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Christophe Geiger

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# Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?

Christophe Geiger\*

*Copyright was originally intended to serve creators as an engine of free expression, protecting them from the interference of others and from all risk of censorship. To this end, a balance was conceived between exclusive control and freedom in order to enable future creativity. Some uses were kept outside the control of the right owner through limitations to the exclusive right. However, none of the existing systems of limitations in the various jurisdictions was specifically designed to address the creative reuse of copyright protected material in the context of derivative works. On the contrary, when an author in his creative process needs to use the expression of a previous copyrighted work, he will have to get the authorization of the copyright owner of the original work. This situation can be quite cumbersome, as right owners are not always easy to trace. Most of all, it can lead to private censorship, as private entities or individuals have the potential to decide what can and cannot be created and block the dissemination of new works. It might*

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*thus be questionable how this situation can be reconciled with either the copyright's rationale of incentivizing creativity or the obligations imposed on States by international and regionally protected human rights such as freedom of expression and freedom of artistic creation. This Article will assess the different options available for legislators and courts to secure creative uses in the context of derivative works to develop a satisfying legal mechanism de lege ferenda, discussing in particular the possible objections that could result from the international and regional framework for both intellectual property and human rights protection.*

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## INTRODUCTION

Born in the Age of Enlightenment, copyright was originally intended as a means to secure the author’s ability to create freely, protecting him from the interference of others and from risks of censorship.<sup>1</sup> Copyright was meant to be “the engine of free expression,” to use the words of the U.S. Supreme Court.<sup>2</sup> To this end, a balance was conceived between exclusive control and freedom, with the overall aim of ensuring the common good: a property right was established to enable the author to live from his works; but at the same time, enough leverage was secured to allow authors to build on what existed in order to create something new. Thus, to enable future creativity, some uses were kept outside the control of the copyright owner through limitations to the exclusive right. These limitations have always played an essential role, alongside the exclusive right, in providing a vital and sustainable creative environment.<sup>3</sup> There are many ways of drafting limitations: as

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1. See, e.g., CHRISTOPHE GEIGER, DROIT D’AUTEUR ET DROIT DU PUBLIC À L’INFORMATION, APPROCHE DE DROIT COMPARÉ 27 (2004); Christophe Geiger, *Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World*, 2006 EIPR 366; Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 983 (1970) (“Copyright is the uniquely legitimate offspring of censorship.”); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. Intell. Prop. L. 319, 322 (2003) (noting that “copyright has at least as long a history of being indifferent or hostile to freedom of expression values as it has a history of being the so-called ‘engine of free expression’”).

2. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[C]opyright’s purpose is to promote the creation and publication of free expression.”); *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (“[T]he Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); see also Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Through the Looking Glass: Alice and Constitutional Foundations of the Public Domain*, 66 J. L. & CONTEMP. PROBS. 173 (2003); Zechariah Chafee Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503 (1945); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002).

3. On their justifications, see the very interesting chapter by Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, in COPYRIGHT LAW IN THE AGE OF LIMITATIONS AND EXCEPTIONS 12 (Ruth L. Okediji ed., 2017). For Europe, see, for example, Christophe Geiger & Franciska Schönherr, *Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis Regarding Limitations and Exceptions*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW,

either open-ended provisions, as a catalogue of allowed exempted uses, or even as a combination of both.<sup>4</sup> The first situation is found more in common law countries, while the second is typical in civil law jurisdictions such as France or Germany.<sup>5</sup> Open-ended provisions are generally considered to adapt to new situations in a more flexible way.<sup>6</sup> At the same time, the results of open-ended provisions are often said to be less predictable,<sup>7</sup> even if this assumption has been challenged in recent times.<sup>8</sup> The U.S. Copyright Act's "Fair Use" clause constitutes perhaps the most prominent example of an open-ended limitation.<sup>9</sup>

However, none of the existing systems of limitations in the various jurisdictions was *specifically* designed to address the creative reuse of copyrighted material in the context of derivative works. On the contrary, when an author intends to create a new work based on another, and when some of the expression of a

CHALLENGES AND PERSPECTIVES 133 (T.E. Synodinou ed., 2012); P. Bernt Hugenholtz, *Fierce Creatures, Copyright Exemptions: Towards Extinction?*, in 2 INTELLECTUAL PROPERTY RIGHTS, CRITICAL CONCEPTS IN LAW, 231 (D. Vaver ed., 2006).

4. See Christophe Geiger & Franciska Schönherr, *Limitations to Copyright in the Digital Age*, in RESEARCH HANDBOOK ON EU INTERNET LAW 110 (A. Savin & J. Trzaskowski eds., 2014).

5. See, for example, BALANCING COPYRIGHT – A SURVEY OF NATIONAL APPROACHES (Reto M. Hilty & Silvie Nérisson eds., 2012), for further analysis on the national models of constructing copyright exceptions and limitations.

6. See, e.g., Christophe Geiger, *Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions*, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 627, 638 (2009) (proposing to interpret and use the international three-step test as a Fair-use type open ended limitation at the international level, thus bridging civil and common law traditions); Tito Rendas, *Destereotyping the Copyright Wars: The 'Fair Use vs. Closed List' Debate in the EU* (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657482](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657482) [<https://perma.cc/2AAF-R3XK>]; Martin Senftleben, *Overprotection and Protection Overlaps in Intellectual Property Law – The Need for Horizontal Fair Use Defences*, in THE STRUCTURE OF INTELLECTUAL PROPERTY LAW: CAN ONE SIZE FIT ALL? 136 (Annette Kur & Vytautas Mizaras eds., 2011).

7. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 562 (2016) (stating that the fair use doctrine is "notoriously unpredictable," in particular in the context of contemporary art appropriation); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 282 (2003) ("[I]t is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases."); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93 (2010) (calling fair use a doctrine "impossible to predict").

8. For suggestions that the fair use defense as it is applied by U.S. courts provides more legal security than it is sometimes assumed, see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair Use in Europe, In Search of Flexibilities* 8–9 (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1959554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959554) [<https://perma.cc/K6P6-3QAQ>]; Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521 (2010).

9. The U.S. Copyright Act § 107 provides that uses are fair and non-infringing depending on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount appropriated from the copyrighted work; and the effect of the use upon the potential market for or value of the copyrighted work. Copyright Act, 17 U.S.C. § 107 (2012).

previous work needs to be borrowed,<sup>10</sup> he often will need the authorization of the copyright owner of the original work.<sup>11</sup> If the original author then refuses to grant permission or asks for too high a price, the creative reuse will be hindered.<sup>12</sup> This situation might resemble private censorship, as private entities or individuals have the potential to decide what can and cannot be created and to block the dissemination of new works.<sup>13</sup> It might thus be questionable how this situation can be reconciled with either the copyright's rationale of incentivizing creativity or the obligations imposed on States by human rights norms such as freedom of expression and freedom of artistic creation. In fact, freedom of art, protected as a separate fundamental right or as a subcategory of freedom of expression, often benefits from strong constitutional or conventional protection at the national or regional level, and in a democratic society can only be limited under very strict conditions.<sup>14</sup>

When confronted with “blocking” situations, courts on either side of the Atlantic have tried to find workable solutions. The landmark U.S. Supreme Court holding in *Campbell v. Acuff-Rose Music* is illustrative.<sup>15</sup> In that case, the flexible nature of the Fair Use Clause allowed the Court to rule in favor of 2 Live Crew's parody of Roy Orbison's “Oh, Pretty Woman,” despite the commercial character of the derivative work.<sup>16</sup> In most European countries, however, where a specific

10. The technique of sampling or mash-ups in music, or appropriation uses in visual arts (so-called “appropriation art”), are popular examples, among many others. Digital reproduction techniques have of course massively amplified the possibilities to creatively reuse existing works.

11. See Luke McDonagh, *Is the Creative Use of Musical Works Without a Licence Acceptable Under Copyright Law?*, 4 INT'L REV. INTELL. PROP. & COMPETITION L. 401 (2012) (contending that for creative use of music, a license will be needed in most situations, as “recent case law suggests that even the use of a very small portion of an original work may result in infringement”).

12. See, e.g., Ines Duhanic, *Copy This Sound! The Cultural Importance of Sampling for Hip Hop Music in Copyright Law – A Copyright Law Analysis of the Sampling Decision of the German Federal Constitutional Court*, 11 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL [GRUR INT.] 1007, 1007–08 (2016) (“[A]t present copyright law does not properly encourage the practice of making creative use of appropriated art forms although the act of taking a portion, or sample, of something and reusing it as a method or as its own creation—sampling—has long been recognized by the art world. The process of sampling is not only omnipresent in the context of the contemporary art scene. It was the digital sampler that revolutionized the music too.”).

13. See Anne Barron, *Commodification and Cultural Form: Film Copyright Revisited*, 52 NEW FORMATIONS 58, 80 (2004) (underlining “the spectre of censorship, for to have a property right in a work is to have the ability to exclude others from using that work as a mean of expression”).

14. For further information on this issue, see Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45 INT'L REV. INTELL. PROP. & COMPETITION L. 316, 321 (2014).

15. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). For a discussion, see, *infra* Part II.A.1.

16. See also *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) for a case involving an artist's appropriation of a copyrighted image in a collage painting. The court explored all statutory factors of the Fair Use Clause, weighed them together in the light of the purpose of copyright and came to the conclusion that copyright law's goal of “promoting the [p]rogress of [s]cience and useful [a]rts” would be better served by allowing the use than by preventing it. On the issue of appropriation art and copyright, see Judith Bresler, *Begged, Borrowed or Stolen: Whose Art is it Anyway? An Alternative Solution of Fine Art Licensing*, 50 J. COPYRIGHT SOC'Y U.S.A. 15, 20 (2003); William M. Landes,

limitation for creative use is lacking, and borrowing from an existing work is only allowed in a very limited way through existing and narrowly defined limitations, the situation is more complicated. There, judges often have to use external legal mechanisms such as competition law or fundamental rights to avoid the deterring effects of exclusivity.<sup>17</sup> In fact, in a number of cases, several courts in Europe have directly applied the fundamental right to free artistic expression, protected under the general ambit of the right to freedom of expression of Article 10 of the European Convention on Human Rights, to allow the creative reuse of a protected work.<sup>18</sup> In the same spirit, some scholars in the United States have advocated to limit copyright based on the First Amendment of the U.S. Constitution.<sup>19</sup> However, as it might not be ideal to rely on rules from outside the intellectual property system to reach the goals of copyright law, it could be preferable to solve these problems by an appropriate revision of the legislative framework. For this reason, there have been vibrant discussions in recent times among European scholars on how to “flexibilize” existing limitations, to establish an open clause such as fair use in the

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*Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 10 (2000). However, in other similar cases, the use was considered unfair. For further detail on this discussion, see *infra* Part II.A.1.

17. On these developments, see Christophe Geiger, “Constitutionalising” *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in Europe*, 37 INT’L. REV. INTEL. PROP. & COMPETITION L. 371 (2006), reprinted in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 314 (Laurence R. Helfer ed., 2013); Christophe Geiger, *Copyright’s Fundamental Rights Dimension at EU Level*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 27, 28–29, 31 (Estelle Derclaye ed., 2009); Christophe Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 115 (Paul L.C. Torremans ed., 3d ed. 2015).

18. See the numerous examples given by Dirk Voorhoof, *Freedom of Expression and the Right to Information: Implications for Copyright*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 331, 332–33 (Christophe Geiger ed., 2015) [hereinafter RESEARCH HANDBOOK]. See also *infra* Part II.

19. See Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 746 (2010) (“[I]f the right to prepare derivative works is sufficiently problematic from the standpoint of freedom of speech, perhaps a more direct approach would be to limit the right on First Amendment grounds rather than indirectly through the fair use doctrine.”); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 52 (1998) (“Protection of the freedom of speech from overzealous courts, Congress, and copyright holders must be assured. An independent First Amendment privilege outside the copyright fair use doctrine is a necessary step in that direction.”).

European Union,<sup>20</sup> or even to implement a specific limitation for “user-generated content,”<sup>21</sup> as was recently done in Canada.<sup>22</sup>

The purpose of this Article is to assess the different options available for legislators and courts, evaluate the obligations resulting from human and fundamental rights, and develop, using a comparative analysis, a satisfying legal mechanism for creative uses in the context of derivative works, thus making copyright fully compatible with the human right to free artistic creativity.

## I. FREEDOM OF ARTISTIC CREATIVITY AND COPYRIGHT LAW: A TENSE RELATIONSHIP

Part I of this Article problematizes the relationship between the human right to freedom of artistic creativity and the legislative and theoretical framework that makes up the copyright system. Although the motivation behind copyright and freedom of artistic creativity can be reconciled, this balance is challenged by the unique test to copyright posed by derivative works and appropriation art. Parts II and III of this Article seek to address how stability may be maintained or full compatibility can be achieved.

### *A. Freedom of Artistic Creativity: A Human Right Largely Recognized and Widely Protected*

Freedom of artistic creativity is a fundamental right protected in international and regional human rights instruments and in national constitutions.<sup>23</sup> Major sources of international law across the board recognize freedom of artistic creativity explicitly, or implicitly, as an inherent element of the right to freedom of expression.

20. See, e.g., Christophe Geiger, *Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law*, 39 INT'L REV. INTEL. PROP. & COMPETITION L. 178 (2008); Christophe Geiger et al., *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 Deckmyn*, 46 INT'L REV. INTEL. PROP. & COMPETITION L. 93 (2015); P. Bernt Hugenholtz, *Flexible Copyright: Can EU Author's Right Accommodate Fair Use?*, in NEW DEVELOPMENTS IN EU AND INTERNATIONAL COPYRIGHT LAW 417, 418–19 (Irina A. Stamatouidi ed., 2016) [hereinafter NEW DEVELOPMENTS]; Hugenholtz & Senftleben, *supra* note 8; Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 522, 524 (2010); Martin Senftleben, *The Perfect Match – Civil Law Judges and Open-Ended Fair Use Provisions*, 33 AM. U. INT'L L. REV. 231 (2017).

21. See, e.g., *Copyright in the Knowledge Economy*, 19–20, COM (2009) 532 final (Oct. 19, 2009).

22. Section 29.21 (Non-Commercial User-generated Content) of the Canadian Copyright Modernization Act (S.C. 2012, c. 20).

23. For a discussion of the core human rights values expressed in the right to freedom of artistic creativity, see, for example, L.P. Chambers, *Moral Freedom and Artistic Creativity*, 42 INT'L J. ETHICS 163 (1932) (discussing the relationship between freedom of ethic and self-determination and freedom of expression); I.J. Oosthuizen & C.J. Russo, *A Constitutionalised Perspective of Freedom of Artistic Expression*, 23 S. AFR. J. EDUC. 260 (2001) (problematizing the definition and scope of the freedom of artistic expression and defining its role in the creation of a democratic society, as applied specifically to South Africa). See also Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed: The Right to Freedom of Artistic Expression and Creativity*, U.N. Doc. A/HRC/23/34 (Mar. 14, 2013).

In these instruments, the individual right to express ideas creatively is often irrevocably linked with the right to receive them. In Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of creativity is formulated as: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information . . . *in the form of art*, or through any other media of his choice.”<sup>24</sup> Likewise, Article 13(1) of the American Convention of Human Rights is expressed in largely the same terms.<sup>25</sup> The link between expression and reception is even present in more tailored human rights frameworks, which explicitly articulate the right as it applies to their limited central subject. Such is the case with Articles 13<sup>26</sup> and 31<sup>27</sup> of the Convention on the Rights of the Child.

While the ICCPR, the American Convention, and the Convention on the Rights of the Child focus on the right inherent to the individual, in other explicit iterations, rather than highlighting the individual claim, a state mandate is created.<sup>28</sup> For example, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) puts the onus on the state to “undertake to respect the freedom indispensable for . . . creative activity.”<sup>29</sup>

An implicit right to freedom of artistic creativity is derived through judicial interpretation of the European Convention on Human Rights’s (ECHR) Article 10,<sup>30</sup> which protects the right to freedom of expression.<sup>31</sup> Expanding on Article 10’s imperative in its decision in *Alinak v. Turkey*, the European Court of Human Rights (ECtHR) emphasized the civic importance of the freedom of artistic creativity and the corresponding duty imposed on European states to uphold and respect it.<sup>32</sup>

24. International Covenant on Civil and Political Rights art. 19, Dec. 16, 1996, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (emphasis added).

25. American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 143 (“Everyone has the right to freedom of thought and expression . . . in the form of art . . .”).

26. Convention on the Rights of the Child art. 13, Nov. 20, 1989, 1577 U.N.T.S. 3 (“The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . [including] in the form of art . . .”).

27. *Id.* art. 31 (“States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”).

28. International Covenant on Economic, Social and Cultural Rights art. 15(3), Dec. 16, 1966, 993 U.N.T.S. 3.

29. *Id.*

30. European Convention on Human Rights (ECHR) art. 10 (“Everyone has the right to freedom of expression . . .”).

31. See *Alinak v. Turkey*, no. 40287/98, Eur. Ct. H.R. (2005); *Karataş v. Turkey*, no. 23168/94, Eur. Ct. H.R. (1999); *Müller and Others v. Switzerland*, no. 10737/84, Eur. Ct. H.R. (1988) (stating that art. 10 “includes freedom of artistic expression – notably within freedom to receive and impart information and ideas . . .”). On these cases, see Christophe Geiger and Elena Izyumenko, *Intellectual Property Before the European Court of Human Rights* (Ctr. for Int’l Intellectual Prop. Studies, Research Paper No. 2018-01, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3116752](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116752) [<https://perma.cc/MT37-ABWQ>].

32. *Karataş v. Turkey*, no. 23168/94.

According to the court:

[f]reedom of artistic expression . . . affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds . . . . Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression.<sup>33</sup>

In other cases, the ECtHR has explicitly enlarged the onus on the state to include a positive obligation to protect Article 10 rights where there is a substantial public interest involved.<sup>34</sup> The right to freedom of artistic creativity is also often conceived as inextricable from the right to enjoy the arts and the right to take part in cultural life,<sup>35</sup> which is most notably enshrined in Article 27 of the Universal Declaration of Human Rights (UNDHR)<sup>36</sup> and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>37</sup> as well as in other important regional human rights instruments.<sup>38</sup>

Recognition of the right to freedom of artistic creativity in domestic legal systems has taken myriad forms. In national constitutions, as with international and regional instruments, freedom of artistic creativity is often located within the strongly-protected right to freedom of expression. For example, Article 5 of the *German Basic Law* contains a special paragraph linking the right to freedom of expression with the right to freely develop the arts and sciences.<sup>39</sup> The *Swedish Fundamental Law*, which is one of the four laws making up the Swedish

33. *Id.*

34. *See* Appleby v. UK, no. 44306/98, Eur. Ct. H.R. (2003).

35. *See* Christophe Geiger, *Taking the Right to Culture Seriously: Time to Rethink Copyright Law*, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT? 84, 88 (C. Geiger ed., 2016) [hereinafter INTELLECTUAL PROPERTY]; Caterina Sganga, *Right to Culture and Copyright: Participation and Access*, in RESEARCH HANDBOOK, *supra* note 18, at 560, 561–62; Lea Shaver, *The Right to Science and Culture*, 1 WIS. L. REV. 121, 122, 131, 156, 169 (2010); Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT'L L.J. 637, 652–54 (2010).

36. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). For further analysis of Article 27 UDHR, see, *inter alia*, ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND 110 (2007).

37. Article 15(1) ICESCR adopts the wording of the UDHR almost verbatim. *See* Shaheed, *supra* note 23 (situating art. 27 of the UNDHR with other explicit and implicit articulations of the right to freedom of artistic expression). *See also* INTELLECTUAL PROPERTY, *supra* note 35, at 19, [http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Publications\\_CEIPI\\_\\_\\_ICTSD/CEIPI-ICTSD\\_no\\_3.pdf](http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Publications_CEIPI___ICTSD/CEIPI-ICTSD_no_3.pdf) [<https://perma.cc/N7WB-KE4J>]. *See especially* the introduction by the Special Rapporteur Farida Shaheed and the contributions of Lea Shaver, Rebecca Giblin, and Christophe Geiger.

38. *See, e.g.*, African Charter on Human and Peoples' Rights art. 17; Arab Charter of Human Rights art. 36; EU Charter of Fundamental Rights art. 13.

39. Basic Law for the Federal Republic of Germany art. 5: "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. . . . (3) Arts and sciences, research and teaching shall be free . . . ."

Constitution, explicitly includes the freedom of artistic creation as part of the key purposes of freedom of expression: “The purpose of freedom of expression under this Fundamental Law is to secure the free exchange of opinion, free and comprehensive information, and freedom of artistic creation. . . .”<sup>40</sup> Constitutions of certain other countries recognize the freedom of artistic expression within the ambit of the right to science and culture.<sup>41</sup>

In U.S. case law, freedom of artistic creativity is covered by the First Amendment of the U.S. Constitution,<sup>42</sup> although the U.S. Supreme Court has never considered this freedom as a distinct category akin to political or commercial speech; it rather addresses the various forms of art in their relation to the First Amendment on a contextual basis.<sup>43</sup> In considering, for example, state-based regulation of obscene art and its threat to free speech, the Supreme Court has articulated the need to protect the “ideal of creativity” and the liberty to explore creatively that is its precondition.<sup>44</sup> According to the Court, freedom of artistic

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40. Swedish Fundamental Law on Freedom of Expression chapter 1, art. 1.

41. See, e.g., Magyarország Alaptörvénye [Constitution] (Hung.) art. X(1) (“Hungary shall ensure the freedom of scientific research and artistic creation . . .”); Konstytucja Rzeczypospolitej Polskiej [Constitution] art. 73 (Pol.) (“The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone.”). For an example of the stand-alone provision on freedom of artistic expression guaranteed independently from either the freedom of expression as such or the freedom of science and culture, see Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 21 (Switz.) (“Freedom of artistic expression is guaranteed.”). On the various options to protect IP at the constitutional level, see for example, Christophe Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles*, in RESEARCH HANDBOOK, *supra* note 18, at 661, 666–67.

42. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (including motion pictures within the ambit of the First Amendment); *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (explaining the First Amendment interest for both authors and audiences in balancing the freedom of artistic expression with the statutory limitations of the Lanham Act); *Sefick v. City of Chicago*, 485 F. Supp. 644, 645, 653 (N.D. Ill. 1979) (holding that sculptures satirizing the then-mayor of Chicago and his wife fell within the protection of the First Amendment).

43. Interestingly, this is a quite different position from that adopted in Europe where the ECtHR and many national courts explicitly place artistic expression in a separate category. For further information on this, see, for example, Raman Maroz, *The Freedom of Artistic Expression in the Jurisprudence of the United States Supreme Court and Federal Constitutional Court of Germany: A Comparative Analysis*, 35 CARDOZO ARTS & ENT. L.J. 341, 346 (2017) (“[W]hile the freedom of artistic creativity has indeed received constitutional protection, the U.S. Supreme Court has neither distinguished artistic freedom from other forms of expression nor given any meaning to the term ‘art speech.’ Nor has the U.S. Supreme Court explained why artistic expression falls within the ambit of the First Amendment or why it is important for social development. In this regard, the approach of the U.S. Supreme Court differs strikingly from the position of the German Federal Constitutional Court, which examined these issues in detail.”). For more on the place accorded to artistic expression among the types of speech protected by the First Amendment, see Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, WIS. L. REV. 221, 222 (1987); George Vetter & Christopher C. Roche, *The First Amendment and the Artist – Part I*, R.I.B. J., Mar. 1996, at 7; George Vetter & Christopher C. Roche, *The First Amendment and the Artist – Part II*, R.I.B. J., Apr. 1996, at 9.

44. See *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Massachusetts*, 383 U.S. 413, 439 (1966).

creativity is an element of the respect for freedom of self-expression, one of the core values of the First Amendment, and American democracy in general.<sup>45</sup>

*B. Freedom of Artistic Creativity and Copyright Law: Two Rights with Similar Goals*

Born from the same respect for the act of creation as the right to free creative expression, copyright law was originally meant to be, in the words of the U.S. Supreme Court, “the engine of free expression.”<sup>46</sup> Indeed, unchecked private interests and rampant censorship in sixteenth and seventeenth century Europe created the background conditions for the advent of copyright, which was touted as a solution to the problem of limitations on creative expression.<sup>47</sup> In this period, the English Stationers’ Guild maintained a registry of the exclusive printing rights of stationers for specific books, thus ensuring their monopoly over the books they printed.<sup>48</sup> The registry also furthered the aims of censorship as it allowed authorities to easily monitor materials published and keep a watchful eye out for the printing of seditious material, which was considered a danger to the state.<sup>49</sup> Simultaneously, the stationers were allowed to keep their monopolies in exchange for complying with the laws.<sup>50</sup>

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45. *Id.*

46. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). For a very deep and interesting historical analysis, see GIANCARLO FROSIO, *RECONCILING COPYRIGHT WITH CUMULATIVE CREATIVITY: THE THIRD PARADIGM* (2018) (examining the long history of creativity, from cave art to digital remix, in order to demonstrate a consistent disparity between the traditional cumulative mechanics of creativity and modern copyright policies).

47. See GILLIAN DAVIES, *COPYRIGHT & THE PUBLIC INTEREST* (2d ed. 2002); *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* (Brad Sherman & Alain Strowel eds., 1994) [hereinafter *OF AUTHORS AND ORIGINS*].

48. See CYPRIAN BLAGDEN, *THE STATIONERS’ COMPANY: A HISTORY, 1403–1959*, at 33 (1977); CYNDIA S. CLEGG, *PRESS CENSORSHIP IN JACOBAN ENGLAND 1–2* (2001); CYNDIA S. CLEGG, *PRESS CENSORSHIP IN ELIZABETHAN ENGLAND 3–5* (1997); DAVIES, *supra* note 47, at 10 (“The royal interest in granting the monopoly was not to provide protection to the stationers’ property rights but to satisfy the desire of the crown for an effective control over the publishing trade and the press so as to outlaw the publishing of seditious and heretical books.”); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 114–43 (1968); *DIRITTO INDUSTRIALE* 335–38 (Niccolò Abriani, Gastone Cottino & Marco Ricolfi eds., 2001). On the Statute of Anne and its history, see RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695–1775)*, at 2–3 (2004); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 12–13, 15, 24 (1993); William Cornish, *The Statute of Anne 1709–10: Its Historical Setting*, in *GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE* 14, 17 (Lionel Bently, Uma Suthersanen & Paul Torremans eds., 2010) [hereinafter *GLOBAL COPYRIGHT*]; Mark Rose, *The Public Sphere and the Emergence of Copyright: Arcopagitica, the Stationers’ Company, and the Statute of Anne*, 12 *TUL. J. TECH. & INTELL. PROP.* 123, 136, 139, 143 (2009).

49. DAVIES, *supra* note 47, at 10; Pamela Samuelson, *Copyright, Commodification, and Censorship: Past as Prologue—But to What Future?* (1999) (unpublished manuscript), [http://works.bepress.com/pamela\\_samuelsan/228/](http://works.bepress.com/pamela_samuelsan/228/) [<https://perma.cc/7RTW-8LS2>].

50. DAVIES, *supra* note 49, at 10.

By the early eighteenth century, however, attitudes towards the restriction of information and ideas had changed.<sup>51</sup> Enlightenment notions about the need for intellectual independence and free debate were more widely ascribed throughout Europe, challenging the legitimacy of monarchic censorship and seeking a balance of interests among the author, the state, and the public.<sup>52</sup> In response, the British Parliament passed the Statute of Anne “for the encouragement of learning.”<sup>53</sup> The Statute was the first codification of modern, public copyright regulations,<sup>54</sup> and the first recorded articulation of the utilitarian theory of intellectual property law: that the enforcement of a limited monopoly through regulation of use could incentivize creation.<sup>55</sup> In this hugely influential affirmation of copyright,<sup>56</sup> the preeminent imperative for regulation seemed to have focused on the maximization of public good, and less on the protection of an individual right.<sup>57</sup> However, the liberty to

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51. For further detail, see Christophe Geiger, *The Influence (Past and Present) of the Statute of Anne in France*, in GLOBAL COPYRIGHT, *supra* note 48, at 122, 129 (“[A] common point between Great Britain and France is linked to the eighteenth century, the advent of the philosophy of the Enlightenment and the will to circumvent Royal censorship. In fact, the Enlightenment philosophers, who gradually became ardent defenders of authors’ rights over their works, mostly conceived copyright as a guarantee for freedom of expression. To them, granting copyright to authors was allowing the dissemination of ideas and knowledge, the author being endowed with an educational mission, in charge of ‘enlightening’ the population. However, the granting of royal privileges was often preceded by a control of the works’ content.”).

52. See, e.g., DAVIES, *supra* note 47, at 34; ALAIN STROWEL, DROIT D’AUTEUR ET COPYRIGHT, DIVERGENCES ET CONVERGENCES (1993); Gillian Davies, *The Convergence of Copyright and Authors Rights - Reality or Chimera?*, 26 INT’L REV. INTELL. PROP. & COMPETITION L. 964 (1995); Geiger, *supra* note 1, at 367; Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); Alain Strowel, *Convergences Entre Droit D’auteur et Copyright dans la Société de L’information*, in SCHUTZ VON KULTUR UND GEISTIGEM EIGENTUM IN DER INFORMATIONSGESELLSCHAFT 59 (1998); Alain Strowel, *Droit D’auteur and Copyright: Between History and Nature*, in OF AUTHORS AND ORIGINS, *supra* note 47, at 235.

53. RONAN DEAZLEY, *Commentary on the Statute of Anne 1710*, in PRIMARY SOURCES ON COPYRIGHT (1450-1900), (Lionel Bently & Martin Kretschmer eds., 2008), [http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary\\_uk\\_1710](http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1710) [<https://perma.cc/UP2F-DHJY>]. Similarly, the preamble of the Statute of Anne emphasizes the need “for the encouragement of learned men to compose and write useful books.” *Id.* According to Ronan Deazley, this is the central element of the 1710 law, which primarily seeks to encourage the production and dissemination of new ideas by way of granting either the author or the publisher a legal monopoly, with this being indirectly beneficial for the public and the society as a whole. *Id.*

54. Paul Edward Geller, *International Copyright: The Introduction*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2[1][b] (Lionel Bently ed., 2016).

55. H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1248–49 (2010).

56. See Geiger, *supra* note 51.

57. See Orit Fishman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497, 507 (2004). Although it is true that the Statute of Anne mentions the author, some scholars have convincingly demonstrated that it was mostly rhetoric. See BLAGDEN, *supra* note 48, at 153–75 (1977). For whom the championing of the author was purely motivated by the circumstances and a desire to cut short the Stationers company’s monopoly, see PATTERSON, *supra* note 48, at 147 (“Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author’s copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too

create freely without any control of the ruler and to spread new ideas within the society, as a manifestation of Enlightenment thinking and a correlative element to the freedom of expression,<sup>58</sup> have been in the regulatory zeitgeist for centuries.<sup>59</sup>

This utilitarian mode of justification has persisted across history. The spirit of the Statute of Anne and of much eighteenth century copyright legislation in Europe is still reflected worldwide. The “Copyright Clause” embedded within the U.S. Bill of Rights is one such adaptation, as the clause purports “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>60</sup>

Yet utilitarianism is not the sole justification for national and international copyright systems. Copyright theory has expanded to include a formulation of ownership rights and personality interests propagated by the personality theorists of the nineteenth century, and often concretized in the form of the protection of the author’s economic interests and his “moral rights.”<sup>61</sup> These approaches, often attributed to Hegel, Locke, or Kant,<sup>62</sup> imbue creators with exclusive authorship rights on the basis of their natural legal right to property, often understood as an extension of an individual’s labor or existential will, the exercise of which individuates private property from a property “commons” (now formulated in the IP field as the “public domain”).<sup>63</sup> The central tenet of these theories is that ownership is established through the dynamic relationship between the personality and the object, with the personality acting upon or through the object. In this

long established to be attacked without some basis change. The most logical and natural basis for the changes was the author . . . [T]he author was used primarily as a weapon against monopoly.”)

58. See Christophe Geiger, *Author’s Right, Copyright and the Public’s Right to Information*, in 5 NEW DIRECTIONS IN COPYRIGHT LAW 24 (Fiona Macmillan ed., 2007) [hereinafter NEW DIRECTIONS] (problematizing the relationship between the author and the recipient of information as it is enshrined in the “freedom of communication” and the freedom of expression); Lyman Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y U.S.A. 365, 379 (2000).

59. Geiger, *supra* note 1, at 367.

60. U.S. CONST. art. I, § 8, cl. 8.

61. See Paul E. Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms*, in OF AUTHORS AND ORIGINS, *supra* note 47, at 167 (“As the Enlightenment gave way to Romanticism, there was an increasing recognition that genius creatively accelerated the progress of the mind by its unexpected but fruitful insights. . . . Romantic critics began to consider the individually creative subject in terms of a new vision, which was to find its way into copyright thought.”); Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 412 (2006). On the emergence of the discourse about the genius, see ROSE, *supra* note 48, at 1; MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* (1994); Giancarlo Frosio, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 341, 370–76 (2014); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

62. See, e.g., GEORG FRIEDRICH WILHELM HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* § 69 (Thomas M. Knox trans., Clarendon Press 1967) (1821); IMMANUEL KANT, *Kritik der Urteilskraft*, in KANT’S KRITIK OF JUDGMENT § 46 (J.H. Bernard trans., Macmillan and Co. 1892) (1790); JOHN LOCKE, *Two Treatises of Government*, in THE WORKS OF JOHN LOCKE § 27 (1727); see also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 287–331 (1988).

63. Shaheed, *supra* note 23.

subject-object interaction, the individual establishes an existential claim to the object which, in a market-based society, manifests as a legally cognizable property right.<sup>64</sup> In the case of intellectual property, the creative expression constitutes the object. While the applicability of personality theory in the IP field is contested, and Locke's labor hypothesis did not explicitly encompass intangible objects in its original formulation,<sup>65</sup> so called "author rights" systems in continental Europe explicitly protect the remuneration interest of creators for the use of their works by granting them special contractual protections against buyouts from publishers or participation in the remuneration generated by levies/statutory licenses.<sup>66</sup>

However, it might still be questionable how copyright's rationales can be reconciled with the obligations imposed on States by human rights, such as freedom of artistic creation. One reason for this is that ostensibly utilitarianism's maximization of creation manifests through the grant of exclusive economic rights in allowing the rightsholder to control the use of his work, without explicitly mandating a counterbalancing individual right of the freedom to create, and moral rights seem to focus on protecting the interests of the initial author. Nevertheless, the central aims of the freedom of artistic creativity and copyright legislation are not irreconcilable, and international and state judiciaries in conjunction with a variety of IP scholars have articulated theories of cohesion between the two systems of rights.

One theory of rapprochement describes a creative right as a "positive dimension" of the freedom of expression, with copyright—which encompasses the moral and economic rights of the creator—as an inherent element of creativity.<sup>67</sup> Another attempt at reconciliation looks to the case law of the ECtHR interpreting Article 10 of the Convention, particularly the Austrian case *Vereinigung Bildender Künstler v. Austria* that balances the individual right to privacy of an Austrian politician with the artist who used his image's right to freedom of expression.<sup>68</sup> In that case, and others like it, the European and national courts attempt to bridge the rights of the public with the rights of the creator through an analysis of artistic contribution to "public debate" and the right of the public to be informed.<sup>69</sup> The interests of the public, arguably, guarantee an authorial right to free creation where there is a public function to the work, one which would be equally valid where a

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64. See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 97–98 (2011).

65. See Letter from John Locke to Edward Clarke (January 2, 1692(-3)), in THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366–68 (B. Rand ed., 1927); see also Justin Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 CARDOZO ARTS & ENT. L.J. 555 (2010); Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 L. & CONTEMP. PROBS. 75, 84–85 (2003). The extension of Locke's arguments to cover intellectual property was due to William Blackstone. See WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 405 (1766).

66. On the role of a "remuneration-based" system, see *infra* Part III.

67. André Kévérec, *Authors Rights Are Human Rights*, 32 COPYRIGHT BULL. 18, 20 (1998).

68. *Vereinigung Bildender Künstler v. Austria*, App. No. 68354/01, Eur. Ct. H.R. (2007), § 26.

69. *Id.*

property right is implicated in a balance of individual rights; copyright and freedom of artistic expression operate hand in hand.<sup>70</sup>

In perhaps the most explicit marriage of the two doctrines, American copyright case law has definitively mandated that the First Amendment and the Copyright Clause work together to promote freedom of artistic creativity. As formulated by the Supreme Court, the role of the Copyright Clause, in promoting the utilitarian notion of the public good, and the role of the First Amendment, in maintaining an individual right of expression, is to assure “that [the] government throws up no obstacle to [the] dissemination [of creative content].”<sup>71</sup> In fact, the Court maintains that the copyright system has developed to allow the balancing of both: to that end, the idea/expression dichotomy and the fair use exception exist to ensure that the limitations of the copyright system are compatible with the free dissemination demands of the First Amendment, which includes the promotion of the freedom of artistic expression.<sup>72</sup>

Having established that the end goals of copyright and the freedom of artistic creativity are not irreconcilable, a delicate balance has been achieved within the system to allow creative freedom while maintaining some notion of exclusive control; copyright simultaneously enables authors to make a living from their creations while allowing them to build on preexisting material to create new works of authorship. Limitations, such as open-ended provisions, a catalogue of allowed exempted uses, or a combination of both, are essential to achieving this essential balance and ensuring future creativity. In working alongside the exclusive right, therefore, limitations play an essential role in fostering a creative environment.<sup>73</sup>

*C. Freedom of Artistic Creativity and Copyright Law: Two Rights in Conflict When it Comes to the Creative Reuse of Protected Works*

As noted, no existing system of limitations in various jurisdictions was specifically designed to address the creative reuse of copyrighted material in the context of derivative works. At present, when one wants to create a derivative work or a dependent creation (that is, a new work incorporating a creative reuse of an

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70. Agata Dimmich, *Copyright as a Human Right Under the European Convention on Human Rights*, in *KNOWRIGHT 2008: KNOWLEDGE RIGHTS – LEGAL, SOCIETAL AND RELATED TECHNOLOGICAL ASPECTS* 23–24 (Jens Gaster, Erich Schweighofer & Peter Sint eds., 2008); Helle Porsdam, *On European Narratives of Human Rights and Their Possible Implications for Copyright*, in *6 NEW DIRECTIONS*, *supra* note 58, at 346–49.

71. *Eldred v. Ashcroft*, 537 U.S. 186, 244 (2003).

72. *Id.*; *see also* *Golan v. Holder*, 132 S. Ct. 873, 876–77 (2012) (describing fair use as a built-in First Amendment consideration in copyright law). As it was often stated by scholars, “fair use polices the boundary between free speech and copyright’s control of creative expression. The defense succeeds when the new creator can show that his use of the copyrighted work in essence advances the goals of copyright itself: ‘to promote the progress of science and useful arts.’” Adler, *supra* note 7; *see, e.g.*, David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan V. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83 (2011).

73. *See* Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515 (2010).

existing protected work), no limitation for creative use is available. On the contrary, very limited options exist, such as the already existing limitations to copyright law. Most of the time, in order to comply with the law, a creator of a derivative work must clear rights associated with the use of the source material.

This requirement seems to be mandated by international law: Article 2.3 of the Berne Convention states that “translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works *without prejudice to the copyright in the original work.*”<sup>74</sup> Although the article offers protection to derivative works as independent, separable artistic creations, it requires the consent of the author of the original work where that work is not in the public domain.<sup>75</sup> To temper these strict demands, some scholarly interpretations of Article 2.3 suggest the existence of a caveat; there could be a potential exception to the consent requirement in the event of a historically accepted transformative (and otherwise lawfully executed) use, such as a parody or a burlesque.<sup>76</sup> Such interpretations make sense since it cannot be in the spirit of the Berne Convention to submit widely accepted and permitted uses such as parodies to the authorization of the initial author.<sup>77</sup> Moreover, submitting these uses to the exclusive right would be in open contradiction with international obligations related to freedom of expression, to which the Member States of Berne are also parties.<sup>78</sup> Furthermore, the status of appropriation art, which takes directly from the original work and expresses creative thought primarily through contextualization, remains ambiguous as “other alterations” have yet to be fully defined by the courts.<sup>79</sup>

The need for greater clarity on this issue cannot be overstated. Scholars of artistic development have long taken note of the growing trend, shared across the

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74. *Id.* (emphasis added). Many states have adopted the text of the Convention, or similar language, in their national legislation.

75. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT 208 (3d ed. 2012).

76. SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 484 (2d ed. 2006).

77. As Goldstein and Hugenholtz note, “[p]arody, though nowhere expressly exonerated in the Berne text, is widely accepted across the Berne Union as a permitted use . . . .” GOLDSTEIN & HUGENHOLTZ, *supra* note 75, at 393. They also admit that one of the hardest questions raised by parodies “[is] the point at which parody leaves off and a derivative work begins,” citing borderline cases in national decisions. *Id.*

78. This interpretation has to be clarified and specified, however. *See* WORLD INTELLECTUAL PROP. ORG., GUIDE TO THE COPYRIGHT AND RELATED RIGHT TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS para. BC-2.44, at 28–29 (2003), [http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf) [<https://perma.cc/77NR-FL67>].

79. *Id.* para. BC-2.48, at 29 (“What definitely needs interpretation . . . is the meaning of ‘other alterations of a literary or artistic work.’ It goes without saying that it cannot mean any alterations but only those which result in new original elements in relation to the previous unaltered form of the work. It is, in fact, not easy to find obvious examples for this subcategory of derivative works. Caricatures and parodies are mentioned sometimes (to the extent that they may not be characterized as adaptations) but the transformation of a computer program into another computer ‘language’ or from source code into object code . . . may also be included in this broader sub-category.”).

generic and formalistic spectrum of artistic creation, towards a contemporary aesthetic that embraces *pastiche*: “appropriation designed to be recognizable.”<sup>80</sup> While art has incorporated referential elements practically since its inception, and postmodernism ushered in an age in which reference and meaning became inextricable, modern artwork has, arguably, embraced appropriation on an even larger scale. Music represents a field with an established history of appropriation developed first through the use of “sampling” and then the invention of the “remix” and “mashup.”<sup>81</sup> It is a history that spans the early intermixture of various strains of jazz music,<sup>82</sup> the incorporation of 60s funk beats into the disco tunes of the 70s,<sup>83</sup> the experimentation by Jamaican DJ’s and studio engineers with “dub” in the late 60s and 70s in mixing live disparate sounds into a single work, mostly on instrumental versions of existing tracks,<sup>84</sup> and the reliance of hip hop producers on innovative uses of copyrighted soul recordings to create completely new works<sup>85</sup> such as the WuTang Clan’s 90s sampling of the 1967 Charmels to create *C.R.E.A.M.*,<sup>86</sup> Danger Mouse’s 2006 mashup of Jay-Z’s set to the Beatles’ *White*

80. Aaron Gervais, *Why Pastiche Has Taken Over Music*, NEW MUSIC BOX (Feb. 24, 2016), <http://www.newmusicbox.org/articles/why-pastiche-has-taken-over-music/> [https://perma.cc/NY2J-FWU8].

81. For a history of musical sampling (as well as its copyright implications), see JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 129–54 (2008); KEMBREW MCLEOD, *FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY* 66 (2007); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Duhanic, *supra* note 12, at 1007 (“No sampling, no Hip Hop. And that would be unacceptable for a democratic society governed by the rule of law and the resulting freedom for artists to express themselves artistically.”); David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607 (1992); Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271 (1996); compare RICHARD L. SCHUR, *PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW* 46–49 (2009); Kevin J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1186 (2008); Kevin J. Greene, *What the Treatment of African American Artists Can Teach About Copyright Law*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 385, 389–90 (Peter K. Yu ed., 2007); Perry A. Hall, *African-American Music: Dynamics of Appropriation and Innovation*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 31 (Bruce Ziff & Pratima V. Rao eds., 1997).

82. Steve Stein, *Steinski Gives a Sampling History Lesson*, NPR (Oct. 22, 2008), <http://www.npr.org/templates/story/story.php?storyId=93844583> [https://web.archive.org/web/20170422200527/http://www.npr.org/templates/story/story.php?storyId=93844583].

83. Thomas Kennedy, *AKAI MPC 2000/The History of Sampling*, JOYFUL NOISE (Sept. 11, 2013), <https://www.joyfulnoiserecordings.com/blogs/news/31858113-akai-mpc-2000-the-history-of-sampling> [https://perma.cc/X2YR-DUK6].

84. Szymanski, *supra* note 81, at 277.

85. See, e.g., Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My! How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843 (2011).

86. Oliver Wang, ‘C.R.E.A.M.’: *The Story of a Sample*, NPR (Apr. 22, 2009), <http://www.npr.org/2011/01/04/103319951/c-r-e-a-m-the-story-of-a-sample> [https://web.archive.org/web/20171010030420/http://www.npr.org:80/2011/01/04/103319951/c-r-e-a-m-the-story-of-a-sample]; see also Duhanic, *supra* note 12 (discussing the issue of sampling in hip hop music from a copyright perspective).

*Album* culminating into the *Grey Album*,<sup>87</sup> and the entire culture of DJ-driven electronic music in which instruments have been replaced with isolated riffs, beats and other sounds (recognizable or not) taken from preexisting works<sup>88</sup>—the examples are countless.

Essentially, the history of popular music, and increasingly popular art as a whole, is a history of artistic development irrevocably connected with the progress of technology and its ability to enable the creation and enrichment of new work by appropriating the old.<sup>89</sup> Technology has also increased access to user-generated content, a new source of borrowable material, the influence of which is as easily observed in the visual art of proponents of the appropriation art movement such as Jeff Koons (further explored in Part II) as it is in the collaborative world of web-based musicians who exchange content amongst their community in an internet sub-sphere. The fear, then, is that ambiguity in the regulation of appropriation could have an enormous chilling effect on the development of modern art, and in fact history has shown that new art or music forms have largely developed by (deliberately or not) ignoring copyright issues.<sup>90</sup>

In fact, textual ambiguities of the relevant legislation are not the only challenges faced by those who seek to clear the rights of the original material for their derivative works. Clearing rights can also be a very challenging process as it is not always easy to identify rightsholders. Further, even when a rightsholder is identified, there remains a risk of blocking, since the rightsholder might deny authorization or ask too high of a price.<sup>91</sup> This process, averse to the spontaneous creation process of authors, thus involves many uncertainties and high transaction

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87. Kyle Adams, *What Did Danger Mouse Do? The Grey Album and Musical Composition in Configurable Culture*, 37 MUSIC THEORY SPECTRUM 7 (2015); Urs Gasser & Ernst Silke, *From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age* (Berkman Klein Center for Internet & Society, Publication No. 2006-05, 2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909223](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=909223) [<https://perma.cc/3U6Y-GA8G>].

88. Gervais, *supra* note 80.

89. *Id.* (positing that the trend towards pastiche can be connected to the development of technology, the rise of DJ culture, nostalgia for the past, the proliferation of sound and an increased open mindedness about new forms of culture).

90. In fact, as rightsholders, they are not obliged to give their consent for the use of their work in derivative works. They may decide to deny their authorization in cases where either the price is not what they would wish or the use is not aligned with their vision for their work, or if they wish to exclusively license the use of their work to another entity or even wish to potentially produce a similar genre of derivative work themselves in the future and want to retain monopoly rights.

91. BARBARA STRATTON, SEEKING NEW LANDSCAPES: A RIGHTS CLEARANCE STUDY IN THE CONTEXT OF MASS DIGITISATION OF 140 BOOKS PUBLISHED BETWEEN 1870 AND 2010, at 10 (2011); DENISE TROLL COVEY, ACQUIRING COPYRIGHT PERMISSION TO DIGITIZE AND PROVIDE OPEN ACCESS TO BOOKS (2005); ANNA VUOPALA, EUROPEAN COMMISSION, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COST FOR RIGHTS CLEARANCE 10 (2010); David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1814 (2013) (“[E]ven where owners are readily identifiable, the costs of negotiation and bargaining may be prohibitive . . .”); Stef van Gompel & P. Bernt Hugenholtz, *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It*, 8 POPULAR COMM. 61, 62 (2010); Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 INT’L REV. INTELL. PROP. & COMPETITION L. 669 (2007).

costs.<sup>92</sup> In this context, artists may prefer to accept being an infringer and take on a potential risk of litigation.<sup>93</sup> In fact, in practice, rightsholders are likely to tolerate these borrowings as long as the success of the work is very limited, the use is non-commercial, or both. Thus, this approach is mostly adopted in cases involving user-generated content on social media. The legal problems most of the time only start to emerge once the works become largely exposed and exploited; in short, when the new work generates financial gain.<sup>94</sup>

As a result, the requirements placed upon outside authors for the creation of derivative works are cumbersome. But far more problematic from a theoretical point of view is that submitting the artistic creation process to the approval of rightsholders resembles at the end a sort of private censorship, as private entities or individuals have the potential to decide what can be created or not and to block the dissemination of new works.<sup>95</sup> This moves copyright radically away from the spirit from which it emerged in the eighteenth century and from its cultural and social function.<sup>96</sup> Thus, it seems imperative to both explore ways to make freedom of artistic creativity fully compatible with copyright law and assess the different options available for legislators and courts to secure creative uses in the context of derivative works in order to develop a satisfying legal mechanism *de lege ferenda*.

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92. These costs may occur as a result of difficulties identifying the author, or the author's heir, with a particular problem existing in the case of orphan works (works where the rightsholders are impossible to identify or find).

93. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572–73 (1994) (“2 Live Crew’s manager informed Acuff–Rose that 2 Live Crew had written a parody of ‘Oh, Pretty Woman,’ that they would afford all credit for ownership and authorship of the original song to Acuff–Rose . . . and that they were willing to pay a fee for the use they wished to make of it. Acuff–Rose’s agent refused permission, stating that ‘I am aware of the success enjoyed by “The 2 Live Crews”, but I must inform you that we cannot permit the use of a parody of “Oh, Pretty Woman.”’ Nonetheless . . . 2 Live Crew released records, cassette tapes, and compact discs of ‘Pretty Woman’ . . . [identifying] its publisher as Acuff–Rose.”).

94. Apart from *Campbell*, other examples include the making of a sequel to the work of a famous French classic, *Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ.*, Jan. 30, 2007, *Bull. Civ. I*, (Fr.) (*Hugo v. Plon SA*); the use of passages from a play for insertion in a new play, *German Constitutional Court, “Germania 3,”* 29 June 2000, *GRUR INT.* 149 (Ger.); and the creation of a sculpture by a famous American artist on the basis of a copyright-protected photograph, *Tribunal de Grande Instance [TGI] [Ordinary Court of Original Jurisdiction] Paris*, Mar. 9, 2017, *N°RG :15/01086* (Fr.).

95. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 378 (1996) (“Given copyright owners’ propensity to private censorship and systematic ability to demand supracompetitive license fees, copyright owners’ expansive control over transformative uses unduly stifles the creative reformulation of existing expression . . .”); *see also* Neil W. Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 *VAND. L. REV.* 1879, 1879–82 (2000); Neil W. Netanel, *Copyright and ‘Market Power’ in the Marketplace of Ideas*, in *ANTITRUST, PATENTS AND COPYRIGHT* 149 (François Lévêque & Howard Shelanski eds., 2005); Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 *VAND. L. REV.* 1933 (2000).

96. Christophe Geiger, *The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law*, in *INTELLECTUAL PROPERTY LAW: METHODS AND PERSPECTIVES* 153 (Graeme B. Dinwoodie ed., 2013).

## II. APPROXIMATING FREEDOM OF ARTISTIC CREATIVITY AND COPYRIGHT LAW: THE CRUCIAL ROLE OF LIMITATIONS

Part II will analyze the use of copyright exceptions and limitations in continental Europe, the United States, and Canada in trying to balance the freedom of artistic creativity while giving effect to the interest of rightsholders. As it will be shown, results can sometimes be quite unpredictable and/or, in European countries, due to an often narrow drafting of the limitations, too one-sided. As a result, courts must sometimes look outside the copyright system to restore balance: this need for external intervention illuminates current copyright law's inadequacy in dealing with upholding artistic creativity on its own terms.

### *A. The Existing (Unsatisfying) Internal Mechanism: Current Exceptions and Limitations to Copyright Law*

#### *1. Trying to Make Creative Use Fit Under Current Free Spaces of Copyright Law: Exceptions and Limitations in Continental Systems and in the United States*

In Continental-European copyright systems, authors who wish to use existing works for artistic purposes have recourse to the limitations and exceptions permitted by law, such as quotations, parody, and *freie Benutzung* (free use).<sup>97</sup> Such provisions can, however, in certain respects appear insufficient as a satisfactory guarantee of the freedom to create.

First, in certain countries the quotation exception still seems to be restricted to text; it is thus often impossible to quote an image. The French Supreme Court,<sup>98</sup> for instance, still regularly reiterates that the integral representation “of a work of whatever form or duration cannot constitute a brief quotation.”<sup>99</sup> Moreover, quotation for artistic purposes frequently requires the breach of the strict limits imposed by the wording of the law.<sup>100</sup> Accordingly, it is not surprising that on numerous occasions judges have had no choice but to apply fundamental rights such as the freedom of expression or the freedom of creativity in order to “push through” the quotation exception.<sup>101</sup>

97. German Copyright Act (Urheberrechtsgesetz, UrhG), art. 24.

98. Cour de Cassation—the highest French court in the judicial order.

99. Cass. 1e civ., Nov. 13, 2003, Bull. Civ. 1, No. 76 (Fr.).

100. LIONEL BOCHURBERG, LE DROIT DE CITATION 128–29 (1994).

101. See, e.g., Cass. 1e civ., May 15, 2015, Bull. Civ. 1, No. 13-27391 (Fr.); Medienprofessor Case, Austrian Supreme Court 12 June 2001, [2002] GRUR INT. 341, 33 INT'L REV. INTELL. PROP. & COMPETITION L. 994; Hague Court of Appeals, Church of Scientology v. XS4ALL, 4 September 2003, 6 AMI 222 (2003); Supreme Court of the Canton of Zurich, Sept. 9, 2004, MEDIALEX 231 (2004); German Constitutional Court, “Germania 3,” 29 June 2000, GRUR INT. 149 (2001); District Court of Paris, 3e civ., Feb. 23, 1999 184 RIDA 374 (2000). However, there have admittedly been numerous decisions that have refused to apply the fundamental rights, holding that the balance between copyright and freedom of expression had already been implemented within copyright by means of the existing limits. See ALAIN STROWEL & FRANÇOIS TULKENS, DROIT D'AUTEUR ET LIBERTÉ D'EXPRESSION (2006); Christophe Geiger, “Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union, 37 INT'L REV. INTELL. PROP. & COMPETITION

Parody also has limited possibilities. Indeed, the Court of Justice of the European Union (CJEU) recently decided in the *Deckmyn* case in 2014 on a uniform definition of the concept of parody.<sup>102</sup> According to the court, “the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery.”<sup>103</sup> Therefore, in order to constitute a parody, there is a requirement to have a humorous or satirical aesthetic, which is seldom the case in a musical context such as sampling but is also not always the case in appropriation art. Moreover, what constitutes a parody is often understood very narrowly. Indeed, in that same case, the Court of Justice of the European Union specifies that article 5(3)(k) of Directive 2001/29, outlining the exception to copyrights for parody purposes, needs to be interpreted “strictly.”<sup>104</sup> Outside the humoristic exceptions, some legal systems also have a concept of “free use of a work.”<sup>105</sup> This is particularly the case in Germany.<sup>106</sup> Indeed, German law does not have a specific exception for parodies, but parodies have been allowed if they are considered to be “free use.” When doing so, the German Federal Court of Justice considered that the German free use limitation must be interpreted according to EU law, and in particular to the ruling of the CJEU in *Deckmyn*.<sup>107</sup> The free use limitation comes from Article 24 of the Copyright Act, which permits the author to freely exploit a work created on the basis of another work, provided that the personal characteristics of the first work are lost in the derived work.<sup>108</sup> However, here too, this possibility has been traditionally interpreted strictly by the literature as well as by the judicial practice, and is rarely upheld in the context of creative reuses of copyrighted material.<sup>109</sup>

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L. 371 (2006); P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 343 (Rochelle Dreyfuss et al. eds., 2001). For an overview, drawing on the case law of the ECtHR and the CJEU, of the influence of the right to freedom of expression and information on European copyright law in the digital context, see Elena Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective*, 19 J. WORLD INTELL. PROP. 115 (2016).

102. Case C-201/13, *Deckmyn v. Vandersteen*, 2014 E.C.R. XX.

103. *Id.* § 20. For comment, see Geiger et al., *supra* note 20; Sabine Jacques, *Are National Courts Required to Have an (Exceptional) European Sense of Humour?*, 37 EUR. INTELL. PROP. RTS. 134 (2015).

104. Case C-201/13, *Deckmyn v. Vandersteen*, 2014 E.C.R. 22–23.

105. German Copyright Act, Sept. 9, 1965, BGBl I at 1273, § 24, last amended by the Act, Dec. 20, 2016, BGBl I at 3037, art. 1 (Ger.).

106. Analogously, see § 5(2) of the Austrian Copyright Act.

107. Bundesgerichtshof [BGH] [Federal Court of Justice], decision of 28 July 2016. For a comment, see Henrike Maier, *German Federal Court of Justice Rules on Parody and Free Use*, 12 J. INTELL. PROP. L. & PRAC. 16, 17 (2017).

108. Detailed in Article 24 of the German Copyright Act. See Duhanic, *supra* note 12, at 1010–11.

109. See ADOLF DIETZ, CHRISTOPHE GEIGER, PETER WAND & SARAH MERZBACH, *COPYRIGHT AND FREEDOM OF EXPRESSION* (2008). However, a recent decision of the German Constitutional Court of 31 May 2016, *Metall auf Metall* (1 BvR 1585/13) might lead to a change, allowing a sample of a song of the German band Kraftwerk by a hip hop artist on the basis of freedom of artistic creativity protected by the German Constitution (art. 5 (3)). It is thus not unlikely that the provision will in the future be interpreted in a more liberal way by courts in the light of the freedom of creativity protected by the German constitution. On this decision, see *infra*.

Unlike the systems of Continental Europe, which are based on strictly enumerated exempted uses, certain common law countries frame copyright limitations as open-ended provisions, which allows reacting to new situations in a more flexible way. U.S. fair use constitutes perhaps the most prominent example. Indeed, “fair use” is a doctrine that allows the use of copyrighted material without asking for permission from the original author of the work in a limited set of circumstances specified in section 107 of the U.S. Copyright Act.<sup>110</sup> This limitation to copyright is considered “open-ended” since there are—beyond the fair uses enumerated in the provision such as news reporting, teaching, scholarship, or research—no limited situations in which the use would be considered “fair” or not. In general, the copying needs to be done for a limited and “transformative” purpose, meaning that the derivative work uses the original work in a new and different way in order to be considered a “fair use.”<sup>111</sup>

The U.S. Supreme Court holding in *Campbell v. Acuff-Rose Music*,<sup>112</sup> which definitively adopted the “transformative use” paradigm over other paradigms,<sup>113</sup> constitutes a good illustration of permissible creative reuse, as the Court ruled in favor of 2 Live Crew’s parody of Roy Orbison’s “Oh, Pretty Woman” despite the commercial character of the derivative work.<sup>114</sup> The appellate court had decided that the commercial nature of the parody made the work “presumptively unfair.”<sup>115</sup> However, the Supreme Court reversed, holding that the commercial nature of a parody was only one of the factors to take into consideration in evaluating the purpose and character of the work, and therefore could not constitute an evidentiary presumption.<sup>116</sup>

In a Second Circuit case, *Blanch v. Koons*, the court had to evaluate whether the adaptation and use of an existing image in a commissioned collage painting by Jeff Koons was an infringement of the original photographer’s copyright.<sup>117</sup> The court

110. The U.S. Copyright Act provides that uses are fair and non-infringing depending on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount appropriated from the copyrighted work; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2012).

111. Rich Stim, *Measuring Fair Use: The Four Factors*, STAN. COPYRIGHT & FAIR USE CTR. (Apr. 10, 2017), <http://fairuse.stanford.edu/overview/fair-use/four-factors/> [<https://perma.cc/WG2T-WBX8>].

112. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

113. Netanel, *supra* note 8. The Supreme Court in *Campbell v. Acuff-Rose* even calls the transformative inquiry the “heart of the fair use” doctrine. The Court built on previous analysis of Judge Leval, considering in his famous article on fair use in the Harvard Law Review that the transformative test lies “at the heart of fair use.” *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

114. *Campbell*, 510 U.S. at 569.

115. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1436 (1992).

116. As the U.S. Supreme Court emphasized in *Campbell v. Acuff-Rose Music*, “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579.

117. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *see also* *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (where Mattel brought an unsuccessful copyright infringement action against Tom Forsythe for his photographs depicting a doll in sexually compromising positions);

explored each factor of the fair use analysis, weighed them together in light of the general purpose of copyright law, and came to the conclusion that copyright's goal of "promoting the progress of science and useful arts" would be better served by allowing creative reuse of the copyrighted image in a collage painting.<sup>118</sup> The copyrighted work was use of a "raw material," but the fact that the use was transformative allowed the court to consider that it was fair.<sup>119</sup> In *Cariou v. Prince*,<sup>120</sup> a case regarding the defendant's reuse of the plaintiff's photographs in a series of paintings and a collage, the Second Circuit found that the appropriation of the copyrighted photographs was also a fair use,<sup>121</sup> although cases involving appropriation might not always turn out this way.<sup>122</sup> Indeed, the general understanding is that "there must be at least some kind of commentary at work for a fair use claim to have a chance,"<sup>123</sup> but there have been some inconsistencies, in particular *Blanch v. Koons*, where commentary was not at work. It is therefore true that the results of the application of the open-ended fair use provision can be hard to predict in the case of creative re-appropriations.<sup>124</sup>

The *Cariou v. Prince* decision expanded the application of transformative use, which has since become the most dominant of the fair use factors and, as an

Mattel v. MCA Records, 296 F.3d 894 (9th Cir. 2002) (a lawsuit between Mattel and MCA Records that resulted from the 1997 Aqua song, "Barbie Girl," which was ultimately dismissed). However, in an earlier case, the Second Circuit refused to allow the fair use defense for Koon's creative reuse of the image of puppies on a greeting card in his famous sculpture "String of puppies." See *Roger v. Koons*, 960 F.2d 301 (2d Cir. 1992); see also Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 23–33 (1992) (criticizing the *Rogers v. Koons* decision as failing to recognize the nature of post-modern appropriation art); Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105 (2009) (discussing evolution of standards in appropriation art in U.S. case law from *Rogers v. Koons* to *Blanch v. Koons*).

118. *Blanch*, 467 F.3d at 244.

119. *Id.* at 253.

120. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

121. However, at the trial court level, the uses were found infringing and fair use was denied. The judge considered the "transformative content of Prince's painting minimal at best," even allowing *Cariou* to destroy the paintings. *Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011).

122. Appropriation art is regularly the subject of litigation, which is the source of major uncertainties for artists and producers involved in these art forms. For a critique on the uncertainty left by the fair use doctrine in the case of new art forms, see Adler, *supra* note 7, at 566, (underlining that "the disparate results in these cases, not to mention the high costs of litigating against a backdrop of uncertainty, help explain why a climate of 'self-censorship' has taken hold in the art world"); see also *Graham v. Prince*, 265 F. Supp. 3d 366, 390 (S.D.N.Y. 2017) (another important case involving appropriation art, which was recently decided before the Southern District of New York).

123. Allan Behr, *Appropriation of Photos: Where to Draw the Line — Part 2*, LAW360 (May 4, 2012, 1:31 PM), <https://www.law360.com/media/articles/331472/appropriation-of-photos-where-to-draw-the-line-part-2> [<https://perma.cc/LY4E-9TAW>].

124. This is the reason why in the context of appropriation art, the transformative test has been heavily criticized as an "obstacle to creativity." As one scholar has emphasized:

Artistic expression has emerged as a central fair use battleground in courts. At the same time that art depends on copying, the transformative test has made the legality of copying in art more uncertain, leaving artists vulnerable to lawsuits under a doctrine that is incoherent and that fundamentally misunderstands the very creative work it governs.

Adler, *supra* note 7, at 559.

empirical matter, tends to be determinant in creative use situations.<sup>125</sup> For example, in the case *Seltzer v. Green Day, Inc.*, the court ruled in favor of the rock band Green Day when it used an artist's illustration in a video displayed during several of its concerts without the artist's authorization.<sup>126</sup> The court considered the use transformative and not a mere quotation, because the illustration was used as a "raw material" and the aesthetic modifications made by the rock band to the original illustration conveyed a new message and was distinct from the original work.<sup>127</sup>

As we have seen, a key inquiry into whether non-parodic appropriation art is fair use is whether the use is considered transformative. The concern here is a lack of guidance about how much observable difference is required for a finding of transformative usage.<sup>128</sup> Daniel Gervais, for example, argues that "transformativeness" is a feature of fair use in order to create a new work rather than a direct reuse; the key inquiry would involve "an equation that reflects the amount of originality of the primary work, the quality and quantity of the originality transferred from the primary work to the derivative work, and the amount of originality and purpose added by the author of the derivative work."<sup>129</sup> Others, such as Darren Hudson Hick, go further to suggest that "to whatever degree the new work appropriates from the preexisting work, where the new work is used to express some distinct idea, . . . such a use [should] be recognized as transformative and so presumptively fair."<sup>130</sup> In any case, it will largely depend on the facts of the case as the addition might be minor but still convey a different and strong artistic message.<sup>131</sup> In some situations, there might not be *any* addition at all, as it will be the context in which the original artwork is shown that will be the vehicle of the artistic message. This is of course the case in the context of "ready-mades" where

125. This far-reaching development to create free spaces for appropriation art has not been unanimously approved though. For a critical comment, see, for example, Jacqueline Morley, *The Unfettered Expansion of Appropriation Art Protection by the Fair Use Doctrine: Searching for Transformativeness in Cariou v. Prince and Beyond*, 55 IDEA — INTELL. PROP. L. REV. 385, 398–408 (2015). The author states that "the Second Circuit's decision blurred the already unclear meaning of transformativeness within the Fair Use Doctrine," *id.* at 398, and that "the [w]orks that the Second Circuit [r]emanded [s]hould [h]ave [b]een [c]ondemned as [n]ot [t]ransformative in [o]rder to [c]reate a [c]lear [s]tandard," *id.* at 408.

126. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

127. *Id.*; see *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994) (to be transformative, the Supreme Court in *Campbell* considered that the secondary work needs to modify the first with a "new meaning or message"); Adler, *supra* note 7, at 563 (underlining, in order to determine "meaning" in fair use case, the courts take different approaches, where "some depend on the artist's statement of intent, some depend on aesthetics or formal comparison, and some depend on the viewpoint of the 'reasonable observer'"); Morley, *supra* note 125, at 410 (linking this decision with past appropriation art cases).

128. Adler, *supra* note 7; Liz Brown, *Remixing Transformative Use: A Three-Part Proposal for Reform* 4 N.Y.U. J. INTELL. PROP. & ENT. L. 139 (2014); Morley, *supra* note 125, at 398.

129. Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better Than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785 (2013).

130. Darren Hudson Hick, *Appropriation and Transformation*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1155 (2013).

131. A good example is the moustache added by Marcel Duchamp in 1919 on a photograph of the famous Mona Lisa of Leonardo da Vinci on a postcard, with the humorous title "L.H.O.O.Q."

the original work is placed in a different artistic context.<sup>132</sup> This is why some scholars in the United States have advocated that the degree of transformation test should be abandoned “as it has failed art,” made the legality of copying in art more uncertain, and thus has created a detrimentally chilling effect on contemporary art movements where appropriation has started to play a central role.<sup>133</sup>

## 2. *The Introduction of a Specific Exception for Creative Reuses: The Canadian Example*

A solution to the problems of both enumerated exceptions and open-ended provisions can perhaps be found in an alternative mechanism: the introduction of a specific limitation for creative reuses. Such a limitation is currently widely discussed in the context of non-commercial practices by internet users in order to address many creative uses, particularly by those on social media, a practice often called creating “user-generated content.”<sup>134</sup> Interestingly, the possibility of a copyright limitation for “user-generated content” was examined back in 2008 by the European Commission in its Green Paper on Copyright in the Knowledge Economy.<sup>135</sup> In the public consultation launched in late 2013 on the review of EU copyright rules, the Commission once again considered introducing an exception for transformative uses into the European copyright framework.<sup>136</sup> More recently, in its non-legislative resolution of July 9, 2015, the European Parliament also addressed the issue and

132. A “ready-made” is an everyday object selected and designated as art; the art form is attributed to French artist Marcel Duchamp. See FRANCIS M. NAUMANN, MARCEL DUCHAMP: THE ART OF MAKING ART IN THE AGE OF MECHANICAL REPRODUCTION (H.N. Abrams ed., 1999).

133. Adler, *supra* note 7, at 562–63 (“There is a deeper problem with fair use that courts and scholars have overlooked. The transformative test poses a fundamental threat to art because the test evaluates art by the very criteria that contemporary art rejects.”).

134. See, on this issue and its copyright implications, CHRISTIAN A. BAUER, USER GENERATED CONTENT URHEBERRECHTLICHE ZULÄSSIGKEIT NUTZERGENERIERTER MEDIENINHALTE (2011); Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841 (2009); Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921 (2009); Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One - Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497 (2008); Mary W.S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075 (2009).

135. *Copyright in the Knowledge Economy*, *supra* note 21. For a comment on this document, see Christophe Geiger et al., *What Limitations to Copyright in the Information Society? A Comment on the European Commission’s Green Paper “Copyright in the Knowledge Economy,”* 40 INT’L REV. INTEL. PROP. & COMP. L. 412 (2009); see also Euan Lawson, *Orphan Works and Transformative Works in the Knowledge Economy*, 20 ENT. L. REV. 61, 61 (2009) (examining “whether a copyright exception should be created for user-generated content on the basis that it is ‘transformative’”).

136. EUROPEAN COMMISSION, PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES 28–30 (2013), [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf) [<https://perma.cc/SL69-LBY2>]. For an overview of responses to this consultation, see EUROPEAN COMMISSION, REPORT ON THE RESPONSES TO THE PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES 67–71 (2014), [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf) [<https://perma.cc/D8XB-284C>] (covering the questions related to the user-generated content).

called for a balanced solution in the case of transformative uses.<sup>137</sup> However, those envisaged proposals in Europe were not adopted into law and remain a heavily debated topic.<sup>138</sup>

Nevertheless, one formulation of this solution has recently been implemented in Canada. Section 29.21 (Non-commercial User-generated Content) of the Canadian Copyright Modernization Act specifies a list of cumulative conditions where:

it is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual – or, with the individual’s authorization, a member of their household – to use the new work or other subject-matter or to authorize an intermediary to disseminate it.<sup>139</sup>

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137. European Parliament Resolution of 9 July 2015 on the Implementation of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, P8\_TA-PROV (2015) 0273, § 42 (“The European Parliament . . . , notes with interest the development of new forms of use of works on digital networks, *in particular transformative uses*, and stresses the need to examine solutions reconciling efficient protection that provides for proper remuneration and fair compensation for creators with the public interest for access to cultural goods and knowledge.”) (emphasis added); *see also* Christophe Geiger, Oleksandr Bulayenko, Théo Hassler, Elena Izyumenko, Franciska Schönherr & Xavier Seuba, *The Resolution of the European Parliament of 9 July 2015: Paving the Way (Finally) for a Copyright Reform in the European Union?*, 37 EUR. INTELL. PROP. REV. 683 (2015).

138. On this issue, *see* Bernd Justin Jütte, *The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form*, 5 J. INTELL. PROP. INFO. TECH. E-COM. L. 172 (2014) (analyzing the current European legal framework with regard to user generated content and identifying its insufficiencies, in particular with regard to enabling a legal mashup culture).

139. Section 29.21 (Non-commercial User-generated Content) of the Canadian Copyright Modernization Act, S.C. 2012, c 20 (Can.), reads as follows:

(1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual – or, with the individual’s authorization, a member of their household – to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes; (b) the source – and, if given in the source, the name of the author, performer, maker or broadcaster – of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so; (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter – or copy of it – or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one. (2) The following definitions apply in subsection (1): ‘intermediary’ means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public. ‘Use’ means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.

Copyright Modernization Act, S.C. 2012, c 20, § 29.21 (Can.).

The main criteria in order to fit within this definition, according to section 29.21, are (1) the non-commercial purpose of the intended use and (2) the absence of negative adverse effect, financial or otherwise, on the existing work.<sup>140</sup> It is however worth noting that the Canadian model is limited to non-commercial uses, which is not always easy to distinguish from commercial use.<sup>141</sup> In addition, the wording of the provision is rather complex, therefore limiting its accessibility and comprehensibility to the common public and/or creators, while creating difficulties in implementation for courts.<sup>142</sup>

The main problem with the current solutions described above, allowing creative reuses of protected works based on open-ended, enumerated, and user-generated content exceptions, is that they are all free of charge.<sup>143</sup> Thus, when they do not otherwise result in adverse effects, they might be suitable in the context of non-commercial uses but might be considered unfair in a commercial context, *e.g.*, when a famous book is made into a movie. In addition, it is often difficult to draw the line between a commercial or non-commercial use, which makes things even more complicated. Consequently, courts will likely interpret the limitation narrowly, leaving many situations of creative reuses without an appropriate answer.

*B. The Consequence: The Increasing Use of External Mechanisms such as Human Rights to Solve the Conflict*

Existing internal mechanisms do not always provide appropriate answers for the creative reuse of work. Therefore, an obstacle to creativity still exists if an author intends to create a new work based on a former one and the original author refuses to give authorization or asks for too high a price. For that reason, courts came up with some ad hoc solutions when faced with copyright claims in the context of derivative works. In particular, courts have often relied on external mechanisms, such as fundamental rights-based reasoning, in order to overcome the hurdle of exclusivity.

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140. *Id.*

141. *Id.*

142. On the pros and cons of importing the Canadian user-generated content exception to other legal systems, see P.K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 177 (2014). For comments on Section 29.21 of the Canadian Copyright Modernization Act, see Joost Blom, *Private International Law Aspects of User-Generated Content*, 26 INTELL. PROP. J. 205 (2014); Christophe Geiger, *Canada - Contenu Non Commercial Généré par l'Utilisateur/Non-Commercial User-Generated Content*, PROPRIÉTÉS INTELLECTUELLES 91, 92 (2016); Theresa Scassa, *Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law*, in THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 431 (M. Geist ed., 2013). More generally on the various forms of appropriation and the way they are addressed in Canadian copyright law, see DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE (R. Coombe, D. Wershler & M. Zeilinger eds., 2014); Warren B. Chik, *Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law*, 11 JOHN MARSHALL REV. INTELL. PROP. L. 240 (2011).

143. Section 29.21 covers *non-commercial* user-generated content.

1. *The Human Right to Free Artistic Creation as an Internal and External Limit to Copyright Law: The Decisions of the German Constitutional Court*

The German Constitutional Court has recognized the admissibility of numerous restrictions of the exclusive right of authors or their derivative rightsholders in the past when the creative interests of secondary authors were concerned.<sup>144</sup> In “Germania 3,” which concerned the refusal of the heirs of Bertolt Brecht to allow the use of passages from a play by their ancestor for insertion in a new play in order to permit a critical analysis in artistic form, the court gave precedence to the secondary author’s freedom to create laid out in Article 5(3) (artistic freedom) of the German Basic Law over “a minor infringement of copyright that only involved a minimal financial loss for the right holders.”<sup>145</sup> The German court thus provided an expansive interpretation of the quotation exception on the basis of artistic freedom from Article 5(3) of the German Basic Law and used human rights as a tool to broaden existing limitations in the copyright system.

In 2016, the German constitutional court allowed freedom of artistic expression to once again prevail over the exploitation interests of the original author in *Metall auf Metall*.<sup>146</sup> In this case, a hip hop artist created a song using a sample from an existing song by the German music band *Kraftwerk*.<sup>147</sup> The right of the hip hop artist to freedom of creative expression was balanced against the exploitation interests of the phonogram’s producers; the importance of artistic dialogue prevailed, justifying an interference with copyright and related rights.<sup>148</sup> According to the German constitutional court, “if the creative development of an artist is measured against an interference with copyrights that only slightly limits the possibilities of exploitation, *the exploitation interests of the copyright holders may have to cede in favour of the freedom to enter into an artistic dialogue.*”<sup>149</sup> With this ruling, the court recognized that sampling is protected by artistic freedom of expression. Of course, not all appropriation situations are covered, and sampling can still constitute

144. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 29, 2000, 3 GRUR INT. 149, § 22 (2001) (Ger.); Federal Constitutional Court, First Senate, *Metall auf Metall*, 31 May 2016, 1 BvR 1585/13 (Ger.).

145. 3 GRUR INT. 149 (§ 22) (Ger.). For a comment, see Elizabeth Adeney & Christoph Antons, *The Germania 3 Decision Translated: The Quotation Exception Before the German Constitutional Court*, 35 EUR. INTELL. PROP. REV. 646 (2013).

146. 1 BvR 1585/13 (Ger.). For comments, see Duhanic, *supra* note 12; Mathias Leistner, *Die “Metall auf Metall”-Entscheidung des BVerfG - Oder: Warum das Urheberrecht in Karlsruhe in Guten Händen ist*, 8 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 772 (2016); Marc D. Mimler, “*Metall auf Metall*” – *The German Federal Constitutional Court Discusses the Permissibility of Sampling Music Tracks*, 7 QUEEN MARY J. INTELL. PROP. 119 (2017).

147. 1 BvR 1585/13 (Ger.).

148. Press Release, Bundesverfassungsgericht, *The Use of Samples for Artistic Purposes May Justify an Interference with Copyrights and Related Rights* (May 31, 2016), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-029.html> [<https://perma.cc/67VX-GAML>].

149. Art. 5 (*artistic freedom*) of the GRUNDGESETZ [GG] [BASIC LAW] (emphasis added), *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.pdf](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf) [<https://perma.cc/86GC-6LNJ>].

an infringement to copyrights, but only if the exploitation rights of the phonograms are severely impaired. In addition, the two songs were not in competition and were easy to distinguish from one another, which were also important determining factors in the reasoning of the court.<sup>150</sup>

2. *The Use of Article 10 European Convention of Human Rights by Domestic Civil Courts to Legitimate Creative Reuses*

The French courts have also used human rights as an external limit to copyright. In a highly publicized case in which Victor Hugo's heirs tried to invoke the famous author's moral rights to prevent a sequel to *Les Misérables*, the French Supreme Court prioritized the freedom of artistic creation.<sup>151</sup> Citing Article 10 of the European Convention on Human Rights (ECHR), the court held that, subject to the rights to paternity and integrity of the adapted work, freedom of creativity prevented the original author of the work or his heirs from hindering the production of a sequel after the exploitation monopoly expired.<sup>152</sup> More recently, in an important 2015 decision that concerned the creative reuse of three copyright-protected photographs in a painting, the French Supreme Court, once again referring to Article 10 of the ECHR, reversed the lower court's finding of infringement.<sup>153</sup> Indeed, the Supreme Court's decision was based on the ground that the appeal court neither showed how exactly the fair balance between the freedom of artistic expression and the copyright-holder's interests had been achieved, nor had sufficiently justified its decision in light of the freedom of creativity protected by the ECHR.<sup>154</sup> The three photographs had been integrated

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150. See Mimler, *supra* note 146.

151. Cass., 1e civ., Jan. 30 2007, *Hugo v. Plon SA* (Fr.), 38 INT'L REV. OF INTELL. PROP. & COMP. L. 736, 738 (2007). For a comment, see Christophe Geiger, *Copyright and the Freedom to Create – A Fragile Balance*, 38 INT'L REV. INTELL. PROP. & COMP. L. 707 (2007).

152. Cass., 1e civ., Jan. 30 2007, *Hugo v. Plon SA* (Fr.), 38 INT'L REV. OF INTELL. PROP. AND COMP. L. 736, 738 (2007).

153. Cass., Bull. 1e civ., May 15, 2015, Bull. civ. I, No. 13-27391 (Fr.). For a comment, see Christophe Geiger, *Droit d'Auteur et Liberté d'Expression Artistique: Art 'Autorisé' et Libre Création Ne Font Pas Bon Ménage*, 38 LA SEMAIFNE JURIDIQUE 1620 (2015); see also, with the same reasoning, the decision of the Supreme Court of the Netherlands, HR 3 April 2015, m.nt. EE (*GS Media BV/Sanoma Media Netherlands BV and Others*) (Neth.). Many other examples could be given also in other fields of IP, where courts have justified the creative use of a trademark or of a protected design with the right to freedom of expression protected by Article 10 ECHR. For trademark, see the numerous cases quoted in Christophe Geiger, *Trade Marks and Freedom of Expression – The Proportionality of Criticism*, 38 INT'L REV. INTELL. PROP. & COMP. L. 317 (2007); for designs, see, for example, the Court of Appeal of the Hague, 4 May 2011, 389526/ KG ZA 11-294; Jani McCutcheon, *Designs, Parody and Artistic Expression- A Comparative Perspective of Plesner v. Louis Vuitton*, 41 MONASH U. L. REV. 192 (2015). Cf. BGH, Apr. 2, 2015, *Leaping Poodle*, I ZR 59/13, unreported, translation from German in 47 INT'L REV. INTELL. PROP. & COMP. L. 358 (2016) (ruling that the artistic freedom did not justify the taking advantage of the repute and distinctiveness of the well-known trademark).

154. Cass., Bull. 1e civ., May 15, 2015, Bull. civ. I, No. 13-27391 (Fr.). Unfortunately, since then the Versailles Court of Appeal in its judgement of remittal of March 16, 2018, No. 15/06029 (Fr.), in the same case took a more restrictive approach and decided that the appropriation of the photograph was infringing the copyright of the photographer. For further English information about the case, see

into the painter's work after being colored.<sup>155</sup> In this case, the defendant explained that his artistic approach was to “use advertising images by modifying them in order to provoke thinking, a contrast leading to divert the original theme and topic and expressing something totally different.”<sup>156</sup> In finding in favor of the defendant, the French Supreme Court put an end to an ongoing debate that had lasted over fifteen years regarding the use of fundamental rights in intellectual property litigation, and established the need to determine a fair balance between copyright and the freedom of expression on a case-by-case manner. The District Court of The Hague held a similar line of reasoning in the 2011 “Dafurnica” case.<sup>157</sup> The case was about an art series depicting a Louis Vuitton bag in the hands of an African child holding a Chihuahua.<sup>158</sup> The art series was called “Simple Living,” pointing out a paradox between the luxury product from Louis Vuitton and famine striking in Africa.<sup>159</sup> Overruling the judgment rendered in preliminary proceedings,<sup>160</sup> the district court allowed the parodist's freedom of expression to prevail.<sup>161</sup>

Yet freedom of artistic creativity does not always prevail in courts and the outcome is by no means certain. For example, the Paris court of first instance decided on March 9, 2017,<sup>162</sup> that a Jeff Koons statue inspired by a French photograph infringed on the original author's copyright.<sup>163</sup> The court mainly based its decision on the fact that the original photograph was not very well known to the public and there was no clear reference made to the original work.<sup>164</sup> Ultimately,

Eleonora Rosati, *Not Sufficiently 'Transformative' Appropriation of a Photograph Held Infringing by French Court*, 13 J. INTELL. PROP. L. & PRAC. 525 (2018).

155. Cass., Bull. 1e civ., May 15, 2015, Bull. civ. I, No. 13-27391 (Fr.).

156. *Id.*

157. District Court of The Hague, 4 May 2011, IER 2011/39 m.nt WS (Nadia Plesner Joensen/Louis Vuitton Malletier SA) (Neth.).

158. *Id.*

159. *Id.*

160. District Court of The Hague, 27 January 2011, IJN: BP9616 KG RK 10-214 m.nt (Louis Vuitton Malletier SA/Nadia Plesner Joensen) (Neth.).

161. Lucie Guibault, *The Netherlands: Dafurnica, Miffy and the Right to Parody!*, 2 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 236, 237 (2011). See also *Laugh It Off Promotions CC v. S. Afr. Breweries Int'l (Fin.) B.V.* 2006 (1) SA 144 (CC) (S. Afr.), for a ruling that a commercial parody on a T-shirt had to prevail over the property interests of trademark holders.

162. TGI Paris, Mar. 9, 2017, No. 15/01086 (Fr.). See also in the same sense the March 16, 2018, decision of the Versailles Court of Appeal in the *Klasen* case discussed *supra* note 154. This shows the legal uncertainty still surrounding appropriation art and calls for a statutory solution to address the issue of creative reuses. See also *infra* Part III for more on this.

163. TGI Paris, Mar. 9, 2017, No. 15/01086 (Fr.).

164. The court indeed points out that the knowledge by the public of the appropriated work is decisive for the produced effect on the spectators and necessary to the perception of the artist's message to provoke the spectator's reflection. In this case, the artists chose to take back in whole the children from the photography without explicitly referring to the portrait, which was not well known by the public, to incarnate a new Adam and Eve, without explaining why he could not do otherwise. Thus, according to the court:

[T]he copy was not dictated by considerations of general interest but personal, allowing the artist to use the models from the photography and by doing so, avoiding the creative work,

because Koons failed “to justify the necessity of using this representation of this couple of children in his artistic speech without the authorization of the author, the implementation of the plaintiff’s copyright [did] not constitute a disproportionate infringement to the freedom of expression.”<sup>165</sup> Here, too, the court makes a clear reference to human rights balancing mechanisms,<sup>166</sup> but does not allow the creative use in the end.

As we have seen, in the absence of appropriate copyright provisions addressing issues of creative appropriation, courts have found solutions using external mechanisms such as fundamental rights to secure the creative reuse of copyrighted works. However, reliance on rules from outside the intellectual property system might not be ideal, and in fact, it might not bode well for the current system if a balance has to be found using correctives from outside intellectual property law. Therefore, a solution needs to be found facilitating the resolution of these unique situations using mechanisms within the copyright framework itself, thus making copyright law fully compatible with freedom of artistic creativity.<sup>167</sup>

### III. MAKING FREEDOM OF ARTISTIC CREATIVITY COMPATIBLE WITH COPYRIGHT LAW: DESIGNING AND IMPLEMENTING A LIMITATION FOR CREATIVE USE

Given that one of the essential goals of copyright law is to promote creativity, it seems perfectly legitimate that the copyright system should itself sustain and encourage freedom of artistic creativity. Part III will explore possible approaches within the copyright framework to ensure that the freedom of artistic expression is sufficiently upheld. This exploration will culminate in the hypothesis that a limitation-based remuneration scheme in the form of a statutory license will be a practical solution to ensure that artistic freedom is protected, while simultaneously ensuring the protection of the creator’s interests. It will be shown that a “limitation-based remuneration” is both workable and compliant with international copyright

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which could not have been made without the authorization of the author whose name and copyright were on the post card.

*See id.*

165. *Id.* (translation from French by the author).

166. The Paris court acknowledges that freedom of expression is a fundamental right but not without any limitations and also makes a reference to the European Court of Human Rights interpretation, which places in balance freedom of expression with intellectual property rights as two fundamental rights on an equal stand. *See id.*

167. In this sense, see Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report of the Special Rapporteur in the Field of Cultural Rights: Copyright Policy and the Right to Science and Culture*, §§ 45–48, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014), <http://undocs.org/A/HRC/28/57> (looking into statutory licenses as one of the possible mechanisms to remunerate the creators). *Cf.* Reto M. Hilty, *Legal Remedies Against Abuse, Misuse, and Other Forms of Inappropriate Conduct of IP Right Holders*, in *COMPULSORY LICENSING: PRACTICAL EXPERIENCES AND WAYS FORWARD* 377–78 (R.M. Hilty & Kung-Chung Liu eds., 2015) (arguing that “[i]n case enforcement of an IP right proves to be abusive, this right should . . . [be] downgrade[d] . . . [to a] ‘liability regime[,]’” which would allow for “more balance . . . through monetary compensation to the right holder”).

obligations and constitutional requirements.<sup>168</sup> Finally, Part III will discuss how such a limitation-based remuneration system for creative uses can be implemented, including how such a scheme would function and how remuneration should be determined.

*A. The Benefits of a “Limitation-Based Remuneration Right”/ Statutory License*

As established in Part II, the current copyright system does contain certain legal mechanisms to address the challenges of derivative works.<sup>169</sup> But as demonstrated, the problem remains that any such use is “free of charge,” meaning that no remuneration is paid to the creator of the original work.<sup>170</sup> The absence of remuneration leads to a tendency of legislators and courts to define limitations narrowly and exclude some important creative uses, generating additional uncertainties in the process. As a consequence, creators often refrain from using existing work, which in turn inhibits the creative process. Moreover, some uses made initially for non-commercial purposes can become commercially relevant afterwards because of their success. In this case, the initial creator should not have the possibility to block the exploitation of the new work, but in certain situations it might be fair that he is entitled to participate in the fruits generated by the derivative creation. Thus, for this situation, a better solution would be to create a specific limitation implemented in the form of a statutory license<sup>171</sup> for derivative works with a clear, yet not severely limiting, scope in order to facilitate creative uses.

*1. Current Existing Non-Exclusive Solutions Inside and Outside IP Law*

The spirit of limiting exclusive rights for creative purposes can be found in the practice of the Court of Justice of the European Union, particularly in its famous *Magill* decision of 1995.<sup>172</sup> In that case, the court held that refusing to grant a license

168. This part of the Article draws on Christophe Geiger, *Statutory Licenses as Enabler of Creative Uses*, in REMUNERATION OF COPYRIGHT OWNERS: REGULATORY CHALLENGES OF NEW BUSINESS MODELS 305 (Kung-Chung Liu & Reto M. Hilty eds., 2017).

169. See *supra* Part II.A.1.

170. Particularly on the issue regarding U.S. Fair Use, see Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1385 (2014), where the author states:

Fair use is an on/off switch: either the challenged use is an infringement of copyright or it is a fair use, which section 107 declares “is not an infringement of copyright.” As a result, either the copyright owner can stop the use or the user not only is dispensed from obtaining permission, but also owes no compensation for the use.

Thus, some U.S. scholars have argued in favor of compulsory licensing to be applied to derivative works. Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 520 (1999); cf. DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 179, 384 n.37 (2009); Frosio, *supra* note 61, at 390–93; Rubinfeld, *supra* note 2, at 1.

171. It is acknowledged that the terms “statutory license” and “compulsory license” are sometimes used interchangeably. For the purpose of this piece, the “compulsory licenses” mentioned refer to those that require a court order.

172. Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eireann (RTE) v. Comm’n*, 1995 E.C.R. I-808, §§ 49–51.

merely to block someone from commercializing a new product on the market was an abuse of the copyright owner's dominant position.<sup>173</sup> The use was thus allowed based on rules outside IP, namely competition law. In this sense a "competition exception" was also proposed in the context of a European Copyright Code, drawn up by a group of academics (the "Wittem Group"), and could serve as inspiration.<sup>174</sup> In the same spirit, patent law provides a mechanism for creative reuse of protected inventions: to prevent the holder of a patent (who is in a dominant position in view of a patent of improvement) from using their right to impede the exploitation of this improvement, the creator can sue for the issue of a compulsory license based on reasons of dependency. Such compulsory licenses are for example foreseen in Sec. 24(2) of the German Patent Act,<sup>175</sup> Art. L. 613-15 of the French Intellectual Property Code,<sup>176</sup> and Article 12 of the EU Directive on the legal protection of biotech inventions of 1998.<sup>177</sup> Such compulsory licenses are also foreseen in the TRIPs Agreement (Article 31), and the members of the World Trade Organization (WTO) have maintained wide discretion regarding reasons that may give rise to the grant of such a license.<sup>178</sup>

The main disadvantage in all these cases is the fact that the license has to be ordered by a judge, a fact that favors those economic actors who have the resources to afford the associated high legal costs of sometimes long proceedings. While cases are pending, creativity is hampered. Therefore, it seems that legal regulations through the mechanisms of a statutory license based on a right to remuneration should be preferable,<sup>179</sup> which would be due at least in the case of a commercial use of the derivative work.

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173. *Id.* The finding, however, took years of litigation, which demonstrates the need for internal mechanisms inside copyright to avoid these kinds of situations from the start.

174. The Wittem Grp., *European Copyright Code*, 1 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 123 (2010). Article 5.4 (Uses for the purpose of enhancing competition), paragraph 2 of the Code reads as follows:

Uses of news articles, scientific works, industrial designs, computer programs and databases are permitted without authorisation, but only against payment of a negotiated remuneration, and to the extent justified by the purpose of the use, provided that: (i) the use is indispensable to compete on a derivative market; (ii) the owner of the copyright in the work has refused to license the use on reasonable terms, leading to the elimination of competition in the relevant market and (iii) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright in the work.

*Id.* at 126.

175. Patentgesetz [PatG] [Patent Act], Dec. 16, 1980, Bundesgesetzblatt [BHBI] at 9, 24(2) (Ger.).

176. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L. 613-15 (Fr.), translation available at <http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf> [<https://perma.cc/HD7H-G9BP>].

177. Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213) 13, 19-20 (EC).

178. See the wording of Article 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

179. For such a proposal in the field of incremental creations such as software, see Reto M. Hilty & Christophe Geiger, *Patenting Software? A Judicial and Socio-Economic Analysis*, 36 INT'L REV. INTELL. PROP. & COMPETITION L. 615, 641-46 (2005).

## 2. *The Creation of a New Statutory License for Creative Use*

One way to secure fair remuneration, while also avoiding the blocking effect of exclusivity, is through so-called “limitation-based remuneration rights,” otherwise referred to as “statutory licenses.”<sup>180</sup> The use of statutory licenses to strike this balance between the interests of rightsholders and users has been explored in the U.S. context by international copyright scholar Jane Ginsburg. She notes that statutory licenses or privately negotiated accords within a statutory framework can ensure that “uses the legislator perceives to be in the public interest proceed free of the copyright owner’s veto, but with compensation—in other words: permitted-but-paid.”<sup>181</sup> The author however restricts the use of statutory licenses to what she calls “distributive uses” (non-creative reuse of copyrighted works), as opposed to “productive uses.”<sup>182</sup> For this second category of uses, fair use “for free” should still be available.

This approach has long been established in many European countries for certain limitations. A prominent example is in private copy exceptions or reproductions for educational and research purposes.<sup>183</sup> In the U.S. Copyright Act, there is a provision providing for a similar solution in relation to musical works.<sup>184</sup> This essentially allows for recording artists to record “covers” of musical works previously written and released by another artist.<sup>185</sup> Section 115 codifies the requirement of compulsory mechanical licenses for reproduction of musical works.<sup>186</sup> However, the extent to which the subsequent musician can creatively alter the work is questionable. Section 115(a)(2) states that a “compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement *shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work* under this title, except with the express consent of the copyright owner.”<sup>187</sup> Nonetheless, it shows that the spirit of statutory licenses to manage the interests of rightsholders and subsequent creative uses is already present in the United States.

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180. To reiterate the distinction made above, although the terms “statutory license” and “compulsory license” are often used interchangeably in legal writings, for the purpose of this piece, “compulsory licenses” refer to those that require a court to order them. As a difference, in the case of statutory license, the use is permitted upfront by the statute (and not downstream by a judge) but needs to be remunerated.

181. Ginsburg, *supra* note 170.

182. *Id.* at 1383.

183. See, e.g., Christophe Geiger & Oleksandr Bulayenko, *General Report: Scope and Enforcement Tools to Ensure Remuneration*, in REMUNERATION FOR THE USE OF WORKS: EXCLUSIVITY VS. OTHER APPROACHES 112 (Silke von Lewinski ed., 2017); Jane C. Ginsburg, *supra* note 170, at 1417–25.

184. 17 U.S.C. § 115 (2012).

185. See generally JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O’ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 413–14 (4th ed. 2015).

186. 17 U.S.C. § 115 (2012).

187. *Id.* § 115(a)(2) (emphasis added).

Copyright is a balancing act between owners and users, between initial and subsequent creators. As shown, limitations (remunerated or not) are used to foster creativity. It is therefore inappropriate to start with the assumption that there is some form of harm to the rightsholder when a limitation or statutory license is engaged. In light of what has been argued previously, it can be considered misleading when the European legislator speaks of “compensation” and not of “remuneration” in connection with copyright limitations and the right of creators to be paid for these permitted uses.<sup>188</sup> Recital 35 of the InfoSoc Directive, for example, reads: “In certain cases of exceptions or limitations, rightsholders should receive fair *compensation* to *compensate* them adequately for the use made of their protected works or other subject-matter.”<sup>189</sup> The Advocate General Trstenjak’s position is thus convincing when in her opinion in the *Padawan* case<sup>190</sup> she stresses that:

[t]he right to “fair compensation” within the meaning of Article 5(2)(b) of Directive 2001/29 . . . primarily has the character of a reward. This is apparent from the first sentence of recital 10, pursuant to which if authors or performers are to continue their creative and artistic work, they have to receive an ‘appropriate reward’ for the use of their work. Recital 35 makes clear that ‘fair compensation’ should also be classified in this category of rewards, where it is stated that in certain cases of exceptions or limitations, rightsholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. On the other hand, legal categorisation of the legal concept of ‘fair compensation’ as a straightforward claim for damages, as the referring court apparently assumes, may not readily be confirmed.<sup>191</sup>

Unfortunately, the European Court of Justice did not follow the Advocate General’s line of reasoning, and held that “fair compensation must be regarded as recompense for the harm suffered by the author,” and that the level of compensation is linked to the harm caused.<sup>192</sup> This “compensation” or “indemnity” terminology seems to imply some kind of damage which has to be redressed. Given

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188. For more on this issue, see Geiger & Schön herr, *supra* note 3; Geiger & Schön herr, *supra* note 4.

189. 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, 2001 O.J. (L 167) 13, recital 35 [hereinafter Harmonisation Directive] (emphasis added). The French wording is very similar: “Dans le cas de certaines exceptions ou limitations, les titulaires de droits doivent recevoir une *compensation* équitable afin de les *indemniser* de manière adéquate pour l’utilisation faite de leurs œuvres ou autres objets protégés” (emphasis added) (quoting French version), <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62009CJ0462&from=FR> [<https://perma.cc/4TTE-28UC>].

190. Case C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España* (SGAE), 2010 E.C.R. I-10055 (AG Trstenjak opinion).

191. *Id.* §§ 79, 80 (emphasis added); see also Harmonisation Directive, *supra* note 189, at 11.

192. Case C-467/08, *Padawan SL*, 2010 E.C.R. I-10055, § 40.

the above discussion, however, these terms appear to be inaccurate.<sup>193</sup> In the interest of the primary authors searching for efficient and pragmatic solutions to generate financial gain from the use of their works, one would rather speak of “remuneration” instead of “compensation.” Hence, there would be remuneration by way of a license and remuneration through a copyright limitation. Terminologically, it would thus be preferable to use the term “limitation-based remuneration rights” than the more established and often misleading term “levies.” The same can be said about the economically-oriented term “liability rule,” often used to describe the kinds of legal situations where, instead of a possibility to forbid, the right owner only gets some monetary reward for the use of their works, as the notion of liability implies a prejudice that needs to be compensated.<sup>194</sup>

The term “statutory license,” which is often used for limitations coupled with a right to receive fair remuneration, seems more suitable to express the concept of remuneration for the use of a copyrighted work, although the term is itself not entirely satisfying, as it implies that there is an exclusive right and that the permission to use is given only by the law. It could as well be argued that the exclusive right is absent in those cases but that the legislator considers that the use should be remunerated as a policy option to secure creators’ interests. In fact, copyright limitations are to be understood as limits to the exclusive right of the authors, beyond which they may not have any control over their work anymore.<sup>195</sup> Therefore, it seems that it would be better to speak of limitations with remuneration (or “limitation-based remuneration claims”) and limitations without remuneration.

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193. In this sense, see also MARTIN KRETSCHMER, PRIVATE COPYING AND FAIR COMPENSATION: AN EMPIRICAL STUDY OF COPYRIGHT LEVIES IN EUROPE 1 n.1 (2011) (“deplor[ing] the incoherence of the EU concept of fair compensation based on harm”).

194. See Annette Kur & Jens Schovsbo, *Expropriation or Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm*, in INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 408, 409 (Annette Kur & Marianne Levin eds., 2011) (defining liability rules as a “legal structure permitting third parties to undertake certain actions without prior permission, provided that they pay compensation for the trespass.”). On this issue more generally, see the seminal article by Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (reminding that the liability paradigm was primarily developed in the context of tort law). For examples of application of liability rules to the intellectual property domain, see Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253 (2009); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996); Jerome H. Reichman & Tracy Lewis, *Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 337 (Keith E. Maskus & Jerome H. Reichman eds., 2005); Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743 (2000).

195. To refer to an image we used in earlier writings, “intellectual property rights constitute islands of exclusivity in an ocean of liberty.” Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT’L REV. INTEL. PROP. & COMPETITION L. 268, 272 (2004). Therefore, “the scope of intellectual property . . . must be deemed only to extend to its limits, whether explicit or implicit. Outside this scope, one is ‘outside the monopoly,’ with the result that the right holder cannot exercise any control whatsoever.” *Id.*

## B. Feasibility

### 1. Implementation and Potential Obstacles

Having limitation-based remuneration for rightsholders from creative uses is clearly both achievable and practical. First, it is a model that has already been adopted by several countries with respect to other types of exceptions and limitations. Second, there is evidence that centralized schemes used to remunerate rightsholders for private uses have been able to generate substantial funds.

Exceptions and limitations-based remunerations are already in place in the copyright law of several European countries. These uses tend to be for educational, news reporting, or religious purposes, and to facilitate access to the disabled;<sup>196</sup> the author is entitled to remuneration for the use in each case.<sup>197</sup> What these exceptions all have in common is that they are aimed at serving the public interest through facilitating dissemination of information and the use of protected works in certain circumstances. In the same spirit, such limitations could also include uses for artistic purposes, which is very much in line with copyright's goal of promoting freedom of artistic expression and cultural development, as established in Part I of this paper.

In Europe, there has been case law favoring such an approach. In its highly regarded decision on July 11, 2002,<sup>198</sup> the German Federal Supreme Court has seen the potential of "limitation-based remunerations" for effective protection of the creator. The Court interpreted extensively the limitation for press review of Article 49 of the German Copyright Act in order to cover electronic press reviews made by companies for internal use. The Court's reasoning was that a considerable part of the received payment would flow to the authors themselves and that a narrow interpretation of the limitation would thus not improve the author's position.<sup>199</sup>

Building upon similar reasoning, the Swiss Supreme Court, in a decision on June 26, 2007,<sup>200</sup> held that the activity of a company, which commercially prepares and delivers electronic press reviews (so-called "press clipping and documentation delivery services" or "value-added information services"), is covered by limitation for personal use according to Article 19 of the Swiss Copyright Act, which allows the reproduction of a work also by third parties.<sup>201</sup> Within the examination of whether this extensive interpretation of the limitation does not violate the so called

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196. See Geiger & Bulayenko, *supra* note 183; Ginsburg, *supra* note 170.

197. *Id.*

198. BGH July 11, 2002, "Elektronische Pressespiegel," [2003] JZ 473, comment by T. Dreier.

199. Christophe Geiger, *Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515, 531 (2010).

200. Bundesgericht [BGer] [Federal Supreme Court] June 26, 2007, 4C.73/2007 (Switz.). For a comment, see Christophe Geiger, *Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way*, 39 INT'L REV. INTELL. PROP. & COMPETITION L. 943 (2008).

201. BGer June 26, 2007, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 473 (Switz.).

“three-step test” of the Berne Convention (article 9.2),<sup>202</sup> the court held:

It cannot be assumed that the interest of the right holder is restricted in an unreasonable manner, if he gets a claim for remuneration instead of the right to prohibit the use, because both the interest of the journalists and those of the publishers have to be considered. With reference to the press review, indeed an exclusive right would perfectly serve the publisher’s interests, who normally owns the rights of the journalists, because then he can freely decide whether he wants to prevent the reproduction of the works or to give his approval against payment of a corresponding remuneration. The journalist as the author of the single article, however, has no interest in such an exclusive right. On the one hand, he is interested in his articles being available to many readers. On the other hand, he only makes money out of the reproductions made for the press clipping and documentation services if he is entitled to a remuneration.<sup>203</sup>

If one follows this argument, it can be stated that an increased number of limitations—when coupled with an obligation to pay an appropriate remuneration—can serve the author’s interests. If one really wants to achieve effective copyright protection, this prospect is not to be disregarded in connection with the interpretation of the existing limitation system, as well as with its—due—adaptation in the future.<sup>204</sup>

In any case, the copyright limitation does not solely protect the remuneration interest of the author who has already created a work, but also the interests of the author during the creation process. It should not be forgotten that at this stage, the authors themselves are the major beneficiaries of limitations to copyright.<sup>205</sup> Like journalists, artists might also want their work to gain exposure through subsequent commentary and use by other artists, subject to attribution and fair remuneration for the use. Similarly, they would not want their creative process to be hindered by rigid exclusive rights where they wish to create art pieces based on previous works.

If a limitation-based remuneration scheme is in place, can sufficient funds for remuneration be realistically raised? Levies on private copying are one existing example of how substantial revenues have been generated to remunerate rightsholders. A WIPO study showed that between 2007 and 2012, in the thirty-two countries covered by the survey, approximately €550 million of private copy levies

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202. Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, as revised on July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention] (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

203. BGer June 26, 2007, 133 BGE III 473 (Switz.).

204. Katerina Gaita & Andrew F. Christie, *Principle or Compromise?: Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying* (Intellectual Prop. Research Inst. of Austl., Working Paper No. 04/40, 2004).

205. Geiger, *supra* note 73, at 532.

were collected per year.<sup>206</sup> A 2011 empirical study by the UK Intellectual Property Office also showed that:

following the Information Society Directive of 2001 (introducing the concept of ‘fair compensation’ for private copying into EU Law), total collection from levies on copying media and equipment in the EU tripled, from about €170 [million] to more than €500 [million] per annum. Levy schemes exist now in 22 out of 27 Member States (with only the UK, Ireland, Malta, Cyprus and Luxembourg remaining outside).<sup>207</sup>

These are clear examples, already in place, of how access to works is facilitated while providing significant remuneration to the rightsholder through a statutory mechanism; thus, it can empirically support the feasibility of generating adequate payments to the rightsholder through the limitation-based remuneration scheme.<sup>208</sup>

If practically feasible, the implementation of a statutory license for creative reuse might potentially face some legal obstacles. These are twofold: (a) international copyright law and (b) the constitutional protection of copyright by the right to property, which will be considered in turn.

#### *a. Obligations Resulting from International Copyright Law*

Any domestic legislation implementing a “limitation-friendly” approach must of course comply with obligations resulting from international conventions, in particular with the so-called “three-step test”<sup>209</sup> included in many international treaties on copyright and intellectual property.<sup>210</sup> The three-step test requires the compliance of the contracting parties with a number of conditions when introducing limitations into their national copyright law. In order to fulfill the criteria, the limitation must (1) describe a certain special case; (2) not conflict with the normal exploitation of the work; and (3) not unreasonably prejudice the

206. WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTERNATIONAL SURVEY ON PRIVATE COPYING 11 (2014), [http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo\\_pub\\_1037\\_2014.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo_pub_1037_2014.pdf) [<https://perma.cc/G4H7-SKGE>].

207. KRETSCHMER, *supra* note 193, at 7.

208. See JOAO PEDRO QUINTAIS, COPYRIGHT IN THE AGE OF ONLINE ACCESS: ALTERNATIVE COMPENSATION SYSTEMS IN EU LAW (2017), for a detailed exploration of the feasibility, desirability, and legality of these remuneration systems, in particular in the context of non-commercial online uses.

209. See, e.g., Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *Understanding the “Three-Step Test”*, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 167, 167–85 (Daniel J. Gervais ed., 2015) (discussing the “three-part test”).

210. TRIPS Agreement, *supra* note 178, art. 13; Berne Convention, *supra* note 202, art. 16(2); WIPO Copyright Treaty art. 10, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty art.16(2), Dec. 20, 1996, 36 I.L.M. 76; 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, art. 5(5), 2001 O.J. (L 167) 10, 17 [hereinafter InfoSoc Directive]; see also Christophe Geiger, *From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test*, 29 EUR. INTEL. PROP. REV. 486, 486 (2007).

legitimate interests of the author and/or the right holder.<sup>211</sup> At the third step, a fair balance of interests involved is required, whereas the second step shall ensure that the core of copyright is not eroded. In this spirit, the normal exploitation of the work is interpreted by scholars as including only the economic core of copyright.<sup>212</sup>

Understood accordingly, the protected core arguably prohibits transforming the exclusive right totally into a right to receive a fair remuneration, but the possibility of a restriction should remain if important conflicting interests of the general public so require. Thus, for the purposes of a normative consideration of the three-step test, which have been advocated by several scholars,<sup>213</sup> it could be argued that the “normal” exploitation in some cases can also be achieved by limitation-based remuneration rights and that the exclusive right only covers the right to oppose the identical reproduction of the work (primary market)<sup>214</sup> and not its creative reuse (derived markets).<sup>215</sup>

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211. Geiger et al., *supra* note 209.

212. See, e.g., Martin Senfileben, *Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und Ihre Begrenzung Durch den Dreistufentest*, in INTERESSENAUSGLEICH IM URHEBERRECHT 159, 182 (Reto M. Hilty & Alexander Peukert eds., 2004).

213. See Martin Senfileben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law*, 37 INT’L REV. INTELL. PROP. & COMPETITION L. 407 (2006), for a discussion in favor of a normative approach to the second step. See also Geiger, *supra* note 20, at 194; Geiger, *supra* note 6.

214. Would a limitation-based remuneration approach still be consistent with the normal exploitation of the exclusive right to authorize derivative works? Under Article 12 of the Berne Convention, authors have the exclusive right of authorizing adaptations, arrangements, and alterations of their works. Notably, in cases where the derivative use is done in exercise of the subsequent user’s freedom of artistic expression, that derivative use is hardly in economic competition, nor do rightsholders anticipate that they would make such uses for economic gain. The U.S. fair use cases above demonstrate this. See Berne Convention, *supra* note 202. The subsequent expression is found to be fair use because the fourth (market) factor determines that the later work is not a market substitute for the original. Hence, this limitation-based remuneration would not be in conflict with normal exploitation of the exclusive right to authorize derivative works when the subsequent users are exercising their artistic creativity without being in economic competition with the rightsholder. Moreover, the primary author would still receive a remuneration as a counterpart for the creative use due to the statutory license mechanisms. Admittedly, not much would be left of the exclusive right of adaptation, mainly non-creative reuses or for uses where the creative input is rather low. However, the strong opposing human rights to free artistic expression of the second author and the cultural function of copyright mandate that the exclusive right is reduced and replaced by a right of remuneration in most cases of creative reuse in order to avoid the blocking effect of exclusivity.

215. See Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, *Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law*, 39 INT’L REV. INTELL. PROP. & COMPETITION L. 707, 712 (2008) (“Limitations and exceptions do not conflict with a normal exploitation of protected subject matter, if they are based on important competing considerations or have the effect of countering unreasonable restraints on competition, notably on secondary markets, particularly where adequate compensation is ensured, whether or not by contractual means.”); see also Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, *Towards a Balanced Interpretation of the “Three-Step Test” in Copyright Law*, 30 EUR. INTELL. PROP. REV. 489 (2008).

*b. Constitutional Property Protection*

Apart from the international three-step test, the constitutional framework for copyright might pose yet another challenge to a total transformation of the exclusive right into a limitation-based remuneration right. This is the situation in those countries where copyright is subsumed under the general right to property,<sup>216</sup> which is the case in most European countries and seems to be the case in the United States too,<sup>217</sup> even if it appears to have been less an issue in United States courts so far.<sup>218</sup> At the European level, it is recognized that copyright enjoys protection according to Article 1 of the First Additional Protocol (property) to the ECHR.<sup>219</sup> Article 17 paragraph 2 of the Charter of Fundamental Rights of the European Union of 2000 even contains the succinct clause “intellectual property shall be protected,”<sup>220</sup> which has led in the first place to abusive interpretations in the absence of any clear explanations of the scope of such protection.<sup>221</sup>

216. Francis Yeoh, *Adaptations in Music Theatre: Confronting Copyright*, 26 ENT. L. REV. 119, 119 (2015) (“The concept of copyright as ‘property’ and the ‘economic’ approach to copyright have ensured that the limitations to the ‘monopolistic’ rights of copyright owners are strictly interpreted.”).

217. See e.g., *Chavez v. Arte Publico Press*, 204 F.3d 601, 605 n.6 (5th Cir. 2000) (“The Supreme Court held in *Florida Prepaid* that patents are considered property within the meaning of the due process clause. Since patent and copyright are of a similar nature, and patent is a form of property . . . copyright would seem to be so too.”) (citation omitted); see also Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004).

218. For an alternative normative frame for copyright, such as the right to culture or the right to freedom of expression, see Universal Declaration of Human Rights, *supra* note 36, art. 27; International Covenant on Economic, Social and Cultural Rights, *supra* note 28, art. 15. For an alternative normative frame for copyright on the national level, see, for example, Czech Charter of Fundamental Rights and Freedoms 1992, art. 34(1); Lietuvos Respublikos Konstitucija [Constitution] Oct. 25, 1992, art. 42 (Lith.); Constitución Española [CE] [Constitution] Oct. 31, 1978, art. 20 (Spain). For further examples of how the constitutional protection for copyright is framed under different domestic and supranational constitutional texts around the globe, see Geiger, *supra* note 41.

219. *Akdeniz v. Turkey*, App. No. 20877/10, Eur. Ct. H.R. (2014) (admissibility decision); *Neij & Sunde Kolmisoppi v. Sweden*, App. No. 40397/12, Eur. Ct. H.R. (2013) (admissibility decision); *Ashby Donald & Others v. France*, App. No. 36769/08, Eur. Ct. H.R. (2013); *Balan v. Moldova*, App. No. 19247/03, Eur. Ct. H.R. (2008); *Melnychuk v. Ukraine*, App. No. 28743/03, Eur. Ct. H.R. (2005) (admissibility decision); *Dima v. Romania*, App. No. 58472/00, Eur. Ct. H.R. (2005) (admissibility decision); *Aral, Tekin & Aral v. Turkey*, App. No. 24563/94, Eur. Comm’n H.R. Dec. & Rep. (1998) (admissibility decision); *A.D. v. Netherlands*, App. No. 21962/93, Eur. Comm’n H.R. Dec. & Rep. (1994) (admissibility decision).

220. See Christophe Geiger, *Intellectual “Property” After the Treaty of Lisbon: Towards a Different Approach in the New European Legal Order?*, 32 EUR. INTEL. PROP. REV. 255 (2010); Jonathan Griffiths & Luke McDonagh, *Fundamental Rights and European IP Law: The Case of Art. 17(2) of the EU Charter*, in CONSTRUCTING EUROPEAN INTELLECTUAL PROPERTY: ACHIEVEMENTS AND NEW PERSPECTIVES 75 (Christophe Geiger ed., 2013).

221. The Community legislator has already referred to Article 17(2) when opting for a “maximalist” conception of IP in the European Union, with an aim to implement a “rigorous,” “more far-reaching” system of intellectual property protection. See, e.g., InfoSoc Directive, *supra* note 210, at 10; Directive 2006/115/EC, of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 2006 O.J. (L 376) 28; see also *Copyright in the Knowledge Economy*, COM (2008) 466/3 final (July 16, 2008). The so-called “absolutist” logic has also influenced the case law of the Court of Justice of the European Union. See, e.g., *Case C-5/08, Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569 (holding that even certain parts of sentences may be considered a protected work);

On the other hand, the potential negative consequences of the property approach should not be overestimated, as they could largely be remedied by the internal limits of the constitutional right to property. Even in a moral rights or natural law-based understanding, the constitutional notion of property has always been considered a right inherently restricted by public interests. This principle of *Sozialbindung des Eigentums* (the “social bounds” of property) for the benefit of society is reflected in both Article 1 of the First Protocol to the ECHR and Article 17 paragraph 1 of the EU Charter, which provide for the possibility of restrictions in the common interest.<sup>222</sup> This means that intellectual property can be limited in order to safeguard the public interest just like the right to physical property. This logic, clearly excluding an “absolutist” conception of IP, was clearly envisaged by the drafters of both the ECHR and the Charter<sup>223</sup> and finds further support in the judicial practice of the European Courts.<sup>224</sup>

## 2. Determining Fair Remuneration for the Creator of the Initial Work Creatively Reused

The final important question that remains to be considered is how “fair remuneration” could, in practice, be secured. Admittedly, this is not an easy

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*see also* Christophe Geiger, *Intellectual Property Shall Be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope*, 31 EUR. INTELL. PROP. REV. 113 (2009).

222. For further discussion of a limited nature of the right to property in general and intellectual property in particular, see Alexander Peukert, *The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature*, in RESEARCH HANDBOOK, *supra* note 18, at 132. *See also* Geiger, *supra* note 96.

223. Council of Europe, Preparatory Work on Article 1 of the First Protocol to the European Convention on Human Rights, CDH (76) 36, Strasbourg, Aug. 13, 1976 (entertaining an idea of a “relative” nature of a newly introduced property paradigm as opposed to an absolute right to own property in a sense it was understood by Roman law).

Similarly, the preparatory documents of the EU Charter specify that “the guarantees laid down in paragraph 1 of Article 17 shall apply as appropriate to intellectual property” and that “the meaning and scope of Article 17 are the same as those of the right guaranteed under Article 1 of the First Protocol to the ECHR.” Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, Text of the Explanations Relating to the Complete Text of the Charter as set out in CHARTE 4487/00 CONVENT 50 (Brussels, 2000), 19–20.

224. Particularly, as it concerns the CJEU, the latter has stated on numerous occasions that IP rights are not absolute and that a “fair balance” has to be struck between intellectual property protection and the other interests of fundamental importance. *See* Case C-580/13, *Coty Germany GmbH v. Stadtparkasse Magdeburg*, 2015 ECLI:EU:C:2015:485 (July 16, 2015); Case C-117/13, *Technische Universität Darmstadt v. Eugen Ulmer KG*, 2014 ECLI:EU:C:2014:2196 (Sept. 11, 2014); Case C-201/13, *Deckmyn v. Vandersteen*, 2014 ECLI:EU:C:2014:2132 (Sept. 3, 2014); Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 ECLI:EU:C:2014:192 (Mar. 27, 2014); Case T-495/11, *Streng v. Office for Harmonisation in the Internal Market (PARAMETRICA)*, 2014 ECLI:EU:T:2014:39 (Jan. 30, 2014); Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012 ECLI:EU:C:2012:85 (Feb. 16, 2012); Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, 2011 E.C.R. I-11959; Case T-439/04, *Eurohypo AG v. European Union Intellectual Prop. Office*, 2006 E.C.R. II-01269. For a discussion of these cases, see Christophe Geiger, *The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union*, in NEW DEVELOPMENTS, *supra* note 20.

question since the systems for establishing and collecting the remuneration of limitation-based remuneration rights diverge worldwide considerably.<sup>225</sup> In short, the share of the remuneration collected to which creators are entitled can be established by law or through negotiation.<sup>226</sup> In the first situation, the solutions might be less nuanced, as some works are more successful than others, whereas in the second case the right owner, not being entitled to refuse authorization, could still negotiate the amount of remuneration to be paid. If no solution is reached by the parties, a regulatory authority could step in and mediate.<sup>227</sup> To this effect, the creation of an independent regulation authority such as an “[o]bservatory on access to copyrighted work” could be envisaged,<sup>228</sup> on the model of some European competition authorities. More generally, statutorily-organized mediation is a regulatory option that has been underexploited so far and should gain much importance in the future in the debate on how to secure balanced solutions taking into account all interests.<sup>229</sup>

Alternative dispute resolution (ADR) mechanisms to assist in determining fair remuneration have been sometimes proposed in similar contexts. Professor Ginsburg has discussed the feasibility of such an option in relation to permitted-but-paid uses.<sup>230</sup> If she acknowledges that ADR may still be “expensive and time consuming” and still includes “disparities in bargaining power,”<sup>231</sup> she nevertheless concludes that this is a workable model to follow, as the bargaining disparities can be offset by weaker parties submitting reasonable bids and having common agents represent groups of weaker parties.<sup>232</sup>

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225. An entire conference was organized on this issue by the ALAI in 2015. The proceedings have been published in REMUNERATION FOR THE USE OF WORKS, EXCLUSIVITY VS. OTHER APPROACHES (Silke von Lewinski ed., 2017).

226. Shaheed, *supra* note 167.

227. Ginsburg, *supra* note 170, at 1446 (recommending the implementation of “statutorily facilitated bargaining between agents representing copyright owners and users, backed up by last best-offer arbitration before the Copyright Royalty Board. Whichever method employed to set the rates for permitted-but-paid uses, the copyright law should ensure that authors share in any statutory or privately ordered remuneration scheme.”).

228. In this spirit, a specific provision on orphan works in the Canadian copyright law permits anyone who wants to make use of a work and cannot locate the copyright owner to petition the Canadian Copyright Board for a license. Copyright Act, R.S.C. 1985, c C-42, s. 77 (Can.).

229. Christophe Geiger, Xavier Seuba & Asako Wechs Hatanaka, *Civil Enforcement of Intellectual Property Rights: Public Consultation on the Efficiency of Proceedings and Accessibility of Measures* (Ctr. for Int’l Intellectual Prop. Studies, Research Paper No. 2013-01, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2971107](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971107) [<https://perma.cc/S6D4-6SG8>].

230. Ginsburg, *supra* note 170, at 1441–45.

231. *Id.*

232. *Id.* at 1445. For an article in favor of using mediation to solve copyright disputes, see Asako Wechs Hatanaka, *Mediation and Intellectual Property Law: A European and Comparative Perspective* (Sept. 26, 2016) (unpublished PhD thesis, University of Strasbourg), <https://tel.archives-ouvertes.fr/tel-01484798/document> [<https://perma.cc/J2DX-BRCH>]. See also Asako Wechs Hatanaka, *Optimising Mediation for Intellectual Property Law - Perspectives from EU, French and UK Law*, 49 INT’L REV. INTELL. PROP. & COMPETITION L. 384 (2018).

Another less “intrusive” alternative would be subordinating creative uses of copyrighted works to a system of mandatory collective administration, as this would not be a limitation but a way of exercise of the exclusive right, which would therefore be more likely to be compatible with the international three-step test.<sup>233</sup> In order to avoid the same blockages as with the exclusive right, the tariffs asked by the collecting society could also be regulated or checked by the same independent authority to be created. In the United States, the Harry Fox Agency, which serves as a centralized agency for many musical copyright owners, collects royalties for Section 115 mechanical licenses in reproduction of music works.<sup>234</sup> Perhaps this model, even though not mandatory, could be a useful example for reference in designing a centralized administrative system for creative remunerated use of works.

#### CONCLUSION

Honoring the common ideology of both doctrines, copyright, as this Article demonstrates, may be made compatible with freedom of artistic creativity. The existing current system, however, leaves much to be desired in this respect; derivative works provide a particular challenge to any marriage of both rights, particularly if isolated within the preexisting internal mechanisms of copyright legislation. Attempts to embrace extrinsic tools to regulate the system and maintain balance between the rights using human rights reasoning have surely brought some potential relief, without solving all situations in a satisfying manner and ensuring sufficient predictability for creators and the public. Therefore, in this Article, the recourse to a statutory license for creative uses has been proposed and its feasibility

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233. CARINE BERNAULT & AUDREY LÉBOIS, PEER-TO-PEER FILE SHARING AND LITERARY AND ARTISTIC PROPERTY: A FEASIBILITY STUDY REGARDING A SYSTEM OF COMPENSATION FOR THE EXCHANGE OF WORKS VIA THE INTERNET (2005), [http://privatkopie.net/files/Feasibility-Study-p2p-acs\\_Nantes.pdf](http://privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf) [<https://perma.cc/F6C2-U7HC>]; P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT 19 (2008), [https://www.ivir.nl/publicaties/download/limitations\\_exceptions\\_copyright.pdf](https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf) [<https://perma.cc/V46F-S74D>] (“Although the practical effect of such a rule is similar to that of a statutory or compulsory license (providing for a right of remuneration), it is technically not a limitation, since the exclusive economic right remains intact and can still be enforced on behalf of right holders by designated collective societies.”); Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*, E-COPYRIGHT BULL., Jan.–Mar. 2007, <http://unesdoc.unesco.org/images/0015/001578/157848e.pdf> [<https://perma.cc/Q4YA-8F6F>]; Silke von Lewinski, *Mandatory Collective Administration of Exclusive Rights – A Case Study on Its Compatibility with International and EC Copyright Law*, E-COPYRIGHT BULL., Jan.–Mar. 2004, <http://unesdoc.unesco.org/images/0013/001396/139656e.pdf> [<https://perma.cc/842D-ZSC2>]; cf. PHILIPPE AIGRAIN ET AL., SHARING: CULTURE AND THE ECONOMY IN THE INTERNET AGE 59–137 (2012); WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT (2004); ALAIN MODOT ET AL., EUROPEAN PARLIAMENT, THE “CONTENT FLAT-RATE”: A SOLUTION TO ILLEGAL FILE-SHARING? (2011), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/460058/IPOL-CULT\\_ET\(2011\)460058\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/460058/IPOL-CULT_ET(2011)460058_EN.pdf) [<https://perma.cc/7NYX-P97T>]; Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-To-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

234. COHEN ET AL., *supra* note 185, at 414.

assessed. The conclusion is that such a limitation-based system is a workable option, provided that a fair remuneration is secured to the original creators in case of commercial exploitation of the derivative work. This framework could be guaranteed through the implementation of an independent regulation authority or a Copyright council,<sup>235</sup> which could check that access is granted at a fair price, taking into account the specificity of the work in question, such as the potential market for the derivative work, the fame of the original creator or work used, etc.<sup>236</sup>

Looking ahead, and maybe more fundamentally, there might be a need in the future to reconsider and reshape copyright as an “access right,” meaning a right to grant access (and not to hinder it), as a right to say “yes” rather than a right to say “no,” as an inclusive right rather than an exclusive right.<sup>237</sup> Such a rethinking of the legislative framework has nothing to do with an anti-copyright position, as it is sometimes portrayed by those reluctant to reform. In fact, in current discussions on the future of copyright law, anyone questioning the functioning of the current system and bringing “access” arguments forward immediately risks being accused of being a supporter of greedy “pirates” who are claiming broad and free access on the Internet, stealing the bread out of the mouth of poor creators.<sup>238</sup> Such caricatures only serve those who have an interest in the status quo and are thus reluctant to any reform that could diminish their control and domination over the copyright system. It has to be recalled: claiming access in copyright law means not

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235. This idea of Copyright Council in the EU has been recently developed by Franciska Schönherr in her Ph.D. thesis defended at the CEIPI/University of Strasbourg on October, 3 2017. Franciska Schönherr, *The Construction of an EU Copyright Law, Towards a Balanced Institutional and Legal Framework* (Oct. 10, 2017) (unpublished Ph.D. thesis, University of Strasbourg) (on file with author). Such an EU Copyright council would allow a more structured, institutionalized dialogue between different stakeholder groups and the institutions and safeguard, on the model of some copyright councils already implemented at national level, that access to copyrighted work is secured at a fair price; it would ensure the legitimacy of copyright whilst protecting freedom of expression and the public interest.

236. This would allow adapting the remuneration on a case-by-case basis. For example, the film adaptation of a very famous novel such as Harry Potter would lead to a higher remuneration than the one of an unknown work, since the fame of the original work is likely to lead to a bigger market and significant revenues. Likewise, the adaptation of Harry Potter for a theatre play in Polish would lead to a significantly lower remuneration than if the play were in English and played on Broadway, and possibly broadcast afterwards to the entire world.

237. Séverine Dusollier, *Inclusivity in Intellectual Property*, in *INTELLECTUAL PROPERTY AND GENERAL LEGAL PRINCIPLES: IS IP A LEX SPECIALIS?* 101 (Graeme B. Dinwoodie ed., 2015); Christophe Geiger, *Copyright as an Access Right, Securing Cultural Participation Through the Protection of Creators' Interests*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 73 (Rebecca Giblin & Kimberlee Weatherall eds., 2016).

238. Indeed, as rightly noted by Reto M. Hilty, “an enhancement of copyright protection scarcely helps the creators of the works, but rather burdens the consumers,” because “the borderline of conflicting interests runs not so much between creators and consumers as greatly emphasized by the traditional perception of copyright, . . . [but] arises from the fact that the exploiting copyright industry wants to optimise its profits by all the possible means they can deploy.” Reto M. Hilty, *Five Lessons About Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn*, 53 *J. COPYRIGHT SOC'Y U.S.A.* 103, 132–33 (2005).

that the access should be for free, but that it should be possible under fair conditions and that it should not block future creativity.<sup>239</sup>

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239. See Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information*, 1 INTEL. PROP. Q. 1, 1–2 (2010); Francis Gurry, *Developments in the International Intellectual Property System*, in *THE INTELLECTUAL PROPERTY SYSTEM IN A TIME OF CHANGE: EUROPEAN AND INTERNATIONAL PERSPECTIVES* 57, 61–62 (Christophe Geiger ed., 2016) (underlining that the role of copyright is “finding a balance between all the competing interests that surround the act of cultural creation. On the one hand, there are the interests of the creators, who derive their economic existence through the restriction on access that copyright entails. On the other hand, there are the interests of society and the general public. *Access is the reason for which we are interested in cultural production*” (emphasis added)).