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Memes, GIFs and copyright legislation; sufficiency of wording within copyright instruments and their enforcement measures

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The document length is 19,782 words from the introduction to the end of the conclusion.

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ABSTRACT

Aim of Thesis is discerning whether specific instruments of copyright legislation, notably 2019/790 Directive, necessitate rephrasing on account of obscure legal position of GIFs and memes for these intstruments to function in effectual manner. Thesis subsumes several international legislations accepted in EU countries, to exemplify uncertain position of memes and GIFs. Through interpretation of these instruments utilizing legal sources and different cases vague Articles are discovered within instruments. These Articles affect economic rights of proprietors and rights actionablity towards GIFs and memes, enforcement Articles against violations and Articles of exception allowing utilization of copyrighted content subsuming GIFs and memes all affecting functioning of instruments. It is ascertained that for the obscure legal position of GIFs and memes to be clarified rephrasing is necessitated. Thus, to clarify the legal position of GIFs and memes in these instruments diverging methods are provided for possible changes. These methods entail taking example from a different country's legal construct, providing flexible interpretative methodology, protective measure for utilization of copyrighted works and filtration method rules and assistance of private individuals. It is concluded that aforementioned methods are required together to provide possible clarity to legal position of memes and GIFs.

Keywords: Copyright, Memes and GIFs, freedom of expression, International treaties, Article 17 Directive 2019/790, balancing of rights

INTRODUCTION

Memes and GIFs ("graphic interchange format") form significant portion of current communion within cyberspace, by provision of commentary, satire and imparting data. Manner in which they emerge can vary broadly, affecting role copyright has in regards to them on account of innovation and individuality.[1] Additionally, their essence relies on dissemination and duplication of materials. Making their legal position ambiguous, concerning copyright. Consequent of lacking definitions and nebulous phrasing.[2] As, acceleration in technological advancements brought about contemporary approaches for works falling under copyright being generated and mistreated, many of which not anticipated during drafting of international instruments.[3] Not helped by the technological ease at which material may be copied and disseminated, constituting elevated danger to copyright.[4] Furthermore, contentious Directive 2019/790 is feared to affect reliability of copyright regime within EU.[5] Affecting legal certainty of copyright regarding GIFs and memes.

As GIFs and memes have proven long-lasting their protection and legal certainty regarding copyright is required. As, freedom of expression is feasibly connected to them. Making essential the determination of such rights. Fast development of technology expands relevancy, leading to extensive dissemination, duplications and inception of copyright infringements. Moreover, incongruity concerning important interpretations, such as moral rights, persist. Thus, due need for legal certainty, as wording of specific instruments is doubted, there is necessity to inspect enforcement measures and sufficiency of wording of copyright instruments pertaining memes and GIFs.

[1] Matalon, L. J. (2019). Modern problems require modern solutions: internet memes and copyright. Texas Law Review, 98(2), 405-[x].
[2] Blunt, R. M. (1999). Bootlegs and imports: seeking effective international enforcement of copyright protection for unauthorized musical recordings. Houston Journal of International Law 22(1), 169-208. pages 170-181.
[3] Okediji, R. L. (2008). Conceiving an international instrument on limitations and exceptions to copyright. Amsterdam Law School Legal Studies Research Paper No. 2012-43, Institute for Information Law Research Paper No. 2012-37.
[4] Russ, C. (2020). Tweet Takers & Instagram Fakers: Social Media Copyright Infringement. Tulane Journal of Technology and Intellectual Property, 22, 205-224. pages 207-209
[5] Blair, S. (2019). Europe's copyright reform: what is so controversial. Landslide, 11(4), 12-15.

Main research question of the thesis centers on specific Articles of international legislation, mostly focusing on Directive 2019/790, and whether these Articles necessitate rephrasing due to vagueness in relations to memes and GIFs, assessing whether wording of specific Articles is vague to extent it affects enforceability and legal certainty of GIFs and memes? Additionally seeking methods to ascertain effective functionality of instruments regarding memes and GIFs ambigious legal position. Qualitative information gathering method is to be utilized, mixing methods of law in context and structural approach, from perspective of legal pragmatism. Information from Journals and Books concerning relations of copyright, memes and GIFs and Treaties relating to them, interrelation and interpretative methodology regarding international treaties, Articles relating to copyright and its exceptions and freedom of expression and how they interact will be utilized. Furthermore, secondary sources, CJEU case law and Advocate General opinions, are applied to determine meaning in international instruments. The gathered information will aid in determination whether the Articles are vague, affecting legal certainty and enforceability of memes and GIFs. Following which comparative method and journals will be applied to supply for a proposal of enhancement of legal certainty and enforceability.

Regarding structure of thesis. Firstly, relationship between copyright, memes, GIFs and international treaties are established, to determine relations and position. Second, copyright infrigements and enforcement measures concerning GIFs and memes are inspected and vague terminology established. Thirdly, copyright exceptions are concentrated on, specifying their scope and whether memes and GIFs could fall under it. Finally, comparative framework is examined regarding copyright exceptions and the fair use doctrine, providing suggestions on legal certainty and enforceability enhancements.

1. Defining and categorizing memes and GIFs

Ethmyological and historic idea of "meme" comes from publication "the Shelfish Gene" of 1976 whose author Richard Dawkins engendered the expression. Within its first manifestation it was referred to as "unit" that had capability to and for mirroring and "cultural transmission." Illustrations of the concept include trends, sentiments, slogans etc. the important aspect being ability to "imitate" in manner of vaulting from one mind to another. Most important characteristics of "memes", according Dawkins, constituted; faithfullness of duplication, durability and swiftness of duplicability. Making it adaptive and indistinct. Original characterization of "memes" interpretation has altered. Its utilization in todays vernacular is nigh inseperable from virtual environment and cyberspace.[6] A meme if defined utilizing widest interpretation encompassess all online phenomenons that reach "virality" particularly; "viral" imagery, actions outside cyberspace achieving "virality" due rapid virtual distribution and popular octothorpe(s).[7] It is indicated that though "viral" memes come from differing sources they share characteristics consisting; 1) pronounced rise in popularity, 2) large scale dissemination within cyberspace, 3) often seen as amusing. Yet, if "meme" is defined in restrictive manner it encompasses; allusion towards preceding materials, adding textual element to copyrighted material and combining copyrighted graphics.[8] Some academics stress memes interrelationship amongst copyrighted material and other memes, attributing their definitive characteristic as constituting; cognizance amongst creations regarding one another, emulated, modified and disseminated amongst multiple individuals. However, broadly accepted definition of a meme falls into more restrictive definition, as a material representation achieving virality from repeated rearrangement via various individuals, combined with additional pictures with or without words. Regarding academic works to copyright certain factors pertaining to memes are accentuated. Concerning memes; communicative characteristics, divergence of form in which it is represented and the meme itself, inherent variable nature and objective pertaining to recognizability for reproduction amongst massess.[9] Creation of memes is

[6] Alder, A., & Former, J.C (2022), Memes on memes and the new creativity. New York University Law Review, 97(2), 453-565. pages 453-470.
[7] Savirimuthu, J. (2005). Open source, code and architecture: it is the memes stupid. International Review of Law, Computers & Technology, 19(3), 341-362.
[8] Matalon, L. J. (2019), supra nota 1, pages 405-418.
[9] Alder, A., & Former, J.C. (2022), supra nota 6, pages 453-485.

possible through several diverging mediums and categories. Most pertinent ones consisting of; “image macros”, incorporating writing and graphics, “deep-fired memes”, purposeful depictions of whimsical and ambiguous graphics through modification, “copypasta” exclusively written material and “memetic sounds and moves” depictions of copyrighted content subject matter and intention of which has been elevated to a meme due their nature.[10] Though, idea of “meme” has been conceptualized for considerable amount of time, through advancements within technologies possibility of their spread has accelerated. Some memes lack any address towards copyrighted image utilized as base, consisting of sharing initial material without addition, possibly constituting breach of copyright. Notable factor in definitions of memes is the throughline of extensive and substantial scope regarding “copying” of materials. General consensus on typical characteristics of memes is found in Patel(s) interpretation. According which it is, “picture with juxtaposed text, developing over time through derivative authors mutating original meme, retaining image and general theme while altering language.[11]” Seemingly, what inherently makes a meme is its duplication on large scale. Which is the main reason memes may conflict with copyright. Since, copyright legislation perceives danger in illicit “copying” regarding innovation. Nontheless, creation of most memes hinges on unlawful, uninhibited replication. Creating tension. As, though creation of anything “new” often relies on slight evocation of what came before, creation of memes often utilizes replication and repetition of copyrighted material without variation. Additionally, possibility of damage towards ones whose original material is utilized must be recognized. Intrinsically memes are value neutral. Still, radical parties have employed dissemination of memes expressing animosity, false facts and misleading data.[12] Such groups are able to utilize memes in; dividing opinions and extremization, due reduced information necessary for a meme to promptly give information. Mostly cases concerning memes against copyright result from individual(s) utilizing copyrighted material to spread communication in manner proprietor deems abominable or copyrighted material is employed in a meme from which unlawful user derives monetary gain. Still, questions persist regarding whether copyright may be utilized contra ordinary people copying meme(s) and using it in cyberspace.[13] Regarding “Graphic Interchange Format” (GIFS), they are intermediates amid moving -and still pictures. GIFs differ from memes in requiring for operating in cyberspace a written code. Thus, reason why they exist today is due an organization funding and creating in 1987 “ a file format” having ability to constrict these “files” to enable extensive

[10] Matalon, L. J. (2019), supra nota 1, pages 415-430.
[11] Mcclure, B. E. (2020). Internet memes and digital public discourse. The University of Georgia, Athens Georgia, page 22, Accessible: file:///C:/Users/bloom/Downloads/McClureBrianPhD.pdf
[12] Matalon, L. J. (2019), supra nota 1, pages 405-422
[13] Russ, C. (2020), supra nota 4, pages 209-224.

dissemination.[14] Similarly to memes GIFs are effortless and rapid to disseminate within cyberspace, as they depict small moments, utilized as response, from a longer whole (video). GIFs circulate infinently and do not necessitate manual activation. Multitude of impressions available when utilizing GIFs, guarantee frequent and continued usage.[15] Due aforementioned attributes GIFs are considered as predominant tool for vocabulary and manner of conveying messages. Ultimately, as GIFs are part of a relatively current procedure of allocating communication it raises questions concerning copyright.[16] Memes and GIFS are similar in that they are often based on copyrighted works without knowledge or consent of proprietor.

1.1. Ratified treaties relating to copyright

Before examining pertinent ratified treaties to copyright it is important to provide explanation on Intellectual Property. Intellectual Property originally had its roots in conceptual basis within construct of judiciature, however amidst of late this conceptualization has altered towards more global commerce related non-theoretical facet of legislation.[17] "Intellectual Property" as expression refers to utilization of mental capability by individual in an imaginative manner regarding diverse concepts and sectors. Signifying that it requires application of intellect from a natural person. Intellectual Property has been defined several times, for example "Convention Establishing the World Intellectual Property Organization" asserts that interpretation of the term subsumes "scientific", artistic and written creations and as per characterization of the World Trade Organisation (WTO) the term refers to granted "rights" to individuals as a result of "creation of their minds." Therefore, the interpretation encompasses distinctive signs, compositions and novel or innovative concepts. One of the primary domains of Intellectual Property constitutes of "copyright and related rights", whose originator has "exclusive rights" regarding "economic and moral" authorization pertaining to copyrighted subject, of which copyright enjoys 70 years of conservation past demise of originator. Copyright incorporates "artistic and literary works" amongst others including; transcribed matter, melodic creations and moving graphics.[18] Regarding

[14] Matalon, L. J. (2019), supra nota 1, pages 410-422.
[15] McGregor, M. (2016). Sports, GIFs and Copyright: Is It a Draw between Content Owners and Consumers in the Web 2.0 Era, UCLA, Ent. L. Rev. 1.pages 1-10
[16] Kingsbury, T. (2018). Copyright paste: the unfairness of sticking to transformative use in the digital age. University of Illinois Law Review, 2018(4), 1471-1502. page 1471.
[17] Beard, T., Ford, G. S., & Stern, M. (2018). Fair use in the digital age. Journal of the Copyrighted Society of the USA, 65(1), 1-30 pages 1-15.
[18]WIPO. What it intellectual property? Accessible: https://www.wipo.int/about-ip/en/

Intellectual property, copyright is of significance requiring evaluation contrasted to GIFs and memes. To determine these relationships it is relevant to examine four ratified treaties relating to copyright.

Firstly, TRIPS Agreement (TRIPS) and Berne Convention as these supranational organs have achieved extensive acceptance (164 and 179 parties analogously[19]) amongst signors. During 1995 TRIPS came into effect and was first Agreement to connect rights relating to Intellectual Property and "trade-related aspects," as before its construction within international relations of trade "intellectual property" became of greater importance. Thereupon, engendering need for harmonization of implementing and safeguarding for intellectual property liberties. Thus, TRIPS Agreement prompted legal certainty, organization and a "dispute" settlement mechanism to broad extent of nations.[20] Some regard TRIPS as pinnacle for inclusive supranational instrument. Still, it has been criticised for vague Articles, due drafting focusing on extensiveness of definitions. Facilitating probability of complicating determination of explicit infringements.[21] Imputable to several elements triad of which hold significance. Consisting of; Firstly, „Historical" element according which IP standards on supranational stage lacked before TRIPS' ratification, as through it all-inclusive international standards regarding „rights" of intellectual property implementation were introduced. Due lack of such structure before drafting TRIPS concentration was directed towards supranational baseline criterion advancement in lieu of constructing homogeneous „universal code". Secondly, „Economic" element under which financial costs of establishing frameworks are attributed as reason for reluctance to require, during consultation, enhancement for regulations. Particularly, if elevated execution of rules had been established it would require significant enroachement against signatory nations jurisdiction and expensive costs. Finally, component of „Negotiary challenges" relating to emergent economies endeavour of instrument subsuming deviations, elasticity and constraints. Discernible from combined goal within deliberations of TRIPS to advance preservation concerning IP privileges and engender executive framework and conduct resulting in a compromise of keeping language nebulous so that considerable amount of Articles would touch on IP to achieve baseline multinational accord. Addittionally, industrialized nations conceded to suggestions of emerging nations ensuring uncertainty in draft. Resulting in definitions lacking explicit and unequivocal certainty in

[19]WIPO (2020). Berne Convention for the Protection of Literary and Artistic Works, parties, Accessible: https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf

[20]World Trade Organization (WTO), Watal, J. and Taubman, A. (2015). The making of the TRIPS Agreement Personal insights from the Uruguay round of negotiations, WTO Secretariat, Geneva Switzerland, page 15-16. Accessible: https://www.wto.org/english/res_e/booksp_e/trips_agree_e/history_of_trips_nego_e.pdf

[21] Yu, P. K. (2020). Trips and its contents. IDEA: The Law Review of the Franklin Pience Centre for Intellectual Property, 60(1), 149-[vi].

elucidations.[22] Notably, regardless of party status of a nation TRIPS Article 9(1), links states to the Berne Convention. As, it requires adherence to most Articles of Berne. Inversely, „1886 Berne Convention for the Protection of Literary and Artistic Works“ (Berne Convention) was drafted amidst a period when coalesence of intellectual property and economic system was in its genesis.[23] Imposing condition of equal treatment between contracting states, self-executing status for copyright and baseline requirements regarding safeguarding of copyright.[24] Moreover, guarding of rights given to a proprietor is paramount and considered object of the Convention.[25] However, a key issue for Berne Convention rose from its sporadic utilization and lack of regulations on execution of rights, leading to drafting of TRIPs.[26] Secondly, „Copyright and Information Society Directive 2001 (2001/29)“ (InfoSoc Directive) put into practice for execution of „WIPO Copyright Treaty“ (WCT) with aim of homogenizing particular copyright aspects prominent in technological era.[27] When adopted it was regarded as technologically advanced, mostly adressing possible restrictions and derogations of copyright.[28] However, certain issues persisted, predominantly as the Directive strove to reinforce preservation of copyright and executing WCT this impacted capability of it to establish consistent EU common commerce as did conflicting execution within member states. An added criticism on ambiguous terminology utilized in InfoSoc Directive persisted, affecting framework provided for compensation.[29] Finally, amid 2019, „The Directive on Copyright in the Digital Single Market“ (Directive 2019/790), initiated in 2016, received acceptance. Evident from the interval to its passing Directive 2019/790 was not unanimously welcomed and the end result may be characterized as a compromise. Antipathetic reception resulted from its reprecussions towards „Online Service Providers“ (OSPs) and change of onus concerning violation of „copyright.[30]“ As, mainly two Articles of the Directive 15 and 17 are feared to force utilization of „content filtering“ within cyberspace, which inevitably would disturb „freedom of expression“ due screening regime. The Directive aimed towards fixing issues of

[22] Yu, P. K. (2010-2011). Trips and it’s achilles heel, pages 482-505.
[23] World Trade Organization (WTO), Watal, J. and Taubman, A. (2015), supra nota 20, pages 15-16.
[24] WIPO (2020). Berne Convention, supra nota 19, pages 227-293.
[25] Blunt, R. M. (1999), supra nota 2, pages 177-183.
[26] Yu, P. K. (2010-2011), supra nota 23, pages 482-483.
[27] Freeland, A. (2020). Negotiating under the new eu copyright directive 2019/790 and gdpr. Currents: Journal of International Economic Law, 24(1), 106-122.
[28] Mattila, H. (2019). Parody and Copyright in the European Union law, Tampere University, Faculty of Management and Business Master’s Thesis, page 31, Accessible: https://core.ac.uk/download/288312929.pdf
[29] Angelopoulos, C., & Quintais, J. (2019). Fixing copyright reform. Journal of Intellectual Property, Information Technology and Electronic Commerce Law 10(2), 147-172.
[30] Tyner, A. (2019). The eu copyright directive: fit for the digital age or finishing it. Journal of Intellectual Property Law, 26(2), 275-288. pages 276-280.

InfoSoc, reconstructing framework of copyright and guaranteeing its operation, remaining to be shown.[31]

1.2. The relationship between copyright memes and GIFs

It must be determined whether GIFs and memes fall under copyright and if affirmative who owns such copyright? and if meme or GIF is derived from, or an amalgamation of, earlier existing material who is copyright proprietor? Copyright provides ensurance to "original works" within artistic domain that are "fixed on tangible medium", under which variety of materials falls.[32] Within EU, there is lack of requirement for cataloging. Hence, once creation is established, that is sufficiently "original", copyright applies to it naturally.[33] Thus, it is possible that creators of GIFs and memes would be protected by copyright. As both concepts contain visual elements secured on medium. Yet, memes often consist mutations from a first visualization with slight or no variations and GIFs from duplication,[34] challenging whether they could fill "originality" requirement.[35] According Berne Convention creations likely pass threshold with reasonably insignificant standards. Still, certain criteria must be met such as; if creation is a reproduction some merit is to be attached to initial creation.[36] Council Directive 93/98/EEC provided clarification on distinctiveness, "… work is original if it is the author's own intellectual creation reflecting his personality."[37] Supporting accedense established in Directive 2019/790 reiterated need for "originality" as a proprietors personal "intellectual" composite within the duplicative piece to fall under "originality" prerequisite.[38] GIFs and memes are created commonly as modified pieces utilizing duplicating aspects from existing mediums. However, this is not deterrent for them falling under copyright. Since, presuming GIF or meme modifies an anterior piece providing either merit

[31]Cloutier, M. (2020). Poland's challenge to eu directive 2019/790: standing up to the destruction of european freedom of expression. pages 161-168.
[32] Kingsbury, T. (2018). Copyright paste: the unfairness of sticking to transformative use in the digital age. University of Illinois Law Review, 2018 (4), 1471-1502.
[33] Mattila, H. (2019), supra nota 31, pages 32-33.
[34] MgGregor, M. (2016), supra nota 15, pages 1-10.
[35] Asay, C. D. (2021). Rethinking copyright harmonization. Indiana Law Journal. 96(4), 1005-1058. page 1020-1031.
[36] WIPO (2020), supra nota 19, Berne Convention. Articles 9-10bis.
[37] Council Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights, Article 6. Accessible: https://eur-lex.europa.eu/eli/dir/1993/98/oj
[38] Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1. Article 14. Accessible: https://eur-lex.europa.eu/eli/dir/2019/790/oj

or "originality" copyright endures. However, it is unsure due vague wording to what extent must piece be modified?[39] Still, CJEU case of Infopaq v. Danske illuminates scope of requirement. Elucidation of "original work" was not illuminated. Yet, it was established that decisive factor for what constitutes original is existence of "intellectual element." As, if absent a piece would not fall under definition of a "work" as established in InfoSoc. The case provided that "certain parts of sentences in a text may constitute a work." Though, contingent on these "parts" by and of itself indicating sufficient individuality.[40] Insinuating that such precondition for "originality" of a piece has a dual purpose of; providing a regarding component in ascertaining copyright violations and contributing mechanism for determination of what comprises copyright. Since, if GIF or meme repurposes a portion of a piece violation would occur on condition that repurposed portion constitutes creations "originality" referring to proprietors personal "intellectual" element.[41] Additionally, Infopaq specified that "form, manner in which subject is presented and linguistic expression" are considered as fulfilling requirement of a cognizant piece. Finally, regarding what "part" is sufficiently individual and whether or not it would be subsumed by copyright, these questions were left for member states. Though, general guideline was formed in that expression behind idea was to be protected by copyright.[42] Thus, if a meme or a GIF fulfill all aforementioned elements they would fall under copyright. Still, the provided explanations are left wide and vague. As, it may be argued that there is uncertainty regarding amount of copying involved in a piece that could be determined as part that in itself has sufficient individuality and duplicating it could constitute infringement of copyright. Leaving such determinations to member states may lead to differing determinations of width and amount of copying. Resulting in legal uncertainty.

Nature of GIFs and memes makes them such of dissemination and as there is no alteration within pure dissemination partaking in it could breach copyright of proprietor. Necessitating consideration of relationship of memes, GIFs and copyright. The connection is intricate.[43] As, integral part of it pertains to the interconnection of strain and uncertainty regarding essential rights of disseminating and rearranging material in cyberspace, subsumed in "freedom of expression and information", incorporated in Article 11 of "European Union Charter on Fundamental Rights"

[39] Alder, A., & Fromer, J.C. (2022). Memes on memes and the new creativity. New York University Law Review, 97(2), 453-565.

[40] InfoCuria, (2009). Judgement of the court (fourth chamber) 16 July 2009, Case C-5/08, Infopaq, EU:C:2009:465, paras. 35-37 and 44-47. Accessible: https://curia.europa.eu/juris/document/document.jsf?text=&docid=72482&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=5470450

[41] Chandler, A., Sunder, M. (2019-2020). Dancing on the Grave of Copyright?. Duke Law & Technology Review, 18, 143-161. pages 150-156.

[42] InfoCuria, (2009), Infopaq, supra nota 44, paras. 44-47.

[43] Ranjan, K., & Srivastava, S. (2021). Copyright Protection in Cyberspace Challenges and Opportunities. International Journal of Law Management & Humanities, 4, 837-885 pages 838-844.

(Charter), wherewith encompasses authorization for spectrum of actions including; promulgating and attaining, distasteful or amiable, sentiments and data unconstrained. Contrasted to this is, Article 17, "economic rights" belonging to copyright's posessor encompassing "right to property" broadly incorporating "intellectual property rights" under which copyright falls.[44] As, both are essential rights there is conflict regarding which prevails. Nevertheless, neither is absolute. Thus, it is of essence to examine Article 52 of the Charter, entailing stipulations for "essential rights" limitation. Notably, necessity to factor in nucleus of a right and its bounds are dictated based on criterion of proportionality. Establishment regarding "proportionality" warrants confining limitations to "necessary" scope, contained to "general interest" as illustrated by determinations of European Union which assess infringement or lack thereof. Element in ascertainment of "proportionality" is consideration of limitations incorporated within Articles 11 and 17. More specific general limitations were determined by legal precedents stipulated in The Court of Justice of the European Union (CJEU), which accepts constraining rights providing; there is no disparities or extorbitance, essence of rights prevails unaltered and required by populaces common benefit. Article 17's limitation appears to afford lowered protection rights of "copyright" contra "material proprietary rights", inferred from terminology "applies to intellectual property rights as appropriate." A corresponding lessened protection is absent in Article 11, still "licensing" contains limitation.[45] Since, both contain limitations it is necessary to conduct a "proportionality test", establishing which right outweighs the other. For such determination Union and its States have duty, as these IP rights are safeguarded in the Charter.[46] Apparent through annotations that "European Court of Human Rights" (ECHR) is regarded as the conclusive barometer for rights incorporated in Fundamental Rights Charter, apropos of their reach, substance and determination. Accordingly, generating justification of construing constraints and defense measures concerning "copyright" and "freedom of expression", via distinct legal precedents which Union Members adjudicate individually. Precedents are employed within Sections 3 and 4.[47] Finally, it is important to determine "interpretative methodology" for international treaties, due vaguness and deficit of controlling appendage, and EU legislation.[48] There is lack of common "rules of interpretation" within EU. Denoting lack of percepts regarding understanding and elucidation of written

[44] Gyalog, R. (2019). Magyar Jeti Zrt. v. Hungary Judgement of the EctHR concerning the Imposition of Liability for Posting Hyperlinks to Defamatory Content. Hungarian Yearbook of International Law and European Law, 2019, 531-552. page 532.
[45] Cloutier, M. (2020), supra nota 34, pages 168-171
[46] Gyalog, R. (2019), supra nota 48, pages 531-532.
[47] Cloutier, M. (2020), supra nota 34, pages 168-171.
[48] Tobin, J. (2010). Seeking to persuade: a constructive approach to human rights treaty interpretation. Harvard Human Rights Journal, 23(1), 1-50. pages 3-14.

legislation and explanation regarding diverging terms.[49] There is however Article 19 of The Treaty on European Union (EUT) concerning "interpretation." Stating that CJEU is to preserve and guarantee EU's founding agreements, TFEU and EUT, functioning and clarification. Additionally, CJEU operates as harmonizer of EU legislation in Member States, providing elucidation of preparatory judgements concerning legislation. As a whole, regarding Vienna Convention on the Law of Treaties (VCLT) EU remains non-signatory. However, its "principles" have been utilized and accepted by CJEU, pertaining to supranational conventions clarification. Such as, TRIPS, Berne etc.[50] Making it important regarding the "interpretative methodology." As, directed through Article 31(1) of VCLT, regarding what is incorporated in interpretation, "…executed according good faith…terms accorded ordinary meaning regarding context, considering the treaty's purpose."[51] In addition, EUs "constitutional" objective and framework of law should be accounted for with objective of instruments.[52] Found in Article 26(1) of TFEU, "ensuring functioning of internal market."[53] Arguably requiring adaptive interpretations to amalgamate with advancing paradigm.

[49] Maduro, M. P. (2008). Interpreting European Law- Judicial Adjudication in a Context of Constitutional Pluralism. European University institute. pages 3-10. Accessible: https://ssrn.com/abstract=1134503
[50] Odermatt, J, (2019). The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law. Forthcoming in Achilles Skordas (ed). Research Handbook on the International Court of Justice, Edward Elgar iCourts Working Papers Series No.158, pages 8-13. Accessible: https://ssrn.com/abstract=3369613
[51] Vienna Convention on the Law of Treaties, (1969-1973). Philippine Yearbook of International Law, 2, 117-151. Article 31 paragraph 1.
[52] Maduro, M. P. (2008), supra nota 54, pages 3-15.
[53] Official Journal of the European Union. (2012). Consolidated version of the treaty on the functioning of the european union. C 326/47, 26.10.2012. Accessible: https://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

2. Copyright infringement: memes, GIFs and actionability

It seems possible for memes and GIFs to fall under copyright. Yet, concurrently they may also be disseminated within cyberspace absent of reformation or failing threshold for copyright.[54] Thus, there may be cases where complainants rights towards safeguarded material has been infringed and enforcement is sought. In opposition respondent through measures, duplication, is alleged to breach copyright of complainant, yet might rely on "exceptions." For actionability against infringement proprietors receive certain rights. Referring to "moral and economic rights" subsumed in copyright. "Economic rights" encompass proprietors "right(s)" to gaining of advantage, from financial gain, via copyrighted mediums. Au contraire, "moral rights" affiliate with rights barring ones involving financial profit, discussed in Section 2.2.[55] Additionally, certain criteria must be fulfilled for proprietors of copyright to initiate court proceedings comprising; existence of proprietorship, reproductions occurrence and considerably equivalence.[56] Proprietor of meme or GIF may derive benefit from works by utilization of affixation to products. However, several intermediary suppliers exist in cyberspace enabling whoever in transferring or duplicating copyrighted meme with intent of imposing it to other goods. Assuming copyright is granted to GIFs and memes conduct of transferring material to another platform and intermediary web page utilized would infringe proprietors entitlement for economic rights.[57] On taking action utilizing right of reproduction against infringers may be useful. As the right is interpreted widely. Apparent from Berne Convention 9(1) stating "Authors of literary and artistic works shall have exclusive right of reproduction of these works, in any manner or form." It is unclear from wording whether newer forms of "reproduction" in cyberspace are covered. Still, interpretation utilized by the World Intellectual Property Organizations International Bureau "WIPO guide to the Berne convention" elucidates that every application regarding duplication, including in cyberspace, falls under "any

[54] Capelotti, J. P. (2020). The dangers of controlling memes through copyright law. The European Journal of Humour Research 8(3) 115-136. pages 115-118. Accessible: http://dx.doi.org/10.7592/ECJHR2020.8.3.Capelotti
[55] WIPO Magazine 6/2016. Accessible: https://www.wipo.int/wipo_magazine/en/2016/06/article_0007.html
[56] Reid, A. (2019). Copyright policy as catalyst and barrier to innovation and free expression. Catholic University Law Review, 68(1), 33-86. pages 40-45.
[57] Marciszewski, M. (2020). The problem of modern monetization of memes: how copyright law can give protection to meme creators, 9 Pace. Intell. Prop. Sports & Ent. L. F.61. pages 6-7. Accessible: https://digitalcommons.pace.edu/pipself/vol19/iss1/3

manner or form."[58] Additionally, even with vague wording of Berne InfoSoc Directives covers "reproduction" in its Article 2 (a), affirming that "…shall provide for exclusive right, for authors, to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or part…[59] Terminology "any means and any form" extensively envelopes every duplication regardless if it is out of cyberspace or within it. Such wide interpretation is affirmed by Advocate General Szpunar and legal precedents set by CJEU.[60] Thus, it may be assessed that "reproduction right" must be understood broadly. However this may provide problems. As, some legal scholars depict term "indirect reproduction" to express duplicate created exercising differing methods for relaying the duplicate. Such as, downloading pictures and printing them out to disseminate. Additionally, wording "temporary reproductions" is understood as wide. Evident of it including in normal meaning both "cache" duplication and "Random Access Memory." As, nearly all actions utilizing computer technology employ reproduction methods. Still Article 5(1) explicitly subsumes stipulation for reservations seemingly including "temporary" copies.[61] From aforementioned it seems that definition of "reproduction" in Article 2(a) provides wide extent of activities that have all-inclusive functions. Yet, it is restricted within Article 5(1). However, what provides possible issue with such elongation regarding definition of right, providing expansive definition and asserting "restriction" towards the right rather than confining term of "reproduction", obscures communication- and reproduction rights boundaries together. Causing blurring of rights affecting ability to govern an apply them negatively.[62] Due uncertainty of which applies. Argument was asserted that terminology "transient and incidential" could have provided effective elucidation functioning as constraint, in lieu of concerning overall right, towards the term of reproduction, as they refer to it.[63] According such understanding regulative approach should have been implemented, excluding from being subsumed under reproduction any measures constituting duplication in interim occurring as natural consequence in methods of

[58] Thetsidaeng, C. (2019). User generated content and copyright dilemma in web 2.0 era should the specific exception be introduced in the EU? Uppsala Niversiter, Masters thesis, pages 18-20. Accessible: https://www.diva-portal.org/smash/get/diva2:1324356/FULLTEXT01.pdf

[59] Official Journal of the European Communities. (2001). Directive 2001/29/EC of the European Parliament and of the Council of 22 May of 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Article 2. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN

[60] Chiou, T. (2019). Copyright lessons on machine learning: what impact on algorithmic art. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 10(3), 398-412. page 401

[61] Mattila, H. (2019), supra nota 31, pages 22-24

[62] Lodder, R. A. and Murray, D. A. (2017). Eu regulation of E-Comerce a commentary, Edward Elgar Publishing Limited, UK. pages 64-65.

[63] Hugenholtz, P. B. (2018). Copyright reconstructed rethinking copyright's economic rights in a time of highly dynamic and technological and economic change, Wolters Kluwer, Kluwer Law International B. V., Netherlands, pages 99-109.

technological transmissions.[64] Such conceptualization could be utilized to amend some of vagueness regarding wide definition of reproduction and legal uncertainty. Another question is posed regarding Article 5(1) whether disseminating meme or GIF on web log that proprietor did not create would fall under exception or breach reproduction right?[65] It is specified in the Article that for it not to apply elements of financial benefit are not to be involved. Expressly, when an individual not owning copyright benefits monetarily from duplication of work it will likely breach right to reproduction.[66] Thus, in situation of maintaining web log to garner financial gain, through earning advertising revenue, memes or GIFs presentation could assist a general objective of commercial earning by creating increased enticement. Expounding financial gain so extensively is substantiated by judicial legislation of CJEU, regarding "communication right" indicating objective for financial gain being present is not required to be linked directly to communication method, au contraire to wider circumstances whereby communication occurs. Hence, such utilization of material persumably constitutes objective for financial gain, breaching copyright.[67] Exceedingly vague area within terminology of the Article consists of "in whole or part" segment, left undefined. As, portion of territories warrant it unnecessary to require ample portion of copyrighted material being copied to comprise "reproduction." For example, in domain of clips some assert that " a sample" is sufficient for "reproduction" application. Still, lack of clarity remains regarding length of "sample" in circumstances that would reach a duplicates scope. For, persuming that terminology "in whole or part" is construed verbatim, in its widest concept this could accelerate to a position lacking minimal threshold for when duplication results from utilization of copied fragment. An interpretation supported by Advocate General Szpunar.[68] In addition, Infopaq decision illustrated necessity of extensively defining the right. Identifying "autonomous" EU legislation construct in "reproduction" and when individuality within material is expressed "partial reproductions" constitute reproductions regardless of length.[69] However, such wide interpretation could result in detriment for GIFs and memes, since their core function of duplicating portions of materials. As such, if clear boundary is lacking regarding acceptable

[64] Institute for Information Law (IVIR). (2006). The Recasting of Copyright & Related Rights for the Knowledge Economy, final report, University of Amsterdam The Netherlands, pages 67-69. Accessible: https://www.ivir.nl/publicaties/download/IViR_Recast_Final_Report_2006.pdf
[65] Rosati, E. (2017). Non-commercial quotation and freedom of paranorma. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 8(4), 311-321. pages 315-317.
[66] Hugenholtz, P. B. (2018), supra nota 71, pages 99-109.
[67] Rosati, E. (2017), supra nota 73, pages 315-317.
[68] EUR-Lex.(2019). Judgement of the Court (Grand Chamber) of 29 July 2019. Pelham GmbH and Others v Ralf Hutter and Florian Schneider-Esleben. Case C467/17, Metall auf Metall, ECLI:EU:C:2019:624, para 29. Accessible: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62017CJ0476
[69] Lodder, R. A. and Murray, D. A. (2017), supra nota 70, pages 64-66.

amount of copyrighted material utilized by duplication, this leads to legal uncertainty regarding what constitutes violation of copyright of proprietor.[70]

Another right providing pivotal ascertainment regarding actionability in event of violations concerns "communication to public" subsumed within InfoSoc Article 3(1).[71] Necessitating determination of scope of the right to assess what measures fall under it. Perceptibly, any copyrighted pieces duplicative- and preliminary "communications" are enclosed by granted protection. Denoted by dictation "retransmission of… protected works" in Article 11bis. WIPO, Article 8, of Copyright Treaty substantiates such understanding, through subsuming in "making available" right's proprietors capacity for permitting viewing of pieces under copyright to extent facilitating capability to gain admittance of copyrighted matter irrespective of its time-related, corporeal or incorporeal whereabouts. There is absence in InfoSoc regarding identification of making available's scope and width, nonetheless coherence is sought in WIPO Treaty Article 8 determining bounds for "public." Substantially WIPO Treaty lacks determination in respect of which composes "a public." Yet, providing illumination on establishment of "a public" which cannot exist without "members." "Members" alludes to multitude of individuals not being prerequisite for amounting to "a public.[72]" Nonetheless, " public" constitutes of more than insignifigant assortment of personages to which specifically copyrighted matter is "made available." Phraseology "may access" demonstrates that there is no stipulation, in "making available to public", for who the matter is open for viewing it. An approximation in composing "a public" is abided by when sum of persons transcending a family unti gain prospective ability to perceive creations. Lastly, expressions utilized in Article 8 implement it "technologically neutral," denoting negligibleness of specific technological expertise through which copyrighted material is "made accessible." Additionally, "making accessible" subsumes both unprecedented and recurrent "communications", resulting in presenting passage to copyrighted pieces both for first and ensuing transmissions falling under it.[73] Aforementioned expressions require further interpretation found through CJEU's legislative precedents regarding comprehending structure actualized via jurisprudence and Article 3(1). Consequently, EU's Judicial Authority presented prerequisites for measures to comprise communication and determinated composition of "public act of communication." Firstly, it is vital to discern "communication to public's" integral structure

[70] Mattila, H. (2019), supra nota 31, page 25
[71] Angelopoulos, C. (2017). Hyperlinks and copyright infringement. The Cambridge Law Journal Vol.76.No.1, pp 32-35. page 33
[72] Lian, J. (2019). Twitters Beware: The Display and Performance of Rights. Yale Journal of Law and Technology, 21, 227-277. pages 254-258.
[73] Ginsburg, J. C. & Budiardjo, L. (2018). Liability for providing hyperlinks to copyright-infringing content: international and comparative law perspectives. pages 156-158. Accessible: https://ssrn.com/abstract=3068786

through CJEU, composed of three main standards. Criterion one institutes that for measures to constitute communication presenting passage to materials is necessitated. Next condition concerns prerequisite of communication obligating presence of "a new public,"unaccounted for when presenting of passage occurred. Closing condition obligates that rationale for "publics" capability to discern material is due the specific "communication." From examination of case legislation few important considerations are noted. Constituting; proprietors of copyrights customarily receiving favourable elucidation regarding rights and determinations of balance concerning "freedom of expression" and "copyright" being concluded through independent foundation. Additionally, structure constured by CJEU employs primarily construct of " indirect infringements" regarding accountability for violating Article 3(1). Principal significance in accountability is placed in rationale, changing to "primary" accountability if there is cognizance of infringement, financial profits or uncommercial incentives, inspiring measures of supplying what constitutes "communication to public." Some maintain that utilization of CJEU's structure and characterization of what terms subsume introduces legislative gray areas.[74] Particularly inquiry about potential legal ambiguity regarding "new public" given its unsupported footing.[75] Regardless CJEU approach structure formulates coordination within EU, amplifying legal certainty of measures constituting violations.[76] From this structure certain criteria(s) are significant namely: 1) consideration whether "a communications" objective contains attainment of revenue, whether cognizance of illegitimate activity existed and 2) when assecing possible "communication to public" components required incorporate; "a new public" and "act of communication" and this communication presenting "new public" straightforward passage to works. A possible problem arises, for this structure, from Directive 2019/790 Article 17 relocating burden of breaching copyright possibly necessitating "Online Service Providers" (OSPs) to employ methods of "content filtering" to operate, impacting freedom of expression. Despite, expressed lack of responsibility of instating "filteration of content" and necessitating "active monitoring," there persists apprehension towards Articles continuance to include these responsibilities whilst bereft overt articulation and distrust of it discomposing legal certainty entrenched in judicial practice. There is connection towards basic rights in 2019/790 Directive engendering necessity in employment of prevailing decisional law regarding comprehension of undefined Articles. Yet, modification of liability is believed to be caused by stipulation of Recital 64, contravening CJEUs

[74] Angelopoulos, C. (2017), supra nota 81, page 35.
[75] Ginsburg, J. C. & Budiardjo, L. (2018), supra nota 84, page 161.
[76] Reid, A, (2019). Copyright policy as catalyst and barrier to innovation and free expression. Catholic University Law Review, 68(1), 33-86. pages 55-70.

utilized structure regarding "communication to public." Since, "direct liability" is appointed to OSPs by establishing "communication to public" as comprising of suppliance of "online-content sharing" as such. Accordingly, constructing "direct liability" for OSPs concerning all illegal actions to copyright material executed through their mediums.[77] Interpretation supported by legal scholars asserting that "communication to public" transcended CJEUs previously established boundaries. Some maintain that "communication to public" within Article 17 differs from the one in InfoSoc Article 3, comprising "sui generis" right, in that individuals actions would be determined by InfoSoc and OSPs by Article 17. However, such interpretation is contested. Still, prevailing standpoint affirms that definition of "communication to public" widened to include "providing online-content sharing" to material under copyright.[78] Albeit, CJEU's skeleton stipulates OSPs freedom from "direct" onus. If Article 17 is understood through Recital 64, it renders OSPs answerable due their operation, affecting CJEUs structure making it incongruous. Hence, assumign wide understanding of Article 17 subsuming Recital 64 is deployed, OSPs would via safety measures inhibit copyrighted material, including GIFs and memes, and recruit preemptive procedures in avoidance of legal action concerning accountability. Nonetheless, CJEU may resume allocation of homogeneous elucidation of 2019/790 Directive regarding understanding of "communication to public" and accountability.[79] Still, Section below shall expand on possibility of Article 17(7) changing framework and possible issues.

2.1. Functionality of enforcement measures of copyright

Regarding enforcement measures in EU, copyright in GIFs and memes may provide an obstacle due their disposition and swiftness of dissemination. It has been emphasized, by EC, that Directive 2019/790 allows transference and posting of memes and GIFs under its 17(7) Article as legitimate if it constitutes "criticism, quotation, review, caricature, parody or pastiche." These "exceptions" are examined in Section 3. Yet, such assertion juxtaposes with prominent perspective asserting that it is not effortless to delienate which memes and GIFS are subsumed under 17(7) through utilizing analyzation of "contents" solely. Rather, obliging understanding of adjacent comprehension of state of affairs concerning governmental, historic and popular culture circumstances. Which

[77] Cloutier, M. (2020), supra nota 34, pages 161-177.
[78] Curto, N. E. (2020). EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?. Case Western Reserve Journal of Law, Technology and the Internet, 11, 84-110. pages 89-96. Accessible: http://dx.doi.org/10.2139/ssrn.3434061
[79] Cloutier, M. (2020), supra nota 34, pages 168-178.

provides problematic as to date individuals and machine intelligence have difficulties comprehending these multiple factors.[80] Additionally 17(4)(b) and (c) contains general demand for OSPs to avert "service users" from loading covered content falling under copyright utilizing "best efforts." The Article lacks mention of what procedures "best efforst" necessitates. Generally, understood to necessitate "automated filtering" in aversion methods. Yet, it seems that aim of Article 17(4) could be adversarial with Article 17(7) as there is lack of direction and precision within the latter, concerning balance amidst a particular- and "general" responsibility for detection.[81] As, requirement for "best efforts" necessitates OSPs,to not be accountable, conducting initial automated confirmation or system of processing materials transferred into cyberspace through individuals, warranting establishment of inhibitory supervisory instrument.[82] Establishment of these instruments may deteriorate lack of censorship's core, conflicting with fundamental rights stipulations for constrains to be essential and "proportioned." However, it is inferred that perimeter is established as "best efforts" are categorised as being restricted through, 17(7), onus of abstaining from precluding exclusions and restrictions available to individuals. Some ascertain that such limitation assures equivalent consideration of "freedom of expression" and copyright. Yet, Article 17(4) , which may aquit responsibilty of Article 17(1) from OSP, second condition according which; service providers have commitment to discern "high industry standards" conforming with reasonable expectations, employing "relevant and necessary information" presented by proprietor including presupposition to assume "best efforts" in deterring violations of copyrighted material has been genrally accepted to subsumes material screening. Since, requirements are found in Recital 64 and 66 specifying "best efforts" connects to "high industry standards" including reasonable expectations such requirements are comprehended same as entailing demand to inhibit and vet material. For, it is unfeasible to obtain deterring procedures, required by 17(4)(b), if screening is not utilized.[83] Additionally, Article 17(2) subsumes framework for which responsibility is on OSPs, regardless commercial profit, to pull down or supress required

[80] Moreno, F. R. (2020). 'Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market, International Review of Law, Computers & Technology, 34:2, 153-182. pages 160-166. Accessible: https://doi.org/10.1080/13600869.2020.1733760

[81] Melart, S. (2022). The Finnish transposition of Article 17 of Directive 2019/790: progress or regress? Journal of Intellectual Property Law & Practice, Volume 17, Issue 5, May 2022, pages 437-442. Accessible: https://doi.org/10.1093/jiplp/jpac030

[82] Cloutier, M. (2020), supra nota 34, pages 187-189.

[83] Spoerri, T. (2019). On upload-filters and other competitive advantages for big tech companies under article 17 of the directive on copyright in the digital single market. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 10(2), 173-186. pages 177-179. Accessible: https://www.jipitec.eu/issues/jipitec-10-2-2019/4914/JIPITEC_10_2_2019_173_Spoerri

material unless there is exceptional factors.[84] Such requirement for framework lacks direct reference to identification mechanisms. Yet, according general consensus it necessitates instruments utilizing algorithms. By contrast Directive 2019/790 17(8) Article mentions necessity for "monitoring" should not reach width of "general" obligation. Reinforced, in Recital 84, that Directive 2019/790 adheres to "Charter of Fundamental Rights of EU," meaning its Articles must be understood in its light.[85] Additionally, dismissal of "general monitoring" responsibility is communicated in Recital 66. However, remaining as solitary direction, lacking instructions concerning concrete procedures. Still, Commissions Guidance, though without legal effect, may bring some light to sufficient measures. According which; "general monitoring in Article 17(8), is understood through Article 15 e-Commerce Directive [ECD]…" According the Article implementing responsibility of "general monitoring" for providers of service would render "caching, hosting and mere conduit" functions, monitoring preserved or imparter data and commanding seeking continuously occasions as exhibitions of illicit operations, which is not generally required. Nevertheless, formulation concerning an "obligation of monitoring" is approved, within ECD, in "specific" situation. However, there is lack regarding particular illustrations regarding "specific-and general monitoring" procedures. Regardless case law has addressed the procedures to an extent. Still, distinction of "specific- and general monitoring" and their respective obligations are not apparent. Considering this, some denote that "specific obligation" refers to situations where provider is alerted of materials that fall under copyright being allowed access by individuals on their online portal and, inversely, that "general obligation" alludes to demand for providers in keeping track of each materials generated by user within web portal.[86] This interpretation for "general obligation" is supported by CJEU jurisprudence.[87] Judgement Glawischnig-Piesczek v Facebook, relating to "general monitoring in specific case", illuminates interpretation in determining the concept subsuming materials judged illicit. As, it was in accordance with the e-Commerce Directive that service providers could be required to eradicate data deemed illicit and analogous or indistinguishable from such transmitted through individuals. Establishing that "specific" allowable situations of monitoring subsumed analogous or

[84]Krysztof, G. (2019). Guiding the blind bloodhounds: how to mitigate the risks art. 17 of Directive 2019/790 poses to the freedom of expression. (October 18, 2019), Forthcoming chapter in Intellectual Property and Human Rights (4th ed), Paul Torremans (ed), Wolters Kluwer Law & Business. pages 4-7. Accessible: https://ssrn.com/abstract=3471791

[85] Moreno, F. R. (2020), supra nota 94, pages 165-174.

[86] Stoor, K. (2022). OCCP's obligations under Article 17(4) of Directive 2019/790 on copyright and related rights in the digital single market: - a roadmapr to ensure compliance with the prohibitions of automated decision-making and general monitoring. Stockholm University, Department of Law, Intellectual Property Law, pages 40-44. Accessible: https://www.diva-portal.org/smash/get/diva2:1678524/ATTACHMENT01.pdf

[87]Moreno, F. R. (2020), supra nota 94, page 168.

indistinguishable data to illicit material, contingent on service provider being free of responsibility to single-handedly appraise substance and that exploration instruments were utilized only on segments identified through injunctions.[88] Still, for algorithm for filtration to be enforced this would involve ability of differentiating illicit and legitimate materials. Yet, majority of present algorithmic instruments are dependent of anterior archives and alternatively transmitted sources provided via proprietors of copyright. Accordingly, operating efficiency of algorithms has susceptibility towards miscalculations, due dependency of restricted data. At worst accumulation of mistakes may produce generalized obstruction by cause of verification tools incapability of differentiating subject matter accurately. Impeding ability to view concerning legitimately transferred material excluded from copyright. Consequently, establishment of algorithms could violate freedom of expression.[89]Further, the Directive lacks direct execution. Denoting propability of EU countries having differing implementation of contents of Directive 2019/790. Further, 17(9) Article provides obligation for OSPs to offer correction and objection method, bereft of "excessive delay" and through estimation of a person, for those whose transmitted material has been taken out or incapacitated, due alleged infringement and precondition for proprietors to give "solid grounds" for such action. The question rises regarding estimation of a person requirement who is accountable? It is articulated that individuals have authority to provide objection of their material falling under copyright restriction or exclusion that should be allowed. Analysis provided by a person is necessitated to examine objections. Thus, possible issue arises as, employing inspectors costs considerably compared to utilizing tools, OSPs could mechanically take down materials alerted by copyright proprietor lacking early evaluation of which materials are excempt, amounting to over-inhibition.[90] Regarding legitimate inhibition procedures, ruled on Fashion ID, a decisive component is necessity to alert individuals probably focused for infromation accumulation, behavioral analyzation and handling. Additionally, information concerning individuals, essential rights are to be respected. Hence, conceivably Article 17 is insufficient to meet "principle of accessibility" enshrined in 8(2) and 10(2) Articles of ECHR guaranteed by European Court of Human Rights (ECtHR) as it fails to defend an individuals rights for permission to view information relating to individual and receive information, due ambiguous terms, within

[88] InfoCuria, (2019). Case C-18/18 Eva Glawischning-Piesczek v Facebook Ireland Limited, Judgement of the Court (Third Chamber), 3 October 2019, ECLI:EU:C:2019:821, paragraphs 39-46. Accessible: https://curia.europa.eu/juris/document/document.jsf?text=&docid=218621&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=1351737

[89] LEX;INBREVE, Soogumaran, K. (2021). Article 17 of the EU Copyright Directive (2019/790) and its Impact on Human Rights, LLB, University of Hertfordshire, University of Malaya Law Review. Accessible: https://www.umlawreview.com/lex-in-breve/article-17-of-the-eu-copyright-directive-2019790-and-its-impact-on-human-rights

[90] Spoerri, T. (2019), supra nota 99, page 183

shape available for individuals and service providers, regarding categories of material under copyright included in it.[91]

Regarding where memes are copied outside internet and sold as mass produced products. According TRIPS Article 61 "MS shall provide for application of criminal procedures and penatiels in cases of… copyright piracy on commercial scale.[92] It is uncertain what "commercial scale" subsumes regarding measures constituting "commercial" illicit operations? Regarding terminology "provide for" ambivalence remains concerning its obligations. For example, is there incorporation of obligation to execute punishment or conversely is enactment solitarily necessitated in lieu of viability?[93] Some clarification is found in "Article 61 DS report" which through reference to case law factored possible scope of "commercial scale." Stating it subsumes average business endeavour(s) volume within individual customer area. Making definition of "commercial scale" flexible, due its alterability contingent upon customer area and goods. Factoring out definite operations concerning replications and plagiarism. No necessity was obligated for arrangement of judicial proceedings for such measures saving fulfillment regarding, indeterminate, supplementary standards.[94] Definition of "provide for" was not touched upon. However, assertment on decision not to comment was made in that China within its legislation "provided for" sanctions and penal processes, however their "implementation" arguably operated nonfunctionally. Thus, it seems wording of the Article does not assert execution.[95] Still, "Qatar – IP Rights v Saudi Arabia" indicated responsibility in "provide for" existed as obligation to "provide for" sanctions, penal processes and execution of legislation. However, establishment was made that examination of every alleged instances of plagiarism and replications was not necessitated. Leaving open which conditions constitute or oblige examining claims of infringement by officials, raising doubt on whether responsibility can be argued to subsist. Thus, when nation(s) penal competence covers a breach measures are obliged to be instated. However, "minimum" qualifications for methods of rectification was unestablished.[96] As, most terms were left vague it is questionable whether proprietor could rely on implementation. Still, Article 41 TRIPS contains "enforcement procedures" that States are required guarantee of to subsume in

[91]Moreno, F. R. (2020), supra nota 94, pages 164-166.
[92] World Trade Organization, (1994). Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Uruguay Round Agreement: TRIPS, Article 61, Accessible: https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm
[93] Judd, P. L. (2014). Retooling trips. Virginia Journal of International Law; 55 (1), 117-162. pages 137-141.
[94] World Trade Organization (WTO), (2022). WTO Analytical Index TRIPS Agreement- Article 61 (DS reports). pages 3-8. Accessible: https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art61_jur.pdf
[95] Judd, P. L. (2014), supra nota 110, pages 137-141.
[96] World Trade Organization (WTO), (2022). -Article 61, supra nota 111, pages 3-8. https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art61_jur.pdf

national legislation allowing "effective action" contra violation of IP.[97] Questions arise regarding what procedures "effective action" comprises and whether it necessitates implementative measures? The term remains undefined, yet it was maintained that "enforcement" measures should be accessible. Nonetheless, functioning of "effective action" was left open to question.[98] If there are violations the article requires rectification to be "expeditious and effective." Ambiguously, there could be "minimum" methods for rectification or the terminology could be interpreted as elastic towards MS elucidation.[99] Still, it may be inferred that there exists demand for legislative frame, yet no explicit stipulation for penalty measures. It may be asserted that unclarity remains regarding which measures are dissuasive. As, concerning financial perspective dissuasive measures include assigning penal measures for punitive compensation or obliging infringer to reimburse any legal charges in compensatory cases. However, within TRIPS, neither option seems requisite. As, there is lack of onus for establishing, implementing protection of IP, designated judiciary and allocating assets to such organ.[100] Thus, it is arguable that as enforcement Articles, 61 and 41, remain vague, this reduces their reach and efficacy.

2.2. Moral rights; a limitation on memes and GIFs?

Origin of "moral rights" comes from formulation of French jurisprudence in idea of "droit moral."[101] In ninetheenth centennial within Europe understanding of creative productions comprising cognitive works awoke. Though, as concept in legislation it developed later.[102] On theoretical side there exist duo of pertinent moral rights propositions relevant to approach that emerged in supranational legislation. As believed by one individuals who "create" cede fragment of persona distinctive to them into creations, forging conjoined amalgamation of product and persona, categorised closer to civil law countries approach to moral rights. Along the other,

[97] World Trade Organization, (1994), supra nota 61, Article 41.
[98] World Trade Organization (WTO), (2022). WTO Analytical Index TRIPS Agreement – Article 41 (DS reports). pages 1-3. Accessible: https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art41_jur.pdf
[99] Volper, T. E. (2007). TRIPS enforcement in china: a case for judicial transparency. 33 Brook. J. Int'l L. 309. pages 326-333.
[100] Heath, C.,& Cotter, T. F. (2005). Comparative overview and the TRIPS enforcement provisions. Patent Enforcement Worldwide-A Survey of, 15. pages 10-15. Accessible: https://media.bloomsburyprofessional.com/rep/files/9781849467094sample.pdf
[101] Pettenati, L. A. (2000). Moral rights of artists in an international marketplace, 12 Pace Int'l L.Rev.425. page 429. Accessible: https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1234&context=plir
[102] Pogacsas, A. (2018). Contemporary Problems of Integrity Protection of Copyrighted Works in the Light of Article 6bis of the Berne Convention and the Recent Practice of CJEU. Hungarian Yearbook of International Law and European Law, 2018, 355-370. pages 355-356. Accessible: https://ssrn.com/abstract=3612723

common law approach, excertion employed in completion of innovation generates rights. Thus, there exist discordant measures for copyright. Which is main reason for friction regarding conceptualization and moral rights connecting to areas within supranational legislation.[103] Signifigance of ”moral rights” and their relationship with GIFs and memes is created from rights ability to fortify competency of a proprietor excersicing rights against violations. Thus, question arises whether moral rights may restrict GIFs and memes? Article 6bis of Berne Convention may be interpreted as ”moral rights” being substantial. As, proprietor of copyright can disapprove ”distortions, mutilations, other modifications or derogations” associated with creation, persisting independently of ”economic rights.”[104] Moral rights may be divided into ”integrity and paternity rights”, former is examined. Integrity relates to ”mutilations or modifications.” However, it is questionable what falls under these terms. Still, acknowledgement has been made that every, illicit, modification or malformation constitutes infringements. Indicating definition is wide. Supported by interpretation which includes changing creations core and essence in addition to mere changes to semblance.[105] Yet, it may be argued that ”integrity” contains reservations. As, alterations are restricted to ones plausibly detrimental to creators character or esteem, restricting employment of right. Character and esteem seem to include measures prospectively accountable for damaging creators, both as individual and creator, by malformation of their creation.[106] Of note are situations where memes and GIFs may compose creations on their own, avoiding violations. Yet, this is an unclear domain, as it could impinge with moral rights by composing illicit modification or malformation. Thus, it is discernible that if meme or GIF fails to ”constitute work” in manner required there could be violation with changing them.[107] Furthermore, there is ambiguity in when ”moral rights” could be depended upon.[108] Leading to uncertainty concerning whether the concept constitutes an acknowldedged notion within the Convention. Interpretation of this in resolution of WTO Panel finds it is possible, not mandatory, to acknowledge.[109] On EU wide -and supranational

[103] Kuldinski, M. (2020). The Sick Child of the Berne Parent: The Limited Protection of Moral Rights in the United Kingdom and the European Path for Harmonisation. Aberdeen Student Law Review, 10, 204-222. pages 205-210.
[104] Havela, S. (2021). Quotations as an autonomous concept of EU copyright law and its compatibility with online content-sharing services, University of Lapland, Masters thesis, Faculty of law, pages 30-36. Accessible: https://lauda.ulapland.fi/bitstream/handle/10024/64567/Grady%FINAL%20-%20Quotation%20as%20an%20Autonomous%20Concept%20of%20EU%20Copyright%20Law%20and%20Its%20Compatability%20with%20Online%20Content-Sharing%20Services.pdf?sequence=1&isAllowed=y
[105] Pettenati, L. A. (2000), supra nota 118, page 429-448.
[106] Pradhan, P. (2011). Author’s rights and their scope. Bodhi: an Interdisciplinary Journal, 5, 2011, ISSN: 2091-0479, pages 128-129.
[107] Hietanen, H. (2009). Pelleily sallittu?- parodia tekijänoikeuden rajoituksena. Defensor Legis 1/2009, pages 148-154. Accessible: https://www.turre.com/8_hietanen.pdf
[108] Graeme, A. (2005). The berne convention as a canon of construction: moral rights after dastar, NYU Annual Survey of American Law, Victoria University of Wellington Legal Research Paper No. 4/2013, pages 115-117.
[109] Okediji, R. L. (2008), supra nota 3, pages 16-25.

legislation section there is absence of unification concerning moral rights.[110] As, they faced omission regarding TRIPS Agreement[111] and InfoSoc Directive.[112] Additionally, acknowledgement towards moral rights, introducing 6bis, was merely achieved during 1928 through revision. Furthermore, it has been argued that 1988 ”Berne Convention Implementation Act” specified that Convention lacks ”self-executing” disposition,[113] necessitating appliance through legal provisions to domestic law.[114] Interpretation majority EU states concur to. Leading safeguarding of ”moral rights” conclusively depending on contingency of determinations of signatory nations. Thus, it is contingent on individual countries inclination what degree defense is endowed to moral rights. If country decides against inclusion of 6bis this will remove effectiveness of moral rights regarding execution. As, Berne omits ensuring of procedures of execution to punish illicit actions, yet such procedures are available within ”WTO dispute settlement process”, regarding TRIPs Article 9(1) necessitating 6bis’s adherence yet discarding binding nature for the Article[115], rendered ineffective if the paritcular Article is omitted.[116] Still, ”Deckmyn” verdict alluded towards connection between ”property- and moral rights” where moral rights influence and possibly provide restrictions regarding ”free use.” Interpreted as advancement towards coordination of ”moral rights,” departing key point of both creative and monetary aspects subsuming within copyright.[117] Yet, moral rights lack harmonization through EU, making their dependability uncertain and contingent on legislation of nations.

2.3. Memes, GIFs and autonomous concepts of exception to copyright

For creation of meme or GIF their generator can depend on aegis of compliance as to not violate copyright. Prevalent safeguards constitute; demonstration of presence of “license” and copyright creations employment composing “fair dealing standard.” Firstly, inoperable circumstance could arise by reguiring licensing, as dissemination and formulation of GIFs and memes occurs promptly. Similarly, most may be incapable of reimbursing license charges required in creating GIFs and memes. As, included in their prevalence is ability to generate them efficiently, which

[110] Kuldinski, M. (2020), supra nota 120, pages 207-208.
[111] Schere, E. (2017). Where is the morality: moral rights in international intellectual property and trade law. 41 Fordham Int’l L J 773, 777-78. pages 777-779.
[112] Official Journal of the European Communities (2001) Directive 2001/29/EC, supra nota 64, Recital 19.
[113] Schere, E. (2017), supra nota 130, page 778.
[114] Port, K. L. (1991). The japanese international law revolution: International human rights law and its impact in japan. Standford Journal of International Law, 28 (1), 139-172. pages 153-155.
[115] Graeme, A. (2005), supra nota 127, pages 115-118.
[116] Schere, E. (2017), supra nota 130, pages 778-780
[117] Pogacsas, A. (2018), supra nota 119, pages 368-369

aquirement of license impedes. Thus, consideration of "fair dealing" may provide advantageous.[118] "Fair dealings" refers to exceptions to copyrightexamined in Section 3. Yet, exceptions for copyright fall under wider EU conceptualization of "autonomous concepts." Alluding to EU members holding alternative for non-fulfillment or fulfillment concerning voluntary Articles, nontheless power of defining Articles width and matter is dependent on CJEU rather than MS.[119] Inferred from consensus amongst various scholars and case law of CJEU. Roots of which are in Costa v Enel wording "…EEC Treaty created its own legal system, which…becoming integral bounding part of MSs legal systems…"[120] Further example of this is Case C-467/08 in which determination was reached when an Article fails to encompass mention, concerning construct or phrase, to national legislation then it is essential to provide the construct consistent and self-reliant explanation within EU. Reinforcing the reading InfoSoc objective and Recital 32 were evoked, concerning necessity of guaranteeing single markets operation by utilization of consistent understanding. As, allowing unrestricted quantification of an Articles content and boundaries signifies violation to the Directive.[121] Further affirmed by Case C-435/12 judging "exceptions must be applied coherently." However, interestingly it was stated that special cases in Article 5 permit complimentarity with a MS's legislative customs. Such determination seems contradictory to the Directive regarding consistency. As, power of decision, of members, restricts towards non-applicability or application of "exceptions", not allowing capacity for legislative customs. Nevertheless, as Directive's Recital 32 is evoked[122] asserting "…this list takes due account of different legal traditions in member states…"[123] it is inferrable that during drafting "exceptions" their conception was accomplished following states diverging legislative customs. To conclude "autonomous concepts" have to do with exceptions that CJEU concludes. Striving for self-reliant and consistent explanations, which in creation accounted for variety of legislative customs. Necessitating observing judicial rulings to determine their breadth.

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[118] Marciszewski, M. (2020), supra nota 62, pages 18-20.
[119] Jongsma, D. (2019). Creating EU copyright law striking a fair balance. Economics and Society, HANKEN, Publication of the Hanken School of Economics, NR 334, Helsinki, Finland, Hansaprint Oy, Turenki 2019. page 203.
[120] EUR-Lex.(1964). Judgement of the Court of 15 July 1964. Flaminio Costa v E.N.E.L.. Case 6/64, Reference for a preliminary ruling: Giudice conciliatore di Milano- Italy. 61964J0006. para 3. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61964CJ0006&from=FI
[121] InfoCuria. (2010). Judgement of the court (third champer) in Case C-467/08 Padawan SL v Sociedad General de Autories y Editores de Espana (SGAE), 21 October 2010. ECLI:EU:C:2010:620, paras. 30-37. Accessible: https://curia.europa.eu/juris/document/document.jsf?text=&docid=83635&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=2315595
[122] InfoCuria. (2014). Judgement of the court (third chamber) in Case C-435/12 ACI Adam BV and Others v Stichting de Thuiskopie, 10 April 2014, ECLI:EU:C:2014:254, paras. 33-35, Accessible: https://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=2358872
[123] Official Journal of the European Communities (2001). Directive 2001/29/EC, supra nota 64, Recital 32.

3. Copyright exceptions

Copyright exceptions are found within InfoSoc Directive Article 5 and Directive 2019/790 Article 17(7) providing framework. Intrinsically exceptions to copyright are legal regulations acquiesceing individuals in accomplishing specific measures. Generally, proprietors may rely on exclusive rights and an exception to these rights is able to restrict their utilization. Functioning as balancer of proprietors personal advantage and ample common benefit regarding circulation of pieces falling under copyright.[124] If an action, utilizing copyrighted material, constitutes exception proprietors consent is not required. Exceptions to copyright diverge regarding proportions and formats. As, nations have dissimilarities concerning categories and amount of available exceptions, often contingent on whether jurisprudence integrates civil-or common law. Most common divide is between nations that: firstly, conduct written record with sanctioned employment methods confined to comparatively limited width and detailed conceptualization or secondly, necessitate legislature to evaluate on factors of case interpretation of exceptions, as they are vague and inclusive.[125] Latter being section most EU countries fall under.[126] Aim of exceptions is to provide evaluation mechanism between common benefits and proprietors advantage. Still, exceptions do not function as solitary instruments utilizable for rectifying balance. Since, innate restrictions within copyright, differentation between copyrightability, innovation aspect and temporal-limits, provide comparable instruments. However, exceptions are better instruments for obtaining determination of which right is to be protected. Therefore, main reason for creation of exceptions relates to the general public substantially deriving value from existence of exceptions

[124] Boyle, J. (2008). The public domain enclosing the commons of the mind. 1st edition, Yale University Press New Haven & London, USA. pages 69-71.
[125] Rendas, T. (2021). Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty. Volume 45 Information Law Series, Kluwer Law International B.V., Netherlands, page 14.
[126] Asay, C. D. (2021), supra nota 39, pages 1016-1028.

devoid of requiring proprietors permission to utilization. Subsumed in these blanket grounds number of additional determined rationale emphasize diverging "exceptions." Several legal sources have determined rationale towards various classifications. However, trio of definite exception rationale are identified by largely accepted classifications. Firstly, classification of exceptions pertaining to fundamental right preservation subsuming for example. "freedom of expression." Expanding to enablence of "parodies and quotation." Secondly, exceptions pertaining to assistance of differing categories of common good for public, distributing data and furthering arts. Finally, exceptions pertaining to circumstances in "market" disturbance namely, occasions where applying copyright veers to unfeasible and unaffordable. It is not uncommon for any exception to fall under multiple categories. What is allowed under an exception and authority of it generally differs contingent of which classification exception falls into. When exception classifies as "market" disturbance there is a right to utilize copyrighted material absent of permission, yet for utilization there exists requirement to provide suitable reimbursement. Contrastingly, during fundamental right preservation there is both freedom to utilize material and lacking requirement for reimbursement.[127]From aforementioned exceptions pertaining to fundamental rights shall be examined.

3.1. Quotation as exception

First quotation exception shall be examined as question arises whether GIFs and memes fall under "quotation" and by relying on actionability of this right could be protected? Concerning what quotation subsumes. Berne Convention, InfoSoc Directive and Directive 2019/790 contain "quotation" exception. Though, Directive 2019/790 explicitly refers to InfoSoc in establishing its compliance to depiction within it. However, both Berne 10(1) and InfoSoc 5(3)(d) lack determined interpretation for "quotation." Still, two judgements of CJEU provide elucidation, denoting quotation subsumes; "…use, by someone…of work or…extract…for illustrating assertion, defending opinion or allowing intellectual comparison between…work.[128]" Wording regarding "use of work or extract" suggests that "works" is interpreted widely to subsume diverging pieces, which could include memes and GIFs. Nevertheless, Berne 10(1) could be asserted to go against

[127] Rendas, T. (2021), supra nota 147, pages 14-16.
[128] InfoCuria. Judgement of the Court (Grand Chamber) 29 July 2019, Spiegel Online GmbH v Volker Beck, Case C-526/17, ECLI:EU:C:2019:625, para 78, Accessible: https://curia.europa.eu/juris/document.jsf?text=&docid=216543&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=3196277 and EUR-Lex. (2019), Pelham, supra nota 76, para 71.

such elucidation. As, though the Article is left unlimited only quotations mentioned pertain to written variety.[129] Thus, if the right is narrowed to only written elements this leads to inherent restriction of what exception subsumes. Narrow definition of quotation is supported by Bernes travaux preparatoires[130] and "Guide to interpreting the Convention.[131]" According this interpretation memes and GIFs would not constitute quotation. Still, InfoSoc Directive Article 5(3)(d) conversely utilizes extensive expressions in its terminology. Since "purposes such as criticism and review" are explicitly mentioned as utilization methods regarding exception for quotation.[132] It may be asserted that wording in the article is wide including constructs further than written ones. Supported in determination of Metall auf Metall according which; "quotation" is understood as "use of work or extract from a work for purposes of illustrating an assertion, defending an opinion or allowing intellectual comparison."[133] Seemingly, wide interpretation is supported, as there is no distiction amongst creations, alluding to diverse extent. Additionally, "interpretative methodology" must be accounted for, consisting; providing expressions "ordinary meaning", coherence within legislation and factoring in existing legal framework whereby terms emerge. Since, aim of InfoSoc was harmonization, pertaining to copyright, acknowledging and reviewing contemporary advances, inconsistencies and restraints in technology and nurturing knowledge society's progression. Therefore, "quotation" necessitates elucidation conforming with "ordinary meaning", that is extensive, subsuming GIFs and memes. Elucidation in Metall offers utilizing section or complete creation in equivalent manner yet Advocate General (AG) Szpunar affirms regarding Article 5(3)(d) juridicial scholastic advisory interpretation " whole or part" has no consensus. "1984 The Brussels Act of the Berne Convention" Section 10(1) is pertinent for possible interpretation. As, "short quotations…" is acceptable. Yet, terminology "short" was abolished in redrafting. Rather dual criteria was established for consistency of "quotation" alongside it not going further than defendable by "quotations" intent.[134] Thus, provided aforementioned criteria is abided even "quotation" of wholly included piece is conceivably legitimate. Corroporated by interpetation provided by CJEU in decision, Spiegel Online, to respond to inquiry presupposing pertinence of "quotation" stipulation concerning illustrations. AG

[129] WIPO (2020), Berne Convention, supra nota 19, Article 10.
[130] Aplin, T. and Bently, L. (2020). Global mandatory fair use the nature and scope of the right to quote copyright works. Gambridge University Press. Cambridge, United Kingdom, Gambridge intellectual property and information law, UK. pages 30-37.
[131] World Intellectual Property Organization (WIPO). (1978). Guide to the Berne Convention for the protection of literary and artistic works (Paris Act, 1971). GENEVA, WIPO Publications No. 615(E). pages 58-59. Accessible: https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf
[132] Official Journal of the European Communities (2001). Directive 2001/29/EC, supra nota 64 , Article 5(3)(d).
[133] EUR-Lex (2019), Pelham, supra nota 76, paras 71-72.
[134] Mittal, D., Yadav, V., & Sharma, M. (2019). Intellectual property law: copyright and remedies and actions for infringement of copyright. Internationa Journal of Law Management & Humanities, 2(1) 460-467.

Trstenjak's opinion supports wide reading of "quotation." Asserting that "complete reproduction may be necessary…to reference back to work." Summizing, in event concerning "quotation" in an all-compassing manner, that predominant determinators include assessment of Article 5(5)'s three-prong assessment. Appearing feasible that "quotation" could subsume complete references.[135] Yet, Metall auf Metall assessment also expanded restrictions, since if modifications given to "quoted" sections or matter is not interconnected to creation and not one of explicit aims exception is illicit.[136] Further limiting factor in the Article necessitates conformity regarding "fair practices," resulting in condition where monetary utilization of quoted creation cannot be hindered. Permissibility of full quotation seems contrasting. As, Painer provided "quotation should in principle only encompass an element of work." Since, allowing utilization of entire creation would invalidate proprietors "right to reproduction.[137]" Additionally, Spiegel illuminated that disallowance on competition expands to where viewing quotes results in abandonment of viewing initial sources. Thus, if quoting entire memes or GIFs concludes in such this would lead to omission from "exceptions" sphere. Yet, restrictive understanding likely affects freedom of expression, lessening its extent, going against coherence. Still, as extent of allowable "quotation" falling under "fair practice" is ambiguous it is uncertain whether it subsumes whole pieces.[138] Making position of memes and GIFs regarding whole "quotation" ambivalent.

3.2. Defining parody through contrast of EU case law and US case law

Judicatures and legislative organs subsume responsibility for ascertainment of legislation regarding copyrights scope towards parody concerning its permittance or restraint.[139] Necessitating consideration to proprietors of copyright and utility for creators of mimicries. Raising question whether GIFs and memes constitute "parody," constituting reliable protector against proprietors "rights.?" As, parody could safeguard lack of censorship and encourage creations dispersal. InfoSoc Directive, Article 5(3)(k) allowed reservations of "pastiche or parody", becoming requisites through Directive 2019/790.[140] Wording which is unaltered from

[135] Havela, S. (2021), supra nota 122, pages 38-39.
[136] Jongsma, D. (2019). AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?. IPRinfo 1/2019. pages 8-10. Accessible: https://iprinfo.fi/wp-content/uploads/sites/2/2019/02/FINAL_Jongsma_IPRinfo_1_2019.pdf
[137] de Cock Duning, M., Belder, L., & De Bruin, R. (2012). Research exceptions in eu copyright law. European Review of Private Law, 20(4), 933-960. pages 935-944.
[138] Jongsma, D. (2019), supra nota 159, pages 9-10.
[139] de Cock Duning, M., Belder, L., & De Bruin, R. (2012), supra nota 160, pages 935-944.
[140] Ali, G. (2021). The (missing) parody exception in italy and its inconsistency with eu law. Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 12(5), 414-438. pages 415-418.

InfoSoc denoting Articles endurance.[141] Definition and utilization of this reservation lacks uniform methods. Additionally, MSs develop discordant frameworks concerning legislative jurisprudence subsuming diverging boundaries of parody's legitimacy.[142] According Deckmyn "parody" constitutes "autonomous concept." Alluding to parody being contingent on its utilization and vernaculars ordinary interpretation. Ordinary interpretation subsuming two criteria. Firstly, eliciting previous creations yet containing substantial deviation. Secondly, incorporating derision or comedy. Thus, if GIFs and memes fulfill these qualifications they receive protectetion. Yet, InfoSoc Article 5 contains balancing test, for proprietor and utilizer of creation. Thus, each situation is determined utilizing "case-by-case" consideration, requiring further discretion of Deckmyn. In which, "moral rights" were elicited as there was "legitimate interest" regarding dissociation of original creation from "parodys" prejudiced communication. These determinations challenged extent to which, elucidating parody, domestic judicature retains right to make decisions. It was determined that decisions are preserved by domestic judicatures in: 1) consideration of creations constitution as "parody" and 2) "parodys" justifiability and "balancing." Final basis is problematic as it makes possible to determine differently in jurisdictions on this balance, causing divergent interpretations regarding whether creation constitutes parody.[143] In addition, decision on "parodies" not requiring nature constituting "original" was made, as substantial deviation was satisfactory. Deciding element being "parodys" failure of inferring intial creation. Still, even if the element had been present within balancing assessment a more important right was "non-discrimination." Thus, prejudicial creations are unlikely to constitute parodies regardless sufficient connection to initial creation,[144] acquainting into consideration within the test "fairness" approach. Second challenge, regarding interpetation is vagueness of requirement for substantial deviation as it is unclear the degree concerning divergence required,[145] though capacity of public in differentiating between initial creation and parody has been accounted.[146] Another challenging aspect is requirement of containing humour, amusement or derision, which are subjective notions.[147] Some assert that "parody" is understood widely, including largely varying observations towards original creation. Yet, generally within legislation concerning copyright

[141] Havela, S. (2021), supra nota 122 , page 58.
[142] Seville, C. (2015). The space needed for parody within copyright law reflections following deckmyn. National Law School of India Review, 27(1), 1-16. pages 2-8
[143] Havela, S. (2021), supra nota 122, pages 2, 25-27
[144] Schwabach, A. (2021). Bringing the News from Ghent to Axanar: Fan Works and Copyright after Deckmyn and Subsequent Developments. Texas Review of Entertainment & Sports Law, 22, 37-84. pages 60-67
[145] Mattila, H. (2019), supra nota 31, pages 9-11.
[146] Seville, C. (2015), supra nota 165, pages 1-15.
[147] Silverman, I. (2015). The Parody Exception Analysed. Managing Intellectual Property, 254, 26-30. pages 26-28

"strict interpretations" of terms are utilized.[148] Requiring "humorous effect", necessitating assessment of what constitutes comical.[149]

Exception that protects parody within US is "fair use doctrine", enshrined in 1976 Copyright Act §107. Containing "four factors" utilized in establishment of what "fair use" subsumes, consisting; 1) during establishment of later creation was previous one utilized and whether anterior falls under copyright; 2) creations status (phantasmal or private); 3) totality of initial creation utilized and 4) monetary impact on initial creation due later's establishment.[150] Warranting examination of cases to determine interpretation of parody. Reinforcement of monetary nature being among considered components was given in Campbell v. Acuff-Rose Music. Not being a decisive factor, as subsuming monetary essence in itself would not make "parody" unjustifiable. Furthermore, creations fall under "transformative" criterion if their grounds or motif is altered. Most important factor being that intent and motive of the work were vastly dissimilar from initial, accounting for actual "creative" impetus in its creation.[151] EU definition of parody seems to contain two main issues detrimental for clarity of when memes and GIFs may rely on this exception. Firstly, amount acceptable to utilize in parody and what constitutes substantial deviation for work. Secondly, what may be considered humorous, regarding "requirement" for generating "humorous effect", which may differ depending on specific MS. Whereas, within legislation of US "exception" seems broader, due taking into account comical purpose rather than "effect.[152]" Additionally, regarding difference among EU copyright exceptions and "transformative use", exceptions are narrowly defined catalog, subsuming quotation and parody, allowing some "transformativeness" regarding creations. However, this allowance is established on their association to civil liberties rather than substance of creations and tied to initial creations in requirement to allude them. Whereas, transformative use inserts distinct disposition and enhanced objective without necessity to refer to previous creation, making it elastic and extensive.[153] Necessitating determination whether "fair use" could provide model.

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[148] Capelotti, J. P. (2020), supra nota 59, pages 126-127.
[149] Rosati, E. (2015). Just a laughing matter? Why the decision in Deckmyn is broader than parody. Common Market Law Review, 52(2), 511-529. pages 513-515. Accessible: https://ssrn.com/abstract=2526835
[150] Capelotti, J.P. (2020), supra nota 59, pages 126-127.
[151] Lai, A. (2015). Copyright law and its parody defense: multiple legal perspectives. New York University Journal of Intellectual Property and Entertainment Law. pages 311-319. Accessible: https://jipel.law.nyu.edu/wp-content/uploads/2016/NYU_JIPEL_Vol-4-No-2-4_Lai_CopyrightLawandParodyDefense.pdf
[152] Mattila, H. (2019), supra nota 31, pages 31-39.
[153] Mendis, D., and Kretschmer, M. (2013). The treatment of parodies under copyright law in seven jurisdictions: a comparative review of the underlying principles. Intellectual Property Office Research Paper. Accessible: https://ssrn.com/abstract=4093790

4. Comparative framework EU and US: towards legal certainty?

4.1. copyright exceptions, three-step-test and fair use doctrine; clarity for memes and GIFs

Concept of "fair use" constitutes utilizing creations excluding necessity for recompense- and permission. Principle for "fair use" utilizes several elements including; whether previous creation was utilized and later one falls under proprietorship, status of creation, amount of initial creation utilized and monetary impact on initial creation.[154] Three-pronged assessment, established through transnational legislation (TRIPS, BERNE, WIPO), is a decisive factor for lawfullness regarding "fair use" and whether its utilizable.[155] Ternary standards in assessment consisting; only "special cases" being permitted in restricting legislation on copyright, monetary contention with initial creation being prohibited and "exceptions" requiring restricted constraints and sufficient interpretation to be "legitimate interest." Generally, these standards are interpreted through combined manner, requiring fulfillment of every standard. Additionally, some interpret final standards regarding monetary gain reaching existing- and prospective "markets" being protected within "legitimate interests." Resulting in allowance for "exceptions" unless damage they cause to "legitimate interests" is exorbitant.[156] Thus, rises issue whether "fair use" is accepted by three-prong assessment and is applicable to other jurisdictions? Interpreting it through "balanced" method the answer seems positive. Perception supported by several experts of law and "Munich Declaration." Substantiating "fair uses" validity. As, copyrights purpose is proposed as advancement "to public interest," augmenting choices or regard concerning totality of public. Perceived through "emergent purpose" percept, advocating apprehending instruments aspirations as flexible and dynamic for evolvement. This perspective indicates assessments of prongs are not read in combined manner, instead all-inclusive evaluation is required. Meaning all requirements are considered yet fulfilling all is unnecessary instead fulfilling majority is satisfactory. Reason being importance of fullfillment of "public interest" which requires evaluation regarding individual prongs without requiring constraints to subsist every prong for "interests" accomplishment. Secondly, regarding "exception" necessitating sufficient interpretation and restricted constraints it is advanced that constraints are bound to "reasonably foreseeable"

[154] Koutras, N., & Rigby, H. (2022). The three-step test through the lenses of international and european laws: the australian perspective. University of Western Australia Law Review, 49(2), 301-325. pages 306-309.
[155] Goold, P. R. (2017). The interpretive argument for balanced three-step-test. American University Law Review, 33(1), 187-230. pages 187-189.
[156] Koutras, N., & Rigby, H. (2022), supra nota 178, pages 306-309.

establishment, being looser, fulfilled in fair use through judicial rulings accomplishing adequate assuredness. As, such appraisal secures merit of elasticity and consistency assisting to attain equilibrium among diverging rights. Finally, on requirement of lack of monetary contention with initial creation "normal exploitation" within sectors allows contest regardless if probable or existing, supporting contestions positive influence. Since, full limitation of contention goes against counterbalancing utilizers and proprietors advantages. Through this "balanced" elucidation towards three-prong assessment concept of "fair use" fulfills it. Still, court judgements are examined to demonstrate existence of "reasonable foreseeability" and equilibrium of steps in following segment. Section 4.1.2 focusing on "balanced" modus.[157]

4.1.1 Fair use: four factors

Copyright Act Section 107 subsumes quartet of components regarding fair use. Yet, concerning assessing such elements there is limited recommendation. Thus, judicatures are given decisive influence necessitating look at cases. Firstly, Campbell determined regarding first basis (utilizations objective and attributes) importance of "transformative" utilization in creations constituting fair use. As, when later creation inserts fresh idea subsuming diverging nature or additional objective modifying initial creation through fresh purport or manifestation this constitutes "transformative." Being important factor, as additional components lose importance when reformation is apparent. Evaluation of "transformativeness" occurs through estimation of divergence between "content" of creations or creators "intent," safeguard is bestowed on creations regardless modifications realization provided it is striven for.[158] As, increased reformation of subsequent creation justifies utilizing initial creation widely. Cariou v. Prince elucidated on "content", inspecting likeness amongst two creations. Including; dissimilarity of artistry, changed pigmentation and shapes, ultimately considering "reasonable" comprehension of creations reformation. Thus, later creation having divergent motif from initial creation leads to "transformativeness", creation not having to differ from initial but rather motif of it must vary, parodies are automatically assumed "transformative," possibly subsuming numerous GIFs and memes.[159] Regarding copyright creations essence general rule, Swatch Group v. Bloomberg, dictates that "factual" creations receive reduced safeguard contrasted to "creative" creations and illegitimate obtainment balancing contra "fair use." Regardless "creative" nature if creation lacks

[157] Goold, P. R. (2017), supra nota 179, pages 195-208 and 215-226.
[158] Picozzi, B. (2017). What's wrong with intentionalism: transformative use, copyright law, and autorship. Yale Law Journal, 126(5), 1408-1459. pages 1418-1421.
[159] Pelc, Y. M. (2017). Achieving the copyright equilibrium: how fair use law can protect japanese parody and dojinshi. Southwestern Journal of International Law, 23(2), 397-422. pages 409-414.

possibility of replacing initial creations as commodities "fair use" may apply.[160] On "substantial amount" utilized, Carlton Dance Lawsuit, a "too simple", anyone is capable of execution, creation is not copyrightable and if there is "substantial" difference, indicating "transformativeness", among two works this will not be against proprietors' rights. Finally, on monetary criteria, Furie v. Infowars and Griner v. King, utilization of initial meme done for monetary gain in later creations, essential addition regarding development or alteration was lacking, such utilization results in breach of copyright.[161] As, detriment is considered from subsequent creations if they provide interchangeable replacement, transformativeness negating replacement.[162] Inferrable from cases is existence of "reasonable foreseeability." As, each component is considered, yet one with most weight is transformativeness, detectable through changed "content" subsuming changes to aesthetic aspects and including parody or "intent", capable of subsuming unchanged creations. Secondly, fictitious creations obtain auxiliary defence, yet if there is lack of substituting initial creations they are likely acceptable. Thirdly, basic and curt creations fall outside copyright and finally if other components are present monetary gains from recreations may be allowed. Since, prohibiting profit requires more than damage.

4.1.2 Issues with fair use: possibility for implementation?

If "fair use" is understood through "traditional" elucidation three-pronged assessment would not accept its utilization. A traditionalist stand with object of preserving proprietors privileges. As, proprietor is to retain benefit from creations profitability, prohibiting reservations limiting these rights. Some academics assert; conditions for "fair use" are understood incrementally through constricted approach. Necessitating every criterions fulfillment for "fair use" to apply to restrictions. Warranting limited extent and distinct expressions for these restrictions. Disallowing later creations utilizing initial ones currently or subsequently causing monetary contention. Through such interpretation three-pronged assessment is unlikely to accept "fair use." Yet, strict interpretation is not supported by US, utilizing fair use, being able to commit to international instruments containing pronged assessment without challenge to modify legislation.[163] Additionally, WCT Article 10 wording indicates need for understanding three-pronged assessment through pursuement of equilibrium. As, it mentions accounting for enablement of restrictions

[160] Standford Libraries. Copyright & Fair Use. (2023). Disagreements Over Fair Use: When Are You Likely to Get Sued?. Accessible: https://fairuse.stanford.edu/overview/fair-use/disagreements-over-fair-use-when-are-you-likely-to-get-sued/
[161] Alder, A., & Fromer, J.C. (2022), supra nota 6, pages 495-542.
[162] Pelc, Y. M. (2017), supra nota 183, pages 415-416.
[163] Goold, P.R. (2017), supra nota 179, pages 200-203.

according information era and asserting judgements for "fair use" are foreseeable through established case law.[164] Thus, the interpretation produces restoration concerning prongs in manner viewed through supranational legislation exceedingly compelling to confirm standardizing, providing effectual elucidation of three-pronged assessment by implementing legislations intent and regularizing its purposes. Augmenting benefits of community by coordinating equilibrium concerning responsibilities and entitlements.[165] Finally, argument on copyright legislations globalisation compromising "freedom of expression" unless universally dogmatic concept, such as "fair use", receives verification is extended. Due traditional importance given to proprietor rights, disregarding other interests.[166] Transgressing object of equilibrium within EU.

4.1.3 "Parody exception vs. Transformative use"; functionality

Advocating interpreting constitution of quotation and parody through "fair use's" (emulating US) subsumation within EU. As, counterresponse susceptibility and elasticity, inherent in "fair use", requirements exist for copyright reservations due their intrinsic tendency for enlargement and digital advancement. Since, EU legislation is sedated regarding response toward rapid alteration, restricting judiciarys abilty to formulate remedies. By subsuming fair use neglected areas, such as free market, would encounter consideration and reduce supranational gap between "exceptions."[167] Upkeeping uniformity in legislation and accounting for existing legal frameworks. As, narrowing conceivably occurred for parody and quotation. Showcased through CJEU cases, clarifying their limitations and requisites. Both requiring interplay or evokement of initial creations. Additionally, quotations are obligated to constitute identifiable yet unchanged and "humorous effect" required from parody leads to divergence in national legislations. Such constraints may cause profound disparity to essential freedoms, lacking suitable grounds for favoring proprietorship and limiting lack of censorship. Leading to limitations excluding memes and GIFs that fail to require interplay or identifiability.[168] Moreover , quantity and intrinsic sections of initial creations utilized is considered with "fair use", balancing both community's motivation to view and exploit and proprietors motive to retain rights. As, information era accelerates increasement of mechanical

[164] Senftleben, M. (2004). Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC Copyright law 17. pages 91-107. Accessible: file:///C:/Users/bloom/Downloads/CopyrightLimitationsThree-StepTestPUBLISHED.pdf
[165] Goold, P.R. (2017), supra nota 179, pages 226-228.
[166] Okediji, R. L. (2000). Toward an international fair use doctrine. Columbia Journal of Transnational Law, Vol. 39. Issue 1. 75-175 pages 75-176.
[167] Östlund, E. (2013). Transforming European Copyright Introducing an Exception for Creative Transformative Works into EU Law. Uppsala Universitet master's thesis. Intellectual Property Law. pages 75-77. Accessible: https://www.diva-portal.se/smash/get/diva2:688462/FULLTEXT01.pdf
[168] Havela, S. (2021), supra nota 122 ,pages 64-68.

safeguarding, creating necessity for reinforcing "fair use" due thightening of proprietors rights.[169] On common law concept in nations of civil law, latter of which majority EU members are. The two traditions are fundamentally different and utilizing concepts of one in other could malfunction. Nevertheless, copyright in civil-and common legislation is increasingly congruent. As, their divergence has become conceptual due dependence on unclear standards' elucidation through employment of judiciaries. Additionally, exceptions are inherently determined by decision of courts.[170] As, crafting detailed proposal is outside realm of Thesis, only an approach accounting for positive sides of US "fair use" is suggested below.[171]

4.2 Proposal for a framework on enforcement of copyright

Unclear wording within international instruments regarding memes and GIFs affects their legal certainty, necessitating formulating changes to guarantee sufficiency of wording for instruments functioning. Since, Section 2, "economic rights'" actionability is unclear due vague wording elucidation is provided. Firstly, "reproduction" contains two problem areas. Pertaining to InfoSoc Article 2(a) and 5(1). Limitation provided by 5(1) should be seen as limitation to Article 2(a)'s reproduction right. As, "case legislation" blurred previous extent of the right, allowing its advancement. Assertion is provided that Article 5(1) is perceived preferably, through regulative approach, for placing exclusion for violating copyright through inhibiting „reproductions" extent.[172] Supported by Recital 33 ascertaining reproduction fails to subsume "temporary" duplicates, resulting in them not constituting „exceptions" due exclusion from copyrights width.[173] Clearing rights boundaries and ascertaining „indirect and temporary reproductions" fall outside limitation. Second interpretative problem concerns "in whole or part." Lacking clear boundary regarding acceptable amount of creation utilized. Causing legal uncertainty concerning what constitutes violation of proprietors copyright and acceptablility in dublications of GIFs and memes. Solution is proposed through categorising memes and GIFs under "parody or quotation" As, Article 17(7) Directive 2019/790 ensured obligatory "exceptions." Providing utilization of creations falls under safeguard when subsumed in 17(7). Thus, quantitative amount allowable for

[169] Okediji, R. (2001). Givers, takers and other kinds of users: a fair use doctrine for cyberspace. 53 Fla, L. Rev. 107. pages 152-153. Accessible: https://scholarship.law.ufl.edu/flr/vol53/iss1/3
[170] Capelotti, J. P. (2020), supra nota 59, pages 126-128
[171] Griffiths, J. (2010), supra nota 191, pages 90-93.
[172] Institute for Information Law (IVIR). (2006), supra nota 72, pages 67-69.
[173] Official Journal of the European Communities (2001). Directive 2001/29/EC, supra nota 64, page 3.

utilization would not provide dispute. Issues may emanate, attributable to countries divergent standards for "exceptions." Still, due constituting "autonomous concepts" CJEU's ensuing decisions will proliferate minimum policies. Another possibility is for screening systems to help determine limits for creations violating copyright, though plausibly enroaching current EU framework.[174] Secondly, "right of communication" framework, Article 3(1) InfoSoc, is to change through Article 17(4) into "strict" liability transporting onus to OSPs regarding "communication to public," creating liability for illicit content on their platforms. Understood to subsume "filtering obligations," linking to Article 15 of ECD. To answer issues excessive screening must be avoided. As, current filtration technology is limited. Utilizing filtering technology with human assistance is feasible, yet may provide expensive. Other solution includes collaboration amongst OSPs and utilizers of cites, where requirement would exist to categorize material as containing limitation, by utilizers, allowing dissemination or denying it. Denial requiring obstruction of material before manual review.[175] Reducing misuses could occur by restricting provision of material to access ID and suspending ID benefits if infringements occur. Providing balance among Article 11 -and proprietor's rights. Further approaches are needed for ensuring balance. Such as, providing openness by networks in exhibiting methods and machinery utilized by OSPs in screening material. Any such machinery must adhere to rules provided in Bambauers screening method consisting; openness of standards and grounds, restricted permittance for screening, openness of suppression concerning entitlements and inaccurate supression's rectification.[176] To strengthen clarity; recognizability of components in systems, regulatory organs and cessation mechanisms are essential.[177] Aforementioned, next to CJEU decisions are required for extensive balanced method. Section 2.1 estimates vagueness of TRIPS Articles 41 and 61 reduces effectiveness of enforcement mechanisms against copyright violations of memes and GIFs. Terms requiring elucidation for enforcement to be certain. Such as, Article 41 "effective action" indicating implementation requires methods, yet not clarifying them. Structure for elucidation of organ is suggested in interpretation of Article. Encompassing; 1) acquiescene to VCLT regarding purpose and circumstances, 2) actual utilization, 3) consistency in elucidation, 4) interconnectability regarding Articles. Through this method inspecting TRIP's aim is necessary. Consisting "promotion of adequate and effective protection of intellectual property rights.[178]" If Article 41 is elucidated as

[174] Krysztof, G. (2019), supra nota 100, pages 7-8.
[175] Spoerri, T. (2019), supra nota 99, para 25-28.
[176] McIntyre, T. T. (2010). Blocking child pornography on the internet: European union developments. International Review of Law, Computers & Technology, 24 (3), 209-222. pages 211-214.
[177] Krysztof, G. (2019), supra nota 100, pages 16-20.
[178] Tobin, J. (2010), supra nota 53, pages 3-14.

necessitating "provision and exercisce of enforcement procedures" such understanding would promote protection of IPR rather than inverse. Additionally, consistency and interconnectability in elucidation is required accounting for context of Article 41(1) in relation to "civil action", 43-48 Articles, in that if there is no actual requirement to fulfill them actions would be useless. Thus, interpretation accounts for functioning of these Articles requiring decisive action, understood as requiring functioning implementation structure.[179] Article 61 "provide for" subsumes "provision and execution for penal and sanction processes." However, question remained whether "investigation" of cases constituted requirement. Safeguarding of intellectual property is more likely guaranteed with requirement to investigate infringements. Seen in conjunction with Articles 50-51 subsuming "criminal remedies" which cannot be fulfilled unless there is requirement to correct infringements, subsuming inspections. On "commercial scale" left indetermined. In the suggested elucidation of Article financial aspect is a considerate element as elucidation included its mention and would be in interest of proprietor. Thus, function of gaining financial benefit may be subsumed in „commercial scale" limiting the term. Though, non-financial elements could also be added requiring interpreting instrument through "emergent purpose" and arguing that original "economic rationale" purpose of treaty has shifted towards balancing rights.[180] Concept of „parodies" within US is determined through "fair use", Section 4.1, serving as example of how these concepts should generally be elucidated within EU. As, they are currently inhibited by frigidity of the three-pronged assessment. Since interpretation of "parody" in EU exposes major issue with uncertainty of position of GIFs and memes. As, parody requires 1) substantial inferrance to and derivation from original creation and 2) subsumation of comedy requiring „humorous effect." These limitations would exclude memes and GIFs that do not infer to previous creation or are not derivative, causing uncertainty, and may be challenged as lacking „proportionality" towards freedom of expression. Whereas, most important aspect in "fair use" is transformativeness of creation, where "content", aesthetic differences, and "intent", motif behind creation differing accepting identical creations, are examined. Thus, this inclusive factor is likely to subsume all GIFs and memes providing their position in copyright law legal certainty. On "humorous effect" providing issues due concepts subjectivity, leading concept being likely determined by differing states in divergent manner. Going against harmonisation purpose of EU and lessening legal

[179] Sprigman, C. J. (2013). Berne's vanishing ban on formalities. Berkeley Technology Law Journal Vol. 28, No. 3, Symposium: reform(aliz)ing copyright for the internet age? pages 1577-1579. Accessible: https://www.jstor.org/stable/24119906

[180] Geiger, C. (2016). Towards a balanced international legal framework for criminal enforcement of intellectual property rights. in: Hanns Ullrich, Reto M. Hilty, Matthias Lamping, Josef Drexl (eds), TRIPS PLUS 20, From Trade Rules to Market Principles, Springer, 2016, pp 645-679., Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2016-04, pages 4-27. Accessible: https://ssrn.com/abstract=3009176

certainty of memes and GIFs. If interpretation is utilized „effect“ will not be the accounting factor but rather „intent“ which provides broader concideration. As, it considers whether something meant to be amusing and not subjective humour in it. Regarding whether quoting in “full“ could be acceptable this is still uncertain. Yet, if determined through “fair use“ complete utilization concerning creation may constitute legitimate if rationale behind utilization is defensible to encompass its totality, accounting measurable and “qualitative“ components, and balanced with other aspects.[181] Another possible solution could be three-prong assessments remodeling. As, it is subsumed throughout laws of Union confining limitations, being denied safeguard if there is monetary advantage. Remodeling has been provided by Koelman, reflecting TRIPSs patent legislations’ invertation of prongs. Alleviating middle prong providing most issues. Through supplementing “unreasonably“ affix to rule of lacking dissonance with financial gain. Permitting cricumnavigating of middle prong due adequate common good. Accounting for basic liberties and constitutional freedoms along with providing structure of elasticity, enabling conforming for swift progression in information era.[182]

[181] Kelly v. Arriba Soft Corp. (2003). -336F.3d811 (9th Circuit Court). para 821-822, Accessible: https://casetext.com/case/kelly-v-arriba-soft-corp
[182] Aplin, T. and Bently, L. (2020), supra nota 152, pages 30-37.

CONCLUSION

In conclusion, aim through Thesis was inspection concerning whether specific Articles within certain instruments, relating to copyright, acceeded to by EU countries necessitate reprhasing due ambiguity of wording for position of GIFs and memes to be more legally certain and instruments enforceable? The answer being affirmative. As, domains containing vague wording were identified in international instruments consisting of InfoSoc Directive, Directive 2019/790, TRIPs and Berne Convention, all of which EU Member States adhere to. It is apparent that several instruments contain vague wording obscuring legal certainty regarding memes and GIFs affecting enforceability of articles. On who owns copyright to meme or GIF when latter one utilizes copyrighted material? Answer depends on whether creation fulfills "originality" prerequisite.

First vague area regarding position of memes and GIFs concerns "Economic rights" of proprietors. As, reproduction right, within Berne 9(1) and InfoSoc Directive Article 2(a) is expanded upon in Article 2(a) yet restrictions of normal actions on computers constituting transient or incidental are limited through 5(1) rather than confining term of "reproduction" obscuring boundaries of communication and reproduction rights together, causing blurring of rights affecting ability to govern and apply them negatively.[183] Additionally, 2(a) Article elucidation on "in whole or part" is wide to extent where what it is able to subsume is uncertain. Unreliability on this definition results in legal uncertainty for memes and GIFs as utilizing duplications is among their essential purposes.[184] Second ambiguous area regards "communication to public" right, InfoSoc Article 3(1) and 17(7) Directive 2019/790, as Directive 2019/790 changes onus structure on term "communication to public" towards OSPs. Understood through Recital 64 and Articles 17(4) connection to Article 15 of ECD[185] as necessity to screen creations for OSPs. Affecting memes, GIFs and freedom of speech through possible algorithmic banning of content utilizing copyrighted creations.[186] Third area concerns "enforcement Articles of TRIPS. As, Article 41 requires "effective action" for violations of IP, lacking minimum explicit stipulation for punitive or penal measures, endangering need to have functioning action for proprietors whose copyright GIFs and

[183] Lodder, R. A. and Murray, D. A. (2017), supra nota 70, pages 64-65.
[184] Mattila, H. (2019), supra nota 31, page 25.
[185] Stoor, K. (2022), supra nota 103, pages 40-44.
[186] LEX;INBREVE, Soogumaran, K. (2021), supra nota 116,

memes could breach.[187] Article 61 subsumes responsibility for criminal measures. Yet, elucidation regarding term is unsure regarding whether "provide for", necessitates actual implementation. "Provide for" requires action yet there is no requirement to inspect possibility of copying, negating possible responsibility of implementing actions, leaving no recourse for proprietor.[188] Additionally, there is grey area of moral rights and whether or not they "limit" utilization of GIFs and memes and work as protections for proprietor. The reliance on these rights is country specific, as Article 6bis is not "self-executing" and not required to be adhered. Making reliance on them uncertain.[189] Final determined area of vagueness concerns "exceptions" to proprietors copyrights, specifically "quotation and parody." Vagueness for quotation, Article 5 InfoSoc and 17(7) Directive 2019/790, emanates from uncertainty of allowed amount, as case legislation regarding answer for this is contradicting, making determination vague for allowed amount. Affecting utilizers of memes and GIFs and proprietors. This exclusion is interpreted narrowly to only utilizations permitting specific strict actions. Excluding anything that makes moot looking at original creation. Such, exclusion affecting most memes and GIFs. As, generally there is no need to search for their original sources.[190] Such narrow interpretation of article results in utilizers of GIFs and memes not being able to rely on its implementation. Same with "parody. " As its, main issue providing vagueness is its narrow definition constituting two criterion; 1) incorporating comedy, requiring "humorous effect." Being an uncertain term due personal understanding. Leading to diverging characterization depending on nations, affecting legal certainty in whether certain memes and GIFs constitute parody, and 2) elicitation of previous creations with substantial deviation. Substantial deviation remaining unexplained and elicitation of prior creations requiring degree of connectivity abstract memes and GIFs are unlikely to have.[191] Thus, vague wording of supranational instruments affects legal certainty of memes and GIFs, hindering their functioning and finding equilibrium among proprietor's rights and utilizers entitlements. Providing response to how narrow and wide interpretation of articles affects implementation? Wide interpretation causing uncertainty regarding when implementation may be relied on and excessively narrow ensuring constrictive understanding excluding terms being included in exceptions.

Ultimately multiple choices are possible to help in rephrasing these instruments. Still, ones provided in Thesis briefly consist of; regarding "exceptions." Supplying answer to what US system may provide to EU? this being utilization of "fair use" model. As, US notion of "fair use",

[187] Heath, C.,& Cotter, T. F. (2005), supra nota 117, pages 10-12.
[188] World Trade Organization (WTO), (2022), supra nota 116, pages 3-8.
[189] Graeme, A. (2005), supra nota 127, pages 112-120.
[190] Seville, C. (2015), supra nota 165, pages 2-8.
[191] Schwabach, A. (2021), supra nota 167, pages 60-67.

interpreted through “balanced” method and accounting for changing purposes of instruments, provides an elastic model. Falling within the three-pronged assessment approval yet not requiring that all subsequent criteria are fulfilled but rather overall fullfillment. Accounting for “transformativeness” of creation considering their “intent” and “content”, subsuming most GIFs and memes. As, the threshold is low. Whether creation is “creative”, gaining more protection, or “factual”, less protection. “Substantial amount” indicates what may be protected quantitatively and allowance of financial profit if subsequent creation is not substitute to initial one. Making possible for fair conditions. Such interpretation of “exceptions” subsuming similar factors would mitigate negatives of elucidation provided by “exceptions” to copyright.[192] Answering, what are differences between copyright exceptions and fair use? “fair use” is wider and more elastic lacking necessity for inferrence to anterior creations. Whilst, “exceptions” are narrower and limited requiring link to primordial works.“Reproduction”, is cleared by utilizing regulative approach inhibiting “reproduction.” Uncertainty of “whole or part” could be restricted through aforementioned “exceptions” providing that material falling under them is not granted “reproduction right.[193]” Communication right is suggested to utilize approach that guarantees screening accounting for balancing fundamental freedoms, compliance with Bambauers screening method, cooperation among OSPs and individuals and promoting openness. For Articles 41 and 61 interpretive methodology, by Tobin J, is suggested which particularly accounts for consistency of interpretation and interconnectability of Articles safeguarding functionality of enforceability of proprietors reclamation mechanisms.[194] Essentially, multitude of offered solutions could help rephrasing instruments to where legal position of memes and GIFs is established and functioning.

[192] Goold, P. R. (2017), supra nota 179, pages 195-226.
[193] Lodder, R. A. and Murray, D. A. (2017), supra nota 70, pages 64-65.
[194] Tobin, J. (2010), supra nota 53, pages 3-14.

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