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ADDRESSING FLEXIBILITY ISSUES IN THE EU COPYRIGHT LAW THROUGH APPLICATION OF US DOCTRINE OF FAIR USE

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ABSTRACT

The choice of this specific topic stems from the need for flexibility in the field of European Copyright Law. Intellectual Property similarly to other major fields of law experienced a faze of rapid development throughout the course of the last 100 years. New concepts and ideas came into existence. As it usually happens, progress not only presented solutions to old longstanding problems, but also posed new questions to be answered. One of the complications brought about by IP Law developments is the increased complexity of establishing intellectual property rights and copyright infringements in various types of works. This problem is especially relevant to works/ user generated content created and published using the Internet. Content creators based on Internet platforms such as "YouTube" and "Twitch" as well as various contemporary artists, sculptors and writers face these difficulties constantly. In recent years, more and more authors are forced to fight increasingly tough battles in hopes of being able to preserve intellectual property rights in the works of their own making. Some of them are lucky enough to be blessed with a large variety of legal tools to be used, others, on the other hand, have to settle for whatever limited means of defence are available to them by their national legislations. Unfortunately, European countries ended up with a short end of the stick when it comes to the means of protection against copyright infringement claims.

The purpose of this research is to outline, define and deliberate on the main issues with the European Copyright System, and draft our own version of the potential solution. This thesis will try to answer three specific questions: 1) Why do current issues exist in European Copyright Law to begin with? 2) Would European Copyright Law benefit from the influence of the US Doctrine of Fair Use? 3)What is the most concise and easy way to implement solutions to these issues? Author will do so by diving into existing copyright protection laws of the European Union and a select group of European countries, as well as the US Doctrine of Fair Use and comparing/contrasting relevant case law.

INTRODUCTION

In this thesis the author will examine both sides of the spectrum of copyright protection law - legal certainty and security approach as well as legal flexibility approach. Legal certainty and security are the pillars of the copyright protection laws in a great number of civil law jurisdictions, primarily those of European countries. Focus will predominantly be on the copyright laws of the EU member states, in addition to the Union wide copyright laws. US Copyright Law and its doctrine of Fair Use will be used as a reference model of a highly flexible copyright law. Following the comparison of the approaches, the author will dive into the relevant case law to outline the issues of EU copyright law, as well as show how Fair Use treats similar cases. Once it is known what makes Fair Use defence "work" it will be possible to project it on the contemporary European copyright laws and develop a possible method of increasing their legal flexibility.

This research does not aim to "revolutionise" the field of copyright protection law. The purpose of this research is to examine possible ways for introducing more legal flexibility to the extremely rigid construct that is European Copyright Law. Author's contribution in this thesis would be the research into, and comparison of copyright infringement case law, domestic copyright laws and fair use policies of different jurisdictions as well as making suggestions that would possibly help resolve the standing issues and increasing flexibility in the EU copyright law. This thesis will try to answer three specific questions: 1) Why do current issues exist in European Copyright Law to begin with? 2) Would European Copyright Law benefit from the influence of the US Doctrine of Fair Use? 3)What is the most concise and easy way to implement solutions to these issues?

In the contemporary world it is impossible to imagine that there are many people who have never heard of popular online platforms such as YouTube or Twitch. With the abundance of countless types of content available, it could be argued that there is a niche for everyone. The more invested the person becomes in this topic, the more obvious it becomes that there is a serious problem plaguing a substantial amount of content creators - copyright infringement claims. These claims prevent the creator from reaping the benefits of their works, such as the ability to receive ad revenue from videos on YouTube, or the work is made completely unavailable for the public. For this purpose, online content-sharing providers apply automatic content recognition technologies. Even though

they operate with mechanical precision they are still bound to make mistakes and produce inconsiderate, unjustified, wrong decisions based exclusively on superficial facts and not the circumstances[1]. As will be examined later, to make the matters worse for the content creators and artists, current copyright legislation in the EU is built in a way that potentially allows for its abuse by one side, without providing sufficient means of defence to another[2].

In addition to the problem itself, the online generated content presents a solution - application of the US Doctrine of Fair use as a possible method of defense against copyright infringement claims. Doctrine's structure maximizes flexibility which in turn allows for arguably a better tool to be used against copyright infringement allegations. Fair use is applicable both to the digital content and physical works as evident from the recent case law in the US[3].

But what is Fair Use, and what is the viewpoint on this concept in contemporary international intellectual property law? Before the author indulges in the analysis of the certain national Fair Use definitions, first the concept should be taken at its face value to see how it relates to the established copyright law adopted and approved by World Intellectual Property Organisation (WIPO) and World Trade Organisation (WTO).

Copyright Limitations in both WIPO Copyright Treaty of 1996 and WTO's TRIPS Agreement of 1994 are based on an older concept introduced in the revised version of the Berne Convention for the Protection of Literary and Artistic Works (henceforth referred to as Berne Convention) in 1967. The so-called Berne Three-Step Test became the basis of the copyright exceptions provisions of various international treaties, as well as several pieces of the contemporary EU Legislation, including but not limited to the EU Copyright Directive, EU Rental Directive, EU Computer Programs Directive, etc.

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[1] Kroll, J. A., Huey, J., Barocas, S., Felten, E. W., Reidenberg, J. R., Robinson, D. G., & Yu, H. (2017). ACCOUNTABLE ALGORITHMS. University of Pennsylvania Law Review, 165(3), 633–705.

[2] Sganga, C., & Scalzini, S. (2017). From abuse of right to European copyright misuse: a new doctrine for EU copyright law. IIC-International Review of Intellectual Property and Competition Law, 48(4), 405-435.

[3] Court decision, 23.08.2017, Matt Hosseinzadeh v. Ethan Klein and Hila Klein, No. 16-CV-3081

Even though Fair Use deviates from the general structure of the Three Step Test in favor of a less vague, more defined approach to copyright limitations, it is still at its core extremely similar to the original. Due to the aforementioned deviations the compatibility of the two concepts was put under scrutiny. Yet, these assumptions do not have any legal basis behind them. The United States of America, origin country of the Doctrine of Fair Use, is a signatory to the TRIPS Agreement, WIPO Copyright Treaty and Berne Convention. This together with the fact that the US national copyright law as well as aforementioned treaties had stayed consistent since their adoption[4], makes any doubts regarding compatibility meaningless. The two concepts were compatible previously and stayed compatible to this day.

[4] Samuelson, P., & Hashimoto, K. (2018). Is the US Fair Use Doctrine Compatible with Berne and TRIPS Obligations?. *Universalism or Pluralism in International Copyright Law (Kluwer Law International, Information Law Series), UC Berkeley Public Law Research Paper*.

1. US APPROACH TO COPYRIGHT LIMITATIONS - DOCTRINE OF FAIR USE

1.1 Fair Use in US Copyright Law

Fair use is not as customary to the copyright policies as more subtle adaptations of the Berne Three-Step Test or lists of rigid limitations. Presently, there globally exist only six countries that adopted it. US legislation was the first to introduce the concept of Fair Use as a legal defense against copyright infringement claims. Fair Use is defined in Section 107 of the Copyright Law of the United States of America. Similarly, to the Copyright Laws of most Civil Law countries, Fair Use doctrine introduced the system of copyright limitations, but unlike them these limitations are not as rigid and grant a greater degree of freedom. The fairness of any given use is decided by the court on a case-to-case basis. The decision is made upon subjecting the case to 4 factor analysis, somewhat similarly to the three-step test of Berne convention. Four factors of Fair Use are defined in the US Copyright Law as follows:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a 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.[5]

It is impossible to conduct meaningful quantitative research on Fair Use, due to the nature of the doctrine and 4 factor analysis. Unlike the Copyright legislation of Civil Law countries that focus on legal certainty and security, Fair Use is based exclusively on the

[5] Copyright Law of the United States and Related Laws Contained in Tıtle 17 of the United States Code, Article 107

concept of legal flexibility and has an open-ended approach to copyright. The EU Copyright Law has a rigid list of copyright limitations which in turn makes it far easier to systemize the criteria required to avoid copyright infringement. Unfortunately, it is not as convenient for Fair Use, the degree of freedom and flexibility it grants comes with a negative effect of decrease in legal certainty. As evident from case law it is exceedingly difficult to predict the outcome of any copyright infringement case involving Fair Use. The outcome depends on the interpretation of the four factors by any given group of judges in any given court.

Previously legal scholars such as Barton Beebe, Pamela Samuelson and Matthew Sag made attempts at systemizing the probability of the successful application of Fair Use based on the fulfilment of each of four factors and even managed to find certain patterns in unpredictable world of Fair Use case law[6]. Unfortunately, it is extremely improbable to acquire any quantitative data for the four factors of Fair Use, with the sole exception of the third factor - "*The amount and substantiality of the portion used in relation to the copyrighted work as a whole".* Though practicality of such data would be questionable. Use of the same portion of the original work in two different new works will not necessarily be fair in both instances, as it will generally depend on their nature. For example, using most of the original work to make a parody can be considered "fair", but the use of a few paragraphs of the same work in the news article can be considered copyright infringement.

Fair Use is not a static concept, it develops and evolves over time[7]. The history of Fair Use is not the history of changes to the doctrine, rather it is the history of presumptions of judges. By the virtue of the research of scholars mentioned above and Neil Natanel's deliberation on said research, it is possible to visualise a comprehensive Fair Use development timeline. The most important historical trends are connected to the three landmark Fair Use cases: Sony Corp. of America v. Universal City Studios (henceforth referred to as Sony Corp Case), Inc; Harper & Row v. Nation Enterprises (henceforth

[6] Netanel, N. W. (2011). Making sense of fair use. Lewis & Clark L. Rev., 15, 715. pp. 717 - 718

[7] Burk, D. L. (2019). Algorithmic Fair Use. U. Chi. L. Rev., 86, 283. pp 297 - 298

referred to as Harper & Row Case); Campbell v. Acuff-Rose Music, Inc. (henceforth referred to as Campbell case).

Sony Corp case will be examined first. The whole case as a whole can be summarised and condensed into the question of whether the users of the VTRs (Video Tape Recorders) recording works disseminated by the way of the public commercial broadcasts can be considered to be under Fair Use. Universal City Studios, owner of the copyright rights in part of the works recorded using VTRs, claimed that said recordings constituted copyright infringement as well as that Sony Corp of America, the manufacturers of the VTRs, were also liable for the infringement.[8] In the end, judges' decision stated that any unauthorised commercial use of copyright protected materials must presumptively be considered unfair.[9]

This decision had a significant impact on the judges' thought process in the Harper & Row Case of 1985. Following the trend introduced in the Sony Corp Case, the final decision of Harper & Row Case cemented the notion that unauthorised commercial use of copyright protected works is unfair. This led to the elevation of the importance of the fourth factor of Fair Use[10]. Therefore, if unauthorised use of the work protected by copyright was commercial then it could not be fair.[11] This mentality stayed prominent for almost a decade until the 1994 court decision in the Campbell Case where it was eventually considered to be in bad law. The Supreme Court finally reinstated the position that elevation of one of several of the four Fair Use factors over any other is foolish and unacceptable.[12] Afterwards, judges ignored their previous claims and attempted to elevate the first factor of Fair Use by emphasizing the importance of the transformativeness of the use over its commercial or non-commercial nature. Ever since, the importance of the transformativeness of any given unauthorised use of copyright protected content has

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[8] Court decision, 17.01.1984, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

[9] Litman, J. (2004). The Sony Paradox. Case W. Res. L. Rev., 55, 917. (947 - 950)

[10] *Ibid., 948*

[11] Visser, C. (2005). The location of the parody defence in copyright law: some comparative perspectives. The Comparative and International Law Journal of Southern Africa, 38(3), 321–343.

[12] Court decision, 07.03.1994, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)

gradually increased. Although it can be argued that there is currently taking place yet another shift of mindset, as evident from a number of more recent cases. These cases show that transformativeness is not necessarily important to every court circuit [13] or that non-transformative use can also be considered fair [14].

1.2 Fair Use in other jurisdictions

Paragraphs below will describe Fair Use in the legislations of the other 5 countries that apply it. Those countries are Israel, Malaysia, Poland, Singapore and South Korea. In general, four out of the five countries follow the US Fair Use formula of four criteria, with certain changes and adjustments. The only country that adopted Fair Use with more radical changes is Poland, in its current state it is almost impossible to recognize.

Malaysian Fair Use is defined in section 13(2A) of the Malaysian Copyright Act of 1987. Singaporean Fair Use is defined in Sections 35 -37 of the Singapore Copyright Act of 1987. Section 35 defines criteria of Fair Use, while Sections 36 and 37 list the purposes of Fair Use. Upon closer examination of both acts there will be no sections dedicated to "Fair Use". Both countries adopted the doctrine but rebranded it from "Fair Use" to "Fair Dealing". Changes introduced by Singapore and Malaysia do not end there, they introduced certain structural changes. Singaporean Copyright Law introduced a unique fifth Fair Use criteria to be taken into account "*the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price*"[15]. The Malaysian Copyright Act, on the other hand, splits the information that is generally contained within a single section of Fair Use Doctrine into two sections. Section 13(2)(a) includes the purposes for which Fair Use is allowed and Section 13(2A) includes the standard 4 criteria.[16]

[13] Court decision, Kienitz v. Sconnie Nation, 766 F.3d 756 (2014)

[14] Court decision, 29.09.2020, Cambridge University Press et al. v. Becker et al.(2020)

[15] Singaporean Copyright Act 1987, Section 35(2)

[16] Malaysian Copyright Act 1987, Section 13(2)(a)

In contrast to Singapore and Malaysia, Israel in its application of Fair Use did not derogate in the slightest from the US Doctrine. Israel's Fair Use is defined in the Chapter 4 article 19 (b) of the Israel Copyright Act of 2007.

Unlike the previous examples where discussion was about the Common Law countries, South Korean copyright law is one of the two examples of the application of Fair Use in the Civil Law based legal systems. The fact that these examples exist, together with the commentaries of European researchers, such as Martin Senftleben further show that open ended copyright limitations, are indeed compatible with the copyright systems in Civil Law legal traditions[17]. Therefore, arguably they are compatible with the Berne Three-Step Test that lies in the core of the copyright limitations of these countries. South Korean Fair Use is defined in the Article 35-3 of the Korean Copyright Act. The article lists four criteria and does not diverge from the original doctrine.

Finally, the time comes to discuss the curious case of the Polysh Copyright Law, where Fair Use is applied in a completely different manner from other countries. There are no strictly defined four Fair Use criteria, rather certain small parts of Fair Use are distributed throughout the articles. Those being articles 23 - 35 of Polish Act of 4 February 1994 on Copyright and Related Rights. Yet another big difference from the usual Fair Use is a clear distinction between private and public use of works. The so-called public Fair Use is extremely narrow and allows for a limited amount of permissible unauthorised uses, especially non-commercial ones. Some of the permissible uses include: quotations of author's work, public dissemination of author's work for academic and educational purposes, and public dissemination of author's work during religious events. The so-called private Fair Use on the other hand is far more flexible with the only limitation being the privacy. It allows family members and people with close social relationships, to share amongst each other single copies of previously disseminated works. [18]

[17] Yu, P. K. (2019). Fair Use and Its Global Paradigm Evolution. U. Ill. L. Rev., 111. pp 134 - 137.

[18] Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Art 23.

2. EUROPEAN APPROACH TO COPYRIGHT LIMITATIONS

This section of the articles will give an overview of the copyright laws of EU member states Germany and France as well as explain the current state of EU copyright law. Notwithstanding the fact that EU copyright legislation was created based on values and copyright laws of the Member states it does not blatantly mirror them. Despite all the odds EU Copyright Law tries to introduce a certain degree of flexibility by the means of a variation on a Berne Three-Step Test. Information Society Directive, which is the basis of the current EU copyright law, attempts to introduce some degree of flexibility to extremely rigid civil law-based copyright systems[19]. The idea that looked promising on paper, unfortunately, was unsuccessful, due to poor execution. The author will discuss the reason behind the current approach to legal flexibility being flawed and in the later parts will examine possible alternatives for more flexible EU copyright laws.

2.1 French and German approaches to Copyright protection

French Copyright Law will be examined first. The core of the French Copyright Law consists of two legal documents: French Intellectual Property Code - Code de la propriété intellectuelle (henceforth referred to as IPC) and French Act No. 2016-925 of 7 July 2016 on freedom of creation, architecture and cultural heritage - Loi no 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine. For the purpose of this research the latter of the two documents will not be discussed, as all relevant limitations to copyright in French Law are included in IPC.

IPC expresses unauthorized uses that the author of the original work cannot forbid after the work in question has been disclosed to the public. Lawfully permitted uses under Article L 122-5 IPC are:

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[19] 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, Official Journal L 167 , 22/06/2001 P. 0010 - 0019, art 5(1) - 5(5).

1. Private and gratuitous performances carried out exclusively within the family circle
2. Copies or reproductions reserved strictly for the private use
3. analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated
4. Press reviews
5. Dissemination, even in their entirety, through the press or by broadcasting, as current news
6. Complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France
7. Parody, pastiche and caricature, observing the rules of the genre
8. Acts necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract.[20]

Limitations to the copyright protection under German law are systemized in the Division 6 of Part 1 of the Act on Copyright and Related Rights - Urheberrechtsgesetz (henceforth referred to as UrhG). It consists of six subdivisions covering everything from main lawfully permitted uses in subdivision 1, to additional permitted uses in subdivision 3, to very specific permitted uses, such as the use of works for teaching and science in subdivision 4, or uses of orphan works in subdivision 5. Additionally, UrhG covers remuneration for reproduction permitted under certain provisions of subdivisions 1 and 4.[21] Copyright limitations provided in UrhG are generally similar to those of IPC and EU's Information Society Directive.

[20] Loi n° 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle (partie législative), article L122-5

[21] Gesetz über Urheberrecht und verwandte Schutzrechte, abschnitt 6, unterabschnitt 3 - 4.

2.2 Current state of copyright limitations in EU

Now the time has come to discuss the current state of EU copyright legislation in regard to copyright limitations, specifically the European Information Society Directive of 2001 and the more recent European Digital Single Market Directive of 2019, as well as outline the current issues.

Limitations to copyright protection in EU legislation are explained in Articles 5(1) - 5(5) of the EU Information Society Directive (henceforth referred to as ISD). Application of copyright limitations in EU Copyright Law is unique in comparison to the European countries. The European Union tries to balance both legal certainty/security and flexibility. Unfortunately, Article 5 of ISD manages to trample on both values.[22] The EU tried to implement legal certainty and security of Civil Law, as well as flexibility more commonly attributed to Common Law. In the end, they ended up with a copyright system that cannot adequately achieve either of the goals. Articles 5(1) - 5(4) of ISD include lawfully permitted uses / limitations which are similar to those that can be found in French and German copyright laws. They aim at providing legal certainty and security. Article 5(5) of ISD includes the variation of the "Berne three-step test" clause which aims at providing legal flexibility as well as setting minimum standards. In EU law it reads as such:

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. [23]

The concept of Berne Three-Step Test was introduced in 1967 during the Stockholm Conference on the revision of the Berne Convention for the Protection of Literary and Artistic Works of 1886.[24] The version present in the ISD slightly deviates from the

[22] Senftleben, M. (2017). The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions. American University International Law Review, 33 (1), 231 – 286. (240 - 244)

[23] 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, Official Journal L 167 , 22/06/2001 P. 0010 - 0019, art 5(5).

[24] Geiger, C., Gervais, D.J., Senftleben, M. (2015) Chapter 5: Understanding the "three-step test". In: Gervais, D.J., *International Intellectual Property.* (167 - 168).

original text of the Three-Step Test of article 9(2) of the revised Berne Convention, but these changes are only phraseological, the original three open ended criteria are still present.

These criteria are supposed to provide flexibility, but as a result diminish certainty due to the wide range of possible interpretations. What are the special cases in which reproductions are allowed? What is a normal exploitation of the work? When do reproductions unreasonably prejudice the legitimate interests of the author? Any given national law will have a different answer to the questions above, thus the legal certainty is greatly diminished on the scale larger than that of any one specific national copyright legislation. Moreover, Berne Three-Step Test can be interpreted in two ways: as a restricting list of cumulative and successive factors required for the application of copyright limitations, or as a more flexible list of factors to be examined and balanced on a case-to-case basis[25].

Upon closer examination it is evident that there really is not currently a unified definition of the Three-Step test[26]. Each adaptation is a variation of the “original" text, thus creating a great many multi-step tests, worded and applied differently, which only adds to confusion regarding which variation EU three-step should apply. Unfortunately, due to the wording of the Berne Three-Step Test clause in the ISD and the heavy notion of legal security and certainty in Civil Law jurisdictions the former of the two approaches is far more likely to be applied, therefore negatively affecting flexibility of the copyright laws in Europe.

Yet another valuable source of the European Copyright Law is the more recent European Directive on Copyright in the Digital Single Market adopted in 2019. The new directive presented several novelties into EU Copyright Law, such as proper introduction of the concept of Extended Collective Licensing (ECL), that greatly affects current union-wide copyright approach to the Collective Management Organisations. Additionally, DSM Directive created new copyright exceptions for such fields as data mining, digital educational activities as well as others, building on top of the existing limitations listed

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[25] Quintais, J. (2017). Rethinking normal exploitation: enabling online limitations in EU copyright law. AMI-tijdschrift v oor auteurs-, media-en informatierecht, 6. pp 200 - 201

[26] Christie, A. F., & Wright, R. (2014). A comparative analysis of the three-step tests in international treaties. IIC-International Review of Intellectual Property and Competition Law, 45(4), 409-433.

in the Article 5(3) ISD[27]. On the other hand, this directive introduced very controversial provisions. Back in early 2019 when DSM Directive was still at the stage of the proposal the Articles 15 and 17, back then referred to as Articles 11 and 13, caused an uproar in the media outlets throughout the Union. If these articles were approved and adopted in their original forms, they would have irreparably damaged internet freedom in the European Union.

Original Article 11 provided publishers of press publications with the rights established in Articles 2 and 3(2) ISD. This meant that they would be able to better control how their content is reproduced and made available to the public through third parties. This would have been a beneficial addition that allows copyright owners to protect their rights as well as receive monetary gains from large corporations. The devil is as always in the details. The scope of Article 11 would among other things include hyperlinking, which led to the creation, of the hypothetical concept of hyperlink tax, that publishers of press publications would be able to impose on media giants. They thus would be forced to either satisfy the claims of the publishers, or what is more likely alter their approach to hyperlinking, to not pay the tax, or pay a significantly lower amount of it. Therefore, it would negatively affect dissemination of the information on the Internet, as a great portion of the population worldwide receives their news and information by the means of Google, or Facebook/Twitter/YouTube feed.

Original Article 13 obliged online content-sharing providers to cooperate with rights holders to prevent their users from infringing copyright rights of said holders. Not only it made them directly liable for the copyright rights' infringements by their users, but it also encouraged them to apply effective and proportionate content recognition technologies to prevent acts of infringement. As was previously discussed in the beginning of this paper, certain online platforms already employ automatic content filters. The obligation to use such algorithms would be extremely detrimental to the freedom of expression on the Internet.

Fortunately, the initial proposal for the DSM Directive was rejected and, in its place, came an updated version. Article 11 of the proposal, now Article 15 of the DSM Directive

[27] Sganga, C. (2020, October). A new era for EU copyright exceptions and limitations?. In ERA Forum (Vol. 21, No. 2, pp. 311-339). Springer Berlin Heidelberg.

excluded the acts of hyperlinking from its scope. Article 13 of the proposal, now Article 17 of the DSM Directive fully defined all the rights and obligations applicable to online content-sharing providers, excluded any mention of the content recognition technologies, as well as defined copyright exceptions and limitations that would apply to the content uploaded by users of said providers. Nonetheless, although Article 17 does not anymore explicitly encourage online content-sharing providers to apply content recognition technologies it does so implicitly through its wording. Which in turn creates a new question, question of compatibility of such technologies with the human right to freedom of expression[28].

The current copyright legislation in place in the European Union is not efficient. Strictly defined limitations of the most Civil Law countries decrease flexibility and open ended criterias of Berne Three-Step Test provide neither certainty, security nor flexibility. EU copyright law needs to introduce more flexibility as the current legislative process at the scale at which it applies to is not nearly fast or efficient enough[29]. There is definitely room for improvement.

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

[29] Senftleben, M. (2017). The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions. American University International Law Review, 33 (1), 231 – 286. (244 - 284)

3. COMPARATIVE ANALYSIS OF COPYRIGHT INFRINGEMENT CASE LAW

Nowadays, flexibility is essential for all content creators alike, regardless of the nature of their works, or the platform they are based on. Unfortunately, where certain legal systems favor creativity and lend a helping hand, others create an impression that their sole purpose is to crush any signs of it. European copyright law is in dire need of flexibility. Previously it was already mentioned that the current copyright laws of European Countries value legal security and certainty over flexibility, and EU Copyright legislation is not much different. Application of the Berne Three-Step Test diminishes legal certainty and does not provide for sufficient flexibility. And the relatively recent addition of the European Directive on Copyright in the Digital Single Market (Directive (EU) 2019/790) creates even more controversies around copyright, especially in regards of the user generated content, such as “memes”, mashups, reactions on platforms such as YouTube[30].

It is completely understandable and reasonable that laws try to protect the rights of authors. What is unreasonable is the effect they have on authors themselves. The barriers imposed by law protect them, but also limit them. There are as many ways of self-expression as there are people and blocking people’s right to self-expression has a negative effect on our culture. We are practically forced to find alternative ways of self-expression as well as alternative ways to defend ourselves against copyright infringement claims. The issue of compatibility of the copyright frameworks established decades ago and the reality we currently live in has been extensively discussed by various legal scholars, a large portion of which consider them incompatible since there have been significant developments since the times of their conception.[31]

[30] Senftleben, M. (2019). Bermuda Triangle–Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market. Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market (April 4, 2019). Page 4.

[31] Giblin, R., & Weatherall, K. (2017). If we redesigned copyright from scratch, what might it look like? In R. GIBLIN & K. WEATHERALL (Eds.), What if we could reimagine copyright? (pp. 1–24). ANU Press.

Recent case law shows that available methods of defence against copyright infringement claims in the EU are not sufficient. Currently it is possible to outline two main methods used in EU: parody defence and freedom of expression defence. The core of parody defence is the exception provided in Article 5 §3 (k) ISD. Article 5 §3 (k) grants copyright exceptions *"for the purpose of caricature, parody or pastiche"*[32]. Unfortunately, this defence is often inapplicable to a large variety of works due to the nature of the definition of parody in the EU as well as misuse of the Article 5 §3 (k) of ISD. Similarly to Fair Use the success of such defence relies fully on the interpretation of the meaning of parody by the Judges. Moreover, on top of the aforementioned factors there is the uncertainty of the Berne Three-Step Test clause of Article 5 §5. As will be evident from the several recent French cases, parody defence is far from being perfect.

An alternative for the parody defence is the Freedom of expression defence based on the Article 10 of the European Convention of Human Rights. The very fact that defendants are forced to resort to defending themselves through the application of basic Human Rights is not a good omen and further shows the lack of other options. Unfortunately, similarly to the parody defence, freedom of expression defence is also not very reliable since its application is even more complicated than that of the parody.

In this section of the article the author will examine several copyright infringements cases from Europe as well as conduct comparative analysis between said cases and similar cases that apply Fair Use.

3.1 Case N° RG 17/04478 - Moulinsart v M. Xavier Marabout

Moulinsart v M. Xavier Marabout henceforth referred to as a "Tintin Paintings Case" is a recent French copyright infringement case from May 10th, 2021. SA Moulinsart, a Belgian company that manages, promotes and protects the works of Georges Prosper Remi (better known by his pseudonym - Herge) the creator of the famous series of comics "The Adventures of Tintin" sued a French painter Xavier Marabout for copyright

[32] 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, Official Journal L 167 , 22/06/2001 P. 0010 - 0019, art 5 §3 (k)

infringement. Marabout created a series of paintings inspired by the characters of Herge and works of American artist Edwar Hopper. Marabout's paintings put Tintin into the "Hopperian" setting of 1930s America.

Plaintiff claims that unauthorised use of Herge's characters is infringement of their copyright rights and is detrimental to the image of Tintin, since among other things some paintings included imagery of oversexualised women accompanying Tintin. Marabout in his defence invoked the parody exception under Article L 122-5 of IPC. Plaintiff took a stance that the parody exception is not applicable since the paintings in question are ***«devoid of humor or criticism, the fact of confronting the character of Tintin with a sexy female character does not make one laugh, or even smile. The fact of sexualizing a representation which did not include such an evocation in the original work does not meet the humorous condition of the parody exception.»***[33]. Fortunately for the defendant, the Judicial Tribunal of Rennes ruled in his favor and found the nature of their works to be parodic. Since French Law does not have a legal definition of parody the court applied definition of parody introduced by the CJEU in Deckmyn v Vandersteen Case C-201/13 back in 2014.

According to that definition, Article 5(3)(k) of ISD must be interpreted as meaning that the essential characteristics of parody are, firstly, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.[34]

This variation included examination of the three factors. Firstly, the parody must allow the immediate identification of the parodied work. Secondly, the parody work must be distinguished from the original work. Lastly, the parody must constitute an expression of

[33] Court decision. TJ Rennes, 10 mai 2021, n° 17/04478. Lire en ligne

[34] Court decision, 03.09.2014, Deckmyn v Vandersteen, Case C-201/13

humour or mockery. In this case the court found that all three criteria were fulfilled and thus a parody exception was applied.

This case is extremely similar in its nature to the 2003 American Case Mattel v. Walking Mountain Productions, where defendant was sued due to his series of photographs titled “Food Chain Barbie”. Like Marabout, Forsythe used intellectual property belonging to a different company. In his case it was the use of Barbie dolls as props in photographs. Barbie dolls were photographed in different poses, in different scenes with an array of various household and kitchen appliances. The plaintiff claimed infringement of copyright rights, while the defendant claimed application of parody defense under the Doctrine of Fair Use. There are even more parallels to be made between the cases, especially in the reasoning process and final judgement. A US court ruled in favor of Tom Forsythe as his photographs complied with the four factors of Fair Use. His photographs were considered to be of parodic, humorous nature. Their purpose was to critique a serious issue of cultural objectification of women with an element of humor by using Barbie dolls that impose unreasonable standards of beauty and feed into insecurities about our appearances[35].

What is better in the Fair Use defence relative to the parody defence is that the four factor test provides for more flexibility to defendants. Where EU parody defence depends on the comedic/humorous/caricature nature of the work as well as three criterias of the Article 5(5) ISD, Fair Use defence has four well defined criterias that do not require comedic nature and allow for a wider scope of application.

3.2 Case 19/03947 - Moulinsart v Christophe Tixier

Moulinsart v Christophe Tixier henceforth referred to as a “Tintin Busts Case” is a recent French copyright infringement case from June 17th, 2021. Around the time of the “Tintin Paintings Case” previously mentioned Belgian Company SA Moulinsart sued another French artist - plastic sculptor Christophe Tixier, known under alias Peppone. Peppone produced 90 busts of the character Tintin. Those busts were made from resin and covered

[35] Shyti, M. E. O. US COPYRIGHT “FAIR-USE”. LEGAL DEFENCE ON PARODY. Vol. VI, Issue I, September 2016 (Page 21)

in comics pages. Similarly, to the Tintin Paintings Case, SA Moulinsart claimed that artworks produced by Tixier constituted infringement of their copyright rights. Texier in his defense invoked copyright exceptions of Article L 122-5 of French Intellectual Property Code as well as questioned in front of the court the legality of plaintiff's copyright claims. As the defendant pointed out, Herge's character of Tintin is itself inspired by the works of a different French illustrator - Benjamin Rabier and his character "Tintin-Lutin".

Unfortunately for Texier, neither of those approaches worked for him. Court ruled in favour of the plaintiff. Their justification regarding the application of Article L 122-5 of IPC was that Texier's busts did not fulfil the requirements of being noticeably different and expressing humour and mockery. This is exactly the misuse of the Article 5 §3 (k) ISD mentioned previously. Even though this specific case applied French Copyright Law, in this context the limitations of articles L 122-5 IPC and 5 §3 (k) ISD can be considered being same. Especially in the light of the fact that Article 5 §3 (k) of ISD was drafted based on the French Copyright Law[36]. Judges were completely correct in their claims regarding the status of parody of Texier's busts. They were incorrect in their decision to default this case to the application of parody. While it is true that both articles L 122-5 IPC and 5 §3 (k) ISD are the basis of the parody defense, they non the less should not be limited exclusively to the application of parody. Both articles specifically provide copyright limitations for the purpose of caricature, parody, or pastiche. In this case the limitations granted to the works of pastiche are of the most interest for this thesis.

Unlike parody and caricature, which were defined in the Deckmyn Case, the situation with pastiche is more complex. Currently there does not exist any legal definition of pastiche in written or case law of France or the European Union. In fact, the very same Deckmyn Case led to this situation in the first place, specifically the opinion of the Advocate General Cruz Villalon on this case.[37] Advocate General introduced the method of defining a parody, but by doing so unintentionally prevented potential creation of the autonomous concept of pastiche in EU Law. Nonetheless, pastiche and parody cannot be

[36] Döhl, Frédéric: The Concept of "pastiche" in Directive 2001/29/EC in the Light of the German Case Metall auf Metall. In: Media in Action. Interdisciplinary Journal on Cooperative Media. Copyright Law (2017), Nr. 2, S. 37– 64. Page 50.

[37] Seville, C. (2015). The Space Needed for Parody within Copyright Law Reflections following Deckmyn. Nat'l L. Sch. India Rev., 27, 1.

considered being same. To understand the concept of pastiche the author will have to resort to the literal definition of the word itself. Upon examining many definitions of pastiche available on the various websites and online dictionaries comes the conclusion that the average definition of the word pastiche would look similar to this.

"*Pastiche is a literary, artistic, musical, architectural or other work that imitates the style or characteristics of one of several previous works of artists. Unlike parody, pastiche is not intended to mock or make fun of the original work, but rather it tries to celebrate/pay homage to the original work."*

At this point it can be presumed that pastiche itself does not necessarily have a humorous nature. Not to say that it can't be humorous, as for example paintings from the "Tintin Paintings Case" can be considered to be both parody and pastiche. If taken into consideration, the fact that pastiche and parody being similar are still different concepts raises a question of validity of the current approach of the Judges. If copyright laws provide limitations for both pastiche and parody, why did not Judges first establish to which of the two categories do Texier's works belong? In the author's subjective opinion these busts as well as other sculptures and artistic works of Peppone would classify as pastiches rather than parodies. Instead of trying to mock their sources, they are inspired by their styles. The author cannot reasonably claim that if such distinction was indeed applied it would result in the different outcome of the case. Most probably the outcome would have still been the same, as there are way too many additional factors to be considered. The point to be proven here is not that misuse of the definitions led to this outcome of the case, but rather that unfortunately there is currently a misuse, that might lead to flawed judgements in the similar cases in the future.

3.3 Case 19/20285 - Jeff Koons v Franck Davidovici

Jeff Koons v Franck Davidovici is a recent French copyright infringement case from February 23rd, 2021. This case is extremely similar to the "Tintin Busts Case". American artist Jeff Koons created a sculpture mimicking the photo of French photographer Franck Davidovici, albeit with certain minor changes. Davidovici sued Koons and a gallery showing his work for copyright infringement under French Law. Koons in his defence

requested application of parody exception under Article L 122-5 IPC. The court ruled in favor of Davidovici both in original proceedings as well as the later appeal.

What differentiates this case from the previously discussed ones is that Koons also tried to exercise his Freedom of artistic expression under the Article 10 ECHR. Since there is no uniform written law in EU on the process of application of Human Rights in to Copyright Law courts resort to precedents in case law. Similarly, to the definition of parody, the precedent of application of freedom of artistic expression also comes from judgement of Deckmyn Case. According to the judgement:

The application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).[38]

Unfortunately for the defendant, court constituted that the restrictions on the freedom of artistic expression in this case are proportionate and necessary under French Law since Koons' work did not fulfill the requirements of the parody exception[39]. The current application of freedom of artistic expression in EU copyright case law is tied to the application of the parody exception. If attention is turned back to the point of misuse of Article 5 §3 (k) ISD discussed in the previous section it can now be seen how it also affects the success of the freedom of expression defence. This case falls in the grey area of law regarding the definitions of parody and. Koons' statue, while clearly being a three-dimensional replica of Davidovici's photo, does not intend to have a comedic effect. Once again, the author can make a claim that rather than being a parody this work would fall under the hypothetical definition of pastiche.

Currently based on the facts above the author can pose several questions. Would in the case of pastiche Article 10 ECHR be applied in the same way as described in the Deckmyn

[38] Court decision, 03.09.2014, Deckmyn v Vandersteen, Case C-201/13

[39] EUIPO. July & August 2021. RECENT EUROPEAN CASE-LAW ON THE INFRINGEMENT AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Case? Can this approach be used outside of the parody exception of 5 §3 (k) ISD? The author would like to claim that answers to both questions would be - yes. Even though currently freedom of expression defence is tied closely to the application of parody it non the less does not prohibit application of Article 10 ECHR outside of parody. Currently there simply aren't any well-known precedents for such an application. Since there are as many ways to express oneself as there are people, the use of freedom of expression in EU copyright law would be a great way to increase legal flexibility while not jeopardising legal certainty and security.

4. SOLVING FLEXIBILITY IN EU COPYRIGHT LAW

Since now the problems with the current EU copyright law are outlined, the author is finally able to make certain meaningful conclusions and suggestions. At this point it is obvious that the current system is flawed and does not suffice for the purpose it is meant to serve. It is evident not only from recent case law, there are a great deal of various legal papers and research on the topic of flexibility in EU copyright law. Good examples would be various works of Christopher Geiger, Elena Izyumenko and Martin Senftleben. Primarily, these works discuss possibilities of achieving flexibility in EU copyright Law based on the Berne Three-Step Test clause of Article 5 §5 of Information Society Directive as well as the right to freedom of expression under Article 10 ECHR.

For example, in his approach from 2019 Article *“'Fair Use' through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations”* Christopher Geiger discussed possibility of granting more flexibility to EU copyright law using the freedom of artistic expression. His idea was that the EU can achieve a greater degree of flexibility in copyright litigations if judges are obliged to balance copyright rights of original authors on the one hand and the freedom of expression of new authors on the other.[40] This is exactly the approach proposed by the Court regarding the parody exception in the Deckmyn Case.

On the other hand, there is also an approach of Martin Senftleben from his 2017 article *“The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions”*. His proposition takes an opposite, more drastic approach to achieving flexibility. In contrast to the addition approach of Geiger, Senftleben goes for a substitution approach. He proposes that the EU abolishes the rigid copyright system in favour of a more flexible “European Fair Use Doctrine” based on the already existing Berne Three-Step Test clause of the Information Society Directive.

[40] Geiger, C. (2020). 'Fair Use' through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations. In: Balganesh, S., Wee Loon, N., & Sun, H. (Eds.). (2020). The Cambridge Handbook of Copyright Limitations and Exceptions (Cambridge Law Handbooks). Cambridge: Cambridge University Press, 8 - 13

In this section of the article the author will discuss possible solutions for the misuse of Article 5 §3 (k) ISD. Moreover, the author will present their suggestions regarding the factors to be considered in the creation of possible "European Fair Use" based on the Berne Three-Step Test and Fair Use Doctrine. The aim of these suggestions is to amend current copyright legislation problems and provide flexibility, while keeping in mind the importance of legal certainty/security, ease of implementation as well as retaining core structure of EU copyright law. This suggestion will combine both addition and substitution approaches.

4.1 First suggestion - Further codification of key legal concepts

Firstly, the author would like to suggest the possible way in which to resolve the issue of misuse of Article 5 §3 (k) ISD. As was previously discussed, the misuse of the Article 5 §3 (k) ISD, and Article L 122-5 IPC stems from the lack of the legal definitions of concept listed in those articles. Copyright limitations provided in the written law are various and supposed to be all-encompassing. They range from the public use to parody and pastiche, to the use during religious ceremonies. Unfortunately, the sheer number of concepts and definitions involved leads to the lack of harmonized definitions of certain concepts in national or EU law, pastiche being an example of this. Since one of the purposes of EU copyright law is to increase legal certainty and security, it is extremely strange that they provided limitations to the concepts for which they do not have a definition. The text of Article 5 §3 (k) ISD was based on the French Law, which also lacks definition of parody, caricature, or pastiche. Therefore, the EU can be given some slack in that regard. Though, it does not explain why the EU decided to abstain from introducing certain definitions from case law to written law via the DSM Directive, whose purpose was to further harmonize copyright laws in the EU. This lack of definition for pastiche in both written and case law leads to the misinterpretation of the Articles 5 §3 (k) ISD and L 122-5 IPC and preemptive application of the parody exception rules to works that by their own purpose and nature do not relay any comedic or humorous intent but rather should be considered an homage to the previously existing works. A viable solution for this oversight would be approaching it from the written law angle - further codification. By giving concepts such as pastiche official definitions, potentially several goals may be achieved at once: increase in legal certainty through distinct terminology and in turn

creation of a more predictable decision-making process; introduction of more flexibility by providing more suitable copyright infringement defence that does not rely on comedic properties of works. This would open a world of possibilities for the implementation of copyright limitations to cases in the areas such as music or contemporary art. Such improvements will especially benefit contemporary artists since artistic techniques of appropriation and partial adaptation of other works have long become essential parts of the modern visual/graphic arts[41].

4.2 Second suggestion - Focus on freedom of expression

Secondly, the author suggests that EU copyright law should include better representation of the freedom of expression approach of Deckmyn Case in the written EU copyright law. It is important to have a fair balance between the freedom of expression of authors and copyright rights of rights holders. Currently, this approach lacks sufficient representation in written EU law. It is almost exclusively based on the case law and only regarding the parody exception of Article 5 §3 (k) ISD, while it would do far better applied to the EU copyright law in general. Parody is far from being the only way of artistic expression, thus why should it be the only one to which the court implements freedom of expression defence? Other types of content/works such as pastiche, review and criticism would also benefit from application of such a method. It has been previously established that copyright is compatible with the Fundamental Human Rights by the virtue of the various exceptions and limitations provided in the written law[42]. There are several ways in which this topic can be approached. In the author's opinion the most logical place for the freedom of expression in the written EU copyright law would be together with the Article 5 §5 ISD and the Berne Three-Step Test clause.

[41] McEneaney, C. L. (2012). Transformative Use and Comment on the Original-Threats to Appropriation in Contemporary Visual Art. Brook. L. Rev., 78, 1521.

[42] Geiger, C., & Izyumenko, E. (2018). Freedom of expression as an external limitation to copyright law in the EU: the Advocate General of the CJEU shows the way. pp 9 - 10

4.3 Third suggestion - hypothetical “European Five-Step Test” approach

Lastly, the author would like to suggest a hypothetical approach to the creation of the “European Fair Use” based on the Article 5 §5 ISD that would increase flexibility and make for a potentially better system that would level the playing field and give equal opportunities to both authors and copyright owners. The copyright limitations system in place is too long and complicated. With this system it is far easier for the plaintiff (copyright owner) to prevail over the defendant (new author) in the court of law. For example, in the simple hypothetical copyright infringement case with the parody defence applied, for the author to prevail over the plaintiff, the court would have to decide on at least seven different factors in favor of the author. These factors are: (i) The parody work must allow the immediate identification of the parodied work; (ii) The parody work must be distinguished from the original work; (iii) The parody work must constitute an expression of humour or mockery; (iv) The court must in its decision balance the interests and rights of the rights’ holder and freedom of expression of the author; (v) The parody work must be “a certain special case”. (vi) The parody work must not conflict with a normal exploitation of the work or other subject-matter; (vii) The parody work must not unreasonably prejudice the legitimate interests of the rights’ holder.
On the other hand, for the copyright owner to succeed the court just has to rule in their favor on only one or two factors. Even though in this case the first three factors are necessary to consider any given work a parody it does not change the fact that there are in total seven steps required for the success of one party and only several for the success of the other. To increase flexibility and resolve this issue the author suggests adoption of the new provision based on the Article 5 §5 ISD.

Current cumulative approach to the factors mentioned above should not stay. Instead, it would arguably be better to mirror the structure of the US Doctrine of Fair Use, which is already compatible with the original Berne Three-Step Test[43]. At this point in time, it is preposterous to consider Fair Use incompatible with the European copyright law. It can be clearly seen that there is a need for flexibility and various attempts have been made to

[43] Samuelson, P., & Hashimoto, K. (2018). Is the US Fair Use Doctrine Compatible with Berne and TRIPS Obligations?. *Universalism or Pluralism in International Copyright Law (Kluwer Law International, Information Law Series), UC Berkeley Public Law Research Paper*.

provide it. Moreover, both Berne Three-Step Test clause as well as the balance of freedom of expression are in their core open ended norms, as such there should not appear any issues with building upon them a better system. Already certain parallels can be drawn between the Three-Step Test and Fair Use. Specifically, between the prohibition of the conflict with a normal exploitation of the work of Berne Three-Step Test and fourth factor of Fair Use - the effect of the use upon the potential market for or value of the copyrighted work[44]. Over the years there have been propositions within the Member States for the adoption of Fair Use style provisions into National Copyright Laws, for example in Ireland[45]. Moreover, even Civil Law Judges are not against the idea of using Fair Use Doctrine for the purpose of comparison in European Case Law[46], with Jeff Koons v Franck Davidovici Case being one of the several examples.

There is no need to fully replace the Three-Step Test, only modify it. In theory, "European Fair Use" will not only increase flexibility in EU Copyright Law, but also allow for adoption of more flexible copyright provisions into the national legislations of Member States. The criteria of the Three-Step Test should be kept intact, with the sole exception of the "certain special use" criteria, which is too vague and should be removed in favor of three new criteria. Two of the new criteria could be based on the existing factors of Fair Use, while the third new criteria should be an adaptation of the freedom of expression balance method. The author proposes to diverge from the cumulative nature of the original Three-Step Test in favor of the balance of all the factors. Since the current system already allows for a significant degree of liberties to the Civil Law judges, there should be no concerns regarding the updated provision providing "too much" freedom.

[44] Geiger, C., Gervais, D., & Senftleben, M. (2013). The three-step test revisited: How to use the test's flexibility in national copyright law. Am. U. Int'l L. Rev., 29, 581.Page 613.

[45] Copyright and Innovation: A Consultation Paper Prepared by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation 111–23 (Copyright Review Committee Consultation Paper, 2012)

[46] Tribunale di Roma, Sentenza n. 6504/2021 – R.G. n. 27160/2017, Unidis Jolly Film s.r.l. and Paramount Pictures Corporation and Paramount Home Entertainment Italy s.r.l. V Universal Pictures International Italy s.r.l. and Sky Italia s.r.l. and Others [12 March 2021]

If “European Fair Use” is ever to be created the author suggests taking into consideration these criteria:

(1) the purpose and character of the work, including whether such use is of a commercial nature.

(2) the amount and substantiality of the portion used in relation to the copyrighted work as a whole

(3) the degree to which the work conflicts with a normal exploitation of the copyrighted work or other subject-matter

(4) the degree to which the work unreasonably prejudices the legitimate interests of the rights holders

(5) the obligation of Courts to strike a fair balance between the interests and rights of persons referred to in Articles 2 and 3 of the directive, and the freedom of expression of the users of a protected work.

CONCLUSION

At the moment there is a need for flexibility in EU Copyright Law, evident both from various theoretical/research papers on the matter, as well as recent case law and propositions to national governments. In this thesis the author tried to answer three main research questions.

Why do current issues exist in European Copyright Law in the first place? The reason is that the current system is too rigid and parts of the written law it is based on are misused. The rigid system of copyright limitations currently in place in the EU and most of the Member States does no longer suffice for the purpose it was introduced for. The current approach values legal certainty and security over flexibility. While such an approach would have been considered acceptable many decades ago, it does not stand the test of time. In the modern world of contemporary art and internet-based content, having a rigid copyright system is impractical. It is not always clear how exactly any given work should be classified; therefore it is far more reasonable to apply a flexible case to case approach instead. There has been an effort by European Judges to create flexibility through application of the human right to the freedom of expression described in the European Convention on Human Rights. A commendable effort, yet with underwhelming results. Currently, the precedent for the application of the freedom of expression in European case law is tied to the definition of parody. Such a conclusion was reached through comparative analysis of case law as well as the overview of various national legislations and legal research.

Would European Copyright Law benefit from the influence of the US Doctrine of Fair Use? The EU had previously attempted to introduce a certain degree of flexibility through application of the Berne Three-Step Test style clause in the Information Society Directive. Unfortunately, it had achieved a completely opposite effect - it did not provide any sufficient flexibility, it also negatively affected legal certainty and security. European Copyright law would greatly benefit from the influence of Fair Use, as it will provide for a more reasonable and flexible system, especially in the combination with the existing Berne Three-Step test provision.

What is the most concise and easy way to implement solutions to these issues? The author considers that the most concise and easy to implement way for fixing existing issues and achieving flexibility in EU copyright law while retaining legal certainty and security is through further codification of certain key legal concepts and creation of the new copyright law provision based on the Berne Three-Step Test Clause of Article 5 §5 ISD. Firstly, by removing the "certain special use" criteria and introducing new criteria based on the freedom of expression approach of Davidovici Case and the US Doctrine of Fair Use. Secondly, by exchanging the cumulative nature of the factors of Three-Step Test in favor of the comparison and balancing of all the factors by the court. Lastly, by introducing official legal definitions of concepts such as pastiche, that will greatly decrease the misuse of the copyright law by the judges. Such an approach will level the playing field for both parties in any given case, as well as enable judges to create a better application of copyright limitation more suitable for the current European Union.

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34) Gesetz über Urheberrecht und verwandte Schutzrechte, abschnitt 6, unterabschnitt 3 - 4

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