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The balance between copyright and freedom of expression in the knowledge society

Chapter 1. Introduction

At the beginning of 2013 The European Court of Human Rights has decided, in two consecutive judgments on the matters, that convictions based on copyright law for illegally reproducing or publicly communicating copyright protected material can constitute an interference with the right to freedom of expression and information under Article 10 of the European Convention on Human Rights.

As the decision seems to indicate the strengthening of Article 10 as a potential obstacle in the enforcement of copyright, the aim of this paper is to find an answer to the following question: Is the right to freedom of expression and information, indeed, gaining importance as an external limitation to copyright protection?

Before the implications of the right to freedom of expression in the enforcement of copyright can be discussed, a review of the (i) origins of the two fundamental rights, (ii) the concepts that the above cited two notions have presently evolved into and (iii) the nature of their interaction throughout history is required. This will be completed over the course of Chapter 2.

Chapter 3 contains a short review of the evolution of European copyright after the Berne Convention, in view of the International Treaties that were adopted, the case-law of the European Court of Justice and the European Court of Human Rights and the Directives that constitute the current framework of European copyright. Afterwards, a discussion on why and whether the right to freedom of expression and information has the potential to play a more important role in the enforcement of copyright will be held, in light of the current doctrinal debate and of the recent case law of the European Court of Human Rights.

In the 4th Chapter, the present state of the balance between copyright and freedom of expression at the European level will be addressed. First, the general expansion of copyright protection in Europe and its consequences on the balance between copyright and freedom of expression will be discussed. Following, the paper is going to focus on a number of provisions of the Information Society Directive that are directly concerned with preserving the balance between the two fundamental rights, such as the ones regarding exceptions and limitations to copyright protection, technical protection measures and the three-step test. Finally, we will discuss the tendency of European Courts to apply Article 10 in copyright cases and the potential of the right to freedom of expression to gain more importance in the future.

In the light of the understanding acquired throughout the course of this research, the thesis will be concluded with the answer to the question posed above, not before acknowledging that in relation to the copyright framework, the right to freedom of expression and information carries a lot more weight than a mere limitation.

Chapter 2: Origins, Concepts, Nature of the relationship

2.1 Origins

The first copyright system arose out of practices and policies of the English Stationers' Guild at the beginning of the 16th century[1]. The system was no more than a registry for staking claims in the books, put in place to ensure harmony within the ranks. A private enforcement system enabled guild members to resolve disputes amongst themselves over rights in particular books[2]. The royal charter (1557) gave to the Guild the right to seize illicit editions and bar the publication of unlicensed books. Convenient for the English authorities of the time, the guild's practices provided an infrastructure for controlling publication of heretical and seditious materials.

Although it is outside debate that this copyright system promoted the dissemination of works, thus promoting free expression and cultural advance, it should be pointed out that this was never its aim. The stationers' copyright regime was part of the apparatus aimed at ensuring that these texts would not be printed or otherwise be made widely accessible to the public[3].

In the context created by general discontent with the conditions described above and under the influence of the values spread by the philosophers of the Enlightenment[4], the first modern copyright law was born. In 1710, the English Parliament passed the Statute of Anne, which had the aim of reforming the established copyright dogma and of steering its purposes away from censorship and towards the principles of freedom of expression[5].

The same values sparked the French Revolution of 1789. Its outcome was the abolition of the medieval privileges, which, in turn, gave way for the adoption of the *Declaration of the rights of Man and of the Citizen*[6]. This consecrated both the right to property and the right to freedom of speech as fundamental human rights[7]. Among the abolished privileges was the perpetual privilege granted to publishers in 1686 for the protection of their investments. Consequently, the first French laws on copyright were adopted in 1791 and 1793[8].

It is important to point out here, before discussing the two concepts and in view of the aims of this paper, that, even though it was conceived as an instrument for the preservation of property[9], the copyright system was designed with a special attention to the values protected by the right to free speech –which the lawmakers considered to be one of the most precious

[1] Samuelson, Pamela. "Copyright and Freedom of Expression in Historical Perspective." *J. Intell. Prop* . 10. (2002-2003): 323. Print.
[2] *Id., p.* 323
[3] *Id., p.*324
[4] they called for the recognition of an author's intellectual property right in order to guarantee the fruits of their labor, with the higher aim of ensuring cultural and social development; at the same time they only considered property legitimate if it serves the public interest; *See e.g.* Geiger, Christophe. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law*. 12.3 (2009-2010): 538. Print.
[5] *Id. 3*
[6] *Déclaration des droits de l'homme et du citoyen de 1789*
[7] Art. 17 and Art. 11 of the *Declaration*
[8] *Loi Le Chapelier*, 13-19 January 1791 and *Loi Lekanal,* 19-24 July 1793; *see.* Ginsburg, Jane C. "French Copyright Law: A Comparative Overview." *Journal, Copyright Society of the U.S.A.*. 36. (1988): 270. Print.
[9] Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 236. Print.

rights of man[10]. [11]

As it was noted in the literature, the first copyright laws conceived a wise balance between property and freedom; the former, in the individualist approach of the age, being considered the means of ensuring the latter, with the overall aim of ensuring the common good – a dose of property to enable the author to live from his works, a dose of freedom to allow creators to build on what exists in order to create something new[12].

2.2 Concepts

2.2.1 Copyright

Although the need for a modern copyright system arose both in France and in England out of similar considerations, the concept has evolved differently under the two different legal philosophies[13]. Although the justifications of Intellectual Property are outside the scope of this paper[14], in the absence of an exact definition of copyright[15], a brief overview is needed in order to be able to delineate the concept.

Jeremy Bentham, one of the theorists of the common law system, identified the will of the legislator as the source of authority of the law[16]. As a consequence of this characteristic, laws in the common law system find their justification on their utility and copyright law makes no exception. In the utilitarian doctrine, the purpose of copyright law is to provide incentives for creators, whom in turn bring their contribution to social development.

Unlike the common law system, French copyright law is based on the natural law doctrine. In the naturalist view, authors' rights are not created by law, but always existed in the legal consciousness of man[17]. Basically, the *droit d'auteur* doctrine sees copyright as an essentially unrestricted natural right reflecting the sacred bond between the author and his personal creation[18].

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[10] Art. 11. *La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi.*

[11] However, it was argued that even when Diderot wrote his vibrant pleadings for the recognition of the natural right of the author in his works, he was acting on behalf of the booksellers, to whom rights were systematically transferred without any guarantee for the author to receive a fair remuneration for his work; *see* Geiger, Christophe. "The Extension of the Term of Copyright and Certain Neighbouring Rights - A Never-Ending Story?." *IIC - international review of intellectual property and competition law* . 40.1 (2009): 78-82. Print.

[12] Geiger, Christophe. "Copyright and the Freedom to Create - A Fragile Balance." *IIC - international review of intellectual property and competition law*. 38.6 (2007): 707. Print.

[13] *See:* Golding, Martin P., and William A. Edmundson, eds. *The Blackwell guide to the philosophy of law and legal theory*. Vol. 18. Oxford: Wiley-Blackwell, 2008. Print.

[14] A discussion on the justifications of copyright in both doctrines can be found here [13]

[15] Dusollier, Severine . "Pruning the European Intellectual Property Tree - In Search of Common Principles and Roots." *Constructing European Intellectual Property: Achievements and New Perspectives*. London: Edward Elgar Publishing, 2012. 11. Print.

[16] *Id. 13, p.* 288.

[17] Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age*. Oxford: Ozford University Press, 2000. 2. Print.

[18] *Id., p.* 2

Even though utilitarian justifications are frequently deployed in today's European copyright[19], it should be noted that continental European copyright has developed mainly on personality-based justifications, as the French copyright laws were the major source of inspiration for all other civil law jurisdictions and for the Berne Convention of Literary and Artistic Works of 1886[20] .

The Berne Convention doesn't contain an explicit definition of copyright. In exchange, the concept of copyright is delineated in terms of the exclusive rights granted to the authors of qualifying works. Through its Articles 8, 9 and 12, the Convention confers authors an exclusive right to authorise the reproduction of their work in any manner and form, and to authorise the translation of their works throughout the term of protection of their rights in the original works[21].

Independent from the "economic" rights, the Convention provides that the author of literary and artistic work has certain "moral rights", namely the right to claim authorship of the works and to object to any distortion, mutilation, modification or other derogatory action in relation to their works which would bring prejudice to the author's honour or reputation[22]. Furthermore, the Convention provides that such moral rights can be enforced after the death of the author by those responsible for the enforcement of copyright protection[23], which means that the safeguarding of such rights is left to the legislation of the contracting states[24].

The Convention also provides that, in respect of original works of art and manuscripts of writers and composers, the creator shall enjoy the inalienable right to an "interest" (pecuniary and not moral) in any resale of the work subsequent to the first transfer by the creator[25].

In view of the balance between copyright and freedom of expression, the most important provision of the Convention is that enshrined in Article 9(2). According to it, contracting states may permit certain exceptions to the exclusive right of reproduction conferred on the author, but they may only do so subject to what has become known as the "three-step" test. Under the test, exceptions to liability for copyright infringement are permissible as long as they are confined to certain special cases; they do not conflict with a normal exploitation of the work; and they do not unreasonably prejudice the legitimate interest of the author.

These provisions of the Berne Convention are what lay at the core of the rights of reproduction, making available to the public and distribution granted under copyright protection today, as well as to their exceptions[26].

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[19] *See e.g.:* Recital 2 of the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs

[20] Ginsburg, Jane C. "French Copyright Law: A Comparative Overview." *Journal, Copyright Society of the U.S.A.*. 36. (1988): 269. Print.

[21] Tritton, Guy, et al. *Intellectual Property in Europe*. 3rd ed. London: Sweet & Maxwell, 2008. 473. Print.

[22] Art. 6*bis*(1) Berne Convention

[23] Art. 6*bis*(2) Berne Convention

[24] *Id. 21, p.* 474

[25] *Id., p. 475*

[26] *See:* Geiger, Christophe. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law*. 12.3 (2009-2010): 515-548. Print.

2.2.2 Freedom of expression

Following the *Declaration of the rights of Man and of the Citizen,* a right to enjoy freedom of expression and information has been embodied in various international treaties and instruments. From a European perspective, Article 10 of the European Convention on Human Rights is, by far, the most relevant. The freedom of expression and information protected under Article 10 ECHR consists of the right to foster opinions, as well as to impart, distribute and receive information without government interference in all Member States that belong to the Council of Europe[27]. Even though the European Convention on Human Rights was not formally a body of European Union law, it was generally accepted that EU legislation and measures need to comply with the fundamental rights embodied in the Convention[28]. However, an explicit recognition of the binding character of the ECHR was embodied in Article 6 of the Treaty on the European Union[29] and was reiterated in the Treaty of Lisbon[30], the only difference being that the latter recognizes the principles laid down in the Charter of Fundamental Rights of the European Union of 7 December 2000 as general principles of Community law[31]. As a result, the provisions of the ECHR or of the Charter may be invoked directly before the courts of the Member States, subject to review by the European Court of Human Rights[32].

Article 10 ECHR is intended to be interpreted broadly. It is phrased in media-neutral terms, applying to old and new media alike. The term "information" includes, at the very least, the communication of facts, news, knowledge and scientific information[33]. Whether or not, and to what extent, the protection conferred by Article 10 extends to commercial speech, has, in fact, been the subject of a number of decisions of the ECtHR[34].

The second paragraph of Article 10 ECHR provides that the exercise of the freedom of expression and information may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the rights of others. Some legal authors have interpreted the idiom "rights of others" as referring only to the fundamental rights recognized by the Convention itself. The argument for this interpretation is that, if human rights and freedoms could be overridden by any random subjective right, the meaning of the convention would be diluted[35]. However, doctrine and case law have never accepted this view. Instead, the "rights of others" have been held to

[27] Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age*. Oxford: Oxford University Press, 2000. 5. Print.
[28] The enforcement of the European Convention on Human Rights by the European Court of Justice began with the Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 419
[29] "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, *as general principles of Community law*"
[30] "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." + an sau sursa, ceva
[31] For a more detailed discussion *see:* Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 235. Print.
[32] *Id. 27*
[33] *Id.*
[34] *See e.g*. Case Mouvement Raelien Suisse v. Switzerland, EctHR, 13 July 2012; and Case of Hertel v. Switzerland, ECtHR, 25 August 1998.
[35] *Id. 27*

include a wide range of subjective rights and interests, certainly including the rights protected under copyright.[36]

As it follows, rather then an absolute prohibition to regulate speech, copyright constitutes a presumption against state interference[37].

Freedom of speech is usually justified on three different grounds.

The first argument is based on the epistemic value of expression. This is the traditional argument of John Stuart Mills that free speech allows for a free market of ideas most conducive to truth. The second argument is based on the function freedom of expression plays in a democratic society. Free speech allows for the expansion of diverse political opinions and the good functioning of democracy. The last argument for freedom of expression is rooted in its intrinsic value as a fundamental human right. Freedom of expression is valued because it shows respect for the reasoning powers of each individual[38].

2.3 The nature of the relationship between the two

As discussed above, the copyright system of the pre-modern era played an important role in the dissemination of works. However, it was by no means an instrument for promoting free speech, but rather the opposite[39].

Modern copyright[40], on the other hand, conceived under the influence of Enlightenment values, came out as the result of reconciliation between diverging interests. Access to information and copyright fully converged regarding both the rationale and the principles involved.

The principle of striking a balance between the different interests involved is reflected in the very essence of copyright. In principle, copyright does not prevent access to information. The exclusive right is in fact subject to a number of limitations, the main or subsidiary aim of which is to ensure free access to information[41].

The rationale of these limitations is that, next to the goal of providing incentives to would-be creators, copyright has the additional objective of disseminating intellectual works[42]. The most important limitation considering the latter aim is the one imposed by the pre-determined term

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[36] *Id.*

[37] Couto, Alexandra. "Copyright and Freedom of Expression: a Philosophical Map". In A. Gosseries, A. Marciano & A. Strowel (eds.), *Intellectual Property and Theories of Justice*. Palgrave , 2008. 163. Print.

[38] *Id., p 16*4

[39] Samuelson, Pamela. "Copyright and Freedom of Expression in Historical Perspective." *J. Intell. Prop* . 10. (2002-2003): 324. Print.

[40] The copyright system that followed the passing of the Statute of Anne in 1710

[41] *See* Geiger, Christophe. "The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information." *Intellectual Property Quarterly*. 14.1 (2010): 5. Print.; Hugenholtz, P. Bernt. "Fierce Creatures. Copyright Exemptions: Towards Extinction?." *discours, IFLA/Imprimatur Conference,"Rights, Limitations and Exceptions: Striking a Proper Balance", Amsterdam*. 1997. 3. Print.; Geiger, Christophe. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law*. 12.3 (2009-2010): 524. Print.

[42] Additional in the naturalist view; from a utilitarian perspective innovation is the superior objective of the copyright system. *See* Geiger, Christophe. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law*. 12.3 (2009-2010): 525. Print.

of protection. The fulfillment of the term has the effect of releasing the work from the publisher's control into the public domain and therefore of facilitating access to it[43].

Another important limitation of copyright protection lays in the idea/expression dichotomy[44]. Similarly, its rationale is to ensure future creativity, by allowing subsequent creators to build on existing works.

Thirdly, there are the statutory exemptions from copyright protection. One of the most influential European copyright theorists held, regarding statutory exemptions, that they are "*par excellence*, tools for fine tuning the rights protected under copyright" [45].

The exceptions mentioned above are the main reason for which a conflict between copyright and freedom of expression has been dismissed throughout most of the existence of modern copyright. The arguments were that copyright does not monopolize ideas, that copyright does not limit the use of "information" and that copyright and freedom of expression are consistent because they both promote free speech. The overarching argument was that copyright, as codified, already reflects a balance between free speech and property rights. In other words, the conflict between the two rights had been "internalized", and presumably solved, within the framework of copyright laws[46].

Another explanation for the late development of European interest in the potential copyright/free speech conflict resides in the natural law mystique that traditionally has surrounded copyright on the European continent[47].

A third explanation was found in the reluctance on the part of European national courts and scholars to apply fundamental rights and freedoms in so-called "horizontal" relationships, more specifically, in conflicts between citizens[48].

However, it has been stressed in literature that whereas copyright grants owners a limited monopoly with respect to the communication of their works, freedom of expression and information, as guaranteed under Article 10 ECHR, warrants the "freedom to hold opinions and to receive and impart information and ideas". Consequently, if one holds the assumption that every copyrighted work consists, at least in part, of "information and ideas", then a potential conflict between copyright and freedom of expression becomes apparent[49].

Since the last decade of the 20th century, the advent of digital technology and the establishment of a networked environment, such as the Internet, have had an immense impact on the patterns of production, modification, dissemination and consumption of creative works. The copyright enforcement effort that followed eroded to some extent the exceptions and limitations on copyright protection, thus turning the conflict between copyright and freedom

[43] Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 235. Print.
[44] *See* Article 2 of the WIPO Copyright Treaty or Article 9(2) of the TRIPS Agreement; the "idea/expression" idiom is the common law terminology for the principle of freedom of ideas
[45] Hugenholtz, P. Bernt. "Fierce Creatures. Copyright Exemptions: Towards Extinction?." *discours, IFLA/Imprimatur Conference,"Rights, Limitations and Exceptions: Striking a Proper Balance", Amsterdam*. 1997. 4. Print.
[46] Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age*. Oxford: Oxford University Press, 2000. 6. Print.
[47] *Id., p.* 2-8
[48] *See Id. 46*
[49] *Id. 46, p.* 1

of expression less potential and more actual[50].

However, in order to discuss the current state of the balance between copyright and freedom of expression, we first need to make a short review of the evolution of European copyright after the Berne Convention, in view of the International Treaties that were adopted, the case-law of the European Court of Justice and the European Court of Human Rights and the Directives that constitute the current framework of European copyright. Afterwards, we will discuss why and whether the right to freedom of expression and information has the potential to play an important role in the enforcement of copyright, in light of the current doctrinal debate and of the recent case law of the European Court of Human Rights.

Chapter 3: Evolution of European copyright and its impact on the relationship with the right to freedom of expression

3.1 Legislative evolution

As a consequence of the Industrial Revolution, the major powers concluded, during the nineteenth century, a large number of bilateral agreements with each other and with third countries for the protection of copyright of artistic and literary works of their nationals in those other countries. This led to undue complexity and uneven protection. As a response to this situation the Berne Convention of Literary and Artistic Works of 1886 was adopted and ratified in the following year[51]. The fundamental principle of the Berne Convention was that contracting states would not discriminate between domestic authors and authors of other contracting states in respect of the level of protection they conferred on qualifying literary and artistic works[52]. Other principles which had the objective of reaching a minimum level of harmonization between the laws of the Contracting Parties were introduced during its revisions[53]. It is important note that the Convention was focused on setting minimum standards of protection.

Among the most important provisions of the Berne Convention are the ones concerning the object of copyright protection, the principle of national treatment, the term of protection and the rights granted to authors. The general term of protection granted by the Article 7 of Berne Convention was the life of the author and fifty years after his death (paragraph 1). In other situations, such as the case of cinematographic works, anonymous or pseudonymous works, the term of protection granted by the Convention expired fifty years after the work has been lawfully made available to the public, or after the making (paragraphs 2 and 3). The Contracting Parties were nevertheless entitled to grant through their national law a term of protection in excess of those provided by the Convention (paragraph 5)[54].

However, as already mentioned, key to the purposes of this paper is the provision regarding the exceptions to copyright protection. First of all, paragraph (2) of Article 9 of the Convention, provides that contracting states may permit certain exceptions to the exclusive

[50] *Id. 43, p.* 236.
[51] Tritton, Guy, et al. *Intellectual property in Europe*. 3rd ed. London: Sweet & Maxwell, 2008. 469. Print.
[52] The principle of "national treatment"
[53] *Id. 51, p.* 469
[54] *Id., p.* 473

right of reproduction conferred to the author, as long as they are confined to certain special cases, they do not conflict with the normal exploitation of the work and they do not unreasonably prejudice the legitimate interest of the author. Secondly, Article 10 of the Convention provides exceptions for the making of quotations for newspaper articles and press summaries and for teaching purposes, while Article 10bis permits contracting states to allow the reproduction, the broadcasting or the communication to the public of literary and artistic works as long as they relate to the current economic, political or religious topics. These provisions were aimed at maintaining a balance between the individual interest protected by copyright and the interests of others.

The advent of sound recording, cinematographic and broadcasting technology during the last century changed the consumption pattern of copyright protected works. As a reaction the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 and the Phonograms Convention of 1971 were adopted, both embodying the principle of national treatment and providing for limited harmonizing measures[55].

Another wave of technological developments, namely in technologies facilitating private copying, prompted the commencement, in 1986, of negotiations concerning international trade-related aspects of intellectual property rights in the frame of the General Agreement on Tariffs and Trade (GATT). In 1994, the Uruguay Round of negotiations concluded with the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, which contained a number of agreements among which the World Trade Organization Agreement (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The TRIPS Agreement covers many areas of intellectual property, including copyright and the related rights. Under the copyright provisions, the Agreement requires the members of WTO to comply with Articles 1 to 21 of the Berne Convention and the Appendix thereto, with the exception of the provisions regarding moral rights[56].

The aim of the TRIPS Agreement was to set basic standards which WTO Member States are required to implement into their domestic law, according to their own legal systems. The Agreement preserves the "national treatment" principle of the Berne Convention and it introduces the "most-favored-nation treatment", under which, subject to certain exceptions, any advantage, favor, privilege or immunity granted to one Member State to any other country must be granted to all other WTO Member States[57]. The idea/expression dichotomy is also introduced by the TRIPS Agreement at the international level, by means of its Article 9(2)[58].

Through the first paragraph of Article 10, the Agreement expands the scope of copyright protection by providing for the protection of computer programs as literary works within the meaning of the Berne Convention. Paragraph (2) of the same article provides protection for compilations of data or other material which "by reason of the arrangement of their contents constitute intellectual creations".

The TRIPS Agreement marks an inflexion point from the minimum standards set by the Berne

[55] *Id., p.* 478
[56] Art 9 TRIPS Agreement
[57] Art 4 TRIPS Agreement
[58] Art. 9(2) TRIPS Agreement:"copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"

Convention towards the strengthening of copyright protection by providing detailed standards concerning civil procedure and remedies, amongst the most notable being the ones regarding injunctions and obtaining information concerning the identities of third party infringers[59].

The most important provision for the aims of this paper is, however, the one regarding the limitations and exceptions to the rights conferred under the TRIPS Agreement[60]. Although signatory states are required to satisfy the three-step test of the Berne Convention when introducing limitations and exceptions to copyright protection, the text of the TRIPS Agreement changes the wording of the second step from "distribution" to "exploitation" and of the third step from "author" to "right-holder", considerably increasing the level of protection awarded under copyright.

Nevertheless, the international agreements that had the strongest impact on the initial balance between copyright and freedom of expression were the World Intellectual Property Organization (WIPO) Treaties of 1996.

As the Internet use became more widespread, right-holders started to realize its potential as a means of copying and disseminating copyright works. Under the pressure of the concerned industries[61], two new international treaties were adopted by the World Intellectual Property Organization – the Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT).

In large, the WCT follows closely the provisions of the TRIPS Agreement. It contains similar provisions regarding the idea/expression dichotomy[62], the protection of computer programs as literary works within Article 2 of the Berne Convention[63] and the protection of compilations of data[64]. Article 10 of the WCT contains the requirements of the three-step test of Article 9(2) of the Berne Convention and of Article 13 TRIPS[65].

However, there are important extensions to the rights set out in TRIPS. First of all, there is the distribution right which is defined as an exclusive right given to authors of literary and artistic works to authorize the making available to the public of the original copies of their works as tangible objects. Secondly, the agreement introduces a rental right covering computer programs, films and works embodied in sound recordings[66].

Even so, there are other provisions of the WIPO Copyright Treaty that had an even greater impact on the balance between copyright and freedom of expression.

First of all, through its Article 8, the Treaty introduces a right of "communication to the public", which is defined widely as the right of authorizing any communication to the public of works, by wire or wireless means, including the making available to the public of works in such a way that members of the public may access these works from a place and at a time

[59] Arts 41-62 TRIPS Agreement
[60] Art 13 TRIPS Agreement
[61] *See* Geiger, Christophe. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law*. 12.3 (2009-2010): 515-548. Print.
[62] Art. 2 WIPO Copyright Treaty
[63] Art. 4 WIPO Copyright Treaty
[64] Art. 5 WIPO Copyright Treaty
[65] Although it only preserves the language of TRIPS concerning "exploitation" , not also "right-holders"
[66] Art 7 WIPO Copyright Treaty

individually chosen by them[67]. In relation to this the relevant Agreed Statement implies that there is a limitation of liability in favor internet service providers who merely engage in the "provision of physical facilities for enabling or making a communication"[68].

Secondly, the Treaty introduces an obligation for the Contracting Parties to provide in their national legislation against the "circumvention of effective technical measures" that restrict unauthorized acts in relation to the protected works[69]. This aspect is highly relevant to our discussion and will be stressed in the following chapter.

Thirdly, contracting states must provide remedies against those who remove or alter any "electronic rights management information" without authority, or who distribute, broadcast or communicate to the public such altered works[70].

The WIPO Performances and Phonograms Treaty also proves a departure from the provisions of the Rome Convention towards a stricter copyright protection. For instance, whereas the Rome Convention provides, with regard to economic rights, for the possibility of performers to prevent fixations of their performances[71], the WIPO Performances and Phonograms Treaty awards performers "the exclusive right of authorizing" the broadcast, fixation, reproduction, distribution, rental and making available of their acts[72].

In spite of the international agreements and of the efforts of European Court of Justice towards harmonizing copyright within the Community, at the end of the 1980s there were still major differences among the laws of the European Member States in the field of copyright and related rights protection[73]. Differences concerned, amongst others, the scope of exclusive rights, the proprietors of the exclusive rights, the term of protection and the remedies available against infringement.

As these differences ran counter to the establishment of the Internal Market[74] and facing the threat posed by the "new dissemination and reproduction techniques" [75], to the industries based on intellectual creation, in 1988 the Commission released the Green Paper on Copyright and the Challenge of Technology[76].

The document addressed four main concerns. First of all, it aimed at eliminating the obstacles and divergences of approach in copyright laws at a national level in order to meet the requirement of a single internal market. The Commission's second aim was to improve the competitiveness of its economy in relation to its global trade partners. The third aim was to prevent outsiders from misappropriating intellectual property resulting from the creative effort or substantial investment from within the Community. Finally, the Commission noted that in

[67] Tritton, Guy, et al. *Intellectual property in Europe*. 3rd ed. London: Sweet & Maxwell, 2008. 484. Print.
[68] Agreed Statement on Article 8, http://www.wipo.int/treaties/en/ip/wct/statements.html
[69] *Id. 67*
[70] Art 12(2) WIPO Copyright Treaty
[71] Art 7 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
[72] Art 6-10 WIPO Performances and Phonograms Treaty
[73] Luder, Tilman. "The Next Ten Years in EU Copyright: Making Markets Work." *Fordham Intell. Prop. Media & Ent. LJ* . 18.1 (2007-2008): 3. Print.
[74] *Id., p.* 4
[75] Chapter 1, point 1.4 of the Green Paper on Copyright and the Challenge of Technology
[76] Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action COM (88) 172 final.

some areas, notably industrial design and computer software copyright protection could have a restrictive, rather than an enhancing, effect on competition[77]. However, the Green Paper also stated that Community legislation should be restricted to that which was necessary for the proper functioning of the Community[78].

Therefore, the Green Paper proposed the issuing of various directives on copyright under former Article 100a of the EC Treaty, which allowed for action to be taken in relation to matters that directly affect the functioning of the internal market[79].

As a result, several Directives harmonizing the substantive law governing copyright at the community level were adopted.

The first one was the Computer Programs Directive[80], adopted in 1991[81]. The Directive granted protection to computer programs as literary works within the meaning of the Berne Convention and made a step towards harmonizing the standard of originality within the Community, by setting it to the "own intellectual creation of the author". Although the Computer Programs Directive also contained provisions regarding exceptions to copyright protection[82],they were mainly concerned with striking the balance between copyright protection and fair competition[83], which is outside the scope of this paper and will not be addressed here.

In 1992, the Rental and Lending Directive[84] was adopted, with the aim of preventing losses in the income of right-holders in front of the increased threat of copyright piracy[85]. Whereas the first Chapter of the Directive confers rental and lending rights upon authors of works, as well as upon performers and producers of phonograms and films, the second Chapter goes well beyond rental and lending rights to confer a whole range of new rights, such as the rights to fixation, broadcasting and communication to the public that were granted to performers, or the distribution right that was granted not only to the artists but also to phonogram producers and broadcasting organizations[86].

Next, the Council adopted the Satellite and Cable Directive[87], which, beyond establishing the relevant law regarding the act of communication to the public[88], required member states to provide an exclusive right for the author to authorize satellite transmission[89].

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[77] Tritton, Guy, et al. *Intellectual property in Europe*. 3rd ed. London: Sweet & Maxwell, 2008. 487. Print.
[78] Chapter 1 , point 1.4.9 of the Green Paper on Copyright and the Challenge of Technology
[79] Presently, Article 95 of the Consolidated version of the Treaty on European Union
[80] Directive 91/250/EEC of 14 May 1991 of the European Parliament and of the Council on the legal protection of computer programs
[81] And amended by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
[82] Art. 5 and 6 of the Computer Programs Directive
[83] Tritton, Guy, et al. *Intellectual property in Europe*. 3rd ed. London: Sweet & Maxwell, 2008. 490. Print.
[84] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property
[85] *See:* Recitals 4, 5 and 7 of the Rental and Landing Directive; Case C-200/96 Metronome Musik v Musik Point Hokamp [1998] E.C.R. I-1953
[86] Articles 7, 8 and 9 of the Rental and Lending Directive.
[87] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
[88] Art. 1(2)b of the Satellite Directive
[89] Art. 2 of the Satelite Directive

Soon after, the Term Directive[90] was adopted, extending the term of protection of 50 years *post mortem auctoris* laid down by the Berne Convention to a uniform standard of 70 years. The Directive also provided for a 50 year term of protection for the related rights[91]. Although in order to achieve harmonization the term could have been lowered, following the Commission's Green Paper line of thought[92], the Term Directive recognized the need to harmonize copyright and related rights at a high level of protection, as such rights were considered fundamental to intellectual creation[93].

In 1996, the Database Directive[94] was adopted. By providing a very wide definition of the concept of "database"[95] the Directive aimed to cover a very wide subject matter[96].In relation to this subject matter, the Directive provided a two-tiered system of protection. First, there is a possibility of ordinary copyright protection for the author of the database, over that aspect of the database that is the result of personal intellectual creativity in the selection and arrangement of content[97]. Secondly, a *sui generis* "database right" was provided for the maker of a database, under the condition that there has been a substantial investment in obtaining, verifying or presenting the material[98].

The Information Society Directive[99] was adopted in 2001 in order to adapt European copyright to the requirements of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Although there are a great number of provisions that can be discussed in view of the expansion of copyright protection to the detriment of freedom of expression[100], the most important ones will be mentioned here and discussed in the following chapter.

As previously noted, limitations and exceptions are the core of the relationship between copyright and freedom of expression. They are inherent to the exclusive rights and define their content and scope in a negative way[101]. Moreover, as it was pointed out in the literature, it is intellectual property rights that are themselves exceptions to a principle of freedom, either freedom of enterprise and competition, either freedom of expression[102].

In this respect, Article 5(2) of the Directive introduces an exhaustive list of limitations to

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[90] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, amended by Directive 2006/116/EC

[91] Art. 3 of the Term Directive

[92] Commission of the European Communities. *Working programme of the Commission on the field of copyright and neighbouring rights. Follo-up to the Green Paper* COM (90) 584

[93] Recital 10 of the Term Directive: "their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole"; *See also* Recital 24 of the Satellite Directive and Recitals 4 and 9 of the Information Society Directive

[94] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

[95] Art. 1(2) of the Database Directive

[96] Recital 17 of the Database Directive

[97] Art. 3 of the Database Directive

[98] Art. 7 of the Database Directive

[99] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

[100] *For example:* Article 5(1) of the Directive introduces a new, broadly defined reproduction right; Article 3(2) introduces the right to "make available";

[101] Geiger, Christophe, Franck Macrez, Adrien Bouvel, Stephanie Carre, Theo Hassler, and Joanna Schmidt-Szalewski. "What Limitations to Copyright in the Information Society? A Comment on the European Commission's Green Paper" Copyright in the Knowledge Economy"." *IIC - international review of intellectual property and competition law*. 40.4 (2009): 414. Print.

[102] *Id.*

copyright protection that Member States can introduce in their national legislation[103]. As some of these exceptions incorporate the right of access to information into copyright legislations[104], the literature argued that this provision is strengthening the rights of the exploiters of works without sufficiently reflecting the interests of their creators and those of the community[105].

Article 5(5) introduces the "three-step" test at the European level[106]. It is particularly important to note that, contrary to international conventions in which the test can be found, the test in the Directive has a broader scope since it is addressed not only to the national legislature but also to the court case judge who is required to examine the implementation of an exception in specific cases[107]. This provision seems to signal a definitive departure from the first copyright laws, which aimed to internalize the conflict between copyright and free speech within the boundaries of the copyright framework[108].

However, the most obviously detrimental provision of the Information Society Directive to the balance between information freedoms and copyright is the one contained in Article 6, regarding the circumvention of technical protection measures[109]. This article has been extensively discussed in the literature[110]. One important observation, in view of our topic, was that "certain exceptions, already considerably reduced, are threatened with extinction in the digital environment, since the technical means for protecting works threaten uses that are nevertheless authorized by the law"[111]. Another is that, in spite of the attempt of Article 6(4) to

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[103] This feature of the Directive was criticized for blocking a fundamental aspect of the cultural policy of the Member States, since Article 151 of the Treaty provides, on the one hand, that the Community is forbid from taking harmonization measures in the area of cultural laws and policies, while on the other, that cultural aspects are to be taken into account when legislating under other provisions of the Treaty. *See:* Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 17-383. Print.

[104] Most notably, the exceptions for teaching and scientific research; for reporting of current economical, political or religious topics; for criticism or review of published works; for the reporting of administrative, parliamentary or judicial proceedings and for use of political speeches and public lectures. The exception for private copying can also be regarded as protecting access to information, as long as this access is not covered by one of the exceptions mentioned above; *See:* Geiger, Christophe. "The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information." *Intellectual Property Quarterly*. 14.1 (2010): 8. Print.

[105] *Id.*

[106] The wording of the provision maintains the language of Article 13 TRIPS Agreement: The exceptions and limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder

[107] *See:* Geiger, Christophe. "The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment." *IIC - international review of intellectual property and competition law*. 37.1 (2006): 5. Print. ; for a different view *see:* Geiger, Christophe. "The Three-Step Test, a Threat to a Balanced Copyright Law?." *IIC - international review of intellectual property and competition law*. 37.6 (2006): 686. *Footnote 22.* Print.

[108] For a discussion on the possible side-effects of this decision of the legislator *see:* can Geiger, Christophe. "The Three-Step Test, a Threat to a Balanced Copyright Law?." *IIC - international review of intellectual property and competition law*. 37.6 (2006): 683-699. Print.

[109] Article 6 implements the provisions of Article 11 of the WCT and Article 18 of the WPPT, although it sets a higher standard by restricting not just the actual acts of circumvention but also secondary acts; this provision was also contested in the literature as overstretching the legal basis of Article 95 of the Lisbon Treaty; *see* Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 117. Print.

[110] *See e.g.:* Tritton, Guy, et al. *Intellectual property in Europe*. 3rd ed. London: Sweet & Maxwell, 2008. 531. Print.; Dusollier, Severine. "The role of the lawmaker and of the judge in the conflict between copyright exceptions, freedom of expression and technological measures" In ALAI (ed.), *Copyright and Freedom of Expression*. Barcelona: Huygens Editorial, 2008. 569-578.; Geiger, Christophe. "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law." *Vanderbilt J. of Ent. and Tech. Law*. 12.3 (2009-2010): 515-548. Print.; Mazziotti, Giuseppe., *Id.* above.

[111] Geiger, Christophe. "Copyright and the Freedom to Create - A Fragile Balance." *IIC - international review of intellectual property and competition law*. 38.6 (2007): 707. Print.

rectify the potential difficulty for exceptions to operate where the right-holder has in place a technical protection measure, the vast majority of defenses can be rendered ineffective by copy protection technology, since most of them are not mentioned in the text of paragraph (4)[112]. Finally, it was argued that technical protection measures act as a prior restraint and even that the anti-circumvention provisions impede the application of the "three-step" test[113].

Finally, in 2004, the Intellectual Property Rights Enforcement Directive was adopted[114]. The Directive's aim was to provide all jurisdictions with effective and harmonized enforcement measures against infringements of intellectual property rights. Even though the Directive raised more concerns in perspective of the right to privacy[115], it did, nevertheless, create an additional stress in the relationship between copyright and information freedoms, as it has strongly encouraged and facilitated purposes of effective enforcement targeted at individuals[116]; after having identified the infringers, right-holders are given broad and prompt access to civil proceedings which grant interlocutory measures intended to prevent any imminent infringement or continuation of infringements and other measures such as the seizure of goods suspected of infringing copyright.

To conclude this review, we will note the shift from the initial paradigm of copyright protection. As it was pointed out, while the exclusive rights have undergone a continuous expansion, the limits continue to be frequently enclosed within very narrow borders as a result of the principle of the restrictive interpretation of copyright exceptions[117]. Another detrimental effect of the harmonization process for the internal balance between diverging interests inherent to the copyright system is the decline of the public domain, which is at odds with one of the aims of copyright legislation, namely ensuring future creativity[118].

3.2 The relationship between copyright and freedom of expression in European case-law

As noted before, there are several reasons for the late development of a European interest in the conflict between copyright and freedom of expression.

One of them is that, in most European continental countries, copyright protection was not expressly recognized by their Constitutions as a human right; rather, the source of copyright protection was found implicit in constitutional provisions that guarantee private property, rights of privacy, personality rights or artistic freedoms[119].

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[112] Tritton, Guy., *Id. 110, p.* 539
[113] Dusollier, Severine, *Id. 110*
[114] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
[115] Art. 8 ECHR ; *See :* Mazziotti, Giuseppe., *Id., p.* 248
[116] Article 9 Intellectual Property Rights Enforcement Directive
[117] Geiger, Christophe. "Copyright and the Freedom to Create - A Fragile Balance." *IIC - international review of intellectual property and competition law*. 38.6 (2007): 707. Print.
[118] *Id.*
[119] Hugenholtz, P. Bernt. "Copyright and Freedom of Expression in Europe." In R. C. Dreyfuss, H. First & D. L. Zimmerman (eds.), *Innovation Policy in and Information Age*. Oxford: Oxford University Press, 2000. 2-4 . Print.

Another reason is that since the beginning of modern copyright the conflict between the two has been perceived as internalized and solved within the framework of copyright laws[120]. The limitations to copyright protection have been put in place specifically for the purpose of alleviating the traditional tension between the fundamental rights of property and freedom.

Furthermore, due to the fact that the right to freedom of expression was mainly seen as a safeguard against state interference, national courts across Europe have always shown a certain reluctance to apply fundamental rights and freedoms in conflicts between citizens[121].

Moreover, as a consequence of the natural law doctrine European copyright law is based on, in most national legislations limitations to copyright protection tend to be rigorously defined and narrowly interpreted. This, together with the fact that copyright limitations in various European law are generally considered to be exhaustive, have lead courts to avoid implying exceptions or even applying exiting exceptions to new situations by analogy[122].

However, beginning with the 1960s, German courts have decided on a number of copyright cases in which free speech limitations have been recognized.

The first case regarded an unauthorized re-broadcasting by a West German television of parts of a news item produced in the German Democratic Republic. The court allowed it, on the grounds that the freedom of expression guaranteed by Article 5 of the Federal Constitution provided an extra-statutory justification[123].

In a later case[124], another German court held that publication in the context of a critical analysis doesn't infringe the author's rights, even though the requirements of the statutory quotation right were not met. The court added that copyright law should be interpreted in the light of the right to free speech[125].

Eventually, in a decision from 1985 the German Supreme Court has recognized that "under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding statutory limitations may be taken into consideration"[126].

Dutch courts were also among the first to consider the application of Article 10 ECHR in copyright cases. In a case concerning the publication of a photograph by a newspaper[127], the Court found that under certain circumstances copyright may conflict with Article 10. Later, the same reasoning was adopted by the Dutch Supreme Court[128].

A notorious Dutch case[129] concerned the publication on the Internet of a number of court documents used previously in an American federal case[130], containing criticisms towards the

[120] *See*: *Lili Marleen* Case, German Federal Supreme Court, 7 March 1985, [1987] GRUR 34; and *Karikaturwiedergabe* Case*,* Austrian Supreme Court, 9 December 1997, [1998] GRUR Int. 896.
[121] *Id. 119*
[122] *Id., p.* 8
[123] *Id. 119, p.* 9
[124] *Bild Zeitung* Case, Berlin Court of Appeal, 26 November 1968, [1969] UFITA 296
[125] *Id. 119, p.* 10
[126] *Pelzversand* Case*,* German Federal Supreme Court 10 January 1968, [1968] GRUR 465
[127] *Boogschutter* Case*,* District Court of Amsterdam, 19 January 1994, [1994] Informatierecht/AMI 51
[128] *Dior v. Evora* Case*,* Dutch Supreme Court, 20 August 1995, [1996] Informatierecht/ AMI 51
[129] *Scientology vs. XS4ALL RB et al* Case, The Hague Court, 9 June 1999, [1999] Informatierecht/AMI august/september 1999, p. 113-115.
[130] *Church of Scientology International v. Fishman and Geertz* Case, U.S. District Court for the Central District

Church of Scientology. Following a raid on the servers of Dutch Internet provider XS4ALL, the Church sued the provider and a number of other parties, most notably a user that helped disseminate the documents, for copyright violations arising from the publication of excerpts from confidential materials. After a ten year long trial, the case eventually arrived in front of the Dutch Supreme Court which did not issue a judgment following the withdrawal of the principal action by the Church. However, the judgment of the lower court, which held that Article 10 of the ECHR prevails in front of the Dutch national legislation on copyright, became final.

French courts, in spite of their prolonged reluctance to apply free speech defenses in copyright cases[131], were the first to apply Article 10 of the ECHR directly. In the judgment issued in the case of Maurice Utrillo, the Paris Court of First Instance emphasized that Article 10 of the European Convention on Human Rights is superior to the national law, including the law of copyright, and concluded that, in light of Article 10, the right of the public to be informed of important cultural events should prevail over the interests of copyright owners[132]. However, the decision was eventually overruled by the French Supreme Court, which held that the argument based on the violation of Article 10 is "invalid"[133].

In a comparable manner, the Federal Court of Switzerland overruled the decision issued by the Supreme Court of the Canton of Zurich in a case regarding the limits of the quotation exception, holding that the balance between the property right and freedom of information had already been realized inside copyright[134].

To the contrary, the Austrian Supreme Court held, in a similar case, that the use of copyright with the sole objective of hindering criticism cannot justify any restriction to freedom of expression in a democratic society. Consequently, the Court found that the reproduction of sixteen newspaper articles on a website belonging to the person the articles were about was covered by freedom of expression under Article 10 of the ECHR[135].

However diverse outcomes they had, these decisions issued by national courts were welcomed by the literature; indeed, they opened the discussion on the adaptation of copyright limitations to the new social context prompted by the ever-increasing use of technology[136].

Nevertheless, throughout the same period of time, the European Commission, formerly the gateway to the European Court of Human Rights, has only been confronted with the problem on two occasions.

In a case concerning the Dutch public broadcasters' monopoly in radio and television program listings[137], the Commission concluded that "broadcaster's copyright did not restrict freedom of

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of California. 1993. Case No. CV 91-6426 HLH (Tx)

[131] *Id. 119, p.* 12

[132] Case 98/7053, Court of First Instance Paris, 23 February 1999, (unpublished)

[133] *Maurice Utrillo* Case, French Supreme Court, 1st Civil Chamber, 13 September 2003, [2004] 35 IIC 716

[134] Geiger, Christophe. ""Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union." *IIC - international review of intellectual property and competition law*. 37.4 (2006): 381. Print.

[135] *Medienprofessor* Case, Austrian Supreme Court 12 June 2001, [2002] GRUR Int. 341, 33 IIC 994

[136] Geiger, Christophe. ""Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union." *IIC - international review of intellectual property and competition law*. 37.4 (2006): 381. Print.

[137] *De Geillustreerde Pers N.V. v. The Netherlands* Case, European Commission of Human Rights, 6 July 1976, European Commission on Human Rights Decisions and Reports 1976 (Volume 8), 5.

expression and information in the first place, and thus, Article 10(2) was not at issue"[138].

A second decision of the European Commission involved potentially overbroad copyright claims[139]. A French visual arts collecting society demanded compensation for copyright infringement by a TV channel. The French Supreme Court decided in the case that the TV channel could not invoke the statutory right to quote briefly from copyrighted works for informational purposes. Before the European Commission, the applicant complained that the analysis above was at odds with Article 10 of the European Convention on Human Rights. Although the Commission acknowledged that, in principle, copyright is a restriction on the freedom of expression and information under Article 10, it found that copyright law was "prescribed by law", for the purpose of protecting the "rights of others''. As it followed, the Commission found that the principles of copyright and free expression were both satisfied by reducing the claim to a simple matter of paying royalties[140].

Nevertheless, the conflict between copyright and freedom of expression started to receive more attention, both at a national and at the European level, only after the adoption of the Information Society Directive.

The highly debated *Mulholland Drive* case[141] concerned the limitation through technical protection measures of the private copy exception. As the Infosoc Directive was not yet implemented by the French legislature, the law did not provide any solution for this conflict. Faced with this gap in the legislation, the judges in the first instance held that the beneficiary of the legal limitations did not enjoy a right of action and dismissed the user's petition[142].

Overruling the previous decision, the Paris Court of Appeal went further and noted that even though the user did not benefit from a "right to the private copy" since this was a legal exception to copyright, such an exception could only be limited under the conditions specified by the legislative texts[143]. The Court went on and analyzed the legitimacy of the exception under the three-step test provided by Article 5(5) of the Information Society Directive, and found that the conditions for a restriction to the exception were not satisfied in this specific case.

Nevertheless, by holding that the exception for the private copy cannot be "disabled" by technical protection measures, the Court recognized its imperative nature, thus making an important statement in the subject matter[144].

However, this second decision was later overruled by the French Supreme Court[145], which illustrated the tendency of most national courts in Europe to read the three-step test above through the prism of the exploitation of the work and from the point of view of the interests of the right holders, rather than a legal instrument that guarantees a fair balance between

[138] *Id., 119, p.* 12
[139] *France 2 v. France* Case*,* European Commission of Human Rights 15 January 1997, Case 30262/96, [1999] *Informatioerecht/AMI 115.*
[140] *Id., 119, p.* 13
[141] *Perequin and UFC Que Choisir v. SA Films Alain Sarde, Ste Universal Pictures video France et al.* Case*,* Paris District Court, 30 April 2004, [2005] 36 IIC 148
[142] Geiger, Christophe. "The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment." *IIC - international review of intellectual property and competition law*. 37.1 (2006): 74. Print.
[143] *Id., p.* 2
[144] *Id.*
[145] *DVD Copy III* Case, French Supreme Court, 1st Civil Division, 28 February 2006, [2006], *DVD Copy III,* 37 IIC 760

diverging interests[146].

A particularly innovatory approach on copyright limitations was put forward by the Swiss Supreme Court[147]. In its interpretation of the three-step test, the Swiss Supreme Court noted that the wording of the third step in the TRIPS Agreement departs from the original version provided by the Berne Convention, by replacing the word "author" with "right-holder". The Court then noted that, as the interests of the authors do not always coincide with those of the right-holders, the three-step test serves to protect the author's interests at least as much as those of the exploiters. Consequently, the Court concluded that the test must under no circumstances be interpreted solely in the light of the latter's interests[148].

Coming back to the European level, while the European Court of Human Rights has delivered in the past few years several judgments in which it asserted that the Internet has become one of the principal means of exercising the right to freedom of expression and information[149], the decision in the case of *Ashby v. France*[150] was the first decision of the ECtHR on the matters in a case concerning the enforcement of copyright on the Internet and Article 10 of the ECHR.

The case concerned the conviction for copyright infringement, by the Paris Court of appeal, of three fashion photographers, following the publication of pictures on an Internet web-site.
The pictures were taken by one of the applicants at a number of Paris fashion shows and published without the permission of the fashion houses. In the appeal to this decision, the French Supreme Court denied the applicants' claim, based on the exception for news reporting and information provided for in French copyright law.

However, the applicants went further and, in front of the European Court of Human Rights, they complained of a breach of their rights under Article 10 of the Convention.

In its judgment, the Court has emphasized a number of important aspects.

First of all, it explicitly recognized the applicability of Article 10 in the present case, hereby confirming its approach that while freedom of expression is subject to exceptions, they must be narrowly construed and convincingly established[151].

Secondly, based on its previous judgments, the Court stated that a wide margin of appreciation is to be given to the domestic authorities in this case, since the publication of such pictures was not related to an issue of general interest for society but was merely a form of "commercial speech"[152].

Thirdly, the Court reiterated that in cases that require striking a balance between two fundamental rights, such as the right to property provided by Article 1 of the First Protocol to

[146] Geiger, Christophe. "Rethinking Copyright Limitations in the Information Society - The Swiss Supreme Court Leads the Way." *IIC - international review of intellectual property and competition law*. 39.8 (2008): 943. Print.
[147] Swiss Federal Supreme Court, 1st Civil Division, 26 June 2007, [2007] GRUR Int. 1046, IIC 990
[148] *Id. 146, p.* 946
[149] *See* e.g. *Times Newspapers Ltd. v. United Kingdom,* ECtHR, 10 March 2009; *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, ECtHR, 5 May 2011; *Ahmet Yildirim v. Turkey,* ECtHR, 18 December 2012
[150] Case *Ashby Donald and Others v. France,* ECtHR, 10 January 2013
[151] (§ 34) and (§ 38) of the Decision
[152] (§ 39); *see* e.g. Case *Mouvement Raelien Suisse v. Switzerland*, ECtHR, 13 July 2012; and *Hertel v. Switzerland,* ECtHR, 25 August 1998

the Convention[153], and the right to freedom of expression and information enshrined in Article 10, the national authorities enjoy an even wider margin of appreciation[154].

According to the Courts case-law, where the balancing exercise between two Convention rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, it requires strong reasons for the Court to substitute its view for that of the domestic courts[155]. In the case of *Ashby Donald and others v. France*, the ECtHR found no reason to consider that the national authorities exceeded their margin of appreciation and consequently did not find the need to undertake itself the balancing exercise. Reiterating the decision of the Paris Court of Appeal, the ECtHR found the conviction justified in that the applicants had knowingly disseminated the pictures in question without permission from the copyright holders and were therefore guilty of forgery under French law[156]. Finally, the Court held that the fines and the substantial awards of damages were not disproportionate to the legitimate aim pursued, even more so in the absence of any evidence of them being too burdening for the defendants[157].

Given the circumstances above, the ECtHR concluded that the conviction of the applicants under the French intellectual property code did not amount to a violation of the right to freedom of expression by the French authorities, as it was prescribed by law, it pursued the legitimate aim of protecting the rights of others and it was found necessary in a democratic society. Nevertheless, the Court has confirmed in this case that copyright enforcement, restrictions on the use of copyright protected works and sanctions based on copyright law can ultimately be regarded as interferences with the right to freedom of expression and information.

Notably, only a few weeks later, the Court had once again the opportunity to decide in a case of conflicting rights between copyright and freedom of expression[158].

In the *"Pirate Bay"* case, the two co-founders of the famous file-sharing service complained before the ECtHR that their conviction for complicity to commit crimes in violation of the Swedish copyright law had breached their right to freedom of expression and information.

The case concerned several companies in the entertainment business which brought private claims within the criminal proceedings against the defendants and demanded compensation for illegal use of copyright-protected music, films and computer games. Consequently, in 2010 Neij and Sundae Kolmisoppi were convicted by the first instance court to ten and, respectively, eight months in prison, and ordered them to pay damages. On the 1st of February 2012, the Swedish Supreme Court refused their leave to appeal.

Before the European Court of Human Rights, the judgment followed largely the same pattern as the one in the *Ashby Donald* case. Even though the Court found file-sharing to be covered by the right to receive and impart information enshrined in Article 10 ECHR, it once again acknowledged the wide margin of appreciation of the national authorities in striking a fair

[153] The ECtHR had previously decided that Article 1 of the First Protocol is applicable to intellectual property; *see* e.g. Case *Melnychuk v. Ukraine*, ECtHR, 7 July 2005; and Case *Anheuser-Busch Incl. v. Portugal*, ECtHR, 11 January 2007
[154] (§ 40) and (§ 41) of the Decision
[155] *See* e.g. Case *Axel Springer Verlag AG v. Germany,* EctHR, 7 February 2012,
[156] (§ 42) of the Decision
[157] (§ 43) of the Decision
[158] Case of *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden,* ECtHR, 19 February 2013

balance between fundamental rights, and as it found that the domestic courts had properly undertook the balancing exercise, the Court dismissed the application as manifestly ill-founded.

Before we can head on to discuss the present state of the balance between copyright and freedom of expression in light of all the above, it is important to point out that the European Court of Justice also played an important role in the evolution of European copyright, not only by establishing and defining the role of copyright within the Treaty, but also by defining the model for subsequent legislation.

3.3 The role of the European Court of Justice

In order to understand its role, it needs to be emphasized that in 1957, at the creation of the European Economic Community, the Treaty of Rome did not explicitly mention copyright. The signatories of the Treaty aimed to abolish all existing, and prevent all future, interstate trade restrictions[159], although the Treaty's provisions were mainly concerned with quantitative restrictions on imports and exports. Nevertheless, the text of Article 30 mentioned industrial and commercial property as a possible source of restrictions on the free movement of goods, which are permitted provided such restrictions do not arbitrarily discriminate or constitute a disguised restriction on trade between Member States.

Under the authority conferred by Article 220 of the EC Treaty[160], the ECJ has to insure the proper implementation and application of the Treaty, which means that acts of the European legislature and of Member States can be controlled as to their compatibility with primary community law. Consequently, the Court was entrusted with the task of defining the balance between copyright, on the one hand, and the principles of free movement of goods and services, non-discrimination and competition law, on the other[161].

Through its decisions, the ECJ has laid down a number of principles upon which the subsequent European copyright framework was built. Among the most important are the Community exhaustion principle[162], the principle of Community-friendly interpretation[163], the principle of non-discrimination[164] or the principle that the secondary Community law is to be interpreted in the light and the spirit of public international law[165].[166]

A decisive contribution of the ECJ to the present state of European copyright, and thus to the balance between copyright and freedom of expression, was the legal opinion it issued at the request of the Commission, concerning the competence of the EC and its individual Member States to conclude the WTO/TRIPS Agreement. This opinion, according to which the

[159] Art. 28 Treaty of Rome
[160] Art. 220 EC Treaty: "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed"
[161] Van Eechoud, Mireille. "Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Work." *JIPITEC*. 3.1 (2012): 60-80. Print.
[162] *Grammophon v. Metro SB* Case, ECJ, 8 June 1971, ECR [1971] 487; *See:* Dreier, Thomas. "Role of the ECJ for the Development of Copyright in the European Communities." *Journal, Copyright Society of the U.S.A.*. 54. (2006): 197-201. Print.; the principle influenced the Rental and Lending Directive and even the Information Society Directive – *see e.g.* Art. 4(2)
[163] *Id. 162*
[164] *Phil Collins v Imtrat* Case, ECJ, 20 October 1993, ECR [1993] I-5145
[165] *Id. 162*
[166] *Id.*

Community and its Member States have a joint competency in the field of intellectual property, has had the effect that the member states subsequently decided to amend the EC Treaty by introducing the possibility for a newly-added competency of the Community[167].

Following the commencement of the harmonization process, the Court was confronted with a number of preliminary reference requests that sought clarification on matters such as what qualifies as "work", the notion of "author" or what constitutes "intellectual creation". As it was noted, the Council and Parliament's failure to engage with such questions has forced the Court to start answering them[168].

Before concluding, it is important to point out that the approach of the European Court of Human Rights in its most recent cases regarding copyright and freedom of expression is similar to the approach the European Court of Justice undertook when it had to balance the enforcement of copyright on the internet with other rights. For instance, in the *Scarlet v. Sabam* judgment[169], the ECJ held that although the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union, there is nothing whatsoever in the wording of the provision or in the Court's case-law to suggest that the right is inviolable and must for that reason be absolutely protected[170]. Moreover, in a number of cases previous to the 2013 judgments of the ECtHR, the ECJ made it clear that the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights, including the right to freedom of expression and information provided for by Article 10 of the Convention[171].

To wind up, considering the importance of the role played by the ECJ in the development of European copyright law and the willingness of the Court to construct pan-European notions of copyright that are not clearly in or out of the Directives[172] through the prism of the increasing number of preliminary references brought before the Court following the implementation of the Information Society Directive, it can be understood that the current attitude of the European Court of Justice will serve as a guideline for future developments in the relationship between copyright and freedom of expression.

In the following chapter we are going to discuss the present state of the balance between copyright and freedom of expression at the European level. First, we will discuss the general expansion of copyright protection in Europe and its consequences. Next, we are going to focus on a number of provisions of the Information Society Directive that are directly concerned with maintaining the balance between the two fundamental rights. Finally, we are going to discuss the tendency of Courts to apply Article 10 in copyright cases and the potential of the right to freedom of expression to gain more importance in the future.

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[167]Opinion 1/94 of the Court of Justice. Strasbourg: ECR I–5267, 1994.

[168] Van Eechoud, Mireille. "Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Work." *JIPITEC*. 3.1 (2012): 60-80. Print.

[169] *Scarlet v Sabam* Case*,* ECJ, 24 November 2011.

[170] (§ 43) of the Decision

[171]Case Belgische *Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECJ, 16 February 2012; and Case *Tietosuojavaltuutettu / Satakunnan Markkinapörssi Oy, Satamedia Oy,* ECJ, 16 December 2008

[172] *See e.g.: Infopaq* Case, ECJ, 16 July 2009, [2009] ECR I-06569*;* or *Eva-Maria Painer v Standard Verlags GmbH and Others* Case, ECJ, 1 December 2011.

Chapter 4: The present state of the balance between copyright and freedom of expression

It has been shown above that the relationship between copyright and freedom of expression is in fact just one aspect of the complex relationship between the fundamental rights to freedom and property. Due to the significance of the values they embody, a certain tension between the two is easy to understand. As it was put, the conflict reflects essentially the balance between the interests of two creators - the initial creator, which legitimately seeks to profit from his creation, and the one who is going to create and legitimately does not wish to encounter any obstacles[173].

Again due to their significance, the relationship between the two is highly sensitive to any social or technological development, as it was emphasized in the chapter dedicated to the legislative evolution of the copyright system.

In this chapter we are going to discuss the main areas in which the conflict between the two is materialized today, and, based on our findings, we are going to draw a conclusion about the present state of the balance between copyright and freedom of expression.

As previously noted, the monopoly that has been created contains a number of limitations aimed at maintaining the balance between the two. Firstly, the right covers the form and not the content. Next, the works are only protected for a certain period of time, at the expiry of which they become part of the public domain. Thirdly, certain uses are expressly permitted by legislature, in order to ensure future creation and thus the benefit of society[174].

Regarding the scope of protection, it has been noted in the previous chapter that while rights were extended, new rights were created, actors were added and the number of works that qualify for protection grew, neither the European legislator, nor the international lawmakers seem to have spent as much effort as the drafters of the first copyright laws to preserve the balance between the divergent interests in the copyright system. Setting this aside, this chapter will be focusing mainly on considerations regarding the term of protection and, more importantly, the exceptions and limitations to copyright protection.

4.1 The impact of term extension on the balance

As previously noted, before the emergence of the first modern laws on copyright, the right

[173] Geiger, Christophe. "Copyright and the Freedom to Create - A Fragile Balance." *IIC - international review of intellectual property and competition law*. 38.6 (2007): 707. Print.
[174] *Id. 173*

was considered perpetual. The Statute of Anne introduced a 21 year term of protection, as an indirect way to assure competition among publishers, and thus the construction and spread of culture. However, the booksellers ignored it, arguing that positive law on copyright was not intended to replace the perpetual common law copyright. In fact, it was only in 1774, in the context created by a famous trial between two British publishers[175], that the idea of perpetual copyright was clearly rejected for the first time in history. More importantly, the moment represents the emergence of the public domain[176]. From this point on, booksellers were no longer in a position to control the development of culture. Accordingly, the public domain became an essential part of copyright philosophy in what concerns the balance between protection and the values embodied in Article 10 ECHR, as it contributes to a great extent to enabling access to information, and thus ensures future creativity[177].

While the discussion above was necessary for correctly understanding the impact of a declining public domain on the internal balance of copyright, it should be noted that the French copyright laws of 1793 and 1791 provided for a much shorter term of protection, namely 5 years after the death of the author.[178]

Regardless, the first international agreement on copyright and the bedrock of the present European copyright framework, the Berne Convention, sets a term of 50 years of protection after the death of the author, allowing the contracting states to grant a term of protection in excess of such a period[179]. As it seems, the drafters of the Berne Convention found a longer term to express an accurate balance between the private interests of copyright holders and those of the public.

However, the 1993 Term Directive[180] added another 20 years to the term set by the Berne Convention, extending it to 70 years *post mortem auctoris*. As previously emphasized, there was no specific need for a longer term in order to achieve harmonization. It should be noted that a more recent proposal of the European Commission[181] to extend of the term of protection of the rights of performers and phonogram producers from 50 to 95 years was received coldly both by European experts and governments of the Member States, and it was eventually abandoned. Such an expansion was criticized for unduly encroaching on the public domain and thus being contrary to the rationales of intellectual property[182].

4.2 Exceptions and limitations to copyright protection

However, the traditional balance between copyright and information freedoms was most influenced by the changes that were either inspired, or triggered by the emergence of the

[175] *Donaldson v Beckett* ,1774, 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257; 17 Cobbett's Parl. Hist. 953 [1813]
[176] Lessig, Lawrence. *Free culture : how big media uses technology and the law to lock down culture and control creativity*. New York: The Penguin Press, 2004. Print.
[177] Geiger, Christophe. "The Extension of the Term of Copyright and Certain Neighbouring Rights - A Never-Ending Story?." *IIC - international review of intellectual property and competition law.* 40.1 (2009): 82. Print.
[178] Art. *2 Loi Le Chapelier*, and Art. 1 *Loi Lekanal*
[179] Art. 7(1) and Art. 7(6) Berne Convention
[180] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, amended by Directive 2006/116/EC and Directive 2011/77/EU
[181] Proposal for a Directive amending Directive 2006/116/EC on the term of protection of copyright and related rights
[182] *Id. 177, p.* 78.

digital networked environment[183].

As pointed out above, the ever-increasing pace of technological development has prompted a fundamental change in the function and effectiveness of copyright law. The evolution of new business models has led to a dramatic shift in priorities. Unprecedented and unfamiliar threats have developed – threats for both the copyright holder and the copyright user[184].

Nevertheless, at a global level, harmonization has mainly focused on securing the right-holders' ability to benefit from new modes of exploitation and business models. This, of course, had a negative impact on the balance safeguarded by means of exceptions and limitations, as it failed to acknowledge that exceptions tailored to domestic needs provide the most important legal mechanism for the achievement of an appropriate, self-determined balance of interests at a national level[185].

With regard to the topic of this paper, a few aspects concerning limitations and exceptions deserve particular attention.

The first issue is how limitations and exceptions were adapted to the digital environment. The basis for this discussion is Article 5 of the Information Society Directive.

The Community harmonization effort in the field of limitations of exceptions has been widely perceived as a failure, with the Directive merely providing an exhaustive and optional list of exceptions, from which national legislators could pick the ones that suited, with the additional possibility to adopt a more restrictive wording[186]. Notwithstanding its horizontal nature, which brought its application to all substantive aspects of the copyright law of Member States, in both the digital and non digital copyright environments, the Directive was highly criticized for failing to provide any legal tool to preserve the effective enforcement of copyright exceptions in the digital society[187].

In response, the Commission adopted in 2008 a Green Paper on Copyright in the Knowledge Economy, in order to "foster a debate on how knowledge for research, science and education can be best disseminated in the online environment"[188]. On this occasion, the Commission acknowledged that that it is exceptions and limitations that ensure the dissemination of knowledge within copyright law and which are the key to the balance to be sought by Community legislation. The first conclusions on this consultation were the subject of a communication by the Commission[189].

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[183]Hugenholtz, P. Bernt. "Fierce Creatures. Copyright Exemptions: Towards Extinction?." *discours, IFLA/Imprimatur Conference,"Rights, Limitations and Exceptions: Striking a Proper Balance", Amsterdam*. 1997. 4. Print.

[184] Geiger, Christophe, Reto Hilty, and Jonathan Griffiths. "Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law." *IIC - international review of intellectual property and competition law* 39.6 (2008): 707. Print.

[185] *Id. 184*

[186] The Commission itself agrees; *See* "Creative content in a European digital single market: challenges for he future", a reflection document of DG INFSO and DG MARKT. 2009. *p.* 15

[187] Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 38. Print. (20)

[188] Green Paper of the Commission of the European Communities on "Copyright in the knowledge economy", Brussels, COM (2008) 466/3.

[189] Communication from the Commission, 19 October 2009, "Copyright in the knowledge economy" COM (2009) 532 final,. *p.*10

Relevant to our general topic was a reaction in the literature to the Green Paper. According to the author "in order to analyze the development of exceptions and limitations to copyright, it is clearly necessary to distinguish between those that allow access to information and those that do not". As the author continues, not all exceptions and limitations have the same justification and importance for the development of the information society. The limitations that require particular attention include exceptions for libraries and archives, for disabled persons, for teaching and research purposes, for news reports, for press reviews, for quotations, as well as private copying when it allows access to information and is not covered by one of the exceptions already mentioned[190].

The distinction made is important, as, absent the exception for disabled persons, all other exceptions listed above are directly related to maintaining the balance between copyright protection and the right to freedom of expression and information[191].

Nevertheless, the Commission failed to include in the list of limitations subjected to discussion at least two limitations that are vital to the accommodation of freedom of speech in the copyright framework, namely the exception for quotation and the private copy exception.

In what concerns the quotation exception, which is essential for democratic debate and free criticism, it has been stressed that the optional character of the exception led to uneven implementation in the Member States and, in effect, both its content and its scope vary widely from state to state[192].

As it was noted in the doctrine, after the implementation of the Information Society Directive, the national provisions regarding the quotation exception seem, in certain respects, insufficient as a satisfactory guarantee of the freedom to create. On the one hand, the quotation exception seems to be, in a number of Member States' legislations, restricted to the field of text, making it, thus, impossible to quote an image[193]. On the other, the quotation for artistic purposes frequently requires the breach of the strict limits imposed by the wording of the law. In fact, these were among the reasons for which national courts in Europe have resorted to applying external limitations, such as the rights to freedom of expression or freedom of creativity, in copyright enforcement cases.

The second important limitation with regard to the balance between copyright and freedom of expression that was omitted in Green Paper is the right to private copy. As previously noted, in absence of another limitation being applicable, the private copy right represents an efficient way to access knowledge[194].

As discussed above, private copying exemptions have existed in various forms in European jurisdictions since the early days of copyright, as one of the primary means to reconcile the

[190]Geiger, Christophe. "The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information." *Intellectual Property Quarterly*. 14.1 (2010): 11. Print.

[191] However, the author stressed that legitimate uses in relation to effective access to information must be clearly separated from other uses of works that are mainly for consumption purposes.

[192] Geiger, Christophe, Franck Macrez, Adrien Bouvel, Stephanie Carre, Theo Hassler, and Joanna Schmidt-Szalewski. "What Limitations to Copyright in the Information Society? A Comment on the European Commission's Green Paper" Copyright in the Knowledge Economy"." *IIC - international review of intellectual property and competition law*. 40.4 (2009): 412-433. Print.

[193] *See e.g.: France 2 v. France* Case*,* European Commission of Human Rights 15 January 1997, Case 30262/96, [1999] *Informatioerecht/AMI 115.*

[194] However, the authors emphasize that legitimate uses in relation to effective access to information must be clearly separated from other uses of works that are mainly for consumption purposes. *Id 192*

conflict between property rights, on the one hand, and the right to privacy and freedom of expression, on the other[195]. Nevertheless, the digital revolution has changed the role of the private copy in copyright legislation.

Based on the technocratic argument that all digital reproductions require some form of copying, regardless how temporary or transient, the right to reproduction was stretched into an exclusive right to use works in digital form[196]. This broad interpretation of the reproduction right was first codified in the Computer Program and Database directives of 1991 and 1996[197] and elevated to a general norm by means of Article 2 of the Information Society Directive[198].

However, in spite of granting a powerful new right to the right-holders, the Information Society Directive does not clearly define the legal status of the private copying exception, nor does it refer to private copying for transformative uses[199]. Moreover, as in the case of the exception for quotation, the Directive leaves the Member States complete discretion regarding the implementation of the exception[200]. Again, this led to varied implementation among Member States and thus, to uncertainty regarding the actual application of the limitation.

As it was emphasized, economic arguments have been used both to justify and to limit private copying and associated levy schemes in Europe. The "market failure" inherent in the absence of practicable licensing and enforcement mechanisms *vis-a-vis* consumers of copyright works has been a powerful argument in favor of statutory licenses permitting private copying. At the same time, the emergence of digital rights management technologies that allow copyright holders to engage in individual end-user licensing has cast into doubt the survival of private copying exemptions[201].

This leads us to the next point of discussion, namely the provisions regarding technical protection measures.

4.3 Technical Protection Measures

The emergence of the digital society has certainly raised new threats to copyright protection. However, it was soon that the potential of technology to provide new tools and means to protect copyrighted works in the digital environment was understood[202].

Consequently, the WCT introduced the obligation for the contracting parties to provide in their national legislations measures against the circumvention of effective technical measures,

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[195] Helberger, Natali, and P. Bernt Hugenholtz. "No place like home for making a copy: private copying in European copyright law and consumer law." *Berkeley Technology Law Journal* 22.3 (2007): 2012-35 . Print.

[196] Helberger, Natali, and P. Bernt Hugenholtz. "No place like home for making a copy: private copying in European copyright law and consumer law." *Berkeley Technology Law Journal* 22.3 (2007): 2012-35 . Print.

[197] Art. 4(1) Computer Programs Directive, and Art. 5(1) Database Directive

[198] *Id. 196*

[199] *Id.*

[200] Art 5(2)b Information Society Directive

[201] *Id. 196*

[202] Dusollier, Severine. "DRM at the intersection of copyright law and technology : a case study for regulation" In E. Brousseau & M. Merzouki (eds.), *Governance, Regulations and Powers on the Internet*. Cambridge University Press, 2012. 298

as well as to provide remedies against infringers[203]. The anti-circumvention provisions were introduced at the European level by means of Article 6 and 7 of the Information Society Directive, which provide a wide definition of the technical measures to be protected[204].

Besides, it was pointed out that the definition of technical devices protected against circumvention refers not to the exclusive rights of the copyright owner, but to what the copyright owner is able to protect through technology. As it follows, limitations and exceptions do not even apply to this new scope of copyright protection. Therefore, it was concluded that the legitimacy, under copyright law, of making a private copy, a parody, a criticism an educational research of use is merely relevant as soon as a technical protection measure is able to inhibit such a use or copy of the work[205]. More simply put, copyright holders are granted some legitimacy in controlling, through technology, acts of use traditionally exempted by copyright law[206].

As it can be drawn, the WCT has considerably strengthened protection in literary and artistic property. Whereas copyright represents the first layer of protection against unauthorized reproduction or communication of the work, the technical protection measures constitute the second, while the anti-circumvention provisions represent the third[207].

However, it was argued that the transposition of these provisions in the Information Society Directive is in open violation of Article 11 of the WIPO Copyright Treaty, as the former failed to immunize copyright exceptions from the operation of access and copy-control mechanisms[208].

As it appears, the normative action of the digital rights management and of the legal protection thereof, under the pretence of simply enforcing the rights of the copyright owners, have implicitly assumed a broader duty[209].

Indeed, the Information Society Directive implies that the circumvention of a digital rights management device is unlawful, regardless of whether it is carried out for the purpose of infringing copyright[210]. As a result, the act of defeating a technical protection measure in order to engage in acts permitted by law would, in any case, attract liability[211].

Moreover, in spite of the attempt of Article 6(4) to rectify the potential difficulty for exceptions to operate where the right-holder has in place a technical protection measure, the vast majority of defenses can be rendered ineffective by copy protection technology, since most of them are not mentioned in the text of paragraph (4). Notably, the private copying exception was left outside the scope of this article[212].

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[203] Art. 11 and 12 WIPO Copyright Treaty
[204] *Id. 202, p.* 300
[205] Dusollier, Severine. "DRM at the intersection of copyright law and technology : a case study for regulation" In E. Brousseau & M. Merzouki (eds.), *Governance, Regulations and Powers on the Internet*. Cambridge University Press, 2012. 299.
[206] *Id. 205, p.* 309
[207] Dusollier, Severine. "The role of the lawmaker and of the judge in the conflict between copyright exceptions, freedom of expression and technological measures" In ALAI (ed.), *Copyright and Freedom of Expression*. Barcelona: Huygens Editorial, 2008. 569.
[208] Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 181. Print.
[209] *Id. 205, p.* 304
[210] Art. 6 and 7 Infosoc Directive
[211] *Id. 208, p.* 183
[212] In spite of Recital 39 of the Directive which states that the right to private copy should not inhibit the use of

What is more, due to these restrictions of legal access, judges may not always be able to review *ex post* the legality of unauthorized uses since these uses could prove to be *a priori* entrenched. This, in turn, renders the newly introduced three-step test inapplicable, and consequently, the possibility for the user to be excused, every time that access to the work is effectively restricted by a DRM measure and the user is forced to circumvent this measure in order to carry out one of the above-mentioned privileged uses[213].

Finally, it should be noted that the greatest negative impact of technical protection measures on the balance between copyright and freedom of expression does not arise from the above, but from the fact that technical protection measures continue to prevent works from entering the public domain even after the fulfillment of the term of protection.

4.4 The three-step test

Since the introduction of the three-step test at the European level, concerns were expressed regarding the impact of this decision on the law of copyright and related rights. As it was previously argued, the scope of this legal instrument has been steadily extended. Under the TRIPS Agreement and the WIPO Treaties, it has been applied to the full range of authors' and related rights and has also been increasingly enshrined in national legislation[214].

According to Article 5(5) of the Information Society Directive, the exceptions and limitations "shall only be applied in certain special cases, which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder". As emphasized above, the test in the directive appears to have a broader scope since it seems to be addressed not only to the national legislature but also to national judges[215].

The *Mulholland Drive* case discussed earlier in the paper is a good example of the side-effects of this approach[216].

On the one hand, the case demonstrated how uncertain the use of the three-step test is, as it this particular case the test was employed to overcome the private copy exception[217]. On the other, the judgment illustrates a contestable use of the three-step test as it states that the making of a private copy of a DVD conflicts with the normal exploitation of the work without explaining what it understands by a "normal exploitation". As emphasized in the literature, the decision shows the risk of arbitrariness when the test is applied on a case-by-case basis[218].

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technological measures or their enforcement against circumvention; *See Id. 208, p.* 185

[213] Mazziotti, Giuseppe. *EU Digital Copyright Law and the End-User*. 1st ed. Berlin: Springer, 2008. 186. Print.

[214] Geiger, Christophe, Reto Hilty, and Jonathan Griffiths. "Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law." *IIC - international review of intellectual property and competition law* 39.6 (2008): 707. Print.

[215] Geiger, Christophe. "The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment." *IIC - international review of intellectual property and competition law*. 37.1 (2006): 74-81. Print.; for a different view *see* Geiger, Christophe. "The Three-Step Test, a Threat to a Balanced Copyright Law?." *IIC - international review of intellectual property and competition law*. 37.6 (2006): 686 (footnote 22).

[216] *See footnote 141 above*

[217] Geiger, Christophe. "The Three-Step Test, a Threat to a Balanced Copyright Law?." *IIC - international review of intellectual property and competition law*. 37.6 (2006): 686

[218] *Id. 217, p.* 692

As it seems, while the regulation was regularly updated in the field of the rights, which underwent a constant extension, the limits remained confined within a narrow concept. Besides the natural law considerations previously discussed, the prevalent understanding of the impact of the three-step test has become even more restrictive due to the WTO Panel's interpretation of the test in its decision regarding Section 110(5) of the United States' Copyright Act of 1976[219].

Moreover, whereas the catalogue of exceptions provided in the first part of Article 5 appears to indicate that the drafters opted for the *droit d'auteur* model of narrow, pre-defined copyright exceptions, this understanding stands in contradiction with provision of paragraph (5) which introduces the three-step test at the European level[220]. Regarding this decision of the European legislator, it was argued that the technical accommodation of free uses is hindered by the ambiguous model of copyright exceptions set out by the Directive. Although the test has established an effective means of preventing the excessive application of limitations and exceptions, the Directive failed to provide a complementary mechanism prohibiting an unduly narrow or restrictive approach[221].

As it seems, even though the balancing of interests is a general objective of intellectual property regulation[222], Article 5(5) does not necessarily reflect it. Accordingly, this had a negative impact on the internal balance between copyright and freedom of expression.

To conclude, we must emphasize that the public interest is not well served if the copyright framework fails to accommodate the more general interest of individuals and groups in society when establishing incentives for right-holders[223]. At the same time, the public interest is particularly clear in the case of those values that underpin fundamental rights. Considering the above, it appears that these values must be given special consideration when applying the three-step test[224].

All the above indicate that the initial balance between copyright and freedom of expression has tilted, throughout the legislative evolution of copyright, constantly in favour of the former. Even more so, the developments that followed the emergence of the information society have decisively affected the equilibrium, to the detriment of the values embodied in Article 10 ECHR.

4.5 Is, then, the right to freedom of expression gaining importance?

There are more arguments that suggest an increase in the importance of the right to freedom of expression as an obstacle in the way of copyright enforcement.

Although it took a long time for national courts across Europe to consider copyright free

[219] The economic nature of the decision appears to leave limited scope for states to balance the interests of right-holders with countervailing interests of fundamental importance; *See Id. 214, p.* 707
[220] *Id. 213, p.* 183
[221] *Id. 214, p.* 708
[222] *See e.g.:* Art. 7 TRIPS and the WCT, the preamble to which emphasizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information".
[223] *Id. 221*
[224] *Id., p.* 709

speech limitations in copyright cases, they eventually did, well before the emergence of the information society. However, following the adoption and the subsequent implementation of the Information Society Directive and of the Enforcement Directive, European courts have been confronted with another wave of copyright infringement claims, this time the copyright framework being a lot less clear upon aspects such as the ones discussed above, that are of paramount importance to the internal balance between copyright and the values embodied by Article 10 ECHR.

As discussed above, the introduction of the three-step test at the European level has brought a lot of uncertainty regarding the application of the exceptions and limitations that help preserve the balance. Nevertheless, acknowledging the shift in doctrine, national courts have started to recognize the imperative nature of those exceptions that protect information freedoms[225]. However, courts continued to interpret the test narrowly, which, as discussed, does not ensure a fair balance between all interested parties[226]. As repeatedly stressed by a number of reputable legal authors, a reading of the test with consideration for other fundamental rights, such as the right to privacy or the right to freedom of expression would overcome the inflexibility of the current copyright framework[227]. In fact, far from weakening the copyright system, such an approach would allow judges to restore the balance that was lost at the regulatory level, which, in turn, would help European copyright overcome the crisis of legitimacy it currently faces[228].

The growing importance of the information freedoms in copyright can also be derived from a number of initiatives taken both at the European level and at the international level.

One argument in support of this can be inferred from the *Report on the harmonization of certain aspects of copyright and related rights in the information society*[229]. The implicit recognition by the Commission of the failure to harmonize exceptions and limitations equals a recognition of the fact that the Information Society Directive does not reflect the careful balancing of the interests involved that should be inherent to the copyright system.

In fact, the release of the Green Paper on ”Copyright in the Knowledge Economy” by the Commission, which aimed to foster a debate on how knowledge can be best disseminated in the online environment, proves just the point made above. According to the Commission, the exceptions and limitations to copyright allow for ensuring the dissemination of knowledge and are at the core of the balance aimed at by the legislature[230].

Moreover, the stand adopted by the Council of Europe at the first Conference of Ministers responsible for Media and New Communication Services that took place in 2009 also implies that the values embodied in Article 10 are of growing importance. On this occasion, the Council held that, as growing numbers of people rely on the Internet as an essential tool for

[225] Geiger, Christophe. "The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment." *IIC - international review of intellectual property and competition law*. 37.1 (2006): 75. Print.
[226] *Id. 225., p.* 76
[227] Hugenholtz, P. Bernt. *Id. 183;* Geiger, Christophe, Reto Hilty, Jonathan Griffiths. *Id. 214;* Dusollier, Severine. *Id. 207*
[228] Geiger, Christophe. "Copyright and the Freedom to Create - A Fragile Balance." *IIC - international review of intellectual property and competition law*. 38.6 (2007): 713
[229] Report of the European Commission. Synthesis of the Comments on the Commission Report on the Application of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights. Brussels: COM/2010/779 final, 2011. Print.
[230] Green Paper of the Commission of the European Communities. *Copyright in the knowledge economy*. Brussels: COM(2008) 466/3, 2008. Print

everyday activities, access to these services also concerns the enjoyment of human rights and fundamental freedoms[231].

Other European initiatives, such as the European Parliament Resolution on cultural industries in Europe suggest the same line of taught. By means of this document, the Parliament invited the Commission to recognize that, as a result of the Internet, traditional ways of using cultural products and services have completely changed and that it is essential to ensure unimpeded access to online cultural content and to the diversity of cultural expressions, over and above that which is driven by industrial and commercial logic[232].

At the international level, the World Intellectual Property Organization has included the issue of limitations and exceptions to copyright protection on the agenda of its Standing Committee on Copyright and Related Rights. According to WIPO, the balance between various stakeholders' interests needs to be re-calibrated[233].

Finally, a noteworthy evolution in this direction has also taken place at the national level.

Based on the right to freedom of expression as set out in Article 11 of the French Declaration of Human Rights, the French Constitutional Council recognized a genuine "right to access the Internet", holding that "in the current state of on-line public media and in view of the importance of these services for participation in democratic life and the expression of ideas and opinions, this right presupposes the freedom to accede to these services"[234].

As it was pointed out in the literature, the developments discussed above show that the delicate balance between protection and access has clearly been called into question and that that the digital revolution has made it necessary to reassess and adapt the underlying balances[235].

Moving on to the recent developments in the case-law of the European Court of Human Rights, it seems that the Court has been sensitive to the shifts that took place both at the national and at the European level, as well as in the legal literature and the public perception.

The two decisions issued at the beginning of 2013 in the cases of *Ashby v. France*[236] and *Neij and Sundae Kolmisoppi*[237] demonstrate a totally opposite stand of the Court regarding the conflict between copyright and freedom of expression than when it was first confronted with the issue. While over the past few years, the Court has delivered several judgments in which it asserted that the Internet has become one of the principal means of exercising the right to freedom of expression and information[238], with these last two decisions the Court has established that copyright enforcement, restrictions on the use of copyright protected works,

[231] Political Declaration of the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services. *A new notion of media?* . Reykjavik: MCM(2009)011, 2009. Print.

[232] Resolution of European Parliament. *European Parliament Resolution of 10 April 2008 on cultural industries in Europe.* Strasbourg: 2007/2153(INI), 2008. Print.

[233] http://www.wipo.int/copyright/en/limitations/index.html

[234] Decision No. 2009-580 DC of 10 June 2009, Official Gazette of 13 June 2009, p. 9675, para. (12)

[235] Geiger, Christophe. "The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information." *Intellectual Property Quarterly*. 14.1 (2010): 7. Print

[236] *Case of Donald Ashby and others v. France, ECtHR,* 10 January 2013

[237] *Case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, ECtHR,* 19 February 2013

[238] *See* e.g. *Times Newspapers Ltd. v. United Kingdom* (ECtHR, 10 March 2009), *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (ECtHR, 5 May 2011), *Ahmet Yildirim v. Turkey* (ECtHR, 18 December 2012)

as well as sanctions based on copyright law can ultimately be regarded as interferences with the right to freedom of expression and information.

However, due to the circumstances of these cases, the Court has not had the chance to elaborate on the interpretation of the three-step test. Considering the importance of the test for maintaining an appropriate balance between conflicting rights[239], and the uncertainty surrounding its interpretation stressed above, the happenstance is unfortunate since as long as it is unclear which criteria should be used in this balancing exercise the future application of Article 10 in matters of copyright enforcement remains uncertain[240].

Finally, and perhaps the most powerful argument in favour of a growing future importance of the right to freedom of expression and information, is the recognition, by means of Article 6 of the Consolidated version of the treaty on European Union, of the equal legal value of the European Charter of Fundamental Rights to that of the Treaty on European Union and the Treaty establishing the European Community[241].

Consequently, the rights and freedoms embodied in the Charter, among which the right to freedom of expression and information[242], have become primary law of the European Union.

The fact that the provisions of the ECHR or of the Charter may now be invoked directly before the courts of the Member States, considered in the perspective of the growing number of cases determined by the combined effect of the IP Enforcement Directive and of the Information Society Directive, clearly suggests the right to freedom of expression and information will become a greater obstacle in the way of copyright enforcement.

Furthermore, as it was pointed out by scholars, the promotion of Charter to the status of primary European law is likely to strengthen the case for revision of European legislation such as the Information Society Directive, which has had a chilling effect on the freedom of expression and information[243].

[239] As the Commission emphasized, the three-step test "has become a benchmark for all copyright limitations", Green Paper of the Commission of the European Communities on "Copyright in the knowledge economy", Brussels, COM (2008) 466/3.
[240]Voorhof, Dirk, and Inger Høedt-Rasmussen. "Copyright vs Freedom of Expression Judgment." *ECHR blog*. N.p., 22 Jan 2013. Web. 30 May 2013. <http://echrblog.blogspot.nl/2013/01/copyright-vs-freedom-of-expression.html>.
[241] Art. 6 Consolidated version of the Treaty on European Union: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".
[242] Art. 11 Consolidated version of the Treaty on European Union
[243] *Id. 213., p.* 235

Chapter 5: Conclusion

In this paper, we have set out to find if the right to freedom of expression is, indeed, gaining importance as an obstacle in the way of copyright enforcement.

The starting point of the thesis was noting that copyright was not always the "engine of free speech" as it was regarded throughout most of its modern history, but rather the opposite[244].

To this end, it has been shown that the initial balance between diverging interests and values, such as the ones protected by property and those protected by information freedoms, was only achieved with great struggle and facing tremendous opposition; as we have seen, although the first copyright laws aimed at achieving an internal balance between the two fundamental rights, by envisaging the former as a means of attaining the latter, it took a long time until the old copyright dogma died away.

Nevertheless, we have argued that while copyright law has shown a remarkable ability to adapt to developments such as the emergence of broadcasting technologies and reproduction technologies, increasingly less attention was paid by the law-makers to preserving the fair balance between the interests of the right-holders and those of the public.

While the term of protection introduced by the Berne Convention was longer than the one reflected in most European legislations of the time, to the detriment of the public domain and thus, indirectly, to the capacity if individuals to access works, the concern of the drafters with maintaining the balance was expressed through the introduction of the three-step test, the aim of which was to allow the reproduction of works in a manner that would guarantee a fair balance between the diverging interests.

However, the scope of copyright protection has also increased with every new regulatory development. Starting with the Rome Convention, progressively more actors were brought under the scope. The TRIPS Agreement, in spite of introducing the idea/expression dichotomy at the international level, has also contributed to the expansion of the scope of copyright protection, firstly, by granting protection to new categories of works and secondly, through extending the scope of the three-step test.

Even so, it has been argued that the emergence of the networked environment and the related technologies were the developments that brought the greatest challenge to the copyright framework. The WIPO Treaties of 1996 that were adopted in order to face new threats such as the impossibility to control the dissemination of works over the Internet. To this end, it granted new rights to the right-holders, such as the rights of making available and communication to the public or the rental right. Moreover, it has been pointed out that the provisions regarding the protection of technical measures have contributed to the strengthening of copyright protection, by acting much in the same way a perpetual right would, considering that at the end of the legal term of protection the technical protection measure installed on a work still prevents the content from entering the public domain.

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[244] Samuelson, Pamela. "Copyright and Freedom of Expression in Historical Perspective." *J. Intell. Prop* . 10. (2002-2003): 319-344. Print

As discussed above, from the offset of the European copyright harmonization effort, the legislator had acknowledged the need to harmonize copyright and related rights at a high level of protection[245]. Consequently, the development of the European copyright framework has not only confirmed the tendency of the international law-makers but went even further in a number of respects.

While the Computer Programs Directive set a low standard of originality, thus allowing a great number of new works to benefit from copyright protection, the Rental and Lending Directive, along with the Satellite and Cable Directive and the Database Directive conferred a number of new rights upon various actors. As these decisions were taken on the basis of the increasing economic significance of the cultural industry they don't reflect much interest for the preservation of the non-economic values embodied in the copyright system. The same conclusions were drawn after discussing the effects the Term Directive and the Information Society Directive on the balance between copyright and freedom of expression. Finally, by granting right-holders access to interlocutory measures, the IP Enforcement Directive has added even more weight on the property side of the balance between copyright and freedom of expression.

Consequently, the departure of the European copyright framework from the initial balance has thrown it into a crisis of legitimacy which is evident not only from the success of the alternative movements such as open-source, creative commons or copyleft, but also from the manifestly high public interest in cases such as the Mulholland Drive, Scientology or The Pirate Bay, that were discussed above.

However, it has been emphasized that the practice of different European national courts describes a contrary trend from that described by the legislative evolution.

In spite of their initial reticence, and of the differences in Member States' laws, diverse national courts have shown themselves increasingly open towards deriving limitations to copyright on the basis of Article 10 of the ECHR as well as towards broadly interpreting the existent statutory limitations.

Next, it has been argued that the adoption of the Green Paper on Copyright in the Knowledge Economy proves that also the Commission grew aware of the shifts that occurred in national case-law, in the doctrine, and not least in the public opinion, regarding the overprotective tendencies of the European copyright framework. By fostering a debate on the best approach for the dissemination of knowledge in the information society, the Commission's initiative also indicates that that the right to freedom of expression and information is likely to play a more important role in the future of copyright than it does presently.

It has also been emphasized that in its recent case-law, the European Court of Justice stressed on the importance of striking a fair balance between the right to property and other fundamental rights, including the right to freedom of expression and information provided for by Article 10 of the ECtHR. In light of the role played by the ECJ in the evolution of European copyright, it is likely that the Court's approach will influence further developments.

Finally, we have shown that, contrary to the attitude demonstrated in the first cases regarding copyright and the right to freedom of expression the European Court of Human Rights was

[245] Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action COM (88) 172 final.

confronted with, the two most recent decisions of the Court confirmed that copyright enforcement, restrictions on the use of copyright protected works and sanctions based on copyright law can ultimately be regarded as interferences with the right to freedom of expression and information under Article 10 of the ECtHR. Nevertheless, we have seen that in neither of the cases has the Court had the opportunity to elaborate on interpretation of the three-step test, which is rather unfortunate considering the importance of the three-step test in maintaining the balance between copyright and freedom of expression.

Despite the fact that the future application of Article 10 remains uncertain in absence of a clear set of criteria elaborated by the European Court of Human Rights for the interpretation of the three-step test, all of the other points made above suggest that in the future courts will have more incentives to apply the right to freedom of expression and information in copyright infringement cases, all the more considering the elevation of the European Charter of Fundamental Rights to the status of primary European law.

I will, therefore, bring my thesis to an end with the answer to the question posed at the beginning: *the right to freedom of expression is, indeed, becoming a more powerful obstacle in the way of copyright enforcement*. However, we must emphasize that over the course of this research we have learnt that the right to property is the exception to the fundamental principle of freedom, and not the other way around. Consequently, to say that the right to freedom of expression represents merely an obstacle to copyright enforcement is an understatement.

In effect, I am going to conclude with reiterating an argument previously made in the literature, namely that in order to overcome the current crisis of legitimacy, the copyright system seems to have no alternative but to accommodate the right of access to information[246].

[246] Geiger, Christophe. "The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information." *Intellectual Property Quarterly*. 14.1 (2010): 1. Print.

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