# The role of exceptions to copyright in the freedom of expression protection of internet users


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## 1. Introduction

This master's thesis is about a possible conflict between copyright and the freedom of expression in the online environment. The goal of copyright is to promote the progress of science and useful arts, to promote creativity and to promote innovation. By granting the copyright owner exclusive rights to exploit a copyrighted work, it becomes more interesting for creators to create copyrightable works. However, the granting of these exclusive rights may also have negative effects, because other persons than the copyright owner cannot use the copyrighted work in the creation of new innovating works. In other words, copyright might limit other persons than the copyright owner in their expression (of innovating works), because such an expression may not contain (a part of) a copyrighted work. So, the goal of copyright is not only served by the granting of exclusive rights of the copyright owner, but also by allowing the free expression of new works. In fact, the freedom of expression is an universally protected freedom, which provides any person with the freedom to express, seek, receive and impart any expression without interference. In order to reconcile copyright and freedom of expression, there are certain limitations and exceptions to copyright. These limitations of and exceptions serve the public interest by protecting certain values, such as freedom of expression values. If these values are insufficiently protected by the limitations and exceptions, copyright might be in conflict with these values. Even though this conflict has been recognized a long time ago and is widely discussed by scholars, new technologies, in particular the internet, shed a new light on it. The internet provided us with a different perspective and changed copyright and freedom of expression regulation, interpretation and values.

Copyright provides the copyright owner with exclusive rights over a literary, scientific or artistic work. These exclusive rights are granted to the copyright owner for a limited term. Copyright protects the particular expression of a work, not ideas the work describes (idea-expression dichotomy). Not all the literary, scientific and artistic expressions fall within the scope of copyright. For example, only original expression can be copyrighted, which means that the work has to reflect the author's personality/carry his personal stamp; it should be the author's own intellectual creation.[1] The limited term, the idea-expression dichotomy and the requirement of originality are limitations of the copyright protection. Ideas, works outside the scope of copyright protection and copyrighted works which term has expired, are part of the public domain and anyone is free to use them in their expression.

The freedom of expression is a universally protected human right, which is considered to be the cornerstone of every democratic society. Article 19 of the Universal Declaration of Human Rights (UDHR) states that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This implies that everyone has the right to express whatever they like, without interference. But what about expressions protected by copyright? The copyright owner has exclusive rights on the copyrighted expression and nobody else may use this expression without the consent of the copyright owner. This seems to be an interference with the freedom of expression. The question to be answered is whether and, if so, under what conditions this interference is allowed.

The limitations of the copyright protection seem to serve freedom of expression interests, as they consign certain works to the public domain, free for everyone to use in their expression. However, the fact remains that certain works are protected by copyright and cannot be used by anyone. In order to compensate freedom of expression interests (and other public interests, such as education and science) copyright law contains exceptions to the exclusive rights of the copyright owner. These exceptions allow everyone, under certain conditions, to use (parts of) a copyrighted work. Examples

[1] CJEU 16 July 2009, nr. C-5/08 (Laserdisken A/S v Danske Dagblades Forening), paragraph 37

are quotations of copyrighted work[2] and the use of copyrighted work in a parody.[3] There is a wide variety of exceptions and almost every country applies different ones.

The internet is a global system which enables 'content to be freely (and effectively anonymously) distributed across the Internet.'[4] Digital technology enables us to make 'perfect copies of the original work.'[5] For copyright owners, these developments have both positive and negative effects. On the one hand, they provide new ways of distributing their content and generating income. On the other hand, they make it much harder to protect and enforce the exclusive rights of the copyright owner, because copyright infringement can happen anywhere on the world and on a massive scale. Over the years copyright laws have been harmonized and adapted to deal with the new technologies. However, it is questionable whether the exceptions to the exclusive rights of the copyright owners did the same. Several European industry, artist, education and consumer groups, such as BEUC, The European Consumer Organisation, have signed a declaration entitled "Copyright for Creativity". This declaration states:

> While exclusive rights have been adapted and harmonised to meet the challenges of the knowledge economy, copyright's exceptions are radically out of line with the needs of the modern information society.[6]

If it is true that the exceptions to the exclusive rights of the copyright owner are out of line with the need of the modern information society, public interests, including the freedom of expression, are in jeopardy. This leads us to the research question.

This master's thesis examines the question **whether mandatory exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users**.

There are a lot of exceptions to copyright applicable in different countries under their national copyright acts. Because of the wide variety of exceptions, a treatment of all those exceptions would entail a far too extensive scope for this master's thesis. Therefore, in this master's thesis the term **exceptions to the exclusive rights of the copyright owner** will be used to refer to a limited group of exceptions, namely: exceptions that allow persons to make use of (parts of) a copyrighted work without consent of the copyright owner and share the result with others.

Methods applied

The following sources are primarily used in order to investigate copyright, the (international) regulation of copyright, in particular the exceptions to the exclusive rights of the copyright owner in this regulation, the freedom of expression and the (international) regulation of freedom of expression: international copyright regulation (e.g. the Berne Convention, TRIPs Agreement, WIPO Copyright Treaties), regional copyright regulation (e.g. United States Copyright Act and the European InfoSoc Directive 2001/29/EC), books on copyright and freedom of expression, articles (of experts in the field of copyright, fair use, limitations and exception and freedom of expression), papers (e.g. on the freedom of expression on the internet), journals, research studies (e.g. by the Research division

[2] United States Senate, Senate Reports No. 94-473 (1975), pp. 61-62 and United States House of Representatives, House Report No. 94-1476 (1976), p. 65; Article 10(1) Berne Convention; Article 5(3)(d) Directive 2001/29/EC

[3] United States Senate, Senate Reports No. 94-473 (1975), pp. 61-62 and United States House of Representatives, House Report No. 94-1476 (1976), p. 65; Article 5(3)(k) Directive 2001/29/EC

[4] Lessig 2006, p. 173

[5] Ibid

[6] 'Copyright for Creativity', 26 February 2011 www.copyright4creativity.eu/bin/view/Public/Declaration

of the European Court of Human Rights) and case-law (mainly of the United States Supreme Court, the European Court on Human Rights and the Court of Justice of the European Union).

Structure of the thesis

In order to determine whether the mandatory exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users, these exceptions have to be defined (Chapter 2). The starting point will be the development of copyright in the United Kingdom and continental Europe (paragraph 2.1). Thereafter, the development of international copyright regulation, in particular the Berne Convention, and the exceptions provided in these instruments are discussed (paragraph 2.2 and 2.3). The purpose of paragraph 2.4 is to provide a description of the exceptions applicable in the United States and on a European level, because those, particularly the United States fair use doctrine, will be used in following chapters. Paragraph 2.5 will provide a conclusion and a summary of the mandatory exceptions in international copyright law.

In Chapter 2 the mandatory exceptions to the exclusive rights of the copyright owner provided by international regulation are explored. Chapter 3 describes the status of exceptions to the exclusive rights of the copyright owner as mechanism protecting the freedom of expression. This will answer the question whether and how exceptions to the exclusive right of the copyright owner protect the freedom of expression. Due to the extensive amount of literature and case-law in the United States on this subject, the major part of chapter 3 will discuss the status and function of the United States fair use doctrine (paragraph 3.1). The discussion of literature from the 1970s will be the starting point (paragraph 3.1.1). In paragraph 3.1.2 the status of the fair use doctrine as safeguard of the constitutional freedom of speech protection will be discussed using case-law of the U.S. Supreme Court. Paragraph 3.1.3 will provide insights in the United States fair use regime. The approaches of the courts in determining whether a certain use is fair (paragraph 3.1.3.1) and the fair uses protecting the freedom of expression (paragraph 3.1.3.2) will be discussed. Paragraph 3.1.4 provides a conclusion. In paragraph 3.2 the European situation, on which a scarce amount of literature and, particularly case-law, is available, will be compared to the United States situation.

When the mandatory exceptions to the exclusive rights of the copyright owner are explored and their status and function as mechanisms protecting the freedom of expression is clear, the question remains which freedom of expression values should be protected for adequate freedom of expression protection of internet users. Chapter 4 contains an analyse of the legal protection of the freedom of expression in the United States and on a European level. The analysis of the legal freedom of expression protection in these two regions is in line with the analysis of the status and function of the exceptions to the exclusive rights of the copyright owner in these regions in chapter 3. The goal is to describe the general freedom of expression values that should be protected and the reason why these values should be protected for internet users. The analyse will be general because the legal system protecting freedom of expression is wide and fragmented. Although there are general provisions on freedom of expression protection in the United States[7] and in Europe[8], there are several of other provisions in regulation protecting (specific) freedom of expression values (e.g. exceptions in copyright laws). To identify the freedom of expression values that can and should be protected by the exceptions to the exclusive rights of the copyright owner, there has to be a general picture of freedom of expression values to select from.
The analysis of the freedom of expression values that should be protected starts from a historical perspective by analysing three prominent theories on which the legal freedom of expression protection in the United States and on a European level is grounded (paragraph 4.1). Paragraph 4.2

[7] U.S. Constitution, Amendment 1
[8] Article 10 European Convention on Human Rights

will describe the main interests involved in legal freedom of expression protection. Although this master's thesis focuses on the freedom of expression interests of internet users, it is important to consider some other interests that should be taken into account. After the discussion of the underlying theories and interests, the general freedom of expression provisions and their interpretation in the United States (paragraph 4.3) and on a European level (paragraph 4.4) will be discussed and linked to these theories and interests. The analysis of the legal freedom of expression protection in the United States and on a European level will be used as starting point for the analysis of two critical and renewing theories that focus on the influence of new technologies, in particular the internet, on the freedom of expression. The analysis will show whether the characteristics of the internet require different or additional freedom of expression values to be protected. In order to do so, paragraph 4.5 describes the potential and characteristics of internet speech (paragraph 4.5.1), the importance of participation and democracy (paragraph 4.5.2), the (ideal) grounding of freedom of expression protection (paragraph 4.5.3) and the requirements for freedom of expression regulation (paragraph 4.5.4). Paragraph 4.6 provides a conclusion.

In Chapter 5 the findings in the previous chapters will be combined to reach a conclusion. The question will be answered whether exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users.

## 2. Exceptions in copyright law

In order to determine whether the mandatory exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users, these exceptions have to be defined. This chapter describes the exceptions to the exclusive rights of the copyright owner in international regulation that may be relevant for the protection of freedom of expression of internet users. Paragraph 2.1 provides a brief description of the history of copyright regulation. Paragraph 2.2 describes the exceptions in the Berne Convention, which may be regarded as the most important international instrument regulating copyright. In paragraph 2.3, additional international instruments and the exceptions provided by these instruments are described. Paragraph 2.4 describes the relevant exceptions provided by regulation on a European level and in the United States law. Especially the United States fair used doctrine has an important part in this study, because of the extensive amount of literature and case-law, compared to European material, on this subject. Finally, a conclusion and a description of the mandatory exceptions is provided in paragraph 2.5.

### 2.1 History

The invention of the printing press in 1476 may be considered as the trigger for the development of copyright protection. From this point on copying became a less comprehensive process. The invention led to new trade and with that the emergence of printers and booksellers. In the beginning these entrepreneurs could not rely on any protection against competition from the sales of unauthorised copies. Because of the substantial investments in materials and the presses, there arose a growing demand for protection. The authorities in Italy, the United Kingdom, France and Germany recognised this demand and came up with a system of privileges. Printers and booksellers subject to a privilege had the sole right to copy a certain work. This indicates a protection for booksellers and printers, but not for authors, with the exception of a limited number of author privileges that were awarded. Usually authors were given a single compensation for their work from a printer or bookseller. However, in the seventeenth and eighteenth century an increasing amount of writers demanded better remuneration for their work.[9] In 1709 the first Copyright statute was introduced: 'An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned' (hereinafter: Statute of Anne). This piece of legislation 'was a stepping-stone towards diverting the limelight from printers to authors.'[10]

#### 2.1.1 The Statute of Anne

> That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed and not printed and published, or that shall hereafter be composed, and his assignee, or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer;[11]

[9] Bently & Ginsburg 2010, p. 1477
[10] Mendis 2003, p. 9
[11] Statute of Anne, 8 Ann., c. 19, § 1 (1710) (Gr. Brit.)

The passage from the Statute of Anne above shows that the author and his assignee or assigns are granted with the sole liberty of printing and reprinting the authors' book. It also shows that the printers and booksellers (purchasers of copies) kept their sole right and liberty of printing books for a period of twenty-one years if they have purchased or acquired those books before the tenth of April 1710. This confirms a transitional period for printed and acquired books and the shift of exclusive rights from the booksellers and printers towards the authors for books not yet printed or acquired.

After the transitional period, booksellers and printers lost their exclusive rights. The booksellers and printers argued that the period in the Statute of Anne was expired, but that they still had a perpetual common law right to publish works for which they had acquired the rights. In *Millar v. Taylor (1769)*[12] the Court of King's Bench ruled in favour, and ruled that there was and perpetual common law right for publishers after the expiration of the term in the Statute of Anne. One of the judges, Yates J. made objections against the judgement, but he was in minority. He expressed his concerns for the public interest, if an author would have an endless monopoly. In *Donaldson v. Beckett (1774)*[13] the decision in Millar v. Taylor was overruled. The majority of the judges ruled that there was no copyright in perpetuity based on common law. It was argued that perpetual copyright would have undesired consequences for the public.

> Lord Effingham rose last, and begged to urge the liberty of the press, as the strongest argument against this property; adding, that a despotic minister, hearing of a pamphlet which might strike at his measures, may buy the copy, and by printing 20 copies, secure it his own, and by that means the public would be deprived of the most interesting information.[14]

In 1775 the Parliament adopted an act which made an exception for universities and some colleges. They retained their perpetual publishing right for all copies acquired at that time or in the future in order to secure the public interest, in particularly the encouragement of learning.[15]

Although there was not a real exception to copyright in the Statute of Anne, it's interesting to notice that there was a provision that "restricted" the copyright by establishing a burden for the owner. This burden consisted in making available copies of a book, printed after the statute came into force, to the nine libraries designated in the statute. This provision was promoting education and thus the public interest.

An interesting doctrine developed during the time the Statute of Anne was in force, was created in a judgment of the Court of Chancery in the case Gyles v. Wilcox (1740).[16] Gyles sued Wilcox for publishing an abridgment of his work. In this case Lord Hartwicke established the doctrine of "fair abridgment".

> Where books are colourably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment.[17]

But a "true abridgment", not being just a "coloured shorting", could under certain conditions be considered as a new work:

> But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgements may with great propriety be called a new book, because not only the paper and print,

[12] Millar v. Taylor (1769) 4 Burr. 2303
[13] Donaldson v. Beckett (1774) 4 BURR. 2407
[14] Ibid
[15] Brown 1784, p. 110
[16] Gyles v. Wilcox (1740) 26 ER 489
[17] Atkyns 1754, p. 142

> but the invention, learning, and judgement of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.[18]

The judgement indicates that the creation of a new useful works is of paramount significance to the public interest and that under certain conditions the right of publication must yield. This case is considered to be the precursor of the modern-day U.S. "fair use" doctrine.

It is important to notice that the Statute of Anne 'closed the period of experiment and tentative administration of literary property and opened the period of modern copyright law'.[19] The granting of exclusive rights moved from the booksellers and printers to the authors. These exclusive rights were granted for a limited period to preserve a proper balance between the exclusive rights and the public interest. And the doctrine of "fair abridgment" was created, which made it possible to make an exception to exclusive rights under certain conditions in order to serve the public interest.

### 2.1.2 Continental Europe

In continental Europe civil law countries, such as Germany and France, copyright developed in another way as in the United Kingdom, a common law country with a *copyright system*. In civil law countries copyright is considered not just as a sole economical right, but as a combination of the 'classical subdivisions of rights, such as personality rights (self-ownership), real rights (property, usufruct, easements), and personal rights (contractual claims, claims for compensation).'[20] The copyright law in continental Europe developed, incorporating elements of these three categories, 'with a theoretical foundation based on natural rights doctrine and German idealism.'[21]

In 1791 and 1793, during the French Revolution, two laws were accepted in France recognising an exclusive author right ("droits d'auteurs") and replacing the royal printing privileges. The natural rights doctrine, which was codified in this legislation, implied that a droit d'auteur is automatically granted to an auteur when he created a work, without the need of formalities such as registration and deposit applicable in the Statute of Anne, recognizing a link between the author and his intellectual creation.[22] The term of protection was granted for the life of the creator plus an additional period. The French law and its natural rights approach was inspired by German idealism, which is the basis for what is now known as "moral rights". Kant believed that 'an author's words are a continuing expression of his inner self' and considered them as 'actions, an exertion of the author's will, rather than an external thing.'[23] He believed that only the author could have the sole right to determine whether and how his work would be disseminated, because the intellectual work is inextricably linked with the author. Hegel did not agree with Kant, although he recognized the link between the author and his intellectual creation, he regarded the intellectual work as an external thing.[24] Hegel's view later developed in the 'dualist theory, which assumes that the author's personal and economical interest are each protected by a legally and conceptually distinct set of rights'.[25]

[18] Atkyns 1754, p. 143
[19] Ransom 1956, p. 106
[20] Bouckaert 1990, p. 793
[21] Netanel 1993, p. 371
[22] Ibid, p. 372
[23] Ibid, p. 374
[24] Ibid, p. 377
[25] Ibid, p. 379

After the French Revolution the *author's right system* was adopted in other surrounding continental countries, and by 1886 almost all European states had enacted their own copyright laws.[26] Of course there were variations between the national author's right laws, for example in the limitations and exceptions to the exercise of rights, needed for the protection of public interests.[27]

The national character of the copyright laws, which only protected works from national authors, resulted in copies being made across the state borders. The increasing amount of unauthorized copies made across the borders was the main reason for 'the development of international copyright relations in the mid-nineteenth century.'[28] France passed a decree in 1852, which extended the protection of copyright across the French borders. This move was an incentive for the up rise of bilateral copyright agreements between France and other countries. Bilateral copyright agreements became quite common by the middle of that century. Despite these developments there remained a lack of conformity between national copyright laws, and the 'demand for a more widely based and uniform kind of international copyright protection began.'[29]

## 2.2 The Berne Convention

In 1878, as a result of a major international literary congress held in Paris during the Universal Exhibition in that city, "l'Association Litteraire et Artistique Internationale" (ALAI) was established. ALAI, with its first president Victor Huge, was the initiator of a number of conferences held in Berne between 1883 and 1886. At the final conference on 6 September 1886, 12 countries were represented and 10 countries signed the Berne Convention. The Convention of 1886 contained two important basic principles, which are still applicable in the current Convention. The first is the principle of national treatment, which means that all nationals of union states are treated similar within a certain member state compared to the own nationals of that member state.[30] The second principle is the principle of minimum rights, which means that authors are granted a minimum level of rights described in the convention.[31]

During the diplomatic conference of 1884, a German questionnaire was to be answered. This questionnaire also contained a question whether restrictions on the reproduction rights should be included in the convention. The question was 'referred to the commission, with clear warning by the French that these should be kept to a minimum.'[32] The French thought that these kind of provisions belonged in bilateral agreements, not in a general convention. [33] Nevertheless, two provisions containing restrictions on the reproduction right were adopted in the draft convention. Article 8 of the 1884 draft allowed the use of extracts, fragments or whole pieces of literary or artistic work, which appeared for the first time in another Union country, provided that such disclosure be appropriate and adapted specially for educational purposes, or has a scientific character. Article 9 allowed the use of newspaper and periodical articles, published in one of the Union countries, in original or in translation. In his closing speech to the 1884 Conference, Numa Droz, president of the conference, stated that 'limits to absolute protection are rightly set by the public interest'[34].

[26] Ricketson 1986, p. 10
[27] Ibid, p. 12
[28] Ibid, p. 13
[29] Ibid, p. 16
[30] Sterling 2008, p. 16
[31] Ibid
[32] Ricketson & Ginsburg 2006, pp. 63-64
[33] Ibid, p. 68
[34] Ibid, p. 756

During the diplomatic conference of 1885, after discussions about the scope and conditions of protection, two amended articles, articles 7 and 8 of the 1885 draft, were created. At the diplomatic conference of 1886 those two articles were adopted in the Berne Convention of the 9th September 1886 for the creation of an international union for the protection of literary and artistic works (Berne Convention 1886):

> *Article 7 Berne Convention 1886*
> *Articles in newspapers or magazines published in any country of the Union may be reproduced, in original or in translation, in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For magazines, it is sufficient if the prohibition is made in a general manner at the beginning of each number of the magazine. No prohibition can in any case apply to articles of political discussion or to the reproduction of news of the day or miscellaneous items (notes and jottings).*
>
> *Article 8 Berne Convention 1886*
> *As regards to liberty of lawfully making extracts from literary or artistic works for use in publications destined for education, or having a scientific character, or for chrestomathies, this matter is reserved to the law of the countries of the Union and to the particular arrangements existing or to be concluded between them.*

During the 1896 Paris Revision Conference and the 1908 Berlin Revision Conference, article 7 and 8, which became article 9 and 10 in 1908, did not endure severe changes. In 1896 one paragraph was added to article 7 excluding serial novels from the provision. The amendment of 1908 narrowed down article 7, which became article 9, by only allowing the reproduction of newspaper articles in other newspapers, unless reproduction was expressly forbidden. Articles in periodicals could only be reproduced with the consent of the author.

During the 1928 Rome Conference, article 9 was broadened again, by allowing the reproduction of articles, on "current economic, political or religious topics" by the press, "unless the reproduction thereof was expressly reserved". The reason for the amendment was the refusal by Greece, Norway, Sweden, Denmark and the Netherlands to adopt Article 9 from the 1908 Convention, as they had their reservations.[35]

As the definition of "literary and artistic works" was expanded to more types of expression in Article 2 of the 1928 Convention, some states 'insisted either on having some further detail in the list of those works or on national legislation being reserved the right to decide on certain limitations relating to the exercise of the exclusive right for its own purposes.'[36] This resulted in Article 2bis, which allowed member states to exclude political speeches and speeches delivered in legal proceedings from the scope of copyright law, and, to regulate the conditions under which lectures, addresses, sermons and other works of the same nature may be reproduced.[37]

> *Article 2bis Convention 1928*
> *(1) The right of partially or wholly excluding political speeches and speeches delivered in legal proceedings from the protection provided by the preceding Article is reserved for the domestic legislation of each country of the Union.*
> *(2) The right of fixing the conditions under which lectures, addresses, sermons and other works of the same nature may be reproduced by the press is also reserved for the domestic legislation of each country of the Union. Nevertheless, the author shall have the sole right of making a collection of the said works.*

[35] Records of the Diplomatic Conference: Convened in Rome, May 7 to June 2, 1928, p. 246
[36] Ibid, p. 237
[37] Ricketson & Ginsburg 2006, p. 108

During the 1948 Brussels Revision Conference the French proposed an explicit text for Article 9, providing 'a complete set of provisions affording the most extensive protection and specifying the content of the rights of journalists.'[38] But the text of Article 9 remained unchanged, due to objections made by several delegations that the proposed text was a restriction of the freedom of information.[39]

The French proposal to systematise the regime of lawful borrowing allowed under article 10, resulted in the permissibility of short quotations from newspaper articles and periodicals, as well as to include the in press summaries. This quotation right was allowed if the quotation was accompanied by an acknowledgement of the source and by the name of the author, if his name appears on the work.[40]

The 1948 Convention also contained a new article, Article 10bis, which extended the right to make borrowings and short quotations to cover new technologies used by the media.[41] The conditions, under which the making of short extracts from literary and artistic works, made by means of photography, cinematography or by radio diffusion, was allowed, were considered a matter for legislation in countries of the Union. Articles 9, 10 and 10bis of the 1948 Convention are exceptions to the exclusive reproduction right of the copyright owner; however, this exclusive reproduction right was not codified in the 1948 Berne Convention and the previous versions.[42] This changed during the 1967 Stockholm Revision Conference, which led to the recognition of a general, right of reproduction in Article 9(1) Berne Convention 1967:

> *Article 9 Berne Convention 1967*
> *(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.*

The original intent was to add general exceptions to the right of reproduction in paragraph 2. In the first proposal it was assumed that the following exceptions to the reproduction right would be permitted by national legislation: '(a) private use; (b) use for judicial or administrative purposes; (c) in certain particular cases, provided (i) that reproduction is not contrary to the legitimate interests of the author, and (ii) that it does not conflict with a normal exploitation of the work.'[43] Finally the Committee adopted only a general clause, the "three-step test", which was an adaption of item (c). In the final form the second condition was placed before the first for interpretation purposes.

> *If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.*[44]

> *Article 9(2) Berne Convention 1967*
> *(2) 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.*

[38] Records of the Diplomatic Conference: Convened in Brussels, June 5 to 26, 1948, p. 261
[39] Ibid, pp. 261-262
[40] Ricketson & Ginsburg 2006, p. 117
[41] Records of the Diplomatic Conference: Convened in Brussels, June 5 to 26, 1948, p. 262
[42] Records of the Intellectual Property Conference of Stockholm: June 11 to July 14, 1967 Volume II, pp. 289-290
[43] Ibid, p. 291
[44] Ibid, p. 292

Article 9(3) Berne Convention 1967 stated that any sound or visual recording of a work shall be considered as a reproduction.[45]

The quotation right in Article 10(1) Berne Convention 1967 was extended, and allowed quotations (not only 'short' quotations) to all categories of works. Quotations were allowed on three conditions, namely: (i) that the quoted work has already been lawfully made available to the public, (ii) that their making is compatible with fair practice; and (iii) their extent does not exceed that justified by the purpose.

In Article 10(2) Berne Convention 1967, the right of making excerpts was changed to the right of making 'utilization' of works 'to the extent justified by the purpose'. The utilisation were only allowed by way of 'illustrations in publications, broadcasts or sound or visual recordings for teaching', provided that such 'utilization is compatible with fair practices'. The word 'teaching' entailed teaching in educational institutions, not general teaching available to the public.[46]

A number of countries wanted to reinstall a provision for dealing with borrowings from newspaper articles, and extend this provision to apply not only to reproduction by press but also to broadcasting. The provision was added to Article 10bis(1) and determined that it was "a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topic, and of broadcast works of the same character". This was only allowed "in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved" and if the source was clearly indicated.

Article 10bis from the 1948 Convention became Article 10bis(2) and endured minor changes. The provision was extended to cover "communication to the public by wire", reproduction was allowed only "to the extent justified by the informatory purpose", and the provision only applied to works "which are seen or heard in the course of the event."[47] During the 1971 Paris Revision Conference and its final amendment in 1979 there were not changes made to article 2bis, 9, 10 and 10bis of the Convention.

The Berne Convention, as applicable now, provides member states the possibility to apply limitations, by excluding certain works from the scope of copyright law, in Article 2bis. It contains exceptions to the reproduction right (Article 9(1) Berne Convention) in Article 9(2), 10(1), 10(2), 10bis(1) and 10bis(2) Berne Convention. These exceptions allow people to reproduce (parts of) a copyrighted work without the authorization of the copyright owner. Article 9(2), 10(2), 10bis(1) and 10bis(2) Berne Convention contain exceptions that may be applied by member states. These articles do not contain mandatory exceptions, because the articles state that it is "a matter for legislation in the countries of the Union" to determine whether or not to apply these exceptions. Article 10(1) contains the only mandatory exception, the quotation right, as it states that "It shall be permissible to make quotations…"

### 2.3 Other international instruments

In this paragraph provides a brief overview of other international instruments regulating copyright and neighbouring rights. The goal is to find additional exceptions to copyright and related rights in the international regulation. First, the Rome Convention is discussed. This convention provides

[45] Records of the Intellectual Property Conference of Stockholm: June 11 to July 14, 1967 Volume II, p. 292
[46] Ibid, p. 293
[47] Ibid, p. 294

protection of rights closely related to copyright. However, in certain common law countries, such as the United States, these neighbouring rights and the rights protected in the Berne Convention are all covered by the same definition: "copyrights." Although these rights are regulated separately in for example most of the national copyright laws in continental Europe, it is useful to provide a brief description, if only for the extensive amount of case-law and doctrine available in the United States which is used in this research. Second, the TRIPs Agreement is discussed and finally the WIPO Copyright treaty. Both provide advances and clarifications on the applicable international copyright protection.

### 2.3.1 The Rome Convention

The range of subject matter protected by the Berne Convention has been expanded in almost all revisions. Over time, due to the development of new technologies that enabled easy and cheap reproduction of sound, images and movies, the question arose whether the rights of performers, producers of phonograms and broadcasters over their works required separate regulation. These works are closely related to the works protected by the Berne Convention. The creation of performances, phonograms or broadcasts, however, often depend on pre-existing work, namely the performance (an interpretation), recording of a performance or broadcasting of a performance of a literary or artistic work.[48] Because of the close relation to copyright the rights protecting these works are called neighbouring rights or related rights. On an international level neighbouring rights are regulated in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations signed on 26 October 1961. With regard to reproduction, the convention provides performers, producers of phonograms and broadcasting organizations the exclusive right on the reproduction of the works or fixations of their works. Limitations and exceptions are provided in Article 15 Rome Convention:

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
    (a) private use;
    (b) use of short excerpts in connection with the reporting of current events;
    (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
    (d) use solely for the purposes of teaching or scientific research.
2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

These exceptions are not mandatory, as "any Contracting State may" provide exceptions. Paragraph 2 contains an indirect link to the Berne Convention. A requirement for membership to the Rome Convention is membership to the Berne Convention. So member state may apply limitations and exceptions provided by the Berne Convention (including exceptions allowed under the "three-step" test) to neighboring rights.

### 2.3.2 TRIPs agreement

In 1947 the General Agreement on Tariffs and Trade (GATT) was signed in Geneva. This agreement dealt with general problems with trade and tariffs on goods. During its revision in Tokyo in 1979,

[48] Ricketson & Ginsburg 2006, p. 1206

experts expressed their concerns about the trade in counterfeit goods.[49] During the next revision, the Uruguay Round of GATT, negotiations between 1986 and 1994 led to the creation of the World Trade Organization (WTO) and an agreement on trade-related aspects of intellectual property rights (TRIPs Agreement). The aim of the agreement is to 'establish international standards in the scope and application of intellectual property rights' and to 'impose obligations concerning the enforcement of intellectual property right'.[50]

In the case of copyright, this included the direct incorporation of articles 1-21 of the Berne Convention into the TRIPs Agreement.[51] This means that the exceptions in article 2bis, 9, 10 and 10bis Berne Convention is also applicable. Article 13 TRIPs agreement is the only specific provision providing exceptions on copyright.

> *Article 13 TRIPs Agreement:*
> *Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*

The text of the "three-step" test provided in Article 13 TRIPs Agreement is almost identical to the test in Article 9(2) Berne Convention. Furthermore, the TRIPs Agreement does not provide any additional mandatory exceptions.

### 2.3.3 WIPO Copyright treaty

The 1886 Berne Convention and the 1883 Paris Convention for the Protection of Industrial Property both established an International Office, to carry out administrative tasks. Those two offices merged in 1893, to form an international organisation called *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle* (BIRPI). In 1960, BIRPI moved from Berne to Geneva, and a decade later, when the Convention Establishing the World Intellectual Property Organization came into force, BIRPI became the World Intellectual Property Organization (WIPO). WIPO became part of the United Nations in 1974.[52]

In 1996 a diplomatic conference was held in Geneva establishing two treaties, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The objective of these treaties was to deal with the technological developments in the 1980s and 1990s, which made electronic dissemination of works very easy.[53] The original intent of WIPO was to deal with those problems in a possible protocol to the Berne Convention, but due to procedural difficulties, another instrument, namely a special agreement as referred to in Article 20 of the Berne Convention, was used.

Article 1(4) WCT states that Contacting Parties shall comply with Articles 1-21 and the Appendix of the Berne Convention. During the Conference the United States proposed the inclusion of a statement on reproduction in the Records of the Conference:[54]

> *Agreed statements concerning Article 1(4) WCT*
> *The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is*

[49] Ricketson & Ginsburg 2006, p. 156
[50] Sterling 2008, p. 854
[51] Ricketson & Ginsburg 2006, p. 158
[52] 'WIPO Treaties – General information, major evens 1883 to 2002', www.wipo.int/treaties/en/general/
[53] Sterling 2008, p. 879
[54] Ibid, p. 886

*understood that the storage of protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.*

Article 10 WCT is a specific provision which deals with limitations and exceptions. Paragraph 1 of Article 10 WCT, permits Contracting Parties to provide for limitations of or exceptions to the rights granted to authors of literary and artistic work under the WCT, on terms of the "three-step" test. Paragraph 2 permits Contracting Parties, when applying the Berne Convention, to confine any limitations of or exceptions to rights provided for therein to the "three-step" test. The Agreed statement concerning Article 10 WCT, relates limitations and exceptions to the digital environment.

*Agreed statement concerning Article 10 WCT*
*It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.*
*It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.*

The TRIPs Agreement 'represented a clarification of or an advance beyond the protection specified in the Berne Convention' and 'the WIPO Copyright Treaty represents and advance on the position established under Berne and TRIPs taken together.'[55] However, the treaties do not provide additional mandatory exceptions.

## 2.4 Regional copyright regulation

This paragraph describes the exceptions provided on a European level in the Information Society Directive (or Copyright Directive) and the fair use doctrine codified in the United States Copyright Act. The fair use doctrine is particularly important, because, as described above, there is an extensive amount of United States case-law and doctrine compared to case-law and doctrine on a European level. This United States case-law and doctrine, including the fair use doctrine, will have a prominent role in this study.

### 2.4.1 The Information Society Directive

On 22 May 2002, the European Parliament and Council adopted a Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive). Important aims of the Information Society Directive are the 'harmonisation of the laws of the Member States on copyright and related rights',[56] 'the development of the information society in Europe'[57] and the implementation of 'a number of obligations arising under the WIPO Treaties 1996.'[58] In the context of limitations and exceptions, Recital 32 Information Society Directive states:

*This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.*

[55] Sterling 2008, p. 897
[56] Directive 2001/29/EC of 22 May 2001 (Information Society Directive), Recital 1
[57] Ibid, Recital 2
[58] Ibid, Recital 15

Article 5(1) Information Society Directive contains one mandatory exception, allowing temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use, of a work or other subject-matter to be made, if the act has no independent economic significance. The aim of this provision is to exclude copies made by intermediaries (such as ISPs) in the technological process of transmission. Those intermediaries save the content (cashing) in order to provide subscribers faster access. In the decision by order in the Infopaq II case, the Court of Justice of the European Union (CJEU) ruled:

> that the acts of temporary reproduction carried out during a 'data capture' process, (…) must not have an independent economic significance provided, first, that the implementation of those acts does not enable the generation of an additional profit going beyond that derived from the lawful use of the protected work and, secondly, that the acts of temporary reproduction do not lead to a modification of that work.[59]

In other words, if a copyright owner publishes a work online, this work may be temporarily reproduced by someone, serving merely as a conduit, in order to allow lawful use (e.g. read, view and listen). This temporary reproduction may not enable the generation of additional profit, which goes beyond the profits gained by being a conduit of works for lawful use. And, the act of temporary reproduction may lead to a modification of that work, because in that case the act 'no longer aim to facilitate its use, but the use of a different subject matter.'[60]

Facultative exceptions to the reproduction right are provided in Article 5(2) and Article 5(3) Information Society Directive. Exceptions in Article 5(3) Information Society Directive are also related to the exclusive right of public communication. Article 5(4) Information Society Directive provides exceptions to the exclusive right of distribution. Article 5(5) Information Society Directive states that exceptions in the first 4 paragraphs of Article 5 are only applicable if they are in conformity with the "three-step" test. Furthermore, it is important to notice that the list of exceptions provided in Article 5 is exhaustive. The limitation to exhaustive list of accepted exceptions aims at the harmonization of the different types of exceptions applicable in the different states of the European Union.

### 2.4.2 Section 107 U.S. Copyright Act: Fair use

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[61]

The doctrine of fair abridgment is considered as the precursor of the fair use doctrine (see paragraph 2.1.1). Before its codification in the 1976 U.S. Copyright Act, the doctrine of fair use only existed as

[59] CJEU, Case C-302/10 (2012)
[60] Ibid, paragraph 53
[61] 17 U.S.C. app. § 107 (1976)

common law. The decision of Justice Story, in 1841, in the case Folsom v. Marsh[62], was the first judicial recognition of the fair use doctrine. He stated that for the qualification as fair use:

> In short, we must ... look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[63]

Section 107 U.S. Copyright Act provides a doctrine that considers certain fair uses of copyrighted material not as an infringement. Whether a certain use is fair, is determined by judge-made decision based on a case-by-case analysis of the four factors described in section 107, 'plus any other factor the court deems appropriate.'[64] The open structure of the doctrine makes it extremely difficult to predict the outcome of fair use cases. As Netanel puts it: 'Given the doctrine's open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify,'[65] as fair use. Examples of situations in which the fair use doctrine may apply, are given in the legislative history by both the Senate[66] and House Reports[67]:

- Quotations of excerpts in a review or criticism for purposes of illustration or comment;
- Quotations of short passages in a scholarly or technical work, for illustration or clarification of author's observations;
- Use in a parody of some of the content of the work parodied;
- Summary of an address or article, with brief quotations, in a news report;
- Reproduction by a library of a portion of a work to replace part of a damaged copy;
- Reproduction by a teacher or student of a small part of a work to illustrate a lesson;
- Reproduction of a work in legislative or judicial proceedings or reports;
- Incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported.

The open structure of the fair use doctrine also has positive effects, compared to the specific exceptions used in for example continental Europe, because it is more suitable for interpretations in line with the present day conditions including new technologies.

## 2.5 Conclusion

Since the development of the printing press, which made copying easier, there has been a need to regulate the rights in artistic and literary works. This began with the granting of privilege to booksellers and printers for the copying of certain works, but over time shifted to granting of rights to the author of a work. Copyright laws were adopted in the United Kingdom and other common law countries, while the countries in continental Europe adopted authors' right laws.

The national character of the laws did not prevent unauthorized copies being made across the state borders. Countries started to see the need to cooperate and regulate copyright on an international level to prevent this. The cooperation led to the development of several international instruments harmonizing copyright and neighbouring rights regulation. Over time the protection offered by national and international regulation expanded both horizontally and vertically. Horizontal, as the development of new technologies led to an increasing amount of subject matters, such as photographs and movies, protected by the regulation. Vertical, because the term of protection has

[62] Folsom v. Marsh, 9 F.Cas. 342 (1841)
[63] Ibid, p. 348
[64] Netanel 2011, pp. 719-720
[65] Netanel 2008, p. 66
[66] United States Senate, Senate Reports No. 94-473 (1975), pp. 61-62
[67] United States House of Representatives, House Report No. 94-1476 (1976), p. 65

been increased several times (the maximum term in the Statute of Anne was 28 years, in the Berne Convention the term is the life of the author and fifty years after his death). In the current situation, the copyright owner has an exclusive right on a wide variety of subject-matters, for a long term and on an international level. This means that a wide variety of artistic and literary works are excluded from the public domain, free to use by anyone, for a very long time. However, ever since the development of copyright laws the need to exclude certain uses from the exclusive rights of the copyright owner have been recognized in order to serve the public interest, such as the freedom of expression.

The international regulation provides a minimum level of protection on which owners and users of protected works can rely in a global environment, such as the internet. In the case of uses excepted from the exclusive rights of the copyright or neighbouring rights owner, countries may adopt, under certain conditions, additional exceptions. The result is a wide variety of different exceptions applicable in different countries. These exceptions should include, at least, the mandatory exceptions in the international instruments. However, in the international instruments, there is only one mandatory exception. This is the quotation right, provided in Article 10(1) Berne Convention, applicable to copyrighted works.

### 2.5.1 The quotation right

> *Article 10(1) Berne Convention*
> *It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*

As stated above, "It shall be permissible to make quotations" indicates that this is a mandatory exception. It is understood that the reason for this 'lies in the exception's rationale: freedom of expression.'[68] However, more about the relation between exceptions and the freedom of expression will be discussed in chapter 3.

Article 10(1) Berne Convention contains three conditions. The first condition to make a quotation is that the quoted work is "lawfully made available to the public". This should be interpreted as 'the making available of works by any means'.[69]
The second condition is that the quotation must be "compatible with fair practice". Whether something is compatible with fair practice should be interpreted on a case-by-case basis by national tribunals.[70] Some guidance can be derived from Article 9(2) Berne Convention, as to what is a "fair" quotation: 'does it conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the author?'[71]
The third condition is that the extent of the quotation 'does not exceed that justified by purpose'. Although there is no list of specified purposes, preparatory work from the 1967 Conference make it clear 'that quotations for 'scientific, critical, informatory or educational purposes' and quotations with an 'artistic effect' are within the scope of Article 10(1) Berne Convention.'[72] A quotation with "artistic effect" entails quotations of artistic work and quotations of works in general for "artistic effect".[73]

[68] Hugenholtz & Okediji 2008, pp. 15-16
[69] Ricketson & Ginsburg 2006, p. 785
[70] Ibid, p. 786
[71] Ibid
[72] Ibid, pp. 786-787
[73] Ibid, p. 787

## 3. Freedom of expression protection by copyright exception

In order to determine whether the mandatory exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users, the question whether and how these exceptions protect the freedom of expression should be answered. The freedom of expression 'includes freedom to hold opinions without interference and to seek, receive and impart information and ideas.'[74] However, certain expressions may be a part of a copyrighted work, and therefore protected from free use by anyone but the copyright owner who has an exclusive right. In chapter 2, exceptions to the exclusive rights of the copyright owner have been described, which allow the use of (parts of) the copyrighted expression. These exceptions seem to have a positive effect on the freedom of expression, because they allow the use of expressions on which the copyright owner has a exclusive right. This chapter describes the status of exceptions to the exclusive rights of the copyright owner as mechanism protecting the freedom of expression. Furthermore, the type of exceptions protecting the freedom of expression and their characteristics will be described. In order to do so, the United States (paragraph 3.1) and European (paragraph 3.2) literature and case-law on this subject will be discussed. However, because of the extensive amount of literature and case-law in the United States on this subject, compared to scarce amount in Europe, the major part of the chapter will discuss the situation in the United States.

### 3.1 The U.S. Situation

This paragraph describes the friction between the freedom of speech and copyright, and the role of the fair use doctrine and other mechanisms in reducing this friction. In the first part (paragraph 3.1.1) the influential literature of Goldstein, Nimmer, Sobel and Denicola will be discussed. Thereafter, analyzing important case-law, the constitutional status of the fair use doctrine will be determined (paragraph 3.1.2). Finally, the current fair use regime will be analyzed in order to determine which (characteristics of) fair uses are important for the protection of the freedom of speech (paragraph 3.1.3). In paragraph 3.1.4 the United States situation will be concluded.

#### 3.1.1 The 1970s

In the 1970s, Goldstein[75], Nimmer[76], Sobel[77] and Denicola[78] recognized the potential conflict between copyright and freedom of speech. Both rights are included in the United State Constitution. The Constitution grants to Congress the "power to 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."[79] While, in contrast, the First Amendment provides that "Congress shall make no law … abridging the freedom of speech, or of the press."

All four scholars acknowledge that the reconciliation of copyright with the First Amendment requires a balance between the absolute forms of those rights. On the one hand, the First Amendment seems to require free participation in all forms of expression. On the other hand, copyright implies that the author has the right to withhold his expression from the public. Goldstein and Nimmer mention the need to draw a constitutional line, which separates 'infringing and non-infringing uses of copyrighted expression.'[80]

[74] Article 19 Universal Declaration of Human Rights
[75] Goldstein 1970
[76] Nimmer 1970
[77] Sobel 1971
[78] Denicola 1979
[79] U.S. Constitution Article 1, § 8, cl. 8
[80] Goldstein 1970, p 991; Nimmer 1970, p. 1185

The four scholars agree on the fact, that copyright law contains internal mechanisms that strike a proper balance between copyright and the First Amendment. According to Goldstein, the originality requirement is such a mechanism. Both Goldstein and Nimmer mention the limited time of copyright. All four writers mention the idea-expression dichotomy and the fair use doctrine. The idea-expression dichotomy is seen as the most important mechanism to strike the balance.

The scholars define the maintenance of the public/democratic dialogue as the most important objective of the protection of freedom of speech. They refer to a ruling of the U.S. Supreme Court, in which the freedom of speech is rationalized as a means of "preserving an uninhibited marketplace of ideas in which truth will ultimately prevail."[81] However, due to the idea-expression dichotomy, the scholars argue, copyright law does not restrict the free flow of ideas, as it only protects expressions and not the ideas contained in those expressions. In other words, ideas are free for everyone to use in the public/democratic dialogue, and it should be from a free speech perspective. The expression, however, is protected by copyright to encourage creativity. Nimmer concludes 'that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests.'[82]

The limited time for copyright is another mechanism that strikes a balance. Nimmer finds that a perpetual term of copyright protection is unacceptable. The expression is protected by copyright, because the interest of encouraging creativity (by means of economic encouragement) prevails over the free speech interest. However, if the copyright protection would last in perpetuity, the 'speech interest in expression remains constant, while the copyright interest in encouraging creativity largely vanishes.'[83] At some point the speech interest will overtake the copyright interest, and the copyright term should end.

The most important mechanism in the context of this study is the fair use doctrine (see paragraph 2.4.2). The idea-expression dichotomy functions as a balancing method, in cases in which the free speech interests are served by the free flow of ideas. However, in some instances the free speech interests require more than free flow of ideas. This is the case if it is the expression which is important for the public/democratic dialogue, and not the "idea".[84] In these cases the fair use doctrine serves as a balancing method.

The interest balanced by the fair use doctrine are 'the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other.'[85] Both interests can be seen as an incentive "To promote the Progress of Science and useful Arts." The Supreme Court explained in 1954 that:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."[86]

The factor of economic detriment to the copyright owner, was considered the most important of the fair use doctrine. The reason for this is the balance that lies at the basis of the doctrine, which entails the author's right to compensation for his work. If a copyrighted expression is used merely as an

[81] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 309 (1969)
[82] Nimmer 1970, p. 1192
[83] Ibid, p. 1193
[84] Ibid, p. 1197
[85] Sobel 1971, p. 51
[86] Mazer v. Stein, 347 U.S. 201, 219 (1954).

substitute of the original expression to make a profit, 'the economic incentive offered by the copyright system is diluted.'[87] Denicola gives the example of a quotation, which may be considered fair use and compatible with the economic incentives, because its purpose is to criticize or review a work and not to create a market substitute.[88] So the fair use doctrine 'promotes the progress of science and of the arts, by removing those barriers to use that are not needed to preserve the economic incentive to produce.'[89] If the fair use doctrine was applicable in cases in which the copyright owner suffers significant economic harm, this would lead to a distortion of the doctrine, because the aspect of economic incentives would be disregarded.[90]

The main objective of the fair use doctrine is "To promote the Progress of Science and useful Arts," not to strike a balance between interests protected by the First Amendment and property rights protected by copyright. This balance, however, is served by the fair use doctrine, as it occasionally reduces the tension between those rights by allowing access to an expression that may be required by free speech interests.[91]

Denicola pleads for an independent First Amendment privilege, to protect the First Amendment interests in situations where the expression is crucial for the public/democratic dialogue and the copyright owner suffers significant economic harm. This group of situations can be described as a residual group. The idea-expression dichotomy is the main mechanism to strike a balance between copyright and the First Amendment interests, by allowing ideas to be used in "the marketplace of ideas". In situations where it is the expression, and not the idea, that is crucial for the free speech interests, the fair use doctrine protects the balance as long as there is no significant economic harm for the copyright owner. According to Denicola, in other situations – in which the expression is crucial for the free speech interests and the copyright owner suffers significant economic harm – an external limitation on the scope of copyright should be introduced, in the form of a First Amendment privilege.

### 3.1.2 The constitutionality of fair use

In the 1970s, the fair use doctrine was considered to be a build-in accommodation in copyright law, capable of avoiding conflicts between copyright and First Amendment interests. However, the doctrine was not elevated to a constitutional status, as its main objective was "To promote the Progress of Science and useful Arts", but not to strike a balance between copyright and the First Amendment. In two important cases, the U.S. Supreme Court changed this conception.

#### 3.1.2.1 Harper & Row v. Nation Enterprises (1985)

Harper & Row v. Nation Enterprises is an important case for the position of fair use doctrine and its relation to the First Amendment. Harper & Row filed suit against Nation Enterprises for publishing excerpts from former President Ford's unpublished memoirs. Nation Enterprises, however, contended that the use of the excerpts should be considered as fair use. In addition, Nation Enterprises stated that First Amendment values required a wide scope of fair use, because the 'substantial public import of the subject matter of the Ford memoirs.'[92] The Supreme Court did not accept the fair use argument and held that the quotation of the memoirs was a copyright infringement.

[87] Denicola 1979, p. 301
[88] Ibid
[89] Ibid, p. 303
[90] Ibid
[91] Ibid, pp. 299 & 303
[92] Harper & Row, Publishers v. Nation Enterprises (1985), 471 U.S., pp. 555-556

The argumentation of the Supreme Court, for not accepting the First Amendment argument of Nation Enterprises, turned out to be of great importance for the relation between fair use and the First Amendment. The Court stated that the 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.'[93] Therefore it would be 'fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public.'[94] The Court referred to Sobel and quoted: 'If every volume that was in the public interest could be pirated away by a competing publisher . . . the public [soon] would have nothing worth reading.'[95] The Court continued its argumentation by stating that First Amendment values were already embodied in the Copyright Act in the form of the idea-expression dichotomy and the fair use doctrine.[96] A public figure exception to copyright, by expanding the fair use doctrine, was thus not necessary and the case should be judged according to the traditional equities of fair use.[97]

The importance of the ruling, in the context of this study, does not lie in the fact that the Court did not see a warrant for a public figure exception. The essence is the position of the idea-expression dichotomy and the fair use doctrine as safeguard of the First Amendment in copyright law. This seems to lift those instruments to a constitutional status, which was later confirmed in the case of Eldred v. Ashcroft.

#### 3.1.2.2 Eldred v. Ashcroft (2004)

In 1998, Congress extended the copyright term by twenty years, by passing the Sonny Bono Copyright Term Extension Act (CTEA).[98] The extension was applicable to all copyrighted material, not just new works. Eric Eldred, who published works which copyright term was expired, sued, arguing that the CTEA was unconstitutional. He stated that the CTEA violated the copyright clause and the First Amendment in the constitution. One of the important arguments was that the term extension was 'a content-neutral regulation of speech that fails heightened judicial review under the First Amendment.'[99] However, the Court rejected this 'plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.'[100]

The argument of the Court to reject an additional First Amendment scrutiny, was the fact that copyright law already 'contains built-in First Amendment accommodations'.[101] Also, in this case the Supreme Court refers to the idea-expression dichotomy as one of those accommodations. It quotes itself in the Harper & Row case, 'this idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protection an author's expression.'[102] And, it refers to the fair use doctrine, which 'allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.'[103]

[93] Harper & Row, Publishers v. Nation Enterprises (1985), 471 U.S., p. 558
[94] Ibid, p. 559
[95] Sobel 1971, p. 78
[96] Harper & Row, Publishers v. Nation Enterprises (1985), 471 U.S., p. 560
[97] Ibid
[98] 17 U.S.C.A. § 304(b)
[99] Eldred v. Ashcroft, 537 U.S. 186, p. 218
[100] Ibid, p. 219
[101] Ibid
[102] Ibid
[103] Ibid

In its reasoning, the Court made a distinction between 'the freedom to make – or decline to make - one's own speech' and 'the right to make other people's speeches.' It states that the First Amendment 'securely protects' the first, while the latter 'bears less heavily' on the freedom protected by the First Amendment.[104] Therefore, the build-in First Amendment accommodations in copyright law 'are generally adequate' to address First Amendment concerns in copyright.[105]

The essence of this argumentation is that the Court rested the constitutional status of copyright on the built-in First Amendment accommodations. In other words, the fair use doctrine is essential for the constitutionality of copyright. This was the first case in which the Supreme Court expressed this in a general formulation. For example, the Harper en Row case addressed fair use and the First Amendment in relation to a public figure exception. It did not state that fair use and the idea-expression dichotomy were essential for the constitutionality of copyright in general, but that those were sufficient in the single case of the substantial important expressions of a public figure to the public.[106]

### 3.1.3 The United States Fair Use Regime

The U.S. Supreme Court considers the fair use doctrine to be a build-in accommodation in copyright, which is essential for the protection of First Amendment interests. However, it remains unsolved which exceptions encompass the fair use doctrine, because of 'the doctrine's open-ended, case-specific cast and inconsistent application.'[107]. To get a clear understanding of how fair use doctrine protects First Amendment values in a practical form, an analysis of the situations in which the doctrine applies is necessary. In a recent study of Netanel, "Making sense of fair use", such an analysis is made.

#### 3.1.3.1 Making sense of fair use

In his study, Netanel tries to 'find patterns in fair use case law that give the doctrine some measure of coherence, direction, and predictability.'[108] For this analysis he uses the findings of three leading scholars, Barton Beebe, Pamela Samuelson and Matthew Sag, who have analyzed fair use case law to find some order in the chaos.[109]

A leading subject in the study is the shift from the "commercial use presumption" to the "transformative use doctrine". Netanel starts the discussion of this shift in the analysis of Beebe's study.[110] In this analysis he describes two cases which are the most important sources of the commercial use presumption. First, the Sony v. Universal[111] case is discussed. The dicta in this case suggests that when a certain 'use is "commercial", there is a presumption of harm to the potential market' for the copyright owner.[112] This presumption indicates that, in the light of the fourth factor of section 107, a certain use is unfair. In the Sony v. Universal case the Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege."[113] The second case, Harper & Row v. Nation Enterprises, confirmed the Sony v. Universal case and stated that the fourth factor of section 107, 'the effect of the use upon the potential market

[104] Eldred v. Ashcroft, 537 U.S. 186, p. 221
[105] Ibid
[106] McJohn 2003, pp. 128-129
[107] Netanel 2008, p. 66
[108] Netanel 2011, p. 718
[109] Ibid, p. 719
[110] Beebe 2008
[111] Sony Corp. of Am. v. Universal City Studios, Inc. (1984), 464 U.S. 417
[112] Netanel 2011, p. 721
[113] Sony Corp. of Am. v. Universal City Studios, Inc. (1984), 464 U.S., p. 451

for or value of the copyrighted work,' was 'undoubtedly the single most important element of fair use.'[114] The effect of those cases was, that it became 'very unlikely that any use deemed "commercial" would qualify as fair use.'[115] This seems to be consistent with the studies from the 1970s, which also considered the fourth factor the most important. The reason for this was that an economic detriment to the copyright owner would be a distortion of the main purpose of the fair use doctrine, "To promote the Progress of Science and useful Arts", because the economic incentive offered by the copyright system would be diluted.[116]

The Supreme Court has abandoned the approach of Sony v. Universal and Harper & Row v. Nations Enterprises in 1994. In the case Campbell v. Acuff-Rose Music,[117] the Court of Appeals quoted the Sony v. Universal case about the likelihood of significant market harm: '[i]f the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.'[118] However, the Supreme Court held this presumption to be an error. The Supreme Court stated that in the Sony v. Universal case the use was a 'mere duplication of the entirety of an original', which meant that it 'clearly supersedes the objects of the original and serves as a market replacement.'[119] For this reason, a presumption of significant market harm was applicable in such a case. However, 'when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.'[120] In other words, the commercial use presumption does not apply when the use extend the mere duplication of the original.[121] In addition, the presumption certainly does not apply in cases of transformative use. A transformative work does not 'merely supersedes the objects of the original creation'; bud 'instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'[122] The Supreme Court states that a transformative use is not an absolute necessity for finding fair use, although 'the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.'[123] The degree of transformativeness of a work will determine the significance of the other factors of the fair use defense.[124] The Supreme Court rejects the position that the fourth factor is the most important and shifts the focus 'to the first factor, the purpose and character of the use, particularly whether the use is "transformative."'[125]

The commercial use presumption, focusing on the fourth factor of the fair use defense, shifted from this point on to what is called the "transformative use doctrine", focusing on the first factor of the fair use defense, in which the degree of transformativeness of the use has a significant role.[126] An unequivocally transformative use causes no market harm, because 'the copyright owner does not have a right to exclude others from the market for transformative uses.'[127] On the contrary, when there is no transformative use, the work usually can be considered a market substitute for the original, and the fair use defense is doomed to fail.[128]

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[114] Harper & Row, Publishers v. Nation Enterprises (1985), 471 U.S., p. 566
[115] Netanel 2011, p. 722
[116] Denicola 1979, p. 301
[117] Campbell v. Acuff-Rose Music, Inc. (1994), 510 U.S. 569
[118] Ibid, p. 591
[119] Ibid
[120] Ibid
[121] Netanel 2011, p. 722
[122] Campbell v. Acuff-Rose Music, Inc. (1994), 510 U.S., p. 579
[123] Ibid
[124] Ibid; Netanel 2011, p. 724
[125] Netanel 2011, p. 722
[126] Ibid, p. 723
[127] Ibid, p. 743
[128] Ibid

The shift towards the transformative use doctrine raises a question, namely: what is a transformative use? In Campbell v. Acuff-Rose Music, the Supreme Court described it as an use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[129] Netanel argues that this means either 'transforming the expressive content of the original work by adding new expression to the original,' or, 'transforming the meaning or message of the original.'[130] However, both the study of Tony Reese, analyzing appellate fair use cases between Campbell v. Acuff-Rose Music and 2007, and Netanel's analyses of fair uses cases between 1995-2010, show that transforming the purpose is the most important factor. Although a modification or an addition to the original content can help, 'different expressive purpose, not new expressive content, is almost always the key.'[131]

### 3.1.3.2 Samuelson – Unbundling fair uses

Netanel analyzed three studies, including the study of Pamela Samuelson. Her findings might show to be of particular importance in the context of this study. The study of Samuelson recognizes that fair use cases fall into 'policy-relevant clusters.'[132] Samuelson names the following clusters:

1. Free speech and expression fair uses
2. Authorship-promoting fair uses
3. Uses that promote learning
4. "Foreseeable Uses of Copyrighted Works Beyond the Six Statutorily Favored Purposes," including personal uses, uses in litigation and for other government purposes, and uses in advertising
5. "Unforeseen Uses," including technologies that provide information location tools, facilitate personal uses, and spur competition in the software industry.

Within every policy cluster, Samuelson analyzed cases to see what fair use factors are of particular importance.[133] Each policy cluster is subdivided by a number of specific uses. Because of the relevance of the study, only the "free speech and expression fair uses" cluster will be briefly analyzed.

Samuelson's study divides free speech/expression uses in to three groups. First, transformative uses. Second, productive uses, which take a part or the whole of an earlier work to criticize it. And, third, orthogonal uses, in which an earlier work is used for another purpose. She also emphasises the importance of criticism, commentary and news reporting, which are included in section 107, as those purposes for fair use seem evident in free speech/expression fair use cases.[134]

#### 3.1.3.2.1 Transformative uses

The first type of transformative uses discussed by the study are parodies. For this type she uses the example of Campbell v. Acuff-Rose Music. In this case a parody to Roy Orbison's song "Pretty Woman" was accepted as fair use. Although the Supreme Court did not explicitly invoke the First Amendment or free speech of expression values, it 'repeatedly emphasized that parodies are a form of critical commentary on a first author's work that fair use could protect.'[135] Exactly those types of expression are crucial to the protected by the First Amendment.

[129] Campbell v. Acuff-Rose Music, Inc. (1994), 510 U.S., p. 579
[130] Netanel 2011, p. 746
[131] Ibid, p. 747
[132] Samuelson 2009, p. 2541
[133] Ibid, p. 2537
[134] Samuelson 2009, p. 2544
[135] Ibid, p. 2548

The second type of transformative uses mentioned are “other transformative critiques”. The case Suntrust Bank v. Houghton Mifflin Co. is used to show that the book “The Wind Done Gone”, which retold the story of “Gone With the Wind” (GWTW), using core parts of the original work, was accepted as fair use. The court stated that “a specific criticism of and rejoinder of the depiction of slavery and the relationships between blacks and whites in the GWTW.”[136] The plaintiff had in the past refused to grant a license to the defendant, unless the defendant was willing to drop certain parts of her critique on the original work. The Court considered that the plaintiff was free to use its licensing policy in such a way, but “it may not use copyright to shield [GWTW] from unwelcome comment, a policy that would extend intellectual property protection into the precincts of censorship.”[137] The court considered the critical notes to be 'plausible parts of the story', in the light of defendants freedom of expression interests.[138]

The last type of transformative uses is “transformative adaptations”. This type of use, ‘adapt expression from existing works’ to create a ‘expression of artistic imagination.’[139] In the case Blanch v. Koons, Koons modified pictures from popular magazines into collages, and rendered those collages into in paint on large collages.[140] Blanch, the owner of two pictures used in the collages, sued Koons for copyright infringement. However, the court accepted the fair use defence, because the plaintiff’s photo was ‘fodder for his commentary on social and aesthetic consequences of mass media,’ for which ‘the use of an existing image advanced his artistic purposes.’[141] Despite the fact that the court did not directly address freedom of expression, it did accept defendant’s position that the original work was reused for commentary on social and aesthetic consequences of mass media.[142]

#### 3.1.3.2.2 Productive uses in critical commentary

New Era Publications International v. Carol Publishing Group[143] is used by Samuelson, because it is a typical “productive criticism” case.[144] Carol Publishing Group published a critical biography of L. Ron Hubbard, making use small parts of 48 of Hubbard’s works. The copyright on those works are owned by New Era Publications, who sued Carol Publishing Group for copyright infringement.
The court accepted the fair use claim by Carol Publishing Group, because the use of the quotes ‘is primarily a means of illustrating the alleged gap between the official version of Hubbard’s life and accomplishments, and what the author contends are the true facts. For that purpose, some conjuring up the copyrighted work is necessary.’[145] Although the court did not address freedom of expression, it concluded that not too much emphasis should be placed on claims of harm to the market in critical commentary cases, and accepted the fair use defence based on the defendants claims that were clearly based on freedom of expression values.[146]

[136] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d, p. 1269
[137] Ibid, p. 1283
[138] Samuelson 2009, p. 2553
[139] Ibid, p. 2553
[140] Ibid, pp. 2553-2554
[141] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006), pp. 253-255; Samuelson 2009, p. 2554
[142] Samuelson 2009, p. 2554
[143] New Era Publications International v. Carol Publishing Group, 904 F.2d 152 (2d Cir. 1990)
[144] Samuelson 2009, p. 2556
[145] New Era Publications International v. Carol Publishing Group, 904 F.2d 152 (2d Cir. 1990), p. 159
[146] Samuelson 2009, p. 2556

#### 3.1.3.2.3 Iterative copying for orthogonal speech-related purposes

In Hustler Magazine, Inc. v. Moral Majority, Inc.,[147] Hustler Magazine published a mock ad about Jerry Falwell. Jerry Falwell led the Moral Majority organization. This organization mailed its members a copy of the ad, asking them to donate money for a lawsuit against Hustler Magazine. However, Hustler sued Moral Majority for infringing copyright. The considerable amount of money generated by Moral Majority's campaign was reason for the court to presume the copying was unfair. Moral Majority pled that the sole purpose of mailing the copies was to help Falwell 'defend himself against derogatory personal attacks,'[148] 'they did not actually sell the copies to willing buyers' as they used 'the copies to generate moral outrage against their "enemies" and thus stimulate monetary support for their political cause.'[149] For this reason, there was no relevant harm to the market and the fair use defense was accepted.[150]

Samuelson has unbundled the most important groups of "free speech and expression fair uses". However, the uses described above, are mostly focused on critic or comment. News reporting fair uses, the third purpose for fair use which is of significant importance, 'typically make productive use of other's works.'[151]

### 3.1.4 Concluding the U.S. Situation

Goldstein, Nimmer, Sobel and Denicola described the potential conflict between copyright and freedom of speech in the 1970s. Their interpretation served as the basis for the development of doctrine and case law concerning the conflict. The four authors recognized that reconciliation of copyright and the First Amendment required certain internal mechanisms in copyright law. Examples are the requirement of originality, the limited term of copyright protection, the idea-expression dichotomy and the fair use doctrine.

The idea-expression dichotomy ensures that only expressions are protected by copyright. The result is that ideas are free to use, preserving an "uninhibited marketplace of ideas" and, therewith, maintaining the public/democratic dialogue. However, those important First Amendment values are at stake in cases in which the idea is inseparable of the expression or solely the expression is important for the public dialogue. In these cases the fair use doctrine served as a balancing method, allowing some unauthorized uses of copyrighted material.

The authors did not consider striking a constitutional balance between copyright and the First Amendment the main objective of the fair use doctrine, but rather the balancing of values underlying copyright's purpose, "To promote the Progress of Science and useful Arts." For this reason, a fair use defense should not be accepted in the cases in which the copyright owner would suffer significant economic harm. This would dilute the doctrine of fair use by removing the economic incentive provided by copyright, which was considered to be at one side of the spectrum of means adopted to achieve the purpose of copyright.

In the 1970s the fair use doctrine was considered a balancing method of internal copyright values, occasionally reducing the tension between First Amendment values and copyright. Significant economic harm to the copyright owner was considered the most important factor of the fair use defense, as it served the purpose of copyright. The U.S. Supreme Court recognized the importance of

[147] Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986)
[148] Ibid, p. 1153
[149] Ibid, pp. 1155-1156
[150] Samuelson 2009, p. 2558
[151] Ibid

the fourth factor of the fair use defense in the cases Sony v. Universal and Harper & Row v. Nation Enterprises. In these cases the court created the "commercial use presumption," which presumes harm to the potential market in the case of an unauthorized "commercial" use of copyrighted material. Such a presumption indicates in the context of the fourth factor of the fair use defense, which the court found to be the most important factor, that a certain use is unfair.

Harper & Row v. Nation Enterprises is an important case for yet another reason. It gave several leads for the acceptation of fair use doctrine as a safeguard of the First Amendment. In Eldred v. Ashcroft, the U.S. Supreme Court confirmed the constitutional status of fair use doctrine in a general formulation. It rested the constitutional status of copyright on the build-in First Amendment accommodations, as those were considered generally adequate to address First Amendment concerns. Without the idea-expression dichotomy and the fair use doctrine copyright would be unconstitutional, because First Amendment values would be insufficiently protected.

In Campbell v. Acuff-Rose Music the Supreme Court held the "commercial use presumption," as applied in most fair use cases until that point, to be an error. It stated that the commercial use presumption was based on duplication of the entire original work serving as a market replacement. However, market harm could not be presumed in the case of a transformative use. It adapted the "transformative use doctrine," stating that a unequivocally transformative use causes no market harm, because it does not serve as a market replacement. From this point on the focus shifted from the fourth to the first factor of the fair use doctrine, as the degree of transformativeness became an indication of potential market harm. In determining the degree of transformativeness, the transformation of the purpose of the use is the most important factor, not the transformation of the original content.

Samuelson unbundled fair use cases in "policy-relevant clusters." Her study analyzed the different groups of transformative uses within the "free speech and expression fair uses" cluster. The first group of uses are the transformative uses, which are uses that change the content or purpose of the original work. This group entails parodies, other types of transformative critiques and transformative adaptations. The second group of uses are productive uses in critical commentary, which take a part or the whole of an earlier work to provide it with critical commentary. This entails uses for news reporting along with uses in other contexts. The third and last group of uses, iterative copying for orthogonal speech-related purposes, which uses an earlier work for another purpose.
All those uses can, in certain circumstances, be considered fair uses under the fair use doctrine provided in the U.S. Copyright Act under section 107, which is a build-in accommodation in copyright law guarantying the constitutionality of copyright by protecting First Amendment values.

### 3.2 The European Situation

All European counties have their own copyright laws. Although there are European Directives harmonizing those laws, there is enough room for dispersion of those laws. As described in the previous paragraph, the friction between copyright and freedom of expression in the United States is based on two provisions (First Amendment and copyright clause) in the U.S. Constitution. However, in Europe, European Convention on Human Rights (ECHR) does not explicitly recognize copyright as a human right. Hugenholtz states that a fundamental rights basis for copyright should protect both personality (because of the author's right regimes; see paragraph 2.1.2) and property.[152] Both interests are protected in ECHR.[153] However, in the Charter of Fundamental Rights of the European Union (CFREU) intellectual property is protected by the right to property in Article 17(2) CFREU. Recital 9 of the Information Society Directive states:

[152] Hugenholtz 2001, p. 3
[153] See Article 1 First Protocol ECHR (property) and Article 8 ECHR (privacy clause).

> Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognized as an integral part of property.[154]

The ECtHR never treated a case on the potential conflict between copyright and freedom of expression. But what if the ECtHR would have to rule on such a case? For example, if a government sues a person that makes unauthorized use of government information in his expression and the national court prohibits this expression. The ECtHR would have to determine whether the prohibition of the expression, because of its copyright protection, is an interference of the freedom of expression (Article 10(1) ECHR). The freedom of expression will be extensively treated in the next chapter, but for not it is important to notice that Article 10(2) ECHR conditions under which a restriction of the freedom of expression is allowed.

> Article 10(2) ECHR
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Restrictions are allowed if they are prescribed by law, have a legitimate aim and are necessary in a democratic society. The first condition does not need an extensive discussion, as the restriction is obviously provided by law in the national copyright acts. The Chapell case[155] provided clarity about the legitimate aim condition. In this case an Anton Piller order, to find evidence of copyright infringement, was accepted as an allowed interference of the right of privacy of Article 8 ECHR. The European Court on Human Rights (ECtHR) accepted "the protection of the rights of others" as legitimate aim for the interference. In the context of this case, this means the protection of the rights of the copyright owner. In other words, the freedom of expression in Article 10(1) ECHR could be restricted in order to protect the rights of the copyright owner, provided by the national copyright act. However, the restriction should be necessary in a democratic society. Whether a restriction is necessary in a democratic society depends on different conditions, such as the aim of the expression (political, artistic, commercial, etc.; difference between these types of speech will be discussed in chapter 4), and should be determined on a case-by-case basis. Hugenholtz, who tried to predict the outcome of such a case, concludes that prohibiting "public speech" (speech that in the U.S. situation would be important for the public/democratic dialogue), because it includes copyrighted expressions, might be considered an infringement of Article 10 ECHR by the ECtHR. This could be the case, for example, if political discourse is suppressed because the national court failed to broadly interpret or stretch existing exceptions to the exclusive rights of the copyright owner, or, the national copyright laws do not provide sufficient exceptions to the exclusive rights of the copyright owner.[156]

The Court of Justice of the European Union (CJEU) ruled that intellectual property rights, including copyright, is part of the fundamental right to property.[157] In the case Scarlet v. Sabam, the CJEU ruled that nothing whatsoever in the wording of Article 17 CFREU or in the Court's case-law suggests that the fundamental right to property, which includes the rights linked to intellectual property, 'is

[154] Directive 2001/29/EC of 22 May 2001 (Information Society Directive), Recital 9
[155] ECtHR 30 March 1989, nr. 10461/83 (Chappell v. The United Kingdom).
[156] Hugenholtz 2001, p. 15
[157] CJEU 12 September 2006, nr. C-479/04 (Laserdisken ApS v Kulturministeriet), paragraph 65

inviolable and must for that reason be absolutely protected'.[158] In fact, it 'must be balanced against the protection of other fundamental rights.'[159] In the case of copyright, this means 'that in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.'[160] Although this case is about copyright enforcement measures, the interpretation of the court, especially the fact that copyright is not absolutely protected, could be applied directly to copyright law. One could argue that a copyright law without, or with insufficient, exceptions to the exclusive rights of the copyright owner would strike an unfair balance between the protection of copyright (which is not absolute) and the protection of the freedom of expression of individuals affected by this copyright law. However, the CJEU has never ruled on such a case.

So, the ECtHR have never ruled on a case involving the property right interests of the copyright owner and the freedom of expression interests of individuals. The reason for this, Hugenholtz argues, is that the potential conflict between copyright and freedom of expression is solved within the copyright laws ('internalized').[161] He refers to mechanisms that have already been discussed in the U.S. situation, such as the idea-expression dichotomy, the limited term of protection and, particularly, the limitations and exceptions of copyright.[162] When these mechanisms within the copyright law, such as the exceptions to the exclusive rights of the copyright owner, are sufficient to strike a fair balance between the protection of copyright and the protection of the freedom of expression of individuals, cannot be derived from the case-law of the European Courts. However, it is clear that regulation of copyright should strike a fair balance between the interests of protecting the copyright owner (maintenance and development of creativity; see recital 9 Information Society Directive above) and the freedom of expression interests of individuals (which will be discussed in chapter 4). Again, this is very similar to the situation in the United States, where the fair use doctrine is considered as a build-in accommodation in copyright law, which strikes a fair balance between copyright interests ("To promote the Progress of Science and useful Arts") and First Amendment interests. Therefore, it is plausible to assume that the exceptions to the exclusive rights of the copyright owner in Europe serve a similar purpose as the fair use doctrine in the United States, even though the European courts have never confirmed nor denied this.

### 3.3 Summary

Chapter 3 analyzed the status and function of the exceptions to the exclusive rights of the copyright owner as freedom of expression safeguard. The United States fair use doctrine can be considered as a build-in accommodation in copyright law protecting the freedom of expression. The U.S. Supreme Court ruled that this build-in accommodation has a constitutional status protecting First Amendment interests. The most important approach used by the United States courts to determine whether a certain use is fair is the transformative use approach. The allowable transformative uses can be divided in policy relevant cluster. The "free speech and expression fair uses" cluster contains three types of transformative uses. Paragraph 3.1.4 provides a more extensive conclusion of the United States situation.
On a European level the copyright regulation is mainly based on the copyright laws in continental European civil law countries. These countries have author's right systems with mostly specific exceptions to the exclusive rights of the copyright owner. However, recent jurisprudence of European Courts show that intellectual property rights, including copyright, are part of the

[158] CJEU 24 November 2011, nr. C-70/10 (Scarlet v Sabam), paragraph 43
[159] Ibid, paragraph 44
[160] Ibid, paragraph 45
[161] Ibid, p. 6
[162] Ibid

fundamental right to property and this fundamental right should be balanced against the protection of other fundamental rights. This means that copyright (included in the fundamental right to property) should be balanced against the freedom of expression. Although the European courts never ruled on the status of exceptions to the exclusive right of the copyright owner, it is likely that these exceptions have a similar function in the context of freedom of expression protection as the United States fair use doctrine, namely the function as a build-in accommodation in copyright law protecting freedom of expression interests. Paragraph 3.2 provides a more extensive conclusion of the European situation.

## 4. Freedom of expression on the internet

In order to determine whether the mandatory exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users, the question when freedom of expression on the internet is sufficiently protected should be answered. To answer this question the general freedom of expression values that should be protected and the reason why they should be protected for adequate freedom of expression protection of internet users will be described. When these values are identified, it will be possible to analyze which of these values can be protected by exceptions to the exclusive rights of the copyright owner (chapter 5). The exceptions to the exclusive rights of the copyright owner (along with the limitations) can be considered as a build-in accommodation in copyright law providing sufficient protecting of freedom of expression/First Amendment interests to reconcile copyright and freedom of expression (see chapter 3). Therefore, the exceptions to the exclusive rights of the copyright owner should protect the freedom of expression values which are identified in this chapter and can be protected by these exceptions in order to provide adequate freedom of expression protection for internet users. If the freedom of expression values that should be protected by the exceptions to the exclusive rights of the copyright owner are identified, it is possible to determine whether the mandatory exceptions to the exclusive rights of the copyright owner provided by international regulation protect these values (chapter 5). Only if this is the case these exceptions provide adequate freedom of expression protection for internet users. But first, this chapter identifies the general freedom of expression values that should be protected for adequate freedom of expression protection on the internet.

The analysis in this chapter starts from a historical perspective by analysing three prominent theories on which the legal freedom of expression protection in the United States and on a European level is grounded (paragraph 4.1). The theories provide the basic reasons for freedom of expression protection and thus reasons why exceptions to the exclusive rights of the copyright owner should protect certain freedom of expression values. The United States and European situation are used because the same regions are used in the analysis of the status and function of the exceptions to the exclusive rights of the copyright owner in chapter 3. Paragraph 4.2 describes the main interests involved in legal freedom of expression protection. Although the focus is on the freedom of expression interests of internet users, it is important to consider some other interests that should be taken into account. After the discussion of the underlying theories and interests, the general legal freedom of expression provisions and their interpretation in the United States (paragraph 4.3) and on a European level (paragraph 4.4) are discussed and linked to these theories and interests. The analysis of the legal freedom of expression protection in the United States and on a European level is used as starting point for the analysis of two critical and renewing theories that focus on the influence of new technologies, in particular the internet, on the freedom of expression. In paragraph 4.5 the analysis of these theories are used to identify which freedom of expression values the legal freedom of expression protection describe in paragraphs 4.1-4.4 should include. In order to do so, the potential and characteristics of internet speech (paragraph 4.5.1), the importance of participation and democracy (paragraph 4.5.2), the (ideal) grounding of freedom of expression protection (paragraph 4.5.3) and the requirements for freedom of expression regulation (paragraph 4.5.4) are described. Paragraph 4.6 provides a conclusion.

### 4.1 Three freedom of expression theories

The starting point of the discussion on the freedom of expression will be provided by three prominent free speech theories. These theories provide the basic reasons for freedom of expression protection that are at the basis of the current legal provisions protecting freedom of expression. To get a better insight in how these legal provisions should be interpreted, it is useful to explore their

origins. The theories will be discussed very briefly and superficial, because the focus of this chapter will be on the analysis of judicial protection of freedom of expression.

### 4.1.1 The argument of finding truth

This theory, which is associated with important writings of John Milton[163] and particularly John Stuart Mill[164], indicates that an open discussion is crucial for the discovery of truth.[165] Mill argues that in a good society every individual should be able to act as he wants and the society should have no right to intervene unless an individual's action causes harm to others.[166] Milton and Mill state that it is in the interest of society to allow individuals to express both true and false views without intervention of the society in order to have an open discussion in which the truth will prevail. A restriction on speech (true or false) would thus prevent the ascertainment of the truth.[167] The theory is adopted in First Amendment jurisprudence in the case Abrams v. United States.[168] In this case Justice Holmes stated: "the best test of truth is the power of the thought to get itself accepted in the competition of the market".[169] The concept of "the marketplace of ideas", which played a major role in the American First Amendment jurisprudence, is based on this case.[170] The assumption is that in the marketplace of ideas, the truth arises out of the competition of various ideas. Such a competition is only possible by "preserving an uninhibited marketplace of ideas."[171] In other words, protecting the free expression of ideas.

### 4.1.2 The argument of self-fulfillment

This theory is based on the importance of free speech for individuals. This liberal theory relies on the autonomy of every individual to communicate in order to achieve self-expression and self-fulfillment. Self-expression and self-fulfillment are important for the growth of an individual's personality. As Barendt puts it: 'People will not be able to develop intellectually and spiritually, unless they are free to formulate their beliefs and political attitudes through public discussion, and in response to the criticisms of others.'[172] Restrictions on the freedom of expression would inhibit self-expression and self-fulfillment.

### 4.1.3 The argument of democracy

This theory, which is mostly associated with the writings of Alexander Meiklejohn, indicates that citizens should be free to receive all information that may affect their political understanding, in order to participate effectively in the working of democracy.[173] Barendt states that 'the argument from democracy has been the most influential theory in the development of twentieth-century free speech law.'[174] In the case Whitney v. California Justice Brandeis stated:

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[163] J. Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing (1644; in Prose Writings, Everyman edn., 1958).
[164] J.S. Mill, On Liberty (Everyman edn., 1872), Ch II
[165] Barendt 1987, p. 8
[166] Ibid
[167] Ibid
[168] Abrams v. United States, 250 U.S. 616 (1919)
[169] Ibid, p. 630
[170] Sadurski 1999, p. 8
[171] Red Lion Broadvasting Co. v. FCC, 395 U.S. 367, 309 (1969)
[172] Barendt 1987, p. 14
[173] Barendt 1987, p. 20; Sadurski 1999, pp. 20-21
[174] Barendt 1987, p. 20

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.

Alexander Meiklejohn believed that the scope of the First Amendment is filled up by people's freedom of self-government (Meiklejohn considered self-government by people the concept of democracy). Self-government, according to Meiklejohn, means that people 'must try to understand the issues which, incident by incident, face the nation', 'must pass judgement upon the decisions which our agents make upon those issues', and 'must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness.'[175] However, self-government can only exist if citizens are able to communicate and acquire the required knowledge. Meiklejohn states that knowledge should be derived from 'many forms of thought and expression within the range of human communications', such as education, philosophy and the sciences, literature and the arts, and public discussions of public issues.[176] He believed that those types of speech should enjoy absolute protection.

## 4.2 Freedom of expression interests

Legal system protecting the freedom of expression is mainly based on the three free speech theories described above. It is useful to explore some interests which are involved, before the discussion of the general legal provisions and their interpretation in the United States and Europe. Although there are numerous freedom of expression interests, the discussion in this paragraph will be limited to the involved actors, because these interests are also involved in copyright regulation.

The most obvious interests involved, are the interests of the speaker. The interests of the speaker can be linked to the theories of self-fulfillment and democracy. The speaker should be protected in order to develop his personality and to participate effectively in the working of democracy. But the speaker might also be protected to promote his economical interests. The latter could include the freedom to advertise one's product, but also, and more important in the context of this study, the freedom to express a new copyrightable work (or other intellectual property).

A second group of interests to be considered, are the those of the recipient. For recipients it is important to receive information in order to make informed (political) choices. This does not entail the right to compel anyone to disclose information which they wish to keep secret, but rather the right not to be censored from receiving information.[177]

Finally the public interest should be considered. This interest is mostly limiting the freedom of expression. This is the case if the disclosure of an expression may have negative consequences to the public interest. These negative consequences may consist in a harmful reaction of the audience reacting on an expression, or harm to the public interest, such as public order or private rights.[178] In the context of this study especially the private rights, such as copyright, are important as those might prevail over the right to freedom of expression.

[175] Meiklejohn 1961, p. 255
[176] Ibid, pp. 256-257
[177] Barendt 1987, p. 26
[178] Ibid, p. 27

## 4.3 United States and the First Amendment

> Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The text of the First Amendment has been a source for many interpretations. Interpretations based on all three theories described above, although the argument of democracy has been the most popular one.[179] An interpretation from an absolutist position would be that there may be 'no law … abridging the freedom of speech'. However, the Supreme Court has never accepted this position. The text should not be interpreted literally, because unrestricted speech could harm vital interests and in certain cases free speech should be regulated to protect the free speech rights (or other private rights, such as copyright) of others.[180]

The marketplace of ideas theory is the most important doctrine in the United States free speech jurisprudence. Baker[181] demonstrates the dominant character of the theory by analyzing three prominent first amendment tests.

The first test, the "clear and present danger test", was created by the Supreme Court in order to test whether a law, limiting citizen's First Amendment rights, was constitutional. Justice Holmes established the test in the case Schenck v. United States[182], stating:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[183]

In Abrams v. United States[184] Justice Brandeis supported the "clear and present danger test". However, Brandeis emphasized that caution should be taken with suppression of speech.

> It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country.[185]

Brandeis believed that 'expressions of opinions that we loathe and believe to be fraught with death' should be allowed, 'unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.'[186] He believed that the 'ultimate good desired is better reached by the free trade of ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.'[187]

In Whitney v. California[188], Brandeis underlined the importance of 'the power of reason as applied through public discussion', because 'the path of safety lies in the opportunity to discuss freely

[179] Barendt 1987, p. 31
[180] Ibid, p. 32
[181] Baker 1989
[182] Schenck v. United States, 249 U.S. 47 (1919)
[183] Ibid, p. 52
[184] Abrams v. United States, 250 U.S. 616 (1919)
[185] Ibid, p. 628
[186] Ibid, p. 630
[187] Ibid
[188] Whitney v. California, 247 U.S. 357 (1927)

supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.'[189]

Baker explains that the logic of the clear and present danger test is derived from the marketplace of ideas theory. He states that '"harms" resulting from speech cannot justify suppression', 'as long as the marketplace continues to operate', if 'the harm result from people being convinced by the robust debate.'[190] This makes sense if we look at Brandeis' words:

> Those who won our independence believed … that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.[191]

The second test discussed by Baker, is that of the constitutionality protection of obscenity. In Roth v. United States[192], was found not to be subject to constitutional free speech protection. Although the court recognized that 'all ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection,' it rejected to give obscenity protection because it is 'utterly without redeeming social importance.' [193] In the case Miller v. California[194] the Supreme Court emphasized this view and stated:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.[195]

In other words, the Court concluded that obscene material contributes nothing or too little to the marketplace of ideas to be protected. This does not mean that obscenity cannot 'influence people's attitudes and ideas', but rather that it influences people 'in a manner more similar to engaging in sexual activity than to hearing argument and debate.'[196] Obscenity is not protected by the marketplace of ideas theory, because its influence is not the 'result from the listener or reader understanding and assimilating the speaker's claim.'[197]

The last test discussed by Baker, is whether defamatory statements are protected by free speech. In the case New York Times v. Sullivan[198], the Court found that defamation of public figures could be protected by free speech. The Court based its conclusion on the marketplace of ideas theory, referring to the decision of Brandeis in Whitney v. California, and stating:

> Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[199]

The Court recognized that there are situations in which defamatory statements are unconstitutional. This is the case if a defamatory falsehood 'was made with "actual malice" – that is, with knowledge

[189] Whitney v. California, 247 U.S., p. 375
[190] Baker 1989, p. 8
[191] Whitney v. California, 247 U.S., p. 375
[192] Roth v. United States, 354 U.S 476 (1957)
[193] Ibid, p. 484
[194] Miller v. California, 413 U.S. 15 (1973)
[195] Ibid, p. 34
[196] Baker 1989, p. 10
[197] Ibid
[198] New York Times v. Sullivan, 376 U.S. 254 (1964)
[199] Ibid, p. 270

that it was false or with reckless disregard of whether it was false or not.'[200] However, there should be some "breathing space" to make erroneous statements, because this 'is inevitably in free debate.'[201]

The marketplace of ideas doctrine, as shown by the analysis of these tests, can be considered as the basis of constitutional free speech protection in the United States. In addition, it application shows the importance of expressions of opinion for the discovery and spread of political truth. For this reason, as the clear and present danger test shows, suppression of speech should be attended with the greatest caution. Even in the case of defamatory falsehood, as the constitutionality of defamation test shows. Finally the obscenity test shows the importance of the contribution of expressions with (redeeming) social importance to the marketplace of ideas, to enable a robust and wide-open political/public debate. However, this does not entail all expressions. Expressions without social importance for the robust and wide-open political/public debate (e.g. obscenity) are not protected by the First Amendment. This was also claimed by Alexander Meiklejohn, who established the political speech theory.

Meiklejohn believed that the scope of the First Amendment is filled up by people's freedom of self-government, as discussed in paragraph 4.1.3. This indicates that the first amendment protects speech needed for self-government. In other words, the first amendment does not protect speech irrelevant for political understanding. However, Meiklejohn concluded that this included a very broad spectrum of expressions.[202] Baker stated that 'once the insight that the personal is political is fully accepted, the category of politically relevant speech could be virtually unlimited.'[203] A similar statement is advocated by Jack M. Balkin, whose work will be discussed in paragraph 4.5.

As starting point for the discussion of freedom of expression protection on the internet in paragraph 4.5 the following observations should be taken into account. The general legal freedom of expression protection in the United States provided by the First Amendment is mainly based on two theories, namely the argument of finding truth and the argument of democracy. These theories are incorporated in the marketplace of ideas doctrine. Under this doctrine individuals are protected to express without suppression (unless there is clear and present danger) as long as the speech contributes to the marketplace of ideas. Speech that contributes to the marketplace of ideas is speech needed for individuals to self-govern. This political speech could be interpreted as narrow as speech relevant for political understanding. However, the founder of the political speech theory defined political speech as a broad spectrum of expressions. Whether the interpretation of political speech is broad or narrow, the fact remains that certain kinds of speech are excluded from protection. For the freedom of expression protection provided by exceptions to the exclusive rights of the copyright owner this would mean that these exceptions should protect individuals their freedom to contribute political speech to the marketplace of ideas in order to discover political truth.

## 4.4 Europe and Article 10 European Convention on Human Rights

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the

[200] New York Times v. Sullivan, 376 U.S., pp. 279-280
[201] Ibid, pp. 271-272
[202] See the examples in paragraph 4.1.3
[203] Baker 1989, p. 26

> prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 ECHR is clearly more detailed as its American variant. There are some obvious differences with the free speech provision in the First Amendment. The rights of both the speaker and recipient are explicitly recognized in the Article. In addition, the public interest is served by an extensive list of circumstances in which an interference with the freedom might be permitted. Freedom of expression is the starting point, but the freedom could be limited if the limitation is "prescribed by law" and "necessary in a democratic society" in order to achieve the legitimate aim pursued. In the case Handyside v. The United Kingdom, the European Court on Human Rights (ECtHR) determined that an interference is "necessary" if there is a "pressing social need", which outweighs the public interest in freedom of expression.[204] In the same case the ECtHR stated:

> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. … it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[205]

In the case United Communist Party of Turkey and Others v. Turkey, the ECtHR stated:

> The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression.[206]

These interpretations of the ECtHR contain elements of the three theories described in paragraph 4.1. The truth argument can be derived from the rulings, because Article 10 ECHR is also applicable to irksome recourses and "information" or "ideas" that offend, shock, and disturb, in order to resolve a country's problems (find political truth) through dialogue. This is considered as "one of the essential foundations of the democracy, one of the basic conditions for its progress and for the development of every man." The latter can obviously be linked to the argument of self-fulfillment, as the development of every man entails the growth of an individual's personality. The last theory, the argument of democracy, can also be derived from the ECtHR rulings, which considers freedom of expression on of the essential foundations of the democracy. In addition, the ECtHR stated that 'freedom of political debate is at the very core of the concept of a democratic society.'[207] The category of political discussion denotes 'direct or indirect participation by citizens in the decision-making process in a democratic society.'[208] And finally, that authorities have a "particularly narrow" margin of appreciation in establishing the "need" for limiting the freedom of expression if the case of political expression[209], because '"political expression", …, requires a high level of protection under Article 10.'[210]

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[204] ECtHR 7 December 1976, no. 5493/72 (Handyside v. The United Kingdom), paragraph 48; ECtHR 26 April 1979, nr. 6538/74 (The Sunday Times v. The United Kingdom), paragraph 59.
[205] ECtHR 7 December 1976, no. 5493/72 (Handyside v. The United Kingdom), paragraph 49.
[206] ECtHR 30 January 1998, no. 133/1996/752/951 (United Communist Party of Turkey and Others v. Turkey), paragraph 57
[207] ECtHR 8 July 1986, no. 9815/82 (Lingens v. Austria), paragraph 42.
[208] ECtHR 25 June 1992, no. 13778/88 (Thorgeir Thorgeirson v. Iceland), paragraph 61.
[209] ECtHR 7 November 2006, no. 12697/03 (Mamère v. France), paragraph 20.
[210] ECtHR 15 February 2005, no. 68416/01 (Steel and Morris v. The United Kingdom), paragraph 88

As starting point for the discussion of freedom of expression protection on the internet in paragraph 4.5 the following observations should be taken into account. The general legal freedom of expression protection on a European level provided by Article 10 ECHR is based on all three theories described above. Freedom of expression is considered "essential foundation of democracy" and "one of the basic conditions for its progress and for the development of every man." Individuals should be free to express anything, including expressions that offend, shock, and disturb, in order to resolve a country's problems through dialogue. This approach seems to be very similar to the U.S. marketplace of ideas doctrine. Especially, because political speech has a higher level of protection under Article 10 ECHR. An obvious difference is provided by paragraph 10(2) ECHR, which allows limitations to the freedom if those are "prescribed by law" and are "necessary in a democratic society" in order to achieve the legitimate aim (from the exhaustive list of aims described in article 10(2) ECHR) pursued. For the freedom of expression protection provided by exceptions to the exclusive rights of the copyright owner this would mean that these exceptions should protect individuals their freedom of expression, unless this freedom is limited in accordance with the conditions in article 10(2) ECHR. Countries have a very narrow margin of appreciation in applying limitations to the freedom of expression, in particular in the case of expression of political speech.

## 4.5 Freedom of expression on the internet

In this paragraph analyzes two critical and renewing theories that focus on the influence of new technologies, in particular the internet, on the freedom of expression. The first theory is Balkin's theory of democratic culture. In the second theory Jørgensen describes the effects of content regulation on the internet for the freedom of expression.

Balkin argues that the internet and digital technologies did not fundamentally change freedom of speech, but rather that it provides us a different perspective. The technologies make features of freedom of speech that have always existed salient.[211] In his opinion, the purpose of freedom of speech, to promote democratic culture, entails more than just political relevant speech. It entails our individual right to participate in cultural creation, which is important because it allows us to 'shape the world we live and make us who we are.'[212]

Jørgensen argues that the internet challenges the right to freedom of expression. The internet empowers individuals with new means of imparting and seeking information enabling a free flow of information, including harmful and criminal content.[213] There is an increasing demand for governments and private parties to control this content, but such content regulation may jeopardize the freedom of expression.

### 4.5.1 The potential of internet speech

Jørgensen uses the concept of system and lifeworld, from Habermas' theory of communicative action[214], and applies it to the internet. In the context of this study, it is impossible to treat the complex theory of Habermas extensively. However, it is important to understand that Habermas made a distinction between system and lifeworld. By lifeworld Habermas means the shared common understanding and values reproduced through communicative action between people.[215] He believed the lifeworld is influenced by qualitative lifeworld media (unquantifiable influence and value-commitments). Systems represent the 'economic-administrative apparatus' reproduced through

[211] Balkin 2004, p. 2
[212] Ibid, p. 5
[213] Jørgensen 2001, p. 5
[214] Habermas 1989; Habermas 1991; Habermas 1992
[215] Jørgensen 2001, p. 8

money and power.[216] Systems are influenced by quantitative system media (countable money and votes). The lifeworld is symbolic in nature; it develops immaterial matters such as culture and language. The lifeworld represent who we are, and this can only be generated by communicative action between people. System media cannot generate influence and value-commitments; it can only express these qualities. This means that the legitimacy of systems depends on the lifeworld, because if the common understanding does not support the system, it is worthless (will get no money or votes). However, in modern societies Habermas recognizes two tendencies. The first is colonization, which means that a growing amount of 'interactions are mediated by system's media (money and power)'[217] leaving less sphere for lifeworld media. The second, the uncoupling of system and lifeworld, means that 'the system increasingly gets disconnected from norms and values, in which it should be anchored.'[218] An example is that an attempt to reach a common understanding through communicative action is not made, because a decision will be made on basis of the largest quantity of votes or money.

Jørgensen applies the theory of Habermas to the internet, stating that in the early stage of the internet it was an uncontrolled public sphere for communicative action. In other words, it 'held promises for an empowered lifeworld', without 'system interference.'[219] The internet is public, because it is open to all, allowing every individual to make an appearance. Only if individuals appear in the public sphere, they are able to participate in the creation of a public opinion (reach common understanding).[220] Jørgensen refers to the similarities between the features of the internet and the characteristics of the formation of public opinion, elaborated by Habermas. In particularly the 'equal possibility of receiving and expressing opinions.'[221] She emphasizes on the fact that traditional mass media lack these features, because they do not allow receivers to express opinions or to react immediately or with affect. And, in addition, mass media is controlled by a small group of authorities that control the realization of opinion, 'penetrating this mass, reducing any autonomy it may have in the formation of opinion by discussion.'[222] In other words, before the internet, the public sphere 'was characterised by mass media as main mediator of public opinion.'[223] The mass media is unable to broadcast or publish every piece of information or public opinion. The public act as information provider, but the mass media will determine what is broadcasted or published (mostly "saleable stories").[224] Participation by individuals is almost impossible, because the possibility of appearance in the mass media is very limited. Because the mass media serve as mediator of the public opinion, Jørgensen concludes that:

> The press has the role of public watchdog or caretaker of the public sphere, but since the press is also enrolled in the system of money (information has to be saleable) and power (the information selection process is part of an institutional power structure), the press is representing both lifeworld and system interests.[225]

The internet, on the contrary, allows individuals to appear and participate. This implies that it enables individuals to express and receive 'a stronger diversity of opinions and expression' and thus provides 'an interactive public sphere, where consensus-oriented communicative actions can

[216] Jørgensen 2001, p. 8
[217] Ibid
[218] Ibid
[219] Ibid, p. 10
[220] Ibid, pp. 8-10
[221] Ibid, p. 10
[222] Ibid, p. 11
[223] Ibid, p. 13
[224] Ibid
[225] Ibid

flourish' and supplement 'the rationale of mass media.'[226] However, there is an increasing amount of internet regulation, such as: 'applying existing laws, developing Internet-specific laws, applying content-based license terms to ISPs, or governments' encouragement of self-regulation by private parties.'[227] Jørgensen sees these systems as a threat for the lifeworld potential of the internet, because they increasingly control access to information on the internet (e.g. ISPs censoring potential harmful content), 'limiting individuals' right to freely impart and receive information.'[228]

Balkin, who's research entails not only the internet but the complete digital revolution, makes similar observations in his essay. He starts with the description of four ways in which the digital revolution changes our perspective of freedom of speech. First, it 'drastically lowers costs of copying and distributing information.' Second, the ease for 'content to cross cultural and geographic border.' Third, it 'lowers costs of innovating with existing information, commenting on it, and building upon it.' Fourth, the democratization of speech, allowing more people to transmit, distribute, appropriate and alter information.[229]

He also recognizes the ability of the internet to supplement traditional mass media, which he considers the "traditional gatekeepers of content and quality". Balkin describes two strategies offered by the internet for dealing with the mass media and publishing houses. First, "routing around", which means that an audience can be reached directly, without 'going through a gatekeeper or an intermediary'. Second, "glomming on", which means to 'appropriate and use something' from the mass media to comment on, criticize or produce and construct things with: 'using them as building blocks or raw materials for innovation and commentary.'[230] Balkin recognizes the fact that "glomming on" has always existed, but argues that the digital revolution increases the ability to and the effect of glomming on. He considers glomming on "cultural bricolage", innovating or commenting on existing cultural material.[231]

Balkin also recognizes the increasing focus on regulating the internet and other offspring's of the digital revolution. He devotes this to the economic interests involved. The digital revolution allows businesses to create more information products and sell it to more people in more places, making media products important sources of wealth.[232] It is obvious that businesses investing in information products want to control the use of those products, but that is becoming increasingly difficult in a world where digital technologies make it very easy to route around an glom on. This creates a social contradiction, because 'new information technologies simultaneously create new forms of freedom and cultural participation on the one hand, and, on the other hand, new opportunities for profits and property accumulation that can only be achieved through shutting down or circumscribing the exercise of that freedom and participation.'[233] Balkin names two obvious examples of the conflict.

The first example involves intellectual property rights. Balkin explains that traditional twentieth century mass media (radio, television, cable) made it easier and cheaper to distribute information products. The relatively small group of people creating the content was able to distribute it to a very big audience. The industry creating content made more money because of the big audience, but also invested more money in creating better products to expand this audience. For this reason they were seeking for more assurance in recouping those costs. They did this by pushing for increased

[226] Jørgensen 2001, p. 13
[227] Ibid, p. 20
[228] Ibid
[229] Balkin 2004, pp. 6-9
[230] Ibid, pp. 9-10
[231] Ibid, p. 11
[232] Ibid, pp. 12-13
[233] Ibid, p. 14

protection for their intellectual property. This is precisely what happened, as intellectual property rights were extended both horizontally (increased scope; e.g. protection of derivative rights) and vertically (e.g. the increased term of protection).[234] Another example is digital rights management, which technically limits the possibilities of use of and access to information products.[235] The expansion of control by media companies over the information products, however, limits the possibilities of glomming on or routing around, reducing the ability to participate in culture and thus seriously curtailing the freedom of speech.[236]

The second example is the telecommunications policy. The media companies distribute their content through some medium of transmission, such as cable or the ether. In contrary to telephone companies, broadcasters, cable companies and satellite companies (broadcasting companies) have been treated as speakers with free speech rights, because they determine what content is broadcasted.[237] However, they have been subject to 'structural public-interest regulation', such as providing equal broadcasting time to political candidates.[238] The reason for the regulation, was the limited amount of bandwidth (limited amount of channels), which allowed only a limited amount of speakers.[239] Broadcasting companies argued that the regulation should be loosened or taken away, because digital technologies offer a podium for a theoretical limitless amount of speakers. In many cases the courts accepted their argument, based on the first amendment, that public-interest regulation does not allow broadcasting companies to broadcast the content they wish, limiting their rights as speaker.[240] However, providing this freedom to broadcasting companies undermines their role as conduits of multiple voices (what Jørgensen would call protecting the public sphere and with that representing life world) changing it to promote the speech of the owner. In addition, if the owner determines what is broadcasted, he will prefer to push consumers to purchase his products (what Jørgensen would call system interests).[241] Although technological innovation enables people to create and distribute competing content and participate in the production of public culture, broadcasters will use their voice to direct users of these technological innovations to consumption of products they prefer (products of their own or their advertisers) and away from products without economic interest to them.[242]

Balkin argues that the changes to intellectual property rights and telecommunication policies have been made to defend investments by media companies. The control over their intellectual property is increased to 'maintain a fair return on investment' and public-interest regulation of telecommunication networks has been decreased allowing media companies to direct users to content in which they have an economic interest.[243] It is a 'market-oriented approach to freedom speech that ties speech rights closely to ownership of property.'[244]

Balkin and Jørgensen both recognize the differences between traditional mass media and the internet. Balkin states that the internet provides that ability for individuals to route around existing mass media and glom on to existing (mass media) material. This increases individual's cultural participation, which is an important aspect of freedom of expression. The expansion of intellectual property rights and the increasing control over telecommunication networks, driven by economic

[234] Balkin 2004, p. 16
[235] Ibid, p. 17
[236] Ibid
[237] Ibid, p. 18
[238] Ibid
[239] Ibid
[240] ibid, p. 19
[241] Ibid, p. 20
[242] Ibid
[243] Ibid, p. 23
[244] Ibid, p. 29

interests, are examples of regulation decreasing the ability of cultural participation and thus limiting the freedom of expression of individuals. Jørgensen states that the internet, in the early stages, was an uncontrolled public sphere, holding promises for an empowered lifeworld without system interference. In this public sphere every individual was enabled to appear and participate in formation of the public opinion. However, the increasing amount of systems (internet regulation), reduces the ability to appear and participate. In other words, these systems limit the ability to receive and impart information and thus limit the right to freedom of expression.

The theories of Balkin and Jørgensen both emphasize the importance of participation. This seem to be in line with the freedom of expression protection in the United States and Europe discussed in paragraph 4.3 and 4.4. In particular the grounding of the protection in these regions on the argument of truth, because the freedom to participate and express is important to discover (political) truth/solve a countries problems through debate.

### 4.5.2 The interpretation of democracy and the significance of participation

Balkin recognizes the democracy theory to free speech, established by Alexander Meiklejohn and his followers, as the most important free speech theory in the twentieth century. He believes there is a connection between the up rise of this theory and mass media. Mass media is controlled by a relatively small group of people, while it can influence an enormous group of people in their public debate. The position of this small group of people may have worrisome results, because they can promote their favored views, leave out important content for public debate and reduce the quality of content for economic reasons.[245] For these reasons, democracy-based theorists of free speech offered a counterweight, arguing that mass media should be regulated in order to prevent the small group to concentrate even further, impose public-interest obligations to cover public issues and open mass media to a diverse and wide-ranging group of speakers.[246]

Although the democracy approach to free speech is a desirable counterbalance for the market-oriented approach, it is limited because it grants political speech a higher status than other speech, it downplays the importance of popular culture and it harms the liberty and personal autonomy by regulating mass media.[247]

In order to explain his concept of a "democratic society", Balkin describes five characteristics of freedom of speech which internet speech makes salient. First, the wide range of subjects available online. Second, the growth of the internet shows the creativity of ordinary people if they are allowed to be active producers. Third, internet makes it easy to innovate upon existing content. Fourth, internet speech is interactive and participatory. Fifth, and finally, it allows us, in an interactive way, to create new communities, cultures and subcultures, which constitute us as individuals leading to self-formation.[248] All these characteristics, exemplary for freedom of speech in general, shows us the limitations of the democracy approach of free speech. Free speech is not just about political relevant issues; it is about the promotion and development of a democratic culture.[249]

> A "democratic" culture, then, means much more than democracy as a form of self-governance. It means democracy as a form of social life in which unjust barriers of rank and privilege are dissolved,

[245] Balkin 2004, p. 28
[246] Ibid, p. 29
[247] Ibid, p. 30
[248] Ibid, p. 31-32
[249] Ibid, p. 32

> and in which ordinary people gain a greater say over the institutions and practices that shape them and their futures.[250]

With the word "democratic" in democratic culture, Balkin means democratic participation, not democratic governance. Freedom of speech is more than the ability to self-government, it is the ability to participate in the development of a democratized society.[251] It is important for people to participate in the development of culture, because it is culture that constitutes them. The freedom to participate in the development of culture is 'something more than just choosing which cultural products to purchase and consume; the freedom to create is an active engagement with the world.'[252]

With the word "culture" in democratic culture, Balkin means the "collective processes of meaning-making in a society. It entails 'a set of historically contingent and historically produced social practices and media that human beings employ to exchange ideas and share opinions.'[253] Internet is an example of such a media that is crucial for the realization of a democratic culture.

Jørgensen seems to agree with Balkin on the importance of (cultural) participation (what Balkin means with "democratic" in "democratic culture") for (democratic) society. She notes that internet 'represents communicative actions, which are an essential part of being human: the freedom to speak, to listen, to seek information and to disagree.'[254] As explained above, communicative action is the only way to achieve common understanding and values (lifeworld), which determine the legitimacy of systems (political and economic). In other words, appearance and participation (receiving and imparting information and opinion), only possible in a public sphere (e.g. the internet; which is an example of what Balkin means with "culture" in "democratic culture"), are essential for the lifeworld (creating the public opinion/reaching common understanding), which develops matters such as culture and language. The lifeworld (matters such as culture and language) in its turn, determines the legitimacy of political and economic systems. This seems to indicate that the freedom of expression should protect the development of the lifeworld, not just political speech necessary for reproducing political systems (through votes). Because, if the development of the lifeworld is difficult or impossible, due to a lack of freedom of expression protection, the legitimacy of those political systems will weaken or disappear.

The theories of Jørgensen and Balkin both argue that individual should be free to participate and express any kind of speech in order to reach common understanding/promote the development of democratic culture. They do not support the view that only political speech should be protected or that political speech deserves extra protection, which is the case in the legal freedom of expression protection in the United States (paragraph 4.3) and on a European level (paragraph 4.4). Instead they argue that all speech is important because the common understanding/democratic culture determines the legitimacy of political (and economic) systems.

### 4.5.3 Grounding freedom of expression

Balkin mentions three important differences that are the result of grounding free speech on the promotion of democratic culture instead of democracy. First, it entails more than just political relevant speech. Second, the role of popular culture becomes of greater importance. Although mass media is controlled by a relatively small group of people, it can be considered as truly popular culture

[250] Balkin 2004, p. 33
[251] Ibid
[252] Ibid
[253] Ibid, p. 34
[254] Jørgensen 2001, p. 29-30

if new technologies such as the internet enable people to route around and glom on. Third, the democracy approach to free speech focused on the discourse of important political speech, because mass media is controlled by a few companies with a limited amount of bandwidth in which political speech should have a place to secure the ability of self-government. [255] However, digital technologies allow everyone – not just a small group of people – to participate in their culture in whatever way they want. Freedom of speech grounded on the democratic culture should allow every person to do so.[256]

Democratic culture, as the basis of freedom of speech, is a regulative ideal.[257] Digital technology allows us to see this ideal. In this ideal view freedom of speech would entail:

(1) the right to publish, distribute to, and reach an audience;
(2) the right to interact with others and exchange ideas with them, which includes the right to influence and to be influenced, to transmit culture and absorb it;
(3) the right to appropriate from cultural materials that lay at hand, to innovate, annotate, combine, and then share the results with others; and
(4) the right to participate in and produce culture, and thus the right to have a say in the development of the cultural and communicative forces that shape the self.[258]

The ideal provides us with a much needed critical perspective, but it is not reality.[259] The market-oriented approach has expanded intellectual property rights and increased the amount of control owners have over their distribution networks. The democratic culture perspective should provide the counterweight for the market-oriented approach in the further regulation of existing and new digital technologies.[260]

Jørgensen does not explicitly states an ideal ground for freedom of expression in general, because this is not the objective of her study. She uses the theory of Habermas to explain the features and characteristics of the internet, in order to analyze whether regulation (such as law, case law and self-regulation) acknowledge and protects these features and characteristics. However, she emphasizes on the importance of protecting these features and characteristic of the internet. Especially, the function as public communicative sphere (lifeworld), because 'this is the only way to ensure transparency, accountability and democratic legitimacy.'[261] As mentioned above, this seems to indicate that all speech needed for reaching common understanding, developing the lifeworld (matter such as culture and language), should be protected by the freedom of expression. In other words, protection of the lifeworld seems to be Jørgensen's ideal ground for freedom of expression.

Jørgensen and Balkin see a protected lifeworld/democratic culture as the basis of freedom of speech. The United States First Amendment protects political speech and is based on democracy, excluding certain types of speech from the protection which are necessary for the development of democratic culture. In addition, the First Amendment and article 10 ECHR are not absolute. It is possible to have regulation which is limiting the freedom of expression, such as copyright law. According to Balkin and Jørgensen ideal freedom of speech protection, the protection should entail all kinds of speech and there should be no systems (such as copyright law) limiting the lifeworld (public sphere). The exceptions to the exclusive rights of the copyright owner are mechanisms protecting the freedom of

[255] Balkin 2004, pp. 36-42
[256] Ibid, p. 42
[257] Ibid, p. 44
[258] Ibid, p. 43
[259] Ibid, p. 46
[260] Ibid, p. 47
[261] Jørgensen 2001, p. 81

expression. These exceptions should protect the freedom of expression by taking away the limitations of the copyright law to the lifeworld.

### 4.5.4 Regulation of internet speech and protecting the ideals

Jørgensen uses Article 10 ECHR as legal point of departure for the regulation of freedom of expression on the internet. She makes similar observations as mentioned in paragraph 4.3.2, stating that Article 10(1) ECHR includes a rather broad guarantee of individual's freedom of expression (freedom to hold opinion and to receive and impart information and ideas) and covers all speech in the public sphere on whatever subject (irksome recourses and "information" or "ideas" that offend, shock, and disturb).[262] According to Jørgensen the first paragraph of Article 10 ECHR provides individuals the freedom of communicative action to reach common understanding, in other words protects the public sphere. Article 10(2) ECHR provides restrictions on this freedom, which should be interpreted narrowly. Especially on the restricting political speech (in the broadest sense), countries have a very narrow margin of appreciation, because the ECtHR regards this as "public interest speech".[263]

Jørgensen continues with the analysis of case law on online content regulation. However, at the time of her study she did not find any case law of the European Court concerning internet and freedom of expression. Therefore, she uses American case law to make her point. Jørgensen uses the cases between Attorney General Reno and the American Civil Liberties Union (ACLU) on the US Communication Decency Act (CDA). The CDA made it possible to impose criminal penalties on anyone who used the internet to communicate patently offensive material to minors under 18 of age.[264] Parts of the Act were ruled unconstitutional by the District Court for the Eastern District of Pennsylvania[265] and the U.S. Supreme Court[266].

The U.S. Supreme Court in Reno v. ACLU recognized the characteristics and features of the internet described by Balkin and Jørgensen in paragraph 4.4.1. It states that the internet is:

> … comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.
> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information.
> … Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.[267]

Jørgensen argues that the internet thus encompasses both system and lifeworld, because it provides individuals a public and private sphere for private or public communicative action and a commercial sphere for commercial communication.[268] The U.S. Supreme Court does not apply case law of traditional mass media to the internet, because:

> In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, (…); the scarcity of available frequencies at its inception, (…); and its "invasive" nature, (…). Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have

[262] Jørgensen 2001, p. 38
[263] Ibid, p. 42
[264] Ibid, p. 45
[265] Reno v. ACLU, Civil 929 F. Supp. 824 (1996)
[266] Reno v. ACLU, 521 U.S. 844 (1997)
[267] Ibid, p. 853
[268] Jørgensen 2001, pp. 48-50

> the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' "(…).[269]

The U.S. Supreme Court emphasizes the difference between internet and traditional mass media, especially the ability for individual users to participate to the public dialogue:

> (The internet) provides relatively unlimited, low-cost capacity for communication of all kinds. (…) This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. (…) individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." (…) We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.[270]

Because of 'the medium's unique characteristics' it receives, unlike traditional mass media, 'full First Amendment protection' and provisions restricting the first amendment should be subject to 'the most stringent review.'[271] This seems to be consistent with the European interpretation of Article 10 ECHR that applies a very narrow margin for restrictions.

The U.S. Supreme Court ruled that the content regulation in the CDA was unconstitutional for several reasons, but mainly because the act defined the regulated content very vaguely and other available means to achieve the goal. One of the last arguments dealt with by the court was, that the Government assumed that 'unregulated availability of "indecent" and "patently offensive" material on the internet is driving countless citizens away from the medium.' However the court disagreed:

> We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[272]

In other words, the marketplace of ideas, the most dominant doctrine first amendment jurisprudence, is unlikely to be served by censorship of internet speech.

Balkin argues that the judicial system of protection of individuals' right of freedom of speech by courts is important, but that the protection of freedom of expression also relies on the technological and regulatory infrastructure.[273] The complete system is produced through the synergy of:

(1) government policies that promote popular participation in technologies of communication,
(2) technological designs that facilitate decentralized control and popular participation rather than hinder them, and
(3) the traditional recognition and enforcement of judicially created rights against government censorship.[274]

[269] Reno v. ACLU, 521 U.S., pp. 868-869
[270] Ibid, p. 870
[271] Ibid, p. 845
[272] Ibid, p. 885
[273] Balkin 2004, pp. 47-48
[274] Ibid, pp. 48-49

Protecting freedom of expression in the digital age means not only protecting individual free speech rights by courts, but protecting free speech values through the complete system. Balkin argues that the following values should be protected: 'interactivity, broad popular participation, equality of access to information and communications technology, promotion of democratic control in technological design, and the practical ability of ordinary people to route around, glom on, and transform.'[275]

Balkin applies these values to the two examples of the market-oriented approach, intellectual property rights and the telecommunications policy. The free speech theory grounded by democratic culture argues that both communications networks and intellectual property right must facilitate broad cultural participation, while the market-oriented approach provides control over intellectual property and the flow of digital content through the communications networks. So, to promote democratic culture communications networks 'must grant fair access to their networks, they must not act as chokepoints or bottlenecks, and they must not unfairly discriminate against content from other sources.'[276] For intellectual property rights 'there must be a robust and ever expanding public domain with generous fair use rights' to 'the spread of culture and possibilities for cultural innovation and transformation.'[277]

The free speech values should not just be protected by the constitution, but, rather, 'through the design of technological systems—code—and through legislative and administrative schemes of regulation, for example, through open access requirements or the development of compulsory license schemes in copyright law.'[278]

Jørgensen and Balkin both recognize that the internet has unique characteristics that enable users to participate in the democratic culture/lifeworld. Therefore, internet should have extensive or at least full freedom of expression protection. This protection should entail the free speech values that the internet, due to its characteristics, make salient. Jørgensen discussed the case of Reno v. ACLU, in which the U.S. Supreme Court stated that it is unlikely that content regulation of internet speech promotes freedom of expression. Even if a law has the potential of promoting the freedom of expression by censoring certain content, such as copyright law, the unique characteristics of the internet might require another interpretation or an adjustment of such a law in order to comply with the free speech values that these characteristics make salient. Balkin argues that freedom of expression grounded on democratic culture requires changes to the complete system of free speech protection. This includes changes to regulation such as copyright laws and telecommunications policy. Especially interesting, in the context of this study, are the generous fair use rights mentioned by Balkin.

## 4.6 Conclusion

In the United States the general provision protecting the freedom of expression is the First Amendment to the U.S. Constitution. The marketplace of ideas theory is the most important First Amendment doctrine. The contribution of expression with social importance to the wide-open and robust public/political debate (marketplace of ideas) is essential for the discovery and spread of political truth. According to Meiklejohn's political speech theory, this entails a very broad spectrum of expressions needed to enable people's self-government.

[275] Balkin 2004, p. 49
[276] Ibid, p. 50
[277] Ibid
[278] Ibid, p. 51

On a European level, the general provision protecting the freedom of expression is Article 10 ECHR. The ECtHR has ruled that the freedom of expression is 'one of the essential foundations of the democracy, one of the basic conditions for its progress and for the development of every man'[279] and that the 'freedom of political debate is at the very core of the concept of a democratic society.'[280] The expressions protected include ideas that offend shock and disturb, because those are needed to find political truth through dialogue. Restrictions to the freedom of expression are possible, but the authorities have, particularly in the case of political speech which requires a high level of protection, a narrow margin of appreciation in establishing the "need" for limiting this freedom.

The internet's unique characteristics, different from traditional mass media, has influenced our perspective of freedom of expression. The internet allows individuals to route around and glom on to existing mass media. It provides a public sphere in which individual can perform communicative actions, in which individuals can speak, listen, seek information and disagree. It allows people to participate in the formation of the public opinion. It increases individual's cultural participation.

The freedom to participate is important, because only by communicative action common understanding can be reached. The freedom to participate in the collective processes of meaning making allows individuals to have a say over the development of a democratized society. Only in a public sphere, such as the internet, in which individuals are free to participate, common understanding can be reached. Common understanding that develops matters such as culture and language. Common understanding that determines whether political and economic systems fit in the democratic society. Only by free participation individuals can have a say over these institutions and practices that shape them and their futures.

Freedom of expression should protect the unique characteristics of the internet that enable users to participate. It should protect the free speech values the internet made salient, such as: 'interactivity, broad popular participation, equality of access to information and communications technology, promotion of democratic control in technological design, and the practical ability of ordinary people to route around, glom on, and transform.'[281] These values should have full freedom of expression protection in order to ensure transparency, accountability and democratic legitimacy, to allow the promotion and development of a democratic culture, to achieve a truly democratic society. Balkin states that in the ideal system protecting freedom of speech values, including the values the internet made salient, the freedom of speech would entail:

(1) the right to publish, distribute to, and reach an audience;
(2) the right to interact with others and exchange ideas with them, which includes the right to influence and to be influenced, to transmit culture and absorb it;
(3) the right to appropriate from cultural materials that lay at hand, to innovate, annotate, combine, and then share the results with others; and
(4) the right to participate in and produce culture, and thus the right to have a say in the development of the cultural and communicative forces that shape the self.[282]

The general legal provisions protecting freedom of expression in the United States and on a European level are broadly consistent with the ideals outlined by Balkin and Jørgensen. They protect the freedom of individuals to participate and freely express and discover truth (reach common understanding). However, it is focused on political speech (political truth) while Balkin and Jørgensen underline the importance of all kinds of speech for the development of democratic culture/reaching of common understanding. The reaching of common understanding/the discovery of political truth

[279] ECtHR 7 December 1976, no. 5493/72 (Handyside v. The United Kingdom), paragraph 49.
[280] ECtHR 8 July 1986, no. 9815/82 (Lingens v. Austria), paragraph 42.
[281] Balkin 2004, p. 49
[282] Ibid, p. 43

requires a public sphere (lifeworld). The real world and the internet provide such a lifeworld in which individuals can freely appear and participate to the public debate. However, there are systems, such as copyright laws, limiting this lifeworld. In the case of copyright there are mechanisms included in copyright law, such as the exceptions to the exclusive rights of the copyright owner, to protect freedom of expression interests and, with that, take away (part of) the limitations to the lifeworld. The internet has unique characteristics that make certain freedom of expression values salient. Therefore the exceptions to the exclusive rights of the copyright owner should also protect these freedom of expression values to prevent limitations to the lifeworld of the internet. This means that other or additional freedom of speech values, which the internet made salient, should be protected compared to the freedom of speech values that were salient and protected in the lifeworld of the real world. Therefore, the exceptions to the exclusive rights of the copyright owner should protect the freedom of expression values, including those made salient by the internet, that can be protected by these exceptions in order to provide adequate freedom of expression protection for internet users.

## 5. Conclusion

In order to protect the freedom of expression of internet users, at least the following free speech values should be protected: 'interactivity, broad popular participation, equality of access to information and communications technology, promotion of democratic control in technological design, and the practical ability of ordinary people to route around, glom on, and transform.'[283] Only if these values are protected, individuals will be able to participate in the formation of the public opinion and reach common understanding. Common understanding that determines the legitimacy of political and economic systems, and thus shapes the institutions and practices that in their turn shape individuals and their futures. This is broader than the interpretation of the general provisions protecting freedom of expression in the United States and on a European level. The First Amendment protection in the United States protects these free speech values so that individuals are able to participate in the wide-open and robust public debate (marketplace of ideas) which is essential for the discovery and spread of political truth. Meiklejohn argues that in a democracy individuals should have the freedom to participate in the marketplace of ideas in order to be able to self-govern, to make informed political choices by voting for representatives. There is a similar interpretation in Europe where freedom of expression values should be protected in order to resolve problems (find political truth) through dialogue. Free participation is 'one of the essential foundations of the democracy, one of the basic conditions for its progress and for the development of every man.'[284] However, scholars such as Balkin and Jørgensen argue that the freedom of expression protection should not only protect political speech, but all kinds of speech necessary to reach common understanding/develop democratic culture. This is a much broader interpretation than the discovery of political truth, which allows individuals to make informed political choices and vote for the right representative. Their interpretation is based on the analysis of the freedom of expression on the internet. A public sphere in which any individual can appear and participate. A public sphere in which individuals are able to participate directly (without representatives) to the development of democratic culture, to the development of the world they live in. Freedom of expression protection should protect the free speech values the internet made salient to allow individuals to participate and reach common understanding/develop democratic culture, to improve individuals their ability to participate in democracy.

Exceptions to the exclusive rights of the copyright owner are essential for the reconciliation of freedom of expression and copyright interests. The exceptions to the exclusive rights of the copyright owner in the United States, the fair use doctrine, even has a constitutional status. Although a European court never ruled on the status of exceptions to the exclusive rights of the copyright owner, it is plausible to assume these serve similar purposes in Europe. Exceptions to the exclusive rights of the copyright owner allow everyone, under certain conditions, to use (parts of) a copyrighted work in order to compensate interferences with certain public interests. In the context of this study, this means that the exceptions to the exclusive rights of the copyright owner (in combination with other mechanisms in copyright law, described in chapter 3) compensate the freedom of expression interests of internet users. The free speech values mentioned above should be protected by the complete system protecting the freedom of expression. The exceptions to the exclusive rights of the copyright owner may be regarded as a part of this system. Balkin states that in the ideal system, the freedom of speech would entail:

(1) the right to publish, distribute to, and reach an audience;
(2) the right to interact with others and exchange ideas with them, which includes the right to influence and to be influenced, to transmit culture and absorb it;

[283] Balkin 2004, p. 49
[284] ECtHR 7 December 1976, no. 5493/72 (Handyside v. The United Kingdom), paragraph 49.

(3) the right to appropriate from cultural materials that lay at hand, to innovate, annotate, combine, and then share the results with others; and
(4) the right to participate in and produce culture, and thus the right to have a say in the development of the cultural and communicative forces that shape the self.[285]

If we relate this to the exceptions to the exclusive rights of the copyright owner, as part of the system protecting the freedom of expression, it is obvious to conclude these exceptions are part of the protection of the right listed under number three. The exceptions to the exclusive rights of the copyright owner allow individuals to use (parts of) copyrighted work in their expression and share the result with others. From a freedom of expression perspective, they protect the right to appropriate from *copyrighted* cultural material that lay at hand, to innovate, annotate, combine and then share the result with others. In other words, in an ideal system of freedom of expression protection, the exceptions to the exclusive right of the copyright owner protect the right to "glom on" (appropriate and use material to comment on, criticize or produce and construct things with; to use as a platform of innovation)[286] to copyrighted material and share the results with others.

In this master's thesis I examined the question whether exceptions to the exclusive rights of the copyright owner, provided by international regulation, provide adequate freedom of expression protection for internet users. The international regulation provides a minimum level of protection on which owners and users of protected works can rely in a global environment, such as the internet. There is only one mandatory exception to the exclusive right of the copyright owner in the international copyright regulation, namely the quotation right. This means that member states to the Berne Convention are obliged to implement a quotation right in their national copyright law. The minimum level of protection offered by international copyright regulation is thus the most narrow implementation of this Article 10(1) Berne Convention in national copyright law.

> *Article 10(1) Berne Convention*
> *It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*

With "quotation" scholars mostly[287] refer to the definition in the Concise Oxford Dictionary: 'the taking of some part of a greater whole–a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art–where the taking is done by someone other than the originator of the work.'[288] The open formulation of Article 10(1) Berne Convention allows member states to implement a narrow interpretation of the exception. A quotation should be "in accordance with fair practice, and to the extent required by the specific purpose." This means that member states are allowed to implement the exception only for limited purposes, e.g. just for educational purposes or criticism.[289] Therefore, member states are able to exclude some kind of works from the scope of the exception, because quotations of such work is not required by the (limited amount of) implemented purposes.[290] Furthermore, the extent of the quotation may be limited, e.g. member states which only allow "short quotations," "passages from a work," or the "use of brief quotations."[291] In addition the quotation should be "compatible with fair practice," which is a generally interpreted as whether the quotation 'conflict with the normal exploitation of the work and

[285] Balkin 2004, p. 43
[286] Ibid, p. 10
[287] E.g. Ricketson & Ginsburg 2006, p. 788; Ricketson 2003, p. 12
[288] See here the first meaning given in the definition in the Concise Oxford Dictionary, 10th Ed. 2001, pp. 1176.
[289] Xalabarder 2009, p. 106
[290] Ibid, p. 109
[291] Ibid, p. 109

unreasonably prejudice the legitimate aim of the author,'[292] and a mention must be made of the source, and the name of the author if it appears thereon (Article 10(3) Berne Convention). Overall, countries can comply with international copyright regulation if they implement a quotation right allowing persons to use a small part of a limited amount of works for limited purposes if this quotation does not 'conflict with the normal exploitation of the work and unreasonably prejudice the legitimate aim of the author'[293] and mentions the source and the name of the author if it appears thereon.

For exceptions to the exclusive rights of the copyright owner to provide an adequate freedom of expression protection, they should protect the right to "glom on" to copyrighted material and share the results with others. However, the minimum level of international copyright protection guarantees individuals that they can take a limited part of a limited amount of works for limited purposes. This does not cover the complete right to "glom on" to copyrighted material and share the results with others, which should be protected to provide adequate freedom of expression protection of individuals (including internet users). To provide an indication of what adequate protection of freedom of expression (the right to "glom on" to copyrighted material and share the result with others) by the exceptions to the exclusive rights of the copyright owner should look like, the United States fair use doctrine is used.

The fair use doctrine has an open structure and its application needs a case-by-case analysis to determine whether a certain use is fair. This may lead to legal uncertainty, because it makes the doctrine hard to predict. However, it can also be considered as a doctrine that provides a good picture of the required protection, because it is interpreted in line with the present day conditions, which includes new technologies. New technologies, such as the internet and digital technologies, that enable the free flow of (copyrighted) material which all internet users can receive, use, copy, edit and impart. The characteristics and features of these new technologies, especially the internet, empower the freedom of expression interests of internet users, if the free speech values mentioned above are protected, because they increase the participation. However, these characteristics and features, especially the ability to "glom on", are also important in the context of copyright protection, because 'the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.'[294] Therefore, it makes sense that the approach used by United States courts in determining whether a certain use is fair increasingly shifted from the "commercial use presumption" to the "transformative use doctrine".

The transformative use doctrine, which was first applied by the U.S. Supreme Court in 1994, is now the most influential and most applied doctrine. Under the commercial use presumption, any use of a copyrighted work deemed commercial is presumed to be an unfair exploitation of the monopoly of the copyright owner, because it causes harm to the potential market of the copyright owner. However, under the transformative use doctrine, an unequivocally transformative use causes no market harm, because it does not serve as a market replacement. In the transformative use approach the focus shifted from the fourth[295] to the first factor[296] of the fair use doctrine, as the degree of transformativeness became an indication of potential market harm. The more transformative the new work, the less important the other factors become.[297] In determining the degree of transformativeness, the transformation of the purpose of the use is the most important factor, not the transformation of the original content. But what about the remaining two factors of

[292] Ricketson & Ginsburg 2006, pp. 786-787
[293] Ibid, pp. 786-787
[294] Campbell v. Acuff-Rose Music, Inc. (1994), 510 U.S., p. 579
[295] The effect of the use upon the potential market for or value of the copyrighted work.
[296] The purpose and character of the use.
[297] Campbell v. Acuff-Rose Music, Inc. (1994), 510 U.S., p. 579

the fair use doctrine? In the case of Kelly v. Arriba Soft,[298] the court quoted the United States Court of Appeals for the Ninth Circuit, explaining the second factor of the fair use doctrine:[299] 'works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.'[300] Although the material in question was found to be creative in nature, this was not decisive. Foremost, because the use of the work was transformative, but also because the work was already published on the internet before it was used.[301] In the same case, the court stated about the third factor,[302] that the 'extend of the permissible copying varies with the purpose and character of the use' and 'if the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.'[303] Furthermore, the court ruled that the use of the whole work (picture) of Kelly in thumbnails for the search engine of Ariba Soft was reasonable.[304] With regard to the transformativeness, the court ruled that the use (as a thumbnail) of the picture of Kelly by Ariba Soft is a transformative use, because it 'serves a different function than Kelly's use – improving access to information on the internet versus artistic expression.'[305] Because the use was transformative it was considered fair use, even though the use was commercial, the original work had a creative nature and Ariba Soft used the whole work. In other words, the transformativeness of the use is by far the most important factor to determine whether a certain use is fair.

The transformative use doctrine as the basis of the fair use doctrine increases individuals' ability to "glom on" to existing material and create new transformed works. It increases individuals' ability to use copyrighted material to comment on, criticize or produce and construct things with. It increases individuals' ability to participate in the public debate. And, it thus promotes not only the goal of copyright, to promote the progress of science and useful arts, but also increases individuals' freedom of expression. Especially the freedom of expression of internet users, because digital technology and the internet have increased the ability to and the effect of glomming on.

To get a better understanding of the transformative uses that fall within the transformative use doctrine Samuelson unbundled fair use cases in "policy-relevant clusters". One of the clusters is the "free speech and expression fair uses" cluster. Within this cluster Samuelson split up general transformative uses into three types, namely: transformative uses, productive uses and orthogonal uses. Transformative uses are uses that change the content or purpose of the original work, such as parodies, other types of transformative critiques and transformative adaptations. Productive uses are productive uses in critical commentary, which take a part or the whole of an earlier work to provide it with critical commentary, such uses of work for news reporting. Orthogonal uses are uses that make a iterative copy of (a part of) the original work for orthogonal speech-related purposes, such as the use of iterative copy of a pamphlet of the Ku Klux Klan in fundraising material of an activist organization fighting racism.

The mandatory exceptions to the exclusive rights of the copyright owner provided by international regulation (quotation right) do not provide adequate freedom of expression protection for internet users, because they only guarantee persons to use a small part of a limited amount of works for limited purposes. Adequate freedom of expression protection of internet users would mean that the right to "glom on" to copyrighted material (including material protected by neighboring rights, which are subject to the fair use doctrine in the United States) and share the results with others should be

[298] Kelly v Ariba Soft, 336 F.3d 811
[299] The nature of the copyrighted work.
[300] Kelly v Ariba Soft, 336 F.3d, p. 820
[301] Ibid
[302] The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
[303] Kelly v Ariba Soft, 336 F.3d, p. 821
[304] Ibid, pp. 821-822
[305] Ibid, p. 819

protected. An indication of adequate protection may be derived from the United States fair use doctrine. In this doctrine the transformativeness (mainly the transformation of the purpose) of the use is decisive in determining whether the use is an exception to the exclusive right of the copyright owner. The other factors of the fair use doctrine, which are similar to those that may be applied to the quotation right, namely the nature of the original work (certain works may be excluded from the quotation right), the extent of the part used from the original work and the impact on the exploitation of the owner of the original work, have less value when the transformativeness of the uses increases. In other words, individuals may (commercially) use any part of any work as long as the use is transformative enough. For exceptions to the exclusive rights of the copyright owner to provide adequate freedom of expression protection, at least the following transformative uses should be allowed: transformative uses (including parodies, other types of transformative critiques and transformative adaptations), productive uses (including new reporting and productive uses in other contexts) and orthogonal uses. When individuals (including internet users) are allowed to make transformative uses their right to appropriate form *copyrighted* cultural material that lay at hand, to innovate, annotate, combine and then share the result with others, is sufficiently protected. If exceptions to the exclusive rights of the copyright (and neighboring rights) owner allow transformative uses, the exceptions provide (at least more) adequate freedom of expression protection for internet users. This would not only promote the goal of copyright law (and neighboring rights law), to promote the progress of science and useful arts, to promote creativity and to promote innovation, by striking a proper balance between the economic incentive offered by the protection and the ability of individuals to create new expressions using existing material. But more important, it would also increase individuals freedom of expression, increasing their ability to reach common understanding, to participate in the development of democratic culture, to participate in the democratic society, to shape the world they live in and that shapes them.

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