NON-COMMERCIAL USER-GENERATED CONTENT AND EXCEPTIONS TO COPYRIGHT

A comparison between the US, Canada, and the EU

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The topic of this thesis is how existing limitations and exceptions to copyright address the conflict between the economic interests of rightsholders and the interests of users in producing and disseminating user-generated content. Creative appropriation is heavily present in user-generated content in the Web 2.0. However, appropriative expressions often clash with copyright. Technological developments have resulted in the expansion of exclusive rights at the expense of limitations and exceptions. The concerns of rightsholders are increasingly focused on protecting economic interests. The thesis utilizes the legal dogmatic approach and the comparative legal method with a focus on the US, Canadian, and EU jurisdictions. Microcomparative comparison between the jurisdictions examines how each of them have addressed the balancing of interests between rightsholders and users in their limitations and exceptions. The political and historical contexts of the jurisdictions are discussed on a macrocomparative level. The main sources are constitutional authorities, statutory copyright legislation and case-law of each of the jurisdictions. References are also made to international treaties, such as Berne, TRIPS, WCT and WPPT. The main findings of the thesis are that US fair use accepts a wide range of purposes – many of which pertain to user-generated content. However, the ambiguous nature of the doctrine may be a hurdle for users. In Canadian copyright law, user-generated content benefits from a fair dealing exception and a non-commercial UGC exception, which are to be interpreted widely and without unduly limiting users' rights. EU copyright law recognizes the need to balance between the interests of rightsholders and users, but limitations and exceptions are interpreted strictly and regarded as derogations to exclusive rights. The approach in EU lacks the mechanisms and flexibilities to effectively respond to and protect the new user-generated types of expressions prominent in the Web 2.0. The thesis concludes that an imperative step for the EU is to elevate limitations and exceptions to copyright to the same level as exclusive rights. Additionally, a combination of a specific exception for non-commercial user-generated content and a (semi-)open-ended exception allows for effective balancing between rightsholders' and users' interests. A wider-scale examination of the different aspects of copyright law that impact user-generated content is required in order to better understand the effects and normative potential of the exceptions analyzed in this thesis.

Keywords: appropriation art, comparative law, copyright, Digital Millennium Copyright Act, Digital Single Market Directive, fair use, fair dealing, freedom of expression, user-generated content, web 2.0

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ABBREVIATIONS

CCFR	Canadian Charter of Rights and Freedoms
CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Copyright Act
DSM	Digital Single Market Directive
ECD	E-Commerce Directive
ECHR	European Convention on Human Rights
EUCFR	Charter of Fundamental Rights of the European Union
InfoSoc	Information Society Directive
L&E	Limitation and exception
OCSSP	Online content-sharing service provider
OSP	Online service provider
UGC	User-generated content

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WIPO Copyright Treaty [‘WCT’] (1996), 2186 UNTS 121.

WIPO Performances and Phonograms Treaty [‘WPPT’] (1996), 2186 UNTS 203.

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1. INTRODUCTION

1.1. Background

Creative appropriation refers to the repurposing and re-contextualizing of an existing creative work or elements of it into a new work.[1] Appropriation as a creative method can be used to convey new and original ideas through the use of existing expressions.[2] Appropriation has occurred long before modern copyright laws were adopted and has always played a fundamental role in creative processes and in artistic and self-expression. Borrowing and taking inspiration from existing works has been common practice throughout history: artists have often re-examined existing works through new artistic styles or based their own work on existing ones.[3] Creative works are never created in a complete social or cultural vacuum.[4] Creators themselves are influenced by other existing works and are often engaged in a reciprocal relationship with the cultural dialogue surrounding such works.

Whilst creative appropriation has been common throughout history, it became particularly prominent in the post-modern art movement beginning roughly in the 1960s. Appropriation was also important in post-modern arts' indirect precursor, the avant-garde period, which encompassed movements such as Dadaism, Cubism and Surrealism.[5] These movements utilized creative styles, such as collage and conceptual art, that made heavy use of appropriation.[6] Post-modernism developed as a reaction to modernism and cannot

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[1] Sherman, Brad. "Appropriating the Postmodern: Copyright and the Challenge of the New." *Social & Legal Studies*, vol. 4, 1995, p. 32.

[2] Attas, Daniel. "Lockean Justifications of Intellectual Property." *Intellectual Property and Theories of Justice*, edited by Gosseries et al, Palgrave Macmillan, 2008, p. 43; Lewis, Nicholas B. "Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualised Forms of Music and Art." *American University Law Review*, vol. 55, no. 1, 2005, p. 270.

[3] Irvin, Sherri. "Appropriation and Authorship in Contemporary Art." *British Journal of Aesthetics*, vol. 45, no. 2, 2005, p. 124; Sherman, 1995, p. 32.

[4] Attas, 2008, p. 43; Lessig, Lawrence. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. Penguin Press, 2008, p. 8; Knobel, Michele and Lankshear, Colin (eds.). *A New Literacies Sampler*. Peter Lang Publishing, 2007, p. 2.

[5] Carlin, John. "Culture Ventures: Artistic Appropriation and Intellectual Property Law." Columbia-VLA Journal of Law & the Arts, vol. 13, no. 1, 1988, pp. 108-109; Gaggi, Silvio. *Modern/Postmodern: A Study in Twentieth-Century Arts and Ideas*. University of Pennsylvania Press, 2015, pp. 20-21.

[6] Carlin, 1988, p. 106; Gaggi, 2015, pp. 20-21.

be defined without reference to it. Modernism refers to the philosophical and artistic movements of the late 19th and early 20th centuries. Modernism based itself on philosophical grounds that emphasized the objective reality, the individual and humanistic, often utopian, values.[7] Post-modernism sought to critique, transcend or even reject these philosophical grounds. Different forms of appropriation, such as borrowing images, quoting, paraphrasing et cetera, were often used in re-examining the nature of 'objective' reality against other realities and universal truths against a multitude of meanings.[8] The extent and form of appropriation in creative works and the subsequent subversion of the original vary widely. The post-modern ethos of invoking new meanings through appropriation, and consequent re-contextualizing and subversion of the original, can perhaps most explicitly be seen in the works of the French avant-garde artist Marcel Duchamp. In his 'readymade' art, Duchamp placed real-life everyday objects, such as a latrine, into a gallery context.[9] In another famous 'readymade' work, he drew a moustache and a beard onto a picture of Leonardo da Vinci's *Mona Lisa*.[10] Even though appropriation has always been an integral part of creative expression, it has been continually challenged ever since the adoption of modern copyright laws.

Lawrence Lessig described the relationship between creativity and appropriation as follows: "The new builds on the old, and hence depends, to a degree, on access to the old".[11] Certain works will become so influential that they enter into mass culture and become part of a common cultural language. Appropriation of such works, which carry culturally specific connotations, may be imperative in order to express certain ideas without modifying or losing their meaning completely.[12] However, appropriation directly conflicts with the exclusive right of authors and copyright owners to reproduce copies of their work in whole or in part, and in conjunction potentially clashes with numerous other

[7] Gaggi, 2015, pp. 18-19, 21.
[8] *Ibid.*, pp. 20-21; Lewis, 2005, p. 281.
[9] Duchamp, Marcel. *Fountain*. 1916/1964; Irvin, p. 124; Landes, William M. and Posner, Richard A. *The Economic Structure of Intellectual Property Law*. Harvard University Press, 2003, p. 260; Lewis, 2005, p. 281.
[10] Duchamp, Marcel. *L.H.O.O.Q.* 1919/1964; Carlin, 1988, p. 109; Sherman, 1995, p. 32.
[11] Lessig, Lawrence. *The Future of Ideas: The Fate of the Commons in a Connected World*. Random House, 2001, p. 105.
[12] Couto, Alexandra. "Copyright and Freedom of Expression: A Philosophical Map." *Intellectual Property and Theories of Justice*, edited by Gosseries et al, Palgrave Macmillan, 2008, p. 166; Lessig, Lawrence. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. Penguin Press, 2008, pp. 74-76.

exclusive rights – a list which has expanded over time. The term itself "is a provocation; 'appropriation' of protected work connotes stealing".[13] The shift to the Web 2.0 era has fostered online participatory cultures in which users can engage, create and share content with significant ease and at virtually no cost, meaning that the risk of copyright infringement is also constantly present. Thus, appropriation raises numerous difficult questions in relation to copyright law.[14] In the essay *The Work of Art in the Age of Mechanical Reproduction*, German literary critic Walter Benjamin argued that large-scale reproduction enabled by technological advancement lessens and emancipates the 'aura' (i.e. the authenticity and its tie with tradition and artistic ritual) of a work and changes the social function and the relationship that art has with the public.[15] This new environment allows and encourages the examination and re-contextualization of existing works. In the past, when the scope of copyright law was significantly smaller and exclusive rights were not as extensive, appropriation was less problematic in legal terms and a wide spectrum of works would regularly enter the public domain that allowed for legal use of such works. Lessig argues that "in our present legal regime, some of [past] content is free; some is controlled", and the scope of copyright has continued to widen as technologies have improved.[16] Simultaneously, appropriation has become even more prevalent in creative expression and both our culture and social environments are dominated by commercial mass imagery.[17] Appropriation, and at present particularly its use in online user-generated content, represents "a most radical challenge to the copyright laws to date".[18]

1.2. Research question

The main research question of the thesis is: "*To what extent does a specific exception for non-commercial user-generated content (UGC) or, alternatively, an open-ended exception to copyright address the conflict between the economic interests of*

[13] Landes, 2003, p. 261.
[14] Attas, 2008, p. 44.
[15] Benjamin, Walter and Jennings, Michael W. "The Work of Art in the Age of Its Technological Reproducibility [First Version]". *Grey Room*, no. 39, 2010, pp. 14, 17, 29; Tang, Xiyin. "That Old Thing, Copyright: Reconciling the Postmodern Paradox in the New Digital Age". *AIPLA Quarterly Journal*, vol. 39, no. 1, 2011, p. 76.
[16] Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. Yale University Press, 2008, p. 40; Lessig, 2001, pp. 105-106.
[17] Carlin, 1988, pp. 110-111.
[18] Sherman, 1995, pp. 32-33.

rightsholders and the interest of users to produce and disseminate UGC?". The United States and Canada both contain an open-ended and a semi-open-ended exception, respectively, in their national legislation. In the United States, the *fair use* doctrine is well-established, and several Commonwealth jurisdictions have a tradition of *fair dealing*. Canada has amended its fair dealing provisions and introduced a specific exception for non-commercial user-generated content into its Copyright Act in 2012. The following sub-question is also answered: *"To this end, should a specific or open-ended exception, or both, be included in European Union law?"*. Based on the features mentioned above, the US and Canadian jurisdictions are generally considered to be more well-equipped to address unforeseen uses of works, such as online user-generated content that appropriate existing copyright-protected works, than jurisdictions that do not have similar features, such as the European Union.

1.3. Methodology and sources

The thesis utilizes the legal dogmatic approach and the comparative legal method with a focus on the US, Canadian, and EU jurisdictions.[19] The thesis focuses mainly on microcomparative comparison between the jurisdictions, examining how each of them have approached and addressed the balancing of interests between rightsholders and users in their copyright legislation and case-law.[20] However, the political and historical contexts of the constitutional and statutory legal frameworks of the different jurisdictions and how these have influenced their respective laws are discussed on a macrocomparative level.[21] The aim of the comparison is to analyze whether similar doctrines to fair use or fair dealing could be implemented or developed in European Union law.

Various sources at constitutional, statutory and case-law levels are examined. In discussing the scope of modern copyright law, the thesis also references international treaties, such as the Berne Convention, the TRIPS Agreement and the WIPO 'Internet Treaties'. These international sources are also relevant as the limitations and exceptions

[19] Smits, Jan M. "What is Legal Doctrine? On The Aims and Methods of Legal Dogmatic Research." *Rethinking Legal Scholarship: A Transatlantic Dialogue*, edited by Gestel et al, 2017, p. 210, 213, 217, 220-221.
[20] Zweigert, Konrad and Kötz, Hein. *An Introduction to Comparative Law*. Translated by Tony Weir. Oxford University Press, 3rd ed. 1998, p. 5.
[21] *Ibid.*, p. 4.

(L&Es) of the analyzed jurisdictions must comply with the three-step test. The thesis describes and assesses the statutory copyright laws containing the relevant limitations and exceptions with regards to user-generated content – fair use in the US, fair dealing and the specific UGC exception in Canada, and the parody and quotation exceptions in the EU – and their underlying policy concerns, particularly fundamental rights and copyright incentives for creativity. In terms of US law, focus is given to the United States Constitution and Title 17 of the United States Code concerning copyright, particularly the Copyright Act of 1976 and the Digital Millennium Copyright Act. As for Canada, the thesis concentrates on the Canadian Copyright Act with some discussion about the Canadian Charter of Rights and Freedoms. With regards to EU law, the thesis focuses particularly on the Information Society Directive, the Digital Single Market Directive and also references the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Case-law about the relevant limitations and exceptions from the above jurisdictions is also examined. There is a lack of case-law expressly about appropriative user-generated content in the jurisdictions. Thus, other cases concerning appropriation or the incorporation of a copyrighted-protected work into a new one, that provide analogies with user-generated content, were chosen.

In terms of limitations, this thesis provides a comparison mainly between common law traditions and the European Union legal system. There is no focus on specific Member State jurisdictions *per se*, but the copyright legislation of Germany is indirectly discussed through the examination of EU case-law. The thesis focuses on a specific sub-category of user-generated content, namely user-derived content.[22] However, some references are made to other forms of user-generated content and the genre of appropriation art in general. The thesis focuses mainly on the economic, and not the moral, interests of rightsholders.

[22] "*Content that was created using parts of one or more pre-existing protected works that are then transformed, adapted, or recast in some way*", see Gervais, Daniel. "Derivative Works, User-Generated Content, and (Messy) Copyright Rules." Copyright & New Media Law, vol. 16, no. 1, 2012, p. 7.

1.4. Structure

Chapter 2 of this thesis sets out how technological developments, particularly the Web 2.0, has enabled the spread of user-generated content and affected the scope of copyright law. The definition and various formats of user-generated content are discussed. The conflict and discrepancies between copyright law and user-generated content are also covered and how the current copyright discourse focuses on the economic incentives of authors and the concept of the 'value-gap'. Chapter 3 goes into more detail about automated digital copyright measures, particularly filtering technologies, and how they affect online user-generated content. With regards to this topic, the thesis also discusses the recent EU copyright reform and the so-called 'upload filtering provision' Article 17. Chapter 4 analyzes and compares the various limitations and exceptions relevant to user-generated content in the United States, Canada and the European Union and how these jurisdictions have managed to balance the interests of rightsholders and users. Based on these comparisons, Chapter 5 discusses possible solutions from the perspective of EU copyright law to achieve a better balance between these interests. Chapter 6 includes concluding remarks.

2. USER-GENERATED CONTENT & COPYRIGHT IN THE WEB 2.0 ERA

Both a changing ethos and technological advancements have greatly impacted the ways in which people communicate to each other (i.e. 'literacies') through various forms of content.[23] Several drivers have led to the expansive growth and spread of user-generated content. Technological drivers include increased broadband availability, improved performance in consumer electronics, access by users to software tools that allow for the creation and editing of content, and the availability of online platforms for the hosting and sharing of user-generated content.[24] Social drivers have also encouraged the growth of user-generated content, such as users and particularly younger age groups becoming increasingly adept at using the Internet and digital tools, the creation of online

[23] 'Literacies' refer to "socially recognized ways of generating, communicating, and negotiating meaningful content through the medium of encoded texts within contexts of participation in Discourses (or, as members of Discourses)", Knobel et al, 2007, p. 8.

[24] Wunsch-Vincent, Sacha and Vickery, Graham. "Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking." OECD Publishing, 2007, pp. 27-28.

communities and spaces for people to interact in, and the spread of societal, political and creative discussion to the online sphere.[25]

The participatory web of today "enables users to collaborate and contribute to developing, extending, rating, commenting on and distributing digital content".[26] Lessig argues that the participatory web and digital software tools have enabled a so-called Read/Write (RW) culture in which users do not merely consume culture, but also take part in "creating and re-creating the culture around them".[27] In contrast, the preceding and more traditional Read/Only (RO) culture did not encompass amateur creativity to a similar extent and users were seen as merely non-interactive 'consumers' of creative works.[28] Currently, however, anyone is able to 'remix' content – i.e. copy, cut, rework and mix an original work or elements of it into a new work and publish or share it online for others to interact with and enjoy.[29] The amount of original input or creative effort from the user that creates a remix work varies widely, just as in the case of appropriative art in general.

Michele Knobel and Colin Lankshear describe that the new changing ethos and the shift from the Web 1.0 to the Web 2.0, a term popularized by Tim O'Reilly after the crash of the dot-com bubble in the early 2000s, has made content "less published, individuated and author-centric".[30] The Web 1.0 made static websites accessible to users, but allowed for little interaction with other users or even with the content itself. Instead it provided readymade content that was made available to users "in the form that their creators have designed".[31] The Web 2.0, on the other hand, gravitates towards web services through which users can collectively participate, collaborate and generate content. The users "remain the core of the value [of the service]".[32] Knobel and Lankshear describe that the ethos of inclusion and mass participation in the Web 2.0 invites everyone to contribute and create content.[33] O'Reilly argues that one of the fundamental principles behind

[25] Wunsch-Vincent et al, pp. 28-29.
[26] *Ibid.*, p. 17.
[27] Lessig, 2008, p. 28.
[28] *Ibid.*, pp. 28-29.
[29] Knobel et al, 2007, p. 8; Lessig, 2008, p. 69.
[30] Knobel et al, 2007, p. 9.
[31] *Ibid.*, pp. 16-17.
[32] O'Reilly, Tim. "What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software." *Communications & Strategies*, no. 65, 2007, pp. 18, 22-24.
[33] Knobel et al, 2007, p. 18.

successful Web 2.0 platforms and services is embracing the 'collective intelligence' of the web and the effects from user contributions.[34] Employing Lessig's RO and RW dichotomy, the Web 1.0 was a Read/Only culture, whereas the Web 2.0 is a Read/Write culture. The Internet and the Web 2.0 have been enabling technologies and, as argued by Jane C. Ginsburg, have "given concrete effect to the post-modernist theory of the [user] as creator".[35] Users have moved from passive consumers to active participants in culture and creative processes. They contribute, collaborate and give meaning to creative works by interacting directly with these works and the surrounding cultural discourse(s). The participatory web has disrupted the hierarchical and traditional author-reader relationship and enabled the general public to take part in cultural and creative activities to an extent that has not been seen previously.[36] The late cyberlibertarian essayist John Perry Barlow described the future of intellectual property similarly: in a digitized world ideas and expressions would come to exist as intangible information and act akin to thought.[37] According to Barlow, information would become 'an activity', 'a life-form' and 'a relationship'. These statements reflect much of the characteristics of user-generated content. Information spreads continuously and is experienced, rather than possessed. Information evolves and interacts with its surroundings, i.e. with users and the cultures that they inhabit. And significantly, the value and meaning of information "depends entirely on the extent to which each individual receiver has the receptors - shared terminology, attention, interest, language [or] paradigm".[38] Thus, creative processes should be seen as interactive flows between multiple participants – including users that are now able to serve inputs to these processes.[39]

Nevertheless, there is no commonly agreed definition for user-generated content. The OECD has described three central characteristics of user-generated content – UGC works

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[34] O'Reilly, 2007, pp. 22-24.

[35] Ginsburg, Jane C. "Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity." *The Evolution and Equilibrium of Copyright in the Digital Age*, edited by Frankel et al, Cambridge University Press, 2014, pp. 23-24.

[36] Ginsburg, 2014, p. 27; Knobel et al, 2007, p. 21; Lessig, 2008, p. 81.

[37] Barlow, John Perry. "The Economy of Ideas". *WIRED*, 1 Mar 1994. Available at <wired.com/1994/03/economy-ideas/>.

[38] *Ibid.*

[39] Elkin-Koren, Niva. "Copyright in a Digital Ecosystem: A User-Rights Approach." *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, p. 145-146.

are 1) published in some way, 2) contain a certain amount of creative effort, and 3) are created outside of professional routines and practices.[40] These provide a good general outline, however, especially the two latter characteristics are increasingly difficult to assess. Daniel Gervais has divided user-generated content into three types: user-*authored* content (such as vacation pictures), user-*copied* content (content that copies a work *without* modification, such as pirated works) and user-*derived* content ("content that was created using parts of one or more pre-existing protected works that are then transformed, adapted, or recast in some way").[41] This thesis focuses on user-*derived* content, and particularly content that is in audio, visual or audiovisual form. These forms of user-generated content are generally more targeted by (automated) digital copyright enforcement measures on online platforms.[42] The terms 'user-generated content' and 'user-derived content' are used interchangeably in this thesis. It would be an impossible task to list all the different categories and forms of user-derived content. However, to help exemplify the range of content out there, some popular categories in the field of audio/visual user-generated content can be identified, such as:

- Mashups and other works employing a cut-up technique[43]
- Lip-syncing videos[44]
- Addition of a (different) audio track or subtitles to a video[45]
- Image macros[46]

[40] Wunsch-Vincent et al, 2007, p. 9.

[41] Gervais, Daniel. "Derivative Works, User-Generated Content, and (Messy) Copyright Rules." *Copyright & New Media Law*, vol. 16, no. 1, 2012, p. 7.

[42] Wunsch-Vincent et al, 2007, p. 32.

[43] Mashups involve combining two (or more) works, such as songs, together. Cut-up techniques involve 'cutting up' a work and rearranging its parts to create a new work.

[44] Lip syncing has been a form of performance and entertainment for a long time and is also extremely popular in the online sphere, as can be seen most recently from the success of social networking apps such as TikTok.

[45] A well-known example is the Downfall Hitler video phenomenon in which a user adds new and original subtitles to a scene from the 2004 German Film 'Downfall' (orig. Der Untergang): "*[the user creates] a video that is, or is intended to be, humorous, with the humor largely derived from the incongruous and anachronistic content of the subtitles as well as from the inherently transgressive use of the original content for comic purposes*", see Schwabach, Aaron. "Reclaiming Copyright from the outside in: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody." *Buffalo Intellectual Property Law Journal*, vol. 8, no. 1, 2012, p. 1.

[46] Image macros feature a picture or an artwork which is superimposed with some form of text. Image macros often appropriate other copyrighted works. An example of a famous macro is the

- ‘Reaction’ gifs[47]

Barlow’s description of information as a ‘life-form’ also aptly describes much of user-generated content – the references used constantly develop and the meanings conveyed may vary depending on the receiver. Barlow also tied this characteristic to the phenomenon of “memes”. Knobel and Lankshear define memes as “contagious patterns of ‘cultural information’ that get passed from mind to mind and directly generate and shape the mindsets and significant forms of behavior and actions of a social group.”[48] Cross-referencing and connections between various cultural phenomena are common in memes.[49] Memes serve a wide range of purposes, such as social commentary, absurdist humor or fan activity. Since memes and user-generated content are inherently social in nature, their existence and spread requires “networked human hosts”.[50] User-generated content and its different forms have altogether permeated and become vital to the various spaces and communities in the online sphere.

For example, a particularly popular meme and a target of remixing in recent years has been the ‘Distracted Boyfriend’ image macro. The meme utilizes a stock photo taken by the Spanish photographer Antonio Guillem.[51] The photo shows a man walking with her girlfriend and looking at another woman, suggesting infidelity on the man’s part. The stock photo quickly became viral and users appropriated the photo to illustrate a range of other relatable situations based around unfaithfulness, such as a person skipping pressing duties to take a nap instead or having a pet cat prefer a cardboard box as a toy rather than an expensive climbing tree that the owner has purchased.[52] The image was often also

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‘lolcat’ image format which combines pictures of cats with humorous and grammatically incorrect text.

[47] Reaction gifs are animated images that often appropriate from existing works. Users utilize them to convey a reaction or a feeling. The use of such gifs is very common on social media platforms and messaging applications.

[48] Knobel et al, p. 199.

[49] *Ibid.*, p. 213.

[50] *Ibid.*, p. 219.

[51] Guillem, Antonio. “Disloyal man walking with his girlfriend and looking amazed at another seductive girl”. *Shutterstock*. Available at <shutterstock.com/image-photo/disloyal-man-walking-his-girlfriend-looking-297886754> [accessed 2 May 2020].

[52] @gorewhore1234. Distracted Boyfriend image macro. *Twitter*, 24 Aug 2017. Available at: <twitter.com/gorewhore1234/status/900580223137263616> [accessed 2 May 2020];

remixed with other copyrighted works. For example, the image bears similarities to a specific scene in the film *Matrix*.[53] And once a certain work or meme becomes highly saturated online, users will often create memes about memes, i.e. 'meta-memes'.[54] Guillem's photo may be a royalty free stock photo, but it is still a copyright-protected work. Guillem has stated that using the photo without having paid the rights is illegal but he has decided not to sue anybody for the use of the image.[55] Of course, he could nevertheless do so under current copyright laws. The decisions of rightsholders in enforcing their rights with regards to user-generated works and memes are often complicated and, to the dismay of users, arbitrary.

The scope of discussion in this thesis does not cover user-generated content shared for purely commercial purposes, but often it may be difficult to distinguish between commercial and non-commercial UGC. Most of user-generated content is not created or shared online for profit and users rarely expect remuneration. As the amount of people using online platforms has skyrocketed and users have started producing more and more content, these platforms have begun to provide users with the means to monetize their content. This way both the platform and the user (and increasingly also the rightsholders[56]) may benefit monetarily from the uploaded content. Gradually, many users have become professional or semi-professional producers of content and a whole industry has risen around so-called "content creators". Many online marketplaces benefit from users publishing and offering others the option to purchase their creations, such as fan art. Additionally, more 'gray' commercialization routes have surfaced, such as crowdfunding websites and monthly subscription or patronage-type platforms through which people can choose to financially support their favorite users and get access to more content. These monetization methods and services are not necessarily aimed *only* to

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@Hungryghoast (Hungryghoast). Distracted Boyfriend image macro. *Twitter*, 28 Aug 2017. Available at <twitter.com/Hungryghoast/status/902123601419231232> [accessed 2 May 2020].

[53] yuspd (*username*). "Distracted Boyfriend – woman in the red dress." *Know Your Meme*, 2018. Available at <knowyourmeme.com/photos/1324109-distracted-boyfriend> [accessed 2 May 2020].

[54] @pixelatedboat (pixelatedboat aka "mr tweets"). Distracted Boyfriend image macro. *Twitter*, 25 Aug 2017. Available at: <twitter.com/pixelatedboat/status/900837129697214464> [accessed 2 May 2020].

[55] Guillem, Antonio. "Important information about copyright and privacy content infringement (EN/ES)". 5 July 2018, available at <antonioguillem.com/2018/07/05/copyright-and-privacy-content-infringement/> [accessed 2 May 2020].

[56] See discussion in Chapter 3.

people making user-derived content. However, from a copyright-perspective, the utilization of these services for the publishing and sharing of user-derived content is clearly problematic. The general conception has been that user-generated content is non-commercial and created by amateurs. The majority of user-generated content certainly remains amateur. Nevertheless, based on the factors mentioned above, the distinction between commercial and non-commercial is often difficult to make.

The term 'user' also has multiple connotations and meanings. Generally, it has referred to the consumer of the 'end-product' of a creative process and, indeed, many users still consume works in such a way. In the Web 2.0, however, users should rather be considered as "various type of players engaging with cultural works in a variety of ways".[57] Users have always utilized existing copyrighted works, whether through analogue or digital and online or offline formats. The Web 2.0 presupposes and requires a certain level of participation from users to generate and edit content – whether audio, visual or textual – in order to achieve its full benefits.

2.1. Technology development and the scope of copyright law

The scope of modern copyright law has broadened and is inherently tied to the technological developments from the 20th century onwards. The traditional focus of copyright on 'copies' and that digital technologies have enabled near costless copying of content, have encouraged copyright owners to seek extensive control of both the legal and the technical infrastructure relating to their works in the digital (and in the past even the analogue) domain.[58] In the 1984 *Betamax* case, Universal Studios and Disney sued Sony for the manufacturing of home video tape recorders that, according to the respondents, could be used by consumers to infringe copyright.[59] Universal Studios and Disney alleged that Sony was liable for contributory copyright infringement for assisting people to carry out copyright violations with their Sony home video tape recorders. However, the Supreme Court of the United States held that Sony was not liable since Betamax products were sold for legitimate purposes and had also other significant (and non-infringing) uses. The Court found that the recording of television programs for later

[57] Elkin-Koren, 2017, p. 135-136.
[58] Boyle, 2008, pp. 61-62.
[59] *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

viewing, when private and non-commercial, constituted fair use.[60] Copyright owners have often tried to prevent or modify the adoption of new technologies and services that enable the reproduction of copyrighted works. Ironically, the popularity of home video recorders and videocassette technology turned out to be highly lucrative for copyright owners since people gained even more interest in consuming copyrighted works, and thus the cassette sale and rental industries generated significant amounts of revenue.[61] Similarly at present, the disrupting technologies have provided new opportunities for rightsholders, yet the continued effort to extend the scope of copyright hinders their utilization.[62]

The so-called 'Internet Treaties' – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – were adopted to ensure the application of exclusive rights also in the digital domain. Now rightsholders may "*[authorize] any communication to the public of their works, by wire or wireless means, including the* ***making available to the public*** *of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them* (emphasis added)".[63] The WIPO Internet Treaties were implemented in the EU through the Information Society Directive (InfoSoc) and in the United States via the Digital Millennium Copyright Act (DMCA). The European Union included a making available right in Article 3 of the InfoSoc Directive. Canada also amended its Copyright Act to contain a making available right.[64] The United States did not amend its copyright legislation to include a specific making available right, but instead considers the existing exclusive rights in Title 17 of the United States Code to cover it.[65]

These treaties also enable copyright owners to protect their works with technological protection measures (TPMs, also often referred to as digital rights management methods)

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[60] *Sony Corp. v. Universal City Studios*, p. 442.
[61] Boyle, 2008, p. 64.
[62] *Ibid.*, pp. 63-65.
[63] *WIPO Copyright Treaty* ['WCT'] (1996), 2186 UNTS 121, Art. 8.
[64] Copyright Act ['Copyright Act 1985'], RCS 1985, c C-42, section 3(1)(f). The definition is found in section 2.4 (1.1.): "*For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.*"
[65] United States Copyright Office. "The Making Available Right in the United States." U.S. Copyright Office, 2016, pp. 2-3.

and to prevent the circumvention of such measures.[66] Both the DMCA, the InfoSoc Directive and the Canadian Copyright Act include provisions which prohibit the circumvention of TPMs to access and use copyrighted works without authorization.[67] TPMs contain methods such as encryption, password protection measures, verification measures, scrambling technologies, region blocking, watermarking, and the list continually grows as new technologies develop. The relationship between TPMs and the legal use of works, based for example on fair use, is complicated and exemplifies how the scope of copyright law has been extended at the cost of often limiting users' ability to legally use a copyrighted work. In addition, the introduction of safe harbor provisions for online service providers in the DMCA and in the E-Commerce Directive (ECD) in the EU has resulted in the adoption of notice-and-takedown systems that have significant effects on user-generated content.[68]

The scope of modern copyright has also been extended to derivative works. This is a fundamental change to the dynamics between appropriation in creative works and copyright. Previously, 'derivative' works were not considered as infringing 'copies'.[69] The right of authors and copyright owners to create derivative works based on the original work is now contained in international and national copyright laws. The Berne Convention states that "*translations, adaptations, arrangements of music and* ***other alterations*** *[of a work] shall be protected as original works without prejudice to the copyright in the original work* (emphasis added)".[70] The Information Society Directive does not explicitly discuss derivative works.[71] However, the right of adaptation is

[66] WCT, Art. 11; *WIPO Performances and Phonograms Treaty* ['WPPT'] (1996), 2186 UNTS 203, Art. 18

[67] Copyright Act 1985, section 41.1.; *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (title IV amending §108, §112, §114, chapter 7 and chapter 8, title 17, United States Code), enacted October 28, 1998, § 1201; *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* ['InfoSoc Directive'], 2001 O.J. L 167/10, Art. 6.

[68] See Chapter 3 for more discussion.

[69] Zimmerman, Diane Leenheer. "Copyrights as Incentives: Did We Just Imagine That?" Theoretical Inquiries in Law, vol. 12, no. 1, 2011, p. 56

[70] Berne Convention for the Protection of Literary and Artistic Works ['Berne Convention'] (1886, as amended on 1979), 1161 UNTS, Art. 2(3).

[71] The Software and Database Directives does, however, state that authors have the exclusive right of adaptation or alteration of a copyright-protected database or software: *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*

generally considered to be encompassed by the reproduction right in Article 2 of InfoSoc: "*the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part... [for authors, of their works]*".[72] United States copyright law defines derivative works as "*work[s] based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation,* ***or any other form in which a work may be recast, transformed, or adapted****. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'* (emphasis added)".[73] The interpretation of what constitutes a derivative work has been increasingly broadened. Derivative works are no longer merely concerned with different adaptation formats, such as abridgments or translations et cetera, but also the wider phenomena of appropriation in creative works.[74] And previously, even translations or abridgments were not considered as 'copies', but rather independent works of their own, since they did not contain the exact expression of the original work.[75]

Generally, user-generated content that utilizes elements from an existing copyrighted work can certainly be considered derivative. Whether the borrowing of copyrighted elements is substantial enough that the UGC work constitutes derivative in a legal and copyright-infringing sense, is a more complicated question and warrants a case-by-case examination for which the rules are not always simple.[76] The expansion of digital and online technologies have led to what James Boyle coins as "the Internet threat". Rightsholders believe that the "strength of intellectual property rights must vary inversely with the cost of copying", and thus the decentralized and open features of the Internet

['Database Directive'], 1996 O.J. L 77/20, Art. 5(b*); Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs* ['Software Directive'], 2009 O.J. L 111/16, Art 4(b).

[72] Bonetto, Giacomo. "Internet Memes as Derivative Works: Copyright Issues under EU Law." *Journal of Intellectual Property Law & Practice*, vol. 13, no. 12, 2018, p. 992; *Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798.

[73] Title 17 of the United States Code, § 101.

[74] Zimmerman, 2011, p. 56.

[75] Miller, Arthur R. & Davis, Michael H. *Intellectual Property: Patents, Trademarks and Copyright in a Nutshell*. West Publishing, 5th ed., 2012, p. 345.

[76] Schwabach, Aaron. *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection*. Ashgate, 2011, p. 64.

must be sufficiently countered by technologies of control.[77] Moreover, since copying content is costless, this logic requires that the level of control that copyright law and its enforcement measures exert must be near perfect.[78] This expansion of scope is a significant change from the past and applies to all Internet users.[79] Copyright law has become to regulate "the full range of creativity – commercial or not, transformative or not".[80]

2.2. The conflict between user-generated content and copyright law

One of the fundamental tenets of copyright is the idea-expression dichotomy.[81] Copyright protection is given to the *expression* of an idea, rather than the idea itself.[82] However, the dichotomy can be difficult to discern and creative appropriation further complicates such analysis.[83] For those that use appropriation to convey different ideas and meanings, the adopted expression "might be as important to its impact as the idea behind it".[84] Consequently, the idea-expression dichotomy places at odds the exclusive rights of authors and copyright owners and the freedom of expression of users.[85] Certain formats of copyrighted works may reinforce "the claim that freedom of speech cannot be properly served by simply describing the idea behind the expression".[86] Eleonora Rosati has argued that the idea-expression dichotomy is not necessarily a useful tool in solving difficult cases that require balancing copyright and freedom of expression, since the dichotomy itself is a 'fallacy' – "expressionless ideas do not exist: an idea can exist only

[77] Boyle, 2008, p. 60.
[78] *Ibid.*, pp. 61-62.
[79] Lessig, 2008, pp. 138-139, 161.
[80] Lessig, 2001, pp. 106, 110.
[81] *Agreement on Trade-Related Aspects of Intellectual Property Rights* ['TRIPS'], (1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, Art. 9(2).
[82] Barendt, Eric. "Copyright and Free Speech Theory." *Copyright and Free Speech: Comparative and International Analyses*, edited by Griffiths el al, Oxford University Press, 2005, para. 2.06.
[83] Rosati, Eleonora. *The Idea/Expression Dichotomy at Crossroads: Past and Present of a Concept*. Lambert Academic Publishing, 2010, pp. 25, 27.
[84] Macmillan, Fiona. "Commodification and Cultural Ownership." *Copyright and Free Speech: Comparative and International Analyses*, edited by Griffiths el al, Oxford University Press, 2005, para. 3.04; Sherman, 1995, p. 39.
[85] Rosati, 2010, p. 13.
[86] Macmillan, 2005, para. 3.33.

if it can be expressed".[87] Thus, applying the dichotomy to the current challenges surrounding user-generated content and copyright infringement may be more of a hindrance than a help in solving them. The increasingly broadening right to make derivative works also undermines the legitimacy of the idea/expression dichotomy.

The idea-expression dichotomy is closely related to authorship and particularly the concept of the 'romantic author' who creates something original purely from the workings of their own mind, and thus should be granted a property-like right to their creation.[88] This approach suggests that user-derived works do not warrant similar protection under copyright law. Furthermore, the concept implies that an author's creativity and originality exist independently of other influences and that authors are immune from appropriating elements into their own works. Post-modern literary theorists Roland Barthes and Michel Foucault, however, argued that the author has become wholly irrelevant since all works are products of other works and to derive meaning from them is an interaction between the reader and the work (and intertextually with other works too) to which the author has no bearing.[89] In such a case, in which the author is "a scriptor" and instead the reader is the one who engages in the creative act, the author should not have an innate property-like right to a work.[90] Ginsburg describes that "once the author descends from her romantic pedestal to become [...] a 'techno postmodernist participant', she can no longer be a 'proprietor'".[91] However, neither of these opposing viewpoints fully solve the discord between copyright and user-generated content. Abraham Drassinower states that the 'traditional' author can also be seen as a user since "[they are] not only producers or creators but simultaneously users of other pre-existing materials".[92] To add, in the participatory culture and diffused creative processes enabled by the Web 2.0, the relationship between authors and users is often interdependent and, through engaging

[87] Rosati, 2010, p. 40.
[88] Kretschmer, Martin. "Copyright and Its Discontents." *The Oxford Handbook of Creative Industries*, edited by Jones et al, Oxford University Press, 2015, p. 458; Rosati, 2010, pp. 12-13.
[89] Barthes, Roland. "The Death of the Author." *Image-Music-Text*, by Roland Barthes and Stephen Heath (ed.), Fontana Press, 1977; Foucault, Michel. "What Is an Author?" *Language, Counter-Memory, Practice: Selected Essays and Interviews*, by Michel Foucault, Donald F. Bouchard (ed., trans.) and Sherry Simon (trans.), Cornell University Press, 1977.
[90] Barthes, 1977, pp. 145-146.
[91] Ginsburg, 2014, p. 24.
[92] Elkin-Koren, 2017, p. 146, see Drassinower, Abraham. "Taking User Rights Seriously." *In the Public Interest: The Future of Canadian Copyright Law*, edited by Michael Geist, Irwin Law, 2005.

with each other, both make original contributions to the meaning of a work and surrounding discourses.[93]

Copyright ownership is also becoming increasingly centralized in the hands of corporations, often large-scale media conglomerates, for lengthy and perhaps even perpetual durations.[94] Companies understand the immense value of extensive IP portfolios and how commodifying cultural works generates more revenue.[95] This is exemplified by the several media mergers, such as the Disney-Fox, Viacom-CBS and AT&T-Time Warner in the United States just in the past recent years. The uneven positions and bargaining power between rightsholders and users, however, restrict creative expression. The most popular works are centralized in the hands of a small number of global media conglomerates and their affiliates, who are also increasingly interested in exploiting their exclusive rights in the domain of derivative works and subsequently seek to control any reproductions of the original work.[96] Yet the works that rightsholders wish to control, are the ones that are the most culturally relevant for users, and are often specifically the ones that users seek to challenge and discuss through re-contextualization and subversion.[97] The existence of user-generated content and derivative works to an extent depends "on the abundance of cultural production and access to media objects by a large community".[98] In addition, the use of prohibitive license fees and the limited means for legal disputation diminishes creativity as smaller platforms and individual users are unable to afford these.

Certain limitations and exceptions and the right to freedom of expression are often invoked when arguing for the legality of appropriation and user-generated content. In the US, the fair use doctrine has generally been the safeguard for the legal use of existing copyrighted materials in new works.[99] The fair use doctrine allows the use of copyrighted

[93] Attas, 2008, p. 44; Elkin-Koren, 2017, p. 147.
[94] Boyle, 2008, p. 8.
[95] Macmillan, Fiona. "Copyright, the Creative Industries, and the Public Domain." *The Oxford Handbook of Creative Industries*, edited by Jones et al, Oxford University Press, 2015, pp. 439-442.
[96] Netanel, Neil W. Copyright's Paradox. Oxford University Press, 2008, pp. 145-146.
[97] Macmillan, 2015, pp. 441-442
[98] Sonvilla-Weiss, Stefan. "Good Artists Copy; Great Artists Steal." *The Routledge Companion to Remix Studies*, edited by Navas et al, Routledge, 2015, p. 54.
[99] Lewis, 2005, pp. 283-284.

works if the new work, which appropriates from the original, has a transformative purpose, such as, but not limited to, comment or criticism et cetera.[100] The doctrine relies on an open-ended four-factor test which includes assessing the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the appropriated portion, and the effect on potential market of or value of the original work.[101] EU copyright law, on the other hand, does not include limitations and exceptions that are as open-ended as the fair use doctrine. Certain exceptions, such as quotation for the purposes of criticism or review[102] or use for the purpose of caricature, parody or pastiche[103], may be relevant in the case of user-generated content. These exceptions have been optional for Member States to implement; however, the newly adopted Digital Single Market Directive (DSM) requires them to be made mandatory in all of the Member States.[104] Based on the case-law of the Court of Justice of the European Union (CJEU), these limitations and exceptions should also be construed narrowly.[105] All limitations and exceptions must comply with the so-called three-step test, meaning they "*shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder*". This combination has made EU copyright law significantly less flexible in addressing the copyright challenges raised by derivative works, appropriation and user-generated content.

On a notional level then, copyright is a restriction on freedom of expression and addressing this conflict requires balancing multiple interests.[106] However, the relationship

[100] 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.* 510 U. S. 569 (1994).
[101] 17 U.S.C. § 107.
[102] InfoSoc Directive, Art. 5(3)(d).
[103] *Ibid.*, Art. 5(3)(k).
[104] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC* ['DSM Directive'], 2019 O.J. L 130/92., see preamble 70 and Art. 17(7).
[105] *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465; Hugenholtz, P. Bernt. "Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use?" *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, p. 286.
[106] Boyle, 2008, p. 67; Dreier, Thomas. "Contracting Out of Copyright in the Information Society – the Impact on Freedom of Expression." *Copyright and Free Speech: Comparative and International Analyses*, edited by Griffiths el al, Oxford University Press, 2005, para. 15.16; Dworkin, Gerald. "Copyright, the Public Interest and Freedom of Speech." *Copyright and Free*

of user-generated content with the scope of freedom of expression is not completely unproblematic. As previously discussed, the reproduction of existing copyrighted elements may be necessary in some cases to effectively convey certain ideas and meanings.[107] Restricting the use of such material can then be a constraint on freedom of expression.[108] Several justificatory theories exist for the freedom of expression right. The democracy theory for freedom of expression holds that certain types of speech, namely political expression, are more privileged to receive protection than other types of expression which are 'less important' for the public and the preservation of democracy.[109] In contrast, the non-utilitarian justification for freedom of expression attests that "[freedom of expression] is an integral aspect of each individual's right to self-development and fulfilment".[110] According to psychologist Abraham Maslow's theory about motivations for human behavior and the hierarchy of needs, creativity is a key aspect of self-actualization in humans and the highest type of development that an individual can strive towards.[111] A non-utilitarian justification supports "a basic commitment to protect all speech regardless of its 'popularity, aesthetic, or moral tastefulness or mainstream acceptance'".[112]

Based on the democracy theory, Cassetteboy's (an English music comedy duo) remix video that fuses sliced video footage and audio of the former British Prime Minister David Cameron's speeches together with the instrumental version of the rap song *Lose Yourself* by Eminem (with also the inclusion of revised politically charged lyrics), is more worthy of protection than a retro jazz cover of the same song.[113] Cassetteboy's work would also

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Speech: Comparative and International Analyses, edited by Griffiths el al, Oxford University Press, 2005, para. 7.07; WCT & WPPT, Arts. 10.

[107] Barendt, 2005, para. 2.11; Couto, 2008, p. 164.

[108] Macmillan, 2005, para. 3.04.

[109] *Ibid.*, paras. 3.06-3.07.

[110] Helfer, Laurence R. and Austin, Graeme W. *Human Rights and Intellectual Property: Mapping the Global Interface.* Cambridge University Press, 2011, p. 225; Macmillan, 2005, para. 3.05.

[111] Maslow, Abraham H. *Motivation and Personality*. Harper & Row Publishers, 2nd ed., 1970, pp. 170-171: "*The creativeness of the self-actualized man seems rather to be kin to the naïve and universal creativeness of unspoiled children. It seems to be more a fundamental characteristic of common human nature - a potentiality given to all human beings at birth.*"

[112] Helfer, 2011, p. 225.

[113] Cassetteboy. "Cameron's Conference Rap." *YouTube*, available at <youtu.be/0YBumQHPAeU> [accessed 20 Apr 2020]; Robyn Adele Anderson. "'Lose Yourself' (Eminem) Gypsy Jazz Cover." *YouTube*, available at <youtu.be/NeB9TSu08KU> [accessed 20 Apr 2020].

likely prevail over a song mash-up combining *Lose Yourself* with Lin-Manuel Miranda's *My Shot* from the musical *Hamilton*.[114] (On a meta-level, however, Miranda has stated that Eminem's image and rhyming style inspired his version of the musical's titular character.[115] A person familiar with both works is able to discern the similarities fairly easily and appreciate the mash-up's results.) Undoubtedly, distinguishing the personal, artistic or commercial aspects from political ones is a task too artificial and binary.[116] Certain user-generated content will correspond more to political expression, whereas other content is more focused on self-expression. Some are intertwined. Inevitably then, under current laws some user-generated content is left outside the protection of 'traditional' freedom of expression and thus is in a precarious legal position. The democratic theory sets a somewhat high threshold for expression that warrants protection. The non-utilitarian approach widens the scope of freedom of expression but does not fully highlight the importance of self-expression for communities and the society at large and, by proxy, to democratic values. After all, the personal is political and the political is personal. Fiona Macmillan aptly states that "a fundamental approach to cultural output would entail encouraging and protecting it on the basis that it has an intrinsic and non-economic value, not only as an expression of human creativity and autonomy, but also [as] a means of communication within the larger cultural, social, and political domain".[117]

2.3. Economic incentives and the 'value-gap' argument

The traditional understanding of the incentive theory for copyright, stating that remuneration for original works is necessary for the promotion of ongoing authorship and the creation of yet more works, also undermines the status of user-generated content. The incentive theory, combined with a focus on the 'romantic author', allocates the task of generating more creative works only to existing authors and ignores the contribution of user-generated content in promoting further creativity. In fact, user-generated content and

[114] Nib Oswald. "Eminem 'Lose Yourself' vs Hamilton 'My Shot'." *YouTube*, available at <youtu.be/wxh4UZfPQ_o> [accessed 20 Apr 2020].
[115] Malone, Chris. "Lin-Manuel Miranda explains how Common, Eminem & more inspired his 'Hamilton' characters." *Billboard*, 11 July 2017, available at <assets.billboard.com/articles/columns/hip-hop/8022853/lin-manuel-miranda-common-eminem-inspired-hamilton> [accessed 20 Apr 2020].
[116] Helfer, 2011, p. 225; Macmillan, 2005, para. 3.07.
[117] Macmillan, 2005, para. 3.08.

derivative works are often considered a threat to the commercial success or integrity of the existing work, thus encouraging authors and copyright owners to exercise strict control over the use of their works. Some creativity certainly requires economic remuneration as an incentive, if not to earn profit then at least to recover the costs associated with creating the work. However, the increase in the scope of what constitutes a derivative work has mostly benefitted corporate actors, rather than the authors themselves, and enabled rent-seeking behavior, instead of creating actual economic incentives.[118] The level of compensation for authors and artists has been regrettably low even before the spread of user-generated content. Jessica Litman states that the architecture of the copyright system encourages delegating one's interests to someone else without ensuring that the author "can take advantage of copyright's benefits once they have done so".[119] Ginsburg describes that publishers and "other exploiters to whom authors cede their rights" have been the substantive economic actors in the copyright system.[120] It is questionable whether the existence of non-commercial user-generated content tangibly lessens the willingness of authors to create new works. It is difficult to assess the financial losses that an author may have suffered as a result of a UGC work appropriating the original. Often works may even benefit from the exposure given by user-derived content. The dichotomy between 'traditional' authors and users from the perspective of the creative process is somewhat artificial in the Web 2.0 era. However, the level of professionalism of the original creator seems to still correlate with how valuable a work is considered. Additionally, if the remuneration of authors is considered to promote further creativity and benefit the public at large, then the legal access and use of existing works by users can be considered a complementing and parallel method. Concerns about the effect of digital and online piracy are valid, but they are unrelated to the majority, if not all, of user-derived content out there. Instead of copyright law having to *prohibit* appropriation, it should be seen "as an institutionalized distinction between permissible and impermissible copying" that applies to authors and users alike.[121]

[118] Zimmerman, 2011, pp. 55-57.
[119] Litman, Jessica. "Fetishizing Copies." *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, p. 129.
[120] Ginsburg, Jane C. "The Role of the Author in Copyright." *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, p. 60.
[121] Elkin-Koren, 2017, p. 156, see Drassinower, 2005.

Nevertheless, the incentive argument has permeated the debate around the Web 2.0 and copyright. An example is the concept of the 'value-gap'. In general, the value-gap refers to "an alleged mismatch between the value that some digital [UGC] platforms are perceived as obtaining from protected content and the revenue returned to relevant [rightsholders]".[122] According to rightsholders, the existing liability laws fail to hold online platforms sufficiently accountable for hosting copyright-infringing content and instead allow them to not negotiate licensing agreements with rightsholders.[123] This value-gap argument has become integral in discussions about the role of online platforms in hosting user-generated content and has encouraged rightsholders to seek more effective digital copyright enforcement measures. The remuneration of the romantic author has become essential in the framing of the value-gap issue in these discussions and certainly raises valid concerns about the financial compensation for authors in the Web 2.0 era, but is somewhat ironic as the argument is most fervently promoted by the media conglomerates and publishers.[124] The value-gap argument was paramount for the introduction and the adoption of Article 17 (previously referred to as Article 13) in the Digital Single Market Directive. The Article requires online content-sharing service providers (OCSSP), which store and enable users to upload and share large amounts of copyrighted-protected content, to ensure the unavailability on the platform of copyrighted content for which no authorization has been granted by the rightsholder.[125] For rightsholders, measures like these are attractive since they "not only help facilitate copyright infringement actions, but also shift the costs and burdens of enforcement on to [service providers]".[126] Several interpretations as to the ramifications of the Article have

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[122] Rosati, Eleonora. *Copyright and the Court of Justice of the European Union*. Oxford University Press, 2019, pp. 200-201.

[123] *Ibid.*, p. 201; International Federation of the Phonographic Industry (IFPI). "Global Music Report 2018: Annual State of the Industry." IFPI, 2018, p. 24.

[124] Ginsburg, 2014, pp. 23, 27.

[125] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*. COM (2016) 592 final (14 Sept 2016), at p. 7: "*There is however a growing concern about the equitable sharing of the value generated by some of the new forms of online content distribution along the value chain. Right holders report difficulties faced when seeking to authorise and be fairly remunerated for the use of their content online.*"; DSM Directive, Art. 17.

[126] Yu, Peter K. "Digital Copyright Enforcement Measures and Their Human Rights Threats." *Research Handbook on Human Rights and Intellectual Property*, edited by Christophe Geiger, 2015, p. 463.

been made, most commonly that it forces platforms to adopt automated *ex-ante* content-filtering measures, which flag copyright-infringing content during the upload process and prevent its publication on the platform altogether.

3. USER-GENERATED CONTENT & SHIFT TO AUTOMATED DIGITAL COPYRIGHT ENFORCEMENT MEASURES

As set out in the previous chapter, user-generated content has begun to face many challenges and restrictions as a result of more extensive copyright enforcement in the digital and online spheres. For the past two decades, one of the main methods for rightsholders to control the use of their works on online platforms has been the *notice-and-takedown* system. Notice-and-takedown procedures are linked to the concept of safe harbor for online service providers (OSP). An online service provider in the context of safe harbor provisions can refer to a range of different providers, such as the more 'traditional' internet service providers that enable access to the Internet itself or the more recent social media and video-sharing OSPs, such as Facebook and YouTube. In summary, a safe harbor provision means that an online service provider will not be liable for storing (or linking) infringing material made available by third parties if they do not have knowledge of the infringement or are not aware of the facts or circumstances from which the infringing activity is apparent.[127] When obtaining knowledge of the infringing activity from the rightsholder, the online service provider must act expeditiously to remove or disable access to the material.

In the United States, the Digital Millennium Copyright Act sets the requirements for the notification procedure – for example, rightsholders must identify the infringing content and its location and attest that their notification is made in good faith.[128] In addition, the person whose content was targeted via a notice-and-takedown procedure may contest this by issuing a counter notification and, amongst some other requirements, state that they have good faith belief that the content was removed or disabled as a result of a mistake

[127] DMCA, § 512(c)(1) and (d); *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* ['E-Commerce Directive' or 'ECD'], 2000 O.J. L 178/1., Art. 14.
[128] DMCA, § 512(c)(3).

or a misidentification.[129] In EU legislation, a safe harbor provision is found in Article 14 of the E-Commerce Directive.[130] The Directive does not define a notice-and-takedown procedure in detail and thus various implementation methods exist in different Member States. Canada, on the other hand, operates a *notice-and-notice* system through which an internet service provider or OSP, after receiving a notification from the copyright owner, sends a notice and information to the suspected copyright infringer about the claimed infringement.[131] The forwarded notice cannot offer to settle the claimed infringement or demand compensation.[132] In fact, the alleged infringer does not have to take any action upon receiving the notice. Thus, the system operates on a basis of discouraging copyright infringement via giving users relevant information and raising awareness about copyright infringement. However, the provider must store the infringer's IP address for a certain amount of time after receiving a notification from the rightsholder.[133]

Since their introduction, notice-and-takedown systems have progressed to something much more extensive than originally intended or even warranted by legislation. Notice-and-takedown procedures were, notably, created before the explosive growth of content-sharing online platforms and user-generated content. The systems and procedures in place at present on major online platforms are usually expensive and have been adopted partly as a result of lobbying from rightsholders.[134] A qualitative study by Urban et al. identified three broad groups into which the notice-and-takedown practices of online service providers can currently be categorized.[135] "*DMCA Classic*" online service providers receive notice-and-takedown notifications from rightsholders relatively infrequently and normally use human review to assess these notifications. On the other hand, "*DMCA Auto*" online service providers receive a high amount of notifications, which have increased in volume over the years, via automated systems and the review process of these notifications is also becoming more automated. Lastly, "*DMCA Plus*" online service providers have adopted measures beyond of what is required by legislation, such as

[129] DMCA, § 512(g)(3).
[130] E-Commerce Directive, Art. 14.
[131] Copyright Act 1985, section 41.25.
[132] *Ibid.*, section. 41.25 (3).
[133] *Ibid.*, section. 41.26.
[134] Urban, Jennifer M.; Karaganis, Joe and Schofield, Brianna L. *Notice and Takedown in Everyday Practice*. American Assembly, version 2, updated March 2017, p. 123.
[135] *Ibid.*, pp. 1-2.

"filtering systems, direct takedown procedures for trusted rightsholders, hash-matching based 'staydown' systems, and contractual agreements with certain rightsholders that set forth additional protections and obligations for both parties".[136] Urban et al. also found that "DMCA Auto" and "Plus" categories often overlap and that "Auto" OSPs may eventually turn into "Plus" OSPs.[137]

Many of the most popular content-sharing and social media online platforms employ types of "DMCA Plus" measures. YouTube's 'Content ID' is perhaps the most famous of these systems. Content ID is a fingerprinting matching technology which automatically detects infringing content uploaded by users. It compares existing and newly uploaded content to a reference file provided by the rightsholder. The scanned content may be audio or visual. A Content ID claim is *not* a takedown notification, i.e. a legal action. However, the rightsholder may escalate it to a formal takedown after a series of steps. Content ID is targeted towards more 'expert' users "such as movie studios, service providers and other publishers that have heavy reposting of copyrighted content [and] mostly enterprises with a large scale of copyright issues".[138] Thus, it often also targets the type of works and content that is most popular amongst users. If a match is found between the reference file and user-uploaded content, the rightsholder can choose from a range of 'match policies', such as, blocking the upload (in the territory where the rightsholder asserts their rights), leaving the video accessible while monetizing it in order to collect ad revenue, muting any infringing audio, or deciding to merely track the video.

A user can accept the Content ID claim or dispute it if they have the rights to use the copyright-protected content or believe their upload has been misidentified. If a user disputes, the match policy is temporarily halted. The rightsholder, in a certain time frame, can respond either by releasing the claim (an inaction to respond to a claim would result in the same outcome) or by issuing a takedown notification. A takedown notification must still be done manually by the rightsholder. The rightsholder can also always opt to file a

[136] Urban et al, 2017, p. 2.
[137] *Ibid.*, p. 2.
[138] YouTube. "YouTube Copyright Management Product Suite." Third meeting of the Stakeholder Dialogue on Art 17 of the Directive on Copyright in the Digital Single Market, 25 Nov 2019, European Commission, Brussels, Belgium. Presentation and recording available at <ec.europa.eu/digital-single-market/en/news/third-meeting-stakeholder-dialogue-art-17-directive-copyright-digital-single-market> [accessed 30 Nov 2019].

takedown claim immediately, bypassing the Content ID steps. In a notice-and-takedown situation, similarly, the user can accept the takedown request, ask for it to be retracted or file a formal counter notification. Thus, user-generated content in such a case can be blocked via two routes: automatically via a Content ID claim or through a takedown notification by the rightsholder (eventually or immediately).[139] In a fairly recent US case concerning user-derived content, the Ninth Circuit held that the rightsholder *must* consider, at least subjectively, whether use of the copyrighted work constitutes fair use before issuing a takedown notification.[140] The plaintiff had uploaded on YouTube a 29-second video of her children dancing to singer-songwriter Prince's song *Let's Go Crazy*.[141]

The traditional economic policy arguments promoted by rightsholders in favor of blocking user-generated content focus on the notion that unlicensed use of content deprives rightsholders of potential revenue, and that user-generated content unfairly competes with or even substitutes the original work in its market, or that it might cause unwanted reputational damage which will be reflected in monetary gains.[142] However, an empirical study by Erickson and Kretschmer investigating the factors that motivate takedowns of user-generated content by rightsholders, found that "policy concerns frequently raised by rightsholders are *not* associated with statistically significant patterns of action (emphasis added)".[143] For example, videos which were more popular or had a higher production value had a *lower risk* of being taken down, thus undermining the commercial substitution argument.[144] Instead, amateur content which represents the majority of user-generated content was more likely to be removed. In addition, parody uploads which targeted the underlying copyright-protected work had a smaller chance of being blocked and the severity of the parody in fact reduced the risk of a takedown, which casts doubt on rightsholders' concerns about reputational damage.[145] Erickson and

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[139] Erickson, Kristofer and Kretschmer, Martin. "This Video is Unavailable": Analyzing Copyright Takedown of User-Generated Content on YouTube." Journal of Intellectual Property, Information Technology and E-Commerce Law, vol. 9(1), 2018, p. 16.
[140] *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015), p. 1133.
[141] Stephanie Lenz. "Let's Go Crazy" #1." *YouTube*, available at <youtu.be/N1KfJHFWlhQ> [accessed 15 Mar 2020].
[142] Erickson et al, 2018, paras. 32-33.
[143] *Ibid.*, p. 75.
[144] *Ibid.*, paras. 51, 59-60.
[145] *Ibid.*, para. 60.

Kretschmer suggest that the possibility for rightsholders to monetize or track the use of their copyright-protected material makes it more likely that rightsholders allow high-quality and popular uploads to remain on the platform. However, the takedown rate for more amateur-level content remains disproportionate. The study concludes that rightsholders "make complex choices that are assisted by automatic detection mechanisms, with little concern for the artistic integrity of the creative works they represent".[146] It is highly problematic that rightsholders themselves, via Content ID and other similar systems, have become the arbiters of whether certain content constitutes infringing and whether it can remain online.

Several other concerns pertain to automated takedown procedures. Another study by Urban et al. found that out of the 1,800 takedown requests investigated (from Google Web Search), a third raised concerns about their validity and one in twenty-five had misidentified the content entirely.[147] In addition, takedown requests made in bad faith remain a problem on many platforms and users utilize formal counter-notification processes quite rarely, possibly to avoid the threat of legal action.[148] Recommendations by academics generally highlight that these type of automated content-filtering systems should include mechanisms for human review.[149] Significantly, neither the DMCA nor the E-Commerce Directive require online service providers to implement automated takedown measures.[150] In fact, Article 15 of ECD explicitly states that Member States cannot impose a general obligation on OSPs to monitor content.[151] Nevertheless, as Urban et al. have described, the most popular online platforms have decided to implement "Auto" and "Plus" takedown measures.

Returning to the examples discussed in Chapter 2 about the various remix works incorporating Eminem's song, *Lose Yourself* is in fact licensed to YouTube by Universal

[146] Erickson et al, 2018, para. 64
[147] Urban et al, 2017, p. 116.
[148] *Ibid.*, pp. 117-119.
[149] *Ibid.*, p. 135; Quintais, João; Frosio, Giancarlo; Gompel, Stef van; Hugenholtz, P. Bernt; Husovec, Martin; Jütte, Bernd Justin and Senftleben, Martin. "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics.", November 2019, pp. 4-5.
[150] *UMG Recordings, Inc. v. Veoh Networks*, Inc, 665 F. Supp. 2d., at 1111-12.
[151] This has also been affirmed in case-law: *Scarlet Extended SA v SABAM*, C-70/10, ECLI:EU:C:2011:771, para. 55.

Music Group. Similarly, *My Shot* has been licensed by Warner Music Group. This allows users to incorporate the songs in their content and even monetize the upload, which also accrues royalties for the rightsholders (though, the rightsholder can choose to monetize the content at any point irrespective of the user's actions). Users would be in a more uncertain position if the songs had not been licensed to the platform, and this continues to be the case for countless of songs and other copyrighted works. The lack of licensing on online platforms is usually more prevalent in the field of non-musical (audio)visual works.[152] There is also the question of whether rightsholders should be able to extend their copyright control and remuneration rights to essentially non-commercial and non-profit uses of their works on these platforms. In the discussed cases, this is made more complicated due to the jazz cover of *Lose Yourself* being performed evidently by a professional singer who, while not receiving profit from the video, operates a merchandise store and a patronage-type subscription service for her fans. Even the creator of the Eminem/Miranda remix, is an individual clearly talented in their trade, though this still does not necessarily indicate that the mash-up would not constitute a non-commercial user-derived work.

3.1. Article 17 and the EU copyright reform

A key development in the European Union with regards to copyright law has been the adoption of the Digital Single Market Directive in 2019, with the transposition deadline for the Directive being in 2021. One of the Directive's main aims is to "achieve a well-functioning and fair marketplace for copyright" as stated in Recital 3. To this end, Article 17 on the use of protected content by online content-sharing service providers was one of the key provisions adopted. The provision itself, its legislative process and (on-going) implementation processes have been controversial. To follow, is a summary of the contents of Article 17.

[152] Keller, Paul. "Article 17 stakeholder dialogue (day 2): Filters, not licenses!" 11 Nov 2019, available at <communia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/> [accessed 3 Dec 2019]; Keller, Paul. "Article 17 stakeholder dialogue (day 4): it's all about transparency." 2 Jan 2020, available at <communia-association.org/2020/01/02/article-17-stakeholder-dialogue-day-4-transparency/> [accessed 2 Jan 2020].

According to the Article, online content-sharing service providers (OCSSP) must obtain authorization from rightsholders, for example via licensing, for storing and giving access to copyright-protected works or other protected subject matter uploaded by users.[153] In Art. 2(6) of the Directive, OCCSPs are defined as "*[providers of information society services that] store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which [the provider] organises and promotes for profit-making purposes*". For example, services like YouTube or Facebook can be categorized as OCSSPs. According to Art. 17(2), the authorization obtained by an OCSSP also covers acts of users "when they are acting on a commercial basis or where [the user's] activity does not generate significant revenues". Thus, OCSSPs in the scope of Article 17 can no longer rely on the safe harbor provision in Article 14 ECD.[154]

Most controversially, in the case of an OCSSP *not* having an authorization from the rightsholder, the provider is liable for storing and giving the public access to protected content, unless they have:

> "*(a) made* ***best efforts to obtain an authorisation****, and*
> *(b) made, in accordance with high industry standards of professional diligence,* ***best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information****; and in any event*
> *(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and* ***made best efforts to prevent their future uploads*** *in accordance with point (b)* (emphasis added)".[155]

The concept of "best efforts" has not been defined and likely creates uncertainties for platforms with regards to the application of Article 17. Certain aspects, such as the type, the size and the audience of the service and the availability of suitable and effective means

[153] DSM Directive, Art 17(1).
[154] *Ibid.*, Art. 17(3).
[155] *Ibid.*, Art 17(4).

and their cost, are considered when assessing "best efforts".[156] Some exceptions are made for 'start-up' OCSSPs, though they are limited in duration.[157] What has created concern amongst stakeholders, interests groups and the public has been that in order to realistically ensure the unavailability of specific works and to prevent any future uploads, near all OCSSPs would need to implement extensive and fully automated content-filtering systems that monitor the content being uploaded. As already mentioned, some providers may already employ their own automated monitoring systems (such as YouTube with Content ID) and other smaller platforms may utilize software provided by companies that specialize in content-detection (which has initially been created with the intention of curbing online piracy, not user-generated content in itself). However, these automated systems that detect the use of copyright-protected works in user uploads are unable to deduce the *context* in which the work is being used.[158] Thus, in the case that automated content-monitoring systems become the norm, this could result in over-blocking of user-generated content that is covered by an exception or limitation or is otherwise legal.

However, the Directive also states that OCSSPs must not prevent "*the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation*", and the provisions regarding quotation, criticism, review and use for the purpose of caricature, parody or pastiche are made mandatory in Union law.[159] The Directive states that the application of Article 17 should *not* lead to a general monitoring obligation.[160] However, it is unclear how this could be averted if OCSSPs are still required to prevent the availability of certain works and any future uploads of them. Notably, for the users, OCSSPs must put in place complaint and redress mechanisms in the event of disputes about the blocking of content.[161] The Article also states that

[156] DSM Directive, Art 17(5).
[157] *Ibid.*, Art 17(6).
[158] Keller, Paul. "Article 17 stakeholder dialogue (day 3): Filters do not meet the requirements of the directive." 3 Dec 2019, available at <communia-association.org/2019/12/03/article-17-stakeholder-dialogue-day-3-filters-not-meet-requirements-directive/> [accessed 3 Dec 2019]; Keller, Paul. "Article 17 stakeholder dialogue (day 4): it's all about transparency." 2 Jan 2020, available at <communia-association.org/2020/01/02/article-17-stakeholder-dialogue-day-4-transparency/> [accessed 2 Jan 2020]
[159] DSM Directive, Art. 17(7).
[160] *Ibid.*, Art. 17(8).
[161] *Ibid.*, Art 17(9).

complaints made by users through such mechanisms must be subject to human review. Users should have access to both out-of-court redress mechanisms or a judicial authority to assert the use of an exception or limitation. Users must also be informed about the exceptions and limitations to copyright provided for in Union law in the terms and conditions of the OCCSP's service.

Several aspects concerning the interpretation and the implementation of Article 17 remain highly controversial. On one hand, the provision relates to licensing, and on the other hand, it also pertains to controlling user-uploaded content. In theory, non-commercial user-generated content that utilizes a copyright-protected work would be covered by the authorization obtained by the OCSSP, and in the case of no authorization, users may be able to rely on certain limitations and exceptions. The focus on licensing in Article 17 is also slightly misleading. For example, a user-uploaded parody of a copyright-protected work that fulfills the threshold for parody would evidently not need to rely on a license since it constitutes a new work. In such a case, the content may even be commercial. However, user-generated content which falls *outside* the traditional parameters of the existing limitations and exceptions or does *not* meet the high threshold for protected expression under a fundamental rights perspective is still left in an uncertain position.

To demonstrate this further, this could be the case for non-critical homage-type works (notably, the line between homage and parody can be difficult to separate) or fan art (i.e. artistic works created by fans utilizing elements from another, often copyright-protected, work). Some of these types of works may well reach the threshold of parody, commentary or criticism. However, the majority of homage or fan works produced and shared by users are non-commercial in nature and shared for purposes of community participation, discussion and general enjoyment.[162] As discussed in the previous chapters, some users may decide to commercialize such works, for example, via online marketplaces or patronage-type online platforms. Clearly, this type of activity corresponds to copyright infringement under current copyright laws. If one were to make these types of activities explicitly legal, the solutions would likely lie in other methods, such as providing more accessible licensing options or perhaps even compulsory licensing. YouTube's Content

[162] Santo, Avi. "Fans and Merchandise". The Routledge Companion to Media Fandom, edited by Click et al, Routledge, 2017, pp. 77-79.

ID operates as almost a quasi-compulsory licensing system where the rightsholder can receive royalties by monetizing the content.

However, for the 'traditional' non-commercial user-generated content, which still amounts to the majority of UGC out there, a specific or a broadly interpreted open-ended exception would provide a firmer legal status. It also sends an affirmative and normative message that users' expression and participatory activities are protected and valued in society. Rightsholders are often aware of the potential that user-derived content and online communities bring to the success of a work. Users wishing to engage in various creative processes in a non-commercial manner should not have to rely on the whim of rightsholders or the existence of a correct license. Nor should exclusive rights, particularly in the domain of derivative works, be taken so far that every possible use would demand a license. To this end, the existence of suitable limitations and exceptions is vital.

4. LIMITATIONS AND EXCEPTIONS – US, CANADA & THE EU

The so-called 'three-step test' has relevance to the balancing of interests between rightsholders and users. The test was first introduced in the Berne Convention for the Protection of Literary and Artistic Works and has since been included, in various updated forms, in other international law instruments, such as the TRIPS Agreement and the WIPO Internet Treaties.[163] The aim of the test is to limit the exceptions and limitations made to exclusive rights under national copyright laws. It has been drafted in an open-ended manner in order for it to apply to any exceptions or limitations adopted at a future time. In general, the three-step test holds that limitations and exceptions to exclusive rights must be confined to:

1. Certain special cases;
2. which do not conflict with a normal exploitation of the work; and
3. do not unreasonably prejudice the legitimate interests of the rightsholder.

Any exceptions or limitations to copyright in national legislation need to comply with the three-step test, if the country is signatory to these treaties. Some nations and regional jurisdictions, such as the EU, have chosen to incorporate the three-step test into their own

[163] Berne Convention, Art. 9(2); TRIPS, Art. 13; WCT, Art. 10; WPPT, Art. 16.

legislation. Even if open-ended, some general conclusions can be made about the features of the three-step test. The first step indicates that a limitation or exception should be definite in scope and reach. The second step requires assessing "the likely economic impact of the exception on the market of the original with the significance of the values upon which the exception is based".[164] And lastly, even in the case where an exception is warranted, the non-economic interests of the rightsholders "must still be considered and weighed fairly to ensure that the prejudice caused is not disproportionate".[165]

4.1. The United States – fair use

The copyright law of the United States is based on an incentive theory as opposed to a natural right theory which endorses an innate property-like right to one's intellectual and creative works. The so-called Copyright Clause of the US Constitution states that the Congress "*shall have power… To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writing and Discoveries*".[166] US copyright law includes a lengthy list of specific limitations and exceptions, but the open-ended fair use defense is most often invoked in relation to user-generated content. The doctrine has its roots in US case-law. In *Folsom v. Marsh*, the Court assessed whether it was justifiable to use copyrighted material, in this case verbatim personal letters, in a book. Justice Story identified four key factors for assessing whether a use might be 'fair', namely, that one must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work".[167] Fair use was eventually incorporated as a statutory exception in 1976. The provision includes a *non*-exhaustive list of purposes for uses and sets out four factors employed in assessing fairness of the use:

> "[**§ 107**] *Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes* ***such***

[164] Jacques, Sabine. *The Parody Exception in Copyright Law.* Oxford University Press, 2019, p. 52.
[165] *Ibid.*, p. 54.
[166] United States Constitution, 17 September 1787, Article I, section 8, clause 8.
[167] *Folsom. v. Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841), p. 348.

> ***as*** *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*
>
> *(1)* ***the purpose and character of the use****, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
>
> *(2)* ***the nature of the copyrighted work****;*
>
> *(3)* ***the amount and substantiality of the portion used*** *in relation to the copyrighted work as a whole; and*
>
> *(4)* ***the effect of the use*** *upon the potential market for or value of the copyrighted work* (emphasis added)."[168]

4.1.1. US case-law

Major aspects of the fair use doctrine have been developed in case-law and several cases provide parallels to the characteristics of user-derived content. The doctrine's listed fairness factors and open-ended format require by nature the courts to assess between the interests of users and rightsholders. The judiciary has recognized the importance of appropriation in making effective references and allusions that are a key component of user-derived content. In a landmark parody and fair use case *Campbell v. Acuff-Rose Music Inc.*, the Supreme Court defined parody as "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work".[169] A rap group 2 Live Crew had created a commercial parody song based on Roy Orbison's song *Oh, Pretty Woman*. The effectiveness of the humor or comment in a parody depends on the "recognizable allusion to its object through distorted imitation… its art lies in the tension between a known original and its parodic twin… and it *must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable* (emphasis added)".[170] Thus, the amount borrowed from the original must be assessed in light of the purpose of the use. In *Suntrust*, the Eleventh Circuit stated that a parody does not necessarily need to be humorous but can also "comment upon or criticize

[168] *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (for the general revision of copyright law, title 17 of the United States Code, and for other purposes), October 19, 1976, § 107.
[169] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 580.
[170] *Ibid.*, p. 588.

a prior work by appropriating elements".[171] The case concerned a critical and transformative re-telling of the novel *Gone with the Wind* from the perspective of a slave. Again, however, it is likely that only the more explicitly humorous or critical UGC works, which at least partly target the original, would be able to effectively rely on the parody, criticism or comment purposes under fair use.

In *Campbell*, the Supreme Court also emphasized that fair use allows courts "to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster".[172] The Court built upon previous case-law in assessing whether the new work was "transformative". A work that appropriates from a copyrighted work but "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message" can be considered as transformative.[173] The main goal of the Copyright Clause – to promote science and the arts – is then furthered by the creation of transformative works.[174] While the four factors serve an important role in assessing whether a use is fair, many have argued that transformativeness has become the key criteria.[175] In general, considerations of transformativeness are especially relevant to user-derived works, particularly ones that are not able to rely on specific purposes. When a new work is highly transformative, the significance of other factors, including whether the work was of commercial nature, are less relevant. Parody is also less likely to be a market substitute since it usually serves a different market function to the original work.[176] Similarly in *Suntrust*, the Court concluded that there was not enough evidence to support the notion that the parody novel could harm the existing or potential derivative markets of *Gone with the Wind*, and that market substitution of the original was unlikely. In order to meaningfully understand a critical parody, one needs to have a certain familiarity with the original work. For certain parodies or critiques, such as the novel in *Suntrust*, the unrelated market might be easy to identify. With regards to user-derived content that serves to extend or add something to the general discourse around a certain work, this task is harder.

[171] *Suntrust Bank v. Houghton Mifflin Co.* 268 F.3d 1257 (11th Cir. 2001), pp. 1268-1269.
[172] *Campbell v. Acuff-Rose Music, Inc.*, p. 577.
[173] *Ibid.*, p. 579.
[174] *Ibid.*, p. 579.
[175] Lewis, 2005, p. 274; Miller et al, 2012, p. 396.
[176] *Campbell v. Acuff-Rose Music, Inc.*, pp. 579, 591.

An impact on the market of the original is, however, not sufficient in itself to establish that a use is *not* fair.[177] All of the four factors are important in assessing fair use, but the Supreme Court has stated that the effect of the use upon the potential market for or value of the copyrighted work is "undoubtedly the single most important element of fair use".[178] As discussed in Chapter 2, the *Betamax* case established that the home-taping of film and television programs for private use constitutes fair use. More significantly, as stated by the District Court, the fact that Universal could not demonstrate that the use would have a meaningful likelihood of harming its market, and that the harm was speculative in itself, weighed in favor of fair use.[179] The Supreme Court explicitly reiterated that a use "that has *no demonstrable effect* upon the potential market for, or the value of, the copyrighted work need *not be prohibited in order to protect the author's incentive to create… the prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit* (emphasis added)".[180] The rightsholder must show "the [prevalence of evidence] that *some* meaningful likelihood of future harm exists… [and] if the [intended use] is for a non-commercial purpose the likelihood must be demonstrated".[181] However, the emphasis on 'value-gaps' and the extension of rightsholder control into the online domain through automated digital copyright enforcement mechanisms demonstrate that the burden has not shifted. At the outset, even *non*-commercial user-generated content is (incorrectly) presumed to have a negative economic impact on the original.

The Supreme Court has emphasized that it is not for the judiciary to assess the artistic merits of works "outside of the narrowest and most obvious limits".[182] In *Walt Disney Productions v. Air Pirates*, the Ninth Circuit found that the substantiality of copying and its fairness need to be evaluated based on how much of "[the taking] was necessary to recall or conjure up the original", keeping in mind the purpose of the use.[183] The amount borrowed from a copyrighted work does not necessarily have to be substantial quantitatively – if the appropriated part qualitatively constitutes 'the heart' of the work

[177] *Meeropol v. Nizer* 569 F.2d 1061 (2nd Cir.1977)
[178] *Harper & Row Publishers, Inc. v. Nation Enterprises*, Inc., p. 566.
[179] *Sony Corp. of America v. Universal City Studios, Inc.*, pp. 452-454.
[180] *Ibid.*, pp. 450- 451.
[181] *Ibid.*, pp. 451.
[182] *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 (1903), p. 251.
[183] *Walt Disney Productions v. Air Pirates* 581 F.2d 751 (9th Cir.1978)

then that could be enough for not establishing fair use.[184] With regards to these aspects, fair use cases about appropriation art provide some useful parallels in relation to user-derived content. Two such cases concern the contemporary artist Jeff Koons. Koons is known for appropriating elements from existing works and objects, often concerning pop culture and consumer advertising, and incorporating these into his own works.

In *Rogers v. Koons*, Koons had created a sculpture based on a photograph that depicted a man and a woman holding a litter of puppies in their arms.[185] The photograph was used widely in tourist-type postcards. Koons' sculpture copied the appearance of the photograph in its totality and the work was part of his art series depicting everyday objects in a new context. The purpose of Koons' sculpture may have been "a satirical critique of [the] materialistic society" based on the photograph, but according to the Court this was too difficult to discern from the use. Koons' work was being exhibited in shows and licensed for various for-profit uses which also weighed heavily against fair use. The likelihood of future harm to the original's market could be presumed since the use was intended for commercial gain. Courts may also analyze the motive and intent behind the purpose and character of the use. Koons had removed the copyright notice from the original work once sending it to his artisans which suggested that the appropriation had been done in bad faith. Unsurprisingly, the Second Circuit affirmed that Koons' use of the copyrighted work did not constitute fair use.

In *Blanch v. Koons,* Koons' collage painting, which depicted several women's feet dangling over images of confections with a landscape scenery in the background, incorporated parts of Blanch's fashion photograph showing a woman's legs and feet with sandals.[186] The Court stated that Koon's purpose for using the original work was to comment on "the social and aesthetic consequences of mass media" and was thus highly different from Blanch's aim to show "some sort of erotic sense" in her photograph.[187] Koons himself stated that "by using an existing image, [he ensured] *a certain authenticity or veracity that enhances [his] commentary*… it is the difference between quoting and paraphrasing…and *ensure that the viewer will understand what [he] is referring to*

[184] *Berlin v. E.C. Publications Inc.* 329 F.2d 541 (2nd Cir. 1964); *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, 471 US. 539 (1985), p. 565.
[185] *Rogers v. Koons*, 960 F.2d 301 (2nd Cir. 1992).
[186] *Blanch v. Koons*, 467 F.3d 244 (2nd Cir. 2006).
[187] *Ibid.*, pp. 252-253.

(emphasis added)".[188] Concerning the second factor, the scope of fair use for fictional or unpublished works is usually narrower compared to works that are factual or published. With regards to this factor, the Court considered Koons' use to not "exploit creative virtues [of the original work]", but rather the intention was to comment on the original's meaning in a transformative manner.[189] Subsequently, also the amount and substantiality of the borrowing was proportional to the purpose of the use. Blanch admitted that Koons' use of her work had not harmed the potential market or value for it. In fact, she had never licensed the photograph, and thus Koons' work could not be considered to have a negative economic impact on the original. The emphasis given by the courts to the motivations and intent behind the use bodes well for user-generated content. Clearly, the majority of UGC works are not done for bad faith purposes (as Koons had done in *Rogers*) and the reasons behind the use of the original work are often very similar to the ones Koons expressed in *Blanch* – to enhance the meaning conveyed in the content. Similarly, non-commercial user-generated content incorporating works which have not been commercially exploited may easily rely on fair use. However, as discussed previously, user-derived content often references prominent and well-known works that have entered into common cultural language and such works are being increasingly exploited by rightsholders in various existing and potential markets.

Another similar case concerns the appropriation artist Richard Prince who used the photographer Patrick Cariou's works in a series of collages that were exhibited publicly in a gallery. The Second Circuit heavily criticized the lower court's narrow approach to transformativeness and responded that fair use "imposes no requirement that a work [comments] on the original or its author in order to be considered transformative, and a secondary work may constitute fair use even if it serves some purpose other than those identified in [its] preamble".[190] The Court stated that Prince's works "manifested an entirely different aesthetic" when compared with Cariou's original photographs. Cariou's works were "serene" and the artist himself had described them as "extreme classical photography [and] portraiture", whereas Prince's appropriative works were "hectic and provocative".[191] The majority of Cariou's collages were found to constitute

[188] *Blanch v. Koons*, p. 255.
[189] *Ibid.*, p. 257.
[190] *Cariou v. Prince*, No. 11-1197 (2nd Cir. 2013), p. 12.
[191] *Ibid.*, pp. 4, 12.

transformative fair use. The Court remanded the investigation of fair use to the District Court concerning Prince's collages with more minimal alterations. The parties eventually settled.

The approach in *Cariou* was later criticized in *Kienitz v. Sconnie Nation LLC*, namely for its overemphasis on transformativeness which could "not only [replace] the list in § 107 but also [override] 17 U.S.C. § 106(2), which protects derivative works".[192] According to the Seventh Circuit, *Cariou* fails to explain "how every 'transformative use' can be 'fair use' without extinguishing the author's rights under § 106(2)".[193] Instead, the Court preferred focusing on the fourth factor and whether the use constitutes "a complement to the protected work [which is allowed] rather than a substitute for it [which is prohibited]".[194] User-generated content would undoubtedly benefit from a wide interpretation of transformativeness, but the Court's description of the new work complementing the original is, in fact, what most user-derived works seek to do in any case.

The case-law regarding fair use tends to emphasize analysis of transformativeness of the use and the fourth factor regarding the effect of the use on the potential market or value of the original work. As such, fair use analysis addresses the interests that users have in creating and sharing user-derived expressions and the economic interests of the rightsholders. The US courts have also shown a general acceptance towards appropriation being an important tool in the formation of new expressions. For user-generated content, the concept of transformativeness is essential. However, as *Rogers* and *Kienitz* demonstrate, it is unclear just how far the scope of transformativeness can be extended, particularly in cases concerning appropriation and substantial copying. Based on the case-law, a certain level of tangible difference to the original expression or a distinctly different purpose behind the use of the expression compared to the original are likely required. The analysis about the effect of the use is not immediately prejudiced against user-generated content, as can be discerned from *Suntrust* and *Betamax*. The extension of derivative work rights and the current emphasis on value-gaps from rightsholders can, however, undermine this aspect.

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[192] *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), p. 758.
[193] *Ibid.*, p. 758.
[194] *Ibid.*, p. 758.

4.1.2. Assessing the fair use provision

The compliance of the fair use doctrine under the three-step test is somewhat controversial. The provision does not include an exhaustive list of purposes for uses which is considered by some to mean that fair use does not meet the requirement of an exception having to apply only to "certain special cases". Others have stated that the fair use case-law can be divided into clusters that show "predictable patterns" of whether a certain use is fair, and thus the scope of fair use can effectively be narrowed to various specific purposes.[195] The fair use test meets the second step of the three-step test by assessing the economic interests of rightsholders via the fourth factor. Compliance with the third step is less clear, but at the very least certain non-economic concerns may be linked to the value of the work. The fair use doctrine may raise several questions about its compliance with the three-step test, but its legality has so far been unchallenged under international law.

Freedom of expression concerns are also relevant to the application of fair use. According to the First Amendment of the US Constitution, the Congress cannot make laws that curtail freedom of speech. First Amendment considerations have often been raised in infringement cases concerning parody or criticism or matters of public interest.[196] The First Amendment can be considered to generally oppose the copyright monopoly.[197] On the other hand, there are also claims that the Copyright Clause itself was created as a tool to promote freedom of speech values.[198] The idea-expression dichotomy has traditionally been seen as a way to separate First Amendment and copyright concerns.[199] However, as discussed in previous chapters, the borrowing of certain expressions is necessary to convey specific meanings and the US courts have discussed this in their case-law, for example in *Campbell*. There may be grounds in current US case-law for fair use to be considered as more of a right, rather than a mere defense. In *Lenz*, mentioned in Chapter 3, the Ninth Circuit argued that labeling fair use "as an affirmative defense that excuses

[195] Samuelson, Pamela. "Justification for Copyright Limitations and Exceptions". *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, p. 52.
[196] Miller et al, 2012, p. 390.
[197] *Ibid.*, p. 377.
[198] Jacques, 2017, pp. 159-160.
[199] *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

conduct is a misnomer" and referred to another case which stated that "it is logical to view fair use as a right".[200] The interpretation of fair use as a right, rather than as a mere legal defense, would seem more suitable in promoting the goals embedded in the Copyright Clause.[201]

On the face of it, the fair use doctrine is a flexible and open-ended exception which tries to balance the interest of rightsholders and users. Theoretically, it should also be open to accept the more social, community and self-expression related purposes, which characterize user-generated content, as suitable under fair use. The open-endedness of fair use is also a weakness. The ambiguous nature of the doctrine can be hurdle for rightsholders, but even more so for users. Authors, and more commonly copyright owners, continue to be in a much better bargaining position with more resources and knowledge of the legal landscape. Reliance on fair use continues to be vital for user-generated content, but more explicit ratios or even *obiter dicta* about the applicability of fair use regarding user-derived works are needed. In combination with the fluctuating case-law, the generally *ex post* determination of fair use after costly litigation is problematic and constitutes a significant deterrent for most users.

4.2. Canada

Canadian copyright law is particularly interesting from the perspective of user-generated content. After a long legislative process, Canada amended its fair dealing provision to include three additional purposes – parody, satire and education – and introduced a specific exception for non-commercial user-generated content.[202] Both fair dealing and the statutory exception for non-commercial UGC, in combination with recent Canadian copyright case-law, have significant bearings on the balancing of rightsholders' and users' interests.

[200] *Lenz v. Universal Music Corp.*, p. 1133.
[201] Elkin-Koren, 2017, pp. 159-160.
[202] *Copyright Modernization Act,* SC 2012, c 20 which amended the *Copyright Act* ['Copyright Act 1985'], RCS 1985, c C-42.

British Commonwealth countries, such as Canada, often have a tradition of fair dealing. There are two stages to a fair dealing analysis.[203] Firstly, it is necessary to consider whether the use of a work, i.e. the 'dealing', falls under a purpose listed in the provision, and secondly, whether the use is fair. There are specific criteria for assessing fairness. In Canada, these have developed in case-law and fairness "is a question of fact and depends on the facts of each case".[204] Thus, fair dealing is generally considered to differ from fair use in the respect that instead of being fully open-ended, it includes specific and a supposedly exhaustive list of purposes for which fair dealing is allowed. Fair use incorporates only the second-stage analysis of fairness. Since 2012, the Canadian Copyright Act has included the fair dealing purposes of parody, satire and education:

> "[**Section 29**] *Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.*"

In addition, fair dealing for the purposes of *criticism or review* and *news reporting* (**sections 29.1** and **29.2** of the Canadian Copyright Act, respectively) does not infringe copyright if the following are mentioned:

> "***(a)*** *the source; and*
> ***(b)*** *if given in the source, the name of the*
> ***(i)*** *author, in the case of a work,*
> ***(ii)*** *performer, in the case of a performer's performance,*
> ***(iii)*** *maker, in the case of a sound recording, or*
> ***(iv)*** *broadcaster, in the case of a communication signal.*"

The above conditions are not required for the purposes of research, private study, education, parody or satire.

The Canadian exception for non-commercial user-generated content concerns specifically user-*derived* content:

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[203] Geist, Michael. "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use." *The Copyright Pentalogy*, edited by Michael Geist, University of Ottawa Press, 2013, p. 158.
[204] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339, para. 52.

"[**Section 29.21 (1)**] *It is not an infringement of copyright for an individual* ***to use an existing work or other subject-matter or copy of one,*** *which has been published or otherwise made available to the public****, in the creation of a new work or other subject-matter in which copyright subsists and for the individual*** *— or, with the individual's authorization, a member of their household* ***— to use the new work or other subject-matter or to authorize an intermediary to disseminate it****, if*

(a) *the use of, or the authorization to disseminate, the new work or other subject-matter is done* ***solely for non-commercial purposes****;*

(b) the source *— and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are* ***mentioned, if it is reasonable*** *in the circumstances to do so;*

(c) *the individual had* ***reasonable grounds to believe that the existing work*** *or other subject-matter or copy of it, as the case may be,* ***was not infringing copyright****; and*

(d) *the use of, or the authorization to disseminate, the new work or other subject-matter* ***does not have a substantial adverse effect****, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one* (emphasis added)."[205]

'Use' in the context of the section refers to "[doing] anything that by [the Act] the owner of the copyright has the sole right to do, other than the right to authorize anything" and 'an intermediary' refers to "a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public".[206]

4.2.1. Canadian case-law

While the statutory changes to Canadian copyright law have been significant in expanding the list of available limitations and exceptions, the development of Canadian case-law has

[205] Copyright Act 1985, section 29.21 (1).
[206] *Ibid.*, section 29.21 (2).

been equally important. The Canadian fair dealing provision used to be interpreted narrowly by the courts until the early 2000s. In a 1990 case, *Bishop v. Stevens*, the Canadian Supreme Court emphasized that the goal of the Copyright Act, originally deriving from UK law, was to "[benefit] authors of all kinds, whether the works were literary, dramatic or musical".[207] The narrow interpretation was reiterated in *Michelin* which concerned the use of the Michelin man logo in a union leaflet during a labor dispute.[208] According the union, the use of the logo was parodic and would subsequently qualify under the criticism purpose in fair dealing. At the time, parody was not included in the provision. The Court stated that parody is not a form of criticism under the fair dealing provision, which should be interpreted narrowly, and that parody is not synonymous with criticism. The Federal Court differentiated Canadian fair dealing from the US-based fair use doctrine and its case-law, particularly *Campbell*, based on differences in the legal regimes.[209] Instead, the Court discussed parody within "the ordinary meaning of the term" and consulted a general dictionary definition, stating that parody is "a musical, literary or other composition that mimics the style of another composer, author, etc. in a humorous or satirical way".[210]

In 2002, the Canadian Supreme Court shifted the interpretation of the Copyright Act as it was set out in *Bishop*. In *Théberge*, the Court stated that the Copyright Act of 1985 balances "between promoting the public interests in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator… [and] the proper balance among these and other public policy objective lies not only in recognizing the creator's rights but *in giving due weight to their limited nature* (emphasis added)".[211] The Court also recognized that excessive control by rightsholders can "unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization".[212]

Two years later the Canadian Supreme Court gave a landmark copyright decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*. Several legal publishers claimed that the

[207] *Bishop v. Stevens* [1990] 2 SCR 467.
[208] *Michelin & Cie v. CAW* [1997] 2 FC 306.
[209] *Ibid.*, see discussion '(iii) American case law and Strict Interpretation'.
[210] *Ibid*., see discussion '(ii) Parody as an exception'.
[211] *Théberge v. Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336, para. 30.
[212] *Ibid.*, para. 32.

Law Society was liable for copyright infringement by reproducing copies of cases and other legal materials to its members, the judiciary and researchers via on request and self-service photocopy services. The Supreme Court, however, held that the Law Society did not infringe copyright, that the use was fair and fell under the fair dealing purpose of research. According to the Court, fair dealing should be understood "as an integral part of the [Copyright Act 1985]" rather than as a mere defense.[213] Significantly, the Court elevated the status of exceptions to copyright, including fair dealing, to a *user's right*. In order to maintain the proper balance between the rights of authors and copyright owners and the rights of users, exceptions *must not be interpreted narrowly.* The Court described that 'research' "must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained… [and that] research is not limited to non-commercial or private contexts".[214]

Whilst the Canadian Copyright Act does not define "fair", the Court endorsed in *CCH* a framework of six different factors, which bear similarities to the factors under US fair use, that should be used to assess whether a dealing constitutes fair: 1) the purpose of the dealing; 2) the character of the dealing; 3) the amount of the dealing; 4) alternatives to the dealing; 5) the nature of the work; and 6) the effect of the dealing on the work.

According to the first factor, the use must fall under one of the listed purposes in the fair dealing provision. However, the purposes should be interpreted in a broad manner in order to not unduly restrict users' rights. Courts can also assess the user's motive in using the copyrighted work. Certain uses are generally less fair than others, for example commercial uses warrant a higher scrutiny than non-commercial ones. For the character of the dealing, it is relevant to consider how widely the work has been distributed as part of the use and what customs exist in certain trades and industries.[215] The third factor assesses the quantity being copied from the work; however, this is not necessarily determinative of fairness since some purposes may require more substantial copying than others.[216] In determining alternatives to the dealing, courts must consider whether there were non-copyrighted equivalents of the work that could have been used instead. Again,

[213] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339, para. 48.
[214] *Ibid.*, para. 51.
[215] *Ibid.*, para. 55; Geist, 2013, pp. 169, 173.
[216] *CCH*, para. 56; Geist, 2013, pp. 169, 174.

some uses may require the specific work to be reproduced in order to effectively convey a certain message. With regards to the fifth factor, using an unpublished work instead of a published one may more easily constitute fair since the reproduction leads to wider public dissemination of the work which is "one of the goals of copyright law".[217] However, if the work in question is confidential (such as private letters, etc.) then the dealing might not be fair. And lastly, the effect of the dealing on the work assesses whether the reproduced work competes with the market of the original work.

The Supreme Court emphasized that the six factors are neither an exhaustive list nor should one of them be seen as more determinative than the others.[218] The effect of *CCH* to Canadian copyright law is profound. The Court considered limitations and exceptions to copyright to be as important as exclusive rights. Both exclusive rights and limitations and exceptions should be seen as fundamental to the aim of creating and disseminating more works, and thus they must be balanced accordingly. This essentially requires Canadian courts to adopt a proportionality-based test in a similar fashion to the law in the EU.[219] However, at the time of the *CCH* decision, Canadian fair dealing did not contain the purposes of parody, satire or education. In 2012, The Copyright Modernization Act amended the fair dealing provision to include these and soon after the Supreme Court handed down several copyright decisions that further reaffirmed the importance of interpreting limitations and exceptions broadly.

In *SOCAN v. Bell Canada*, the Supreme Court held that the use of short 30- to 90-second preview snippets of musical works in online purchasing was justified under the purpose of research.[220] The Court reiterated how the dissemination of works "is central to developing a robustly cultured and intellectual public domain" and that users' rights play an essential part in fulfilling the public interest goals of the Copyright Act.[221] The Court interpreted the purpose of research under fair dealing very broadly:

> "*Limiting research to creative purposes would also run counter to the ordinary meaning of 'research', which can include many activities that do not demand the*

[217] *CCH*, para. 58; Geist, 2013, pp. 169, 175.
[218] *CCH*, paras. 53, 60
[219] Jacques, 2017, p. 68.
[220] *SOCAN v. Bell Canada* [2012] 2 SCR 326.
[221] *Ibid.*, paras. 10-11.

establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework".[222]

In a similar case, *Alberta (Education) v. Canadian Copyright Licensing Agency*, concerning the copying of materials by teachers, the Supreme Court interpreted 'private study' to cover a wide range of activities: "*With respect, the word "private" in 'private study' should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavors, whether they are engaged in with others or in solitude*".[223]

Amending the fair dealing provision to cover more purposes was a vital development, however, its effects would not be the same without the innovative finding in *CCH*. Through the broad interpretation, a wide range of user-derived content may rely on the listed purposes. Education, in particular, warrants a specific mention since user-generated content has become an important method in promoting media literacy and engaging students and young people for various educational goals.[224] The Court's finding in *Alberta (Education)* that 'private study' covers a very broad range of activities implies that this is most likely also the case for the purpose of education.[225]

The first assessment of the new parody purpose under fair dealing and under the *CCH* ratio occurred in a 2017 Federal Court case *United Airlines Inc. v. Jeremy Cooperstock*. Cooperstock was the owner-operator of a consumer criticism website called Untied.com which targeted the commercial aviation company United Airlines. The website reproduced the logo of the United Airlines, with some modifications, and the website's

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[222] *SOCAN*, para. 22.

[223] *Alberta (Education) v. Canadian Copyright Licensing Agency* [2012] 2 SCR 345, para. 27.

[224] Burwell, Catherine. "Youth, Bytes, Copyright: Talking to Young Canadian Creators about Digital Copyright." *The Routledge Companion to Media Education, Copyright, and Fair Use*, edited by Renee Hobbs, p. 173.

[225] Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law." *The Copyright Pentalogy*, edited by Michael Geist, University of Ottawa Press, 2013, p. 444.

layout, colors, fonts and other elements were highly similar to United Airline's official website. There was a disclaimer on the site telling visitors that it was not the official website of the aviation company. The Federal Court stated that since Canadian copyright law does not define the content, meaning or scope of parody, the fair dealing provision "must be read in [its] entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[226]

As in *Michelin*, the Court referred to the dictionary definition of parody, but deviated from previous case-law by stating that a parody does *not* need to target the work that is being borrowed.[227] The Court stated that while the meaning of parody established in *Campbell* ("the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work") is useful, it must be approached cautiously given the differences between the fair use doctrine in the US and fair dealing in Canada.[228] Interestingly, the Court instead endorsed the characteristics of parody established in the European Union case *Deckmyn v. Vandersteen* –that parody must 1) invoke an existing work whilst being noticeably different from it, and 2) constitute an expression of humor or mockery. The Court stated that the finding in *Deckmyn* reflects "the ordinary meaning of the term, the purpose, and scheme of the fair dealing provisions in [the Copyright Act 1985], and the intention of the Parliament".[229]

Under the *Deckmyn* requirements Cooperstock's website qualified as parody. However, the use did not pass the fairness analysis. The Court found that particularly the purpose, the amount and the effect of the dealing weighed against fairness. When analyzing the real motive behind the appropriation, the defendant's intent was not to engage in parody, but rather to embarrass and punish United Airlines "for its perceived wrongdoings".[230] The website copied almost the entirety of the United Airlines official website in its likeness and thus the copying was substantial, in both qualitative and quantitative terms,

[226] *United Airlines Inc v. Jeremy Cooperstock* (2017) FC 616, para. 110.
[227] *Ibid.*, paras. 112-115, 119; Jacques, 2019, p. 36.
[228] *United Airlines*, para. 116; Jacques, 2019, p. 34.
[229] *United Airlines*, paras. 117-119; Jacques, Sabine. "First application of the Canadian parody exception." *Journal of Intellectual Property Law & Practice*, vol. 12, no. 11, 2017, p. 896.
[230] *United Airlines*, paras. 124-125; Jacques, 2017, p. 896.

which weighed heavily against the defendant.[231] The Court admitted that "when considering parody, available alternatives to the dealing cannot be weighed too heavily" since it might affect the effectiveness of the message that is meant to be conveyed.[232] However, the substantial and near unaltered use of the original work and "mean-spirited" copying were not seen as necessary to meet the purpose of humorously criticizing the company. According to the Court, other alternatives could have been used, with more explicit use of humorous parodic elements. Concerning the effect of the dealing, the use was not considered to have a harmful economic effect *per se*, but the intent was to cause harm to the professional reputation of United Airlines.[233]

Given the parody purpose should not be interpreted narrowly, this enables a wider range of parodies to rely on the fair dealing provision. Parodies can be non-critical or more expressive of paying homage than conveying mockery or humor, and importantly, as confirmed in *United Airlines*, do not necessarily have to target the work being borrowed but can rather comment on something external to the work. This removes a significant hurdle for many user-derived works and allows for different forms of appropriation and subversive expressions. These types of parodies would not have qualified for protection under the previous fair dealing provision or pre-*CCH* interpretation.

The Canadian courts have, and even more so than the US courts, explicitly noted user's rights and the importance of limitations and exceptions for users and their subsequent ties to copyright policy objectives, while still notionally having a less open-ended doctrine than fair use. Both jurisdictions seem to allocate some weight to the user's motive behind using the work, as seen in *Rogers* and *Blanch* in the US and in *United Airlines* in Canada. The fairness factors for fair dealing are very similar to the ones listed in fair use, but in Canada their assessment is guided by more explicit understanding and interpretation of the position of users. Similarities can be seen in *Cariou* and *Campbell* regarding fair use, but the connection is not quite as direct. *Alberta* and *SOCAN* demonstrate how the wide interpretation of the different fair dealing purposes could likely also cover a range of user-derived works. As in the case of fair use, the substantiality and amount of appropriation

[231] *United Airlines*, paras. 128-130.
[232] *Ibid.*, para. 132.
[233] *Ibid.*, para. 140; Jacques, 2019, p. 123.

is a possible restriction for user-generated content and near identical copying is unlikely to pass as fair, as shown in *Michelin* and *United Airlines*.

4.2.2. Assessing the fair dealing provision

Canadian courts have numerously emphasized the differences between the US fair use and Canadian fair dealing[234], but the distinction is less clear than before. Indeed, Michael Geist argues that the Canadian fair dealing has shifted much closer to fair use since the listed purposes under fair dealing can be interpreted much more broadly.[235] The first stage of the fair dealing analysis is now easier to pass and the emphasis has shifted to the second stage with an actual analysis of fairness. Fair dealing can still be seen to categorically exclude uses which do not fall under the exhaustive list of enumerated purposes in the provision, and this may negatively impact the development of new forms of expression and creativity.[236] However, the fact that limitations and exceptions have been elevated to the same level as exclusive rights and that they must be given a wide interpretation in order to ensure users' rights, makes the current regime significantly more supportive of user-generated content than before.

Generally, the Canadian fair dealing provision seems to comply with the three-step test. The use of a work must be for one of the listed purposes under the provision which fulfills the first step of the test. However, since the fair dealing provision must now be interpreted broadly in order to not unduly restrict users' rights, one could question whether it sufficiently meets the first step. Nevertheless, the existence of the first 'hurdle', even if in a somewhat looser form, should satisfy the first step. The six non-exhaustive fairness factors endorsed in *CCH* allow for a deeper analysis that take into account the economic and non-economic interests of the rightsholder and weigh them against the fairness of the use, and thus enable the fair dealing provision to satisfy the second and third steps.

Freedom of expression is guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms (CCFR): "*Everyone has the following fundamental freedoms… freedom of*

[234] *Michelin,* see footnote no. 208; *United Airlines*, para. 116; *SOCAN*, para. 26.
[235] Geist, 2013, p. 176.
[236] Katz, Ariel. "Fair Use 2.0: The Rebirth of Fair Dealing in Canada." *The Copyright Pentalogy*, edited by Michael Geist, University of Ottawa Press, 2013, p. 140.

thought, belief, opinion and expression, including freedom of the press and other media of communication…".[237] Rights and freedoms are subject "*only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".[238] This is similar to the approaches in the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union.[239] Freedom of expression should be interpreted liberally, but it does not extend to expressions that are hostile or inconsistent with the values contained in the Canadian Charter. [240] Political, religious, artistic or commercial expressions "should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community".[241] In *Michelin*, the Court decided the defendant's right to freedom of expression under section 2(b) CCFR was not restricted and that the reproduction of the Michelin man logo could not be justified based on freedom of expression grounds. The Court considered that the defendant could have conveyed their message using different means and not have reproduced the logo in such a substantial fashion.[242] The Court stated similarly in *United Airlines* and deemed the defendant's insincerity behind the use to also support this finding. Based on the current case-law, parodies and appropriation in general continue to face a hurdle based on the substantiality of the borrowing.

4.2.3. Assessing the UGC exception

The specific exception for non-commercial user-generated content enables users to create and disseminate user-derived content without having to obtain authorization from the rightsholder. The text of the provision indicates that the creator of the UGC work must be an *individual*, thus it seems that corporate entities would not be able to rely on the exception but are instead covered by the (somewhat narrower) fair dealing provision. The

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[237] *Canadian Charter of Rights and Freedoms* ['CCFR'], Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[238] CCFR, section 1.
[239] *European Convention for the Protection of Human Rights and Fundamental Freedoms* ['ECtHR'], as amended by Protocols Nos. 11 and 14, 4 November 1950, Art. 10(2); *Charter of Fundamental Rights of the European Union* ['EUCFR'], 26 October 2012, 2012/C 326/02, Art. 52(1).
[240] *R v. Keegstra* [1990] 3 SCR 697; Jacques, 2017, p. 156.
[241] *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927.
[242] *Michelin*, see discussion '(vi) Summary on the scope of Protection under Section 2(b)'.

provision also allows for persons other than the individual to disseminate the work. The non-commercial status of the new work is assessed from the point of view of the individual user, not the disseminator, which might suggest that the authorized disseminator could perhaps even profit from the work.[243] However, if the creator of the user-derived work may not profit from it, then it seems rather counter-intuitive that the possible disseminator could do this instead. Courts will still have to interpret the provision in line with, and whilst balancing, the interest of both rightsholders and users. Considering the UGC exception focuses on an *individual* user, it also brings up the question whether the provision extends to collaboratively made user-generated works.[244] If not, many types of works could be left outside the scope of the exception. Wikis and encyclopedia-type UGC works would possibly still be able to rely on the fair dealing provision, particularly under the purposes of research or private study which, at any rate, would be interpreted liberally.

Under the provision, the work being borrowed must have been already "published or otherwise made available to the public". Thus, works such as private letters or journals likely cannot be used in UGC works.[245] The creator of the UGC work must also have reasonable grounds to believe the existing work itself does not infringe copyright. The provision states that the source of the existing work should be mentioned "if it is reasonable in the circumstances to do so". "Reasonable" is not defined, but it could possibly depend on the level of professionalism of the UGC work in order to prevent and clear suspicion about market substitution. Since user-derived content uses appropriation to convey certain messages and to participate in cultural discourse, the source of the existing work is usually familiar to other users and in such a situation an attribution would likely be unnecessary. Thus, the attribution requirement in the provision seems flexible and allows for a multitude of UGC works, but also protects rightsholders' interests. The UGC work created by the individual must be a new work. The provision dismisses "from the scope of the exception 'works' that are either mere copies of existing works or that are barely modified copies".[246] The user-derived work, thus, needs to bear some differences to the existing work and show a sufficient original contribution from the user.

[243] Scassa., 2013, p. 437.
[244] *Ibid.*, pp. 438-439.
[245] *Ibid.*, p. 439.
[246] *Ibid.*, p. 440.

Pirated works and identical copies uploaded and shared online, even when non-commercial, continue to remain outside the scope of protection of limitations and exceptions to copyright. In general, the Canadian exception for non-commercial user-generated content allows for the broad use and dissemination of user-derived works as long as certain conditions are met.

However, the exception can still be criticized for not going far enough. Subsection (1)(a) of the exception ("solely non-commercial purpose") could pose significant limitations for the use and dissemination of use-generated works. It is not clear what type of users fall under the provision. This is particularly problematic since the lines between commercial and non-commercial UGC works are increasingly harder to determine and the skills, capabilities and even the prominence of different users vary widely. Additionally, since the UGC exception "characterizes the 'user'… as one who makes [use of] copyright-protected works of others… it [in fact] perpetuates the myth that the regular 'creator' does not borrow from or use the works of others".[247] For example, would professional individuals who create a UGC work be covered if the work itself is non-commercial? What 'non-commercial' means will still likely be assessed on a case-by-case basis, which does not remove the uncertainties that users face over the legality of their content. It is also possible that the courts will inspect the ulterior motive, similarly to fair dealing, behind the use of the borrowed work. Those who merely exploit the original work to gain commercial exposure or engage in nefarious use would likely not be able to rely on the exception.

In terms of the three-step test, the UGC exception could be criticized as being too broad for the first step. Under the exception, a work may be made for any purpose as long as it is non-commercial. The range of user-derived works online and the various motivations behind their creation and dissemination would, however, be impossible to list exhaustively in any provision, since they include anything "from making a home video of a friend or family member dancing to a popular song and posting it online" to "creating [mash-ups] of video clips". At any rate, an exception would have to be interpreted broadly based on *CCH*. Sub-section (1)(d) of the UGC exception states that the use or dissemination of the new work must "not have a substantial adverse effect, financial or

[247] Scassa, 2013, p. 437.

otherwise, on the exploitation, or potential exploitation of the existing work or on an existing or potential market for it". This likely ensures that the second and third steps of the three-step test are met. The meaning of 'substantial adverse effect' is not defined. One could assume that a non-commercial UGC work cannot have a *substantial* adverse effect financially in the first place. It is unclear whether user-derived content with a higher production value or more popular works that 'take a life of their own' could be understood as having a substantial adverse effect on the exploitation of the work.

To conclude, under Canadian copyright law, user-derived content benefits from both fair dealing and the non-commercial UGC exception as defenses, or rather as "rights". In terms of commercialization, fair dealing is broader since it allows for both non-commercial and commercial uses. The amending of fair dealing to include more purposes has strengthened it further. Under the UGC exception, however, the purpose of the use (other than it having to be *non*-commercial) is not defined. The inclusion of a UGC exception is significant. It is drafted in a way that understands and even encourages the production *and* dissemination of user-generated content, much in the way of a 'life-form' that spreads freely and continuously as Barlow described. The exception is an affirmation about the value that user-derived content brings to the development of political, social and self-actualizing aspects for individuals and the society at large. As Geist describes, Canada "remains the only country in the world where the highest court has positively (and repeatedly) affirmed the principle of users' rights within copyright law".[248]

Concerns and uncertainties about the limits of non-commercial and commercial uses are, however, still present. It is possible that more 'amateurish' works may be able to rely on the UGC exception, whereas more professional works hinging on the line of commercial will more likely rely on fair dealing. This evidently limits uses to a narrower list of purposes but enables for a more in-depth analysis of fairness which may be deservedly called for in some cases. This should ease the minds of rightsholders to some extent. Undoubtedly, the most important legal rule supporting the production and spread of user-generated content, is the finding in *CCH* that limitations and exceptions must be considered as users' rights. Subsequently, limitations and exceptions are for users what exclusive rights are for authors and copyright owners, and both are tied to the policy aims

[248] Geist, Michael. "The Canadian Copyright Story." *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, p. 173.

of copyright itself. This interpretation also makes such cases subject to a proportionality analysis. In many ways this is similar to the system in the EU and countries adhering to the European Convention on Human Rights. The Canadian courts' proneness to discuss solutions from other jurisdictions, such as in *United Airlines* even explicitly endorsing the parody definition found in *Deckmyn*, could offer some interesting lessons for the development of copyright law in the EU.

4.3. The European Union – quotation and parody exceptions

In general, the continental European approach and to an extent the EU copyright law are based on the natural law focus of *droit d'auteur* that provides broad and strong exclusive rights. The Information Society Directive sets out an exhaustive list of limitations and exceptions of which all but one (exemption for temporary acts of reproduction in Article 5(1); the Orphan Works Directive 2012/28/EU has also added another mandatory exception for the use of orphan works, ie. copyright-protected works whose rightsholders are unknown, for certain purposes) are currently non-mandatory for Member States to implement in their national laws. In order to ensure harmonization within the Union, Member States cannot implement exceptions that are beyond the list provided in the Directive. The list contains several, and some very specific, limitations and exceptions. Some may pertain to user-generated content more than others, such as private copying, illustration for teaching or scientific research or use for the purpose of research or private study.[249] However, the most relevant ones concerning user-*derived* content in the scope of this thesis, are the quotation and parody exceptions. Member States may provide for exceptions or limitations to the exclusive rights provided in the Information Society Directive in cases of:

> "[**Art. 5(3)(d)**] ***quotations*** *for purposes* ***such as criticism or review****, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose*;
> …

[249] InfoSoc Directive, Arts. 5(2)(b), 5(3)(a), 5(3)(n).

[**Art. 5(3)(k)**] *use for the purpose of* ***caricature, parody or pastiche***".

As part of the implementation of the DSM Directive, the above exceptions must now be made mandatory in all Member States. As opposed to the US and Canada, the European Union has implemented the three-step test into its copyright law via the Information Society Directive:

> "[**Art. 5(5)**] *The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 [of Art. 5 InfoSoc] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder*".

The implementation of the three-step test is significant as to the scope of the limitations and exceptions provided for in EU copyright law. In the famous *Infopaq* case, the CJEU described limitations and exceptions as "derogations from the general principle [of exclusive rights]", meaning that the status of exceptions is evidently lesser compared to exclusive rights. Since they are 'derogations', limitations and exceptions must be interpreted strictly, and the Court emphasized that the role of the three-step test in ensuring rightsholders' interests further supports this interpretation.[250] In combination with strict interpretation of limitations and exceptions, the EU three-step test weighs the balancing test in favor of the rightsholders.

4.3.1. EU case-law

The case-law of the CJEU has important implications to the scope and interpretation of limitations and exceptions to copyright under EU law. The *Infopaq* ratio continues to remain a general foundation in EU copyright law, however, in more recent case-law the CJEU has found methods to interpret limitations and exceptions in a somewhat more liberal manner. In *Murphy*, the Court did confirm a general requirement for strict interpretation, but also cited Recital 31 of the InfoSoc Directive and stated that the interpretation of an exception "must enable [its] effectiveness… and permit observance of the exception's purpose". In addition, an exception "must allow and ensure the

[250] *Infopaq*, paras. 56-58.

development and operation of new technologies and *safeguard a fair balance* between the rights and interests of rightsholders… *and users of protected works who wish to avail themselves of those new technologies*… (emphasis added)".[251] Similarly, in *Painer*, the Court reaffirmed both of these findings.[252] In addition, the quotation exception, which was at stake in *Painer*, is intended to strike a fair balance between the right to freedom of expression of users and the reproduction right of authors.[253] Interestingly, the Court considers that a quotation, in the scope of the Article, should be accompanied by comment or criticism.[254] Article 5(3)(d) InfoSoc does, however, explicitly contain the wording "such as". Comment and criticism easily pertain to freedom of expression interests and possibly hence the linkage. However, it is less clear whether this extends to the more subversive or discourse-related quotations present in appropriation art and user-derived content. Thus, whilst the narrow interpretation of L&Es is the norm, the CJEU has generally attested that a fair balance must be ensured and that the exceptions' effectiveness should not be undermined.

In the *Deckmyn* parody case, the CJEU however endorsed a wider interpretation of the exception and once again emphasized the need to ensure the effectiveness of the exception through balancing interests. Deckmyn, a member of the far-right Vlaams Belang party in Belgium, had reproduced a drawing with some alterations from the cover of the Belgian *Suske en Wiske* comic book series. The Court held parody to be an autonomous concept under EU law and defined the essential characteristics of parody as: 1) to evoke an existing work while being noticeably different from it, and 2) to constitute an expression of humor or mockery.[255] Supposedly, humorous *intent* suffices, since it may be impossible and inappropriate for the judiciary to assess whether there was a humorous *effect*.[256] It is not apparent from the usual meaning of 'parody' in everyday language that it would be subject to other conditions. A parody does *not* need to "display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work", and neither is it subject to "[having to relate] to the original

[251] *Football Association Premier League Ltd and Others v QC Murphy and Others*, joined cases C-403/08 and C-429/08, EU:C:2011:631, paras. 162-164.
[252] *Painer*, paras. 133-134.
[253] *Ibid.*, para. 135; Rosati, 2019, p. 135.
[254] *Painer*, paras. 119-120.
[255] *Deckmyn*, para. 20.
[256] Rosati, 2019, p. 131.

work itself or mention the source of the parodied work".[257] Thus, a parody does not need to constitute an original work in itself and the parodic expression does not necessarily have to target the reproduced work, and can instead comment on something external to the work. In line with previous case-law, the Court connected the exception with a fundamental rights concern. The parody exception implicates a freedom of expression interest and thus a fair balance must be struck between the exclusive rights of authors and the freedom of expression of the user relying on Art. 5(3)(k).[258] Nevertheless, all circumstances need to be taken to account, and if the use of a work and the expression is made in a discriminatory nature, as was the case in *Deckmyn*, this weighs against the user relying on the parody exception.[259] This wider interpretation of the parody exception is a welcome development from the perspective of user-generated content, although the requirement for humorous intent and substantial linkage with freedom of expression concerns may serve as obstacles. If 'pastiche' (also included in Art. 5(3)(k) InfoSoc) is interpreted similarly, it could be an avenue for the protection of expressions that pay homage (without incorporating humorous elements) through appropriation.

A recent case bearing the most parallels with user-derived content is the preliminary ruling in *Pelham*. Music producer Moses Pelham had sampled in his work a two-second sequence from Kraftwerk's song *Metall auf Metall* without authorization. The sample played as a continuous background loop in Pelham's work. The Court stated that the reproduction by a user of a sound sample, "even if very short", amounts to a reproduction "in part".[260] The Court once again reaffirmed the importance of balancing interests and stated that, from a fundamental rights perspective, intellectual property rights are not absolute rights even when enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union (EUCFR).[261] Freedom of the arts, enshrined in Article 13 of the EU Charter, falls within the scope of freedom of expression in Article 11 of the European Convention on Human Rights (ECHR). The Court admitted that sampling constitutes a

[257] *Deckmyn*, para. 21; Jacques, 2019, p. 129.
[258] *Deckmyn*, paras. 25-27; Jacques, 2019, p. 19.
[259] *Deckmyn*, paras. 29-30; Rosati, 2019, p. 132.
[260] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben,* C-476/17, EU:C:2019:624., para. 29
[261] *Ibid.*, paras. 33-34; Snijders, Thom and van Deursen, Stijn. "The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the *Pelham*, *Spiegel Online* and *Funke Medien* Decisions." *International Review of Intellectual Property and Competition Law*, vol. 50, 2019, pp. 1178-1179.

form of artistic expression that is covered by Article 13 of the Charter, and thus also implicates Article 11 ECHR.[262] Interestingly, however, the Court differentiated between samples that are recognizable and those that are unrecognizable to the ear in the new work.[263] According to the Court, the former constitutes a reproduction, whereas the latter does not. With regards to the quotation exception, the CJEU stated that an essential characteristic of a quotation is that the user of a protected work "[must have] the intention of entering into 'dialogue' with that work".[264] The Court did not elaborate further on the meaning of 'dialogue' but attested that it cannot exist if the work being used is unrecognizable in the appropriative work, and thus the scope of the quotation exception does not extend to such situations. What the Court seems to set out here is that a quotation must serve a certain purpose, such as "illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between [the original work] and the assertions of [the] user".[265] User-derived works may often be considered to be "in dialogue" with the borrowed work, however, the CJEU's description possibly still alludes to quotations that have a critical or commentative undertone.

Notably, German copyright law allows for so-called 'free use': "*an independent work created in the free use of the work of another person may be published and exploited without the consent of the author [whose work is being used]*", though this does not apply in the case of musical works "*in which a melody is recognizably taken from the work and used as the basis for a new work*".[266] However, since there exists no equivalent of 'free use' in the EU, the Court was asked whether it is consistent with EU copyright law. According to the referring court free use is "based on the idea that it is not possible to conceive of a cultural creation without that creation building upon the previous work of other authors".[267] However, the Court stated that in order to ensure consistency within the Union, the Member States cannot provide for exceptions and limitations that are beyond

[262] *Pelham*, para. 34-35
[263] *Ibid.*, paras. 31, 36-37.
[264] *Ibid.*, paras. 71-74.
[265] *Ibid.*, para. 71.
[266] *Copyright Act of 9 September 1965* (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 28 November 2018 (Federal Law Gazette I, p. 2014), section 24.
[267] *Pelham*, para. 56; Snijders et al, 2019, p. 1181.

those expressly set out in the Information Society Directive.[268] *Pelham* aptly demonstrates the inflexible nature of the EU copyright regime.

The recent EU case-law does acknowledge the position of the user and the role of effective limitations and exceptions in safeguarding user's interests, but to a much lesser extent than the US and especially Canada. In addition, these acknowledgments are not tied to the recognition that user-derived expression could contribute to the overarching policy goals of copyright in creating and disseminating more works, as has been the case in the two other jurisdictions. Rather, they primarily relate to fundamental rights (particularly freedom of expression) as seen in *Deckmyn* regarding parody and in *Painer* and *Pelham* about quotation. The inflexibility of the EU system by rejecting the German free use rule because of harmonization concerns and the existing derogation rule deriving from *Infopaq* both mean that the limitations and exceptions under EU law cannot be interpreted as widely. Thus, when compared to US and Canada, the position of users and user-derived works are generally in a weaker position than the rightsholders.

4.3.2. Assessing the EU L&E framework

In general, the more specific and narrowly interpreted limitations and exceptions in EU law are considered to provide more legal certainty than the open-ended fair use doctrine in the US and the semi-open-ended fair dealing provision and liberally interpreted exceptions in Canada. In addition, the open-ended three-step test in EU law is understood to further constrain the already narrow limitations and exceptions. Simultaneously, however, the strict interpretation doctrine makes EU copyright legislation less equipped to respond to new types of uses and technologies, such as appropriative expressions and the spread of user-generated content. P. Bernt Hugenholtz describes the result as an "increasing mismatch [in the EU] between the law of copyright and emerging social norms [that are shaped, at least in part, by the state of technology]".[269] Since limitations and exceptions are still regarded as derogations to the general rule (i.e. exclusive rights),

[268] *Pelham*, paras. 64-65; Snijders et al, 2019, p. 1183.

[269] Hugenholtz, P. Bernt. "Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use?" *Copyright Law in an Age of Limitations and Exceptions*, edited by Ruth L. Okediji, Cambridge University Press, 2017, pp. 275-276.

the current approach in EU does not focus on users' rights in a similar way as Canada does, even if a balancing test and an assessment of the purpose are still required.

The focus on fundamental rights is a core part of the balancing of interests between the rightsholder and the user. Both intellectual property and freedom of expression are contained respectively in Articles 17(2) and 11 of the EU Charter and in Articles 1 of the First Protocol and 11 of the ECHR. In addition, freedom of the arts is listed in Article 13 of EUCFR. Although a fundamental rights focus is an important method for the judiciary to balance interests and allow certain types of creative expressions, it is apparent that the protected expressions pertain largely to cases where a particularly important speech interest is at stake. As previously discussed in Chapter 2, these interests are generally considered to relate more to political and critical expressions. Thus, much of user-generated content is left outside the scope of the existing and inflexible, as shown in *Pelham*, list of limitations and exceptions in EU law.[270] EU copyright legislation does not contain similar flexibilities that are provided by (semi)open-ended exceptions, such as fair use or fair dealing or the liberal interpretation of "users' rights", thus it is less likely to be able to extend protection to a vast range of user-derived content.

5. USER-GENERATED CONTENT IN EU COPYRIGHT LAW – POSSIBLE SOLUTIONS

To summarize, the EU copyright legislation lacks the mechanisms and flexibilities to effectively respond to and protect the new user-generated types of expressions prominent in the Web 2.0. EU copyright law has, however, undergone several reforms with the most recent major one being the adoption of the Digital Single Market Directive in 2019. Further reforms addressing the sphere of user-generated content should not be considered non-viable. The Canadian approach that includes adopting a specific exception for non-commercial user-generated content and broadening the interpretation of limitations and exceptions through case-law could also be a possible route in the EU.[271] Based on the analyzed cases, some convergence can be seen between the jurisdictions, such as favoring

[270] Snijders et al, 2019, p. 1180.

[271] Lambrecht, Maxime and Cabay, Julien. "Remix allowed: avenue for copyright reform inspired by Canada". *Journal of Intellectual Property Law & Practice*, vol. 11, no. 1, 2016, p. 22.

a similar definition to parody and Canada having essentially adopted a proportionality-based analysis between exclusive rights and limitations and exceptions.

Recital 70 of the DSM Directive explicitly states that users "*should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche*". As discussed previously, these exceptions still fail to effectively cover the various forms of user-derived content. Enlarging the existing exceptions, such as parody or quotation, is unlikely to provide a solution as the strict interpretation doctrine will not allow for an extensive understanding of them.

A clear-cut solution would then be to adopt a new specific exception for non-commercial user-generated content, much akin to Canada. It outlines a specific and somewhat stable category of use, which is the preferred approach under EU copyright law and continental civil law traditions in general. There have already been discussions about the viability of an exception for user-generated content in the EU.[272] Influenced by the Canadian exception, the specific exception would allow a user to use an existing copyrighted work in the creation of a user-derived work and authorize its dissemination, if both are done for non-commercial purposes, with the source indicated if reasonable. The exception would be subject to the three-step test and thus the effects on authors' and copyright owners' exclusive rights will also be assessed. These balanced with the interests of the user, and addressing the possible fundamental rights concerns related to freedom of expression and the arts, would also allow courts to assess the various motivations behind the creation of a user-derived work. In the current regime, there remains a risk that the more political and critical expressions are still favored even under an exception for non-commercial UGC. User-derived content would be interpreted strictly. Additionally, the

[272] European Commission. *Green Paper: Copyright in the Knowledge Economy*. COM (2008) 466 final (16 July 2008), p. 19: *"The [Information Society Directive] does not currently contain an exception which would allow the use of existing copyright protected content for creating new or derivative works.* ***The obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated****. However, before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rightsholders of the original work.* ***There have been calls for the acceptance of an exception for transformative, user-created content*** (emphasis added)*."*

determination of what constitutes commercial or non-commercial would likely be challenging and assessed on a case-by-case basis.

The most optimal approach, however, would be the addition of a specific exception *in combination* with a semi-open-ended exception governing the limitations and exceptions provided for under EU copyright legislation. Based on such a system, legislatures would be more equipped to also address unforeseen uses of copyrighted works. The idea of introducing a more open-ended exception into EU copyright law is frequently criticized based on the 'incompatibilities' between common and civil legal traditions in relation to copyright and the fear of increase in legal uncertainty. The type of semi-open-ended exception inspired by the Canadian legislation could, however, be a "third way" between the inflexible EU and the fully open-ended US approaches.[273] It is also uncertain how much of a gap in reality exists between the European and Anglo-American, especially Canadian, regimes. Martin Senftleben argues that "the alleged inability" of civil law judges in applying flexible and open-ended copyright provisions is not a valid argument against the adoption of a semi-open-ended exception.[274] At the very least, harmonization via international law will have resulted in some convergence, and a shift towards a balancing test between rightsholder and user interests can be seen in all the discussed jurisdictions.[275] The DSM Directive has reaffirmed this balancing principle in the recitals.[276] The balancing test in the EU is, however, weighed from the outset towards the side of rightsholders based on the strict interpretation of both L&Es and the three-step test. The CJEU, in its case-law, has not shown to be incapable of applying open-ended exceptions and indeed, in the field of copyright, the three-step test itself constitutes one.

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[273] Lambrecht et al, 2016, p. 32.

[274] Senftleben, Martin. "The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provision". *American University International Law Review*, vol. 33, no. 1, 2017, pp. 253, 255, 262, 284.

[275] Lambrecht et al, 2016, p. 32.

[276] DSM Directive, Recital 70: *"The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property."*

Legal certainty would be guaranteed by following relevant case precedents. The notion that open-ended or semi-open-ended exceptions lead to significant legal uncertainty is also undermined by the finding that such cases often form fairly consistent clusters and patterns.[277]

The EU copyright regime would benefit from complementing its exhaustive list of limitations and exceptions with a semi-open-ended exception, akin to the extended Canadian fair dealing doctrine resulting from the *CCH* decision. This combination would provide legal certainty in the sense of a closed list of purposes but still be flexible in terms of interpretation. The imperative step for the CJEU would be to remove the strict interpretation for limitations and exceptions by no longer depicting them as "derogations" and instead elevating them to the same level as exclusive rights. The CJEU in its case-law and the EU legislature in the InfoSoc and DSM recitals have repeatedly stated the importance of balancing interests and have recognized a connection between users' interests and fundamental rights. In order to effectively balance between these interests, it is doubtful how exceptions could still be considered as merely derogations, especially if they are laden with fundamental rights concerns or considered to be vital for the dissemination and production of more works. The latter is an objective that the Union has increasingly emphasized, particularly in light of the internal market.[278]

Niva Elkin-Koren describes a "user-rights approach" to copyright, which shares similarities with the Canadian regime, that shifts the emphasis from exclusive rights to a better understanding of creative processes themselves and the various parts that authors and users play in these. A user-rights approach recognizes the role of users in promoting the goals of copyright and places permissible uses on the same level as exclusive rights – they should be defined as rights rather than as mere defenses.[279] The current narrow legal framework for limitations and exceptions accepts the scope of exclusive rights as a given and thus cannot counterbalance against the "rapid expansion of copyrights" or properly "safeguard user liberties in the digital environment".[280]

[277] Hugenholtz, 2017, p. 282.
[278] Lambrecht et al, 2016, p. 31; DSM Directive, Recital 2.
[279] Elkin-Koren, 2017, p. 134.
[280] *Ibid.*, p. 140.

In addition to the CJEU recognizing the pertinent need for balancing, a slight modification or rather "re-calibration" of the EU copyright legislation's wording could be a solution. Senftleben suggests modifying the EU three-step test in Article 5(5) InfoSoc into the following:

> "*In **certain special cases comparable to those** reflected by the exceptions and limitations provided for [in Art. 5(1)-(4)], the use of works or other subject-matter may also be exempted from [the exclusive rights in Arts. 2 and 3], provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder* (emphasis added)."[281]

A similar suggestion was introduced by the Wittem Project on a European Copyright Code, a collaboration by European copyright scholars concerning the future of European copyright law. In the Code, limitations and exceptions are listed into four different categories, with three of them being particularly relevant to user-derived content, namely: (1) uses with minimal economic significance; (2) uses for the purpose of freedom of expression and information; and (3) uses permitted to promote social, political and cultural objectives. Another section allows for uses which are "comparable" to the uses enumerated in the above categories (given they do not conflict with normal exploitation or unreasonably prejudice the rightsholder's legitimate interests).[282] Such re-wording of the three-step test is still likely compliant, since at the very least the uses are confined to "certain special cases" that are comparable to the existing purposes. These modifications would provide the type of flexibility and adaptability required in the Web 2.0 era. The three-step test itself does not need to be interpreted strictly. Assessing the financial harm or damage to the moral interests of the rightsholder can be done parallel to the analysis of users' intent and purpose in using a copyrighted work. This approach may be different from the general understanding of the three-step test in the EU as it stands, but it is unlikely to be incompatible with the test itself.[283]

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[281] Senftleben, 2017, p. 271.

[282] The Wittem Project. European Copyright Code. 2010, available at <ivir.nl/copyrightcode/ecc-pdf/> [accessed 10 Mar 2020], Art. 5.1-5.5.

[283] Lambrecht, 2016, pp. 30, 33-34.

6. CONCLUSION

A copyright system should not leave users in limbo over whether they can legally take part in the range of creative processes and expressions facilitated by the participatory web. At the same time, the concerns that authors may have over fair remuneration for their creative efforts are certainly valid. However, neither the numerous successive copyright reforms in past decades nor the "massive enhancement" of the scope of copyright owners' rights have resulted in significant, or even fair, increases in monetary rewards for authors.[284] The current discourse about value-gaps and the reforms listed in the Digital Single Market Directive in the EU are also unlikely to fully solve this situation. The more prominent threat for authors and copyright owners is large-scale digital and online piracy that distributes identical copies of works. The motivations behind online piracy are usually very different to the ones behind the production and dissemination of user-derived content.

If one of the aims of copyright is to ensure the dissemination of works, it should be better enabled to acknowledge the role and value that both authors and users bring to the system. The substantial increase in the scope of exclusive rights at the expense of L&Es is not conducive to this goal. One solution is to adopt a specific exception for non-commercial user-generated content, as in Canada's case. Complementing this, jurisdictions should also consider introducing a (semi-)open-ended exception that serves as the judiciary's tool to interpret limitations and exceptions more flexibly and to respond to unforeseen uses as new technologies develop. The EU's inflexible copyright regime would benefit from such a reform and it is less contradictory with the current state of EU legislation and case precedent than generally thought. These modifications would also send a strong normative message about the legitimacy, value and integral role of user creativity to the policy aims of copyright. Professional forms of authorship are unlikely to disappear, since many still enjoy consuming creative works in the 'traditional' way and are captivated by individuals with talent and expertise in their trade. [285] Copyright laws should, however, recognize that a multitude of creative processes and expressions exist in the Web 2.0 era.

[284] Litman, 2017, p. 130
[285] Ginsburg, 2017, p. 69.

The introduction of a specific exception or a more open-ended exception, or a combination of these, will not remove all the challenges facing user-derived content. The technological protection mechanisms meant to tackle digital and online piracy also indirectly impair the possibility of users to access and use a copyrighted work for permissible purposes. Digital copyright enforcement measures, particularly automated ones, have become prevalent on major online platforms but the respective bargaining power and resources of copyright owners and users are vastly different. Rightsholders should be compelled to assess in good faith whether the use of a work is covered by a limitation or exception before possibly requesting the content to be taken down. Generally, users also need to be more informed of their rights, since otherwise only the more prominent and influential users, and perhaps even corporate actors, are more likely to benefit from them.[286] Thus, a wider-scale examination of the different aspects of copyright law that impact user-generated content is required in order to better understand the effects and normative potential of the exceptions analyzed in this thesis.

[286] Elkin-Koren, 2017, p. 162.