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USER-GENERATED CONTENT AT RISK IN EU

Bachelor's thesis

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ABSTRACT

The aim of this research is to clarify and analyze the situation of user-generated content within the European Union law and legal practice. The thesis aims to analyze user-generated content, the scope of protection afforded to its creators, and how the liability regime of online service providers affects it. This research aims to answer the questions: how does the lack of flexibility affect user-generated content and is the introduction of a licensing system an appropriate solution? The thesis is based on both traditional dogmatic and comparative methods, by describing and analyzing the relevant EU laws and exploring alternative approaches based on foreign legal systems. The lack of flexibility in European copyright laws places user-generated content in a somewhat uncertain and disadvantaged position. The introduction of a licensing system, as it currently is, fails to efficiently solve the problems and may bring unwanted negative consequences to the new category of creators online. There is, thus, good reasons to explore the alternative approaches of a specific exemption clause or an open fair use clause, introduced in Canada and the US respectively.

Keywords: copyright, user-generated content, licensing system, fair use

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Copyright Act
DSMD	Directive on copyright in the Digital Single Market
EU	European Union
OSP	Online Service Provider
UGC	User-generated Content

INTRODUCTION

Because of the changing society, the technological development and the European harmonization, the European copyright laws have been constantly updated in the past century, this has led to a decrease in the flexibility that the system had before.¹ It could be argued that while the flexibility in the legislation has decreased, the need for it has done the opposite. As what is known as Web 2.0 was developed and introduced, the use of the web changed from passive to active as every web user could easily become a creator of content. This has led to the popularization of user-generated content (hereinafter UGC), in other words, online produced content that is usually built upon pre-existing materials without prior-authorization.² After a long struggle of how to regulate the phenomenon, European Union (hereinafter EU) legislators have found solution in a licensing system that is introduced with the Directive on copyright in the Digital Single Market (hereinafter DSMD). The Directive is new and has not yet so far been adequately researched by legal scholars. This gives good reason to study whether the new system is an appropriate solution to the emergent phenomenon.

This thesis seeks to analyze flexibilities, and the need for them, in the European copyright system. The thesis will analyze how user-generated content is regulated by EU law and what kind of protection is afforded to them. Furthermore, the thesis seeks to explore alternative approaches based on models from countries outside of the EU.

For the purpose of this research, the thesis seeks to answer the following research questions:

- **Is there a need for more flexibility in the EU copyright system?**
- **Regarding the regulation of user-generated content, is the licensing system appropriate?**
- **Is there a more suitable alternative?**

¹ Hugenholtz, P.B., Senftleben, M.R.F. (2011). *Fair Use in Europe. In Search of Flexibilities*, p 7. Accessible: <https://ssrn.com/abstract=1959554>, 18 March 2019.

² George, C.E., Scerri, J. (2007). Web 2.0 and User-Generated Content: Legal Challenges in the New Frontier. – *Journal of Information, Law and Technology*, Vol. 2, p 4.

The thesis is structured as follows:

The first chapter explains author's right and flexibilities in copyright. The chapter provides a discussion on open norms in copyright law, in both civil and common law traditions respectively. The aim of the chapter is to explain why copyright has lost much of its flexibility in Europe.

The second chapter aims to explore and illustrate the need for more flexibility in the EU's copyright system. This is done through court cases where the court has decided to move outside the set limitations and exceptions of the copyright law.

The third chapter will explain what user-generated content is and how it is defined. Furthermore, the chapter will explain the regulations affecting UGC and examine them, mostly from a users point of view.

The fourth chapter will explore alternative approaches to regulating UGC by examining different models of exemptions. This includes the specific exemption clause introduced in Canada and the open norm of fair use implemented in the United States.

The thesis seeks to describe and analyze the laws in the EU and explore foreign legal systems. Thus the thesis is based both on traditional dogmatic and comparative methods. The aim is to clarify and analyze the legal situation of UGC. The sources of this research are mainly based on legal textbooks and legal articles in the field of copyright law.

1. COPYRIGHT, AUTHORS' RIGHT AND THE OPEN NORMS

Copyright is not an absolute right; it is a limited right structured around limitations and exceptions. These exceptions and limitations allow the users of the copyrighted works the necessary freedom to interact with them without threatening copyrights purpose to an unwarranted degree. Thus these exceptions and limitations can be considered as balancing tools for an ideal copyright system. They are necessary for both cultural and social as well as economic and political purposes. Flexibilities exist in all parts of the copyright system, but the statutory limitations make up the main tools of flexibility.³

1.1. Flexibilities in the Author's right tradition

Similarly to any other systems of law, copyright law has to balance between the need for legal security and the need for fairness. One supports predictability that can be provided by precise legal provisions and the other supports a wide margin of judicial appreciation that is provided by open legal concepts. This balance is found in civil law by creating somewhat open legal provisions that make for the general rules, leaving little to no need to force the courts to use principles such as, for example, reasonableness and fairness. This is the reason why, with regards to copyright law, the civil law countries that are part of the authors' right tradition (in French: *droit d'auteur*) tend to have much more abstractly phrased codes and shorter copyright legislations than their common law counterparts. These differences in the legal systems can also be considered as the reason for the absence of general rules of fairness in the laws of the authors' right tradition. The open norms in the civil law system provided a flexibility that did not require a general rule of fairness to be codified.⁴ On the other hand, such a general rule can be found in the US, known as the fair use doctrine.⁵

³ Hugenholtz, Senftleben (2011), *supra nota* 1, p 6.

⁴ *Ibid.*

⁵ U.S. Code, Section 17 §107

Unfortunately, as copyright laws have been updated frequently in the past century, due to the changing society and the technological development as well as the needs of the European harmonization, the legislations of the authors' right tradition have lost a substantial part of their flexibility.⁶

Another important reason behind the differences in flexibility between the legal systems lies in how tolerant the systems are to unauthorized uses of copyrighted works, such as user-generated content, and the line of reasoning that is behind the authors' right tradition. In the case that protecting the author's rights is already actually a matter of fairness, the limitations set to the right must remain as exceptions. Because of this, the courts in the authors' right jurisdictions interpret the limitations set in the copyright legislation in a restrictive manner.⁷ With regards to the principles of EU law, a similar approach has been adopted by the Court of Justice of the European Union (hereinafter CJEU) in its decision in the Infopaq case. In the case, the ECJ stated that printing out an extract of 11 words, during a data capture process that included scanning a newspaper and converting it into a text file as well as electronically processing, storing and printing out the reproduction, constituted a copyright infringement under Article 2 and did not fulfill the requirements set out for transient works in Article 5(1) of Directive 2001/29.⁸ Meanwhile, the US copyright system is more tolerant to fair uses that support the goal of optimizing the spreading of creative works. The main reasoning behind it lies in the goal to promote the progress of useful arts, as is set in the US Constitution.⁹

The combination of this narrow approach to limitations and the economic theories that lobby for copyright to be viewed as property similar to that of tangible goods has strengthened the perception that the economic rights provided to copyright owners should be absolute. According to this concept, copyright owners should have complete control of their works, tolerating close to no free uses, just as the property rights in tangible goods are absolute, making uses without permission illegal.¹⁰

⁶ Hugenholtz, Senftleben (2011), *supra nota* 1, p 7.

⁷ *Ibid.*

⁸ CJEU, 16.7.2009, Infopaq International A/S v. Danske Dagblades Forening, C-5/08, ECLI:EU:C:2009:465, point 74.

⁹ U.S. Constitution, Article 1, Section 8.

¹⁰ Geiger, C. (2008). Flexibilising Copyright - Remedies to the Privatisation of Information by Copyright Law – *International Review of Intellectual Property and Competition Law*, Vol. 39(2), p 183.

1.2. Problems with open norms versus precise legislations

Even though a less flexible copyright system is favored by many economic theories and copyright owners, a fair use approach is similarly appealing to many. The Gowers Review has recommended for “creative, transformative or derivative works” to be counted as exceptions under copyright law.¹¹ Even the Dutch Government has multiple times stated that it is committed to initiate a discussion on a European style fair use rule at the European political level.¹² However, even though a European style fair use rule is attractive and has a lot of political potential, it is also systematically problematic. The concept of fair use has been established in the US common law system, simply adopting the concept to the legislations of the civil law-based authors’ right tradition could invite unintentional consequences as the system might reject it.¹³

Open and flexible norms often come with risks to the legal structure. Flexible and open norms allow courts to serve justice in a fairer manner and to provide better results in cases that the lawmakers have not predicted, however, the increased fairness will also end up reducing the legal security.¹⁴ This could lead to situations where a set standard could result to different outcomes occasionally. One could argue that an open norm or standard with many possible results are worse than a rule that selected one result for all cases, or possible a consistent compromise between the possible results. On the contrary, it can also be argued that a set rule will limit the permissible considerations.¹⁵ Precise rules are also often considered more efficient than open norms as the citizens will be more informed about their rights and obligations. This will allow the people to be more aware of their legal position already before the case is solved by a court.¹⁶ Thus, flexible norms in copyright law may initially allow users of copyrighted works more freedom, but it can also leave them uncertain of to what extent they dare to use the copyrighted content. While the open norms usually become more predictable when enough precedents have been created by the courts, this is a lengthy process that may take even over a decade to happen. Furthermore, in case judges repeatedly decide cases on case-based perceptions

¹¹Gowers Review of Intellectual Property December 2006. p 68. Accessible: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf, 19 March 2019.

¹² Hugenholtz, Senftleben (2011), *supra nota* 1, p 4.

¹³ *Ibid*, p 8.

¹⁴ *Ibid*.

¹⁵ Kaplow, L. (1992). Rules Versus Standards: An Economic Analysis. – *Duke Law Journal*, Vol. 42, No. 3, p 587.

¹⁶ Hugenholtz, Senftleben (2011), *supra nota* 1, p 8.

of justice, it may leave the system without a permanent framework and with no rational defining values.¹⁷

The constitutional objection against vague and open norms should also be noted, as political decisions will basically be delegated from the legislators to the judges which will lead to political decisions being made without the necessary democratic checks. This will also affect the costs of the lawmaking progress, while the flexible norms are cheaper to create for the lawmakers, the costs will be shifted to the judicial system. Furthermore, while the precise rules may be more costly to produce than open norms, the open norms are usually more costly for the citizens when they wish to decide what to create and how to protect themselves against claims on their works.¹⁸ The fear of uncertain legal costs may turn creators against the idea of creating new works with the risk of infringement claims. This would go against the goal of promoting creativity that the pursuit of flexibility in copyright initially aims for.

¹⁷ Leval, P.N. (1990). Towards a Fair Use standard. – *Harvard Law Review*, Vol. 103, p 1105.

¹⁸ Hugenholtz, Senftleben (2011), *supra nota* 1, p 8.

2. THE NEED FOR MORE FLEXIBILITY

The US Supreme Court has stated that the fair use doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁹ It can also be argued that EU’s lack of flexibility in its copyright laws does, actually, go against the fundamental right and freedoms, as well as, the social and economic interests it aims to promote. This is especially true when it comes to the exceptions and limitations set in the copyright law; they are often rather unbending and bound to a certain state of technology.²⁰ The current state of the copyright law in EU could be considered outdated in a time when social medias importance for social and cultural communications keeps increasing, as the law does not leave much room for user-generated content that includes already existing copyrighted works.²¹

The legal security that precise legislations provide, as described above, is also not absolute. In order to allow certain unauthorized uses that benefit general interests, many national courts, as well as the CJEU, have had to resort to norms and rights outside the copyright legislation.²² The cases described below show that courts have allowed copyright uses that are not included in the exceptions and limitations of the copyright law.

2.1. Dior v. Evora

Civil courts tend to be unwilling to use unwritten exemptions or override the rules of copyright. However, the Dutch Supreme Court has found that there has to be room to draw borderlines of copyright outside set limitations and exceptions. The court did not agree with the idea that the

¹⁹ U.S. Supreme Court, *Campbell v Acuff-Rose*, 510 U.S. 569.

²⁰ Hugenholtz, Senftleben (2011), *supra nota* 1, p 10.

²¹ Lee, E. (2008). Warming Up to User-Generated Content. – *University of Illinois Law Review*, Vol. 2008, No. 5, p 1548.

²² Hugenholtz, Senftleben (2011), *supra nota* 1, p 9.

exemptions should be narrowly interpreted since there had to be a way to balance the interests that are similar to the rationale behind the existing exemptions.²³

The case *Dior v. Evora* is about the use of copyright protected perfume bottles in an advertisement made by a retailer that was selling parallel-imported goods. As the advertisement did not fall into any of the existing exemptions, the court found room to move outside of the copyright system and its exemptions. This decision can be considered to open the door to a fair use defense similar to the one in the US. Furthermore, the case inspired the Dutch Copyright Committee to propose the introduction of an open exception, similar to fair use, into the copyright law. The aim of the exception was to allow for certain unauthorized uses that were subject to the three requirements introduced by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.²⁴

2.2. Germania 3

As stated above, the national courts often prefer not to go against the existing copyright rules. However, they may now and then find inspirations from the fundamental freedoms. Interpreting the rights and limitations of the copyright law in compliance with the fundamental freedoms, such as the freedom of expression, may provide increased flexibility to the copyright system.²⁵ One example of such an interpretation is the Federal Constitutional Court of Germany's decision in the landmark case *Germania 3*. The case was about a play containing over four pages of quotations from a pair of Berthold Brecht plays. Even though the quotations did not meet the strict test of the statutory quotation right, the Court found that the quotation right requires a broad application in compliance with the freedom of artistic expressions in Article 5(3) of the Constitution. Authors have to accept that their works will gradually enter the public domain and the exemptions of the copyright law must be construed correspondingly. Furthermore, the interpretation should balance the relevant interests in the case. In its decision, in *Germania 3*, the judge found that the economic rights of the rightsholder should be limited for the rights of the user to provide artistic commentary.²⁶

²³ *Ibid*, p 10.

²⁴ *Ibid*.

²⁵ *Expanding the Boundaries of Intellectual Property*. (2001). /Eds. R.C. Dreyfuss, D.L. Zimmerman, H. First. Oxford: Oxford University Press, p 350.

²⁶ Hugenholtz, Senftleben (2011), *supra nota* 1, p 11.

2.3. Sabam v. Netlog

When it comes to legal questions concerning user-generated content, one of the most common questions is in regards to the liabilities of social media platforms and other hosting providers, as well as, their need to use filtering technologies. This highly discussed question was brought to the CJEU in the case Sabam v. Netlog. In this case, Netlog, a social networking platform, offered the users with a possibility to make a globally viewable profile, where they could upload content. Sabam claimed that the users made unauthorized uses of material, such as music, belonging to them and thus sought to obtain an injunction that Netlog has to install a filtering system. The filtering system would apply to all uploads indiscriminately and then identify and block content belonging to Sabam. CJEU did not permit such systems but instead found that the case involved problems with fundamental rights. The court found leeway for Netlog in the need to balance intellectual property with other fundamental rights and freedoms.²⁷ CJEU concluded that an injunction for a filtering system would intrude on Netlog's freedom to conduct business because it would require the installation of permanent, complicated and costly filtering systems. CJEU also stated that it would also be in contradiction with the conditions set in Article 3(1) of Directive 2004/48, which does not allow the measures ensuring intellectual property to be excessively complicated or costly.²⁸ Furthermore, the system would also violate the Netlog users fundamental right to protection of their personal data, in accordance with article 8 of the Charter of Fundamental Rights of the European Union, and the freedom to receive or impart information without interference, in accordance with article 11 of the same charter.²⁹

²⁷ Senftleben, M., Angelopoulos, C., Frosio, G., Moscon, V., Pequera, M., Rognstad, O. (2018). The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform. – *European Intellectual Property Review*, No. 40(3). Sweet & Maxwell and its Contributors, p 151.

²⁸ CJEU, 16.2.2012, Sabam v. Netlog, C-360/10, ECLI:EU:C:2012:85, point 46.

²⁹ Senftleben, Angelopoulos, Frosio, Moscon, Pequera, Rognstad (2018), *supra nota* 27, p 152.

3. USER-GENERATED CONTENT

The lack of flexibility becomes especially clear when considering user-generated content. As what is known as Web 2.0 was developed and introduced, the use of the web changed from passive to active as every web user could easily become a creator of content. This active role of users online is the reason that user-generated content has become so popular and its creation a common practice online.³⁰ The term user-generated content stands for the enormous amount of new works published online, more often than not by non-professionals, that is usually based on previous works.³¹ It could be argued that UGC is a technological evolution of peoples tendencies to modify own expressions based on others', as appropriating and reusing others works to produce follow-up creativity is creativity in itself.³² The topic of UGC is a rather complex one as a general definition of it appears to be hard to develop, it may end up being too broad, or it may become too technical or narrow.³³

In the broad sense, all kinds of media published online, regardless of the content or if it is an adaptation of a previous work, is part of UGC.³⁴ From a technical perspective, "User" is a person using the computer and the internet. This usually means an amateur creator online, but it could also be a professional within the same scope of activity.³⁵ It should also be noted that, when considering content shared online, an amateur can also easily be considered as a professional if the only difference between the two is the size of their works public. Thus UGC makes it increasingly harder to differentiate between amateurs and professionals. The term "Generated" means, in the case of UGC, the creation or copy of works online, as well as their uploads. "Content", on the

³⁰ George, Scerri (2007), *supra nota* 2, p 4.

³¹ Gervais, D. (2008). The Tangled Web of UGC: Making Copyright Sense of User-Generated Content. – *Vanderbilt Journal of Entertainment and Technology Law*, Vol. 11, No. 4, p 843.

³² Frosio, G.F. (2014). Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?. – *The John Marshall Review of Intellectual Property Law*, Vol. 13, No. 2, p 345.

³³ Gervais (2008), *supra nota* 31, p 845.

³⁴ *Ibid*, p 841.

³⁵ Soliman, C. (2012). Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing. – *Albany Law Journal of Science and Technology*, Vol. 22, No. 2, p 286.

other hand, means creative work or expression of creativity.³⁶ The Organisation for Economic Co-operation and Development has, in its report commissioned in 2007, recognized that UGC includes three characteristics that define the term. The work is 1) an online publication 2) with creative effort 3) that is created outside of the common professional practices. These three characteristics are all-important and fit for both areas of UGC: works that are original and works that are adaptations of pre-existing works.³⁷

Meanwhile, the European Commission has decided to focus only on the latter area of UGC, limiting the definition to content that is built upon pre-existing works with or without authorization from the rightsholder, in other words, user-adapted content. The restriction is not a problem as long as it is clear that this only represents a part of UGC, which as explained above, is a much broader phenomenon.³⁸ The limitation to the definition makes sense as user-adapted content without prior authorization is the area of UGC that struggles in the existing copyright system.³⁹

3.1. UGC in the EU

When considering UGC in its limited definition, namely the adaptations of copyrighted works without authorization, such content conflict with the economic rights granted to the authors of the original works. Furthermore, it is also in conflict with the moral rights granted to authors. Because of the increasing importance of online hosting providers and the massive amount of content uploaded through them, it is also important to consider the liabilities they face.

3.1.1. Economic rights

The economic rights involved in UGC are mainly the reproduction right set out in Article 2 and the right of communication to public set out in Article 3 of the Information Society Directive 2001/29/EC (hereinafter ISD). Article 2 provides copyright owners with “the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in

³⁶ Hetcher, S. (2008). User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership. – *Vanderbilt Journal of Entertainment & Technology Law*, Vol. 10, No. 4, p 871.

³⁷ OECD. (2007). *Participative Web: User Created Content*, p 8. Accessible: <https://www.oecd.org/sti/38393115.pdf>

³⁸ Erickson, K. (2014). User Illusion: Ideological Construction of ‘User-Generated Content’ in the EC Consultation on Copyright. – *Internet Policy Review*, Vol. 3, No. 4, p 3.

³⁹ Chuang, I. (2009). Be Wary of Adding Your Own Soundtrack: *Lenz v. Universal* and How the Fair Use Policy Should be Applied to User Generated Content. – *Loyola of Los Angeles Entertainment Law Review*, Vol. 29, No. 2, p 164.

any form, in whole or in part”.⁴⁰ This is a very broad definition of the reproduction that covers nearly any use of the copyright protected work, both through analogical and digital means.⁴¹ Article 3, on the other hand, provides copyright owners with the exclusive right of making the work available for the public by any means. This includes the right of prohibiting others from making their works available for the public.⁴²

Because of this, most national laws state that any adaptations of pre-existing works are subject to authorization from the copyright owner. This implies that it is necessary to obtain the authorization from the author of the copyrighted work in order to lawfully create and share derivative works. This is thus the most conflicting right as the European Commission defines UGC as content built upon pre-existing work without the consent of the legitimate copyright owner. Furthermore, since the definition is not harmonized through the EU, the situation of UGC becomes even more complex.⁴³

3.1.2. Moral rights

Evaluating UGC’s effect on moral rights is even further complicated. The affected moral rights are the right of integrity and right of paternity. The right of integrity implies the right to oppose any derivations of the work that could have negative effects on the creator’s name and reputation. The right of paternity, instead, implies the right of the creator to be cited.⁴⁴

There are two main problems to consider in moral rights when considering changes to the copyright system for better regulation on UGC. Firstly, moral rights are not harmonized throughout the EU. Secondly, moral rights are virtually impossible to waive or transfer; thus the enforceability of them may cause systemic failure, as the authors may just object to UGC with the reasoning that it violates their moral rights.⁴⁵

⁴⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22/06/2001), Article 2.

⁴¹ Monteleone, A.G. (2016). *User-Generated-Content and Copyright: The European Union Approach*, p 8. Accessible: <https://ssrn.com/abstract=2922225>, 17 March 2019.

⁴² Directive 2001/29/EC, *supra nota* 40, Article 3.

⁴³ Monteleone (2016), *supra nota* 41, p 8.

⁴⁴ *Ibid.*

⁴⁵ Scassa, T. (2013). Acknowledging Copyright’s illegitimate Offspring: User-Generated Content and Canadian Copyright Law. – *The Copyright Pentalogy. How the Supreme Court of Canada Shook the Foundations of Canada*, Ottawa: University of Ottawa, p 443.

3.1.3. Hosting providers liability

Ever since basically anybody can post content on the internet, an enormous amount of unlawful content has been shared online, including illegal copies of movies and other copyright protected works. Usually, when content is shared online, it is done through intermediaries, such as online service providers (hereinafter OSPs), that function for the transmission of the content, these include websites for video uploading and streaming platforms, in other words, host providers. Without access and host providers, the internet would not function as it does today. These OSPs are also the ones that are best able to control the content shared online. This may be through interventions during allegedly illegal actions or through preventative measures, such as filters or other automated control software. For these reasons, the liability set on OSPs is also of utmost importance.⁴⁶

Under civil law, the causality of the OSPs must be established. There has to be a connection between the services carried out to the third parties and the infringements. This approach has been influenced by the common law theory of secondary liability for infringements of intellectual property and defamation. It is, however, important to note that the message carried is not the responsibility of the messenger under civil law doctrine.⁴⁷ Because of the difficulty to establish the connection of the functioning of the online service providers and the damage caused by the posted unlawful content, the safe harbour approach has been adopted in the US Law with the introduction of the Digital Millennium Copyright Act (hereinafter DMCA).⁴⁸ EU has also adopted a similar approach with the introduction of the e-Commerce Directive (Directive 2000/31/EC), which establishes an immunity regime for the intermediaries regarding illegal content on the internet.⁴⁹ The e-Commerce Directive governs all types of liability with a horizontal approach, unlike the system set in place in the US, where different legislations are separately addressed.⁵⁰

⁴⁶ *The Responsibilities of Online Service Providers*. (2017). /Eds. M. Taddeo, L. Floridi. Springer International Publishing, p 43.

⁴⁷ *Ibid.*, p. 44.

⁴⁸ Nathenson, I.S. (2009). Looking for Fair Use in the DMCA's Safety Dance. – *Akron Intellectual Property Journal*, Vol. 3, No. 1, p 122.

⁴⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000).

⁵⁰ Taddeo, Floridi (2017), *supra nota* 46, p 45.

3.2. Licensing system and the Copyright Directive

In “On Content in the Digital Single Market”, a communication published by the European Commission in December 2012, the Commission recognized that the Internet is an important tool for content creation and distribution. Furthermore, the potential of the internet is also used for many new business models; thus the Commission has set as one of its objectives “to ensure that copyright and copyright-related practices, such as licensing, stay fit for purpose in this new digital context.”⁵¹ The tools for this project were decided in a dialogue with stakeholders because the solution was aimed to be industry oriented and reasonable for the parties involved. Legislative intervention was set as a remaining tool for the case that a more flexible approach would not be attainable. The dialogue was considered as an incubator for an innovative win-win solution.⁵²

The “Licensing for Europe” project was introduced as “a process (that) will seek to tap the potential and explore the possible limits of innovative licensing and technological solutions in making EU copyright law and practice fit for the digital age”. The plan included four groups of discussion, based on the areas of uncertainty in copyright and digital technology: Cross-border access and the portability of services; UGC and licensing for small-scale users of protected material; Audiovisual sector and cultural heritage institutions; and Text and data mining.⁵³ The stakeholders could, however, not come to an agreement in the discussion about UGC, as they found it impossible to develop a common position regarding the discussed problems or aimed results.⁵⁴

Nevertheless, the legislators of EU have pushed forward the licensing system, by creating the highly controversial Directive on copyright in the Digital Single Market. The final version of the text was agreed upon 13th February 2019. The licensing solution has for long been strongly supported by authors, as well as collective management and broadcasting organizations.⁵⁵ The approach appears to be a result to the incentive role that the licensing system has on both copyright owners and users. The incentive theory encourages copyright owners to engage in licensing and user to purchase the license.⁵⁶ This approach will ensure that copyright owners have their rights

⁵¹ European Commission. (2012). *On content in the Digital Single Market*, Brussels, p 2. Accessible: <https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-789-EN-F1-1.Pdf>, 17 March 2019.

⁵² Monteleone (2016), *supra nota* 41, p 4.

⁵³ European Commission (2012), *supra nota* 51, p 3.

⁵⁴ Monteleone (2016), *supra nota* 41, p 4.

⁵⁵ *Ibid*, p 9.

⁵⁶ Lev-Aretz, Y. (2015). The Subtle Incentive Theory of Copyright Licensing. – *Brooklyn Law Review*, Vol. 80, No. 4, p 1363.

protected and that piracy is decreased. Furthermore, licensing grants the rightsholders the ease to decide whether they participate to the system according to their personal evaluations.⁵⁷

One concern raised in the discussions about the licensing system is the allocation of costs of the licensing. In case the costs are too high or only allocated on the end users, it would discourage the users or possibly turn them back to piracy and unauthorized uses.⁵⁸ The new Directive on copyright in the Digital Single Market (hereinafter DSMD) intends to solve this concern by allocating the costs on the online content sharing service providers, including host providers, by withdrawing the limitations set to their liability in the e-Commerce Directive.⁵⁹ The abolishment of the immunity regime is the main reason for the criticism the Directive is receiving from both creators of UGC and online service providers.

The requirements and conditions set on the OSPs are in many parts unclear or unreasonable. First, the OSPs must obtain an authorization, for instance with a license agreement, for any copyright protected works that are uploaded.⁶⁰ For big sites like YouTube, this would basically mean virtually all copyright protected works. Second, the OSPs, excluding the new and small ones, must do their best efforts to ensure that all unauthorized works that include copyrighted materials, registered on the platform, are made unavailable on the platform.⁶¹ This will force the OSPs to deploy uploading filters that are expensive and often error-prone. Last, in case the courts find that OSPs are lacking in their efforts of obtaining authorization or making unauthorized content unavailable, they will be directly liable for the copyright infringements.⁶² This could lead to OSP blocking any content that includes unlicensed materials in the EU Member States as each of these uploads are essentially awaiting court cases. Thus, the Article could lead to massive amounts of censorship which in turn will affect the people fundamental right of expression.

DSMD also leaves much ambiguity on what happens to content before OSPs receive notice from the copyright owners. Combined with the risk of liability, this will result in the OSPs, like Youtube, blocking content because they have to minimize their legal risks and stay on the side of caution. Specifically, the Directive is unclear on the role of the copyright owners, when it comes to

⁵⁷ Monteleone (2016), *supra nota* 41, p 10.

⁵⁸ *Ibid.*

⁵⁹ Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Article 17 §3

⁶⁰ *Ibid.*, Article 17 §1.

⁶¹ *Ibid.*, Article 17 §4 (a)

⁶² *Ibid.*, Article 17 §3-4

providing the necessary level of detail to identify their content, and on what kind of content the OSPs need to have licenses for, whether it is videos, pictures, sounds, paintings or something else. With this uncertainty, there is no way for the OSP to know whether all the rights are covered on the time of uploading.

Furthermore, DSMD faces problems with fundamental rights and previous legislations, as stated earlier in the case *Sabam v. Netlog*. Forcing host providers to install costly uploading filters would intrude on their freedom to conduct a business, as is safeguarded in Article 16 of the Charter of Fundamental Rights, and also be in contradiction with the conditions set in Article 3(1) of Directive 2004/48, which states that the measures, procedures, and remedies used to enforce intellectual property shall not be too complicated or costly.⁶³⁶⁴ The upload filter would also violate the online users fundamental rights as can be seen in the statement of CJEU in the prior mentioned case, where the court stated that, if national courts forced OSPs to install the filtering systems, they would not be respecting the requirement that intellectual property should be in fair balance with the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information.⁶⁵ With this case law in mind, it is hard to find the measures set in Article 17 of the DSMD to be compatible with the fundamental rights and freedoms guaranteed in EU. These worries are further supported by the fact that the upload filters tend to be error-prone, a fact that is also acknowledged by the Impact Assessment accompanying the Commission Proposal itself. Content recognition technologies keep resulting in false positives, which makes the system a problem for legal UGC.⁶⁶

The approach introduced with Article 17 of DSMD ignores the approach of the CJEU and removes the liability safe harbour, set in the e-Commerce Directive. This will have a spreading effect that will be felt in all relevant services, such as social media platforms, online marketplaces and even online databases of scientific papers. The uploads filters necessary in the directive have not advanced to the state that they could separate the legal content that is in accordance with the exceptions and limitations set to copyright in EU. The currently existing systems are costly and

⁶³ Senftleben, Angelopoulos, Frosio, Moscon, Pequera, Rognstad (2018), *supra nota* 27, p 151.

⁶⁴ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), Article 3 §1

⁶⁵ CJEU, *supra nota* 28, point 51.

⁶⁶ Senftleben, Angelopoulos, Frosio, Moscon, Pequera, Rognstad (2018), *supra nota* 27, p 151-152.

will lead to an advantage for the biggest platform operators, which in turn will lead to further market concentration.⁶⁷

⁶⁷ Senfleben, Angelopoulos, Frosio, Moscon, Pequera, Rognstad (2018), *supra nota* 27, p 161-162.

4. ALTERNATIVE SOLUTIONS

Considering the setbacks that the licensing system and the new liability regime for host providers introduced, in the new directive, when it comes to the users' rights, censorship, and the fundamental rights, it would seem better to consider the two other approaches, as mentioned earlier, for the regulation of UGC. Both of the approaches require the addition of a new copyright exception, either as a specific clause, like the one used in Canada, or a general open clause, like the fair use doctrine used in the US.

4.1. Canada and the specific clause model

Canada has set out a specific exception for UGC in its copyright system with the introduction of the Copyright Modernization Act in 2012. According to Article 29.21 of the Act, the use of an existing work or other subject-matters in the creation of a new derivative work is not an infringement of copyright, provided that it is done solely for non-commercial purposes, the creator of the existing work is mentioned, the new work does not have a substantial adverse effect on the existing work, and the new derivative work is capable of copyright protection.⁶⁸

The conditions set in the clause are rather strict. Scholars have recognized that the conditions, specifically the requirement that the new work is capable of receiving copyright protection, can cause distortion to the copyright system. A creation can be regarded as either transformative enough to be considered an original work on its own or alternatively, the same creation can be regarded as derivative and thus a form of creation not explicitly permitted by copyright law. It has been argued that the introduction of a specific exception does not solve the issue of user creativity but rather it would just cause derogative treatment and further reinforce the creative hierarchy that already exists in copyright law.⁶⁹ What is built as an exception for users is, in fact, a rule for the

⁶⁸ Copyright Modernization Act, S.C. 2012, c. 20, Article 29.21.

⁶⁹ Meese, J. (2015). User Production and Law Reform: A Socio Critique of User Creativity – Sage Journals: Media, Culture & Society, Vol, 37, No. 5, p 762.

authors. Many scholars have been unsatisfied with the fact the legal doctrine does not take on an investigation of the position of creativity within the law for an effective solution but rather tries to fix the new cultural change in an outdated way.⁷⁰ Furthermore, because of the requirement of solely non-commercial purposes, the new creators, who may use their works in accordance with the provision, will have limited rights compared to traditional creators.⁷¹

Because of these reasons, it may seem as an unattractive option to introduce a specific exception based on the Canadian example to EU. It appears to be a purported regulation of the new way of creation that, in fact, does not provide online creators with appropriate protection.⁷²

4.2. US Fair Use model

Many online host providers have suggested the introduction of a general clause, such as a European-style fair use clause, based on the model of the US fair use doctrine.⁷³ Section 17 U.S.C §107, permits unauthorized uses of copyright protected works if the use is a fair use. The U.S. Code states that in order for copyrighted works to be considered as fair use, the following list factors must be considered:

- “(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”⁷⁴

The first factor is two parted. The first parts requires to determine whether the work is transformative while the function of the second part is to inspect if the work is commercial. The Supreme Court in the Campbell case has stated that for a work to be transformative, it must add

⁷⁰ *Ibid*, p 765.

⁷¹ Scassa (2013), *supra nota* 45, p 442.

⁷² Yu, P.K. (2014). Can the Canadian UGC Exception Be Transplanted Abroad?. – *Intellectual Property Journal*, Vol. 26, p 203.

⁷³ Erickson, (2014), *supra nota* 38, p 9.

⁷⁴ U.S. Code, *supra nota* 5.

“something new, with a further purpose or a different character, altering the first [work] with new expression, meaning or message”.⁷⁵ UGC is often created for the purpose of entertainment, besides the core and most common purpose, they often also serve additional purposes like reviews or criticism. Thus, they are usually considered transformative. To determine the second part of the factor, the focus is on whether the new creator receives profit from exploiting the copyrighted work. However, unlike in the specific clause introduced in Canada, receiving profit for the new work doesn’t necessarily remove the protections of fair use.⁷⁶

To determine the second factor, the nature of the copyrighted work, the question is whether the uploaded video is considered a creative work or a factual work, as the factual works have a more enormous scope of fair use.⁷⁷ UGC can often be considered both, it brings forth the new creators creativity but, at the same time, many works present relevant information to customers. Example of such works are reviews of older works that function as criticism.

In accordance with the court statement in *Campbell v. Acuff-Rose Music*, the third factor “asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole’ are reasonable in relation to the copying’s purpose.”⁷⁸ When it comes to UGC, they often take parts of copyrighted materials and modify them; thus they tend to fill the low quantity requirements of this factor. In case the viewer can experience the true quality of the copyrighted work, the work in question is more of a copy than an adaptation and thus falls outside of the UGC that needs protection.

The final factor considers is the effect that new works has on the potential market or value of the original work. It is thus based on the harm that the new work may cause as a market substitution. Markets to consider are both the current and potential markets where the copyright owner could develop or license for others to further develop the works.

⁷⁵ Bartholomew, T.B. (2015). The Death of Fair Use in Cyberspace: Youtube and the Problem with Content ID. – *Duke Law & Technology Review*, Vol. 13, p 74.

⁷⁶ Hunt, K. (2007). Copyright and Youtube: Pirate’s Playground or Fair Use Forum. – *Michigan Telecommunications and Technology Law Review*, Vol. 14, No. 1, 215.

⁷⁷ Bartholomew (2015), *supra nota* 75, p 75.

⁷⁸ U.S. Supreme Court, *supra nota* 19.

In the Campbell case, the Supreme Court stated that there does not exist a protectable derivative market.⁷⁹ While the fair use doctrine has not been developed exclusively for UGC, the US Courts have appeared rather friendly of UGC in their application of the exception.⁸⁰

The court's decision in the case *Lenz v. Universal Music Corp* can be considered to constitute a cornerstone for a new approach to UGC. The case was brought after Universal Music, as the owners of the copyright, had used the provisions of notice-and-take-down to remove a video, from YouTube, of a toddler dancing to a song from Prince.⁸¹ The Federal District Court ruled that it is necessary for the rightsholder to consider if the Fair Use exception applies before he orders a take down on a video available online.⁸² As a defense, Universal Music argued that considerations regarding the fair use exception are unpredictable and may end up wasting time when an infringement requires a fast response. Furthermore, Universal Music argued that fair use is only an excused infringement of copyright instead of an authorization by law, and that fair use should be considered as a defense against claims instead of an exception to the copyright.⁸³ In spite of the fact that this approach is often considered as the traditional application of fair use, it is not entirely correct, since fair use is an essential quality of a work, even though it can only be used as a defense after an infringement is claimed. The use of pre-existing works is either fair use or not, notwithstanding when the question of fair use is raised.⁸⁴ Because of this, the 9th Circuit Court of Appeals stated its opinion that "Copyright holders cannot shirk their duty to consider - in good faith and prior to sending a takedown notification - whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law".⁸⁵

Considering this approach from the US Courts, many US scholars have agreed that the fair use doctrine is an efficient tool for regulating UGC, thus leaving no need for a specific exception clause.⁸⁶ The introduction of a European-style fair use clause has been discussed often but has yet

⁷⁹ *Ibid.*

⁸⁰ Monteleone (2016), *supra nota* 41, p 12.

⁸¹ Blythe, S. (2019). Freedom of speech and the DMCA: abuse of the notification and takedown process. – *European Intellectual Property Review*, No. 41(2). Sweet & Maxwell and its Contributors, p 75.

⁸² Chik, W.B. (2011). Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law. – *The John Marshall Review of Intellectual Property Law*, Vol. 11, No. 2, p 251.

⁸³ Chuang (2009), *Supra nota* 39, 177.

⁸⁴ Ashley, D.E. (2009). The Public as Creator and Infringer: Copyright Law Applied to the Creators of User-Generated Video Content. – *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 20, No. 2, p. 597.

⁸⁵ U.S. Court of Appeal for the Ninth Circuit, *Lenz v. Universal Music Corp.*, 801 F.3d 1126.

⁸⁶ Perlmutter, S. (2014). Making Copyright Work for a Global Market: Policy Revision on Both Sides of the Atlantic. – *Columbia Journal of Law & the Arts*, Vol. 38, No. 1, p 63.

so far been unimplemented. This is mainly because the introduction of an open norm into the copyright system in many civil law countries could bring along many drawbacks and risks as explained earlier.

CONCLUSION

This thesis aimed to clarify the lack of flexibility in the European copyright laws and find out if there is an actual need for more flexibility. The thesis further aimed to see how the lack of flexibility affects user-generated content and if the proposed licensing system is an appropriate solution in regulating the phenomenon. Lastly, the different solutions used abroad were examined and considered.

Copyright, as any other system of law, must seek a balance between the need for legal security and fairness. It is also a right that is structured around limitations and exceptions that need to evolve to keep up with advances in technology. Unfortunately, the changes made to copyright law in the EU has made it lose much of its flexibility. The lack of flexibility in the EU also becomes clear, when comparing it with different copyright systems, especially those of the common law origin. This lack of flexibility is not easily fixed, as the civil law-based copyright system, based on the authors' right tradition, may not work with general open norms. The difference in flexibilities is also affected by how tolerant the different traditions are to unauthorized uses. If intellectual property is to be regarded as any other property, the owner should have full control over it.

Nonetheless, there are certain uses of copyrighted materials that should be allowed for the benefit of general interest. Courts have had to resort to norms and rights outside of the copyright legislation, in order to allow those certain uses or in order to find a balance between fundamental rights. This proves that there is a real need for more flexibility in the copyright legislation itself.

UGC seems to be one category of content that is affected by the lack of a general copyright exemption the most. UGC, as a phenomenon where anybody can create new content based on earlier works, is understandably in need of restrictions. However, the current system fails to properly protect derivative and transformative works that can be considered fair uses, such as parodies. The important factors to consider when regulating UGC are the original creator's economic and moral rights, as well as the liabilities that online service providers face.

Because of the growth of the Internet and UGC, the legislators of the EU needed to find a way to regulate the phenomenon. As a solution, a licensing system was pushed forward with the new Directive on copyright in the Digital Single Market. The Directive will change the safe harbour afforded to OSPs by the e-Commerce Directive, making the platforms liable for content uploaded on them by the users. The new Directive has been a controversial topic of discussion as the requirements set on OSPs are in many parts unclear or unreasonable.

The requirements will also force the OSPs to deploy uploading filters to their platforms, that make any unauthorized uses of copyright blocked and unavailable to the public. This will, in turn, affect the peoples fundamental right of expression and freedom to receive or impart information. Because the current upload filters are costly and indiscriminatory, it will also affect the OSPs freedom to conduct business, as well as the users and uploaders right to protection of personal data, as the CJEU has stated in the case *Sabam v Netlog*. Furthermore, as acknowledged in the Impact Assessment accompanying the Commission Proposal itself, these upload filters tend to be error-prone, resulting in false positives. Because of the possibility that even legitimate content could be blocked, the intellectual property rights of anyone uploading content is at risk. It is thus apparently clear that the licensing system, as it is introduced by the DSMD or more precisely Article 17, is not an appropriate solution for the regulation of UGC.

Alternative approaches to consider are the specific clause model introduced in Canada and the general open clause used in the US. The Canadian approach introduces a rather strict exception. It has been argued that the clause does not solve the issue of user creativity but rather causes derogative treatment and supports an already existing creative hierarchy. It can be considered to try to fix the cultural change in an outdated way. Furthermore, because of its non-commercial requirement, it does allow limited rights to new creators, when compared to traditional ones.

There is thus reason to consider the US model, with its fair use clause, instead. Because of the nature of UGC, the content tends to fulfill the vague requirements set in the clause as long as they are derivative and transformative, in other words, deserving of protection in the first place. This only leaves the problem of integrating the open norm to the civil law based system, which could be achieved by narrowing it down. Another option would be to follow the Dutch Copyright Committees proposal, which was inspired by the *Dior v. Evora* case, to introduce a fairly open exception to allow certain unauthorized uses that fulfill the requirements of the Berne three-step

test. This could work as a European styled statutory exception for transformative and derivative works and solve the problems that the adoption of the common law-based fair use doctrine could create. These options would need to be combined with a notice and takedown procedure, such as the ones introduced by the e-Commerce Directive or the DMCA, to ensure the rights of the original creators.

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