmyn*, introduce a structure to frame artistic reputational harm. It requires the author to evidence a legitimate interest not to be associated with a message of the new work. In *Deckmyn*, this message was racist and discriminatory, however when the message is not political as in *Helene Fischer*, but of a conflicting or differing artistic nature, can an author still withdraw their consent? Cases following *Deckmyn* evidence to consider the proportionality of harm between the artist and the subsequent use. However, in the case of future creative exploitation, one could argue that the balancing of freedom of expression for both artists could result in a standstill as the inability to sample a snippet to create works could subjectively meet the harm resulting from your music being referenced in a hip hop song.

While national courts attempted to reconcile this tension by focusing on the transformative or artistic nature of the subsequent use, *Helene Fischer* provides a more practical solution. As we observed, the case adopted an objective test to the question of artistic reputational harm and asked whether the average consumer of the artist would make a link between the artist and the subsequent use. This indirect construction of the *Deckmyn* requirement to consider the legitimate interest of the holder to not be associated is equally then balanced against other factors including the relevant interests, the intensity and the impact of the mutilation, the economic interest, and the level of creativity. This section contends that the *Helene Fischer* test provides a helpful foundation to structure artistic reputational harm as a limitation to the principle of implied authorisation.

To flesh out the boundaries of this limitation, this section noted that unfair competition concepts in trade mark law are helpful. This is due to the availability of enforcement against trade mark uses which tarnish or take unfair advantage of the repute of a mark which involve the standard of the average consumer. As we observed in this section, both categories of reputational harm cast a wide net either due to tarnishment remaining relatively undefined or from the court's broad interpretation to extend unfair advantage to free-riding when there is no confusion nor an impact on the functions of a trade mark. Hence the requirement to prove a link has arisen in the mind of the relevant public between the earlier trade mark holder and the alleged infringer, and is essential to deter over-protection.

Building from both author's personality rights and concepts of unfair competition, it becomes clear that artistic reputational harm should also be dependent on proving the presence of a link in the minds of the relevant public, not the artist. This factor similarly acts as a gatekeeper to the *Deckmyn* requirement that authors have a claim, based in personality rights, to not be associated with a subsequent harmful message of a work. Following *Helene Fischer*, the limitation can then be balanced against the surrounding factors of the use, which are informed by fundamental rights. Returning to the fact pattern of *Pelham*, the question would be whether the relevant public, would associate Kraftwerk with the message of *Nur Mir*, the song that sampled Kraftwerk's *Metall auf Metall*. Once a link is proven, then the surrounding factors of the use can be evaluated.

2.5. CONCLUSION

In this chapter we have reflected on the characterisation of consent as a concept supporting creativity online through regulating access to and use of works. The broad interpretation of consent in internal market case law has strengthened a central tenet of this chapter, that consent is a question of control. Additionally, the ability of the CJEU in cases such as *Musik-Vertrieb* to allow consent to trigger community-wide exhaustion, given the choices the copyright holder made when first placing the product on the market, opens the door to consider implied authorisation. It also confirms the reasonable and proportional approach that implying consent necessitates and provides a concrete foundation for a similar approach online.

Despite the promise of the doctrine of exhaustion, the chapter also discusses how secondary EU law, namely the Information Society Directive and the Software Directive, handles the doctrine of exhaustion to the extent that the former closes the door on any legislative basis of 'digital exhaustion'. The conflicting approaches, both appearing to centre on the artificial divide between intangible and tangible goods, means that digital copies pursuant to the Information Society Directive do not benefit from exhaustion due to the CJEU's fixation of a tangibility requirement. This is due to the outdated notion that digital copies online that are exhausted will compete with unexhausted copies, despite the possibility of digital lending schemes such as those described in *Tom Kabinet*.

We have also observed the growing significance of the right to communicate to the public. It is so essential online, that the distribution right is no longer a relevant point of discussion, effectively excluding any application of the doctrine of exhaustion, as evidenced in

Tom Kabinet. Quite simply, the idea that the communication right is both the starting point and end point for creative reuses online has spelt the end of ‘digital exhaustion’. Yet, somewhat unexpectedly, we also observed the dominance of the communication right online resulting in a special category of implied licences. Essentially uses are deemed implied or authorised by law in certain circumstances, namely that the work has not been communicated to a new public, and that fundamental rights should be balanced.

These implied linking cases are premised on the logic that given the role hyperlinking plays online to facilitate freedom of expression and of information, an implied licence is needed to avoid copyright liability. The chapter contends that the principle of implied authorisation is reflective of this proportional and flexible approach to account for the creativity that will be stifled if the freedom of expression supporting the subsequent author is not balanced against the author’s own freedom of expression. By introducing, the right to freedom to conduct a business and aligning the obligation for platforms to compensate for subsequent creative uses uploaded with a wider understanding of consent as inclusive of the choice to communicate works, the section defines both adequate remuneration and the creative reuse as integral to the principle of implied authorisation. The result being that all relevant interests, and their supporting fundamental rights are balanced, allowing future creative exploitation.

Such an approach has significant ramifications for copyright platform liability as it means that an obligation arises on behalf of platforms to ensure that uses which benefit from the principle of implied authorisation are not taken down, manually or using algorithmic enforcement measures as addressed in Chapter IV. However, it also potentially conflicts with authors’ personality rights. In this context, the chapter addressed the question of artistic reputational harm that may follow the creative reuse of a work. Section four proposed that *Soulier and Doke*, and *Spedidam* provide the framework for considering whether an author can prevent future artistic exploitation of their work by withdrawing their consent. The latter, explains that while author’s consent can be implied, it is also dependent on the court balancing relevant interests which arguably includes the balancing of relevant fundamental rights.

We noted that one aspect that has not been addressed in jurisprudence, or the commentary sufficiently is how a negative construct of freedom of expression on behalf of the original author should be considered in relation to other fundamental rights, namely freedom of expression of the subsequent author. This chapter has evidenced that national courts, when viewing freedom of expression as a defence, tend to focus on the transformative or artistic

nature of the work, not on the possibility that such use might result in a harmful association between the original author or work and the subsequent use. This chapter uses a broad definition of reputation and considers it from the perspective of authors' personality rights and unfair competition concepts in European trade mark law. Relying predominantly on *Deckmyn*, the chapter focused on requirement to consider the legitimate interest that copyright holders have not to be associated with a harmful message, and for this to be balanced against other interests supported by fundamental rights. We observed that this factor should be practically implemented in a similar approach to *Helene Fischer* where the German Federal Court assessed the nature of the negative connotation from the perspective of the average consumer of the artist, before undertaking a balancing assessment of the negative message against relevant circumstances and interests including the potential creative reuse.

Given the similarity of this approach to reputational-based trade mark enforcement and the requirement that a link must occur in the relevant mind of the public, the chapter then discussed whether trade mark law features mechanisms to balance defamatory messages against freedom of expression concerns. While we observed that both tarnishment and unfair advantage cast a wide net for infringement, the court's focus on the trade mark holder proving that a link has formed in the mind of the relevant public is a significant factor in reducing over-protection at the risk of creating an illegitimate trade monopoly. Subsequently, this chapter proposed that a similar factor is needed when allowing an author to claim artistic reputational harm to rebut the principle of implied authorisation. Once this is proven, then the harm can be balanced against the surrounding circumstances including the transformative or referential nature of the work. This analysis would then involve the balancing of fundamental rights which support both authors and include the negative construct of freedom of expression on behalf of the original author.

This chapter has located the principle of implied authorisation within the European copyright system, drawing upon diverging CJEU and national case law as well as both primary and secondary EU law to unravel the relationship between authors, exploiters, platforms and users online in the context of subsequent creative uses. Though the chapter has attempted to reconcile the free digital spaces within European copyright law to support creative reuses online, there remains a question over the extent to which the principle of implied authorisation can be overridden by contract law reliant on technological 'locks' such as TPMs and policies of interoperability. In the following chapter, this thesis will build upon the relationship that

such a fundamental policy of access for creativity has on the notion of freedom of contract within the boundaries of the European copyright system.

CHAPTER III: EXPLOITERS' RIGHTS OVER CREATIVE REUSES OF WORKS

3. INTRODUCTION

So far, this thesis has explored how creative reuses of works can best be facilitated and supported within the European copyright system through the principle of implied authorisation. Central to its implementation, however, is the overarching theme of European copyright law, the exploiters' narrative. Since the Information Society Directive, there has been a preference for protecting and incentivising licensing as a means of bolstering online business models by strengthening exploitation rights. The introduction of enforcement mechanisms online such as TPMs, designed to control access to and use of works online, at the age of the millennium, signified the status of exploiters within the European copyright system as paramount. It also gave weight to a new world online which has aptly been referred to as the end of ownership⁴³⁸, where any potential "licensability" of a work or closely related subject matter must be protected, enforced and above all, paid for by users.

Today users are generally licensed out of the option to 'buy' copies of copyright works. This is despite the "buy now" phenomenon where users are enticed through the language of ownership to agree with burdensome terms and conditions restricting users' property rights. The evolution of technology and the terms regulating access have also impacted the very core of economic rights outlined in the Information Society Directive. As we observed in the previous chapter, following *Tom Kabinet*, the applicable right in the online environment is the right to communicate to the public which excludes the application of the doctrine of exhaustion pursuant to the Information Society Directive. Though computer programs remain an odd exception following *UsedSoft*, gone are the days where upon purchasing access to a copy of a work, users have autonomy over it.

The latest extension of this narrative is undoubtedly art. 17 DSM Directive. The last two chapters have begun to sketch the impact of this new legislation which ultimately requires use of algorithmic copyright enforcement on platforms to protect and enforce exploiters' rights on platforms, leading to filtering and subsequently stifling creativity online. For users that create by reusing previous creative works, such an outcome almost appears desolate. Given the

⁴³⁸ Perzanowski [n 11].

grossly imbalanced traditional bargaining positions of users and exploiters, artistic communication seems to be sacrificed to uphold the high level of protection of copyright holders that the Information Society Directive has long demanded. Yet, if we are to view users through a more practical lens as authors, this conflict between the extent to which exploiters are permitted to use burdensome terms and conditions, in addition to TPMs, in relation to creativity, is not so clear.

This chapter seeks to unravel the position of exploiters within the European copyright system, focusing on whether there is an obligation upon them to support creativity online. It aims to provide a more proportionally balanced answer to the question of platform uploads of a transformative or referential nature that reuse previous creative works. Necessarily, the position of exploiters within the principle of implied authorisation is a conflicting one as the notion that not all potential uses should be licensable and exploitable conflicts with the traditional narrative of exploiters. For this reason, the chapter aims to delineate the extent to which these reuses should be permitted by reflecting on theories of propertization within copyright law as well as ideas attached to the boundaries of exploitation or investment rights.

Firstly, the chapter considers the evolution of contractual override within the European copyright law system with the aim of determining the extent to which the principle of implied authorisation could be overridden by assignment. The section considers this copyright-contractual conflict by drawing upon propertization theories within the literature that suggest that social justifications of property should be incorporated. From the context of creativity, the section builds upon notions of authorship and self-autonomy, discussed in Chapter I, to found a claim based on creativity as a social justification for property. By viewing the principle of implied authorisation through the lens of propertization, the thesis broadens its remit to discussing more defined functions to exploiters regarding creativity.

Subsequently, in section two, the chapter addresses the advent of technology as an enforcement mechanism against access to and reuse of previous creative works. The section seeks to trace the history of TPMs as well as their protection within the European copyright system against circumvention. This analysis is designed to spark comparisons between the long-standing narrative of exploiters with the current approach outlined in art. 17 DSM Directive. The section will then draw upon these findings to detail the possible undesired outcomes upon creativity, if, like TPMs, art. 17 is implemented in a manner which blocks subsequent creative reuse being uploaded on to platforms.

This leads to the chapter discussing whether exploiters' behaviour should be balanced through a doctrine of copyright misuse proposed by the commentary. We will outline the doctrine as well as consider why an "abuse" or "misuse" perspective can be helpful for limiting exploitation rights. The section will then attempt to locate the doctrine of copyright misuse within the European copyright system by reflecting upon both the position and effectiveness of the principle of implied authorisation and the doctrine of exhaustion. The section intends to reflect on how copyright interests should be balanced in a manner that reconciles, not entrenches, their positions.

Lastly, the chapter reflects the concerns over how exploiters' interests can best be balanced by considering the extent to which there should be a re-exception to the principle of implied authorisation. The section adopts the perspective of 'manifestly' infringing uses and discusses the approach of both Advocate General Saugmandsgaard Øe and the CJEU in *Poland* to frame the discussion of whether commercial uses should be excluded from the principle of implied authorisation. The section compares the focus on commercial nature to a disposition within the literature to concentrate on whether the reuse meets a specific exception identified within legislation including parody, pastiche, caricature or quotation. This analysis allows the section to then consider whether a competition-based approach should be preferred where only those works which act as substitutes for copies of the original works should be excluded from upload by platforms.

Ultimately these perspectives on the exploiters' narrative which, to an extent, characterizes the implementation of the European copyright system, allow the thesis to consider the relationship between creativity and exploitation. By unravelling the role of exploiters regarding the fostering and support of creativity online, the chapter helps to define the boundaries of the principle of implied authorisation in a manner that proportionally balances all copyright interests.

3.1. DOES THE LICENSABLE NATURE OF WORKS INCLUDE CREATIVE REUSE OF WORKS?

Using contract law to provide an additional and alternate layer of protection for exploiters is not a novel concept.⁴³⁹ Not only does it authorise third party use of works, but crucially, it

⁴³⁹ Robert P. Merges 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) 84 Cal. L. Rev. 1293, 1293–393.

allows exclusive rights to be monetized by exploiters.⁴⁴⁰ From the perspective of an exploiter, it would be in their interest to include contractual terms with authors and platforms to limit the application of the principle of implied authorisation. Whether it is an assignment from an author or a licensing agreement with a platform, it is probable that exploiters would exclude its application to protect their business models. The principle also arguably conflicts with fundamental contractual principles such as freedom of contract and sanctity of contract. Yet, just as there are free spaces within the European copyright system, the implication of contractual terms raises additional carve-outs to what was contemplated between the parties.

This section seeks to determine the status of the principle of implied authorisation in the context of contractual override. Firstly, the section reviews the largely unregulated nature of contractual override in copyright and the dominance of private ordering mechanisms such as restrictive licensing terms. Building upon literature critical of the proprietization of copyright, it considers whether the principle of implied authorisation is doctrinally capable of preventing contractual override for the purposes of supporting follow-on creativity. This is briefly tested in relation to authors' assignment to see if exploiters can exclude its application. Lastly the section examines the impact of the licensing structure set out in art. 17 DSM Directive, including parody, caricature and pastiche being deemed mandatory exceptions. These perspectives will help locate the principle of implied authorisation as an authors' right of access that cannot be waived and remains unaffected by contractual override.

The Information Society Directive does not provide a clear answer on the tension between copyright exceptions and limitations against overriding contractual terms in EULAs. Firstly, the nature of these carve-outs is precise and limited, known as the closed list principle. While the Information Society Directive comprises a small list of mandatory exceptions relating to reproductions that are temporary, transient or incidental, or an internal or essential part of a technological process, the other twenty exceptions are optional and carry considerable discretion for member states. The approach is said to preserve "national cultural diversities and legal traditions" as well as providing space for member states to introduce "derogatory provisions they have deemed the most fitting to their social, cultural and economic needs and features".⁴⁴¹

⁴⁴⁰ Jacques de Werra, 'Contract law and intellectual property transactions: Research perspectives' in Irene Calboli and Maria Lilla Montagnani (eds) *Handbook of Intellectual Property Research* (OUP 2021) 67.

⁴⁴¹ Caterina Sganga, 'A new era for EU copyright exceptions and limitations? Judicial flexibilities and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice' (2020) 21 ERA Forum 311.

Conversely, the Software Directive provides explicit provisions on contractual override. Users can make back-up copies⁴⁴², test the functionality of computer programmes⁴⁴³ and decompile them.⁴⁴⁴ Importantly, these exceptions are expressly protected meaning that contractual provisions overriding them become null and void.⁴⁴⁵ However, as will be addressed in the following section, the *lex specialis* nature of the Software Directive means that its subject matter is interpreted strictly, excluding “complex products” such as e-books or video games.⁴⁴⁶ Additionally, while the Database Directive is not as explicit as the Software Directive, it answers the question of contractual override by focusing on its “lawfulness”.⁴⁴⁷ Note, that though the DSM Directive has introduced new mandatory exceptions⁴⁴⁸ that cannot be overridden by contract⁴⁴⁹, the long closed list of exceptions pursuant to the Information Society Directive still lacks statutory protection from contractual terms.

Secondly, the Information Society Directive emphasizes the status of contractual provisions over exceptions and limitations. Recital 45 states that the latter should not prevent contractual relations “designed to ensure fair compensation for rightsholders” which, of course, is qualified by the extent to which national law permits these exceptions and limitations.⁴⁵⁰ Commentary explains that there are conflicting schools of thought on what this recital means: Some contend that certain exceptions can be overridden by contract⁴⁵¹, appearing to confirm the absolute nature of the exception.⁴⁵² Others argue that legitimate uses, which do not require the author’s authorization, are a factor forming part of the context of contractual agreements regarding the price.⁴⁵³ The ambiguity is unsurprising as the CJEU nor the EU legislator gives

⁴⁴² Software Directive, art. 5(2).

⁴⁴³ Ibid, art. 5(3); See, Case C-406/10 *SAS Institute Inc. v World Programming Ltd* ECLI:EU:C:2012:259.

⁴⁴⁴ Software Directive, art. 6.

⁴⁴⁵ Ibid, art. 8.

⁴⁴⁶ *Tom Kabinet* at [40]; *Nintendo* at [23].

⁴⁴⁷ Database Directive; See, Case C-30/14 *Ryanair Ltd v PR Aviation BV* ECLI:EU:C:2015:10.

⁴⁴⁸ DSM Directive art. 3 (Text and data mining for the purposes of scientific research); art. 5 (Use of works and other subject matter in digital and cross-border teaching activities).

⁴⁴⁹ Ibid, art. 7.

⁴⁵⁰ Information Society Directive, recital 45; Tatiana Eleni Synodinou, ‘Lawfulness for Users in European Copyright Law: Acquis and Perspectives’ (2019) 10 J Intell Prop Info Tech & Elec Com L 20, 23-4 at [14]

⁴⁵¹ Séverine Dusollier, ‘Fair Use By Design in the European Copyright Directive of 2001: An Empty Promise’ (2003) 46:4 *Communications of the ACM* 51; Séverine Dusollier, ‘Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise’ (2003) 34 IIC 62–75, 72.

⁴⁵² Synodinou [n 450]; Lucie Guibault, ‘Relationship between copyright and contract law’ in: Estelle Derclaye, (ed) *Research Handbook on the Future of EU Copyright*, (Edward Elgar 2009) 529. Synodinou contends that the Verwertungsgesellschaft Wort (VG Wort) cases support the former approach as member states, according to the CJEU, have a choice over “whether or not to allow exceptions to be overridden by, limited by, or otherwise dependent on contract law”.

⁴⁵³ Ibid.

further guidance on its meaning.⁴⁵⁴ If we are to consider recital 45 to justify legitimate uses found in national law, there are only a handful of member states that prescribe an exception as lawful and absolute.⁴⁵⁵

Jurisdictions such as Germany take a further step by holding that clauses in business to consumer contracts can be held unenforceable if they contravene essential principles of statutory provisions with the result customers experience an unreasonable disadvantage. One such case was *OEM-Software* involving the resale of OEM-versions of Microsoft software, contrary to Microsoft licences. The German Federal Court held that the contractual restriction, aimed at preserving different distribution channels, would have adverse effects on the need to protect market transparency.⁴⁵⁶ Thus, the court ruled that exhaustion pursuant to the German Copyright Act

“had occurred even if the first sale of the software was in breach of Microsoft’s contractual restrictions for OEM versions, so that this exhaustion prevailed over the provision that [the] exploitation right may be transferred only with the author’s consent”.⁴⁵⁷

So long as there was no contract regulating the relationship between such subsequent resellers, the software manufacturer could not restrict a latter resale of the software.⁴⁵⁸

Much later in *Half-Life 2*,⁴⁵⁹ the German consumer protection organisation, Verbraucherzentrale (VBZ), sued Valve Inc, the operator of the PC games digital distribution platform, Steam, regarding the sale of the video game Half-Life 2 on DVD in Germany.⁴⁶⁰ Users required a Steam account to play the game which pursuant to the EULA could only be created once and could not be transferred. Commentary explains that in German civil law clauses used in business-to-consumer contracts can be “unenforceable if they deviate from essential principles of statutory provisions in a way that puts customers at an unreasonable disadvantage”⁴⁶¹. The consumer protection organisation alleged that the Steam EULA

⁴⁵⁴ Lucie Guibault, ‘Individual Licensing Models and Consumer Protection’ in Kung-Chung Liu and Reto M. Hilty (eds) *Remuneration of Copyright Owners. Regulatory Challenges of New Business Models* (Springer 2017).

⁴⁵⁵ Examples include Belgium, Ireland and Portugal. See, Guibault [n 452] 537.

⁴⁵⁶ Guido Westkamp, ‘The limits of open source: lawful user rights, exhaustion and co-existence with copyright law’ (2008) 1 I.P.Q. 14, 37.

⁴⁵⁷ Tjeerd Overdijk and *et al*, ‘Exhaustion and Software Resale Rights. A comparison between the European exhaustion doctrine and the U.S. first sale doctrine in the light of recent law’ (2011) 2 CRi 33, 36.

⁴⁵⁸ *Ibid*.

⁴⁵⁹ *Half-Life 2* [2010] BGH 178/08.

⁴⁶⁰ *Ibid*; Maša Savič, ‘The CJEU Allposters case: beginning of the end of digital exhaustion?’ [2015] EIPR 381.

⁴⁶¹ Savič [n 376] 419.

contravened the doctrine of exhaustion and is thus, unreasonable, abusive and consequently unenforceable.⁴⁶²

However, the Federal Court held that the restriction was legitimate as it only affected the user account and not the physical copy, meaning that the original purchaser of a DVD is neither legally nor actually prevented from reselling the physical DVD.⁴⁶³ Lastly, the court held that “while the doctrine of exhaustion limited the right holder’s powers in regard to a DVD, it did not require them to design their business in a way that facilitated the sale of used games and therefore did not make Steam’s terms of service unenforceable”⁴⁶⁴. While some commentators contend that this a positive outcome for game platforms as their freedom to adopt new distribution models was safeguarded,⁴⁶⁵ the decision also highlights the plight of end users in the digital age and the contractual strategies that copyright holders can, with ease, implement to circumvent copyright balance safeguards.⁴⁶⁶

In 2014, VBZ sued Valve Inc again which commentary refers to as the *Steam Accounts* case.⁴⁶⁷ Relying on *UsedSoft*, they argued that the marketing and transfer of used licences for computer programs downloaded from the internet is legal and cannot be contested by the original copyright holders.⁴⁶⁸ However, the Berlin Court of Appeals held that *UsedSoft* is only applicable in cases where the game software is purchased and downloaded in its entirety and can then be activated and played locally.⁴⁶⁹ Further, that Steam games can only be played through Steam user accounts meaning that the user does not simply purchase the game, but also the functions and services provided continuously through the individual steam account which are not subject to exhaustion.⁴⁷⁰ This meant that the clause which prohibited the transfer of user accounts did not conflict with German and European copyright law principles.⁴⁷¹

Similarly in 2019, the French consumer association, UFC-Que Choisir, commenced proceedings at Valve in the *French Valve* case.⁴⁷² Commentary explains that the Paris Court of

⁴⁶² Savič [n 376] 419.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Alina Trapova and Emanuele Fava, ‘Aren’t we all exhausted already? EU copyright exhaustion and video game resales in the Games-as-a-Service era’ (2020) 3 Interactive Entertainment Law Review 77, 82.

⁴⁶⁶ This will be discussed more comprehensively in Chapter IV.

⁴⁶⁷ LG Berlin, 2014, 15 O 56/13 – Steam Accounts; Trapova and Fava [n 465] 83.

⁴⁶⁸ Marcus Dittmann, ‘Steam user accounts not transferable, confirms Berlin Court of Appeals’ (27 January 2020) < <https://ihde.de/en/steam-user-accounts-not-transferable-confirms-berlin-court-of-appeals/> > accessed 3 January 2023.

⁴⁶⁹ Ibid.

⁴⁷⁰ Dittmann [n 468].

⁴⁷¹ Ibid.

⁴⁷² 2019 TGI Paris, 17 September, RG 16/01008 - UFC-Que Choisir (*‘French Valve’*).

First Instance found that “Valve was not required to allow users to freely transfer their Steam accounts, as those are made of an indissociable blend of personal data, data on the player’s activity, and data on the digital purchases and services related to the account”⁴⁷³. Given this ambiguity, it’s not surprising that, some commentators propose that European legislators should:

“clarify which limitations on copyright can be waived by agreed contractual terms by deploying technical protection mechanisms regulating both access and use intensity, and which limitations are both legally and factually absolute in character”.⁴⁷⁴

In those member states lacking clear legislation, it is for national courts to decide on the lawfulness of uses grounded in exceptions, though conflicting with contractual provisions. Of course, when exceptions are interpreted at national level, not only is it an exhaustive list and subject to the three-step test, but they are interpreted narrowly within the limits of EU law,⁴⁷⁵ limiting the external application of fundamental rights⁴⁷⁶. Commentary explains that this perspective of exceptions means that:

“users of copyright protected material find themselves in a double whammy: on the one side a system of digitally enforced ‘perfect’ contracts and on the other a rigid and narrow system of what was intended to be flex-mechanisms”.⁴⁷⁷

Indeed, recent studies on contractual terms used in EULAs affirm this outlook and evidence that third parties restrict certain uses and provide limited access to contents, despite the substantive flexibilities for consumption offered to consumers.⁴⁷⁸

Thirdly, the EU’s overarching narrative of harmonization has characterised the copyright system as a tool to

⁴⁷³ Trapova and Fava [n 465] 84.

⁴⁷⁴ Thomas Dreier, ‘Thoughts on revising the limitations on copyright under Directive’ (2016) 11 JIPLP 138,146.

⁴⁷⁵ *Stichting Brein; Funke Medien*.

⁴⁷⁶ *Pelham; Spiegel Online*.

⁴⁷⁷ Jens Schovsbo, ‘Making sure copyright works – safeguarding authors’ and users’ rights’ in Gustavo Ghidini and Valeria Falce (eds) *Reforming Intellectual Property* (Edward Elgar 2022) 218.

⁴⁷⁸ Péter Mezei and István Harkai, ‘End-user flexibilities in digital copyright law – an empirical analysis of end-user licence agreements’ (2022) 5 Interactive Entertainment Law Review 2.

*“strengthen the internal market and remove obstacles to its functioning, incentivise the development and competitive industries, create new jobs, and protect and stimulate the investment’s of producers of creative works”.*⁴⁷⁹

Most components of the EU copyright system are designed to “provide a satisfactory return” to industrial rightsholders with the effect that it is justified and extended through a property-based perspective.⁴⁸⁰ Sometimes referred to as the “propertization” of copyright law, this property-based logic is primarily supported by art. 17(2) Charter with the statement that “intellectual property shall be protected” and affirmed by the CJEU decision to increase the scope of copyright protection beyond member states’ national laws.⁴⁸¹ The argument is that property logic has “idealised IP rights as completely positive, self-sufficient measures required by fundamental rights”.⁴⁸²

While copyright commentary is critical of the strength of this argument,⁴⁸³ referring to the CJEU’s current obsession with fundamental rights, the ‘propertization’ of copyright perspective, to an extent, has become reality as exploiters sit at the centre of the EU copyright system, not authors.⁴⁸⁴ Practically it means that all forms of access, regardless of the closeness of their link to copyright and related rights, are protected. Long gone is the concept of ownership for users as access to digital content relies upon a long-winding list of terms and conditions, aptly been named the “end of ownership”.⁴⁸⁵

As we saw in *Pelham*, protection now extends to ‘the mere licensability of “snippets”’ which are viewed “as a sufficient ground to protect virtually any licensable asset against appropriation for the economic benefit of exploiters”.⁴⁸⁶ Alongside the EU’s harmonization goal and absent guidance in the Information Society Directive regarding contractual override,

⁴⁷⁹ Caterina Sganga, ‘Systematizing and rebalancing EU copyright through the lens of property’ (2017) 1 Opinion Juris in Comparatione. Studies in Comparative and National Law 31, 34.

⁴⁸⁰ Ibid.

⁴⁸¹ Sganga [n 142].

⁴⁸² Alexander Peukert, ‘Intellectual Property as an End in Itself’ (2011) 32 EIPR 67, 71.

⁴⁸³ Ibid; Jessica Litman, ‘What we don’t see when we see copyright as property’ (2018) 77 Cambridge Law Journal 536; Julie E. Cohen, ‘Copyright as Property in the Post-Industrial Economy: A Research Agenda’ (2011) Georgetown Public Law and Legal Theory Research Paper No. 11-25; Séverine Dusollier, ‘Unlimiting limitations in intellectual property’ in G. Ghidini and V. Falce (eds) *Reforming Intellectual Property* (Elgar 2022).

⁴⁸⁴ Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity. The Third Paradigm* (Edward Elgar Publishing: 2018) 187.

⁴⁸⁵ Perzanowski and Schultz [n 11] 6.

⁴⁸⁶ Westkamp [n 139].

the effect of the copyright propertization argument has culminated in an environment where private ordering mechanisms characterize EULAs to predominantly suit exploiters' interests.⁴⁸⁷

To fill void left by the Information Society Directive and mitigate the property-based logic left rampant within the EU copyright system, commentary suggests that copyright exceptions be defined as objective rights.⁴⁸⁸ Compared to subjective rights, objective rights relate to the pursual of public goals. They differ to exclusive rights in copyright which have specific criteria and clear consequences in terms of judicial remedies.⁴⁸⁹ Commentary explains that regarding copyright exceptions:

*“the general interest to achieve a balance between copyright and fundamental rights becomes an objective right and finds application in favor of a specific subject every time the protection of his or her fundamental right(s) is subordinated to the possibility of exercising the exception itself”.*⁴⁹⁰

Notions of proportionality are used to balance the contractual restriction against the exercise of the exception as an objective right and are supported by fundamental right such as freedom of expression.

This approach echoes an increasing trend within the commentary to use the property lens of copyright to bolster its social function.⁴⁹¹ The experience of national constitutional propertization regarding copyright, particularly Germany and art. 14 of the German Constitution which safeguards property, provides an alternate approach. Commentary explains that when assessing its application, the German Constitutional Court offers “clear criteria to guide and assess both the legislative and judicial weighting of copyright against conflicting interests, ensuring transparency and predictability in the interpretative results”⁴⁹².

Effectively, by granting property the status of a fundamental right, it can then be balanced against other fundamental rights that “protect human dignity, empower individuals, and allow their self-fulfilment and the realization of the public interest”⁴⁹³. We discussed this in detail in Chapter I, where the German Constitutional Court, in *Pelham*, limited the application of the phonogram right to balance the right to property more effectively against freedom of expression

⁴⁸⁷ Severine Dusollier, ‘Sharing Access to Intellectual Property through Private Ordering’ (2007) 82 Chicago Kent Law Review 1391, 1393-4.

⁴⁸⁸ Sganga [n 107].

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Dusollier [n 487]; Cohen [n 483]; Litman [n 483]; Sganga [n 107]; Peukert [n 482].

⁴⁹² Caterina Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (Edward Elgar 2018) 222.

⁴⁹³ Ibid 205.

and art. The Court emphasized that the potential licensability of a snippet was insufficient to allow copyright enforcement “to prevail over the artistic freedom of a new author and the public goal of cultural development of the community”⁴⁹⁴.

CJEU jurisprudence is not as straightforward. While in cases such as *Scarlett Extended* where the Court confirmed the inviolable nature of IP rights as well as their inability to offer absolute protection, recent cases such as *Funke Medien*, *Pelham* and *Spiegel Online* have restricted the application of fundamental rights when interpreting copyright exceptions. Now they can only be applied as part of the internal workings of the European copyright system to the extent that the provision is not harmonised by EU law. However, offering some breathing space to national courts, in these cases, the CJEU explained that they must ensure that the effectiveness of exceptions is safeguarded, providing also extensive interpretations when these are needed, particularly when the protection of fundamental rights and freedoms is at stake.⁴⁹⁵ Commentary eloquently explains that this approach leaves:

*“the door open to the constitutionalisation but also mak[es it] clear that the constitutional door only gives way to a room which has been built to the blueprint found in the InfoSoc Directive”.*⁴⁹⁶

This section contends that the European copyright system, comprising the Information Society Directive, inherently includes the principle of implied authorisation. It supports the notion of constitutional propertization, at both the national level and the more limited CJEU level, to balance economic rights, supported by general trend of propertization, by balancing them against other social justifications of property, specifically creativity. The principle of implied authorisation, which implies consent through a proportional and facts-dependent assessment of the relevant fundamental rights, arguably extends to a balance between the contractual restriction and the exercise of the exception as an objective right. Hence there is potential that the principle of implied authorisation could provide the doctrinal foundation to prevent contractual overrides when the purpose is for access to and use of works online to create additional creativity.

⁴⁹⁴ Sganga [n 492] 207; Mimler [n 109].

⁴⁹⁵ *Funke Medien* at [71]; *Spiegel Online* at [55].

⁴⁹⁶ Sebastian Felix Schwemer and Jens Schovsbo, ‘What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ in Paul Torremans (ed) *Intellectual Property Law and Human Rights* (Wolters Kluwer 2020).

In the context of authors' assignment, it is widely accepted that authors sit in a more disadvantage position than exploiters when negotiating contracts for distribution.⁴⁹⁷ So it would not be surprising if exploiters decide to pressure authors to agree to exclude the application of the principle of authorisation. However, as we saw in Chapter I and II, the principle of implied authorisation is similar in effect to the doctrine of exhaustion and founded on the link between self-determination and freedom of expression to ensure access to and use of previous works. Given the fundamental role of artistic communication, it would be catastrophic if authors were able to limit the application of authorial consent for these uses as it would strike the heart of the principle for implied authorisation: Namely, providing room for subsequent creativity that forms part of concepts of self-autonomy and the extended personhood theory. The only possible caveat to this prohibition of excluding authorial consent, addressed in the previous chapter, relates to artistic reputational harm given its potential impact on the author's relationship with their work.

Lastly, there is a question regarding the relationship between the principle of implied authorisation and the licensing framework outlined in art. 17 DSM, including the now mandatory exceptions of parody, pastiche and caricature. It has widely been acknowledged that, dependent on the style of implementation of art. 17 DSM Directive, it has the potential for platforms to use technological solutions, to avoid liability, that lead to using upload filters and other forms of algorithmic content monitoring.⁴⁹⁸ In the case of national implementations using the "stay down" method which arguably disproportionately affects authors' and users' recourse to copyright exceptions needed for creativity. The DSM Directive attempts to mitigate this impact by requiring member states to ensure that users can rely on quotation, caricature, parody of pastiche when uploading and making available content generated by users on platforms.

However, whether algorithmic copyright enforcement can detect caricature, parody or pastiche remains to be proven.⁴⁹⁹ *Prima facie*, it appears that any use, no matter the size or commercial nature, will be detected as a potential infringement and could result in uploads "staying down" until clarified. Although it is discussed in more detail in Chapter IV, the German implementation evidences a different approach where users tag works as legitimate.

⁴⁹⁷ Schovsbo [n 477] 209.

⁴⁹⁸ Westkamp [n 24] 64; Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20 German Law Journal 840; Martin Husovec, 'Remedies First, Liability Second: Or Why We Fail to Agree on Optimal Design of Intermediary Liability' in Giancarlo Frosio (ed) *Oxford Handbook of Online Intermediary Liability* (OUP 2020).

⁴⁹⁹ Dan L. Burk, 'Algorithmic Fair Use' (2019) 86 University of Chicago Law Review 283.

These stay up unless the upload is abusive, then right holders can have it removed automatically, triggering an internal complaints mechanism. Lastly, a direct line of payment is introduced between platforms and authors for when a parody, pastiche or caricature of their work is uploaded. Such an approach, which puts both the initial and subsequent author at the centre of copyright, cleverly avoids over blocking and encourages exploiters to then enter into licensing agreements, both outcomes which ultimately support and foster creativity online.

The German implementation evidences a practical example of the principle of implied authorisation online. To the extent that the legislation is not found to conflict with art. 17 DSM Directive, the approach supports the claim that the new licensing structure, when implemented in a reasonable and proportional manner, inherently comprises the principle of implied authorisation. The Directive itself also overall, focuses on creating an environment where platforms are licensed for uploads using previous creative works. Commentary reflects on the wide range of licensing categories available⁵⁰⁰, finding that the “broad margin of discretion” given to member states could weaken traditional arguments against authorisation via statutory licensing and mandatory collective licensing.⁵⁰¹

Critics of countries, such as Germany, which introduce versions of the latter, contend that a forced licensing mechanism conflicts for industries reliant on exclusivity as a business model.⁵⁰² This sections asserts that art. 17, if adopted in a compliant manner to the principle of implied authorisation, can safeguard artistic creativity online without impacting exploiters’ business models to distribute content online. Though section 3 will examine the nature of creative and commercial uses online in more detail, it suffices to note here that an approach which places authors, including users, at the centre of the European copyright system ultimately benefits the future creativity which does not compete with the distribution of previous creative works by exploiters.

At the core of this conflict between copyright and contract law are the boundaries which delineate copyright holders’ monopoly over subsequent digital use of a copy of a work protected by copyright and other related rights. The patchwork of provisions applicable grounded in a variety of Directives and national law compounds an already problematic

⁵⁰⁰ João Pedro Quintais and Martin Husovec, ‘How to license article 17 of the Copyright in the Digital Single Market Directive? Exploring the implementation options for the EU Rules on content-sharing platforms,’ (2021) 70 GRUR International 325. These include direct licensing, voluntary collective licensing, collective licensing with extended effect, mandatory collective management, statutory licensing and hybrid licensing.

⁵⁰¹ Ibid.

⁵⁰² Ted Shapiro and *et al*, ‘3C Copyright Law Session. EU Copyright Reform’ at the 27th Annual Fordham Institute Conference on International Intellectual Property Law and Policy (25 April 2019) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=ipli_conf_27th_2019> accessed 6 November 2022.

balance⁵⁰³ between contractual freedom and the wider policy reasons including the fundamental rights and freedoms in the Charter that balance the grant of a copyright monopoly. This section has built upon literature proposing an alternate reading of the “propertization” of copyright to suggest that the principle of implied authorisation provides the doctrinal foundation to prevent contractual overrides when the purpose is to for access to and use of works online to create additional creativity. Given its ability to imply consent through a proportional and facts-dependent assessment of the relevant fundamental rights, it is a mechanism that allows exceptions, framed as objective rights, to be balanced against restrictive contractual terms supported by subjective rights.

The link between self-determination and freedom of expression, which is crucial for authors to communicate themselves artistically, also provides the principle of implied authorisation with a non-waivable nature. One that cannot be excluded by previous authors to the detriment of future authors, including users. This culminates in the section contending that such an approach is evident not only in the German implementation of art. 17 as a form of a mandatory collecting licence to the benefit of authors, but art. 17 generally due to its call to motivate exploiters to enter into licensing agreements with platforms to cover all uses. Hence this section has presented the principle of implied authorisation as an inherent principle within the European copyright system, including art. 17 DSM Directive, and capable of preventing its own contractual override, given the fundamental status of creative communication for authors, including users.

However, the story does not end here as the use of TPMs, supported by contractual restrictions to access, can prevent future authors from being able to create transformative or referential works. This is particularly significant as the DSM Directive states that technological measures established in the Information Society Directive remain essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightsholders.⁵⁰⁴ Though this is prefaced with the caveat that such technological protection cannot prevent the enjoyment of copyright exceptions and limitations within the Directive,⁵⁰⁵ the balance between these stances of protection and access are almost intentionally left ambiguous. In the next section we will unravel what the EU legislature means by this recital in

⁵⁰³ Stavroula Karapapa, *Private Copying* (Routledge 2012) 160. Karapapa explains that “the exercise of copyright limitations is highly uncertain in the online environment which is increasingly governed by contract”.

⁵⁰⁴ DSM Directive, recital 7.

⁵⁰⁵ DSM Directive recital 7.

the context of the evolution of digital locks and the relationship they have with the principle of implied authorisation.

3.2. THE EXPLOITERS' NARRATIVE: A CAUTION AGAINST ALGORITHMIC ENFORCEMENT

As suggested in the previous section, the advent of technological enforcement is really an expansion of contractual override. However, it comes with the advantage that while contractual terms can be found to be unlawful and inequitable, in certain circumstances, technological measures as a condition of access to copyright work are protected and even encouraged in European copyright law. From the perspective of creativity online, the prohibitive effects of provisions within the European copyright system that protect TPMs, used to 'lock' access to works, is felt directly by authors and users. This is particularly the case regarding UGC if users share creative reuses of works where the original work was subject to TPM restriction. These legal provisions have undoubtedly bolstered exploiters to "develop practices and processes that increasingly discourage UGC creators from uploading material [and]... are heavy-handed and without proper legal foundation"⁵⁰⁶.

This section will first trace the history of TPMs and their protection within European copyright law, focusing on their impact on creativity online. Secondly, the section will examine the extent to which art. 17 DSM Directive reflects a long-standing exploiter narrative within the European copyright system. Lastly, this section considers the extent to which TPMs can block the practical implementation of the principle of implied authorisation to the detriment of creative access and use of works. This ultimately begins the discussion of whether TPMs that block access which is required for creativity should be unlawful which will be more comprehensively addressed in the following section.

Following international pressure from right holders to adequately protect exploitation rights in the digital environment, TPM protection was introduced to protect right holders from those who circumvent these digital locks to get access to works without authorisation.⁵⁰⁷ The

⁵⁰⁶ Warren B. Chik, 'Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content under Copyright Law' (2011) 11 John Marshall Review of Intellectual Property Law 240.

⁵⁰⁷ Jessica C. Lai and Christoph B. Graber, 'Is digital text-watermarking the long-desired user-friendly digital rights management?' (2016) 38 EIPR 391, 392. See, Stefano Giovanni Rizzo, 'Fine-grain watermarking for intellectual property protection' (2019) 10 EURASIP Journal of Information Security; Anthony D Rosborough, 'Unscrewing the Future: The Right to Repair and the Circumvention of Software TPMs in the EU' (2020) 11 J

WCT requires Contracting Parties to implement safeguards against the circumvention of effective TPMs and provide legal remedies when authors use TPMs regarding their exclusive rights under the WCT or Berne Convention.⁵⁰⁸ The legal protection must be adequate, and the legal remedies, effective. However, the lacking guidance on TPM protection implementation has raised many issues when attempting to comprehend the intended minimum standard of protection.⁵⁰⁹

The method of implementation clearly varies per Contracting State resulting in uneven TPM protection across the Contracting Parties. Given the complex task of balancing the prevention of unauthorised access with the free flow of digital information, it is impossible to comprehend how uniform TPM protection could be achieved by the inclusion of vague and ambiguous language, particularly when the only proviso is that such protection and related remedies must be adequate and effective. However, in the EU, this is achieved through three legal instruments, which some argue results in overprotection of the interest of exploiters⁵¹⁰: Information Society Directive; Software Directive; and the Conditional Access Directive (CAD).

Art. 6(1) of the Information Society Directive states that:

“Member States shall provide adequate legal protection against circumvention of any effective technological protection measure, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.”

Protection is also extended against those that manufacture, import, distribute, sell, rent, advertise for sale or rental, or possess for commercial purposes devices, products or components of services related to circumventing “any effective technological measures”.⁵¹¹ These acts must occur on a sliding scale of intentions: Either the alleged infringer simply

Intell Prop Info Tech & Elec Com L 26, 35 at [40]. Rosborough explains that while the EU was of the view that TPMs should require knowledge or intent on behalf the person circumventing, the US, according to the commentary, “advocated strongly against it”,

⁵⁰⁸ WCT, art. 11.

⁵⁰⁹ Instead of providing a detailed explanation of what TPM protection should encapsulate, the WCT uses broad terms, providing Contracting Parties with considerable leeway for implementation. There was no explicit requirement for Contracting Parties to incorporate anti-circumvention rules into domestic copyright laws, allowing more general laws, such as *sui generis* or competition law.

⁵¹⁰ Petroula Vantsiouri, ‘A legislation in bits and pieces; the overlapping anti-circumvention provisions of the Information Society Directive, the Software Directive and the Conditional Access Directive and their implementation in the UK’ (2012) 34 EIPR 587.

⁵¹¹ Information Society Directive, art. 6(2).

promotes, advertises or markets the circumvention service; they have a limited commercially significant purpose other than to circumvent; or, they are primarily designed to enable facilitating the circumvention.⁵¹²

The Information Society Directive defines “technological measures” as:

*“any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright, or any right related to copyright”*⁵¹³

by law or *sui generis* rights pursuant to the Database Directive. They are deemed “effective” where the use of a protected work or other subject-matter is controlled through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter of a copy control mechanism, which achieves the protection objective.⁵¹⁴

From the perspective of UGC, it is near impossible to rely on the exceptions and limitations outlined in art. 5 Information Society Directive. The only possible route is if in the absence of a rightholder implementing a voluntary measure, such as a licence, then the Member State must ensure that rightholders provide access if the use is supported by a limited number of exceptions and limitations provided in national law.⁵¹⁵ An example would be a member state imposing an appropriate measure (i.e. mandatory) by requesting the TPM to be modified by the rightholder.⁵¹⁶ Rightholders additionally have the possibility to avoid these requirements entirely due to the Directive removing the ability to implement exceptions-based measures if the TPM is being used in the context of licensed interactive on-demand services.⁵¹⁷ The outcome is that TPMs generally override copyright exceptions and limitations.

⁵¹² Information Society Directive, art. 6(2).

⁵¹³ Ibid art. 6(3).

⁵¹⁴ Ibid.

⁵¹⁵ Ibid art. 6(4) and recital 51; The exceptions and limitations that must be protected are arts. 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e).

⁵¹⁶ Note that commentary explains that “no provisions of the kind have been implemented by Member States, despite the absence of voluntary agreements”. See, Marcella Favale, ‘Approximation and DRM: can digital locks respect copyright exceptions?’ (2011) 19 International Journal of Law and Information Technology 306, 311; also see, Rossana Ducato and Alain Strowel, ‘Ensuring Text and Data Mining: Remaining Issues with EU Copyright Exceptions and Possible Ways Out’ (2021) 43 EIPR 322.

⁵¹⁷ Information Society Directive art. 6(4)(4); Quintais [n 133].

Commentary describes this state of affairs as a “copyright nexus”⁵¹⁸ where:

*“copyright limitations not declared as potentially enforceable at the national level remain unenforceable as a defence to acts by which TPMs are circumvented”.*⁵¹⁹

Firstly, the “absolute protection” granted TPMs is through the lens of copyright, meaning that even though they clearly fail to meet the threshold for copyright to subsist, they benefit from a comprehensive monopoly right. Secondly, given the extensive leeway granted Member States to implement the list of twenty-one exceptions and limitations in the Information Society Directive, the application will of course, vary. In combination, the extent of protection granted the status of TPMs across Member States also greatly varies,⁵²⁰ and thirdly, the concept of overprotection is rampant.⁵²¹

The EU is generally left with a digital copyright protection framework that at its very core conflicts with creativity as well as legal certainty, given its ambiguous implementation at national level. Yet, significantly, the Software Directive does not prohibit the act of circumvention and the CAD leaves it to the discretion of Member States. Much of the availability of the doctrine of exhaustion pursuant to the Software Directive, depends on the subject matter of the work which the TPM protects, when a creator circumvents a TPM to gain access to a work.⁵²² In *Sony v Ball*, a chip was designed to run both authentic games designed for the geographical area where the gaming consoles were intended, as well as unauthorized

⁵¹⁸ Guido Westkamp A, 'Code, Copying, competition: The Subversive Force of Para-Copyright and the Need for an Unfair Competition Based Reassessment of DRM Laws after Infopaq' (2010) 58 J Copyright Soc'y USA 665, 668; Guido Westkamp B, 'Code protection, end users and fair use: Mutations of the copyright nexus debate' (2009) 4 Computer Law Review International 104; Guido Westkamp C, Digital rights management, internet governance and the autopoiesis of modern copyright law' (2008) 7:4 Contemporary Issues in Law; Kamiel Koelman 'A Hard Nut to Crack: The Protection of Technological Measures' (2000) 22(6) E.I.P.R. 272, 278. Koelman questions in relation to the pending implementation of the Information Society Directive, at the time, whether the EU legislature intended for circumvention to be viewed as a copyright infringement.

⁵¹⁹ Westkamp A [n 518] 668.

⁵²⁰ Ibid at 667.

⁵²¹ TPMs can be used to regulate access to works where copyright, at best, partially subsists, as well as against access that is non-infringing. Bohdan Widła, 'More than a game: Did *Nintendo v. PC Box* give manufacturers more control over the use of hardware?' (2017) 33:2 Computer & Security Review 242. Widła suggests that “the threshold of copyrightability is rather low” given that “in *Infopaq* the CJEU ruled that an extract of a protected work comprising 11 words may manifest the author’s own intellectual creation”. This is reflected at national level in 2007 TPI Bruxelles, 13 February 2007 - *Google Inc v Copiepresse SCRL*.

⁵²² Petroula Vantsiouri, 'Inconsistencies in the regulation of anti-circumvention in the EU' in B.Maria, A. Eugenia & I. Iglezakis (eds) *Values and Freedoms in Modern Information Law and Ethics* (4th International Seminar on Information Law: 2012) <file:///C:/Users/georg/Downloads/articles_2012_07.pdf> accessed 4 January 2023.

copies and games from other regions ‘foreign’ to the console.⁵²³ Laddie J held that the console’s authentication system came within the broad interpretation of a “technological measure” but also confirmed the low threshold for TPM protection in finding that the most important factor is that there is “copy protection”, regardless of its form.⁵²⁴

This exploitation-based narrative to support granting copyright protection against circumvention can also be seen in *Mulholland Drive* where the French Supreme Court confirmed the status of TPMs against the private-copying exception for the purposes of transferring the format a film from DVD to VHS.⁵²⁵ As such a copy would conflict with a normal exploitation of the work, the exception could allow lawful access.⁵²⁶ In stark contrast to the view of the Paris Court of Appeals, the court explained that normal exploitations must be determined against the background of the enhanced risk of piracy in the digital environment, and that the exploitation of films on DVDs was important for recouping the investment in film productions.⁵²⁷ The rejection of consumer-based arguments such as format shifting in *Mulholland Drive* confirm the overarching emphasis on investment-centric justifications within modern European copyright law, and not the bolstering of users, including those who create.

Such an approach is also apparent in *Nintendo Co Ltd v Playables Ltd*.⁵²⁸ Here, the defendants imported devices into the UK that could store and play many copies of Nintendo DS games. The TPMs circumvented comprised the shape of the slot on the consoles which corresponded to the shape of the game cards, the boot-up software which was permanently stored on the console, and the use of shared encryption technology and scrambling. The UK High Court held that while the first TPM was unlikely to meet the threshold of an effective technological measure, the former two did. Floyd J also held that while the information stored on the card included a computer program, it also comprised graphics and other works which were copyright works “other than computer programs”. Significantly Floyd J confirmed that manufacturing and selling TPM circumvention devices is a tort of strict liability. This confirms

⁵²³ *Kabushiki Kaisha Sony Computer Entertainment Inc. Also Trading as Sony Computer Entertainment Inc. (A Company Incorporated under The Law of Japan), Sony Computer Entertainment Europe Limited, Sony Computer Entertainment Uk Limited v Gaynor David Ball, Gary Edmunds, Boris Baikov, Ina Sorokovich, Igor Tiporov, K Shashkov, Stepan Gvozdeff* [2004] EWHC 1738 (Ch) (*‘Sony v Ball’*).

⁵²⁴ *Ibid* at [43].

⁵²⁵ Cass. Civ, 28 February 2006, no. 05-15824 - *Mulholland Drive*; Martin Senftleben, ‘The international three-step test. A model provision for EC fair use legislation.’ (2010) 1 JIPITEC 67,701 at [23].

⁵²⁶ Senftleben [n 525] 71 at [23].

⁵²⁷ *Ibid* at [24].

⁵²⁸ *Nintendo Co Ltd v Playables Ltd* [2010] EWHC 1932 (Ch); [2010] E.C.D.R. 14; [2010] 7 WLUK 789 (Ch D) (*Playables*).

that liability will be found regardless of whether it is done for a non-infringing purpose, such as one supported already by copyright exceptions and limitations.

As suggested already in this section, there are two TPM circumvention regimes within the European copyright system based on either the Information Society Directive or the Software Directive. In *Grund*,⁵²⁹ the CJEU was asked whether devices which allow gaming consoles to be circumvented to run unauthorised videogames are computer programmes or hybrid products. The case was ultimately withdrawn after being notified by the CJEU of the judgement in *Nintendo v PC Box*.⁵³⁰ In a similar factual scenario, the defendants in *Nintendo* argued that Nintendo's use of TPMs attempted to:

*“prevent the use of independent software which does not constitute an illegal copy of videogames, but is intended to enable MP3 files, movies and videos to be read on consoles, in order to fully use those consoles”.*⁵³¹

This seems to reflect the consumer and competition concerns expressed in *Mulholland Drive*.

However, the CJEU defined video games as constituting complex matter, meaning that they comprise software as well as graphic and sound elements which, “although encrypted in computer language, have a unique creative value which cannot be reduced to encryption”⁵³². The CJEU appeared to confirm the dominance of investment-centric logic within European copyright law by confirming a broad interpretation of whether a technological measure is “effective”. The court emphasized that all that is required is that the measure relates to:

*“any technology, device or component that, in the normal course of its operation, is design to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder...”*⁵³³

Affirming the Advocate General's opinion, the court extended TPM protection to measures including “encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism” as it complies with recital 9's requirement that author's receive a high level of protection.⁵³⁴ Lastly, the CJEU's guidance on whether legal protection of a TPM

⁵²⁹ C-458/13 *Grund v Nintendo Co Ltd*. EU:C:2014:589

⁵³⁰ C-355/12 *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v PC Box Srl, 9Net Srl* ECLI:EU:C:2014:25 (*Nintendo*).

⁵³¹ *Nintendo* at [15].

⁵³² *Ibid* at [23].

⁵³³ *Nintendo* at [24].

⁵³⁴ *Ibid* at [27].

is proportional is limited to advising national courts to consider whether other forms would have caused less interferences with the activities of third parties that do not require authorisation while still providing protection.⁵³⁵

In the wake of this decision, commentary suggested that it would “likely increase the burden of proof on console manufacturers to show that their TPMs are proportionate, not excluding legitimate uses, and that any circumvention products they seek to challenge are primarily aimed at illegitimate use”.⁵³⁶ Yet, since *Nintendo* it is yet to be seen how low the threshold is to prove that use of a TPM is proportional. Some commentators contend that the question of legitimate use would have been better resolved if the Software Directive was applicable,⁵³⁷ and that “a more nuanced understanding of the *lex specialis* doctrine in *Nintendo v PC Box* [is required]”⁵³⁸. Pursuant to the Software Directive, distribution of unauthorised circumventing devices is prohibited if it is the sole intended purpose.⁵³⁹ This is clearly a much narrower standard than the art. 6 Information Society Directive.⁵⁴⁰ The ability to exhaust digital copies pursuant to the Software Directive could also be a limitation on TPMs restricting transfer of software.⁵⁴¹ Such an approach has been described as both acting as a “policing mechanism to restrict misuse and expansive application of technological protection” and “tailor[ing] the legal standard to specific technological features” such as “forward and delete technology”.⁵⁴²

The contrast between the approaches of the Information Society Directive and the Software Directive regarding TPMs and investment-centric logic could not be clearer in *VG Bild Kunst*. As we observed in Chapter II, in this case the CJEU held the communication right is infringed by linking via framing if such use circumvents TPMs and allows users of the

⁵³⁵ *Nintendo* at [30]-[35].

⁵³⁶ Heather Newton & *et al*, ‘CJEU increases burden on manufacturers of game consoles to prove the unlawfulness of devices circumventing technological protection measures and their TPMs are proportionate’ (2014) 9 *JIPLP* 456, 458.

⁵³⁷ Widła [n 521] 247.

⁵³⁸ Tito Rendas, ‘Lex specialis(sima): videogames and technological protection measures in EU copyright law’ (2015) 37 *EIPR* 39.

⁵³⁹ Software Directive, art. 7(c).

⁵⁴⁰ Rosborough [n 507] 38 at [54] & 41 at [69]. Rosborough explains that this standard “leaves open the possibility of promoting and advertising the means of circumvention so long as that is the sole intended purpose for such means. However, this does not mean that the alternative pursuant to the Software Directive is an improvement as the list of exceptions and limitations in the Information Society Directive are not applicable to the former.

⁵⁴¹ Shubha Ghosh & Irene Calboli, ‘Exhausting intellectual property rights. A comparative law and policy analysis’ (Cambridge University Press 2018) 165.

⁵⁴² *Ibid*.

subsequent website to access that work.⁵⁴³ Commentary explains that “accordingly, a licence to publish a work under the conditions that TPMs are installed to prevent framing constitutes a limited authorization to a specifically defined public”⁵⁴⁴. We can plainly observe the CJEU entrenching the copyright nexus as despite TPM protection not meeting the threshold of copyright originality, it receives equal protection to an actual communication of a work without authorisation. As previously stated, the CJEU link this unlawful framing to investment-centric logic to support exploiters. The court notes that if this were lawful, copyright holders would be unable to claim an appropriate reward for the use, ultimately conflicting with the specific subject-matter of copyright.

The factor of fair compensation seems to mirror *Copydan Båndkopi v Nokia Danmark A/S* where the CJEU further delineated, *inter alia*, the relationship between TPMs, fair compensation and private copying.⁵⁴⁵ Here the CJEU held that:

*“regard to the voluntary nature of technological measures... the Court has held that even where such a possibility exists, the non-application of those measures cannot have the effect that no fair compensation is due.”*⁵⁴⁶

However, and perhaps more troubling for the proportionality requirement in *Nintendo*, Member States have discretion to make the level of compensation dependent on whether technological measures are applied.⁵⁴⁷ This means that if the technological measure is found not to comply with the principle of proportionality, national courts can still discount this fact and award a higher level of compensation.

These arguments, based on ensuring that copyright holders are fairly compensated for access to and use of works, has stood the test of time within the European copyright system, particularly given the notion of pay being enshrined with the recitals of the Information Society Directive.⁵⁴⁸ As we saw in Chapter I and II, a similar style argument was used in relation to art. 17 DSM Directive. The argument was that there was a value-gap between copyright holders, including authors and exploiters, effected by platforms that monetize creative content. The answer from lobbyists was to incentivise licences between copyright holders and platforms by

⁵⁴³ *VB Bild-Kunst* at [40].

⁵⁴⁴ Péter Mezei & Bernd Justin Jütte, ‘CJEU clarifies that framing infringes copyright if TPMs are circumvented’ (2021) 16 JIPLP 461, 462.

⁵⁴⁵ C-463/12 *Copydan Båndkopi v Nokia Danmark A/S* ECLI:EU:C:2015:144 (*‘Copydan’*).

⁵⁴⁶ *Ibid* at [71].

⁵⁴⁷ *Ibid* at [72].

⁵⁴⁸ Information Society Directive, recitals 35, 36, 38, 45, and 52.

introducing platform liability for unauthorised uses of works uploaded on to platforms. Though there are provisions aimed at protecting uses of works authorised by law, namely parody, pastiche, caricature and quotation, by and large, it was accepted that unless platforms implement technology that can verify these types of unauthorised uses, the creative reuse of content will “stay down”.

This section contends that such an approach mirrors, in effect, the implementation of TPM protection within European copyright law.⁵⁴⁹ The “stay down” implementation involves authorised uploads being dependent on a system that preferences the status of the exploiter over users, including authors, online. Only until the upload is verified as a legitimate parody, pastiche, caricature or quotation can it be allowed online. Not only do TPMs preference exploiters by restricting access at the outset, but a similar result unfolds. Though, theoretically, TPMs must provide access based on some exceptions, not only are there practical hurdles to initiate such a complaint at member state level, but it is limited by the carve-out for interactive on-demand services as well as licensing being framed as a voluntary measure. In both situations, technology and contractual terms can and are used to override access despite exceptions authorising use.

Both TPM circumvention provisions and art. 17 DSM Directive clearly lack the balance required between all copyright interests to support creativity online. It means that despite lacking access to works and platforms for the purposes of artistic communication, users, including authors, will continue to access and use previous works, risking liability and their work not being communicated and distributed on platforms. The ability of algorithmic enforcement to verify authorised uses has already been questioned in Chapter II as well as substantially by the literature,⁵⁵⁰ ultimately stifling creators’ ability to disseminate their works online, a central feature of online creativity. Similarly protection against TPM circumvention impacts creators’ access to works to such an extent that it presents major obstacles when users’ rely on the UGC exception recently adopted in Canada.

Commentary reflects that:

⁵⁴⁹ Westkamp [n 24] 76.

⁵⁵⁰ Ibid; Burk [n 472]; Kris Erickson & Martin Kretschmer, ‘Empirical approaches to intermediary liability’, (2019) CREATE Working Paper 2019/6; Kris Erickson & Martin Kretschmer, ‘This Video is Unavailable: Analyzing Copyright Takedown of User-Generated Content on YouTube’ (2018) 9 JIPITEC 75; Sabine Jacques *et al*, ‘An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity’(2018) 15SCRIPTed 277; Martin Senftleben and *et al*, ‘The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform’(2018) 40 EIPR 149.

*“Currently, restrictions on digital lock circumvention are nearly all-encompassing, thereby preventing even legitimate copying activities.... [I]nnovative creators cannot legally access the content they need. These restrictions undermine Canadian innovation and the public domain”.*⁵⁵¹

Commentary have similarly cautioned that though some of the new mandatory copyright exceptions introduced in the DSM Directive cannot be overridden by contract, they can be limited by TPMs. They explain that “the relationship between TPMs and exceptions [in the Information Society Directive] is partially grandfathered into the DSM Directive” with the exclusion of the interactive on-demand services contractual override provision.⁵⁵²

This development is ultimately the latest expansion in a long line of measures created, used and advocated by exploiters to safeguard investment and digital business models. As we will observe in the following chapter, comparatively, Germany’s implementation clearly stands apart from the “stay down” approach of art. 17 DSM Directive implementation which reflects, and potentially, entrenches protecting against TPM circumvention. The possibility of users flagging their content as lawful, with the adoption of an initial “stay up” approach, is innovative as it counters the eternal copyright narrative of investment-centric logic to support exploiters’ exploitation of copyright works online. However, there is an outstanding question of the relationship between such approaches which appear to implement the principle of implied authorisation with TPMs generally.

In the previous section, we observed that the principle of implied authorisation is capable of preventing its own contractual override due to its status within the European copyright system. However, the current mechanisms for users to appeal locked access despite lawful use, such creative reuse of works through the principle of implied authorisation, are completely unhelpful. Instead, TPMs should be subject to further conditions which is arguably a policy that the DSM Directive failed to consider. Short of legislative intervention, all that can be hoped for is clarification from the CJEU that communicating content which creatively reuses a work that was made available subject to a TPM is lawful based on the principle of implied

⁵⁵¹ Carys J. Craig, ‘Meanwhile, in Canada... a surprisingly sensible copyright review’ (2020) 42 EIPR 184, 188.

⁵⁵² Quintais [n 133]; Ducato and Strowel [n 516]; Thomas Margoni and Martin Kretschmer, ‘A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology’ (2022) 71 GRUR International 685; LIBER, ‘Europe’s TDM Exception for Research: Will It BE Undermined By Technical Blocking From Publishers?’ <<https://libereurope.eu/article/tdm-technical-protection-measures/>> accessed 9 November 2022.

authorisation. Other issues of access, linked to the process of creativity and inspiration, are simply impossible without reform.

However, the ability of the principle of implied authorisation to build upon the innovative “proPERTIZATION” discourse, could lead the way forward in proposing that use of TPMs and their protection within copyright law, without specific boundaries supporting creativity online, is unlawful and negatively impacts the social justifications of treating copyright as property. Drawing upon natural law ideals of self-determination and freedom of communication from a broader perspective of personhood theory, as observed in Chapter I, this section contends that the principle of implied authorisation can serve as the foundation to reform TPM policies in the European copyright system. As will be discussed in the following section, the social and communal reality of creativity online necessarily involves reuse and subsequent sharing as part of the creative process and possibly extends to the notion that technical mechanisms which restrict it are unlawful and unjust.

In this section we have observed that the WCT Contracting Parties came together in response to the developing digital age and the fear that copyright holders needed legal safeguards against the circumvention of TPMs. However, what resulted was a very broad and ambiguous standard as there were no specifics on how TPMs should be protected. Naturally, this meant that protection varies between Contracting Parties. Likewise, the EU implemented an equally ambiguous threshold for TPM protection that has required judicial interference from the CJEU and national courts to fill these gaps. Generally, the circumvention of TPMs has been dealt with strictly by national courts, cementing the notion of the copyright nexus.

From its broad interpretation in *Sony v Ball* to the recurring investment-centric logic of protecting copyright exploitation via online business models, evidence both in *Mullaholand Drive* and *Nintendo*, it is clear that national courts preference the status of exploiters despite consumer and competition law concerns. We observed that this supports the underlying narrative of EU copyright law: That it is determined through the application of investment-centric property logic. The existence, however, of the Software Directive, presents an outlier to this narrative given its more detailed boundaries for protection against TPM circumvention. However, *Nintendo* clarifies, as it did indirectly for the doctrine of exhaustion, that the Software Directive can only be applied to computer programmes given its *lex specialis* nature, to which complex products such as video games, comprising of software, audio and visual elements are excluded.

This forms a dual system for the protection of TPMs, clear in *VG Bild* where an arguably non-infringing purpose was found liable due to the requirement of fair compensation. We saw

that this situation was heightened in *Copydan* where the proportionality requirements of TPM implementation can be absent, and yet a copyright holder is still able to be compensated. Fair compensation arguments for copyright holders led us to consider the striking similarity that TPMs have with art. 17 DSM Directive when implemented using a “stay down” approach. Both techno-legal approaches to access and artistic communication have the effect of stifling online creativity and appear to be steeped in investment-centric logic rhetoric by both the CJEU and recitals of both the Information Society Directive and DSM Directive.

It is from this foundation, that the section proposes that the implementation of art. 17 DSM Directive should not follow suit. Instead, an approach should be adopted which from the outset supports authors, including users. Additionally, the CJEU should clarify that the TPM provisions outlined in art. 6(4) Information Society Directive do not apply to the new mandatory and non-contract overridable copyright exceptions in the DSM Directive, even though it has already carved-out on-demand interactive licenses. While the principle of implied authorisation could potentially be excluded by the continued use of TPMs, this section contends that it serves as an effective foundation to begin the discussion on the unlawful and unjust nature of exploiters’ exclusionary behaviour in the context of creativity.

3.3. SHOULD EXPLOITATION RIGHTS BE LIMITED VIA A MISUSE OF COPYRIGHT?

As we have observed throughout this thesis, the Information Society Directive created an environment that privileges exploiters without any critical reflection on the blurred lines between authors and users, nor the essential role creativity plays within the notion of authorship.⁵⁵³ However, earlier in this chapter, we noted that when copyright is interpreted through the lens of constitutional propertization, it allows exploitation rights to be subject to balancing against social property justifications, in our case, creativity. The question is how such balancing should occur. The commentary contend it could be addressed through notions of misuse and abuse of both exploitation rights and the status that the European copyright

⁵⁵³ This is despite the language of the Information Society Directive mentioning the needs to promote, support and disseminate culture. See, Information Society Directive, Recitals 11 (‘A rigorous and effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources ...’), 12 (‘Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint’), 14 (‘This Directive should seek to promote learning and culture ...’) and 22 (‘The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights ...’).

system affords them.⁵⁵⁴ The idea being that certain dysfunctional and abusive uses of exploitation rights go beyond their initial grant.

This section seeks to consider whether exploiters' behaviour and the impact of the exploiters' narrative should be considered a misuse of copyright. It aims to build upon the literature to determine whether the principle of implied authorisation practically addresses exploiter behaviour that impacts creativity and falls outside the specific subject-matter protected by copyright. First, the section reflects on the notion of abuse and misuse within the European copyright system and identifies why a doctrine of copyright misuse could be helpful online. Then, we will examine the proposed doctrine of copyright misuse within the literature and consider its application in relation to creativity online. Lastly, this section will explore the link between the doctrine of copyright misuse and the doctrine of exhaustion and contend that the latter comprises the former as an inherent balancing mechanism of European copyright law.

This chapter has so far illustrated that there is a severe imbalance between the bargaining powers of users and exploiters due to reliance on contractual terms and technological 'locks' to control every single use of a copyright work online. As we have discussed already, from a creative perspective, this "permissioned culture" inhibits the production and dissemination of future creativity. Additionally, there are questions whether exploitation rights should extend to govern creativity online when, arguably, these rights are linked to investment. One way of viewing this conflict between exploiters and users, including authors, is to argue that this extension is a misuse of copyright. It requires examining the conduct of exploiters and determining whether it goes beyond the grant of copyright due to its dysfunctional or abusive nature.⁵⁵⁵

Commentary draws upon specific circumstances within CJEU jurisprudence where it has been found that the exercise of exploitation rights by rightsholders could be categorised as such.⁵⁵⁶ Evidenced by the existence/exercise dichotomy and the specific subject matter test, Community-wide exhaustion, the fair balance of rights and interests, fundamental rights, competition law and consumer law, there are broadly mapped instances by the commentary where the application of exploitation rights have been curtailed. They remark that generally, CJEU decisions either focus on the relationship between fundamental rights and copyright, or competition law and copyright.⁵⁵⁷ The latter, largely relating to instances where a rightholder

⁵⁵⁴ Caterina Sganga and Silvia Scalzini, 'From Abuse to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48:4 IIC 405.

⁵⁵⁵ Sganga and Scalzini [n 554] 408.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid 421.

has refused to licence and abused a dominant position, is distinguished from the former and excluded from the doctrine of misuse of copyright.

This is because it is incompatible with the doctrine's focus on subjective rights.⁵⁵⁸ Commentary explains that abuse occurs when an exploiter's:

*“conduct significantly broadens her controlling power, often taking advantage of non-regulated grey areas, resulting in the creation of conflicts between copyright and other public/private interests”.*⁵⁵⁹

Hence, they propose that the doctrine of copyright misuse “could act as an additional tool to tackle distortive uses of copyright and strike a fair balance between exclusive rights and conflicting interests”⁵⁶⁰. In relation to creativity online, it is possible that the doctrine could be applied in a manner that helps rebalance users' and exploiters' interests online, by deterring the use of burdensome contractual terms and TPMs, unnecessarily restricting access.

The construct of misuse of copyright is helpful as it entrenches the boundaries of current exploitation rights by relating them back to their function.⁵⁶¹ Despite reliance, particularly in Community-wide exhaustion cases regarding the “essential function”, commentary explain that there is no overarching test in modern European copyright law.⁵⁶² In this way the doctrine of misuse of copyright acts to reconcile circumstances where the CJEU, as well as national courts, have found that the application of exploitation rights goes beyond their grant. The test for a misuse of copyright is as follows:

*“[I]n the case of (a) an exercise of a moral or economic right; (b) that constrains or prejudices the qualified interest of a counter-interested party; (c) in a disproportionate manner; and (d) without an objective justification based on the function of the right (reasonableness).”*⁵⁶³

In relation to prong (b), the commentary note that it comprises all:

⁵⁵⁸ Sganga and Scalzini [n 554] 424.

⁵⁵⁹ Ibid 407.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid 428.

⁵⁶² Ibid 407.

⁵⁶³ Ibid 428.

*“instances of dysfunctional use of copyright as it covers a range of potential effects of the rightholder’s conduct (from mere limitations to stronger constraints and damages) on the qualified interest of another”.*⁵⁶⁴

A “qualified interest” is said to include both subjective and objective rights, meaning that it is applicable in cases where fundamental rights and freedoms conflict, but also against wider public interests.⁵⁶⁵ Relating to creativity, we could assume that attempts to restrict access to platforms for the purposes of artistic communication could be termed a dysfunctional use of copyright impacting users that create and share content online as well as the broader public interest in supporting creativity.

The proportionality test in (c) is the core of the doctrine and requires a balance between the benefit gained by the rightholder and the harm caused.⁵⁶⁶ This is tempered by the reasonableness filter introduced in (d) and “weighs the proportion between harms and benefits by limiting the latter to what the rightholder can expect from a normal exploitation of the works, defined on the basis of the function(s) of the right”⁵⁶⁷. Equally, to the previous section, it appears that the misuse of copyright doctrine draws upon the distinction between exploiters’ interests and the public interest by considering what types of subsequent uses would interfere with the investment which grounds their grant. This could indeed be framed in a similar manner to the principle of implied authorisation which responds to the question of whether the subsequent use has a commercial nature.⁵⁶⁸

Additionally, the doctrine of misuse of copyright, like the principle of implied authorisation, considers the impact of moral rights. While the former identifies both economic and moral rights as subject to a proportional balancing assessment to determine the extent to which they go beyond the functions delineated by the EU legislature, the latter constructs personality rights, specifically artistic reputational harm, as an exception. It also carefully maps out the type of objective test required to prevent future authors from using works in a new creation. In this respect, it appears that the doctrine of misuse of copyright is broader than the principle of implied authorisation as there are no specific requirements, simply a harm-balancing assessment.

⁵⁶⁴ Sganga and Scalzini [n 554] 428.

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid 429.

⁵⁶⁷ Ibid.

⁵⁶⁸ We will explore this commercial nature of creative reuse in the next section by focusing on the extent to which the use is manifestly infringing.

As we have observed throughout this thesis, when reflecting upon the relationship between self-autonomy and creativity, it is clear that a balance must be struck between artists and future artists, given the significance of artistic communication. This is all the more obvious when examining cumulative and collaborative creativity through the lens of the extended personhood theory. However, to conflate economic rights, in terms of abuse, with the status of moral rights, in this thesis' view does not reflect the current balance of copyright interests addressed in the two previous sections of this chapter. Instead, it is recommended that by focusing on authorisation, not only can the exploitation rights of exploiters be side-lined, but the modern construct of the author can be bolstered and supported.

While it is arguable that the proportional balancing method described would most likely consider how the enforcement of moral rights could harm users that create and share content online, it is unclear how simultaneous claims for freedom of expression and the right to protect IP will be balanced against each other. Comparably, the principle of implied authorisation focuses on how to construct an objective claim of artistic reputational harm. It comprehensively considers how these competing claims should be reconciled. Such an approach appears to more clearly respond to the ambiguity introduced by the CJEU to balance relevant fundamental rights, in line with harmonisation efforts, which the doctrine of misuse of copyright contends that it solves.

The doctrine of copyright misuse also appears to continue the pitting of interests against each other by it focusing on whether there is a misuse. While there is merit in considering the use of exploitation rights that goes beyond the initial grant, whether through the CJEU extending the scope such as in *Pelham* or through the use of both contractual and technological overrides, this is again hard to justify in relation to authors. Instead, as will be discussed in more detail in the next chapter, the principle of implied authorisation's requirement that for such subsequent creative uploads, platforms must pay authors, better joins the interests of authors and users in a way that reflects the increasingly blurry line between them. It also aligns with the close relationship between artists and the cyclical nature of creativity discussed in Chapter I.

Though initially the notion of restricting exploitation rights to their function is attractive when presented as a misuse of copyright, this section contends that it fails to encompass a wholistic approach reflective of the bargain struck at the core of copyright between access and protection. Though it may be a more semantic distinction, it is preferred to simply delineate the public space and interest from exploitation rights as opposed to increasing more division and uncertainty by framing the extension of exploitation rights as a misuse. While the question

of whether creativity online requires a departure point from the European copyright system will be discussed in the following chapter, it suffices to note here that the framing of this delineation is important. Removing creative reuses from the purview of exploiters not only affirms the function of exploiters within the European copyright system, but also reconciles the matrix of imbalanced copyright interests without introducing new elements subject to arguments that the EU legislator's closed list of copyright exceptions and limitations disallows any new 'defences', similarly to the free use exemption in *Pelham*.

There are also questions surrounding how the doctrine of misuse of copyright would be incorporated by platforms regarding the new art. 17 DSM Directive licensing mechanism. As we have discussed throughout this thesis, there are already significant challenges with platforms using algorithmic copyright enforcement technology which is unable to detect the mandatory copyright exceptions of parody, pastiche and caricature. Though we will discuss the potential of the principle of implied authorisation to guide a proportionally balanced implementation of art. 17 DSM Directive later in the thesis, the principle's emphasis on whether the creative reuses acts a copy for the original and the platform's direct payment to the initial author, provide essential features to respond to the challenges presented by art. 17 DSM Directive.

It appears that the doctrine of misuse of copyright would only become relevant once the platform's complaint and redress mechanism is complete and the user appeals the decision through the national court system. Additionally, given its reliance on the CJEU to affirm its existence, its application will most likely unfold on a case-by-case basis. This means that users will not receive the direct support when the artistic communication is most critical. When located within a wider context of access to justice, EULAs and TPMs, it is difficult to comprehend how the doctrine of misuse of copyright would help rebalance the interests of users and rightsholders without substantial CJEU referrals.

As we will see in the following chapter, the German implementation appears to reflect these concerns by providing a provision on abuse of either the pre-flagging procedure or the "red button". In this way, we could comment that the provision incorporates the doctrine of misuse by accounting for the procedural abuse of the European copyright system by exploiters. However, the inclusion of users in this provision departs from the doctrine of misuse and begins to more clearly reflect the principle of implied authorisation. It reconciles all relevant copyright interests and accounts for the extent to which the equilibrium between access and protection could be disturbed when procedural safeguards, designed to support users and rightsholders, are abused, impacting the additional interest of platforms.

Considering these reflections, this section contends that, in relation to creativity online, the principle of implied authorisation captures the dysfunctional or abusive behaviours identified by the doctrine of misuse of copyright. Secondly, that given the Community-exhaustion foundation of the misuse of copyright doctrine and its potential to reflect attempts to balance rights regarding secondary copyright legislation, such as the Software Directive in *UsedSoft*,⁵⁶⁹ the doctrine also forms part of the wider balancing mechanism of the doctrine of exhaustion. Though the over-arching and fundamental nature of the doctrine of exhaustion will be discussed comprehensively in the following chapter, we can note that it is capable of providing a “functional interpretation of... [an] agreement [which] may constrain freedom of contract to make contracts consistent with copyright rules and goals”⁵⁷⁰.

The reason being is that the core of the doctrine of exhaustion is to delineate space where both private individuals and the public cannot be subject to exploitation rights. This delineation of a public space area appears to extend beyond the notion of abuse or misuse of an exploitation right. It reflects a balance of fundamental rights that is integral to the human experience. From the perspective of creativity, as the principle of authorisation illustrates, the balance is supported by the value placed on artistic communication by artists and authors. Online this means that authors’ access to platforms is a necessary pre-condition for creativity, and one that can be achieved through the principle of implied authorisation.

Hence, lastly this section contends that the doctrine of copyright misuse fails to respond to a modern construct of copyright interests, particularly the role of platforms that appear to extend exploitation rights. Some commentary has even identified that platforms, to an extent, have become legislators.⁵⁷¹ They sit at the core of the conflict between users, including the public interest, and exploiters that the doctrine of misuse of copyright attempts to address. While the next chapter will examine the extent to which platforms should be responsible for protecting these spaces online, whether for users or for the broader public interest, we can note that any attempt to reconcile copyright interests and delineate free digital spaces should extend to the role of platforms.

This section has reflected on an attempt within the literature to rebalance copyright interests by drawing together circumstances where the CJEU has found that the application of exploitation rights goes beyond the function of the right, terming them a misuse of copyright. After outlining the doctrine proposed by the commentary, this section has found that it does

⁵⁶⁹ Sganga and Scalzini [n 544] 430.

⁵⁷⁰ Ibid.

⁵⁷¹ Xiyin Tang, ‘Privatising Copyright’ (Forthcoming: 2023) 121 Mich. L. Rev.

not adequately reconcile copyright interests. Instead, the focus on entrenching boundaries of these rights without considering how fundamental rights should be balanced appears to mirror the problem that both this thesis and the doctrine are attempting to redress: the ambiguous nature of a fair balance of copyright interests supported by fundamental rights.

When comparing its structure to the principle of implied authorisation, the section has found that the doctrine of misuse does not reflect the need within the European copyright system for interests to be reconciled and not drawn apart. Conversely, the principle of implied authorisation provides a mechanism, though specific to the social justification of creativity, for all relevant copyright interests to be balanced. Therefore, when considering the broader operation of the doctrine of exhaustion, as the ultimate balancing assessment within the European copyright system, it can be argued that the doctrine of misuse stands as one necessary element to delineate integral public spaces, creativity related or not. In light of this finding, the question that we must now ask is how exploiters' interests should be balanced. If the doctrine of exhaustion comprises both the doctrine of copyright misuse and the principle of implied authorisation, the thesis then needs to evaluate how these approaches are reconciled in relation to creative reuses.

3.4. SHOULD THERE BE A RE-EXCEPTION FOR COMMERCIAL CREATIVE REUSE?

The question which arises in restricting the scope of exploiters' rights over subsequent creative reuses is the status of such uses that are additionally commercial. As the premise of the principle of implied authorisation links to creative reuses that are created and shared for the purpose of artistic communication, it appears that the right to protect IP, which supports the position of exploiters, is not engaged. The crux of this question is whether a reuse is purely creative or commercial, or if the line is drawn somewhere between the two. This section aims to examine the limits of subsequent creative uses by addressing the exploiters' position to prevent infringing uses of creative works being uploaded on to platforms.

This analysis is designed to determine the extent to which the principle of implied authorisation requires a re-exception for commercial creative reuse. First, the section will reflect upon the approach of Advocate General Saugmandsgaard Øe and the CJEU in *Poland* regarding the intended balance struck between exploitation rights and exceptions and limitations. Secondly, we will consider Germany's approach to supporting exploiters' through the implementation of an abuse mechanism for user flagging known as the 'red button'.

Thirdly, the section will reflect upon how CJEU and national jurisprudence distinguishes creative and commercial uses and propose that online, the balance struck should mean that only substitutes for entire works should be excluded from the principle of implied authorisation, reflecting the effect of the doctrine of exhaustion.

Commentary is clear when it asserts that:

“if access to platforms as culturally valuable communicative for a is socially desirable, participation must be guaranteed and deterrence prevented, and such objective necessitates a certain degree of accepting copyright infringement”.⁵⁷²

The question of infringing commercial use is really one of definition and balance: To what extent must a subsequent work use a previous work for it to be considered as infringing from the perspective of supporting creativity? Both the EU Commission and Advocate General Saugmandsgaard Øe support the limitation of infringing uploads to those that are “manifestly” infringing, excluding “ambiguous” uses from being the subject of preventative blocking measures.⁵⁷³

Commentary explains that it “must refer to uploads that are identical or to a high degree similar to protected works and other subject-matter”⁵⁷⁴, referring to the art. 17 Guidance from the Commission that “exact matches of entire works or of significant proportions of a work should normally be considered manifestly infringing”⁵⁷⁵. Accordingly, this would also extend to “works which have been distorted in order to avoid recognition by automated content recognition technology”.⁵⁷⁶ The Advocate General explains that “manifestly infringing” extends to “content which reproduces that subject matter in the same way, but with insignificant alterations, with the result that the public would not distinguish it from the original subject

⁵⁷² Westkamp [n 24] 83-4.

⁵⁷³ Commission, ‘Communication on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market’ COM(2021) 288 final (‘Commission Guidance’), 21; Opinion of AG Saugmandsgaard Øe Case C-401/19 Republic of Poland v European Parliament, Council of the European Union ECLI:EU:C:2021:613, paras. 198 et seq., 205-206. The distinction between likely (later “manifestly”) infringing and likely legitimate uploads was mentioned first in a consultation paper published by the Commission in July 2020. See, Commission, ‘Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market’ (27 July 2020) <<https://digitalstrategy.ec.europa.eu/en/news/directive-copyright-digital-single-market-commission-seeks-viewsparticipants-stakeholder-dialogue>> accessed 4 January 2023.

⁵⁷⁴ Christophe Geiger and Bernd Justin Jütte, ‘Towards a virtuous legal framework for content moderation by digital platforms in the EU? The Commission’s guidance on article 17 CDSM Directive in the light of the YouTube/Cyando judgement and the AG’s Opinion in C-401/19’ (2021) 43 EIPR 625, 628.

⁵⁷⁵ Commission Guidance 21; Ibid; Also see *Poland AG* at [201].

⁵⁷⁶ Geiger and Jütte [n 574].

matter”⁵⁷⁷. An example being technical alterations designed to circumvent filtering systems by amending the format, reversing the image or changing its speed.⁵⁷⁸

However, the CJEU in the *Poland* challenge did not explicitly adopt the notion of manifestly infringing content as a standard for justified blocking and filtering. Instead, the CJEU leaves the construction of infringing uses on platforms to legislators and points to the principle of proportionality as an answer to preventing over-blocking. Member states are tasked with meeting this ambiguous standard by taking “care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter”⁵⁷⁹. The CJEU hint that such a proportional outcome may involve the limitation, to a certain extent, on the exercise of the right of users to freedom of expression and information in order to protect IP rights in a manner that contributes “to the achievement of a well-functioning and fair marketplace for copyright”.⁵⁸⁰

While in the following chapter will examine the extent to which the principle of implied authorisation can implement art. 17 DSM Directive without limiting artistic communication, this section reflects on whether there should be a re-exception to the principle of implied authorisation to meet this goal. Germany’s implementation is novel as it appears to proportionally balance all copyright interests, specifically exploiters’, through what the translated text refers to as a “red button” for when the mechanism for users to flag content as legitimate is abused. Essentially “trusted rightholders” can manually require immediate takedown in cases where delayed takedown would significantly harm the economic exploitation of the work”⁵⁸¹.

This section proposes that such an approach is an attempt to introduce a re-exception to the overarching policy of Germany’s implementation: to support creativity online by allowing creative reuse to be uploaded to platforms through users’ flagging. How effective the “red button” is for achieving a proportionally balanced outcome for all copyright interests, however, turns upon the definition of legitimate uses. As we will examine in the following chapter, the German implementation defines quotations, caricatures, parodies and pastiches alongside other

⁵⁷⁷ AG Poland at [202].

⁵⁷⁸ Ibid.

⁵⁷⁹ Poland at [99].

⁵⁸⁰ Ibid at [82]; Bernd Justin Jütte, ‘Poland’s challenge to Article 17 CDSM Directive fails before the CJEU, but Member States must implement fundamental rights safeguards’ (2022) 17 JIPLP 693.

⁵⁸¹ Urheberrechts-Diensteanbieter-Gesetz vom 31. Mai 2021 (BGBl. I S. 1204, 1215) (Act on the Copyright Liability of Online Content Sharing Service Providers), s. 18. Also see, Mattias Leistner, ‘The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks’ (2022) 71 GRUR International 909.

uploads authorised by law as legitimate uses which “stay up”.⁵⁸² Yet these exceptions are heavily reliant upon national court interpretation as automated copyright enforcement is near-impossible. Hence they ultimately require a conflict resolution mechanism outside platform upload procedures.

National exceptions for caricature, parody or pastiche only permit limited uses of a work, performance or recording or part thereof in a new work.⁵⁸³ Given their autonomous nature, they require the CJEU to define their scope. *Deckmyn* provides, in the context of parody, more detailed guidance though such uses are limited to specific and privileged artistic purposes that are humorous or mocking expressions which evoke an existing work while being noticeably different from parodied material. In the case of pastiche, what the exception truly comprises is very much an open question in terms of an autonomous concept of EU law.⁵⁸⁴ However, commentary proposes that it could be implemented and interpreted by member states flexibly to guarantee free expression.⁵⁸⁵

Despite these calls for a more flexible and encompassing approach, given either the restricted or uncertain nature of these exceptions, member states would be wise to implement a complaints and redress mechanism that doesn’t overly burden users,⁵⁸⁶ risking the very core of artistic communication. Though the German approach of pre-flagging insulates authors, including users, compared to potentially infringing uploads “staying down” awaiting confirmation of legitimate use, the issues that accompany these exceptions complicate the provision of a proportionally balanced outcome. It is from this context, that this section contends that it is better to frame a creative reuse, not in reference to an exception, but to relate their use to the propertization of copyright.

Previously in this chapter, we examined a growing movement within copyright discourse to use property-based theories of copyright to support social functions by viewing copyright exceptions and limitations as an objective right, supported by fundamental rights balancing.⁵⁸⁷ The question is whether the upload would substitute the original which commentary explains

⁵⁸² Act on the Copyright Liability of Online Content Sharing Service Providers, s. 5(1).

⁵⁸³ Information Society Directive, Art. 5(3)(k).

⁵⁸⁴ Hui and Döhl [n 401]. Indeed, the latest instalment of *Pelham* involves an appeal to the German Federal Court centres upon whether the recent pastiche exception comprises sampling. It is expected that the case will eventually make its way to the CJEU regarding the meaning of the pastiche exception.

⁵⁸⁵ Axel Metzger and *et al*, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589323> accessed 4 January 2023; Emily Hudson, ‘The pastiche exception in copyright law: a case of mashed-up drafting’ (2017) 4 Intellectual Property Quarterly 346.

⁵⁸⁶ Martin Senftleben, ‘The Original Sin – Content ‘Moderation’ (Censorship) in the EU’ (2020) 69 GRUR International 339, 340.

⁵⁸⁷ See, section 3.1.

requires determining whether there is competition between the original author and the subsequent user.⁵⁸⁸ Essentially, is there “a hypothetical market for a license of such right” to restrict creative reuse? If not, this section contends that such uses are legitimate without resorting to the issues arising from defining and applying these exceptions.

Earlier in the thesis, drawing upon natural rights theory and an extended personhood theory, we found that freedom of expression inherently includes the ability to access and reuse previous creative works, as well as the ability to communicate these new creative works to the public. Part of the reason why these spaces for creative reuse are safeguarded according to Kant is that one author’s artistic expression must coexist to allow future creative use and artistic communication. This section contends that this delicate balance of authors’ interests is maintained because the creative reuse does not compete with the initial creative work nor act as its substitute or replacement. Instead, it can be viewed as an eternally evolving artistic discussion between authors.

For this reason, the criterion of substitution or competition becomes a critical aspect for basing an exploiter’s claim to a re-exception to the principle of implied authorisation.⁵⁸⁹ Further, it is essential that such a carve-out to artistic communication is not based on whether an upload meets the restrictive or currently ambiguous standards of parody, pastiche, caricature or quotation exceptions. Alternatively, the analysis should centre upon whether exploitation rights should extend to preventing creative reuses of works on the basis that the subsequent author “unfairly appropriate[d] and profite[d] from pre-existing efforts”⁵⁹⁰.

Additionally, the three-step test is notoriously broad and could also comprise any possibility of licensing or future collaboration. Commentary explains that “permitting user creativity... would ultimately render existing licensing opportunities obsolete”⁵⁹¹. However, as we observed in Chapter I, the three-step test is an intrinsic balancing vehicle designed to answer the following question:

*“whether there exists an acceptable trade-off between the objectives
undergirding the rights granted to authors/(related) rightholder and the public*

⁵⁸⁸ Westkamp [n 139] 275.

⁵⁸⁹ See, Kimberlee Weatherall, ‘The Relationship Between User-Generated Content and Commerce’ in Dan Hunter, Ramon Lobato, Megan Richardson and Julian Thomas (eds.) *Amateur Media: Social, Cultural and Legal Perspectives* (Abingdon: Routledge 2012) p.62. Weatherall explains that “many instances of UGC are so distant from markets for the original copyright works that they are unlikely to compete directly with copyright holders: it is hard to believe... that the three-step test would require any UGC exception to be limited to solely non-commercial activities”.

⁵⁹⁰ Westkamp [n 24] 276.

⁵⁹¹ Ibid 277.

*interest or legitimate user interests and this requires one to grapple with the question why “the rights of authors” are privileged in the first place”.*⁵⁹²

Reprobel provides an interesting answer to this question as it confirmed that the amount of fair compensation due a copyright holder depends on the actual harm suffered.⁵⁹³

Here the printer manufacturer, Hewlett-Packard (HP), was informed by a collective management rights organisation, Reprobel, that the sale of multifunction devices required the payment of a levy per printer offered for sale, applied retrospectively. The CJEU highlighted that recitals 35 and 38 Information Society Directive link:

*“the harm resulting for the author from the reproduction of his protected work without authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by that author”.*⁵⁹⁴

The Court also found that publishers should not be entitled to any fair compensation because they do not suffer any harm,⁵⁹⁵ but as they are not the subject to any harm for the purpose of copyright exceptions.

Combining the notion of actual harm with the substitution criterion, in the context of art. 17, leads to a preferable construction of legitimate uses, flagged by users, as excluding exploiters’ claims against creative reuses uploaded to platforms. It removes the long-standing argument by exploiters that any potential licensability of a work should result in strong protection against creative reuses as evidenced in *Pelham*.⁵⁹⁶ *Reprobel* affirms the position of authors’ interests against exploiters, the latter being subservient meaning that “the function of investment rights is relative to the function of copyright law by and large: to incentivise creativity”⁵⁹⁷.⁵⁹⁸

Such an approach ultimately reflects, in effect, the doctrine of exhaustion and by extension the principle of implied authorisation. Regarding the former, as we observed in the

⁵⁹² Jongsma [n 156] 342.

⁵⁹³ C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* ECLI:EU:C: 2015:750 (*‘Reprobel’*) at [69].

⁵⁹⁴ *Ibid* at [35].

⁵⁹⁵ *Ibid* at [47], citing Information Society Directive, art. 2.

⁵⁹⁶ Westkamp [n 24]; Also see, Branislav Hazucha, ‘Private copying and harm to authors – compensation versus remuneration’ (2017) 133 (Apr) L.Q.R. 269. Hazucha evidences, in the context of private copying, that the view that it causes harm to copyright holders, is merely supported by anecdotal evidence and is hard to substantiate without sound empirical evidence.

⁵⁹⁷ Westkamp [n 24] 280.

⁵⁹⁸ Note that a very similar discussion is occurring in relation to the new press publishers’ right outlined in art. 15 DSM Directive. The question is whether platforms such as Google News are a substitute for articles accessed through direct publication channels. See, Silvia Scalzini, ‘The new related right for press publishers: what way forward?’ in Eleonora Rosati (ed) *Handbook of European Copyright Law* (Routledge 2021).

previous chapter, early free movement of goods case law evidence that the exhaustion of the distribution right is based on surrounding contextual factors, namely the presence of fair remuneration. The focus is on the decision of the copyright holder to place the good on the market and benefit from its sale. The copyright holder cannot prevent further distribution beyond first sale as, in relation to second-hand goods, these cannot compete with goods the copyright holder is yet to place on the market in terms of quality.

The notion of harm in *Reprobel* also aligns with the principle of implied authorisation's obligation for platforms to directly pay authors for creative reuse uploads. Commentary characterizes such harm as cyclical because the presence of a copyright exception, authorises infringement, meaning that no licence can be issued and in effect, excludes a fee that could have been charged by the author.⁵⁹⁹ Given the subservient status of investment rights to creativity, following this payment, any claim by authors or exploiters for further payment or enforcement of economic rights against the upload are exhausted. The only issue left to consider is what the substitution criterion comprises.

Inspiration can be found within the Canadian Copyright Act which provides an exception for UGC. The Act provides *inter alia* that the new work:

*“does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work... on an existing or potential market for it, including that the new work... is not a substitute for an existing one”.*⁶⁰⁰

Commentary proposes that a European approach would exclude from copyright protection “merely adding, subtracting or associating some pre-existing content with other pre-existing content”⁶⁰¹ if “the enriched and/or remixed material has sufficient own attractiveness to avoid a substitution effect”⁶⁰². Framing exploiters’ re-exception to the principle of implied authorisation around the notion of substitution instead of a commercial creative reuse

⁵⁹⁹ Martin Kretschmer, ‘Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe’ (2011) Intellectual Property Office Research Paper No. 2011/9, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710611> accessed 4 January 2023.

⁶⁰⁰ Copyright Act of Canada, s. 29.21(1)(d).

⁶⁰¹ Jean-Paul Triaille and *et al*, ‘Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the “InfoSoc Directive”)’, Study prepared by De Wolf Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, p. 455; Martin Senftleben, ‘User-Generated Content – Towards a New Use Privilege in EU Copyright Law’ in Tanya Aplin (ed) *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2019).

⁶⁰² Senftleben [n 601].

additionally circumvents a strict interpretation requiring non-commercial character which is increasingly difficult to define in the context of platform content monetization.

This section has examined the limits of subsequent creative uses by addressing the exploiters' position to prevent infringing uses of creative works being uploaded on to platforms. Drawing upon the approach of both Advocate General Saugmandsgaard Øe and the CJEU in *Poland* as well as the Commission's Guidance for implementing art. 17 DSM Directive, the section attempts to reconcile the balance of copyright interests in a proportional manner. Despite the attractiveness of the German implementation, the section reflects that reliance on categories of creative reuse is largely unhelpful. Instead, the section proposes that a re-exception for exploiters to the principle of implied authorisation be defined through the notion of substitution.

This approach centres upon the reconciliation of exploiters' and authors' interests. *Reprobel* guides the analysis by affirming that fair compensation is linked to the idea that authors can suffer actual harm by a creative reuse. Secondly, that given this principle, exploiters are subservient to authors, meaning that investment rights essentially function to support creativity. It is from this context that the section proposes that a re-exception to the principle of implied authorisation be based on the notion of substitution, instead on the commercial nature of a creative reuse.

The idea being, similarly to the doctrine of exhaustion, that once an author has received fair compensation any right to control creative reuses exhausts. As we will observe in more detail in the following chapter, an obligation for platforms to pay authors directly for uses that are not substitutions is an essential element of the principle of implied authorisation in allowing such uses. Though the German implementation, to an extent, follows this logic, this section's proposal to frame the re-exception not from the categorisation of exceptions, including parody, pastiche, caricature and quotation, but from the ability of a subsequent work to act as a substitute for the original, arguably strikes a better balance between relevant fundamental rights but also reflects CJEU jurisprudence on the notion of harm which provides the basis for claiming payment.

While this approach conflicts with the propertization of copyright where every potential use of a work could be licensed, the social justifications of property support limiting exploiters' recourse to a 'commercial' re-exception through the substitution criterion. The addition of creative effort on behalf of subsequent authors, including users, to previous creative works is a social aim of the European copyright system and one which this section has evidenced exploiters must support. As will be discussed in the following chapter, this thesis proposes that

the principle of implied authorisation is capable of regulating creative reuse of works so long as such use does not act as a substitution of the original work.

3.5. CONCLUSION

Chapter III probes the status of exploiters within the European copyright system specific to the support of creativity online, given the overarching narrative of incentivising online business models since the Information Society Directive. We have observed that despite the damning tale of the propertization of copyright, which has allowed copyright exceptions and limitations to be overridden and TPMs circumvention enforced, there is scope within the literature to use a property-logic lens to consider social justifications of property. This chapter has explored the inclusion of creativity as such a justification within the property system and considered whether creativity should be defined as an objective right.

The chapter evidenced that the principle of implied authorisation inherently fulfils this role by using proportional balancing mechanisms which offsets the contractual override of copyright exceptions and limitations. By locating the principle of implied authorisation within the propertization of copyright debate, it ensures the balancing of the right to property against other fundamental rights which support notions of authorship and extended personhood theory addressed in Chapter I. The approach of the German Constitutional Court in *Pelham* exemplifies this construction of the principle of implied authorisation where mere licensability of a musical snippet is insufficient to prevail against artistic communication supported by freedom of expression and information.

Though the chapter acknowledges that recent CJEU jurisprudence excludes the external application of fundamental rights to copyright exceptions and limitations, the construction of the principle of implied authorisation as an objective right within the propertization of copyright, confirms that it is no less part of the inherent balancing mechanism than exploitation rights. Instead, the principle of implied authorisation, specifically the characterisation of consent as a meta-exception discussed in the previous chapter, operates at a level which is inclusive of the balance between exploitation rights and the closed-list of copyright exceptions and limitations. It is from this context, that the Chapter asserts that there is potential for it to provide the doctrinal foundation to prevent contractual overrides when the purpose is for access to and use of works online to produce additional creativity.

The chapter proposes that this construction of the principle of implied authorisation, as the ultimate balancing mechanism to proportionally reconcile the right to protect property against freedom of expression and information, in the context of user platform uploads, is

reflected in the German implementation of art. 17. While as stricter approaches, addressed in the final chapter, necessarily lead to over-blocking and the stifling of creativity online, the “stay up” approach cleverly encourages exploiters to enter into licensing agreements which largely support and foster creativity online. Such an approach supports the sentiment that exploiters’, users’ and authors’ interests can be reconciled in a manner which safeguards artistic communication without impacting the exploiters’ licensing business models.

Yet, as evidenced in this chapter, the use of TPMs, particularly copyright protection against their circumvention, presents a condemning blow to the principle of implied authorisation. As evidenced by the evolution of TPMs, their inclusion within the European copyright system represents a defining moment of the exploiters’ narrative. The offshoot being that copyright holders feared the dissemination of copyright works on the internet, despite the benefits that it would bring to authors particularly when considering freedom of expression as a crucial element of authorship and extended personhood theory. The conflicting treatment by both national courts and the CJEU of TPMs and their scope is best illustrated by comparison to the Software Directive.

Here we observed, similarly to the doctrine of exhaustion, that software that does not meet the definition of a computer programme, which is highly likely for creative reuses, fails to benefit from a more flexible and proportionally balanced approach to the use and application of TPMs. It also appears to confirm the investment-centric logic evident throughout European copyright law given the potential licensability of any work. This is additionally clear when considering the impact of *VG Bild-Kunst* and *Copydan* where not only was a non-infringing purpose found to require fair compensation, but even when proportionality requirements for a TPM are absent, the compensation claim still survives. Such a strict application of exploiters’ rights alongside a flexible application of proportionality requirements, should serve as a warning against implementing art. 17 DSM Directive in a similar manner where user uploads “stay down” until verified, despite their lawfulness.

Following this detailed outline of the imbalanced relationship between users and rightsholders, we considered whether the doctrine of copyright misuse would be helpful in reconciling copyright interests relating to creativity. However, upon examination, we found that the doctrine introduces more ambiguity as it fails to comprehensively determine how the identification of a dysfunctional or abusive use would adequately reconcile copyright interests in a practical manner. Comparably, the principle of implied authorisation, specific to creativity, considers and introduces mechanisms to reach a proportionally balanced outcome. The chapter comes to the conclusion that the doctrine of misuse ultimately forms part of the doctrine of

exhaustion given the importance of limiting exploiters rights to delineate integral public spaces for social justifications. We then considered, in the last section, how exploiters' rights should be balanced, as opposed to the introduction of an "abuse" or "misuse" by reflecting upon the notion that some secondary creative uses may be commercial in nature.

This last point, though addressed comprehensively in Chapter IV, examined the supposedly difficult line to draw between works that are legitimate and are subsequent reuses of creative content, forming new works of a transformative or referential nature, and those that infringe. Art. 17 DSM Directive attempts to provide a licensing structure to distinguish between these types of subsequent uses. In this chapter, we considered whether this should be reflected as a re-exception to the principle of implied authorisation. While both Advocate General Saugmandsgaard Øe in *Poland* and the EU Commission's Guidance focuses on the idea of 'manifestly' infringing uploads requiring licenses and not being filtered on platforms, the CJEU in *Poland* avoided the matter entirely by referring to targeted filtering and leaving this crucial distinction to national legislators as a matter proportional balancing.

Germany's implementation appears to best reflect such a balanced and flexible approach. However, this chapter contends that reliance upon exceptions, specifically parody, pastiche, caricature or quotation, all accompanied by either overly strict or ambiguous construction issues, ultimately require conflict resolution outside of platform upload procedures, to the detriment of artistic communication. Instead, this chapter proposes that a more flexible and encompassing approach is required by framing a creative reuse through the principle of implied authorisation as located within the propertization of copyright. We have observed that the social function of propertizing copyright, in terms of creativity, requires considering whether an upload would substitute the original copy and if there is competition between the original and subsequent author.

Drawing upon *Reprobel* and the notion of actual harm, the thesis contends that exploiters' interests are subservient to authors. This means that exploitation rights function to support creativity. This reconciliation of interests, pursuant to creativity, alongside the criterion of substitution removes the question of whether commercial creative reuses should be licensed, and instead, focuses the analysis on the limits of exploiters' interests and rights. As we have observed, this perspective should provide the foundation of a re-exception to the principle of implied authorisation. There is also support through parallels with the doctrine of exhaustion as once an author has received fair compensation for these uses, any control over subsequent creative reuses exhausts on the premise that they are not mere substitutions for accessing these works but forming new transformative or referential works entirely.

This Chapter has unravelled the role of exploiters within the European copyright system regarding creativity. It was designed to reflect upon the narrative of exploiters and draw upon contractual and technological approaches which bolster their normative status to warn against a similar implementation of art. 17 DSM Directive being implemented. In the final chapter of this thesis, we will now examine current implementation approaches and focus on the extent to which the principle of implied authorisation can provide a point of departure from the exploiters' narrative dominant within the European copyright system to benefit authors, users and creativity online.

CHAPTER IV: A FUNDAMENTAL POINT OF DEPARTURE FOR A WIDER RIGHT OF ACCESS

4. INTRODUCTION

Up to this point, we have examined the tension between creativity online and the European copyright system. While current European legislative efforts have focused on the role of platforms as enablers of copyright infringement, resulting in art. 17 DSM Directive, this thesis can be located within a wider discussion in the commentary on the impact that the exploiters' narrative has on users, including authors. It has built upon freedom of expression and notions of self-determination, in a collective context such as UGC, to propose that the principle of implied authorisation provides an inherent comprehensive framework to balance the interests of authors, users, platforms and exploiters. In this chapter, the aim is to examine the role of the principle of authorisation in supporting and facilitating creativity by focusing on the gatekeeper role of platforms as the ultimate arbitrator of creative user uploads.

In the shadow of art. 17 DSM Directive, the chapter assumes that despite clarification within the Directive that it will not result in general monitoring, the standard that platforms must comply with is ambiguous and gives rise to an unresolvable conflict between European copyright law and creativity. We start from the premise that the only way that platforms can meet these standards is to use algorithmic copyright enforcement technology. This means that software would detect and decide whether a digital use of a copyright work amounts to copyright infringement. Given the fragmented nature of the European copyright system and the complex application of copyright exceptions and limitations online, this chapter considers that the judiciary, not automated enforcement measures, are best placed to reconcile these legal issues. It opines that the very nature of algorithmic copyright enforcement complicates the resolution of a balanced approach to digital access of copyright works as it relies on the law being distilled into lines of code. This topic is already one subject to substantial discussion.⁶⁰³

Despite the theoretical availability of courts to determine and resolve these questions, as discussed in Chapter III, there is a significant imbalance of bargaining power between both users and platforms as well as users and exploiters. It means that the implementation of art. 17

⁶⁰³ See for example, Quintais and Husovec [n 166]; Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10 JIPITEC; Sebastian Felix Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' [2020] Nordic Intellectual Property Law Review; Axel Metzger and *et al* [n 585].

DSM Directive should be done in a manner that better acknowledges and supports users in the digital environment.⁶⁰⁴ This chapter seeks to examine how to achieve a proportional balance that fosters creativity online both in relation to implementing art. 17 DSM Directive, but also in the context of the European copyright system wholistically. The chapter considers that the principle of implied authorisation could potentially provide a point of departure within the European copyright system to allow for and support creative reuses. This would align with the principle's aim to reconcile the fundamental free spaces within European copyright law to bolster creativity.

Firstly, the chapter examines the two main options for implementing art. 17 DSM Directive at member state level. Focusing on art. 17 (9) which requires member states to provide a complaint and redress system, the first section asks whether during this process user uploads that have been identified as potentially infringing by software should “stay up” or “stay down”. The argument is that in the case of the latter, users which create content using previous copyright works will be severely impacted as often within the UGC community, time is of the essence and any delay will gravely hamper their artistic communication provided for by both freedom of expression and the extended personhood concept. The section will address this legal issue by referring to and comparing the CJEU and Advocate General Øe's opinion in *Poland* as well as the EU Commission's Guidance for implementing art. 17 DSM Directive. This will provide the doctrinal foundation to analyse two examples that best illustrate these contrasting options: France and Germany. To the extent that these approaches fail to adequately protect users' creativity on platforms, the section will consider whether Digital Services Act (DSA) will provide mandatory procedural safeguards for users.

Drawing upon this practical and procedural discussion of supporting both users and creativity online, the subsequent section will consider whether the principle of implied authorisation, which has the potential to guide implementation in a proportional manner, should be viewed as a fundamental point of departure within the European copyright system. The section focuses on the obligation for authors to be appropriately remunerated for uploads of a subsequent creative nature. The section first considers this obligation by examining whether the principle of implied authorisation reconciles the fundamental free spaces within the European copyright system to provide an overarching escape mechanism from the exploiters' narrative. Then we will determine the relationship between the appropriate remuneration

⁶⁰⁴ Litman [n 138] 107-131; Niva Elkin-Koren, ‘Copyright in a digital ecosystem: A user rights approach’ in Ruth L. Okediji (ed) *Copyright law in age of limitations and exceptions* (2017) 132-168.

obligation against the characterisation of the principle of implied authorisation as a point of departure within European copyright law. The section will lastly apply these doctrinal findings by considering the outcome of applying the principle of implied authorisation to the fact pattern in *Pelham*. The aim of this section is to use this analysis to illustrate the potential of the principle to reach a more proportionally balanced outcome that reflects how communities and sub-communities online create and share creative reuses of works.

Finally, this line of argument will be extended to consider whether the principle of implied authorisation's status as a departure point from the EU copyright system provides the foundation to construct a wider right of access. Working off the basis that authors' access to platforms is a necessary pre-condition for creativity online, the last section considers whether platforms should be responsible for protecting artistic communication, supported by freedom of expression, outside of traditional copyright constructs, namely platform copyright liability. We will review German case law which has forged a path of responsibility for hybrid bodies, that are of both a private and public nature, based on the indirect effect doctrine. This will develop and extend its application to the realm of European copyright law by reviewing the legal concept of digital constitutionalism and comparing its approach with calls from copyright commentary to adopt a constitutional propertization lens which would allow for the right to protect IP to be balanced against other rights, namely freedom of expression.

From this juncture, the thesis will adopt a broader theoretical stance and consider whether digital constitutionalism firstly allows for the creation of a wider right of access and reflects a view within the commentary that law generally should be viewed as a complex and adaptive system. We will observe whether such an approach promotes this access right to the level of a genuine counter-right to the dominant exploiters' narrative within the European copyright system. Central to this discussion will be the trans-subjective nature of the right to expand beyond the individual creator and include communities as well as social practices, specifically creativity online. Lastly, it will consider whether the principle of implied authorisation has the potential to guide a reshaping of the law to account for the community-based regulation of creativity that is occurring outside of the European copyright system.

It is envisaged that this chapter will refresh the EU's approach to platform responsibility regarding creativity. By extending upon the notion that authors' access to platforms is a necessary pre-condition for creativity and constructing it outside of traditional copyright mechanisms, it has the potential to shift the emphasis from exploiters to reconciling the

necessary free spaces and support the role that artistic communication plays in community-based creativity, significantly UGC.

4.1. IMPLEMENTING USER SAFEGUARDS IN ART. 17 DSM DIRECTIVE: “STAY DOWN” OR “STAY UP”?

The story of art. 17 DSM Directive has never been a straightforward one. The controversial provision introduces platform liability for user uploads infringing copyright. It requires online specific platforms, online content-sharing service providers (OCSSPs), to make “best efforts” to obtain an authorisation for such uploads, or at the very least, to ensure the unavailability of such works once rightholders give notice. These uploads must be “acted expeditiously” upon by OCSSPs to “disable access to, or to remove from their websites, the notified works or other subject matter” as well as to prevent future uploads of the same kind. It is the implementation of this last limb, the “notice and stay down provision”⁶⁰⁵, which this section focuses upon.

Art. 17 DSM Directive is undoubtedly the product of intense lobbying from the music industry to address the “value-gap” between platform’s monetization of copyright works and rightholders. The argument was that OCSSPs fail to fairly remunerate copyright holders for streams of user-uploaded videos containing copyright content. Commentary proposes that exploiters, lacking remuneration from YouTube for these uses, were willing to reshape the law, including any safe harbours limiting platform liability, to get it.⁶⁰⁶ Yet, allocating OCSSPs a gatekeeper role to regulate uploads, specific to copyright provisions, is a dangerous decision. Commentary has been very clear that art. 17 DSM Directive practically requires the use of algorithmic copyright enforcement to keep up with the exponential amount of OCSSPs’ uploads. The question that sits at the centre of this discussion is how should the interests of authors, users and exploiters be reconciled by OCSSPs.

Given that OCSSPs’ liability hinges upon making best efforts to make the correct filtering decision, OCSSPs are almost incentivised by the Directive to adopt an approach which avoids liability, by refusing user uploads until they are verified. This outcome passes a striking resemblance to the dominant exploiters’ narrative that characterises European copyright law making. The previous chapter illustrated the impact that such an approach has had on users’

⁶⁰⁵ Martin Husovec, ‘The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?’ (2018) 42 Colum. J. L. Arts 53.

⁶⁰⁶ Bridy [n 27].

access to works which naturally conflicts with notions of authorship and creativity. The use of burdensome contractual terms, as well as utilising copyright provisions to protect against TPM circumvention, now defines how works are accessed and enjoyed online. The result is so restrictive, that such an extension of exploiters' rights should really be a warning against a similar implementation of art. 17 DSM Directive.

Art. 17(7) DSM Directive attempts to respond to these concerns by providing a caveat to its implementation: uploads which do not infringe copyright should be uploaded, including where they are covered by an exception or limitation. There is also an outright ban on its implementation resulting in a general monitoring obligation.⁶⁰⁷ Perhaps more practically, art. 17(9) DSM Directive requires that platforms provide an effective and expeditious complaint and redress mechanism for users in the event of disputes regarding user uploads that are filtered or blocked. This mechanism requires rightsholders to duly justify their reasons for requesting uploads to be removed or disabled. These complaints are to be processed without undue delay, and decisions to disable access or to remove content are subject to human review. The mechanism is also subject to out-of-court redress mechanisms.

Art. 17(9) DSM Directive emphasizes that the required redress and complaint mechanism shall enable disputes to be settled impartially and not to deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. Member States are to specifically ensure that users have access to court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights. The Directive maintains that it should in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and not lead to any identification of individual users nor the processing of personal data. Lastly, OCSSPs are required to inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights.

However, national legislators are stuck in a complicated position. How best to strike this balance between protecting users' fundamental rights such as freedom of expression and information against exploiters' and authors' right to protect IP? This discussion has crystalised as a choice between whether, after receiving notice from rightsholders, user uploads should "stay up" or "stay down". However, as we can see from the text of art. 17 DSM Directive above, the EU Commission fails to provide any indication of which implementation method is

⁶⁰⁷ DSM Directive, art. 17(8).

preferred. Given this ambiguity, this section aims to examine both options to locate their position within the European copyright system and determine which option best reconciles authors, users, OCSSPs and exploiters interests in a proportionally balanced manner that supports creativity online.

First, the section reflects on the *Poland* decision where the CJEU considered the extent to which the wording of art. 17 DSM Directive protects the fundamental rights of users, without limiting the strong protection guaranteed rightsholders. Building upon the EU Commission's Guidance and the Advocate General Saugmandsgaard Øe's opinion in *Poland*, discussed in detail in the previous chapter, the section seeks to reconcile these perspectives of how best member states should transpose art. 17 DSM Directive. Subsequently, the section reviews the two general categories of art. 17 DSM Directive implementation: First, the "stay down" model, personified by France's implementation, will be analysed considering its contextual history as well as its impact on creativity. Second, the section will review Germany's "stay up" model and assess whether this alternative from traditional content moderation systems reconciles all copyright interests in a proportional manner that supports creativity online and incentivises rightsholders to enter licences covering creative reuses with platforms. Lastly, the section examines the extent to which the DSA provides support for the German implementation of art. 17 DSM Directive.⁶⁰⁸

The *Poland* decision centres upon the OCSSPs' obligations outlined in art. 17(4) DSM Directive. Keeping with the unique legislative history of art. 17 DSM Directive, it was handed down a year after the deadline for member states to transpose the obligations. The Republic of Poland submitted that this obligation limits the exercise of the right to freedom of expression and information of the users of OCSSPs, guaranteed by art. 11 Charter.⁶⁰⁹ The CJEU first confirms that the obligation on OCSSPs to conduct a prior review of user uploads and the use of filtering technology restricts an important means, online communication via OCSSPs, for freedom of expression and the dissemination of information. However, the Court eventually found that the restriction is justified per art. 52(1) Charter. For our purposes, it is useful to reflect on both the court's reasoning, but also on the extent to which it shapes national implementation, specifically regarding how the issue of legitimate uses should be dealt with by OCSSPs.

⁶⁰⁸ 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').

⁶⁰⁹ *Poland* at [39].

The first issue to consider is the inherent ambiguity of art. 17 DSM Directive that fails to clearly explain the degree to which member states should implement a prescriptive approach detailing how OCSSPs should meet these obligations. The CJEU confirms this vagueness,⁶¹⁰ yet reflects that such uncertainty was said to ensure that these obligations can be adapted to the circumstances of various OCSSPs and to the development of industry practices and of available technologies.⁶¹¹ Despite support for flexible limitations found in both ECtHR and CJEU jurisprudence,⁶¹² this section asserts that this approach strengthens the assertion that national legislators have a considerable discretion in shaping these obligations, if they choose to at all, resulting in more fragmentation. As we will observe later in this section, those member states that choose to implement the art. 17 DSM Directive in verbatim effectively place the OCSSPs into a quasi-role of legislator and adjudicator online, particularly given the uneven bargaining power between users and exploiters, and issues surrounding access to justice.

Secondly, the Charter requires that justified limitations respect the essence of the right to freedom of expression and information.⁶¹³ Throughout the judgement, the CJEU appears to view copyright exceptions and limitations as constructing user rights.⁶¹⁴ Leaning upon safeguards within art. 17 DSM Directive, interpreted as a whole, the argument is that the EU legislator has structured this limitation in a manner which respects the essence of both fundamental rights. Firstly, the CJEU pointed towards the guarantee that co-operation between OCSSPs and rightholders should not prevent uploads that do not infringe copyright, specifically through the application of a limitation or exception.⁶¹⁵ The court also highlighted the direct statement that the Directive “shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”⁶¹⁶. Lastly, the judgment finds that art. 17 DSM Directive reflects CJEU case law requiring copyright protection to be strictly targeted to avoid affecting OCSSP users.⁶¹⁷ Yet, *Poland* offers no further guidance as to how these safeguards should be implemented; specifically, the CJEU fails to address the extent to which they may impact rights nor to identify necessary criteria to ensure that their transposition actually protect freedom of expression and information.

⁶¹⁰ *Poland* at [72].

⁶¹¹ *Ibid* at [73].

⁶¹² *Ibid* at [74]-[75].

⁶¹³ *Ibid* at [76].

⁶¹⁴ *Ibid* at [87].

⁶¹⁵ DSM Directive, art. 17(7).

⁶¹⁶ *Ibid*, art. 17(9).

⁶¹⁷ *Poland* at [81].

The third issue examines the proportionality requirement to ensure that relevant fundamental rights are balanced by the limitation.⁶¹⁸ The CJEU identifies that art. 17 DSM Directive is designed to protect IP guaranteed in art. 17(2) Charter and that its obligations arise from the Directive's goal to contribute to the achievement of a well-functioning and fair marketplace for copyright.⁶¹⁹ In the court's view, such a balance between art. 17(2) Charter against other fundamental rights, specifically freedom of expression and information, regarding copyright protection pursuant to platforms, to a certain extent, must be necessarily accompanied by a limitation on the latter.⁶²⁰ Additionally, these obligations are found to be both appropriate and necessary in light of protecting IP rights.⁶²¹ Drawing upon the previous finding that art. 17 DSM Directive as a whole, in particular regarding user-based safeguards⁶²², respects the essence of relevant fundamental rights, the CJEU finds that art. 17 DSM Directive does not disproportionately restrict them.

From these three issues, the question of member state discretion emerges as a central theme. Most of the judgement, without providing specific guidance or rules as to how national legislators should implement art. 17 DSM Directive, turns on the 'sufficient' safeguards included to avoid over-blocking and filtering of lawful and legitimate user uploads on platforms. While we observed in Chapter III, that both the EU Commission's Guidance and Advocate General Saugmandsgaard Øe in *Poland* hinted that member states could respect user rights by focusing on the notion of 'manifestly' infringing uploads, the CJEU avoids the question entirely. The court appears to prefer member states to fill the gap either by prescribing measures themselves or by default, to leave this interpretative task for OCSSPs.⁶²³

The CJEU additionally qualifies this flexible approach by referring to the need for national transpositions to allow a fair balance to be struck between the various fundamental rights protected by the Charter.⁶²⁴ Though in *Poland*, the court limits its application to freedom

⁶¹⁸ Ibid at [84].

⁶¹⁹ Ibid at [82].

⁶²⁰ Ibid; C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* ECLI:EU:C:2008:54.

⁶²¹ *Poland* at [83].

⁶²² Ibid at [85]-[94].

⁶²³ Indeed, a recent EU Commission-funded research report states that the previous guidance may need to be reviewed following the *Poland* decision specifically in regard to fragmentation within member state approaches due to lacking clear guidelines, the standing of 'user rights', the role of complaint and redress mechanisms, the notion of manifestly infringing versus the ability of a technology to distinguish between lawful and unlawful content. See, João Pedro Quintais and *et al*, *Copyright Content Moderation in the EU: An Interdisciplinary Mapping Exercise* (Recreating Europe Report: August 2022) available here https://communia-association.org/wp-content/uploads/2022/09/220831recreate_copyright_content_moderation.pdf.

⁶²⁴ *Poland* at [99].

of expression and of information, this statement arguably opens the door to consider other relevant fundamental rights when transposing art. 17 DSM Directive. This could include the right to conduct a business pursuant to art. 16 Charter. Though we will discuss how to balance this fundamental right later in the chapter, in relation to user obligations, it suffices to note here that the CJEU appears to contemplate that art. 17's implementation should also not restrict OCSSPs' abilities to operate by placing a steep economic burden which practically requires complicated and costly algorithmic technology.⁶²⁵ This qualification also extends to both national law, ideally to constitutional guarantees, as well as with general principles of law, specifically the principle of proportionality.⁶²⁶

It is clear, that to respect the essence of freedom of expression and of information, legitimate content should not be blocked or filtered. What remains uncertain is whether these safeguards can be effective when legitimate content is 'earmarked' or flagged by rightsholders as infringing and blocking is requested due to its ability to potentially cause significant economic harm⁶²⁷, erroneously. Following *Poland*, there are such circumstances where following proportionality balancing, blocking is necessary to the detriment of freedom of expression. This limitation is only justified however, regarding legitimate content, if the essence of freedom of expression is respected, at this junction, fulfilled by the redress and complaint mechanism. Commentary explains that too long a delay can restrict the right to an effective remedy.⁶²⁸ Art. 17 DSM Directive hints that effectiveness requires the process to be without undue delay and subject to human review. But how long must a user wait, from a proportional perspective, for a wrongful block to be removed? Or is it perhaps a more proportional outcome if, during this procedural process, the legitimate content stays up?

Commentary proposes that outside of cases of prima facie copyright infringement, also referred to as manifestly infringing uploads, that:

*“there should be no presumption that the uploaded content is infringing,
meaning that such content should remain available to the public... until its*

⁶²⁵ *UPC Telekabel* at [49].

⁶²⁶ *Poland* at [99].

⁶²⁷ Commission Guidance 22.

⁶²⁸ Geiger and Jütte [n 574] 528.

legal status is determined, following a procedure consistent with Article 17(9).’’⁶²⁹

However, it seems, that when member states transpose art. 17 DSM Directive literally, it is likely that such a presumption will prevail because OCSSPs become tasked with deciphering the meaning of a legitimate upload. Arguably, such an approach additionally reflects the exploiters’ narrative, evidenced throughout this thesis, as private actors, in an unconstitutional manner detached from any notion of sovereignty, become responsible for ensuring that the safeguards identified by the CJEU in *Poland* effectively respect the essence of relevant fundamental rights, namely freedom of expression. The French implementation appears to exemplify such an approach.

The transposition takes its initial shape from the aptly named proposal for the law on audio-visual communication and cultural sovereignty in the digital era,⁶³⁰ allowing amendments to the French Intellectual Property Code. The result is a literal copy of art. 17 DSM Directive without considering comments made in *Poland* that member states should ensure that the ‘user rights’ provisions mentioned by the CJEU are applied in a practical and helpful manner to support users. Instead, the implementation appears to rely on the finding in *Poland* that art. 17 DSM Directive inherently includes sufficient safeguards to respect the essence of freedom of expression and of information. Such an approach fails to consider that without oversight, these safeguards could be implemented by platforms in a way that does not allow a fair balance to be struck between relevant fundamental rights and additionally, conflicts with the principle of proportionality.

The French implementation merely provides that platforms must not deprive users of the effective benefit of copyright exceptions already outlined in the French Intellectual Property Code.⁶³¹ Notably, the French legislator has chosen not to explicitly state that parody, caricature and pastiche are mandatory exceptions, but silently elect to rely on those exceptions already forming part of French law. At minimum, OCSSPs are required to inform users through their terms and conditions that lawful use of works, such as those authorised by exceptions or

⁶²⁹ João Pedro Quintais and *et al*, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’ (2019) 3 JIPTEC 277, 280 at [23].

⁶³⁰ Law n° 2021-1382 of October 25, 2021, relating to the regulation and protection of access to cultural works in the digital age.

⁶³¹ French Code de la propriété intellectuelle (version consolidée au 30 juin 2022) (‘French Intellectual Property Code’), art.137-4(I).

limitations, are allowed to be uploaded on to OCSSPs.⁶³² Otherwise, as with the construction of a complaint and redress system⁶³³, OCSSPs are required to fill the gaps left by both the EU Commission, CJEU and French legislator. This stance conflicts with stakeholder consultations that suggested that EU Commission provide Guidance specifically on how safeguards for legitimate use should be transposed by member states.⁶³⁴

Given the likelihood that OCSSPs, in such circumstances, will implement these obligations strictly, requiring potentially infringing uploads to ‘stay down’ while they are verified, also conflicts with stakeholders, largely excluding rightsholders, that advocated for uploads to ‘stay up’ during the redress and complaint mechanism.⁶³⁵ It also conflicts with the EU Commission’s Guidance, particularly the need to identify manifestly infringing works. Unsurprisingly, rightsholders have generally taken the view that the Guidance conflicts with art. 17 DSM Directive. They contend that OCSSPs should assess the applicability of exceptions before they are made available, based on “the ill-defined and nebulous comments of ‘likely infringing’ and ‘likely legitimate’ uploads”⁶³⁶. They view the possibility that “likely legitimate” content will “stay up” as not only inconsistent with art. 17 DSM Directive, but contradictory regarding platforms’ obligation to expeditiously disable access to or remove unauthorised content from their websites.⁶³⁷ Unsurprisingly, following the French

⁶³² Ibid, Art. L137-4(VI).

⁶³³ Ibid, Art. L137-4(II)-(III). The system must, without undue delay, decide whether to block access to uploaded works or to withdraw these works subject to oversight by a natural person.

⁶³⁴ European Visual Artists, ‘EVA’s Contribution to Art 17 Guidelines. European Visual Artists remain vigilant on the Copyright Directive to close the value-gap for real’ (15 September 2020) < <https://www.eartists.org/press-release-evas-contribution-to-art-17-guidelines/>> accessed 4 January 2023; Computer and Communications Industry Association (CCIA Europe), ‘CCIA Responds to the European Commission Consultation on Article 17 of the Copyright Directive’ (10 September 2020) < <https://ccianet.org/news/2020/09/ccia-responds-to-the-european-commission-consultation-on-article-17-of-the-copyright-directive/>> accessed 4 January 2023; Communia Association, ‘Article 17 stakeholder dialogue: What have we learned so far’ (16 January 2020) < <https://communia-association.org/2020/01/16/article-17-stakeholder-dialogue-learned-far/>> accessed 4 January 2023; Communia, ‘Open letter on Article 17: Is the Commission about to abandon its commitment to protect fundamental rights?’ (20 April 2020) < <https://communia-association.org/2021/04/20/open-letter-on-article-17-is-the-commission-about-to-abandon-its-commitment-to-protect-fundamental-rights/>> accessed 4 January 2023.

⁶³⁵ Ibid.

⁶³⁶ ALAI, ‘Second Opinion1 on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market’ (18 September 2020) < https://www.alai.org/en/assets/files/resolutions/200918-second-opinion-article-17-dsm_draft_en.pdf> accessed 4 January 2023.

⁶³⁷ Ibid.

transposition, rightsholders praised the implementation, noting that it reflects the initial lobbying by rightsholders to ensure that OCSSPs are held accountable.⁶³⁸

The French implementation's position on legitimate uses, appears to be founded in the belief that there is no need for ex-ante user rights safeguards as the redress and complaint mechanism inherently balances the interests of users.⁶³⁹ In a similar vein to the *Poland* decision, those supporting the French implementation contend that temporary restrictions on freedom of expression are justified to ensure strong protection of IP rights.⁶⁴⁰ However, even before the Guidance was published, tension was palpable between the EU Commission and France regarding this interpretation, as commentary explains that some view the redress and complaint mechanism as being insufficient to protect legitimate uses, instead, requiring ex-ante protection.⁶⁴¹

Perhaps most critically, the French implementation grants the Audiovisual and Digital Communication Regulatory Authority (ARCOM) the power to hear complaints of OCSSPs' redress and complaint systems.⁶⁴² ARCOM is result of a merge between the French media regulator, CSA, and HADOPI, the French online copyright authority. This new regulatory agency's remit extends beyond enforcing copyright online, but also includes protecting minors, and responding to disinformation and hatred online. France's previous online copyright legislation, referred to as the HADOPI anti-piracy legislation, monitored those suspected of distributing copyright content without authorisation. It was most famous for its graduate response method which meant that after three warnings, sent by internet service providers, at the behest of HADOPI, the behaviour is reported to a judge who had discretion to impose

⁶³⁸ SACEM, 'French transposition of the EU copyright directive: a historic step forward for the protection of creators in the digital world' (14 May 2021) <<https://presse.sacem.fr/french-transposition-of-the-eu-copyright-directive-a-historic-step-forward-for-the-protection-of-creators-in-the-digital-world/?lang=env>> accessed 4 January 2023.

⁶³⁹ Conseil Supérieur de la Propriété Littéraire et Artistique (CSPLA), 'Second Report on Content Recognition Tools on Digital Sharing Platforms' (29 April 2020) <<https://www.culture.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux-publications/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-plateformes-de-partage-en-ligne-II>> accessed 4 January 2023; See, Communia Association, 'France once more fails to demonstrate support for its interpretation of Article 17' (4 February 2021) <<https://communia-association.org/2021/02/04/france-once-more-fails-to-demonstrate-support-for-its-interpretation-of-article-17/>> accessed 4 January 2023.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid. Support for the French implementation appears to stem from the notion that France presents itself "as the guardian of the original intent of the directive".

⁶⁴² French Intellectual Property Code, Art. L137-4(IV).

penalties including disconnecting the internet.⁶⁴³ Commentary note that this regime did not considerably impact the ability of consumers to access protected materials⁶⁴⁴, mainly due to the increase in other methods of illicit consumption such as streaming.

This section contends that the combination of lacking guidance on how to ensure that arts. 17(7) and 17(9) DSM Directive ensure that the essence of freedom of expression is respected with a rebranding of an infamous French piracy regulator appears to cast a dark spell on the ability of the transposition to ensure that legitimate uses are allowed and fundamental rights, proportionally balanced. The outcome of this approach is quite simple: user uploads will most certainly “stay down” while they are verified. The French judiciary will fill the gap, only if users are able to afford appealing the administrative decision of ARCOM. Commentary explains that:

*“[I]n the context of UGC, it is often crucial to react quickly to current news and film, book and music releases. If the complaint and redress mechanism finally establishes that a lawful content remix or mash-up has been blocked, the significance of an affected quotation, parody or pastiche may already have passed”.*⁶⁴⁵

Such an approach, this section contends, ultimately ignores the requirement that, if fundamental rights are to be balanced proportionally, there must be procedural safeguards to ensure that legitimate content is not unduly delayed, to the extent, that the upload is no longer relevant due to the pace of creativity and communication online.

Throughout this thesis, the German copyright legislation and jurisprudence has served as a calling point for discussing how relevant copyright interests can be reconciled online, given the country’s strong constitutional foundation for protecting art as well as a person’s dignity and personality, as discussed in Chapter I. The German implementation of art. 17 DSM Directive is no different.⁶⁴⁶ The German approach differs significantly from the “stay down” French model by including ex ante safeguards when user uploads, following rightsholders’ notice to block an user upload, are recommended to “stays down”. These procedural

⁶⁴³ Nicola Lucchi, ‘Regulation and Control of Communication: The French Online Copyright Infringement Law (HADPOI)’ (2011) 19 Cardozo Journal of International and Comparative Law, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-07..

⁶⁴⁴ Péter Mezei, ‘Platform Economy vs. Privacy : The (Un)expected Consequences of Online Media Consumption’ (2018) 2 Medien und Recht International 57.

⁶⁴⁵ Axel Metzger and *et al* [n 585] 17.

⁶⁴⁶ Urheberrechts-Diensteanbieter-Gesetz vom 31. Mai 2021 (BGBl. I S. 1204, 1215) (Act on the Copyright Liability of Online Content Sharing Service Providers) (‘UrhDag’).

safeguards focus on those user uploads that are both authorized by law⁶⁴⁷ and those that are not manifestly infringing, contending that they should be constructed as presumably authorized by law.⁶⁴⁸

User uploads can fall into two categories of blocking if they are not lawfully authorized by law, simple or qualified blocking.⁶⁴⁹ The first refers to the standard ‘notice and takedown’ procedure where upon receiving information from rightsholder that the upload is an unauthorised communication to the public, giving a duly substantiated notice, the upload is removed. Qualified blocking involves situations where, despite a request being made by the rightholder, it is unclear whether the upload is infringing. Commentary explains that as preventative blocking and stay down naturally give rise to issues surrounding over-blocking and filtering, the German legislature elected for it to consider users’ rights and interests through ex ante safeguards.⁶⁵⁰ The structure of the preventative blocking procedure ultimately morphs it into “a delayed takedown system for certain well-defined small scale uses or certain user-generated contents, which have been flagged by the end user as being justified under the exceptions”⁶⁵¹.

The German Act divides the preventative blocking mechanism into two separate groups depending on the upload. For minor uses, the system largely reflects arts. 17(7) and 17(9) DSM Directive, where upon the upload being requested to be blocked, the user has recourse to the redress and complaint system.⁶⁵² Regarding UGC, the Act includes a presumption that so long as the upload contains less than half of the original copyright content, which is combined with other content, and uses the works of third parties only to a minor extent, that use is presumably authorised by law.⁶⁵³ A minor use is capped to 15 seconds of audiovisual works, 15 seconds of soundtracks, 160 characters of a text and up to 125 k byte of visual arts files.⁶⁵⁴ Lastly, they must not serve any commercial purposes or only serve to generate insignificant income.

The second group refers to circumstances where the user believes the upload is lawful. Here, the upload must meet the presumption regarding UGC, but instead of the upload meeting the strict requirements of a minor use, following a blocking request, the user can flag the use

⁶⁴⁷ UrhDag, ss. 4, 5, and 6.

⁶⁴⁸ Ibid, ss. 9 and 10.

⁶⁴⁹ Ibid, s. 8.

⁶⁵⁰ Leistner [n 581] 915.

⁶⁵¹ Ibid.

⁶⁵² UrhDag, ss. 9 and 14.

⁶⁵³ UrhDag, s. 9.

⁶⁵⁴ Ibid, s. 10.

as justified due to a relevant exception.⁶⁵⁵ The user has a 48-hour window to respond to the blocking request and flag the upload as legitimate.⁶⁵⁶ Lastly, the presumed lawful upload “stays up” until the redress and complaint mechanism finishes, and if the upload infringes, the OCSSPs is exempt from liability for that period of verification.⁶⁵⁷

Both simple and qualified blocking require the OCSSP to substantiate complaints and notify all relevant parties, giving them an opportunity to comment.⁶⁵⁸ Then, the OCSSP must, within one week, decide whether the upload is infringing and should be taken down.⁶⁵⁹ Such decisions are made by impartial natural persons.⁶⁶⁰ As discussed in the previous chapter, the German Act includes a specific method for balancing rightsholders interests called the ‘red button’. Here, if following the OCSSP’s review by a natural person, a ‘trusted’ rightsholder can declare that the presumption of a legitimate use should be rebutted and that the upload “staying up” impairs the economic exploitation of the work.⁶⁶¹ Then the OCSSP must immediately block the work until the conclusion of the complaint procedure.⁶⁶² Additionally, so long as rightsholders notify platforms sufficiently, preventative blocking is available for time-sensitive content such as sporting events or film premieres.⁶⁶³ Lastly, both the ‘red button’ and the pre-flagging of presumably lawful content are subject to one final restriction: procedural self-regulating measures against abuse.⁶⁶⁴

Commentary remark that this system makes rightsholders bare both the initiative and cost of the redress and complaint mechanism, specifically for when algorithmic copyright enforcement reaches its limits (i.e. parody, pastiche and caricature).⁶⁶⁵ User uploads, traditionally residing in a weaker bargaining position against rightsholders, benefit from the presumption that the upload is legitimate until the it is verified at the behest of exploiters. This presumption negates the delay on artistic communication online found in the practical and textual implementation of 17(9) DSM Directive but also provides strong protection of rightsholders for manifestly infringing uses. Lastly, for authors, removed from the categories

⁶⁵⁵ UrhDag, ss. 9(2)(3) & 11(1).

⁶⁵⁶ Ibid, s. 11(2).

⁶⁵⁷ Ibid, s. 12(2).

⁶⁵⁸ Ibid, s. 14.

⁶⁵⁹ Ibid, s. 14(3).

⁶⁶⁰ Ibid, s. 14(5).

⁶⁶¹ ‘Trusted’ rightsholders are said to include “rightsholders with larger and/or premium repertories, qualified personnel, a case history of justified notice and takedown requests”. See, Leistner [n 581] 917.

⁶⁶² UrhDag, s. 14(4).

⁶⁶³ Ibid, s. 7(2).

⁶⁶⁴ UrhDag, s. 18.

⁶⁶⁵ Leistner [n 581] 915.

of rightsholders, also benefit as the German implementation, regarding these difficult to detect uploads, provides that platforms must pay the author, not the exploiter, appropriate remuneration for the communication of parody, pastiche and caricature uses of works.⁶⁶⁶

The question that both options for implementation must answer is the extent to which they create an environment where affected rightsholders are willing to grant licences to OCSSPs, as this is really the crux of the liability mechanism. This section's review of the French implementation, specifically the likelihood that it will fail to allow legitimate uses to 'stay up' during the redress and complaint system, not only fails to ensure that arts. 17(7) and 17(9) DSM Directive can respect the essence of freedom of expression effectively, but do not provide any guidance likely to incentivise rightsholders to enter licences with OCSSPs for the benefit of creativity online, specifically UGC. Germany, by comparison, appears to incentivise rightsholder entering into licences which cover presumably authorised uses as it is only at this juncture that rightsholders can receive a cut of the monetization of content. Outside of such a licence, the German implementation closely resembles the features of a statutory licence for non-manifestly infringing uses.

The German approach tasks collective management organisations (CMOs) with managing the new lines of remuneration to authors, strengthening the collective management of rights.⁶⁶⁷ Commentary explain that large institutional rightsholders "will possibly be confronted with arguments to subtract the resulting additional remuneration costs for the use from the individual licensing fees"⁶⁶⁸. Indeed, the entire approach of the German implementation is directed at collective licensing, as commentary notes that it would be near to impossible for "individual rightsholders with small, non-representative repertoires" to be able to obtain authorisation pursuant to art. 17(4)(a) DSM Directive.⁶⁶⁹ Additionally, the shift in burden to initiate and bare financial responsibility for the complaint and redress system for non-manifestly infringing uses, should incentivise rightsholders to enter licences with OCSSPs.

The DSA, adopted late in 2022, is an EU regulation designed to modernise the e-Commerce Directive that provided safe harbours *inter alia* for platforms to escape copyright liability when users uploaded infringing content. Commentary contends that the new DSA rules could potentially provide more guidance to the question of how to implement art. 17 DSM

⁶⁶⁶ UrhDag, ss. 5(2) & 12(1).

⁶⁶⁷ Leistner [n 581] 920.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

Directive.⁶⁷⁰ Regarding the relationship between the DSA and the art. 17 OCSSP regime, the former explains that to the extent that the European copyright system generally establishes specific rules and procedures, these should remain unaffected by the DSA, confirming its *lex specialis* nature.⁶⁷¹ Thus, the role of the DSA in this context is to support art. 17 DSM Directive by complementing and not affecting its application. Additionally, the DSA outlines that it can also apply to the extent that member states have a discretionary power to transpose art. 17 DSM Directive.⁶⁷²

It follows that though we should view the DSA as an overarching horizontal regulatory regime for illegal content, art. 17 DSM Directive specifically outlines a small part of this broader picture by focusing on infringing copyright content uploaded to OCSSPs. To the extent that the DSA can fill the gaps left by both the EU Commission and the CJEU in the *Poland* decision, member states would have access to more detailed implementation guidance, arguably elevating the level of protection of authors, including users, online. It is important however, to distinguish the procedural value of the DSA from the user safeguards articulated in arts. 17(7) and 17(9) DSM Directive which appear to be stronger than those outlined in the DSA as the latter are designed, pursuant to *Poland*, to respect the essence of fundamental rights specifically freedom of expression.

If member states are to rely on the DSA to fill the procedural gaps inherent in art. 17(4)(b), this section contends that the German implementation approach naturally aligns with the procedural safeguards introduced by the DSA. The DSA provides detailed procedural rules on notices and counter-notices regarding illegal content. These include provisions in notice-and-action⁶⁷³, statement of reasons⁶⁷⁴, trusted flaggers⁶⁷⁵ and measures and protection against misuse⁶⁷⁶. The Act also envisages the creation of Digital Services Coordinators of each member state to fulfil a supervisory role regarding very large online platforms and services,⁶⁷⁷ and to certify out-of-court dispute settlement bodies⁶⁷⁸, forming a European Board for Digital Services⁶⁷⁹. Lastly, given the regulatory nature of the DSA, it may also force the hand of

⁶⁷⁰ Jütte [n 580] 695.

⁶⁷¹ Ibid, recital 11.

⁶⁷² Ibid, recital 10.

⁶⁷³ DSA, arts. 15 & 16.

⁶⁷⁴ Ibid, art. 17.

⁶⁷⁵ Ibid, art. 22.

⁶⁷⁶ Ibid, art. 23.

⁶⁷⁷ Ibid, art. 33.

⁶⁷⁸ Ibid, art. 21.

⁶⁷⁹ Ibid, art. 61.

member states, such as France, that have implemented art. 17 DSM Directive in a textual manner, without specifying any ex ante procedural user safeguards, to ensure that arts. 17(7) and 17(9) DSM Directive effectively respect the essence of relevant fundamental rights.

There is no doubt that lacking specific and detailed guidance, art. 17 DSM Directive will certainly result in fragmentation, cutting against the DSM Directive's overarching goal of harmonisation within the digital single market. Already, by comparing the approaches of France and Germany it is clear that these diverging implementations centre upon the extent to which the member state is willing to introduce ex ante procedural protection for users, or whether the implementation is a literal transposition of the text of art. 17 DSM Directive, ultimately relying upon the judiciary at both national and CJEU level to fill the gaps. Turning to the position of OCSSPs, it most certainly would have been preferable if a comprehensive EU-wide approach to copyright liability was outlined at the very beginning. Tasked with meeting greatly varying obligations alongside operating on a European, if not global, level, OCSSPs in Germany appear to be implementing the bare minimum, preferring to wait for a consolidated approach.⁶⁸⁰

This section aimed to examine the two implementation options of art. 17 DSM Directive: the “stay down” utilised by France against the “stay up” approach of the German implementation. The goal was to determine to which extent either option best reconciles authors, users, platforms and exploiters in a proportionally balanced manner that supports creativity online. By first considering the recent CJEU judgement in *Poland*, the chapter set the parameters of implementation guidance. Compared to the EU Commission's Guidance and the Advocate General Saugmandsgaard Øe's opinion in *Poland*, we found that the CJEU's approach lacked certainty and precision. The CJEU's finding that art. 17 DSM Directive, viewed as a whole, is a limitation on freedom of expression and of information that is justified appears to actively refuse to engage with any helpful discussion as to how crucial user safeguards in arts. 17(7) and 17(9) DSM Directive should practically be implemented. The result being that the discretion of member states, a central yet indirect theme of the judgement, yields more fragmentation to the detriment of authors, including users, and it follows, creativity online.

⁶⁸⁰ Jasmin Brieske and Alexander Peukert, ‘Coming into force, not coming into effect? The impact of the German Implementation of art. 17 CDSM Directive on Selected Online Platforms’ (2022) CREATE Working Paper 2022/1.

We have observed that the French implementation, largely supported by rightsholders, is a literal transposition of art. 17 DSM Directive. However, despite the importance identified in *Poland* of the role of the user safeguards, it is surprising that the French approach fails to specify how OCSSPs should ensure these safeguards are effective. Additionally, the rebranding of a regulatory agency known for strict enforcement of copyright online, will have knock-on effects on users' fundamental rights. Overall, the French approach seems to rely on the role of the judiciary beyond art. 17 DSM Directive to fill these gaps. Yet as discussed above, it is unlikely that users will have the same recourse to the judiciary as exploiters relating to a larger access to justice issue.

Conversely, the German implementation of art. 17 DSM Directive relies completely on ex ante user safeguards to guide the procedural application to ensure that the essence of freedom of expression is respected. This is most clear through the qualified blocking mechanism where upon being informed of a blocking request, users can flag their upload as a legitimate use pursuant to copyright exceptions. The German legislator has also considered the impact that parody, pastiche and quotation could have on authors and provides a direct line of payment from the OCSSP to authors. While the innovative structure is designed to incentivise rightsholders to enter licences with OCSSPs, the legislation supports rightsholders through the red button. Lastly, the legislation provides an overarching balancing mechanism by providing a provision on abuse of either user-flagging or the red button.

The comparison between both the French and German implementation, exemplified the option between user uploads “staying down” or “staying up” during the complaint and redress mechanism respectively, evidence the very real need for specific guidance to be shared with OCSSPs on how to meet the threshold to ensure arts. 17(7) and 17(9) DSM Directive are effective in respecting the essence of relevant fundamental rights. The German legislator has obviously taken the task upon themselves, providing explicit procedural safeguards to oversee the implementation of art. 17 DSM Directive by OCSSPs. Lacking helpful guidance from the EU Commission, the CJEU and member states, such as France, we have observed that commentary is hopeful that the DSA may be able to fill these procedural gaps.

This section has illustrated that these diverging approaches to the implementation of art. 17 DSM Directive are steeped in a broader context within the European copyright system regarding the prominence of exploiters to the detriment of authors, including users, that use previous works to produce new creativity and share this online. Now the exploiters' narrative

impacts platforms, specifically those designated with OCSSP status, as rightsholders seek to reshape European copyright law to obtain a cut from platforms that monetize content. Yet, despite advances made by lobbyists and member states such as France to spearhead the value-gap campaign, interventions in the form of the EU Commission's Guidance and the Advocate General Saugmandsgaard Øe's opinion in *Poland*, have attempted to balance the art. 17 DSM Directive to support users' fundamental rights. Though the CJEU's judgment in *Poland* is largely unhelpful, the statements reflecting the need to find a fair balance between fundamental rights as well as the role of user safeguards specifically, hint that a German implementation of art. 17 DSM Directive is not merely envisaged by the Directive, but perhaps preferable.

Such an approach serves as the practical foundation in the following section to consider the extent to which the principle of implied authorisation should be viewed as a fundamental point of departure within the European copyright system.

4.2. EXHAUSTING AUTHORIAL CONSENT: THE OBLIGATION FOR PLATFORMS TO PAY AUTHORS DIRECTLY FOR CREATIVE REUSES OF AUTHORS' WORKS

Throughout this thesis, we have traced the development of the exploiters' narrative. As we saw in the previous section, the latest instalment of this expansion of exploitation rights has occurred through art. 17 DSM Directive. Yet, it is clear that there is mounting pressure within the commentary against the implication of additional rules regulating fundamental modes of online communication which benefit the few, rightsholders, to the detriment of authors, platforms and users. Particularly in the previous section, we observed both the CJEU, in addition to the more direct statements of the EU Commission and the Advocate General Saugmandsgaard Øe's opinion in *Poland*, emphasize the need to ensure a fair balance between copyright interests online as well as the fundamental rights that support them. This ultimately crystallised in the German implementation of art. 17 DSM Directive, contrasting from the literal transposition of France; the former implementing ex ante procedural safeguards to bolster the position of authors, including users, and creativity online.

Alongside this political and legal context, the thesis has delineated the existence of an inherent fundamental principle within the European copyright system: implied authorisation. Building upon the free movement of goods case law and distinguishing its implementation from the notion of digital exhaustion, the principle of implied authorisation takes shape as a balancing mechanism specific to creativity online. Connected concepts of fundamental rights and self-determination provide the foundation for authors, including users, to lawfully use

previous works and communicate them online. Thus, the principle of implied authorisation emerges as a mechanism for mediating the interests of authors, users, platforms and exploiters in a manner that supports creativity online.

In this section, we will expand on the principle of implied authorisation by considering the obligation for authors to be appropriately remunerated for creative reuses. We will draw upon Germany's implementation of art. 17 DSM Directive which includes a direct line of payment from platforms to authors for uses falling within the parody, pastiche or caricature exception. The aim is to examine how the principle of implied authorisation, through its parallel effect to the doctrine of exhaustion, provides a point of departure for access to and use of works within the European copyright system. This will provide the basis for the thesis to construct, in the following section, a wider access right, as a counter-right from the European copyright system.

Firstly, the section expands upon the discussion of the doctrine of exhaustion already advanced by the thesis to consider how the principle of implied authorisation reconciles the fundamental free spaces within the European copyright system to provide an overarching escape mechanism from the exploiters' narrative. Secondly, following the discussion for a re-exception for commercial creative reuse and the standard of manifestly infringing uploads, we will examine the author's residual remuneration right for creative reuses of works and consider the extent to which substitution should guide the implementation of the principle of implied authorisation. Lastly, the section will apply the principle of implied authorisation to the facts in *Pelham*, to illustrate the potential of the principle to reach a more proportionally balanced outcome that reflects how communities and sub-communities online create copyright works.

Absent recognition of the principle of implied authorisation within the European copyright system, creativity relies upon a patchwork of principles within the national and CJEU jurisprudence, statutory exceptions and limitations, and more recently the influence of fundamental rights, specifically freedom of expression and art. Traditionally, the CJEU interpreted these free spaces restrictively, preferring to rely upon the standard enshrined within the Information Society Directive that IP rights should receive strong protection. However, over the last few years these interpretative footing has begun to shift as the Court has continued to emphasize the increasing significance of striking a fair balance between relevant copyright interests. Though the latest expansion of exploiters' rights, art. 17 DSM Directive, introduces specific liability for OCSSPs, alongside mandatory parody, pastiche and caricature exceptions,

the CJEU's decision in *Poland* also requires transpositions to allow a fair balance to be struck between the various fundamental rights protected by the Charter.

While many hoped that fundamental balancing would introduce much-needed access points within the European copyright system as we observed in Chapter I, the CJEU effectively foreclosed the option of applying fundamental rights externally to copyright limitations and exceptions that are already fully harmonised. Parody is such an exception. Following *Deckmyn*, the contours of the parody exception are completely determined by EU law. Crucially, it means that any application of fundamental rights can only occur in two scenarios: (1) Similarly to parody, national courts can only apply fundamental rights internally, relying upon the EU legislator and CJEU's jurisprudence to determine scope and meanings. (2) In situations where the exception or limitation is not entirely determined by EU law, national courts can apply fundamental rights directly when interpreting the meaning of the provision.

While exploitation rights are fully harmonised, meaning that "their terms are to be interpreted autonomously and only by the CJEU in the light of the Charter's fundamental rights"⁶⁸¹, exceptions and limitations grant a residual degree of discretion to member states when transposing them into national law, to which they may additionally apply national constitutional rights. This discretion can only be interpreted on a "case-by-case basis in line with the wording of the respective limitation or exception"⁶⁸². This is clear in *Funke Medien*, *Spiegel Online* and *Pelham* where the CJEU found that both the news reporting and citation exception are not fully harmonised due to the "indeterminacy of the statutory wording": "to the extent justified by the informatory purpose", "use... in accordance with fair practice, and to the extent required by the specific purpose", and "purposes such as criticism or review". In these spaces, national courts can apply national constitutional guarantees but must do so within the confines of a fair balance of fundamental rights pursuant to the Charter.

Earlier in the thesis, it was proposed that the European copyright system, comprising the Information Society Directive, inherently includes the principle of implied authorisation.⁶⁸³ Building from the notion of constitutional propertization which requires balancing of relevant rights, including exploitation rights, the thesis emphasized the importance of social justifications of property, specifically creativity, to limit the potential of contractual override

⁶⁸¹ Thomas Dreier, 'The CJEU, EU Fundamental Rights and the Limitations of Copyright' (2020) 69 GRUR International 223.

⁶⁸² Ibid.

⁶⁸³ See, Chapter 3.1.

of the principle of implied authorisation. This section additionally proposes that through the lens of constitutional propertization, the doctrine of exhaustion should be cast as an overarching fair balancing mechanism within the European copyright system, comprising the application of the principle of implied authorisation. The argument is that the doctrine of exhaustion reflects an intrinsic trade off within copyright, the balance between access and protection.

This means that not only does it facilitate the application of fundamental rights, but ultimately, wholistically renders the fair balance of fundamental rights. The principle of implied authorisation achieves this balance with respect to creativity. It does so by requiring two elements that mirror the doctrine of exhaustion: consent and appropriate remuneration. Throughout this thesis, one of these elements, consent, has been described as a meta-exception given its doctrinal capacity to reflect the balance between access and protection, specifically regarding earlier free movement of goods jurisprudence that interpreted it almost as an arbitrator of exhaustion of IP rights generally. However, the status afforded consent can also be located within a broader context of the European copyright system, moving beyond the strict confines of Community-wide exhaustion.

It stems from the idea that authorisation is the gatekeeper of the European copyright system. Starting from *Infopaq*, the CJEU held that when interpreting copyright exceptions and limitations pursuant to the reproduction right, they should be constructed as a derogation from the requirement of authorisation from the rightholder for any reproduction of a protected work.⁶⁸⁴ However, authorisation is not limited to the wording of exploitation acts listed in the Information Society Directive. In view of recent jurisprudence, particularly the role of fundamental rights, when interpreting the scope and application of a copyright exception or limitation, authorisation takes its form through other sources.

As we saw in Chapter II, the first attempt by the CJEU to consider the delineation of exploitation rights was through the notion that some uses can be authorised by law. Linking case law demonstrated a preference of the CJEU to interpret the “communication to the public” criterion restrictively, reserving space for uses where fundamental balancing is relevant such as freedom of expression and information and the ability of hyperlinking to ensure these rights’ effectiveness online. This section contends that the German implementation which focuses on the definition of manifestly infringing by reference to minor uses or the procedural requirement of user pre-flagging for legitimate uses, under the heading “presumably authorised by law”, is

⁶⁸⁴ *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C: 2009:465 at [57].

a construction of authorisation that evokes the fair balancing mechanism that this meta-exception espouses online.

Indeed, the entire debate as to whether user uploads that are legitimate and unable to be identified by algorithmic copyright enforcement technology, reflects a theoretical question over the role of authorisation within the European copyright system. Though exploiters argue that, in line with *Infopaq*, any derogations to exploitation rights should be interpreted strictly, following *Poland*, national legislators are required to consider the effectiveness of user safeguards, to which some, including the CJEU, have referred to as users' rights, bolstered by fundamental rights. It appears that the general principle of authorisation can comprise not merely specific instances of consent, but a wider construction informed by the fair balance between fundamental rights, particularly freedom of expression. It is this approach to balancing copyright interests that reflects both the doctrine of exhaustion and supports the proposal that the doctrine is an overarching fair balancing mechanism within the European copyright system.

The second element which triggers this escape mechanism from the exploiters' narrative, reflected in overly extensive copyright protection⁶⁸⁵ is the concept of appropriate remuneration. As we observed in Chapter II, early free movement case law evidence limitations on defining the concept of appropriate remuneration, mostly dependent on contextual factors. For example, in *Coditel I*, the CJEU held that the essential function of copyright is to ensure an appropriate remuneration, but as we saw for cinematographic works, where commercial exploitation lay in the ability to repeatedly perform them, one single payment is insufficient.⁶⁸⁶ More recent secondary EU case law on the application of exhaustion pursuant to the Information Society Directive, focuses on whether it would conflict with a recital in that directive requiring a high level of protection for rightholders to allow them "to obtain an appropriate reward for the use of their work"⁶⁸⁷.

In *Allposters*, the CJEU define appropriate to mean "reasonable in relation to the economic reward for the use of the ... work",⁶⁸⁸ referring to the ability for the rightholder to exploit the work in new commercial markets.⁶⁸⁹ Comparatively in *UsedSoft*, the CJEU holds that if exhaustion was not applicable on these facts, it would "allow the copyright holder to control the resale of copies downloaded from the internet and to demand further remuneration

⁶⁸⁵ Discussed in Chapter III regarding contractual override and protection against TPM circumvention.

⁶⁸⁶ *Coditel I* at [11].

⁶⁸⁷ Information Society Directive, recital 10.

⁶⁸⁸ *Allposters* at [43].

⁶⁸⁹ *Ibid* at [48].

on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain an appropriate remuneration”⁶⁹⁰. Referring to *FAPL*, the CJEU remarks that such an approach would “go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned”⁶⁹¹.

Such an approach is based on limiting the application of exploitation rights to the defined scope of copyright: the principle that rightholders should receive appropriate remuneration for uses of their works. In the previous chapter, we sketched the application of this principle to creative reuses and considered whether a factor of commerciality should require rightholders to be remunerated. The argument was that it depends on the level of harm produced by the subsequent use. Instead of focusing on the commercial nature of the creative use, the thesis proposes that it should be decided through a theory of substitution. The question should be whether the creative reuse acts as a copy, competing with the original work. We observed that for creative reuses, no harm is directed towards exploiters, as these uses are intended to further artistic communication and discussion online.

Authors, in the context of creative reuses, remain the only relevant copyright interest with a claim to be appropriately remunerated for use of their work due to the principle that they should be able to obtain an appropriate reward for the use of their works.⁶⁹² It follows that the element of appropriate remuneration is linked to the type of secondary use. Indeed, the question of whether a subsequent use can substitute the original work is addressed by the EU Commission’s Guidance and the Advocate General Saugmandsgaard Øe’s opinion in *Poland*, in reference to the need to prevent non-manifestly infringing uses “staying down” during the complaint and redress mechanism. It is also indirectly supported by the CJEU in *Poland* requiring member states to transpose arts. 17(7) and 17(9) effectively, to protect the essence of freedom of expression and information that the user safeguards shield.

Parallels can be drawn with the concept of trade mark use in EU trade mark law where to find infringement for ‘double identity’ use, a strict liability style of infringement, requires the trade mark holder to prove that the alleged infringer has ‘used’ the mark.⁶⁹³ Though the concept of trade mark use has opened the floodgates and expanded the scope of trade mark use,

⁶⁹⁰ *UsedSoft* at [63].

⁶⁹¹ *Ibid.*

⁶⁹² *Filmspeler* at [22].

⁶⁹³ See, Case C-206/01 *Arsenal Football Club Plc v Reed* EU:C:2002:651.

particularly online⁶⁹⁴, extending the boundaries of infringement, it still stands as a helpful tool in demarcating exclusive rights based on their specific subject matter or essential function. This section contends, that in the context of European copyright law, a strict interpretation of these boundaries would better balance relevant copyright interests. Such an approach is reflected in the construction of the principle of implied authorisation as it delineates these boundaries by considering the need for creators to access and use previous works to create new works. If using the language of trade mark law, these non-manifestly infringing uses would be termed a “non-use” of the copyright work.

While art. 17 DSM Directive provides some guidance of what types of subsequent uses should not be filtered (i.e. the mandatory nature of parody, pastiche and caricature exceptions)⁶⁹⁵, as suggested in Chapter III, the criterion of substitution more effectively delineates types of subsequent uses where authors are entitled to receive appropriate remuneration without jeopardising the form or nature of subsequent creativity. This criterion also appears to reflect the non-use principle within trade mark law as this thesis proposes that it determines whether the use is creative and conclude that an obligation to pay the initial author arises. This broad approach, however, is tempered by linking these uses to the appropriate remuneration of authors for these uses.⁶⁹⁶

Commentary supports this sentiment by explaining fair remuneration can be achieved through “limitation-based remuneration rights, also referred to as ‘statutory licences’”⁶⁹⁷. These have been referred to uses that are “permitted-but-paid”,⁶⁹⁸ ensuring “relatively inexpensive dissemination in furtherance of socially worthy goals”.⁶⁹⁹ This approach echoes commentary that suggests that the “permitted-but-paid” approach should extend beyond distributive uses (non-creative reuse) to include creative reuses of works.⁷⁰⁰ However, this

⁶⁹⁴ Georgia Jenkins, ‘How helpful is initial interest confusion in finding double identity trade mark infringement in online marketplaces?’ (2021) 43 EIPR 306.

⁶⁹⁵ There is a theoretical risk that member state transpose it strictly, only providing these exceptions for OCSSP-related copyright infringement, and not for platforms falling outside this definition that may be liable pursuant to art. 3 Information Society Directive.

⁶⁹⁶ Senftleben [n 601].

⁶⁹⁷ Geiger [n 107] 446.

⁶⁹⁸ Jane C. Ginsburg, ‘Fair Use for Free, or Permitted-but-Paid?’ (2014) 29 Berkeley Tech. L. J. 1383.

⁶⁹⁹ Ibid a t1387.

⁷⁰⁰ Geiger [n 107] 449; Christoph Geiger, ‘Statutory Licences as Enabler of Creative Uses’ in R.M. Hilty and K.-C. Liu (eds) *Remuneration of Copyright Owners* (Springer 2017); Reto M. Hilty and Sylvie Nérissou, ‘Collective Copyright Management and Digitization: The European Experience’ in *Handbook on the Digital Creative Economy* (Edward Elgar 2013) 222-234; Warren Chik, ‘Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law’ (2011) 11 J. Marshall Rev. Intell. Prop. L. 240. Also see, João Pedro Quintais, *Copyright in the Age of Online Access*.

thesis suggests the obligation to pay authors for creative uses be defined through the substitution criterion.

In the previous chapter, we detailed the approach of the German implementation of art. 17 DSM Directive, finding that it requires platforms to pay authors directly for uses that meet the definition of parody, pastiche or caricature. This thesis contends that this is in effect a statutory license, a requirement by the German legislator to allow creative uses so long as they are paid.⁷⁰¹ The German Act states that the author's appropriate remuneration for these uses is not waivable, can only be assigned in advance to a collecting society, and asserted by a collecting society.⁷⁰² Note that whether creative reuses are allowed appears to depend on whether the author has assigned this remuneration right to a collecting society before the subsequent creative use is uploaded on an OCSSP. Though this may seem a practical solution for identifying the relevant author, there are questions surrounding whether an author can refuse to assign these rights to avoid any creative reuses. This conflicts with the construction of the principle of implied authorisation as an inherent balancing mechanism within the European copyright system that extends from the notion of consent as inclusive of future creative works that build upon previous creative works discussed in Chapter I.

Outside of art. 17, the DSM Directive also requires member states to conform with a principle of appropriate and proportionate remuneration and implement measures to ensure that when authors and performers license or transfer their exclusive rights they are remunerated to this degree.⁷⁰³ Member states are "free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests" when implementing this principle.⁷⁰⁴ Arguably the German implementation is an example of implementing the principle through the vehicle of statutory licensing. Thus, it appears that both the meta-exception of consent as well as the principle of appropriate remuneration are both crucial elements that allow the principle of implied authorisation to wholistically render a fair balance

Alternative Compensation Systems in EU Law (Kluwer Law International 2017) 399. Quintais proposes an alternative compensation scheme designed to ensure access to works and fair remuneration through a statutory licensing construct dependent on non-commercial use of works online.

⁷⁰¹ Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 JIPITEC 147, 162 at [66]; Quintais and Husovec [n 135] 27. Both articles suggest that art. 17 should be implemented using statutory licensing and mandatory collective management schemes.

⁷⁰² UHRDaG, s. 5(3).

⁷⁰³ DSM Directive, arts, 18-23.

⁷⁰⁴ Ibid, art. 18.

of copyright interests online, balance relevant fundamental rights, enshrined within the structure of art. 17 DSM Directive.

It follows, that these two crucial elements of the doctrine of exhaustion, when located in a broader context of balancing the competing values of access and protection, serve as mutually inclusive points of departure from the European copyright system. In the context of creativity, commentary explains that a wider approach to creativity ensures that:

*“everyone – not just political, economic or cultural elites – has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and [in] the communities and subcommunities that they belong.”*⁷⁰⁵

It reflects the fundamental relationship between self-determination and freedom of expression discussed earlier in this thesis,⁷⁰⁶ but also the extended personhood theory which adopts a broader approach to authorship, inclusive of users and community-based creativity and interaction online.

When these elements are viewed wholistically, forming crucial elements of the principle of implied authorisation, they arguably reflect a more practical understanding of how “cultural works are created and shared” and recognizes:

*“the dynamic, interactive, and diffused nature of creative processes...[by] shift[ing] the locus of creative processes from a single act of authoring ‘from thin air’ to an ongoing process with multiple participants”.*⁷⁰⁷

The question of subsequent creativity is no longer one of whether it falls into an acceptable category, but whether authorial consent is exhausted, facilitating and supporting future creativity online. In this way, the principle of implied authorisation can be characterised as a point of departure grounded in natural rights theory as well as an inherent balancing mechanism of the European copyright system.

⁷⁰⁵ Peter K. Yu, ‘Increased Copyright Flexibilities for User-Generated Creativity’ in Gustavo Ghidini and Valeria Falce (eds) *Reforming Intellectual Property* (Edward Elgar 2022) 310, citing Jack M. Balkin, ‘Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society’ (2004) 79 *New York University Law Review* 1, 4-5.

⁷⁰⁶ See, Chapter 1.1.

⁷⁰⁷ Niva Elkin-Koren, ‘Copyright in the Digital Ecosystem: A User Rights Approach’ in Ruth L. Okediji (ed) *Copyright Law in the Age of Limitations and Exceptions* (Cambridge University Press: 2017) 145.

The facts of *Pelham* provide a perfect opportunity to test the effectiveness of the principle of implied authorisation in constructing this escape clause from the exploiters' narrative online, outside of art. 17 DSM Directive. As discussed comprehensively in Chapter I, the case centres upon Moses Pelham, a producer, sampling two seconds of a rhythm sequence in 'Metall auf Metall' by Kraftwerk in a song without authorisation. Following the discussion above, the central question is whether Kraftwerk's authorial consent is exhausted. This requires considering whether the sampled snippet resulted in a completely new and original work, placing it in a new context, or whether it simply copies the song, acting as a substitution to the original. The latter would arguably effect both rightsholders, but also authors as it would impact their ability to be remunerated for their creativity by exploiters through licensing and assignment agreements.

The application of the substitution criterion hinges upon whether the subsequent use is not manifestly infringing. While the harmonised interpretation of the parody exception in *Deckmyn* would exclude Pelham's use of the snippet⁷⁰⁸, the pastiche exception remains unharmonized and dependent on national legislators and courts' interpretation. It also means that the exception is open to external application of fundamental rights and national law including constitutional guarantees such as the German freedom of art provision alongside rights to protect integrity. Commentary suggests that member states can rely on the ordinary meaning of a pastiche which "encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works"⁷⁰⁹.

If the pastiche exception is harmonised restrictively in the future,⁷¹⁰ the substitution criterion proves helpful to ensure that a fair balance is struck between authors, users and exploiters. Following from direct support to ensure not-manifestly infringing uses are not blocked or filtered from the EU Commission's Guidance and the Advocate General Saugmandsgaard Øe's opinion in *Poland*, as well as the more indirect support from the CJEU in *Poland* that user safeguards must be effectively implemented to protect the essence of

⁷⁰⁸ *Deckmyn* at [20]. The CJEU held that "the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery". It is highly unlikely that a use, such as Pelham's, would meet this standard.

⁷⁰⁹ Senftleben [n 601]; Hudson [n 585] 362-4.

⁷¹⁰ Recently the *Pelham* saga continues, as now Pelham is asserting that the sampling use falls within the newly implemented pastiche exception pursuant to both the Information Society Directive and DSM Directive. This has been appealed to the German Federal Court and it is likely that a preliminary ruling will be requested to determine the nature of the pastiche exception. See, OLG Hamburg 2022, 5 U 48/05 – Metall auf Metall III.

relevant fundamental rights, we can observe that the sampling by Pelham, an exercise of artistic communication, does not act as a copy of the original song by Kraftwerk.

Instead, it uses the previous creative work in a new transformative context to effect Pelham's freedom of expression. As we noted in Chapter I, the balance of fundamental rights should reflect the fundamental relationship between self-determination and freedom of expression and the necessity for authors to determine how they express themselves and communicate this expression to those around them. Once Pelham's sample is proven to be a not manifestly infringing use of Kraftwerk's song, an obligation arises on behalf of platforms that communicate this work to pay Kraftwerk directly for the transformative use. The combination of appropriate remuneration and the application of consent as a meta-exception, comprising the freedom to communicate creatively, exhaust Pelham's consent.

The only exception to the application of the principle of implied authorisation would be due to the presence of artistic reputational harm on behalf of Kraftwerk. As observed earlier,⁷¹¹ this should depend on an objective test whether in the mind of the public the subsequent use results in a negative link between Kraftwerk and Pelham. One argument could be that Pelham benefited from a false assumption on behalf of the public that there was a collaboration or licensing agreement in place between the two artists, to the detriment of Kraftwerk. However, as addressed in Chapter II, a heavy evidentiary burden is required for authors to prove that such a link could occur, particularly considering the implications on freedom of expression and future creativity.

Overall, following the application of the principle of implied authorisation, it is likely that so long as Pelham's use can be determined to not manifestly infringe and Kraftwerk receives appropriate remuneration from platforms where the song is uploaded, Kraftwerk's authorial consent is exhausted to the extent that no detrimental link can be proven between the two artists, caused by Pelham's sampling. This analysis demonstrates the potential of the principle of implied authorisation, mirroring the doctrine of exhaustion in effect, to provide a point of departure from the exploiters' narrative which continues to expand exploitation rights to access to and use of copyright works to the detriment of authors and users, particularly in the context of creativity. It affirms that creative reuses, which are to a degree currently supported by a patchwork of exceptions and limitations, require a more wholistic assessment.

⁷¹¹ Chapter 2.4.

One that accounts for the notions of self-determination, community-based creation and the cyclical nature of creativity that builds upon previous works.

The principle of implied authorisation has emerged as an inherent balancing mechanism that can provide a proportional approach which balances the interests of authors, users, platforms and exploiters by ensuring that the essence of those fundamental rights is effectively protected as an extension of the CJEU judgement in *Poland*, similarly to the balancing of fundamental rights required in *YouTube/Cyando*. The exhaustion of Kraftwerk's consent in this scenario, reliant upon the construction of consent as a meta-exception and the obligation for the platform to pay them directly for the subsequent use being uploaded, illustrates an alternative construction of European copyright law that facilitates access to creative works and supports creativity. Its confirmation as an inherent component of the European copyright system evidences the potential for the future copyright trajectory to evolve to a more balanced outcome, not simply one that penalises authors and limits access to and use of copyright works on principle,⁷¹² but evolves to support new forms of creativity online.⁷¹³

However, if copyright law fails to adapt and recognise UGC in a comprehensive manner by providing effective user safeguards, it does not mean that users will stop creating content and sharing it online. Indeed, commentary explains that the most significant copyright development of the 21st century was not through any judgement or legislation, but from “the unorganized informal practices of various, unrelated users of copyright works, many of whom probably know next to nothing about copyright law”⁷¹⁴. As we will discuss in the following section, there is a general argument that copyright law must necessarily reflect the communities and sub-communities that create works, particularly through the balancing of relevant fundamental rights, namely freedom of expression. This is because without such confirmation the allocation of exploitation rights for future creative works becomes unfounded.

The question that arises is whether the European copyright system preferences non-UGC works and by extension, whether it is even possible to distinguish between these types of work. Certainly, leaps in technology have significantly reduced the costs of creating and communicating creative works, but is this a relevant argument to designate UGC as a weaker work unworthy of safeguards? The EU legislator has attempted to reflect this reality by

⁷¹² Bridy [n 27]; Alan Hui, ‘Mashup music as expression displaced and expression foregone’ (2021) 10 Internet Policy Review 1.

⁷¹³ Yu [n 705] 316.

⁷¹⁴ Edward Lee, ‘Warming up to user-generated content’ (2008) 5 University of Illinois Law Review.

providing that parody, caricature, and pastiche exceptions are of a mandatory nature. However, as addressed above such an overly prescriptive test to determine whether a subsequent use is creative fails to account for future modes of artistic communication.

Commentary explains that the advent of UGC requires a fundamental reshaping of copyright law that shifts from a system based on exclusivity and central control, to one that enables collaboration.⁷¹⁵ In this respect, the principle of implied authorisation, specifically through the reliance on the substitution criterion comprises the ability to reflect creativity from a “bottom-up approach”⁷¹⁶, taking direction for the communities and sub-communities creating copyright works, not those tasked with exploiting them commercially. A key term of conduct of these communities, implied consent, allows users to use previous creative works to make new creative works, based on both a view that remix culture requires no authorisation,⁷¹⁷ supported by natural rights theory, as well as the significance of attribution. The principle of implied authorisation provides a higher threshold of consent to protect authorship, by comprising a platform obligation to pay authors directly in line with European copyright principles as well as through the exception of artistic reputational harm.

It has become clear during this section, that the principle of implied authorisation can be characterized as a departure point from the exploiters’ narrative, providing points of access to and use of copyright works to facilitate and support creativity online. The argument presented is that it neatly reconciles the fundamental free spaces within European copyright law that traditionally support creativity, namely exceptions and limitations. Given the increasing complexity of the relationship between these free spaces and fundamental rights, the section has proposed that as the principles forms an inherent part of European copyright law, it incorporates the fair balance of relevant copyright interests, supported by fundamental rights, that CJEU and the Information Society Directive require. Building from previous chapters, the section draws upon this ability through the lens of constitutional propertization to balance exploitation rights against broader social justifications, namely creativity.

The section narrows its analysis to the two mutually inclusive elements that trigger the doctrine of exhaustion, in a broader balancing context: consent as a meta-exception and

⁷¹⁵ Niva Elkin-Koren, ‘User-Generated Platforms’ in Rochelle C. Dreyfuss, Diane L. Zimmerman & Harry First (eds) *Working Within the Boundaries of Intellectual Property* (OUP 2010).

⁷¹⁶ Lee [n 714].

⁷¹⁷ Giorgos D. Vakras, ‘Does Copyright Support Musical Creativity in a Remix Era?’ in Tatiana-Eleni Synodinou and *et al*, (eds) *EU Internet Law in the Digital single Market* (Springer 2021); Kaye Valdovinos and *et al*, ‘You Made This? I Made This: Practices of Authorship and (Mis)Attribution on TikTok’ (2021) 15 *International Journal of Communication* 3195.

appropriate remuneration. Reflecting on the former, the section reflects on the general principle for authorisation within European copyright law and advances the argument that it can be interpreted beyond the strict wording of exploitation rights, and extended to include those uses authorised by law, but also those uses that are presumably authorised by law as illustrated in the German implementation of art. 17 DSM Directive. Such a construction of authorisation supports the sentiment that the doctrine of exhaustion, in this context, fulfils an overarching fair balancing role within the European copyright system.

Turning to appropriate remuneration, the section links the principle that remuneration should reflect the harm that a subsequent use produces, addressed in the previous chapter, with the EU Commission's Guidance and Advocate General Saugmandsgaard Øe's opinion in *Poland*, to ensure that uses that are not manifestly infringing are not filtered or blocked by platforms when implementing art. 17 DSM Directive. Expanding from the CJEU's indirect support of not manifestly infringing uses by requiring arts. 17(7) and 17(9) DSM Directive to be implemented effectively in a way that protects the essence of relevant fundamental rights, the section observed that there are parallels with the trade mark principle of "non-use" which could be extended to the category of subsequent use to house uses of copyright works that are not manifestly infringing. Similar to the substitution criterion addressed in the previous chapter, we noted that creative reuses should be assessed relative to their ability to act as a copy for the original work.

Practically, the section identifies that the uses should be "permitted-but-paid", adopting a statutory licensing structure to comply with *Reprobel* and the principle that authors must be fairly remunerated for uses of their works. The German implementation was highlighted as incorporating appropriate remuneration through the requirement for OCSSPs to pay authors directly for uses that fall within parody, pastiche or caricature exceptions. In addition to an explicit requirement for member states to respect a principle of appropriate and proportionate remuneration to support authors and performers within the DSM Directive, the section contends that both the consent meta-exception and appropriate remuneration are crucial elements that allow the principle of implied authorisation to wholistically render a fair balance of copyright interests and balance fundamental rights. It followed, that this space was found essential to facilitate and support creativity. Drawing upon earlier discussions on the role of natural rights theory, specifically the theory of extended personhood, the section characterizes the implied principle of authorisation as a departure point from the exploiters' narrative.

This section then tests this characterisation by applying the principle of implied authorisation to the fact pattern in *Pelham*. The analysis summarises that the preferred approach is to consider the following issues: Firstly, whether the subsequent use impacts the author's remuneration from exploiters or whether it places the original work in a new, transformative context such as that described by commentary in relation to the pastiche exception. Secondly, it outlines when a platform obligation to pay authors for these uses arises, specifically whether the subsequent use competes with the original serving as a mere copy as opposed to an artistic communication. Thirdly, the extent to which the principle of implied authorisation can be rebutted is examined and the section notes the difficulty of proving a negative link in the mind of the public between two authors. The section concludes that this application illustrates that the principle is really an overarching balancing mechanism as it constructs an escape clause from the continued extension of exploitation rights, resulting in reduced access to and use of copyright works.

Lastly, the section evaluates the impact of the principle of implied authorisation serving as a departure point to support creativity online. Reflecting upon the commentary, the section concludes that while there is a real need for European copyright law to implement safeguards beyond the patchwork of copyright exceptions and limitations available, creativity online, specifically UGC, the absence of legal support will not stop user creating content and sharing it online, risking filtering and blocking by platforms and potentially copyright infringement lawsuits. Instead, the section proposes that copyright law should reflect the manner that communities and sub-communities online create works. This leads the thesis to conclude that a fundamental reshaping of copyright is required to reflect a system that enables creative collaboration. It is from this context, that the thesis proposes that the principle of implied authorisation, as an inherent and fundamental element of the European copyright system, can reflect the future of creativity online.

In the following and final substantive section, we will examine the extent to which such an approach leads to the development of a wider access right within the European copyright system. Drawing upon the role of platforms to support creativity, the thesis will consider whether it can be achieved by focusing on the responsibility of platforms to support and facilitate creativity online.

4.3. A FUNDAMENTAL POINT OF DEPARTURE FOR A WIDER ACCESS RIGHT IN THE EUROPEAN COPYRIGHT SYSTEM

The core of this thesis is an examination of the relationship between copyright and creativity online. It considers how recent European legislative approaches respond to the question of access and protection when the subsequent use is itself creative and likely protected by copyright such as UGC, which largely characterizes the creative industry.⁷¹⁸ Yet despite its near non-commercial status, it conflicts with traditional exploitation modes as subsequent creative uses lack comprehensive copyright protection and are often subject to platforms' enforcement measures, namely takedown. As we have already observed, art. 17 DSM Directive attempts to fill this gap, but as commentary opines:

“[I]nstead of changing law so that it’s legal and easier for users ‘to do something commonplace’, legislators have engineered the law so that online gatekeepers have an incentive to prevent, block, filter and sanitize proactively that commonplace digital creativity... [to its detriment]”⁷¹⁹

We have observed throughout the thesis that authors' access to platforms is a precondition for creativity, supported by freedom of expression as an artistic communication online. This section develops upon this argument to propose that a wider right of access can be constructed by examining the role of platforms to support authors, users, and overall, creativity online. It contends that platforms have a responsibility to ensure authors' access to work. This includes user uploads that comprise subsequent creative uses as platforms offer a primary mode for artistic communication online. Central to this discussion is the question of how platforms, as private entities, can or should be bound with public norms such as fundamental rights. This responsibility arguably goes beyond platform copyright liability. Instead, this section extends upon the principle of implied authorisation to consider whether a wider access right can be constructed through the legal concept of digital constitutionalism, a recently revitalised approach within commentary to respond to the gatekeeper role of platforms online.

This section addresses this question by considering the application of human rights standards to the private sphere. Focusing on platforms, the section examines whether they can be bound by fundamental rights outside of the European copyright system. First, we will reflect

⁷¹⁸ Yahong Li and Wjijie Huang, 'Taking users' rights seriously: proposed UGC solutions for spurring creativity in the digital age' (2019) 9 Queen Mary Journal of Intellectual Property 61.

⁷¹⁹ Frosio [n 29].

upon relevant jurisprudence which outlines the extent to which citizens have a right of access to public forums to assert their constitutionally supported communication rights. Secondly, this section will consider the legal concept of digital constitutionalism and attempt to locate a wider right of access within a much broader policy discussion on the role of platforms and constitutional rights. Lastly, the section will assert that access to works on platforms is a genuine counter-right to the exploiters' narrative by considering the effect that this right of access has on the function of European copyright law.

German jurisprudence has long considered the relationship between private and public law in comprehensive detail, specifically through the doctrine of indirect effect (*Drittwirkung*). The legal concept relates to the presumption that an individual can rely on constitutional rights to sue another private individual for allegedly violating those rights. Sometimes referred to as total constitutionalism,⁷²⁰ the doctrine of indirect effect has been described as effectively constitutionalizing the relationship between private actors. While it has Germanic roots, commentary explain it has been adopted in many other constitutional traditions, and even “exerts a strong influence on the case law of the CJEU and ECtHR”⁷²¹. As will be discussed later in this section, it is evident that there are clear parallels with proposals within European copyright commentary to invoke fundamental rights by viewing copyright through the lens of constitutional propertization.⁷²²

Turning to the realm of private law, the doctrine of indirect effect first materialised in the landmark German case, *Lüth*.⁷²³ Here, the question, on appeal to the German Constitutional Court, was whether a producer and distributor of a film, written and directed by the same person as an anti-Semitic film, could prohibit an activist's call for the new film to be boycotted. The producer initially argued that the German Constitution was inapplicable as this was a private law dispute. Yet given the German Constitution is silent on whether it regulates legal relationships among private individuals, the court found that it establishes an “objective ordering of values” which strengthens the application of constitutional rights and guarantees beyond their traditional application between individuals and the state.⁷²⁴

⁷²⁰ Frosio [n 29].; Oreste Pollicino and Giovanni De Gregorio, ‘Constitutional Law in the Algorithmic Society’ in Hans-W. Micklitz and *et al* (eds) *Constitutional Challenges in the Algorithmic Society* (Cambridge University Press 2021) 19.

⁷²¹ *Ibid* 19.

⁷²² The theory of constitutional propertization was discussed at length in Chapter 3.2.

⁷²³ BVerfGE 7, 1958, 198 – *Lüth*. See also Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory* (1989) 48 Md. L. R. 247.

⁷²⁴ *Lüth*; Quint [n 723] 261

The court also introduced the notion of balancing conflicting constitutional rights by stating that:

*“[T]his value-system, which centres upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private”.*⁷²⁵

The judgement transformed these values into “principles so important that they must exist ‘objectively’ - as an independent force, separate from their specific manifestation in a concrete legal relationship”⁷²⁶. While these governing principles guide constitutional interpretation, in the context of private individuals, this balancing involves the relevant constitutional rights in a diluted form.⁷²⁷ Essentially this doctrine of indirect effect means that in private law disputes between individuals, constitutional rights to an extent, influence private law rather than completely override them.

Following *Lüth*, the German Constitutional Court in *Fraport* both confirmed the doctrine of effect and introduced the possibility of extending its scope in specific circumstances.⁷²⁸ The case involved activists demanding access to Frankfurt Airport to protest deportations by the German government. The operator of the airport, Fraport-AG, a public company, introduced a ban against protestors entering the airport including the distribution of material. The activists argued that this ban violated fundamental rights, namely freedom of assembly and freedom of expression. The court held that though Fraport was owned predominantly by public institutions, the company was not directly bound by fundamental rights. Further, the court stated that even if Fraport was directly bound, it would only extend to the use of a public space for its designated purpose which on the facts was travelling.

Fraport is significant for two reasons: Firstly, the possibility to extend the application of fundamental rights on private companies, and secondly, the integral link between the public

⁷²⁵ Edward J. Eberle, ‘Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview’ (2012) 33 *Liverpool Law Review* 201, 204.

⁷²⁶ *Ibid.*

⁷²⁷ Peter E. Quint, ‘The Global Constitutional Canon: Some Preliminary Thoughts’ (Digital Commons Maryland Law 2012)

<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1150&context=schmooze_papers> accessed 1 December 2022.

⁷²⁸ BVerfGE, 2011, 128, – *Fraport*; Livia Fenger and Helena Lindemann, ‘The FRAPORT Case of the First Senate of the German Federal Constitutional Court and its Public Forum Doctrine: Case Note’ (2014) 15 *German Law Journal* 1105, 1110.

space and its designated purpose. The latter delineates the scope of protection for individuals relying on fundamental rights to use that space. Regarding the former, commentary explains that the binding nature of fundamental rights on private companies following *Fraport* comes extremely close to the direct effect that binds the state.⁷²⁹ This is said to occur when

*“the state itself – as a consequence of privatisation – cannot provide sufficient environmental conditions for the citizen to exercise her fundamental rights of communication, which in turn means that the exercise of the fundamental rights depends on the possibility [of] recourse to privately operated public premises”.*⁷³⁰

The court is removing the extent to which private companies, particularly public ones, can rely on private law as a haven from the application of fundamental rights.

Turning to the notion of a public space, the meaning of a privately operated public premises becomes significant. In *Fraport*, when weighing the airport’s private rights against the right to assemble, the court focused on the notion of a public forum. Commentary explains that the decision supports the “right to assemble at locations outside of general traffic, so called public forums” which include “any locations other than public street space that are similarly open to public traffic and where places of general communication develop”⁷³¹. The court held that:

*“[S]uch facilities cannot be exempted from freedom of assembly insofar as the fundamental rights are directly binding or private persons can be burdened through the indirect effect of the fundamental rights between private parties”.*⁷³²

Further that:

*“[B]y being made available for the coexistence of different uses, including communicative uses, these places become a public forum where political debate in the form of collective expression of opinion through public debate cannot be prohibited”.*⁷³³

⁷²⁹ Fenger and Lindemann [n 728] 1110.

⁷³⁰ Ibid.

⁷³¹ Ibid 1112.

⁷³² *Fraport* at [68].

⁷³³ Fenger and Lindemann [n 728] 1112, citing *Fraport* at [70].

Fraport appears to introduce a flexible and broad approach to the interpretation of a public space. Traditionally German jurisprudence defined public spaces for communication by relying on those identified within the constitution.⁷³⁴ Yet *Fraport* extends this notion of a public space by interpreting “public” in reference to how citizens use them for communication.⁷³⁵ The court stated that:

*“[T]he exercise of freedom of expression as the right of an individual does not as a general rule imply a particular need for space...it [has] no specific geographical connection. As a right of the individual, citizens are fundamentally entitled to it wherever they happen to be at a given moment”.*⁷³⁶

Following this analysis, this section proposes that platforms provide a primary mode of communication online for users, including authors. Given that no geographical link is needed, all that is required is for individuals to require such a communicative space, platforms undoubtedly reflect the logic of *Fraport*. Comparatively, the scope of the US public forum doctrine, recently considered in *Packingham v. North Carolina*, describes the Internet as the “modern public square” explaining that “social media allows users to gain access to information and communicate with one another about it”.⁷³⁷ This argument is also mirrored by commentary contending that such an integral role within society should mean that they are bound by fundamental rights, specifically to ensure freedom of expression online.⁷³⁸

This flexible and broad approach to public spaces was confirmed in *Stadionverbot* and extended to include to “the opportunity of each individual to tak[e] part in societal life”⁷³⁹. Here, an individual was banned permanently from a football stadium as he was suspected to have been a hooligan in the past. The German Constitutional Court found that the stadium operator must respect the fundamental right to non-discrimination pursuant to the German Constitution.⁷⁴⁰ The court held that there needs to be a substantial reason to exclude someone from an activity relevant to life in society, such as major football games. Such an exclusion would require granting a right to appeal a (private) decision when excluding an individual from

⁷³⁴ Amélie P. Heldt, ‘Merging the social and the public: How social media platforms could be a new public forum’ (2020) 46 Mitchell Hamline Law Review 997, 1015-6.

⁷³⁵ Ibid 20.

⁷³⁶ Fenger and Lindemann [n 728] 1115, citing *Fraport* at [98].

⁷³⁷ 137 S. Ct. 1730 (2017).

⁷³⁸ András Koltay, ‘The protection of freedom of expression from social media platforms’ (2022) 73 Mercer Law Review 523.

⁷³⁹ Heldt [n 734] 1021, citing BVerfGE 148, 2018, 267 – *Stadionverbot*, at [1]–[58].

⁷⁴⁰ Heldt [n 734] 1021, citing *Stadionverbot* at [41].

the public (sphere).⁷⁴¹ Some commentary suggests that *Stadionverbot* reasoning, specific to the equality guarantees within the German Constitution, could extend social media platforms “which constitute a vital tool for many people to participate in social life”⁷⁴².

This section agrees and proposes that the flexible and broad approach in *Fraport*, confirmed and extended in *Stadionverbot*, should mean that platforms are public spaces. This means that platforms cannot restrict access when it conflicts with fundamental freedoms, specifically freedom of expression. As we have observed throughout this thesis, authors’ access to platforms is a pre-condition for creativity. Additionally, Chapter I specifically explains that freedom of expression enables authors to express themselves artistically. This communication is central to creativity, reflecting an extension of personhood theory where community and sub-community-based creativity requires authors’ self-determination and autonomy regarding the communication of their creativity. For example, it appears that UGC is the main method for authors to engage in discourse on social media platforms⁷⁴³, particularly platforms such as YouTube, SoundCloud, TikTok and Instagram.

Such an approach links to German constitutional theory that is closely connected to German sociologist Jürgen Habermas who theorised on the spaces where public opinion was shaped, terming them the “public sphere”,⁷⁴⁴ describing them as “the fundamental site of participatory democracy and a bulwark against the powers of the state and the market”⁷⁴⁵. Commentary explains that a platform “serves as a public sphere comparable to the 17th century coffee houses of Britain and salons of Paris from which the Habermasian idea of the public sphere originated”⁷⁴⁶. Though they are algorithmically driven and centrally controlled, platforms similarly to Habermas’ spaces have “enormous power over what speech is possible, and the algorithms they deploy govern which perspectives are seen and which are buried”⁷⁴⁷.

⁷⁴¹ Heldt [n 734] 1021; *Stadionverbot* at [45] & [58].

⁷⁴² Alix Schulz, ‘Horizontality and the Constitutional Right to Equality– Recent Developments in the Jurisprudence of the German Federal Constitutional Court’ (OxHRH Blog, November 2019), <https://ohrh.law.ox.ac.uk/horizontality-and-the-constitutional-right-to-equality-recent-developments-in-the-jurisprudence-of-the-german-federal-constitutional-court> accessed 1 January 2022.

⁷⁴³ Sunimal Mendis, ‘Democratic discourse in the digital public sphere: Re-imagining copyright enforcement on online social media platforms’ in Hannes Wethner and *et al* (eds) *Perspectives on Digital Humanism* (Springer 2022) 42.

⁷⁴⁴ Jillian C. York and Ethan Zuckerman, ‘Moderating the public sphere’ in Rikke Frank Jørgensen (ed) *Human Rights in the Age of Platforms* (The MIT Press 2019) 146.

⁷⁴⁵ Jürgen Habermas, *The structural transformation of the public spheres: An inquiry into a category of bourgeois society* (English Language ed., Cambridge MIT Press 1989); Evan Steward and Douglas Hartmann, ‘The new structural transformation of the public sphere’ (2020) 38 *Sociological theory* 170.

⁷⁴⁶ Sara Abbasi, ‘Internet as a Public Space for Freedom of Expression: Myth or Reality?’ (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064175> accessed 1 December 2022.

⁷⁴⁷ York and Zuckerman [n 744] 148.

This section builds upon this perspective to argue that, to the degree that fundamental rights bind platforms, they provide a public space which among other uses, also facilitates artistic communication.⁷⁴⁸ It would mean that platforms have an obligation, given this public space status, to ensure that authors and users have access to platforms to effectively ensure artistic communication. Communities and sub-communities that create UGC would be able to rely on this access right to disseminate subsequent creative works. It could also produce a much more effective transposition of art. 17 DSM Directive, as platforms would be directly responsible, beyond platform copyright liability, to ensure authors and users have access to communicate artistically and “reclaim [users]... dignity and autonomy”⁷⁴⁹.

Some commentary formulate this responsibility as a “general legal must carry dut[y]”, reflecting *Fraport* and *Stadionverbot*, it appears to arise “where platforms have a dominant, ‘self-chosen’ role as a general-use oriented infrastructure for their users to take part in public and social life”.⁷⁵⁰ It was recently discussed in relation to Facebook users’ posts being taken down pursuant to Facebook Community Guidelines where the German Federal Supreme Court held that Facebook is a “forum for communication which is essential for participation in public debates” and the posts were required to be reinstated.⁷⁵¹ Commentary proposes that “depending on the importance of communication made (user-side) and the “significant market power” (intermediary side), the social network services in Germany face restrictions in limiting access to... platform[s]...via the concept of indirect third-party effect of fundamental rights”⁷⁵².

This section submits that given the significance of artistic communication and the role of platforms now as a gatekeeper to accessing works and communicating new creative works, platforms should be subject to a wholistic balancing assessment of fundamental rights, namely the principle of implied authorisation, to determine whether they are responsible at a

⁷⁴⁸ See, Robert P. Merges, ‘Locke Remixed ; -)’ (2007) 40 UC Davis Law Review 101. Merges argues that remixing should not be given a legal right to remix. Merges contests the argument that remixing is necessary for the self-actualization of people living in a media-saturated world.

⁷⁴⁹ Katrina Geddes, ‘Meet your new overlords: How digital platforms develop and sustain technofeudalism’ (2020) 43 Colum. J. L. & Arts 455, 485.

⁷⁵⁰ Matthias Leistner, ‘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?’ (2020) 2 Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ) 123-214. For a US context, see, Daphne Keller, ‘Who do you sue? State and platform hybrid power over online speech’ (2019) Aegis Series Paper No 1902 1.

⁷⁵¹ BGH GRUR 2020, 1318 – Facebook; OLG München 2020, 18 U 1491/19 – Facebook hate posts; OLG Köln 2018, O 187/18 – Deleted Facebook postings; Matthias C. Kettemann and Anna Sophia Tiedeke, ‘Back up: Can users sue platforms to reinstate deleted content?’ (2020) 9 Internet Policy Review 1; Klaus Wiedemann, ‘A matter of choice: The German Federal Supreme Court’s Interim Decision in the Abuse-of-Dominance Processings *Bundeskartellamt v. Facebook* (case KVR 69/19)’ (2020) 51 IIC 1168.

⁷⁵² Kettemann and Tiedeke [n 751] 11.

constitutional level for creativity online. The question becomes how this construction of public space obligations could be incorporated within European copyright law, as it is likely that exploiters will argue that: Firstly, it is incompatible, and secondly, they will pressure platforms through private ordering mechanisms with the threat of infringement.

The indirect effect doctrine has also already shaped EU jurisprudence extensively by interpreting provisions ‘in light’ of fundamental rights.⁷⁵³ In the context of European copyright law, the legal concept takes form through the horizontal application of fundamental rights.⁷⁵⁴ Regarding contractual override or the use of over burdensome terms and conditions in EULAs limiting user access, these strategies arguably exceed and conflict with the role of platforms as “an essential facilities [for]... accessing and communicating content online”⁷⁵⁵. Commentary explains that the European copyright system values this facilitating role to support freedom of speech and information when determining platform copyright liability.⁷⁵⁶ The argument proposed is that given this facilitator role is relevant when determining liability, should it not also mean that “platforms are held responsible to fulfil this doctrine?”⁷⁵⁷

A recently renewed push for “digital constitutionalism” appears to fill this gap within European copyright law.⁷⁵⁸ It refers to a new age of European constitutionalism used to temper the “discretionary exercise of power by online platforms in the digital environment”⁷⁵⁹. Commentary explains that digital constitutionalism comprises two core elements: (1) “an acknowledgement of fundamental right and freedoms”, and (2) “an institutional arrangement enabling collective action and limiting the exercise of power”⁷⁶⁰ online. It is a proposed theoretical lens to respond to the significant power that platforms now wield, fulfilling a role

⁷⁵³ Kettemann and Tiedeke [n 751] 19.

⁷⁵⁴ Notably from *Promusicae* which holds that “fundamental rights should not only be used by national legislators when implementing EU law, but also by national authorities and courts when applying related national measures.

⁷⁵⁵ Henning Grosse Ruse-Khan, ‘Global Content Protection Through Automation – A Transnational Law Perspective’ (2018) 49 IIC 1017, 1020.

⁷⁵⁶ Ibid.

⁷⁵⁷ Ibid.

⁷⁵⁸ Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022); Lex Gill, Dennis Redeker and Urs Gasser, ‘Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights’ (2015) Berkman Centre Research Publication No. 2015-15.

⁷⁵⁹ Giovanni De Gregorio, ‘The rise of digital constitutionalism in the European Union’ (2021) 19 International Journal of Constitutional Law 41, 42. For a historical overview of digital constitutionalism see, Edoardo Celeste, ‘Digital constitutionalism: a new systematic theorisation’ (2019) 33 International Review of Law, Computers & Technology 76.

⁷⁶⁰ Claudia Padovani and Mauro Santaniello, ‘Digital constitutionalism: Fundamental rights and power limitation in the Internet eco-system’ (2018) 80 the International Communication Gazette 295, 297, citing Beau Breslin, *From words to worlds: Exploring constitutional functionality* (Cambridge University Press 2010).

that sits “at the intersection between public authority and private ordering”⁷⁶¹. Undoubtedly this reality accurately reflects the state of European copyright law where art. 17 DSM Directive has legally placed OCSSPs into the position of copyright enforcer and regulator by connecting platform copyright liability with an emphasis for platforms and rightsholders to license.

This section contends that concept of digital constitutionalism incorporates the lens of constitutional propertization which has characterized the current European copyright system, in particular through CJEU jurisprudence advocating to strengthen user rights through the balancing of fundamental rights.⁷⁶² In the context of online copyright content, digital constitutionalism was first applied by the CJEU following the Lisbon Treaty recognizing that the Charter has the same legal value as EU primary law regarding the prohibition on general monitoring on intermediaries.⁷⁶³ As we discussed in the previous chapter, there is a proposal within copyright commentary to accept the propertization of copyright, through Art. 17(2) Charter, and subject it to fundamental rights balancing, namely freedom of expression to support users.⁷⁶⁴ This thesis even suggested the principle of implied authorisation could effectively render the fair balance between fundamental rights regarding creativity online.

Given the general resurgence of digital constitutionalism in the EU, specifically the constitutional propertization of European copyright law, this section contends that it is normatively possible to construct a wider access right for platform users. While European copyright law, to this point, has relied upon the horizontal application of fundamental rights to private parties, digital constitutionalism also comprises the ability to identify a “constellation of new rights that could be identified to deal with the new challenges posed by algorithms”⁷⁶⁵. While the commentary focusses on algorithmic-specific rights, the sentiment is clear: to respond to the growing role of platforms,⁷⁶⁶ users require rights that are identified using a

⁷⁶¹ De Gregorio [n 758] 1.

⁷⁶² Christophe Geiger and Elena Izyumenko, ‘From internal to external balancing, and back? Copyright limitations and fundamental rights in the digital environment’ in Conception Saiz Garcia and Julian Lopez (eds.) *Digitalización, acceso a contenidos y propiedad intelectual* (Dykinson 2022).

⁷⁶³ Commentary cite *Scarlet* and *Netlog* as the starting point of digital constitutionalism’s application to the European copyright system. See, De Gregorio [n 758] 52.

⁷⁶⁴ Some commentary refers to this development as “constitutional hedging”. See, Sganga [n 142]; Henning Grosse Ruse-Khan, ‘Effects of Combined Hedging: Overlapping and Accumulating Protection for Intellectual Property Assets on a Global Scale’ in Jonathan Griffiths and Tuomas Mylly (eds) *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (OUP 2021) 23. Ruse-Khan defines constitutional hedging as “establishing a barrier or boundary to protect and enclose; a process of ordering and resolving by means of reliance on fundamental principles”.

⁷⁶⁵ Pollicino and De Gregorio [n 720].

⁷⁶⁶ Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet. A Road Towards Digital Constitutionalism* (Hart 2021); De Gregorio [n 758] 67.

bottom-up approach based on social need.⁷⁶⁷ It follows that the wider right of access is based on such a need: access to platforms is a precondition for users' creativity and artistic communication online.

This section proposes that in this light, digital constitutionalism calls for the construction of a wider access right based on the status of platforms as public spaces. Commentary explains that a new and innovative approach to digital constitutionalism involves the "reconsideration of the traditional boundaries of constitutional law and the distinction between private and public actors in exercising public tasks online"⁷⁶⁸. Such a distinction is said to afford:

"[U]sers a legitimate expectation that if a public actor has entrusted a private one to pursue a public policy, it is necessary that those private actors be held accountable for any violation of users' fundamental rights".⁷⁶⁹

Similarly, to the indirect effect doctrine, digital constitutionalism expands the remit of those liable for violating fundamental rights, meaning that users can bring stronger claims against platforms regarding content moderation policies and the use of algorithmic copyright enforcement technologies.⁷⁷⁰

Following *Fraport* and *Stadionverbot* and the fundamental distinction between private and public actors, platforms should be considered as 'hybrid bodies' obliged to fundamental rights standards.⁷⁷¹ Firstly, platforms should ensure access to platforms in relation to freedom of expression. As discussed earlier in this section, platforms play a vital role in providing digital space for the inspiration, creativity and the communication of creativity; all necessary factors striking at the heart of the principle of self-determination and freedom of expression. This thesis proposes that these principles would be upheld by platforms through the construction of a wider access right distinct from copyright platform liability.

Regarding the more commercial use of platforms, access to works, invoked as a right, compliments the contractual relationship that users have with platforms, and allows platforms to fulfil both purposes simultaneously. Platforms are reliant on upon users to upload content

⁷⁶⁷ De Gregorio [n 758] 59.

⁷⁶⁸ Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society' (2019) 11 European Journal of Legal Studies 65, 96-97.

⁷⁶⁹ Ibid 101.

⁷⁷⁰ Ibid.

⁷⁷¹ Orit Fischman-Afori, 'Online rulers as hybrid bodies: The case of infringing content monitoring' (2021) 23 U. Pa. J. Const. L. 351.

and engage in discussion with other users.⁷⁷² Commentary explains that “remix culture of user-generated content is turned into a profit enterprise for platforms and publishers that can jointly exploit the users’ digital labour”⁷⁷³. In the context of creativity, platforms benefit from users uploaded UGC as its community-based foundations means that it will exponentially give rise to new content, but also provide points of discussion within sub-communities. These forms of platform interaction undoubtedly go together with content monetization strategies.

Secondly, the right to conduct a business could be constructed as a secondary right to support authors and users. Before the Charter, this fundamental right was interpreted by the CJEU when considering the lawfulness of national injunctions and prohibition against general monitoring.⁷⁷⁴ The CJEU’s interpretation transformed the fundamental right into a “directly effective subjective right that national courts have a duty to respect – even in proceedings against another private person”.⁷⁷⁵ While commentary disagree as to whether art. 16 Charter is a guiding principle or subjective right,⁷⁷⁶ others contend that it is both, terming it a “quasi-subjective” right.⁷⁷⁷ They explain that “private autonomy can be used to counter-balanced EU policies or the so-called ‘regulated autonomy’ in horizontal situations and may thus help shift the balance toward the individual in some circumstances”⁷⁷⁸. Art. 16 could be applied directly to private entities in line with *Fraport* and *Stadionverbot*, to support their role as a public space for artistic communication.⁷⁷⁹

⁷⁷² Paul M. Di Gangi and Molly Wasko, ‘The co-creation of value: Exploring user engagement in user-generated content websites’ (2009) 9 *Sprouts: Working Papers on Information Systems* 9.

⁷⁷³ Zoe Adams and Henning Grosse Ruse-Khan, ‘Work and works on digital platforms in capitalism: conceptual and regulatory challenges for labour and copyright law’ (2020) 28 *International Journal of Law and Information Technology* 329, 362; Rebecca Tushnet, ‘Scary monsters: Hybrids, mashups and other illegitimate children’ (2011) 86 *Notre Dame L. Rev.* 2133, 2141.

⁷⁷⁴ *Scarlett; Netlog*.

⁷⁷⁵ Eduardo Gill-Pedro, ‘Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU law’ (2022) 18 *European Constitutional Law Review* 183, 191. For a critical perspective see, Kent T. O’Sullivan, ‘Copyright and Internet Service Provider “Liability”: The Emerging Realpolitik of Intermediary Obligations’ (2019) 50 *IIC* 527; M. Everson and R. C. Gonçalves, ‘Art 16 – Freedom to conduct business’ in S. Peers and *et al* (eds.) *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 451.

⁷⁷⁶ C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 at [46]. O’Sullivan [n 732] 529, 538. O’Sullivan explains that the CJEU emphasized that nature of art. 16 relative determined that it should be regarded as a principle not a classical fundamental right.

⁷⁷⁷ O’Sullivan [n 755] 529, 537-9.

⁷⁷⁸ Xavier Groussot, ‘Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights’ in Sionaidh Douglass-Scott and Nicholas Hatzis (eds) *Research Handbook in EU Human Rights Law* (Edward Elgar 2017).

⁷⁷⁹ Dorota Leczykiewics, ‘Horizontal effect of fundamental rights: In search of social justice or private autonomy in EU law? In U. Bernitz and *et al* (eds) *General Principles of EU Law and European Private Law* (Kluwer International 2013); Andrea Usai, ‘The Freedom to Conduct a Business in the EU, its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social and Political Integration’ (2019) 14 *German Law Journal* 1867; Marta Maroni, ‘An Open Internet? The Court of Justice in the

This approach to platforms and fundamental rights, provides greater support to copyright exceptions and limitations, ultimately promoting them to the standard of user rights, capable of considering other limitations to accessing copyright works online for the purposes of creativity. Couched in the language of a wider access right, the indirect effect doctrine's application to platforms strengthens authors and artistic communication online. It also incentivises the adoption of creativity-friendly content moderation policies in contrast to the French implementation which grants considerable discretion to platforms. In addition to being held to this higher level of accountability, this section contends that platforms should implement a similar approach to the principle of implied authorisation to balance exploiters' right to protect IP against user rights, supported by the above analysis of both freedom of expression and the quasi-subject right to conduct a business.

It is submitted that the principle of implied authorisation can provide the legal scaffolding to realize this right. As we have observed throughout this thesis, in relation to the right to protect IP, for creative reuses, the principle of implied authorisation exhausts exploitation rights to the extent that the use is not manifestly infringing and there are no substantiated claims of artistic reputational harm. When the principle of implied authorisation is viewed through the lens of digital constitutionalism and recent developments in German jurisprudence regarding the effect of fundamental rights directly against private entities with a quasi-public use, specifically platforms, it can be structured as a wider access right to support creativity.⁷⁸⁰

Lastly, this thesis suggests that this approach ultimately reflects a larger critique on transnational private rights, such as copyright exploitation rights online, using the indirect effect doctrine.⁷⁸¹ Constitutional rights are described as social "institutions" with the aim of supporting societal aims, such as art and creativity, alongside a view that no single justification should dominate society.⁷⁸² Commentary explains that this construction of constitutional rights "reverses the supposedly 'classical' function of constitutional rights as negative, or defensive, rights of the individual against the state"⁷⁸³. Instead, it extends the scope of fundamental rights to apply to "not only individuals, but also other social systems and institutions, in particular

European Union between Network Neutrality and Zero Rating' (2020) 17 European Constitutional Law Review 517.

⁷⁸⁰ Given the mandatory nature of the DSA, as discussed in the previous sections, there is a question as to whether these procedural safeguards could be regarded as practical implementations of this wider access right.

⁷⁸¹ Lars Vellechner, 'The transnational dimension of constitutional rights: Framing and taming 'private' governance beyond the state' (2019) 8 Global Constitutionalism 639, 648. Note that Vellechner discusses the internet in relation to domain names, not copyright.

⁷⁸² Niklas Luhman, *Law as a Social System* (OUP 2014).

⁷⁸³ Vellechner [n 781] 649.

processes of societal self-regulation”⁷⁸⁴. It is from this basis that commentary suggest that constitutional rights serve both as enablers and limiters of constitutional arrangements”⁷⁸⁵.

Regarding copyright, the exploiters’ narrative has long called for strong IP protection and over the last decade this has only intensified from the use of TPMs to algorithmic enforcement on platforms, supported by the right to protect IP. Yet, by recognising the existence of UGC, that is created regardless of copyright, this construction of constitutional rights provides a theoretical foundation for a wider right of access. When constitutional rights are viewed not as defensive rights, but as enablers of “positive” protection it “allow[s] for equal participation and consideration in transnational governance arrangements when they hold a monopoly in providing a service that is indispensable for providing freedom”⁷⁸⁶. This section maintains that platforms provide such an indispensable space and that considering this status, the horizontal application of constitutional rights should extend to support creative communities and sub-communities online by ensuring a wider right of access to works.

Given the relationship between platforms and creativity, the thesis contends that the principle of implied authorisation, the key balancing mechanism that platforms can use to guide them in protecting user rights, should be characterised as a genuine counter right to the European copyright system. Drawing upon the dimension of constitutional rights to enforce self-regulating social spheres, such as UGC communities and sub-communities, a “positive” right of access provides a fundamental departure point from the exploiters’ narrative that is supported by constitutional rights. This is aided by commentary that characterizes counter-rights as having a “trans-subjective” nature,⁷⁸⁷ meaning that they expand beyond the individual creator and include communities as well as social practices.

The result is that the original function of constitutional rights is restored,⁷⁸⁸ but, specifically in the context of UGC, the community-based regulation is affirmed as normative expectations are reflected in the law.⁷⁸⁹ This construction of constitutional rights is based on viewing the law generally as a complex and adaptive system. It means that “if society evolves

⁷⁸⁴ Viellechner [n 781] 649

⁷⁸⁵ Ibid.

⁷⁸⁶ Ibid 652.

⁷⁸⁷ Gunther Teubner, ‘Counter-rights: On the trans-subjective potential of subjective rights’ in Poul F. Kjaer (ed) *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 375.

⁷⁸⁸ Ibid.

⁷⁸⁹ Marta Maroni, ‘A court’s gotta do, what a court’s gotta do. An analysis of the European Court of Human Rights and the liability of internet intermediaries through systems theory’ (2019) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 20, 17.

to changes in law, and vice versa, then law and society must co-exist in an evolving system. Each needs the other to define itself”.⁷⁹⁰ It aptly describes the monumental shift regarding creativity online where users no longer adopt a passive role, but enthusiastically participate creating their own content. This creativity currently conflicts with the law as recent EU legislative approaches find the communication of this creativity unlawful, particularly through the textual implementation of art. 17 DSM Directive, such as France. Complex systems theory would indicate that in response to this mounting tension between UGC communities and the law, European copyright law requires reshaping to facilitate and support creativity online.

Central to this discussion is the self-regulatory nature of UGC communities. Commentary explains that in the context of music:

“[R]emixing... is not about copying artistic works; it is about modifying, embellishing, appending, reinventing, and mashing them together with other elements. Most of all remixing is about being a producer, participating in the creative enterprise, and sharing your creations with others”.⁷⁹¹

The mismatch between the function of exploitation rights to prevent competing uses and the justification for UGC to benefit from comprehensive safeguards amount to the law being normatively re-ordered. This thesis contends, that the creation of a wider right of access would reshape the European copyright law in a manner that reflects creativity occurring in communities and its self-regulation online, but also temper the continuing extension of the exploiters’ narrative by strengthening user rights. Such an approach would ultimately create a more balanced environment in which European copyright law functions to support creativity. It would allow users to upload subsequent creative uses online, sparking discussion and future creation. These are features that are central within remix culture which are not addressed by the EU legislator.⁷⁹²

It would ultimately rebalance what some commentary refers to as the tension between “free culture” and “permission culture” where the latter only allows “creators... to create with

⁷⁹⁰ Peter K. Yu, ‘Intellectual property, Asian philosophy and the Yin-Yang School’ (2015) 7 W.I.P.O. J. 1,8; citing J.B. Ruhl, ‘Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State’ (1996) 45 Duke Law Journal 849.

⁷⁹¹ Don Tapscott and Anthony D. Williams, *Wikinomics: How mass collaboration changes everything* (Portfolio: 2006) 125; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

⁷⁹² Bernd Justin Jütte, ‘The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form’ (2014) 5 JIPITEC 172.

permission of the powerful, or of creators from the past”⁷⁹³. Support is also found from within the commentary which suggest that “an invasion of the traditional permission rule” may be required alongside “mechanisms to provide economic incentive to creation” such as “the apportionment of profits”.⁷⁹⁴ Theoretically, this is what the principle of implied authorisation, at its core, comprises: a reshaping of the notion of consent, granting it the status of a meta-exception within the European copyright system, and the protection of authors online by both an obligation on platforms to pay authors for user uploads that involve subsequent creative uses of their works and the notion of artistic reputational harm, as a means of rebutting authorisation.

Ultimately, this approach “reconnect[s] creativity with its cumulative nature”⁷⁹⁵ by providing a counter-right from the dominance of the exploiters’ narrative and delineating a point of departure to account for the nature of creativity occurring online. Though nearly two decades ago commentary predicted that society was on the cusp of a monumental change and suggested that “[d]igital technology could radically expand the range of “creators” who participate in the remix of culture,”⁷⁹⁶ it seems that we are only beginning to ascertain the impact that technology will have on creativity. Given the existence and nurturing of creativity outside of the European copyright system, the law should adopt the approach of the principle of implied authorisation, using it as a departure point from the dominance of the exploiters’ narrative and delineate its status as a counter-right.

This section has sought to determine the extent to which platforms have an obligation to both ensure and protect authors’ access to works online. It draws from the central argument of this thesis that such access is a necessary pre-condition for creativity online, stemming from the role that artistic communication plays in community-based creativity, significantly UGC. This argument implements the extended personhood theory and cultural theory which supports the construction of copyright as inclusive of free digital spaces to foster creativity in a way that encompasses its cumulative nature. It follows, that the section addresses the relationship between this creative pre-condition with the role of platforms, given their role as a gatekeeper of content online and ability to provide an essential facility of creativity online, artistic communication.

⁷⁹³ Lawrence Lessig, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (Penguin: 2014) 254-9.

⁷⁹⁴ Giancarlo Frosio, ‘Rediscovering cumulative creativity from the oral formulaic tradition to digital remix: Can I get a witness?’ (2014) 13 J. Marshall Rev. Intell. Prop. Law 341, 391.

⁷⁹⁵ Ibid.

⁷⁹⁶ Lawrence Lessig, ‘Free(ing) Culture for Remix’ (2004) 2004 Utah L Rev 961, 975.

While most of the thesis has considered this question from within the European copyright system, mainly due to the CJEU's preliminary ruling that fundamental rights cannot be externally applied to copyright exceptions and limitations which support cumulative creativity, this section examines the role of platforms outside of EU copyright platform liability mechanisms (i.e., art. 17 DSM Directive and art. 3 Information Society Directive). We have observed that German jurisprudence on the relationship between public and private law is helpful in unpacking the status of platforms as a primary mode of communication for individuals, specifically the indirect effect doctrine. The landmark *Lüth* case provided the foundation to characterize platforms as private entities immune from the application of human rights standards.

However, the construction of platforms as public spaces providing integral communication modes, was gleaned from subsequent German case law, specifically *Fraport* and *Stadionverbot*. In these two cases, the German Federal Supreme Court outlined that fundamental rights extend to private entities to the extent that they provide a public space with a designated purpose that links with the connected right. In this section, relying upon the characterization of public spaces to foster discussion and communication envisaged by freedom of expression, but also to provide individuals with the opportunity to take part in societal life, it was proposed that platforms should be considered as public spaces integral for artistic communication.

Subsequently, we considered whether the legal concept of digital constitutionalism could best incorporate this theory of public spaces and fundamental rights within European copyright law. The section observed that this development within public law mirrors the call within European copyright literature to adopt a lens of constitutional propertization given its ability to strengthen user rights through balancing fundamental rights such as freedom of expression against the right to protect IP. Leaning upon the foundations of digital constitutionalism, the section argued that the concept allows for the creation of new rights, specifically in the context of new challenges posed by algorithms such as content moderation, adopting a bottom-up approach based on social need.

Regarding creativity, the section concluded that this requires the construction of a wider right of access based on platforms providing public spaces necessary for creativity. As digital constitutionalism, like the indirect effect doctrine, not only extends the application of constitutional rights to platforms, but requires constitutional rights to be balanced against each

other, the section notes that the principle of implied authorisation serves as a natural and proportional balancing mechanism able to guide platforms in balancing freedom of expression of authors online. Regarding the right to conduct a business, we structured this as a subjective right to support authors and users, and overall, creativity. The section contends that both the public space doctrine of *Fraport* and *Stadionverbot* when applied in combination with the legal concept of digital constitutionalism supports the construction of a wider right of access that strengthens authors and artistic communication online.

Lastly, the section characterizes this wider right of access as a genuine counter-right to the dominant exploiters' narrative. This is achieved by reflecting upon complex systems theory and its ability to critique transnational private rights, such as copyright exploitation rights enforced online. It required adopting the bottom-up approach of digital constitutionalism and examining how remix culture facilitates creativity online. Focusing on the capacity of constitutional rights to be constructed as positive rights of access, the section determined that the horizontal application of constitutional rights, such as freedom of expression and the right to conduct a business, should extend to support cumulative creative culture in the form of a wider right of access.

This outcome is grounded in the reasoning behind complex systems theory that when tension mounts between the law and self-regulated social spheres, such as UGC, it requires both to adapt to co-exist. In relation to European copyright law, the increasing blurred lines between authors and users, coupled with the dominance of the exploiters' narrative, has reached a junction where the law must reconcile itself with cumulative creativity. It must consider this community regulated creativity and attempt to subsume it as law. This means acknowledging the evolution that these communities have made from a permissioned culture to one that creates, injecting their own collective personality to place works in new contexts and remix their meaning and culture to the benefit of society. The reshaping of law required by complex systems theory requires a discussion of permission, and as we have seen throughout this thesis, the principle of implied authorisation provides the framework to do so.

It is from this perspective, that the section contends that a wider right of access, facilitated or simply guided by the principle of implied authorisation, serves as a departure point from the European copyright system as characterized by the dominant exploiters' narrative. This approach refreshes the discussion of fundamental free spaces within European copyright law by reconciling them as an entry point for supporting creativity online, enlightened by the

integral link between creativity and communication as a necessary element of personal and cumulative autonomy and self-determination.

4.4. CONCLUSION

This chapter has sought to place the principle of implied authorisation within a broader context, the tension between creativity online and the European copyright system. The crux of the current approach centres upon the position of platforms as gatekeepers to, and enforcers of, copyright works online. The central argument of this thesis is that given this state of affairs, authors' access to platforms is a necessary pre-condition for creativity online. However, as we have observed throughout this thesis, recent European legislation, specifically art. 17 DSM Directive, complicates authors' access as it is likely that platforms will utilize algorithmic copyright enforcement technology to comply with the best efforts standard in lieu of a licence between rightsholders and users sharing creative reuses of previous works on platforms.

It is for this reason that the chapter has focused on the implementation of user safeguards outlined within art. 17 DSM Directive, specifically the complaint and redress mechanism for when content is wrongly blocked or uploaded. The first section crystalised this argument as one of two options. Either the user upload "stays up" or "stays down". In the latter situation, the chapter contends that this approach would be the result of a member state implementing art. 17 textually, in a verbatim manner. However, drawing from both the CJEU and Advocate General Øe's opinion in *Poland*, as well as the EU Commission's Guidance, the first section found that more is required of member states to ensure that the user safeguards are implemented effectively to respect the essence of the relevant fundamental right at play, such as freedom of expression.

The first section makes the argument that if the essence of fundamental rights are to be effectively protected by member states, it requires user uploads to "stay up" during the complaint and redress mechanism. While both Advocate General Øe's opinion and the EU Commission's Guidance is more explicit, referring to uploads that are not "manifestly" infringing as not being subject to blocking or filtering at this first stage, the CJEU's focus on the need for national transpositions to strike a fair balance between relevant fundamental rights generally as well as to take stock of national constitutional guarantees, evidences that more is required than a textual transposition. However, as we have seen, the implementation of France counters this proposal as the amendment to the French Intellectual Property Code appears to rely on the judiciary to determine the lawfulness of an upload and in the meantime, solely

protect rightsholders by opting for a “stay down” approach. This seems to confirm the French position that ex ante user safeguards are not required to balance the interests of users.

In contrast, the German implementation of art. 17 offers a comprehensive framework of ex ante user safeguards. As we observed, in the first section, user uploads are *inter alia* subject to qualified blocking where users can flag an upload as justified if they believe it is covered by a relevant exception. Following flagging, the upload “stays up” until the complaint and redress mechanism finishes, and in the event that the upload infringes, the OCSSP is exempt for liability for that period of verification. This balances rightsholder interests by providing the “red button” for allowing user uploads to “stay down” in limited and critical circumstances. Lastly, there is a platform obligation to pay authors, not exploiters, when uploads covered by the parody, pastiche or caricature exception are uploaded.

Compared to France, the German approach is quite innovative at addressing the tension between creativity and the European copyright system by implementing the equivalent of a statutory license with the effect that exploiters are incentivised to enter licences with platforms to cover these uses, without effecting authors’ interests. Yet, given the contrasting approaches of member states, the first section also discussed the potential of the DSA to fill the ex ante procedural gaps left by the DSM Directive given its mandatory nature as a regulation. While it largely reflects the approach of the German legislator, the DSA specifically outlines safeguards that support and protect users, particularly the creation of Digital Service Coordinators that could play an important role to reconcile the resounding fragmentation that art. 17 DSM Directive has produced.

In the following section, we relied upon this practical implementation of art. 17 DSM Directive to expand on the ability of the principle of implied authorisation to reconcile the fundamental free spaces within the European copyright system, ultimately providing an overarching escape mechanism to support creativity online. As we have seen throughout this thesis, the current European copyright framework is restrictively interpreted at CJEU level. In combination with the patchwork of provisions, predominantly copyright exceptions and limitations, that support users, the CJEU, has to an extent reinforced these free spaces, most recently by considering the role of fundamental rights. However, as we have observed, following *Funke Medien*, *Speigel Online* and *Pelham*, the hope within commentary for fundamental rights to play a larger role to support users was cut short due to harmonisation concerns.

This section extended on the status of the principle of implied authorisation as an inherent element of the European copyright system, not requiring external application of fundamental rights. Firstly, relying upon its parallels with the doctrine of exhaustion, the section argued that the principle of implied authorisation, specific to creativity, renders a wholistic fair balance between fundamental rights through its two core elements: consent and appropriate remuneration. Drawing upon the notion of consent as a meta-exception, we observed that beyond Community-wide exhaustion discussed in Chapter II, authorisation sits at the core of the European copyright system and arguably reflects the debate on legitimate user uploads as it comprises explicit consent but also a wider construction informed by the fair balance of fundamental rights.

Moving to the second element, appropriate remuneration, the second section drew upon earlier discussions relating to remuneration in CJEU jurisprudence and substitution theory to propose that authors' interests are the only claim for payment of creative reuses shared online. We observed that this position is similar to the concept of trade mark "use" for double identity infringement where certain types of use simply do not meet the threshold to be considered infringement as it must be connected to relevant trade mark functions. In the same way, if a user upload does not act as a copy of the original work, there is no claim on behalf of exploiters, only authors. This approach was found to mirror solutions within the commentary where fair remuneration is achieved through a "permitted-but-paid" licence as well as the German implementation and the principle of appropriate and proportionate remuneration which supports authors and performers pursuant to the DSM Directive.

The section then applied these two mutually inclusive elements to the *Pelham* fact pattern to illustrate the potential of the principle of implied authorisation to reach a more proportionally balanced outcome that reflects how communities and sub-communities online create copyright works, providing a point of departure from the European copyright system. We found that the principle requires one to consider two factual issues: the nature of the subsequent use, defined by the substitution theory, and whether the implied authorisation can be rebutted due to artistic reputational harm. Regarding the first, if it does not act as a copy of the original, this does not impact exploitation rights and an obligation for platforms to pay authors directly for these uses being uploaded arises. In relation to the second, if the subsequent use contravenes the concept of artistic reputational harm, then authors benefit from a safety net against the communication of the creative reuse based on an extension of personality rights.

We have observed that the application of these two elements to the *Pelham* fact pattern evidence that it is possible to reshape the European copyright system in a manner that both protects authors and enables creative collaboration such as UGC without impacting exploitation rights. In the final substantive section, the thesis considered how the relationship of platforms and fundamental rights could reshape the European copyright system. Drawing upon notions of public law accountability for platforms, recent calls to reignite the legal concept of digital constitutionalism, and complex systems theory perspectives, the thesis proposed that a wider right of access could be constructed as a counter-right to the European copyright system to support authors, users and creativity online. First, the section traced the approach of the German indirect effect doctrine and found that it could extend to consider platforms as public spaces crucial for the artistic communication of authors and users. This laid the foundation to assert that platforms are bound by fundamental rights outside of platform liability pursuant to art. 17 DSM Directive or art. 3 Information Society Directive.

In the following section, we considered how this finding could be incorporated within the European copyright system. Drawing parallels between the indirect effect doctrine and the horizontal application of fundamental rights specific to the copyright context, we noted that there is a renewed push to adopt a digital constitutionalism-based approach in relation to the role of platforms online generally, given the rise of algorithmic decision-making. Using this concept as the theoretical base of the section, we considered how the law could be reshaped to support creativity, specifically its pre-condition of authors' access to platforms. As digital constitutionalism maintains that, in response to algorithmic decision-making, more rights to support users are required, we proposed that a wider right of access be constructed on the basis that platforms are bound by fundamental rights.

We identified two relevant fundamental rights relating to creativity online: freedom of expression and freedom to conduct a business. Regarding the former, the section argued that given the public space nature of platforms, they should ensure access to platforms to support artistic communication, as defined by principles of self-determination and the extended personhood theory. Additionally, we observed that platforms' support of freedom of expression compliments their business structure which is reliant on users to upload and discuss new content. In relation to freedom to conduct a business, the section constructed this right as a secondary right, building on the general monitoring case law. This would mean that its public-private nature could result in fundamental rights being applied to platforms in a supportive or secondary manner.

Lastly, the section found that the wider right of access should be constructed as a counter-right in line with complex systems theory. Firstly, given the right's "trans-subjective" nature, we observed that it can expand beyond individual creators and allow access on a wider basis, creativity. We reflected on tension mounting between creativity and the European copyright system and found that the law will need to reconcile this tension. Following guidance from the commentary, we determined that system theory best reshapes the law when it adopts a bottom-up approach, similarly to digital constitutionalism, and ensures that the law accounts for the process of cumulative and collaborative creativity online occurring in communities and sub-communities. The section focused on UGC and found that the principle of implied authorisation could guide the construction of a wider right of access, providing a "positive" right to ensure that authors can access platforms for the purposes of artistic communication.

The third section concluded by indicating the potential outcome of constructing a wider right of access as a counter-right to the European copyright system, guided by the principle of implied authorisation. We found that this approach to the mounting tension between creativity and the European copyright system would ultimately rebalance the "free culture"/"permissioned culture" dichotomy by making inroads through the construction of authorisation. The section confirmed that this is possible through the principle of implied authorisation, given its focus on consent as a meta-exception, appropriate remuneration, the criterion of substitution and the incorporation of authors' personality rights as a limitation in specific circumstances relating to artistic reputational harm. Overall, when viewed as a counter-right, the principle of implied authorisation has the effect of reconnecting online creativity with its inherent collaborative and cumulative community-based nature. It is from this perspective, that we asserted in this last section, that it really takes form as a departure point from the European copyright system which has been heavily dominated by the exploiters' narrative.

This chapter has attempted to locate the principle of implied authorisation within a broader context, specifically the mounting tension between the European copyright system and creativity. By considering implementation methods of art. 17 DSM Directive, focusing on the two mutually inclusive elements of the principle of implied authorisation, and the potential of platforms to be bound by fundamental rights outside of the European copyright system, the chapter has identified the markings of a wider access right to platforms which has the potential to more effectively support creativity, by protecting authors and users, without jeopardising exploitation rights online.

CONCLUSION

This thesis started from the premise that the European copyright system should facilitate and support creativity. It has explained that since the introduction of the Information Society Directive, European copyright law has followed a trajectory that strengthens rightsholders to the detriment of users, authors and creativity generally. We have found that often, the discussion is constructed as an imbalance between rightsholders on the one hand, and users on the other, particularly by the CJEU as well as in critical reflection by the commentary. This characterisation of the European copyright system fails to comprehensively address the impact of what the thesis has termed the exploiters' narrative. Given this failure, the thesis has examined the imbalance between rightsholders and users by unpacking the relevant "sub-interests". By doing so, we have observed that it is possible to reconcile the expansion of exploitation rights against larger concerns relating to creativity, namely its core element, artistic communication.

Following a comprehensive review of the European copyright system, we have identified that the advent of the internet, particularly reliance on platforms to disseminate creativity, requires redefining and re-organising copyright interests into the following groups: authors, users, exploiters and platforms. Following this amended status quo, the thesis has proposed that if these interests are identified in a manner which corresponds both with the relevant fundamental right that supports them and with their function within the European copyright system, it is possible to proportionally balance all copyright interests while simultaneously supporting and facilitating creativity. The thesis has illustrated that the most effective way to reconcile copyright interests is through the overarching status of the doctrine of exhaustion and its tailoring to creativity online via the principle of implied authorisation. In the following sections, we will now reflect on 6 key findings that support this conclusion:

1. The doctrine of exhaustion is an overarching proportional balancing mechanism integral to the European copyright system.
2. The relationship between authors and users that create and share content online is blurry.
3. Exploiters must be treated differently to authors.
4. Platforms have a responsibility to support authors and users.
5. The implementation of art. 17 DSM Directive should be guided by the principle of implied authorisation.

6. A departure point from the European copyright system is necessary to facilitate and support creativity online.

**FINDING 1: THE DOCTRINE OF EXHAUSTION IS AN OVERARCHING
PROPORTIONAL BALANCING MECHANISM INTEGRAL TO THE EUROPEAN
COPYRIGHT SYSTEM**

Before reflecting on how the thesis constructed the principle of implied authorisation in the shadow of the doctrine of exhaustion, it is worth emphasizing the all-encompassing status of the doctrine within the European copyright system. As we observed in relation to the doctrine of copyright misuse, attempts have been made within the literature to embed the fundamental free spaces necessary within European copyright law for users as well as the public interest. However, the thesis has proposed that the doctrine of exhaustion is capable of comprising these approaches and reconciling these spaces, whether exceptions or limitations, through the guise of consent, as a meta-exception. Significantly it is both an inherent and integral element of the European copyright system. This means that it does not invoke claims regarding the external application of fundamental rights nor questions of whether it is a disguised exception absent from the exhaustive list of copyright exceptions pursuant to the Information Society Directive.

This overarching proportional balancing mechanism also mirrors calls within CJEU jurisprudence and the literature to consider the horizontal application of fundamental rights. We observed that the constitutional propertization lens achieves this balance by contending that the propertization of copyright should be subject to social property justifications, supported by fundamental rights such as freedom of expression or of information. Comparably the doctrine of exhaustion effects this balancing by providing a mechanism for both limiting the application of exploitation rights but also by preserving fundamental public spaces supported by fundamental rights. In relation to creativity, the doctrine of exhaustion, taking form through the principle of implied authorisation, exhausts both authors' and exploiters' claims, allowing access to and use of copyright works for the purposes of creative reuses, supported predominately by freedom of expression, but also by a construction of freedom to conduct a business as secondary and supportive right.

Overall, it becomes clear that the doctrine of exhaustion supports and facilitates fundamental public spaces, such as creativity, by providing a practical implementation of the renewed call for digital constitutionalism. It offers a concrete framework to comprehensively

consider whether a point of departure from the European copyright system is needed to resolve the tension mounting between it and creativity occurring either outside of the bounds contemplated by European copyright law, or in the case of copyright exceptions, lacking support, namely for UGC. Using systems theory as a guiding principle, the thesis has proposed that the exhaustion doctrine offers this point of departure to support and facilitate creativity, through the principle of implied authorisation. Following this characterisation of the doctrine of exhaustion as an overarching proportional balancing mechanism integral to the European copyright system, the thesis examined how the principle of implied authorisation should be constructed.

Initially we drew inspiration from the effect of Community-wide exhaustion which was used to both hold exploitation rights to their functional boundaries but also to balance relevant copyright interests, namely the public space or interest in having free spaces such as free trade. However, at this junction, we observed that the doctrine of exhaustion was used to further harmonisation aims of the EU single market by balancing free movement of goods norms against secondary IP legislation. The result was that in certain circumstances, once a good was put on the market either directly by the IP rightholder or with their consent, any claims to control further distribution were exhausted. The reasoning often hinged on this notion that the IP rightholder has already fundamentally benefited from the single market, so if they were to further restrict distribution and dissemination of the same good, it would be a greater detriment to the internal market.

The reasoning sparked an examination of how the doctrine of exhaustion should delineate the boundary between social justifications, specifically creativity, against the application of exploitation rights. By focusing on the core element of the doctrine of exhaustion, consent, we began to construe the principle of implied authorisation as a broader construct for preserving and supporting fundamental free spaces necessary for creativity. Essentially the notion of consent was extended beyond the harmonisation goal of Community-wide exhaustion to reflect other norms that should reside outside of the scope of exploitation rights. In this way, consent was constructed as a lawful authorisation which does not require rightholders to explicitly consent to creative reuse.

We delved deeper into these elements by examining classical exhaustion cases including *Musik Vertrieb*, the *Coditel* cases, and *Football Association and Premier League and Murphy*. They evidenced that when determining whether the rightholders' consent is exhausted,

triggering exhaustion, the surrounding circumstances of when the good was placed on the market or the broadcast was made are essential. This review of cases emphasized not only that the doctrine involves a balancing and proportional assessment, involving the specific subject-matter principle and the essential function of the relevant IP, but that whether the rightsholder has a claim for appropriate remuneration is a key factor when examining consent. It was from this finding, that we confirmed that consent operates as a meta-exception within the European copyright system which has the potential to consider creative reuses non-infringing so long as relevant copyright interests, regarding specific contextual factors, are allowed.

We then turned to secondary copyright legislation, specifically the Information Society Directive, to consider how consent as a meta-exception operates within the European copyright system. Despite calls for a concept of ‘digital exhaustion’ pursuant to art. 4(2) Information Society Directive, a review of CJEU jurisprudence on the communication right evidenced that it is unlikely to be directly implemented through EU legislation or the CJEU. This is even though an entirely different exhaustion regime applies pursuant to the Software Directive after *UsedSoft*, given the latter’s *lex specialis* nature. This illustrated an emphasis within the European copyright system on goods and the notion of tangibility requiring a different set of rules compared to the digital environment. This was most clear in *Tom Kabinet* where the CJEU excluded the application of the distribution right, normally used to trigger exhaustion pursuant to the Information Society Directive, and confirmed that the right to communicate to the public is the most relevant right online.

Despite this setback for digital exhaustion, the CJEU’s interpretation of the communication right strengthens the application of the principle of implied authorisation within the European copyright system. We found that often following public policy considerations relating to freedom of expression and the role that the Internet plays in facilitating communication online, there have been cases where the CJEU has found uses of copyright works online to be authorised though they lack clear and explicit consent from the relevant rightsholders. Referred to as the “new public” concept, the argument in *Svensson* was that regarding hyperlinking, such a use is not made to a new public because users have already been able to access the work linked previously. It is only when the hyperlink is used to circumvent restrictions used by the author, such as in *GS Media*, that this use will have enabled a new public to access a work otherwise restricted. As we noted, this implied licensing construct for linking is based on the notion that hyperlinking is a necessary form of

communication online supported by freedom of expression as opposed to direct posting of works illustrated in *Renckhoff*.

Reflecting on this construct, we found that it provides the thesis with an allegory to ground the doctrine of exhaustion relating to creativity. Expanding upon the lawful implication of consent in these hyperlinking cases by the CJEU, the thesis proposed that the principle of implied authorisation, mirroring the mechanism of implied linking licences that are dependent on balancing freedom of expression and information online, implies authorisation to support artistic communication online. It balances the combined calls to support freedom of expression and of information, the right to protect IP as well as freedom to conduct a business by considering the function of the right asserted against the greater social need, in this case creativity. It does so by allowing the exhaustion of rightsholders' consent in specific circumstances. When applying this principle to the position of authors, users, exploiters and platforms within the European copyright system, the analysis gave rise to the following 4 findings to guide the reconciliation of copyright interests supported by fundamental rights.

FINDING 2: THE RELATIONSHIP BETWEEN AUTHORS AND USERS THAT CREATE AND SHARE CONTENT ONLINE IS BLURRY

Secondly, the thesis illustrated that there is increasing cross-over between authors and users online. The argument is that users equate with the position of authors when they engage in creativity and share new works online. It means that it is no longer possible to distinguish traditional copyright works from UGC, and nor should the latter receive less support from the European copyright system. The thesis explained that protection should take the form of access to platforms to ensure that authors, including users, can artistically express themselves online. This is founded in notions of self-autonomy and freedom of expression that guide authors' creativity generally.

As we observed throughout this thesis, these guiding theoretical and philosophical principles should be applied to online creativity, which is inherently cumulative and collaborative, through the extended personhood theory. Though natural rights theorists such as Kant could be extended to define an individual's ability to communicate creativity as including space for subsequent creative use, the focus in copyright law on an individual's potential to create is at odds with creativity online. The extended personhood theory, founded in German constitutional guarantees regarding personality rights such as informational self-determination,

was found to encompass the creative interaction of users online and the necessary element of artistic communication within creative communities and sub-communities.

This approach aligns with the understanding of the doctrine of exhaustion as an overarching balancing mechanism that delineates fundamental spaces, in the public interest, free from applicable exploitation rights. Following the extended personhood theory, it became clear that one such necessary and fundamental space occurs on platforms where UGC is uploaded, discussed and sparks further creativity. This approach to personhood theories enables the construction of a sound framework for basing the principle of implied authorisation. It transforms integral elements of communication which protect the ability of individuals to determine their own “self-image” to community-based creativity online. In this regard, the extended personhood theory represents a modern theoretical understanding of creativity online and calls for copyright to protect the ability of communities to create and share together online by ensuring that authors, including users, have access to platforms, as a pre-condition of creativity.

Despite the increasingly blurry line between authors and users, the thesis has identified that the principle of implied authorisation does not apply to all creative reuses. Reflecting on the status of artistic communication for creativity, the thesis has found that though notions of self-autonomy and freedom of expression from a creative perspective comprise space for follow-on creativity, there is a point where subsequent uses erode the original work and its relationship to the author. However the line between legitimate and harmful subsequent creative uses can be difficult to distinguish when an author-focused approach is taken. Thus, we examined the doctrine of author’s consent within CJEU jurisprudence which focuses on the extent to which authors’ consent can be implied from surrounding circumstances to allow a subsequent use.

Before commenting on the thesis’s sub-finding that an objective approach to harmful creative reuses should be adopted, it is worth noting the distinction between the principle of implied authorisation against the doctrine of authors’ consent generally. As we observed in the thesis, the doctrine of authors’ consent, a creature of CJEU jurisprudence, is implied, almost in fact, relying on specific factors about the authors’ behaviour similar to an implied licence in common law. The principle of implied authorisation in comparison, refers to an implication beyond specific facts and relates to a wider call, from the perspective of creativity, for

rightsholders' consent to be exhausted, given the overarching status of the doctrine of exhaustion within the European copyright system.

With this in mind, as we observed earlier, the doctrine of authors' consent, following *Soulier and Doke* and *Spedidam*, requires a fair balance of interests, to an extent that it allows fundamental rights balancing. So, when considering this blurry line between authors and users online, we must account for competing claims to protect IP as well as for freedom of expression by both interests. In the thesis, we narrowed our examination to circumstances where it is arguable that an author can withdraw consent from future creative exploitation due to what it has termed artistic reputational harm. This was described as occurring when the way a user uses an author's work conflicts with their artistic communication, supported by freedom of expression, to determine how their works interact with the world. The most obvious example being when politicians use an artist's song as walk-on music for a political campaign.

Yet the thesis evidenced that when fundamental rights have been used to balance the interests of authors and users by national courts, often it does not mention artistic reputational harm such as in *Malka v Klasens*, *Koons v Franck Davidovici* and *Swedish scapegoats*. Hence this thesis narrowed its lens to consider artistic reputational harm through the conflict between personality rights, specifically the integrity right, and parodic uses. The *Deckmyn* judgement initially provided guidance by requiring the proportionality assessment to include the legitimate interest of the rightholder to ensure that a work protected by copyright is not associated with a harmful message, for example, a racist or discriminatory one. While we found that some commentary view *Deckmyn* as diluting the already weak strength of exceptions, particularly in view of the *Maya the Bee* case, the thesis asserted that the notion of the author's legitimate interest is a helpful starting point to frame the discussion of artistic reputational harm.

In cases such as *Le Point* and *Fat-Cropped*, we observed that a practical approach was adopted that centred upon the degree to which the parody would conflict with the intended use of the work as well as the purpose of parody to support freedom of expression. This more flexible approach was fleshed out in *Helene Fischer* and introduced an objective test for harm. It required the harm to be assessed to the standard of an unbiased average consumer. This was phrased as a gatekeeper element as if the average consumer could not exclude the possibility that there is a connection between the subsequent use and the author, then the Court can then balance the interests, the intensity and the impact of the mutilation, the economic interest and

the level of creativity to determine whether the integrity right would trump the parody exception.

At this junction, we observed that the German Federal Court's approach is similar to mechanisms within European trade mark law to reign in broad reputational rights such as tarnishment or unfair advantage which require a link to first be established, through the mind of the relevant public. The argument was that authors' personality rights and principles of unfair competition require an objective approach which takes into account the nature of the subsequent use. From the perspective of creativity online, we observed that perhaps the most convincing argument would be for the original artist to find that the use of their work by the subsequent artist points toward a form of collaboration or partnership to their detriment. However, when viewed through the lens of trade mark law and the recent *Rich Prada* case, the thesis proposed that given the strength of reputational-based trade mark infringement, it cannot be wielded in a manner that creates an illegitimate trade monopoly, similar to the expansion of exploitation rights in European copyright law. The focus is on whether there was an "image transfer" between the parties, which requires more than the potential link between the two artists.

We can see that the principle of implied authorisation addresses the blurry line between authors and users online by holding that there is a theoretical and philosophical justification for an authors' communication of their work to the world inherently comprising space for the creativity that builds upon it to create new works. However, the principle also responds to moral concerns of authors that the subsequent use could be of a harmful nature and damage the very creativity that allows future creativity.

There is one last additional point that we concluded in relation to the relationship between authors and users and that is the obligation of platforms to pay for creative reuses of creative works uploaded by users. This obligation is steeped in CJEU jurisprudence on the doctrine of exhaustion. We found in this thesis, that in addition to expansive definition of consent, the doctrine of exhaustion can only exhaust author's control over future dissemination of subsequent creative uses if authors are paid fairly for these uses.

FINDING 3: EXPLOITERS MUST BE TREATED DIFFERENTLY TO AUTHORS

This leads us to the third key observation regarding the application of the principle of implied authorisation, rightsholders must be separated into two separate categories: exploiters

and authors. This distinction is critical because it not only confirms that that function of rights related to exploiters and authors differ, but that they require different approaches to balance their joint fundamental rights claim to protect IP. The thesis has found that exploiters hold a controversial position within the mounting tension between the European copyright system and creativity online. From the use of contractual provisions to override copyright exceptions and limitations pursuant to the implementation of TPMs and the protection granted against their circumvention at an international level, exploiters have appeared to shape the trajectory of modern European copyright law.

As we have noted throughout this thesis, this phenomenon can be referred to as the “exploiters’ narrative”, but within the commentary, it is known as the propertization of copyright law. The constitutional propertization lens also offers the opportunity to balance this dominance within the system against other social justifications for property, such as creativity. While, the use of technology, such as TPMs, complicates this reconciliation, ultimately the principle of implied authorisation prevents any systemic override. However, we also observed that the introduction of art. 17 DSM Directive presents a very similar choice to the decision to protect TPMs against circumvention within European copyright law. Without further clarification on the application of art. 17 DSM Directive at national level, the outcome could be identical to UGC restricted by TPMs as users that create and share content online would effectively be ‘locked out’ conflicting with the integral right of artistic communication to the detriment of creativity online.

Comparably, regarding authors, we have already reflected upon the necessity to consider a claim for artistic reputational harm, however, the other key difference between exploiters and authors, is that the latter have a claim for appropriate remuneration for every single user platform upload that uses their work in a creative manner. The trade-off being that the theory of extended personhood and creativity can be upheld and uploads allowed so long as authors are paid. This finding is grounded in *Reprobel* which we noted affirms the position of authors’ interest against exploiters as when the latter do not suffer harm the CJEU held that they should not be entitled to any fair compensation, particularly given the fact that they are not affected by the purpose of copyright exceptions. It follows that while authors’ consent is exhausted on the basis of the extended personhood theory as well as appropriate remuneration for creative reuse being uploaded and shared, given the function of exploitation rights within the European copyright system, the approach for exploiters’ consent differs.

In the thesis, we addressed this sub-finding by asking whether there should be a re-exception for creative commercial reuse. This references back to the findings in *VG Bild-Kunst* and *Copydan* where even though there was a non-infringing purpose, there was a requirement for fair compensation, despite in the latter, the TPM failing to meet the requisite proportionality requirements. The thesis attempted to locate this statement and understand how and when there should be a requirement for exploiters to be paid for uses, such as through the license envisaged and preferred by art. 17 DSM Directive to avoid any unnecessary filtering or blocking through algorithmic copyright enforcement technology. If not, of course, the argument would be that these types of uses, when a copyright exception or limitation is inapplicable, would infringe exploiters' rights.

When unpacking the exploiters' claim for remuneration, we constructed a theory of substitution. This meant that when considering whether exploiters' consent is exhausted the analysis should focus on if the subsequent creative use acts as a copy, competing with the original work. The analysis should centre upon whether the exploitation rights should extend to preventing a creative reuse on the basis that the subsequent author unfairly benefited from the taking to the detriment of the exploiters' investment. We concluded that these types of uses do not direct any harm towards exploiters as they are intended to further artistic communication and discussion online.

The substitution theory is firstly grounded in the doctrine of exhaustion, as the reasoning by the CJEU in classical exhaustion cases was to allow further distribution following first sale as arguably 'second-hand' goods would not compete with goods that are yet to be put on the market. Similarly, the principle of implied authorisation distinguishes between these two types of subsequent uses. On the one hand, if a user uploads a copyright work lacking any of their own creativity to such a degree that other users could potentially use it to access a copy of the work unlawfully, the principle of implied authorisation will not provide protection for these uploads. On the other hand, if a user produces a subsequent work which builds upon the original and uploads it to a platform it is arguable that this upload is unable to compete with the original work.

Secondly, the approach of both the EU Commission in art. 17 DSM Directive Guidance and the Advocate General Saugmandsgaard Øe in *Poland* support the substitution theory. Both emphasize the need for the implementation of art. 17 DSM Directive to not result in the filtering or blocking of user uploads that are not manifestly infringing. Additionally, and perhaps less

directly, the CJEU in *Poland* holds that when implementing user safeguards, national legislators should do so in a way which protects the essence of relevant fundamental rights, namely freedom of expression. Both approaches reflect the necessity for creative reuses to be protected. While the Commission Guidance and Advocate General opinion in *Poland* are more direct, the sentiment is that ordinarily infringing uses are distinguishable from those uses which should arguably be covered by copyright exceptions, namely parody, pastiche and caricature.

We also observed an attempt by the German legislators to address this distinction through the construction of a ‘red button’. The procedural feature allows trusted rightsholders to manually require the immediate takedown of user uploads in cases where delayed takedown would significantly harm the economic exploitation of the work. Despite this progress to provide specific measures and guidance for platforms to strike this balance to benefit creativity, the thesis found that this re-exception turns upon the meaning of a legitimate use which is generally defined in relation to copyright exceptions. Instead, the thesis finds that this element of the re-exception is unhelpful as the exceptions are focused on specific circumstances, some of which are yet to be defined. We noted that it is more preferable if the substitution criterion guides any claim by an exploiter to restrict user uploads that use previous creative works.

Upon reflection, we observed that this approach to exploiters and exploitation rights, steeped in defining the latter to their function, investment, is also similar to a concept within trade mark law to identify when a use of a trade mark even comes within the bounds of a trade mark right. Hence the notion of non-use is helpful here to guide the balancing of exploiters’ interests when viewed through the lens of the theory of substitution, supported by the doctrine of exhaustion. We also noted that similar claims are made through the doctrine of misuse of copyright as when exploitation rights are applied beyond their initial grant, investment, we found that the doctrine would similarly view this as a non-use or a non-infringing use.

The thesis has clarified that while authors both impliedly consent to future creative exploitation, with the caveat of artistic reputational harm, due to the obligatory payment by platforms for these uploads, exploiters require a different analysis which centres upon the function of exploitation rights distinct from artistic communication, investment.

FINDING 4: PLATFORMS HAVE A RESPONSIBILITY TO SUPPORT AUTHORS AND USERS ONLINE

Fourthly, this thesis has affirmed that platforms play a vital role within the European copyright system as both a central facilitator of access and an enforcer of copyright infringements online. Given this critical position, the thesis argued that so long as exploiters' rights are balanced, the role of platforms should be construed to support both authors and users and artistic communication online. This finding builds upon the relationship between authors and users, particularly when viewed through the lens of extended personhood theory and the cumulative and collaborative nature of creativity online.

While in the fifth finding we will reflect on the implementation of art. 17 DSM Directive, we have observed throughout this thesis that this new legislation has sought to address the role of platforms by introducing a specific licensing mechanism. Many of the concerns addressed by this thesis relate to how art. 17 DSM Directive will impact users, particularly those that function as authors online. Hence the statement that platforms have a responsibility to support authors and users, though made generally, is particularly relevant for the implementation of art. 17 DSM Directive.

We have noted that the relationship between authors and platforms is, to an extent, reciprocal. From the position of users creating and sharing content online, platforms are a primary mode to protect and facilitate artistic communication. The thesis noted that they provide a fundamental digital space for the inspiration, creativity and the communication of creativity; all necessary factors striking at the heart of the principle of self-determination and freedom of expression. For platforms, authors' access and use of platforms for artistic expression, compliments the contractual relationship that users have with platforms as their business models are reliant on users creating and sharing content and discussing it with other users. Hence, when viewing the relationship from the lens of freedom of expression, platforms must support both authors and users, to their own benefit.

We also found that there is potential to interpret freedom to conduct a business as a secondary right which supports authors and users. Founded in CJEU cases on the ban against general monitoring, the thesis expanded upon the idea that freedom to conduct a business can be effected against both a private individual but also in support of wider social justification, similar to the approach of digital constitutionalism. Then we proposed that this 'quasi-

subjective’ right could support the characterisation of platforms to support authors and users online, given the significance of artistic communication.

The thesis also reflected on the role and responsibility of platforms more widely than the European copyright system. In view of the complicated status of applying fundamental rights to support users discussed in the thesis, adopting an approach that starts from the intersection of private and public law, is a refreshing perspective. By examining German jurisprudence, specifically new approaches in *Fraport* and *Stadionverbot*, which addresses this conflict of laws traditionally through the doctrine of indirect effect, we were able to provide a concrete foundation to claim that platforms should be subject to fundamental rights, to a degree, outside of the European copyright system.

Finding support in commentary that platforms should be viewed as the equivalent of a digital town square, the thesis proposed that this ‘hybrid’ characterisation of platforms would provide the necessary foundation to ground their responsibility to users. The thesis proposed that the characterization of public spaces to foster discussion and communication envisaged by freedom of expression, and their ability to provide individuals with the opportunity to take part in societal life, should mean that not only are platforms considered as public spaces integral for artistic communication, but that responsibility to ensure artistic communication should follow.

This approach to platform responsibility to support users and authors, specifically through ensuring access to platforms to guarantee artistic communication, largely mirrors digital constitutionalism. Though we will discuss this aspect of the thesis more comprehensively in Finding 6, regarding the potential of a wider access right to platforms, commentary that has refreshed calls for digital constitutionalism additionally provides a further theoretical base for platforms to support users and authors online. In relation to the principle of implied authorisation, we proposed that this statement can be implemented through an obligatory direct payment from platforms to authors for users’ uploads that are creative reuses of previous copyright works. As we will reflect in Finding 5, the German implementation appears to adopt a similar approach as to both the position and responsibility of platforms within the European copyright system. However, overall, we have found that regardless of how this finding is implemented, it supports the necessary precondition for creativity online, authors’ access to platforms.

FINDING 5: THE IMPLEMENTATION OF ART. 17 DSM DIRECTIVE SHOULD BE GUIDED BY THE PRINCIPLE OF IMPLIED AUTHORISATION.

Ultimately all the above findings have indirectly characterised the current debate within European copyright law to respond to exploiters' calls for platforms to be liable with the European copyright system for user uploads that infringe copyright as well as to pass on profits made from monetizing copyright content on platforms. The thesis has reiterated the harmful consequences that art. 17 DSM Directive, without effective user safeguards, will have on creativity online. To this end, we have found that its implementation should be guided by the principle of authorisation.

Before reflecting on this finding, this section will first summarise the three key cumulative elements of the principle of implied authorisation:

- 1) A creative reuse of non-manifestly infringing character;
- 2) The exhaustion of authorial consent through a platform obligation to pay authors directly; and
- 3) The potential to rebut authorial exhaustion given objective evidence of the subsequent use resulting in artistic reputational harm.

It is clear that these mutually inclusive key elements reflect the above 4 findings of the thesis, each informing the extent to which platforms have a responsibility to ensure authors' access to platforms and to facilitate and support creativity online, specifically artistic communication. Throughout the thesis, we have observed that this construction of the doctrine of exhaustion has the potential to carefully balance all copyright interests in a proportional manner that supports creativity online. The thesis has also used the principle of implied authorisation to assess the extent to which implementation of art. 17 DSM Directive by member states balances authors, users, platforms and exploiters proportionally to the benefit of creativity.

The comparison between two extreme models of implementation of art. 17 DSM Directive, "stay up" or "stay down", focused on how the complaint and redress mechanisms were implemented at national level. The thesis elected to contrast France and Germany as both exemplify the contrasting implementation options as well as reflect the surrounding commentary and stakeholder opinions on how platforms should be addressed within the European copyright system. The crux of the discussion has been to determine whether user

uploads, that algorithmic software determines as potentially infringing, should the upload “stay up” or “stay down” during the complaint and redress mechanism.

The thesis noted that the approach of the CJEU, including Advocate General Saugmandsgaard Øe’s opinion, in *Poland* and the EU Commission’s Guidance are helpful to the extent that it appears that a verbatim textual implementation, envisaged by France, will conflict with what was intended by art. 17 DSM Directive. We gleaned this sub-finding from reconciling the more direct approach of the latter two with the CJEU’s judgement in *Poland*. While the latter two directly emphasizes that not manifestly infringing content should not be blocked or filtered, the CJEU judgement adopts a more indirect approach. We observed that the Court requires the implementation of the complaint and redress mechanism to respect the essence of fundamental rights namely freedom of expression. Further the CJEU require implementation generally to affect a fair balance between fundamental rights. Hence, the thesis proposed that all three sources indicate that more is needed to ensure the effectiveness of user safeguards within art. 17 DSM Directive.

It is clear following our close analysis of the French implementation, that the French legislators have merely extended the discretion they had to meet this balance of all copyright interest to platforms. The predicted outcome being that users will need to wait for a court to rule that the upload benefits from a mandatory exception listed in art. 17 DSM Directive before it can be restored on the platform. As we noted, this fails to consider the time sensitivity that accompanies UGC uploads on platforms, to the detriment of creativity online.

The failure to require platforms to implement any ex ante procedural safeguards for users places either a deep trust in platforms to maintain a proportional balance online. It also appears to evidence the opinion of the legislator that a proportional balance means rightholders interests should be preferred to users. As reflected already above, approaches within copyright jurisprudence and commentary that fail to distinguish sub-actors within the term ‘rightholders’ and to acknowledge the close relationship between authors and users online, will almost certainly harm creativity, and inherently evoke the exploiters’ narrative which has long dominated the European copyright system.

Comparably, when we examined the German implementation, the ex ante procedural safeguards exemplify an attempt to secure a proportional and balanced equilibrium between authors, users, platforms and exploiters online. The thesis has observed that the inclusion of provisions such as user-flagged uploads “staying up” during a complaint and redress

mechanism, the “red button”, and a provision against abuse of either safeguards effectively transform art. 17 DSM Directive into a piece of legislation that works to reflect cumulative and collaborative nature of creativity online. This type of approach, to an extent, mirrors the principle of implied authorisation in striking this balance. However, as discussed earlier in relation to the mandatory copyright exceptions versus a standard of not manifestly infringing, it is more likely using the latter that the law can foresee advances in creativity that extend beyond parody, pastiche and caricature.

We can then characterise the principle of implied authorisation as a gold standard to which the German implementation comes close, and the French implementation largely, ignores. This was clear when the thesis applied the principle of implied authorisation to the fact pattern of *Pelham*. We observed that it would be likely, so long as Pelham’s use is not manifestly infringing and Kraftwerk receives appropriate remuneration from the platform where the song is uploaded, that Kraftwerk’s authorial consent would be exhausted if no detrimental link can be proven between the two artists, caused by Pelham’s sampling. The analysis evidenced that the principle of implied authorisation can provide a more wholistic assessment which accounts for the notions of self-determination, community-based creation and the cyclical nature of creativity to build upon previous copyright works, in lieu of the traditional approach supported by a patchwork of exceptions and limitations. It will be interesting to note the extent to which the DSA procedural safeguards will meet this gold standard.

FINDING 6: A DEPARTURE POINT FROM THE EUROPEAN COPYRIGHT SYSTEM IS NECESSARY TO FACILITATE AND SUPPORT CREATIVITY ONLINE.

The last finding is the result of viewing findings 1-5 cumulatively as a call to reshape the European copyright system. Undoubtedly, art. 17 DSM Directive has thrust the role of platforms within the European copyright system into focus. Whether the legislation effectively balances copyright interests or not, we can note that it is an attempt to respond to a resounding problem that has characterised European copyright law since its formation, technology. While previously technological concerns were linked to advancements such as the printing press or photocopier, today the internet has encouraged the existence of platforms that facilitate access to digital society.

From a copyright perspective, we have observed that this technological threat has been addressed by EU legislators by requiring member states to implement legislation that is said to

encourage licensing of copyright works on platforms through the deterrent of platform copyright liability. Throughout this thesis, the flaws of this approach have been outlined in relation to the users who become authors by creating and sharing content on platforms, which places original works into new contexts. The argument has been that without more interference by national legislators through required procedural safeguards such as in the German implementation, creativity will most certainly be stifled.

However, another perspective, influenced by complex systems theory would suggest analysing the effectiveness of this approach by considering how mounting tension between the European copyright system and the communities and sub-communities that create should be resolved. We noted that systems theory, as well as digital constitutionalism, allow for the creation of rights utilising a bottom-up approach based on social need. We proposed that a wider right of access is based on such a need as authors' access to platforms is a precondition for users' creativity and artistic communication online. From the lens of complex systems theory, the thesis suggested that this wider right is a genuine counter-right to the European copyright system. In this regard, the mounting tension between European copyright law and self-regulated social spheres, such as UGC, requires the law to reconcile itself with cumulative creativity.

We noted that this means the law should, adopting a bottom-up approach, account for this community regulated creativity and attempt to subsume it as law. We found that such a consideration involves acknowledging the evolution that these communities have made from a permissioned culture to one that creates, injecting their own collective personality to place works in new contexts and remix their meaning and culture to the benefit of society. This also appears to reflect the theoretical basis for creativity discussed throughout the thesis as this notion of extended personhood theory which connects the self-autonomy that creativity requires with community-based creativity. It is from this perspective, that the thesis proposes that a wider right of access should serve as a departure point from the European copyright system to insulate these self-regulating social spheres from the encroachment of exploitation rights.

It was also clear that the reshaping of law required by complex systems theory necessitates a discussion of permissioned culture, which is largely the result of the exploiters' narrative. Thus we can also view this genuine counter-right of access as a departure from the strength of exploiters' interests that have dominated the European copyright system since the

introduction of the Information Society Directive through contractual terms overriding copyright exceptions and limitations as well as reliance on TPMs. As we observed earlier, the implementation approaches of some member states, particularly France, risk a return to access being denied until appealed and granted by a court. With this in mind, the need for the European copyright system to depart from a narrative of strengthening exploiters and their exploitation rights to deny creative access, in favour of payment, is warranted.

One way that this thesis has suggested the genuine counter-right can take form is through the principle of implied authorisation which expands the concept of permissioned culture to include authorisation for creative reuses through social justifications. We found that the principle of implied authorisation acknowledges these fundamental free spaces outside of European copyright law that are crucial for these self-regulating social spheres of creativity. The principle effectively reconciles all these spaces and classes them as an entry point for supporting creativity online, enlightened by the integral link between creativity and communication as a necessary element of personal and cumulative autonomy and self-determination. This approach also connects back to the approach discussed earlier in relation to non-use trade mark uses and entrenches the boundaries of the European copyright system to bolster creativity. We can also note that this ultimately reflects the overarching status of the doctrine of exhaustion as a proportional balancing mechanism which determines what types of subsequent uses should fall outside of the European copyright system.

Lastly, as hinted in finding 4, the role of platforms when viewed through the lens of digital constitutionalism affirms the need for a wider right of access to act as a departure point from the European copyright system. Given the extent to which other areas of the law are reckoning with the presence of platforms and their ability to disrupt traditional systems of law, such as copyright, complex systems theory is confirmed in its suggestion that the European copyright system must be reshaped. The principle of implied authorisation is one solution that attempts to address this mounting tension specific to the European copyright system and creativity, but it will likely be joined by other proposals outside copyright law to normatively ask how the law should continue to respond to new technological advancements, in this case, platforms and algorithmic copyright enforcement.

FINAL REMARKS

This thesis has illustrated the potential that the doctrine of exhaustion has to provide a concrete foundation to address the tension between the European copyright system and

creativity online. The six findings outlined above all serve to support the hypothesis that a broad construction of authorisation can provide a right of access for the purposes of artistic communication online. We have observed that this outcome is evidenced both within the European copyright system, through CJEU jurisprudence and the normative status of the doctrine of exhaustion as a proportional balancing mechanism of all copyright interests, but also as providing a departure point from the European copyright system, namely through platforms having a responsibility to support users and authors founded in an extension of the doctrine of indirect effect.

This has meant that the principle of implied authorisation, as a guiding principle for either the implementation of art. 17 DSM Directive or the construction of a genuine counter-right, has emerged as wide enough to reconcile the interests of authors, users, platforms and exploiters in a proportional and balanced manner to the benefit of creativity. It is finally suggested that the advent of platforms can continue to have a profound and positive effect on creativity, if, following the principle of implied authorisation, the European copyright system provides the fundamental spaces to support and facilitate artistic communication online, either as part of its own scope or as a limit, allowing the introduction of a fundamental wider right of access.

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