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Intellectual Property



LAW REVIEW

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#2**

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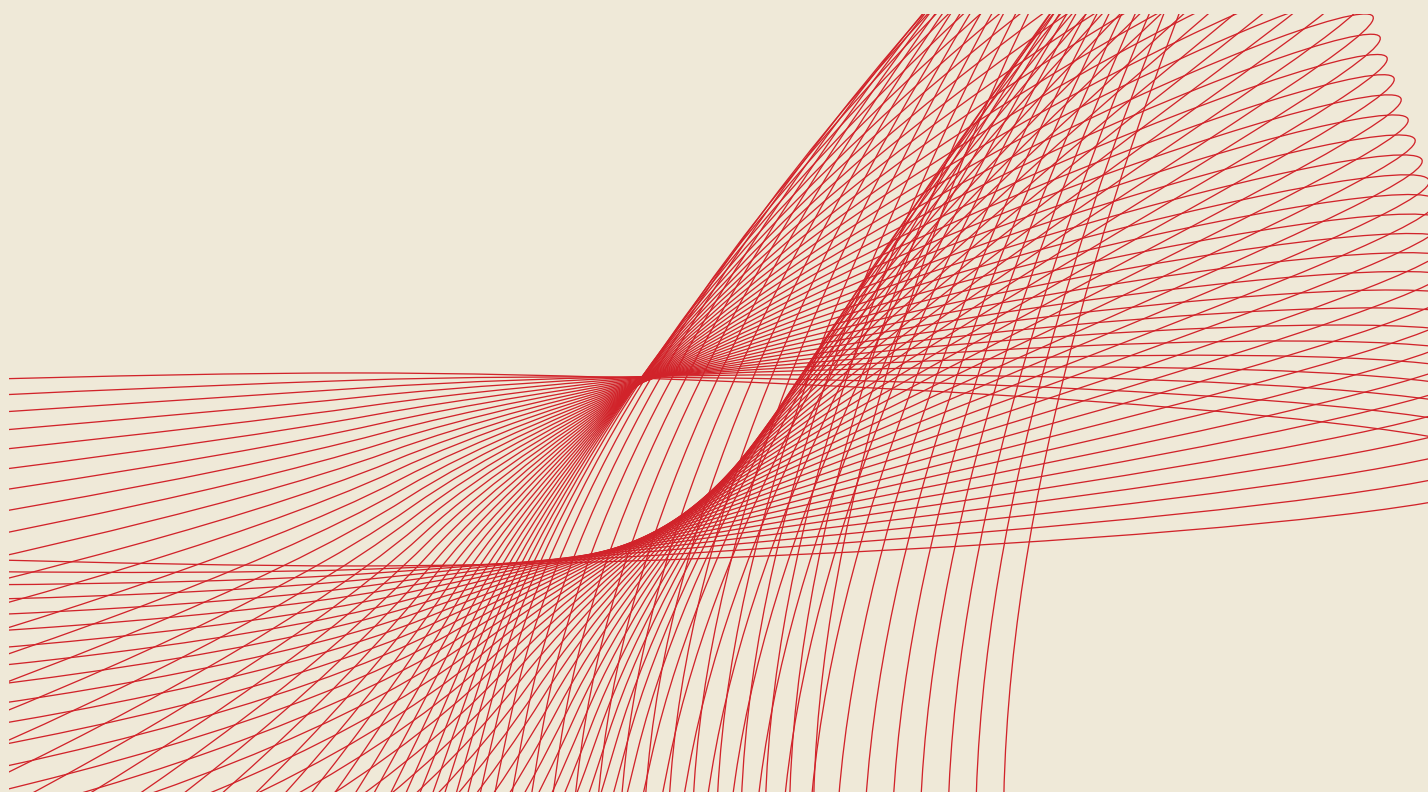
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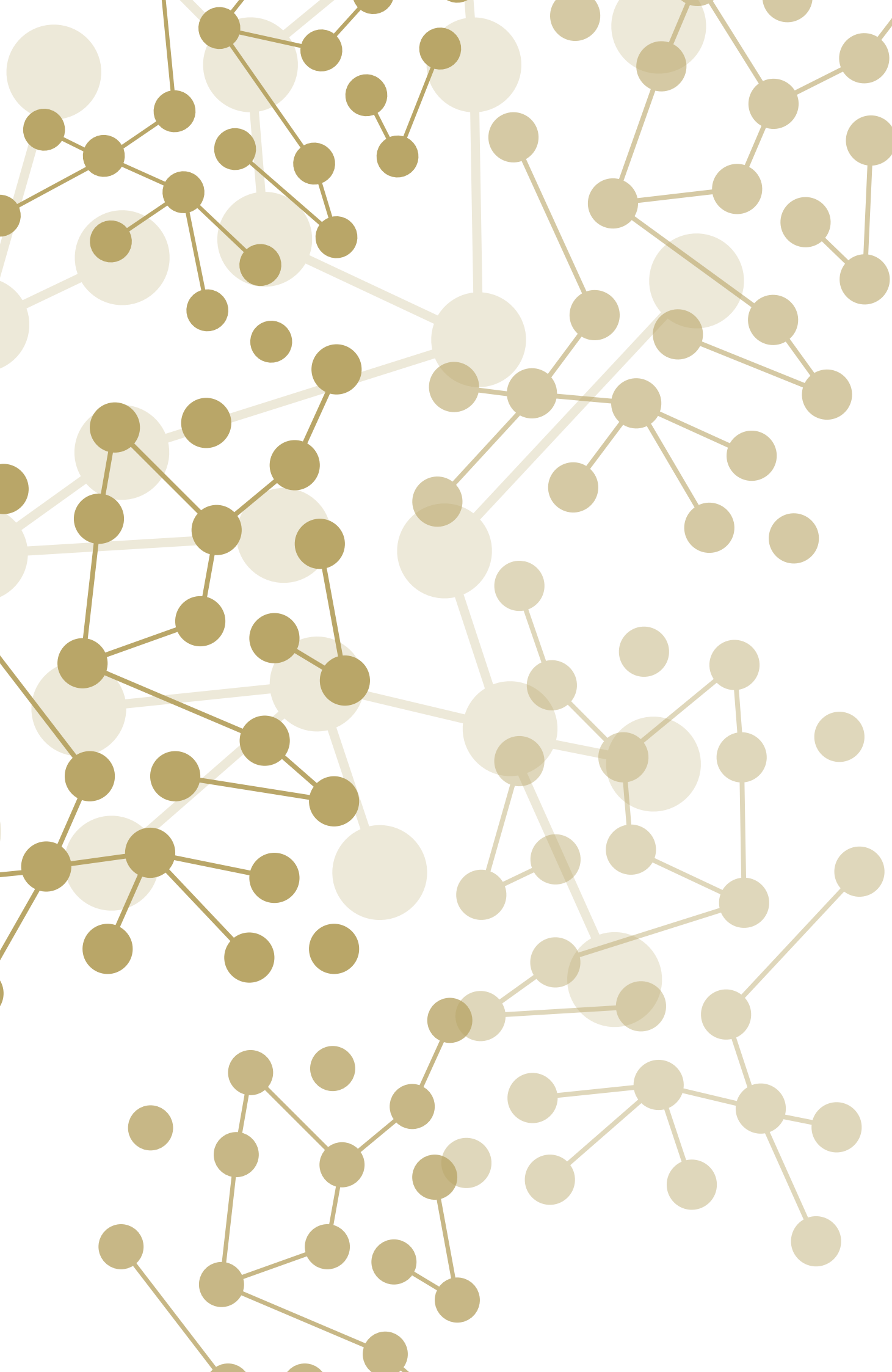
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Editorial Preface

On the 10th of December each year, the Nobel Prize Award Ceremonies are held in Stockholm, Sweden and Oslo, Norway. Nobel Laureates are selected in the categories of physics, chemistry, physiology or medicine, literature and peace, as well as the later established Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel. The Nobel week in December marks not only the celebration of the Nobel Laureates and their work but is one of the world's most prestigious celebrations of science and research.

Alfred Nobel was a Swedish chemist, inventor, engineer, entrepreneur and business man. He dictated in his will that his entire remaining estate should be used to endow “prizes to those who, during the preceding year, have conferred the greatest benefit to humankind”. When he died in 1896 Alfred Nobel had acquired 355 patents worldwide. His most famous invention is without doubt dynamite, but he invented and experimented in making synthetic rubber, leather and artificial silk among many other things.

This year, William D. Nordhaus and Paul M. Romer shared the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel. William D. Nordhaus received the prize for his work on climate change, but as Fredrik Tell and David Andersson shows in their article, Nordhaus earlier work concerned patents. In fact, many of the Nobel Laureates are owners of patents. We are very proud to present Tell's and Andersson's interesting analysis on market for patents in Sweden both past and present, not least in the spirit of the Nobel prize, scientific breakthroughs and technology transfer in relevant markets.

The support of younger colleagues and upcoming researchers is a prominent characteristic of the Nobel Laureates. During the Nobel week the Nobel Laureates visit Swedish schools and universities to promote academic research, knowledge dissemination and inspire young persons to begin their career as scientists. In the same vein, one of the aims of the Stockholm Intellectual Property Law Review is to give master graduates and young lawyers a possibility to publication of their works. In addition, the editorial board consists of present master students, who take on the demanding editorial work with diligence and a strong work ethic.

In this issue, we are proud to present the works of a talented group of young researchers. Stockholm university master graduates Kate Galilee and Ana Barbu publish articles based on their master theses in copyright law. Galilee analyses the ‘panorama exception’ for uses of public architectural works and Barbu writes about the ‘parody exception’ and its relation to freedom of expression. Astrid Wilson Roldão, associate at Vinge, presents a case note on unconventional trade marks and product design. Harsh Mahaseth's contribution gives a global perspective on the Marrakesh Treaty and the important work towards social inclusion.

There is (unfortunately) no Nobel Prize in Legal Sciences (yet...), but in the meantime, we hope you enjoy this second issue of Stockholm Intellectual Property Law Review!

Åsa Hellstadius & Frantzeska Papadopoulou



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Åsa Hellstadius

Internal and external control mechanisms for intellectual property rights: between a rock and a hard place?

Intellectual property is subject to both internal and external control mechanisms, which limit the scope of relevant rights. The former relate to the very requirements for protection and exceptions/limitations to the rights, while the latter result from that balancing exercise between contrasting rights and freedoms, which has become increasingly critical to undertake.

First, when we speak of internal mechanisms, these encompass, positive requirements for protection. So, in relation to copyright, requirements include the idea/expression dichotomy and originality. Turning to trade marks, in order for a sign to be registered, the requirements of distinctiveness and representation in an appropriate form must be present, and neither absolute nor relative grounds for refusal must subsist. In patent law, protection is available to inventions that are novel, non-obvious, have industrial application, and are not excluded subject matter. Similarly, design protection is subject to the design being novel and possessing individual character.

Second, the scope of protection granted by the relevant rights (once they have arisen or have been granted) is limited internally by the availability of exceptions and limitations, that is the possibility for third parties to do acts restricted by the right at issue without the permission of the relevant rightholder. The underlying rationale of exceptions and limitations is safeguarding third-party freedoms and rights, including freedom of expression, freedom to conduct a business, and the respect of personal and private life.

The concepts of freedom of expression and freedom to conduct a business will promptly lead readers to think of fundamental rights: Articles 11, 16 and 7 of the Charter of Fundamental Rights of the European Union mandate protection of, respectively, freedom of expression, freedom to conduct a business and the respect of personal and private life. And, indeed, fundamental rights operate as an external control mechanism. The Court of Justice of the European Union has increasingly referred to the need of balancing intellectual property protection with third-party fundamental rights, eg in relation to the topic of copyright enforcement (Telekabel, C-314/12).

Reference to internal and external control mechanisms has been recently made also by Advocate General (AG) Szpunar in his Opinion in *Funke Medien*, C-469/17, a case concerning copyright (as tentatively enforced by the German Government in the background national proceedings) in military reports. The AG noted how copyright itself contains internal mechanisms allowing possible conflict between fundamental rights, including freedom of expression, and copyright to be resolved.

These include the idea/expression dichotomy and exceptions and limitations. Copyright is also subject to external limitations, including the respect for fundamental rights:

If it became apparent that there were systemic shortcomings in the protection of a fundamental right vis-à-vis copyright, the validity of copyright would be affected and the question of legislative amendment would then arise. However, there may be exceptional cases where copyright, which, in other circumstances, could quite legitimately enjoy legal and judicial protection, must yield to an overriding interest relating to the implementation of a fundamental right or freedom.

The fil rouge of the contributions included in this issue of *Stockholm IP Law Review* is indeed the exploration of control mechanisms inherent to different intellectual property rights. These include the parody exception, the exception known as ‘freedom of panorama’, and the new exceptions mandated under the WIPO Marrakesh Treaty in relation to copyright works; the absolute grounds for refusal for shapes in trade mark law; and the availability of different rights in relation to one’s own overall intellectual property strategy.

Overall, the contributions showcase the potential tension between exclusivity and inclusivity, as well as the need to balance carefully proprietary regimes with third-party rights to access, use, and create new subject matter from existing subject matter. In this sense, intellectual property rights are placed between somewhat of a rock and a hard place: on the one hand, they must safeguard the creative and commercial efforts of those who create works, wish to have distinctive signs protected, and inventions eligible for patent protection; on the other hand, they must ensure that third-party creativity (eg parodies) is not stifled and competitors are not unduly restricted in their activities (eg, when certain shapes are registered as trade marks).

Enjoy this new issue of the Review!



ELEONORA ROSATI'S

Dr Eleonora Rosati is an Associate Professor in Intellectual Property Law at the University of Southampton, and Editor of the *Journal of Intellectual Property Law & Practice* (Oxford University Press), and a copyright law & policy consultant (e-LAWnora). She also contributes to *IPKat* and *1709 Blog*, and is the author of *Copyright and the Court of Justice of the European Union* (Oxford University Press).



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The market for patents in Sweden: past and present

By David E. Andersson‡ Fredrik Tell†

ABSTRACT

The worldwide revenues from the sale and licensing of patents have soared into the hundreds of billions of dollars in recent years. Consequently, the market for patents has become an important strategic option for firms to stay competitive, both by allowing them to leverage their own intellectual property rights (IPR), but also as a way of accessing important external technology. This article analyzes markets for patents in Sweden past and present by presenting and examining data on the market for patents in the 19th century as well more recently available data. We show that the origins of technology trade can be traced back to the 18th century and that an active national market for patents emerged by the end of the 19th century where intermediaries such as patent agencies and specialized marketplaces helped to broker deals between buyers and sellers of inventions. By contrast, today the domestic Swedish markets for patents is relatively insignificant, but Swedish firms instead act on international markets for patents. More firms are active on the demand side than on the supply side of the market, which indicates that the impact of a few large firms on the aggregate number is potentially large.

1. INTRODUCTION

On December 10, 2018 William D. Nordhaus and Paul M. Romer were awarded the Sveriges Riksbank Prize in Economic Sciences. Nordhaus for his work on climate change and Romer for his endogenous growth theory. What is perhaps less known is that Nordhaus early in his career

also worked on an endogenous theory of economic growth.¹ Even less known to the general public is probably that Nordhaus placed patents in the center of his analysis and that he probably was the first to introduce patent length as a parameter in patent policy design.²

In Nordhaus’ model of invention, he stressed that inventions are produced within the economic system, that any invention is potentially an indivisible public good, and that an inventor is given a monopoly over the invention (i.e. a patent). In his analysis, he followed Schmo- okler’s work concerning the role of the economic forces of the market as determinants of inventive activity.³ How- ever, Nordhaus emphasized how what he denoted “markets for invention” create incentives for technological change. According to Nordhaus, the royalty each invention receives in the market, relative to general market price, induces technological change.⁴ Accordingly, this analysis puts markets for technology (MfT) at the center of economic growth as an important mechanism through which eco- nomic activity can determine inventive activity. Such a conception requires that inventions (equated with patents) can be traded or licensed on a market and royalti- es can be earned. In this paper, we ask questions about markets for patents in Sweden by looking at how these markets have emerged and evolved in Sweden. How did and do markets for patents function in Sweden? Who have been the main actors on markets for patents? What are the conceived effects of markets for patents, and what effects can be discerned in Swedish markets for patents?

The article presents an overview of markets for patents in Sweden, past and present. The aim is threefold. First, we aim to provide an overview of the theory of markets for technology, considering markets for patents a sub-cate- gory of such markets. Second, the article aims to provide empirical evidence of patent markets in the Swedish context by making use of data collected from the Swedish

National archive (Riksarkivet) as well as the archives of the Swedish Patent Office (PRV) and by providing historical and contemporary examples of how these markets were used. Our third aim is to point out directions for future research on markets for technology and markets for patents.

The article continues as follows: section 2 lays out the theoretical arguments regarding the existence and func- tioning of MfT. Section 3 traces the origins of patent trade in Sweden back to the 18th century and ends with current empirical observations of the Swedish market for patents. Section 4 concludes and presents directions for future research.

2. MARKETS FOR TECHNOLOGY

MfT, that is, trade in technology disembodied from physical products, have received increased attention by scholars during the last 15 years due to their effects on industry structure and corporate strategy.⁶ By stimulating trade in intellectual resources, property rights and ideas, MfT open up industries, especially knowledge-based ones. There are parallel discussions, both internationally and in Sweden, in spread of the open innovation paradigm, which argues for increased technology trade and external knowledge acquisition by firms.⁷ One of the main deter- minants of this development is widely seen to be the emergence of intellectual property rights (IPR), such as patents, which enables the separation of the intangible (the technology) from the tangible (the product) and makes it possible for economic forces of supply and demand to act upon this type of property.⁸ Technology trade thus allows for increasing economic efficiency by reallocating property rights to actors who are betting at commerciali- zing the technology because of their better access to com-plementary assets. Akcigit et al emphasize this role of MfT in “correcting the misallocation of ideas across firms”

and that MfT also may influence firms’ R&D decisions.⁹ In this way, such markets are conducive for specialization of inventive activity as productive inventors may profit from their inventions through the market.¹⁰ This type of speci- alization in invention does not take place within internal R&D labs of large firms, but through the use of property rights provided by the patent system to furnish an active market.

MfT can also stimulate the diffusion and use of existing technologies. Codification of technology into an intel- lectual property right (IPR), for instance a patent, implies that it will be easier for both buyers and suppliers to make use of new inventions and technology through licensing. In these markets, several actors are active: firms, inven- tors who buy and sell their inventions and ideas, as well as intermediaries who facilitate technology transactions. The potential welfare effects have been estimated to be large. Akcigit et al find that a shutdown of MfT would decrease economic growth in the US, while a situation where each seller matches with a perfect buyer has the potential to increase the growth rate of the economy by up to 50 percent conjoint with significant welfare impro- vements.

While the notion of MfT has made it possible to investi- gate the effects of such markets, critical voices have been raised regarding MfT status as proper markets.¹¹ The inter- active nature of the innovative process from conception to marketable product calls for further investigation of diffe- rent subsets of MfT, and who are acting in such submar- kets. This feature points to the diversity of MfTs and what type of marketplaces can facilitate technology trade, where Akcigit et al note that “[t]o date, online intellectual pro- perty platforms have failed to arbitrage the market.”¹² Instead, these authors emphasize the role of the patent agents in MfTs, since patents are often sold and bought through intermediaries due to the sensitivity of IPR.

‡ Department of Business Studies, Uppsala University and Department of Management and Engineering, Linköping University.
† Department of Business Studies, Uppsala University.
¹ William D. Nordhaus, *Invention, Growth and Welfare: A Theoretical Treatment of Techno- logical Change* (MIT Press, 1969).
² William D. Nordhaus, “The Optimal Life of a Patent,” Cowles Foundation Discussion Papers (Cowles Foundation for Research in Economics, Yale University, November 1967), <https://ideas.repec.org/p/cw/cwldpp/241.html>. copyright and related rights in the information society (‘Infosoc Directive’).
³ Jacob Schmookler, *Invention and Economic Growth* (Harvard University Press, 1966).
⁴ More formally, Nordhaus stated that assum- ing that inventions are technically indepen- dent, i.e. the contribution to total productivity (A) per invention does not depend on whether other inventions are used, the ith invention contributes to total productivity by ΔA_i . If this holds, then the royalty of the ith invention (s_i) as a proportion of the market price is equal to the ratio of the change in productivity due to the ith invention such that: $s_i / p = [\Delta A_i] / A$.
⁵ Nordhaus used the term “markets for inven- tion”.
⁶ Ashish Arora, Andrea Fosfuri, and Alfonso Gambardella, *Markets for Technology: The Economics of Innovation and Corporate Strategy* (MIT Press, 2001); A. Arora and A. Gambardella, “Ideas for Rent: An Overview of Markets for Technology,” *Industrial and Corporate Change* 19, no. 3 (June 1, 2010): 775–803, <https://doi.org/10.1093/icc/dtq022>.
⁷ Henry William Chesbrough, *Open Innova- tion: The New Imperative for Creating and Profiting from Technology* (Boston, Mass: Harvard Business School Press, 2003);

Ove Granstrand, “The Economics and Management of Technology Trade: Towards a pro-Licensing Era?,” *International Journal of Technology Management* 27, no. 2–3 (2004): 209–240; Nicolette Lakemond and Fredrik Tell, eds., *Öppen Innovation: I Teori Och Praktik* (Lund: Studentlitteratur, 2016).
⁸ Alfonso Gambardella, Paola Giuri, and Alessandra Luzzi, “The Market for Patents in Europe,” *Research Policy* 36, no. 8 (October 2007): 1163–83, <https://doi.org/10.1016/j.respol.2007.07.006>; D. F. Spulber, “HOW PATENTS PROVIDE THE FOUNDATION OF THE MARKET FOR INVENTIONS,” *Journal of Competition Law and Economics* 11, no. 2 (June 1, 2015): 271–316, <https://doi.org/10.1093/joclec/nhv006>; Gaëtan de Ras- senfosse, Alfons Palangkaraya, and Elizabeth Webster, “Why Do Patents Facilitate Trade in Technology? Testing the Disclosure and Appropriation Effects,” *Research Policy* 45, no. 7 (September 2016): 1326–36, <https://doi.org/10.1016/j.respol.2016.03.017>.
⁹ Ufuk Akcigit, Murat Alp Celik, and Jeremy Greenwood, “Buy, Keep, or Sell: Economic Growth and the Market for Ideas,” *Econo- metrica* 84, no. 3 (2016): 982, <https://doi.org/10.3982/ECTA12144>.
¹⁰ Naomi R Lamoreaux and Kenneth L Sokoloff, “Market Trade in Patents and the Rise of a Class of Specialized Inventors in the 19th Century United States,” *American Economic Review* 91, no. 2 (May 2001): 39–44, <https://doi.org/10.1257/aer.91.2.39>.
¹¹ Joshua S. Gans and Scott Stern, “Is There a Market for Ideas?,” *Industrial and Corporate Change* 19, no. 3 (June 1, 2010): 805–37, <https://doi.org/10.1093/icc/dtq023>.
¹² Akcigit, Celik, and Greenwood, “Buy, Keep, or Sell,” 947.

Although there has been a surge in the research on MfT following the influential publication of *Markets for Technology: The Economics of Innovation and Corporate Strategy* by Ashish Arora, Andrea Fosfuri, and Alfonso Gambardella,¹³ neither the term in itself nor the empirical phenomenon are new to the world or to economic research. An early and influential study of the market for technology licenses was the one by Caves et al.¹⁴ Caves et al identified several of the market imperfections addressed by recent research and they also lay out a framework for analysis of technology markets in identifying some of their most important characteristics. The authors summarize salient features as “small-numbers bargaining”, “impacted information and opportunism”, “uncertainty”, “risk aversion” and “transaction costs”.¹⁵ The interaction of these characteristics causes imperfections in MfTs, and make them susceptible to market failures.

Since the mid-1990s, scholars concerned with the economics of innovation have paid increasing attention to the now pervasive phenomenon of technology licensing and the selling and buying of IPR, most commonly patents.¹⁶ In their review of the field Arora and Gambardella point out that this research was prompted by two factors.¹⁷ First, the apparent paradox that despite the notion that continued specialization has been a major source for economic growth during the 20th century, many industries were characterized by internalization of innovation in large firms. Second, the increasing opportunities for unbundling technology from physical goods and products through the use of IPR.

In Figure 1 we disentangle some concepts used in the discourse on MfT (shaded in the figure) and present an overview of the research field. We view MfT as an umbrella term that consists of different kinds of markets for the trade of technology and ideas. Sometimes the concepts *Market for Ideas* or *Markets for Innovation* are used interchangeably with MfT. In this article we zoom in on markets for IPR and more specifically on markets for patents, where the commodity or asset being transacted on this market is patents. Just as the concept of MfT includes many different types of “goods”, it can also include a variety of different types of transactions.¹⁸ In terms of patents the two most common types of transactions are patent transfers and patent licensing.¹⁹ In the first case, the patent is fully or partially transferred by the original owner to a buyer. In the case of a licensing contract the licensor (owner) gives the licensee (buyer) a temporary right to use the patented invention under various pre-determined conditions such as royalty fees to be paid, either for a fixed sum or as a percentage of revenues attributable to the licensed patent. Cross-licensing, when two or more actors grant a license to each other in exchange for one or more patents that each actor owns, is also common in MfT. Lastly, patents can be used as security in financial transactions, which may help the inventor to raise necessary capital for production or commercialization.²⁰ Furthermore, transactions can be either horizontal or vertical.²¹ Horizontal transactions refer to transactions between already established producers in an industry and vertical transactions represent the transfer of a technology from an upstream producer/supplier who does not have any commercial interests in the downstream product market.

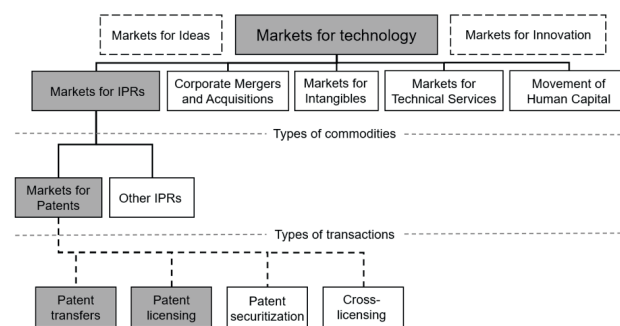


Figure 1: Overview of markets for technology and markets for patents

3. MARKETS FOR PATENTS IN SWEDEN IN THE 19TH CENTURY

The shaded parts of Figure 1 above also contextualize the article empirically as we move from theory to data. In the following two sections we present data on the markets for patents in Sweden, focusing on patent transfers and licensing, but with an emphasis on patent transfers. The historical data is based on a newly constructed database consisting of all granted Swedish patents and privileges 1819-1914.²² In addition to detailed information on patent characteristics, inventors and patentholders, the database also contains information on around 5,000 patent transfers. Along with digitized data from Swedish industry journal Norden we use this data to show how a marketplace for inventions was created in Sweden at the turn of the 20th century. Following this, we move to the present to show the development of markets for patents in Sweden 1990-2017.

3.1 Early developments

The first recorded IPR trade in Sweden involves the Swedish botanist Carl Linnaeus. Linnaeus was a professor at Uppsala University between 1741 and 1772, and is renowned for developing the botanical classification system. In 1762 Linnaeus had devised a method to inoculate genuine pearls in clams. He then presented his invention to a parliamentary committee who was prepared to reward him for his work. However, a trader from Gothenburg by the name of Peter Bagge approached the committee and offered to pay Linnaeus 6,000 silver daler (approximately \$45,000 today) under the condition that he was given the sole right to the invention and would be allowed to practice it unhindered in the Kingdom without intrusion by others.²³ Bagge furthermore asked that this right would be inherited by his descendants and promised to use the invention in the best manner possible for the good of the kingdom. As a result, the King granted Bagge a *privilegia exclusiva* based on Linnaeus invention on September 7, 1762 under the condition that Bagge would leave a copy of the described invention to the parliamentary committee for future use.²⁴

What happened to Linnaeus’ new method after this transaction was made is not clear, but the privilege was

still in force in 1819 when the new law for *privilegia exclusiva* was promulgated. Notwithstanding, Bagge obviously recognized a good enough business opportunity to be prepared to pay a significant amount of money in advance for its right of use and the right to exclude others from the same use. Division of labor followed. We may assume that Linnaeus had little interest or business acumen to fully bring his invention to the market and make a profit from it. A trader such as Bagge was most likely both better economically situated as well as he had superior access to the complementary assets needed to exploit the invention commercially.²⁵ To our knowledge, this is the earliest Swedish record and example of a market for technology, where the underlying asset being traded is the right to an invention or process.

The legal status of IPR transferability thus goes far back in Swedish history and has most likely been an important part of legislation regarding the early *privilegia exclusiva*. In the first Swedish patent law from 1819 it is clearly stated in the sixth paragraph that “*privilegia exclusiva* can as other property be inherited or gifted and also through sale or transaction transferred to another Swedish citizen” (authors’ translation).²⁶ This is repeated in subsequent patent laws in 1834 and 1856. In 1856 however, it was also allowed to transfer rights to foreigners as long as they used a Swedish agent.²⁷

¹³ Arora, Fosfuri, and Gambardella, *Markets for Technology*. The same thing could arguably be said about Naomi Lamoreaux and Kenneth Sokoloff’s pioneering work *Inventors, Firms, and the Market for Technology* in the Late Nineteenth and Early Twentieth Centuries (Lamoreaux and Sokoloff 1999).

¹⁴ Richard E. Caves, Harold Crookell, and J. Peter Killing, “The Imperfect Market for Technology Licenses,” *Oxford Bulletin of Economics and Statistics* 45, no. 3 (1983): 249–267.

¹⁵ Caves, Crookell, and Killing.

¹⁶ Ashish Arora and Alfonso Gambardella, “The Changing Technology of Technological Change: General and Abstract Knowledge and the Division of Innovative Labour,” *Research Policy* 23, no. 5 (1994): 523–532; Ashish Arora and Andrea Fosfuri, “Wholly Owned Subsidiary versus Technology Licensing in the Worldwide Chemical Industry,” *Journal of International Business Studies* 31, no. 4 (2000): 555–572; Bharat N. Anand and Tarun Khanna, “The Structure of Licensing Contracts,” *The Journal of Industrial Economics* 48, no. 1 (2000): 103–35; Arora, Fosfuri, and Gambardella, *Markets for Technology*; Ashish Arora and Andrea Fosfuri, “Licensing the Market for Technology,” *Journal of Economic Behavior & Organization* 52, no. 2 (October 1, 2003): 277–95, [https://doi.org/10.1016/S0167-2681\(03\)00002-7](https://doi.org/10.1016/S0167-2681(03)00002-7); Ashish Arora and Marco Ceccagnoli, “Patent Protection, Complementary Assets, and Firms’ Incentives for Technology Licensing,” *Management Science* 52, no. 2 (2006):

293–308; A. Fosfuri and M. S. Giarratana, “Introduction: Trading under the Buttonwood—A Foreword to the Markets for Technology and Ideas,” *Industrial and Corporate Change* 19, no. 3 (June 1, 2010): 767–73, <https://doi.org/10.1093/icc/dtq025>; Gambardella, Giuri, and Luzzi, “The Market for Patents in Europe”; Alfonso Gambardella, Dietmar Harhoff, and Bart Verspagen, “The Value of European Patents,” *European Management Review* 5, no. 2 (2008): 69–84, <https://doi.org/10.1057/emr.2008.10>; Carlos J. Serrano, “The Dynamics of the Transfer and Renewal of Patents,” *The RAND Journal of Economics* 41, no. 4 (2010): 686–708.

¹⁷ Arora and Gambardella, “Ideas for Rent.”

¹⁸ Thierry Madiès, Dominique Guellec, and Jean-Claude Prager, eds., *Patent Markets in the Global Knowledge Economy: Theory, Empirics and Public Policy Implications*. (Cambridge University Press, 2014).

¹⁹ Ashish Arora, “Patents, Licensing, and Market Structure in the Chemical Industry,” *Research Policy* 26, no. 4–5 (1997): 391–403; Bharat N. Anand and Tarun Khanna, “The Structure of Licensing Contracts”; Lamoreaux and Sokoloff, “Market Trade in Patents and the Rise of a Class of Specialized Inventors in the 19th Century United States”; Arora and Fosfuri, “Licensing the Market for Technology”; Andrea Fosfuri, “The Licensing Dilemma: Understanding the Determinants of the Rate of Technology Licensing,” *Strategic Management Journal* 27, no. 12 (December 1, 2006): 1141–58, <https://doi.org/10.1002/smj.562>; Carsten Burhop, “The

Transfer of Patents in Imperial Germany,” *The Journal of Economic History* 70, no. 4 (2010): 921–939; Serrano, “The Dynamics of the Transfer and Renewal of Patents.”. The term assignment is used interchangeably with transfer in the literature.

²⁰ Madiès, Guellec, and Prager, *Patent Markets in the Global Knowledge Economy: Theory, Empirics and Public Policy Implications*.

²¹ Arora, Fosfuri, and Gambardella, *Markets for Technology*.

²² David E. Andersson, *The Emergence of Markets for Technology: Patent Transfers and Patenting in Sweden, 1819–1914*, Doctoral Thesis 179 (Uppsala: Department of Business Studies, 2016).

²³ Exchange rates calculated using the “Historical Currency Converter”: Rodney Edvinsson and Johan Söderberg, “A Consumer Price Index for Sweden, 1290–2008,” *Review of Income and Wealth* 57, no. 2 (2011): 270–292.

²⁴ At this point in time, *privilegia exclusiva* was regulated by article 29 in the general legislation on manufacturing privileges from 1739.

²⁵ J. A. Markman, “En Uppfinning Av Linné,” *Svenska Patentkontorets Cirkulär* 14, no. 2 (1922): 83–84.

²⁶ Kongl. Maj:ts nådiga förordning angående Hwad iakttagas bör wid förekommande frågor om *Privilegia Exclusiva* för nya i Riket förut okända Slöjde-inrättningar, konster eller väsentliga Konst-förbättringar. Stockholm, 1819.

²⁷ See Swedish Code of Statutes (SFS) 1834:41, §18 and 1856:49, §1 and §11.

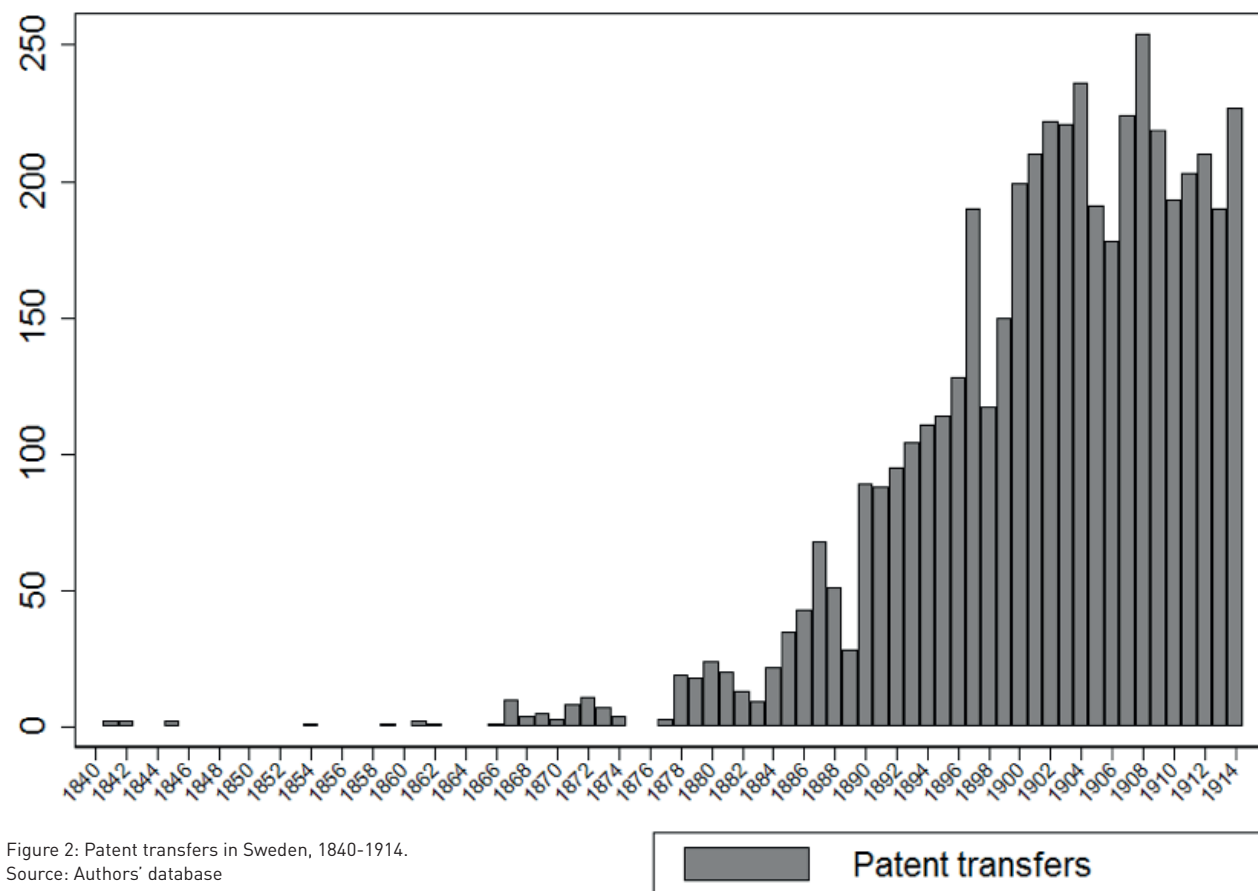


Figure 2: Patent transfers in Sweden, 1840-1914.
Source: Authors' database

Even though the transferability of IPR thus has a long history in Sweden, the beginning of the 19th century saw relatively little activity in markets for patents. The relative quiet market, both in absolute and relative terms, could in part be attributed to relatively weak property rights and a high propensity to litigate, which in turn increased uncertainty about the value of granted patents.²⁸ Based on data collected from the Swedish National Archive and the archives of the Swedish Patent Office, Figure 2 shows the evolution of patent transfers during the 19th century and to the start of World War II. As can be seen, before the 1870s there were few transfers of granted patents taking place. However, in the 1880s this changed and patent transfers steadily increased. In total about 12 percent of all granted patents 1885-1914 were transferred at least once.²⁹ This is in line with historical research from the US, Germany and Japan indicating that early markets for patents

emerged globally during a time when patenting activity was becoming increasingly international.³⁰

3.2 The “Inventor Exchange”: A 19th century marketplace for inventions

As patenting and patent transfers increased, the actors involved realized that using a market for patents involved transaction costs, including those associated with finding buyers or sellers of relevant patents, ascertaining patent quality and usefulness, and the enforceability of property rights. The appearance of such transaction costs induced initiatives to structure and facilitate the operation of a marketplace. The recently established patent agencies of the time became one significant actor in trying to achieve this objective. Early Swedish patent agencies such as L. A. Groth & Co and Stockholms Patentbyrå Zacco & Bruhn

were important intermediaries in the Swedish market for patents. These patent agencies seized the opportunity to make patent trade an important part of their business model.³¹ Some patent agencies, like the Wawrinsky agency, even produced their own journal where they published advertisements for patents for sale. Not only patent agencies emerged as providers of marketplaces for technology, where they could act as brokers. The Association of Swedish Inventors (Sveriges uppfinnareförening) took further measures and founded an “Inventor Exchange” (Uppfinnarebörs) in 1886 in prominent industry journal Norden, publishing the Swedish Journal of Patents and Trademarks as a weekly supplement.³² Acknowledging the problem of transaction costs the inventors’ association wrote in the first edition that:

“An exchange, a marketplace, where those who wish to acquire or sell inventions can find their customers still does not exist in our nation and in this we find one of the reasons why inventors in spite of our relatively good patent law in general obtain little benefit from their inventions. It is often observed that he who has managed to produce a valuable invention only occasionally possesses the traits required to bring it to the market.../.../... It would therefore be of mutual benefit, and foster the industrial life, if these two categories of intellectual workers had a somewhat more secure way to find each other than merely by chance.” (authors’ translation) (Norden, Journal of Patents and Trademarks, May 28, 1886, p. 159)

The “Inventor Exchange” made it possible for anyone to publish advertisements (up to three times free of charge) for the sale or acquisition of inventions. The popularity of the journal indicates that this was most likely one of the most efficient ways to attract attention to your inventions. During the next twenty years the “Inventor Exchange” received more than a thousand advertisements for the sale, licensing or acquisition of different inventions. It seems, however, that secure property rights were indeed a prerequisite for the marketplace to function. Andersson and Tell found that no less than 741 advertisements included references to granted patents.³³ The Inventor Exchange was not a “lemons” market and seems to have been a relatively successful marketplace. Patents for sale in the marketplace on average was of higher quality than other patents measured as number of patent fees paid.³⁴

Figure 3 shows an advertisement from the Inventor Exchange in the left column, and patents for sale in Wawrinsky’s *Patentunderrättelser* in the right column. We suggest two conspicuous features of these advertisements: First, all of them include references to granted Swedish patents. Second, all of them explicitly refer to the use of intermediaries, in this case Swedish patent agencies. We believe this highlights two features of markets for patents mentioned above: the importance of IPR for secure transactions and the importance of intermediaries to lower transaction costs. As more modern patent laws partly alleviated the appropriation problem inherit in the creation of new ideas this was still not enough for a market to emerge. Intermediaries and a more formal infrastructure were still needed to furthermore lower risk and uncertainty surrounding this type of transactions.

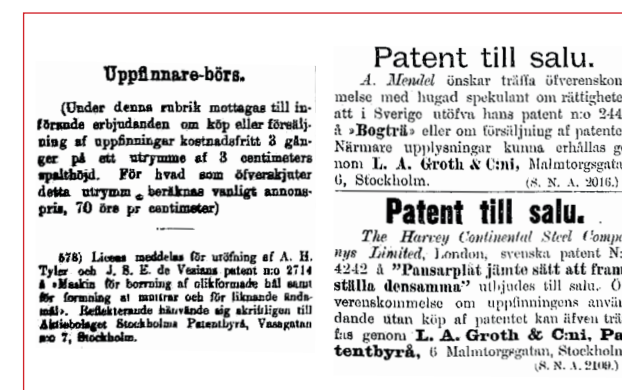


Figure 3: The Inventor Exchange and patents for sale.
Sources: (left) Norden, vol. XXVIII, no. 1, p. 12 [January 5, 1900], (right) Patentunderrättelser, vol. 1., no. 25, p. 1 [June 25, 1896]

3.3 Some examples of important patent transfers in Swedish history

The market for patents has also left its mark on Swedish business history and has at times played a crucial role in the very formation of noteworthy Swedish industrial enterprises. Although Swedish industrialist and inventor Gustav de Laval was one of the founders of AB Separator to exploit his improved milk separator in 1878, the basis of the firm was in fact a patent transfer and the division of labor made possible by markets for patents.³⁵ De Laval’s

²⁸ David E. Andersson and Fredrik Tell, “From Fighting Monopolies to Promoting Industry: Patent Laws and Innovation in Sweden 1819-1914,” *Economic History Yearbook*, forthcoming.

²⁹ Andersson, *The Emergence of Markets for Technology*.

³⁰ See for example: Naomi R. Lamoreaux and Kenneth L. Sokoloff, “Inventors, Firms, and the Market for Technology in the Late Nineteenth and Early Twentieth Centuries,”

in *Learning by Doing in Markets, Firms, and Countries*, ed. Naomi R. Lamoreaux, Daniel M. G. Raff, and Peter Temin (University of Chicago Press, 1999), <https://doi.org/10.3386/h0098>; Burhop, “The Transfer of Patents in Imperial Germany”; Tom Nicholas and Hiroshi Shimizu, “Intermediary Functions and the Market for Innovation in Meiji and Taishō Japan,” *Business History Review* 87, no. 1 (2013): 121–149.

³¹ David E. Andersson and Fredrik Tell, “Patent agencies and the emerging market for

patenting services in Sweden, 1885-1914,” *Entreprises et histoire* 82, no. 1 (2016): 11, <https://doi.org/10.3917/eh.082.0011>.

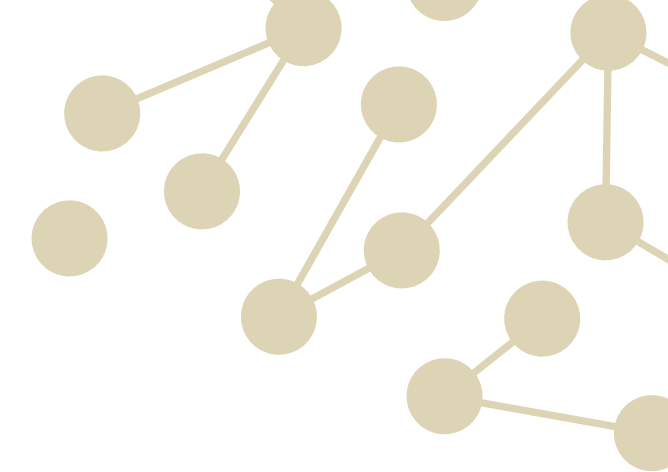
³² Norden can best be described as a Swedish version of the *Scientific American*.

³³ David E. Andersson and Fredrik Tell, “The Structure of Markets for Technology: New Evidence from Swedish Patent Data and Patent

Advertisements 1885-1914,” Working Paper, 2015.

³⁴ George A. Akerlof, “The market for lemons: Quality, uncertainty and the market mechanism,” in *Uncertainty in Economics*, ed. Peter Diamond and Michael Rothschild (Academic Press, 1978), 235–51, <https://doi.org/10.1016/B978-0-12-214850-7.50022-X>; Andersson and Tell, “The Structure of Markets for Technology: New Evidence from Swedish Patent Data and Patent Advertisements 1885-1914.”

³⁵ AB Separator changed its name to Alfa Laval in 1963.



business partner Oscar Lamm Jr. was able to raise funds thanks to de Laval’s patent that was transferred to Lamm’s company in 1879, leading to the subsequent formation of AB Separator in 1883.³⁶ Figure 4 shows the registration of the transfer to Lamm in the register of the Swedish kommerskollegium.³⁷ Furthermore, the real breakthrough for AB Separator did not come until the revolutionary “Alfa”-patent was in fact acquired in another patent transfer by Alfa Laval in 1889 from the German inventor von Bechtolsheim.³⁸ According to Larsson and Tell, Alfa Laval’s patent strategy was crucial to the success of the firm and clearly involved the market for patents as emphasized by Gustav de Laval himself.³⁹

“we must not only improve our own machines, we must spare no costs in acquiring patents that in the hands of the competition would be devastating to Separator”⁴⁰ [authors’ translation]

Moreover, one of Alfa Laval’s main competitors at the time, the Danish firm Burmeister & Wain, used the market for patents as it bought a patent similar to Laval’s from Danish firm Nielsen & Petersen in 1882.⁴¹

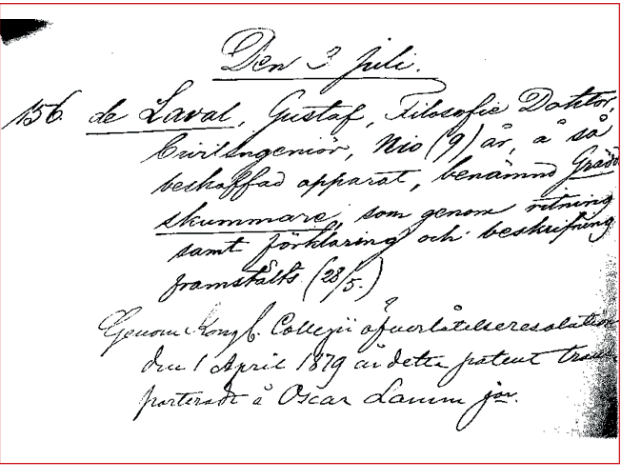


Figure 4: Registration of the transfer of Gustav de Laval’s separator patent Source: Riksarkivet, Kommerskollegium, Huvudarkivet, Ingående diariér över patent (Clc) 14.

Another well-known Swedish firm based on a patent transfer is Atlas Copco. The firm AB Diesels Motorer, which together with AB Atlas, was to form what today is Atlas Copco in 1917, was founded on the basis on the acquisition of Rudolf Diesels Swedish patent in 1898 by the well-known Swedish industrialists the Wallenberg family.⁴² The patent application dated to 1892, giving the newly established firm nine years of patent protection in Sweden to develop its business.

Even though we do not have time series data on actual prices paid for transferred patents, some examples do exist which indicate that the sums involved were considerable even by today’s standards. For example, the Rudolf Diesel patents acquired by the Wallenberg family was valued at SEK 150,000 in 1898 (approx. \$1,114,000 today).⁴³ On another occasion, AB Separator bought the patents inventions made by mechanic Carl August Johansson from him and his two partners. Separator reportedly paid SEK 21,000 (approx. \$167,000 today) in 1886.⁴⁴

4. THE PRESENT SWEDISH MARKET FOR PATENTS: DOMESTIC AND INTERNATIONAL OBSERVATIONS

Available data about present day markets for patents in Sweden is not as detailed as the historical data on the functioning of past patent markets. However, there are some data accessible on the relative size and potential volume of the market and firm activity. Recent research has also made available new data on the number of patent transfers by Swedish firms, which we can compare with our historical counterpart.

4.1 Swedish and international markets for technology

The current situation with respect to Swedish markets for technology is, to a great extent, a story about Swedish telecom firm Ericsson that has been actively monetizing IPR during the last 15-20 years. In 2012, the company passed the billion-dollar mark in revenues generated solely from the sale and licensing of their patents and this business continued to increase in the years thereafter, resulting in

a ten-fold nominal increase between 2005 and 2015. Ericsson’s dominant position is also evident in patent counts where the company, including subsidiaries, makes up almost a quarter of all patent applications made by Swedish firms over the period 2000-2016, its patenting more than doubles that of the second most active Swedish firm, Astra Zeneca.⁴⁵ Ericsson has mainly generated revenues from different licensing deals. Former Ericsson CEO, Carl-Henric Svanberg, stated that Apple’s iPhone was one of the greatest things to happen to Ericsson, since Apple was required to reach a licensing agreement with Ericsson in 2006 to be able launch the first version of its smart phone.⁴⁶ A new licensing agreement with Apple was reached in 2015. On the other side of the Baltic Sea, Nokia, once the leading firm in the mobile phone industry, sold its phone business to Microsoft in 2013. However, the Finnish company held on to their 30,000+ patent portfolio, which meant that Microsoft had to pay a 10-year license on the patents to be able to use Nokia’s inventions in mobile phone technology. Previously, Nokia had only used their patents defensively to protect its phone business. Using the market for patents however turned out to be a shrewd business move as other mobile phone manufacturers such as LG soon had to license Nokia’s patents as well and on February 1, 2016 they reached a similar license agreement with mobile phone giant Samsung, reportedly worth up to \$1.4 billion.⁴⁷

Table 1: Important patent deals

Owner	Buyer/licensee	# of patents	Total Value	Year
Nortel	Rockstarß	6,000	\$4.5 bn	2011
Motorola	Google	24,500	\$12.5 bn	2011
Novell	CPTN*	882	\$450 mn	2010
Nokia	Microsoft/LG/Samsung	>30,000	>\$1.4 bn	2013-2016
IBM	Google	1,023	N.A.	2011
Ericsson	Apple	>37,000	SEK 2-6 bn	2015
IBM	Google	217	N.A.	2012
Kodak	Intellectual Ventures†	1,100	\$527 mn	2013

Notes: *Consortium consisting of Microsoft, Apple, EMC and Oracle. †Patent aggregator. ßConsortium consisting of Rockstar, Sony, Microsoft, RiM, Ericsson and EMC

However, even though licensing is more common, large acquisitions of blocks of patents is are also frequent and an important part of companies’ IPR strategies. The last ten years have seen the striking of several massive patent deals, which has drawn the attention of the public. The most well-known is probably Google’s 2011 acquisition of Motorola Mobility along with its patent portfolio of 24,500 patents for \$12.5 billion to protect the Android ecosystem. A year earlier, Microsoft, Apple, EMC and Oracle bought a patent portfolio of 882 patents from software firm Novell for \$450 million and only six months later in 2011 some of the same firms acquired 6,000 patents from Canadian telecom firm Nortel for \$4.5 billion. In addition to its acquisition of Motorola Mobility, Google also secured 1,023 patents from IBM the same year.⁴⁸ Table 1 summarizes some of the largest and most publicized patent deals in recent years.

With exception of these high profile patent deals, gauging the total size and value of markets for patents today is inherently difficult since many transactions occur between affiliated actors. Another reason being that patents transactions are often taking place as bilateral agreements made under conditions of secrecy.⁴⁹ However, some data is available that can help us get a picture of the potential size of these markets. According to the International Monetary Fund, payments for the use of IPR passed \$400 billion globally in 2017.⁵⁰ This data also fit reasonably well with some of the earlier estimates made by Athreye and Cantwell, and Arora and Gambardella.⁵¹ Breaking

³⁶ Swedish patent granted 1878-07-03 and transferred to his business partner Oscar Lamm 1879-04-01.
³⁷ Kommerskollegium was responsible for issues regarding patents until the Swedish Patent Office was founded in 1885 which in turn was housed in kommerskollegium before it became an independent government agency in 1892.
³⁸ See Swedish patent no. 2708.
³⁹ Mats Larsson and Fredrik Tell, “Två Snilleföretags Patentstrategier Runt Förra Sekelskiftet,” in Patent Och Pirater: Patentstrategier Och Varumärken under 100 År, Näringslivshistoria 3 (Stockholm: Centrum för näringslivshistoria, 2010), 92–130.

⁴⁰ Wohler, Wohler, Klaus. Framväxten Av Svenska Multinationella Företag: En Fallstudie Mot Bakgrund Av Direktinvesteringsteorier: Alfa-Laval Och Separatorindustrin 1876-1914., 80.
⁴¹ Klaus Wohler, Wohler, Klaus. Framväxten Av Svenska Multinationella Företag: En Fallstudie Mot Bakgrund Av Direktinvesteringsteorier: Alfa-Laval Och Separatorindustrin 1876-1914. (Almqvist & Wiksell International, 1981).
⁴² Torsten Gårdlund, Atlas Copco 1873-1973: Historien Om Ett Världsföretag i Tryckluft (Nacka: Atlas Copco AB, 1973). Patent database, Swedish patent No. 5804 granted 1895-01-31 and transferred to AB Diesels Motorer 1898-06-30.

⁴³ Gårdlund.
⁴⁴ Wohler, Wohler, Klaus. Framväxten Av Svenska Multinationella Företag: En Fallstudie Mot Bakgrund Av Direktinvesteringsteorier: Alfa-Laval Och Separatorindustrin 1876-1914., 77. Although the patents are not mentioned by their number, they are mostly likely Swedish patents no: 296, 309, 422, 432 and 607. Johansson is furthermore registered as Johansson in the patent register.
⁴⁵ Johanna Gustafsson and Sara Lodén, “Main Determinants of Patent Transfers in Sweden: An Empirical Study of the Market for Ideas” (Master Thesis, KTH, 2018), <http://www.diva-portal.org/smash/get/diva2:1258451/FULLTEXT01.pdf>.

⁴⁶ Carl-Henric Svanberg, Ericssons kris och resan tillbaka (Ekerlids, 2015).
⁴⁷ Shawn Knight, “Nokia’s 30,000+ Patent Portfolio Continues to Generate a Sizable Income,” Techspot (blog), February 1, 2016, <https://www.techspot.com/news/63670-nokia-30000-patent-portfolio-continues-generate-sizable-income.html>.
⁴⁸ K. N. C, “Doing the Maths,” Babbage, The Economist (blog), August 17, 2011, <https://www.economist.com/babbage/2011/08/17/doing-the-maths>.
⁴⁹ Arora and Gambardella, “Ideas for Rent”; Federico Caviggioli and Elisa Ughetto, “The Drivers of Patent Transactions: Corporate Views on the Market for Patents,” R&D

Management 43, no. 4 (September 1, 2013): 318–32, <https://doi.org/10.1111/radm.12016>; Antonio De Marco et al., “Global Markets for Technology: Evidence from Patent Transactions,” Research Policy 46, no. 9 (November 2017): 1644–54, <https://doi.org/10.1016/j.respol.2017.07.015>.
⁵⁰ However, this data also includes the use, through licensing agreements, of produced originals or prototypes (such as copyrights on books and manuscripts, computer software, cinematographic works, and sound recordings) and related rights (such as for live performances and television, cable, or satellite broadcast). An interesting fact is that according to the IMF data, the world

in total seems to be running a deficit in the charges for the use of IPR, meaning that payments are larger than receipts. In theory of course, these should be equal. See <https://data.worldbank.org/> for more.
⁵¹ Suma Athreye and John Cantwell, “Creating Competition?: Globalisation and the Emergence of New Technology Producers,” Research Policy 36, no. 2 (March 1, 2007): 209–26, <https://doi.org/10.1016/j.respol.2006.11.002>; Arora and Gambardella, “Ideas for Rent.”

down these numbers on a country level, Figure 5 shows the net charges for the use of IPR for different countries in current US dollars. In panel A, we compare Sweden with other large industrial nations in Europe, such as Germany, France and the UK. Panel B shows the same data for the US, the EU and China. We want to highlight a few conspicuous features. First, Sweden has seen a significant increase in revenues from IPR since the early 1990s while for example Germany was running a large deficit until as recently as 2010. This is also consistent with similar data provided by Statistics Sweden.⁵² Second, the dominance of the US over the EU is clear, emphasizing the commanding role of the US as world technology leader. Furthermore, as China's economic development has picked up, the country has been a big importer of technology through the use of IPR in the last 10-15 years. Third, it is important to keep in mind the large influence of single firms such as Ericsson in the Swedish data who most likely represent a large part of the total national net revenue. At the same time, in per capita terms, Sweden positions itself well ahead of the US.

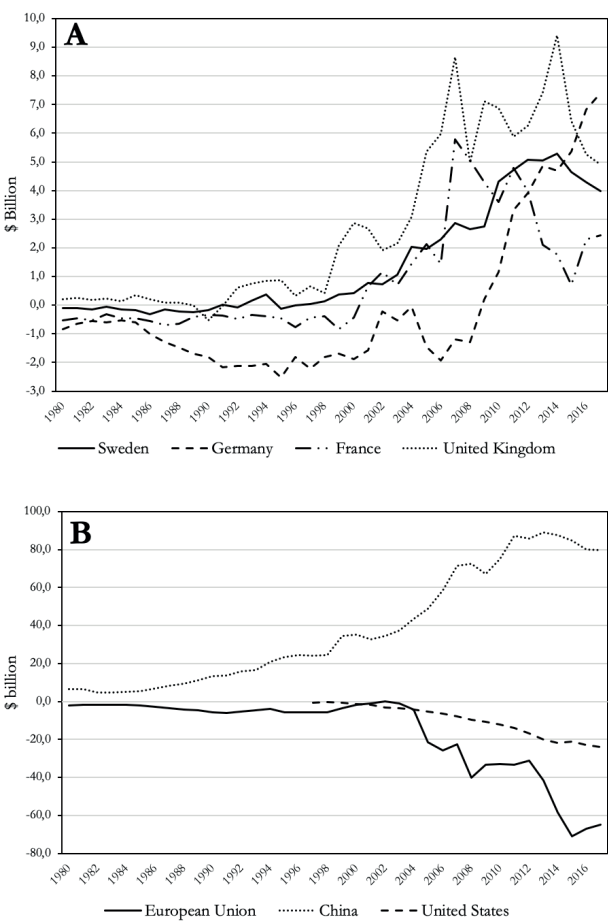


Figure 5: Net charges for the use of IPR, current \$US
Source: International Monetary Fund, Balance of Payments Statistics Yearbook and data files.

We know that Ericsson represents an important part of Sweden's share of markets for technology. But what about Swedish firms in general? The Swedish data from the EU led Community Innovation Survey (CIS) can give us an indication of to what degree Swedish firms use IPR and participate in activities in the market for technology. The survey is based on a population of 36,039 firms with more than ten employees, from which a sample of 9,297 firms was randomly drawn. The survey had a response rate of 82%, which means that the data below is based on 7,624 Swedish firms. According to Statistics Sweden 52% of these firms were involved in some kind of innovative activity during 2014-2016.⁵³ Figure 6 shows the use of different IPR by Swedish firms by number of employees. About, 20% report that they had applied for a patent, while about 13% had applied for a trademark and as much as 42% had registered a design. Since IPRs are important assets in the market for technology this can give us an indication of the number of potential Swedish firms on the supply side of the market without taking into consideration that past activities can of course play an important role in influencing firms' strategic positions. Furthermore, the CIS data also do not give us information on the number of IPRs applied for or registered.

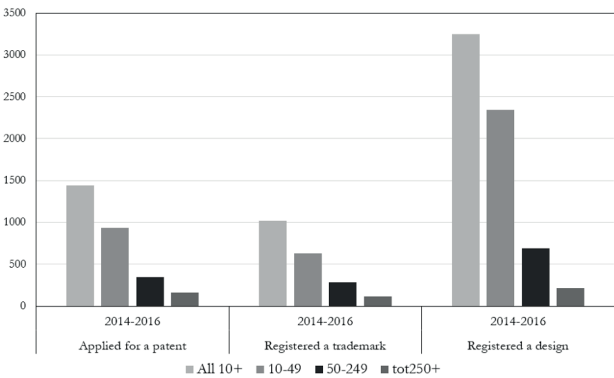


Figure 6: The use of IPR among Swedish firms
Source: Statistics Sweden (SCB), CIS, Innovation activity among enterprises

A more direct measure of participation in MfT is to consider to what extent Swedish firms leverage their internal IPR or use externally developed technology in their businesses. Figure 7 gives a glimpse of this by showing the number of Swedish firms that have either licensed out or sold IPR or licensed in or bought IPR by number of employees. The data reveals that there are more firms that buy or license-in IPR than firms who sell or license-out IPR. Recall that Figure 7 shows the number of firms and not the total value. About 6,5% of all firms are part of the supply side of the market, while ca. 12% of all firms form part of the demand side of the market. This is of course not to say that one firm can't be active on both sides of the market, this is most likely often the case. However, the data indicates that in general more Swedish firms do seem to be on the demand side. This emphasizes the significance of large Swedish high-tech firms driving the large volumes of Swedish technology exports through IPR. This indicates that although on a general level Sweden is performing well in the markets for technology, in mere numbers more Swedish firms actually rely on and pay for externally developed IPR.

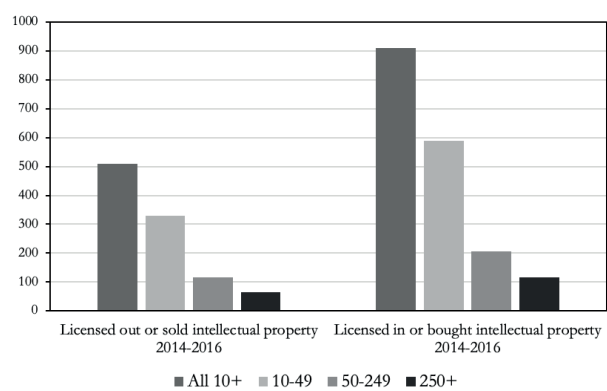
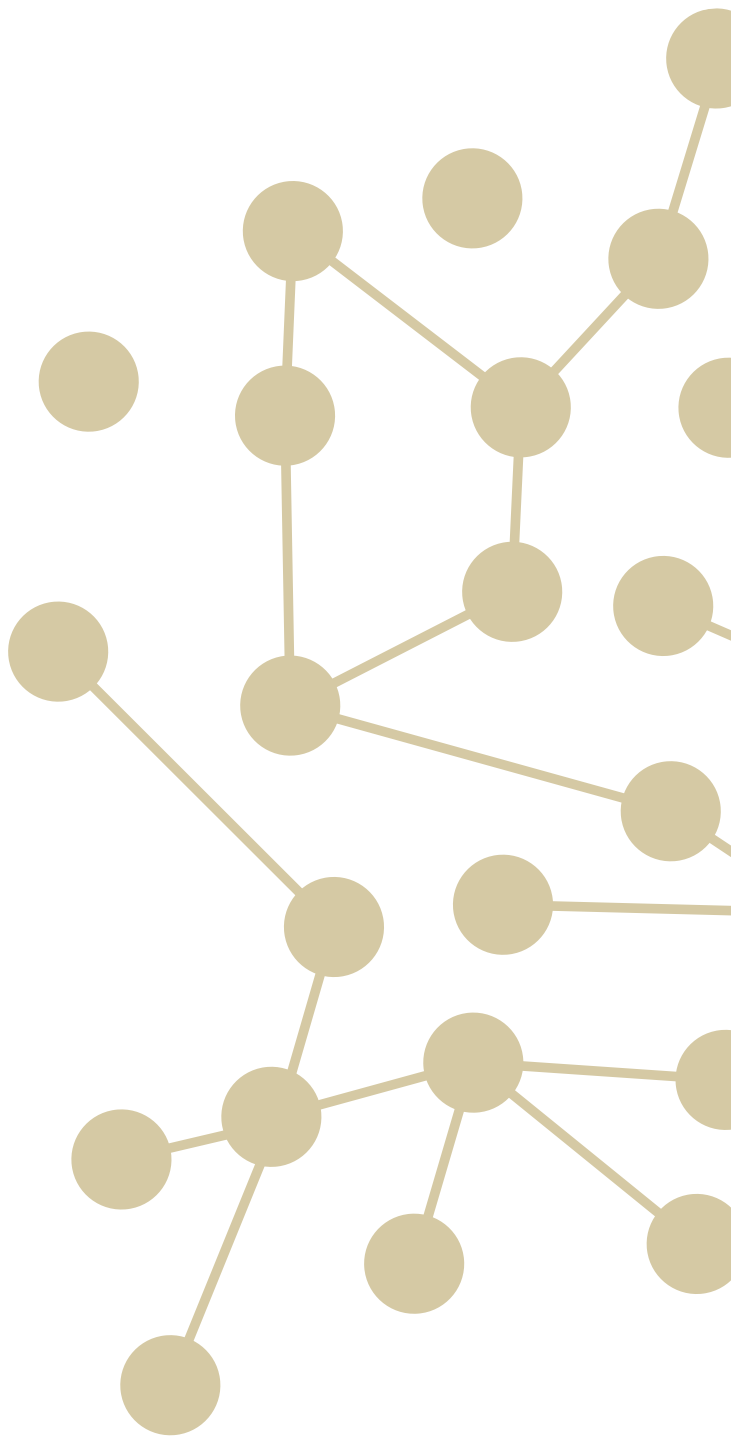


Figure 7: Participation in markets for technology among Swedish firms
Source: Statistics Sweden (SCB), CIS, Innovation activity among enterprises



⁵² See Tjänstehandel. Export och import efter kontopost, år 1982-2017, kontopost "8 nyttjande av immateriella rättigheter", <http://www.statistikdatabasen.scb.se>. Data is however only available from 1998.

⁵³ "Innovationsverksamhet i Svenska Företag 2014-2016" [Stockholm: SCB, Statistiska centralbyrån, 2018], https://www.scb.se/contentassets/9e6a00ac2fc7421cabab329528166232/uf0315_dok_2014-2016_cl_180214.pdf.

⁵⁴ Gustafsson and Lodén, "Main Determinants of Patent Transfers in Sweden: An Empirical Study of the Market for Ideas." For PATLink see: <https://data.houseoffinance.se/otherDB/patlink>.

4.2 The Swedish market for patents

We now turn specifically to the market for patents. Recently, new data on the Swedish market for patents has become available through the PATLink project and the work of Gustafsson and Lodén.⁵⁴ Examining this data reveals some patterns regarding the transfer of patents at PRV as well as the transfer of patents by Swedish patent-holders at the European Patent Office (EPO) and the United States Patent and Trademark Office (USPTO) for the period 1990-2016. First, Figure 8 shows that the Swedish market for patents per se, that is, patent transfers regarding patents applied for at PRV, is far smaller today than its historical equivalent shown in Figure 1. Except for the peak in 2005, which according to Gustafsson and Lodén is due to a large number of patents being sold by Sandvik Intellectual Property AB to various different buyers, transfers of national PRV patents rarely amount to 40 per year compared to more than 200 yearly transfers in the beginning of the 20th century. The low numbers in the late 1980s should perhaps be viewed with a bit of caution.

The decline in domestic patent transfers filed can be explained by the increasingly international MfT, where most Swedish firms are active today and a more general trend of less patent applications being filed at smaller national offices such as PRV. This is also evident in Figure 9, which shows the transfer of Swedish patents filed to EPO and USPTO in addition to PRV. Here instead a large increase in patent transfers by Swedish firms is visible. A more than six-fold increase in the number of transferred patents has taken place since the early 1990s.

According to Gustafsson and Lodén, this implies a transfer rate of around 15% in 1998 to a transfer rate around close to 45% in 2012.⁵⁵ However, these numbers

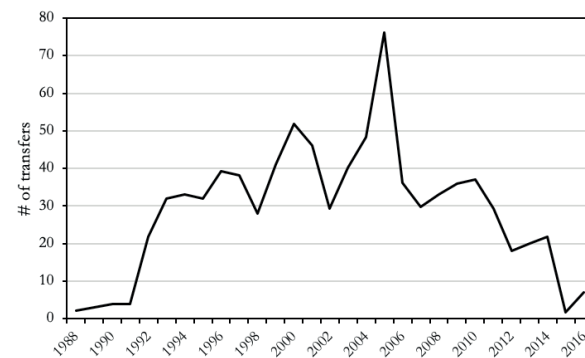


Figure 8: Patent transfers filed to PRV
Source: Gustafsson and Lodén (2018)

are most likely inflated by intra-firm transfers, and by transfers between individuals and firms. Even so, they indicate that the Swedish activity on the markets for patents currently is substantial.

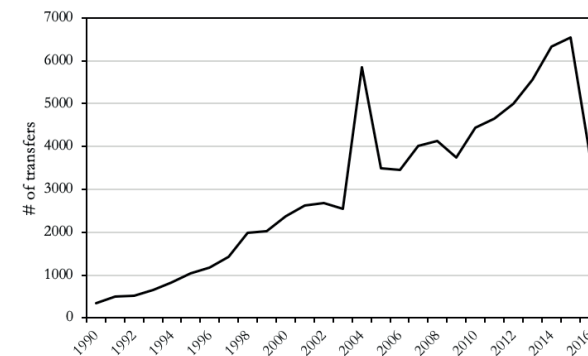


Figure 9: Swedish patent transfers filed to PRV, EPO and USPTO
Source: Gustafsson and Lodén (2018)

5. CONCLUDING REMARKS

In this article, we have presented and discussed historical and contemporary data on markets for patents. First, as we showed with the example from Carl Linnaeus, the transferability of IPR has a long history in Sweden going back all the way to the 18th century. The rapid increase in volume relating to the use of IPR in general, but also the growth in patent transfers in the 1990s, bear similarities to the rise in patent transfers starting in the 1880s. Not surprisingly, increases in patent transfers happened concomitantly with patenting booms. The surge in patenting that took place in the 1980s is sometimes referred to as the “pro-patenting era” and scholars such as Granstrand have referred to the 2000s as the “pro-licensing era”.⁵⁶ Perhaps a more accurate description would be to refer to the more recent period as the “second” pro-patenting or pro-licensing era. Whatever the label, it seems to indicate that there was a first emergence of markets for patent during the late 19th century and then a second re-emergence in the late 20th century. This begs the question of what happened in between? Our historical data ends in 1914 and does not pick up until 1990, which directs attention to a large empirical deficit and a data gap covering most of the 20th century. Thus, there is a void in our knowledge about the role of IPR during post-war industrialization in Sweden.

Second, the historical and contemporary empirical observations reported here indicate that markets for patents can be conceived as a case of MfT. As suggested by theory, patents are a form of IPR that allows for commercial trade, which, in turn induces division of innovative labor. Aggregated data and selected examples reveal that technology trade had beneficial economic effects. It is more difficult to ascertain the more precise workings of these markets, for instance in terms of search and enforcement costs, as well as price levels for IPR transfers and licensing. This predicament alludes to, as exemplified both in historical and contemporary data, a valuation problem regarding the transactions on these kinds of markets. Information on the real value of licensing deals and patent acquisitions is scarce and not available in any organized fashion. Here we believe there is a real opportunity for research, both by economic historians and scholars in economics of innovation and technology, to make important contributions.

Third, at least historically, there was a role for intermediaries such as patent agencies to act as brokers and market makers. Our discussion shows how patent agencies, as well as the inventors’ associations, at the turn of the last century made efforts to facilitate and organize markets for patents. From what we can gauge drawing upon aggregate data on volumes of patents transferred, their efforts were not in vein. All of the patent agencies mentioned in this article are still active in Sweden today, but there is little systematic knowledge on what their roles in contemporary market for patents are. In contemporary MfT a more complex picture of emerges, where firms such as Sandvik have their own IPR companies, but where patent aggregators, IPR investors and open innovation intermediaries are active as well.⁵⁷ The division of labor and economic effects of such developments are yet to be fully understood.



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⁵⁵ Gustafsson and Lodén, 61. See Figure 10.

⁵⁶ Ove Granstrand, *The Economics and Management of Intellectual Property* (Edward Elgar Publishing, 1999); Samuel Kortum and Josh Lerner, “What Is behind

the Recent Surge in Patenting?,” *Research Policy* 28, no. 1 (January 1999): 1–22, [https://doi.org/10.1016/S0048-7333\(98\)00082-1](https://doi.org/10.1016/S0048-7333(98)00082-1); Granstrand, “The Economics and Management of Technology Trade.”

⁵⁷ These firms include for example: Intellectual Ventures, OceanTomo, NineSigma, InnoCentive etc.

To what extent should uses of public architectural works be permitted under European copyright law?

By Katherine Galilee

ABSTRACT

This paper argues that the optional exception to copyright law contained in Article 5(3)(h) of Directive 2001/29/EC should be extended to clearly include commercial uses of copyrighted works, and should be made mandatory across the European Union. Copyright law must be clearly justifiable, requiring a balance between the private interest of right holders and the wider public interest. It is argued that the significant role of architecture in society is such that there is great public interest in the public being able to freely use copyrighted architectural works for commercial and non-commercial purposes, and that copyright law must therefore be reformed to reflect this. It is argued further that the distinction between commercial and non-commercial uses is unworkable following the digital revolution, and that an unharmonised panorama exception is incompatible with the European Union's Digital Single Market Strategy and creates uncertainty amongst European citizens.

1. INTRODUCTION

Architectural works were first legally recognised as deserving protection under copyright law with the revision of the Berne Convention in 1908.¹ In the use of copyright law as a mean of giving creators certain exclusive rights over their literary and artistic works, it was thereafter accepted that architecture should be afforded protection as works created with the purpose of presenting 'a visual spectacle'.² Indeed, architectural works involve not merely creativity and aesthetic appreciation but also a deep understanding of the impact of physical space on productivity, health, personal safety, order and overall well-being.³

Much like the pharmaceutical and software industries, the

very high levels of investment, time, skill and labour required to bring a proposed project to fruition give particular weight to the need for copyright protection. Unlike these industries, however, architecture is notable for its public element.⁴ Even private works of architecture have the ability to take on some public significance when forming part of the overall physical landscape of society, as is reflected in the use of planning regulations in the control of private use of land.⁵ Also reflecting this public element in the context of the European Union, Directive 2001/29/EC introduced an optional exception to the exclusive right of reproduction and communication to the public under Article 5(3)(h) for reproductions and communications of architectural works.⁶ This is commonly known as the 'freedom of panorama'.⁷

This article will argue that freedom of panorama under European law does not go far enough to protect the public interest in using copyrighted works of architecture. Crucially, it will be argued that the 'panorama exception' must be extended to include both commercial and non-commercial uses, and be made mandatory throughout the European Union. This will be argued on two primary bases. First, architecture has a particularly central role in society, both in the context of the everyday lives of European citizens, as well as forming part of the 'discourse' about society itself. Second, it will be argued that enforcing copyright law in the context of public works of architecture runs contrary to developing social norms and practices, particularly in regard to the internet. It will also be argued that, in failing to harmonise this exception to copyright law, thereby allowing a distinction between commercial and non-commercial works to subsist in certain European Member States, the European Union is hampering its own efforts to create an internal market in the digital age.

First, it is necessary to lay down a standard against which copyright law in the European Union can be assessed. Part 2 of this Article will therefore discuss the basis on which copyright law is justified. It will be argued here that

copyright law is only justifiable to the extent that an appropriate balance is struck between the interests of right holders and those of the public. Therefore, to the extent that copyright can be found to have failed to strike such a balance, reform is required.

Following this, so as to justify the implementation of a mandatory exception for uses of public architectural works in the European Union, a key question to be answered is how architecture is different from other protected works so as to warrant a difference in treatment. Part 3 of this article will seek to answer this question by reference to the standard laid down in Part 2: is an appropriate balance reached between private and public interests? As such, it will be argued that the public has a particularly strong interest in using copyrighted works of public architecture, due to the central role of architecture in public and private life, as well as the relatively recent development of internet as a key tool in the dissemination of knowledge.

Finally, Part 4 of this article will consider the potential implications of leaving the 'panorama exception' non-harmonised in the European Union. This will include examining such impact within the context of the internet, educational initiatives, and the European internal market. It will be argued here that leaving the law non-harmonised creates a lack of legal certainty, an increasing gap between the law and social norms, and the potential to inhibit cross-border educational initiatives.

2. THE JUSTIFICATION OF COPYRIGHT LAW

In this chapter it will be argued that copyright protection over architectural works is only justified to the extent that it strikes an appropriate balance between the private interest of copyright holders and the public interest. It will be argued that, due to the inherently monopolistic nature of copyright, its integration into the European legal system requires clear justification. Such justification is generally made on the basis that intellectual property rights provide an incentive for creators to create new works, and that this is ultimately in the public interest due to these works eventually passing into the public domain and furthering

human technological and creative progress for all. To the extent that public interest cannot be shown, however, or to the extent that public interest can be shown to be greater where there is freedom to use copyrighted works, this justification for copyright law breaks down.

2.1 Justifications for copyright

While we will not enter into a detailed discussion here as to the monopolistic nature of copyright law, it is submitted that works of architecture are 'intellectual works' that are non-exclusive, public goods (meaning that they can be possessed, in abstract, by an unlimited number of persons simultaneously, and can be reproduced for this purpose at very little cost).⁸ Our definition of monopoly may be derived from the European Court of Justice in *Hoffman-La Roche & Co AG v Commission of the European Communities*:

*"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers."*⁹

In artificially imposing exclusivity to an intellectual work, copyright law attaches an otherwise non-existent (or at least low) cost to the transfer of intellectual works for all persons but the right holder.¹⁰ As such, it is submitted that the exclusive rights provided by copyright law place the right holder in a position of economic strength that affords her the power to behave to an appreciable extent independently of her competitors. Despite this, the copyright system is widely considered to be a justifiable aspect of the European legal system, on two primary bases.

First, copyright is justifiable in that it provides an incentive for creators to create works that will eventually enter the public domain and may benefit society as a whole. The second, related, justification is that copyright acts as a reward for those who invest their time and resources into, hypothetically, furthering human progress. We will now examine these in further detail.

¹ Berne convention for the protection of literary and artistic works of September 9, 1886, completed at Paris on May 4, 1896 ('Berne Convention').

² L. Altman, 'Copyright on Architectural Works' (1992) 33 IDEA: The Journal of Law and Technology 1, 7-8, cited in M. Mathis, 'Function, Non function, and Monumental Works of Architecture: An Interpretative Lens in Copyright Law' (2000) Cardozo Law Review 595, 595.

³ For example see, on the one hand, the

redevelopment of Times Square, New York, aiming to make the district safe 'for everyone' (J. Ockman, 'What is Democratic Architecture?' (2011) Dissent 65, 67) and on the other hand, the rise in 'defensive urban architecture' such as 'unsleepable' benches aimed at deterring the homeless population from a particular area (K. de Fine Licht, 'Hostile urban architecture: A critical discussion of the seemingly offensive art of keeping people away' (2017) Nordic Journal of Applied Ethics 27, 29).

⁴ A. Benjamin, *Writing Art and Architecture* (2010, Melbourne: Re.Press) 12-13.

⁵ N. Harris, 'Discipline, Surveillance, Control: A Foucaultian Perspective on the Enforcement of Planning Regulations' (2011) 12 Planning Theory and Practice 57, 64.

⁶ Directive No 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').

⁷ M. Dulong de Rosnay and P. Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence' (2017), 6(1) Internet Policy Review 1, 3.

⁸ M. Clancy and G. Moschini, 'Incentives for Innovation: Patents, Prizes, and Research Contracts' (2013) 35 Applied Economic Policy and Perspectives 206, 207.

⁹ ECLI:EU:C:1979:36 *Hoffmann-La Roche & Co.*

AG v Commission of the European Communities at 4; see also J. Duffy, who defines monopoly as exclusive or dominant control over a market (J. Duffy, 'Intellectual Property as Natural Monopoly' (2005, Unpublished research paper) 6, <https://law.utexas.edu/wp-content/uploads/sites/25/duffy_intellectual_property_natural_monopoly.pdf>).

¹⁰ See generally on this point J. Gans, P. Williams and D. Briggs, 'Intellectual Property Rights: A Grant of Monopoly or an Aid to Competition?' (2004) 37(4) Australian Economic Review 436.

2.1.1. Copyright as an incentive

This argument can be detected in the European Union’s objective in adopting the Infosoc Directive – to ‘stimulate creativity and innovation’ and ‘facilitate the development of new technologies now under the purview of European copyright law’.¹¹ In order for the creation of intellectual works to be worthwhile (and thereby in order to stimulate the production of creative works), the argument goes, creators must be able to capture the value of their work.¹² An investment of time, labour, and potentially other resources is required in order to create intellectual works, and as such potential creators may be less willing to create – or at least to release their creations to the public – without the possibility of this investment being recouped. In the interest of achieving a socially optimal rate of innovation, copyright is used to enable creators to capture the value of their work.¹³ By providing creators with the exclusive right to financially exploit this work, they are protected from the possibility of other market actors benefiting from it commercially without having to invest their own resources.

Without such protection, creators will be unable to capture the value of their work, and may be deterred from innovating further in future.¹⁴ This is the clear dynamic benefit of copyright law – future innovators know that, if they were to invest time and labour in creating an intellectual work, they will enjoy a monopoly over that work, and their ability to capture its value is assured.¹⁵ Without such protection, the creator may be deterred from introducing their product to the market, and as such society as a whole may not benefit from this innovation.¹⁶ As such, society as a whole benefits from the copyright system – not only does it incentivise wider investment in research and innovation, but it increases the likelihood that innovations will be introduced to the public, and eventually move into the public domain.

2.1.2 Copyright as a reward

A further justification for copyright – one that is closely related to the idea of incentivising innovation – is that

those who create innovations must be rewarded for their efforts. This can be seen in the term of copyright protection – while we are able to exclude others from using our works for 70 years, this is considered sufficient recognition of the investment we have made.¹⁷ This is evidence also of an understanding that such behaviour should not be over-rewarded. For instance, in regard to the term of protection for performers, the European Commission stated that the term acts as “recognition and reward” for performers’ creative contributions to society.¹⁸ This is derived from the idea of having the right to the ‘fruits of our labour’ – ¹⁹ that which we create with our own intelligence, effort, and perseverance, ought to be considered our property.²⁰ In the context of intellectual property, this argument applies to the application of ‘intellectual labour’ to the ‘intellectual commons’ (information that is publicly accessible).²¹ Creators of intellectual works do not merely identify information that anyone could likewise discover, but use intellect, perceptiveness, and pioneering spirit to bring new creations into existence, otherwise known as the ‘finders keepers’ rule.²² While it is beyond the scope of this article to examine the validity of these justifications, it is clear that a balance between private and public benefit must be found to exist for copyright to be clearly justifiable,²³ and this balance must be maintained in relation to architectural works.

2.2 The importance of public interest in justifying copyright

Implicit in the above justifications for copyright is an understanding that these will only hold water to the extent that the public interest is not unduly prejudiced.²⁴ Indeed, the incentive argument relies on public benefit entirely – innovation is incentivised because it benefits society as a whole – while the reward argument is limited by the period of protection, as well as the criteria according to which work is eligible.²⁵ As Drassinower notes, despite much debate as to the nature of copyright law, its structure as a balance between right-holders and users is generally undisputed.²⁶

One way in which this balance is maintained in copyright law in the European Union is in the list of exceptions and limitations to copyright infringement, to which we will now turn.²⁷

Article 5 of the Infosoc Directive lays out a list of over 20 exceptions and limitations to the exclusive right of reproduction under copyright law (Article 5(1), (2) and (3)) as well as to the right to communicate a work to the public (Article 5(3)). It must be noted that, under the Directive, the rights of the author are crucial – the principal objective of the Directive is the establishment of a high level of protection for right holders,²⁸ and as such Member States must ensure that any application of the Directive’s exceptions is in accordance with the ‘three-step test’. Under this test, exceptions “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”.²⁹

The Article 5 exceptions, if implemented by a particular Member State, allow the public a degree of free use concerning certain acts of exploitation of copyrighted work.³⁰ There are four main categories of exception: promotion of freedom of expression,³¹ access to knowledge,³² the requirements of justice and the functioning of the government, and private or personal use.³⁴ Each category indicates a key interest of the wider public that, in conflicting with otherwise exclusive rights under copyright law, are specifically exempted in the interest of achieving an appropriate and reasonable balance between interests. This may be compared to the more flexible ‘fair use’ doctrine in the United States, allowing the use of copyrighted work for ‘criticism, comment, news reporting, teaching, scholarship, or research’.³⁵ It is clear that in both cases copyright law must allow reasonable and legitimate use of protected work by the public, provided that both right holders and users have their interests respected.

What is considered a reasonable and legitimate use of protected work by the public differs, however, across the Member States of the EU. Indeed, due to the ‘shopping list’ of optional exceptions, Member States have been able

to adapt copyright law – including their implementation of the panorama exception – so as to most closely approximate their national legal traditions as possible.³⁶

In the civil law jurisdictions of France and Italy, for instance, the panorama exception has been only partially implemented. Architecture is protected as a ‘work of the mind’ by French copyright law under Article L122-2 of the French Intellectual Property Code.³⁷ Through the Law for a Digital Republic, modifying Article L 122-5 of the Intellectual Property Code, French law recognises a limited right to freedom of panorama.³⁸ Under this article, architecture and sculptures located permanently on public roads may be reproduced for all non-commercial uses by natural persons.³⁹ It must be noted, first, that it is not specified what constitutes a commercial use; and second, that this exception does not apply to legal persons.⁴⁰

In Italian law, architecture is protected under the Italian Copyright Law of 22 April 1941,⁴¹ as well as Italian cultural heritage law.⁴² There is no specific part of Italian law that allows for freedom of panorama, however Italian law does allow for the use of copyrighted works for personal use, or the use of low-resolution images on the internet for scientific or educational use, or other digital reproductions, provided that such use has no commercial purpose.⁴³ This is supported by comments made by the Ministry of Cultural Heritage, which has stated that works can be produced for educational purposes that are not for profit.⁴⁴

In explaining why the full panorama exception has not been implemented in these States, the cultural background of each may prove illuminating. French copyright has its basis in natural law and the belief that creative works are the expression of the personality of the author.⁴⁵ Accordingly, there is a strong belief that authors have a natural right to have these expressions protected, and this will consequently weigh heavily in any assessment of the appropriate balance between the rights of authors and those of the public.⁴⁶

¹¹ European Commission, ‘Commission welcomes adoption of the Directive on copyright in the information society by the Council’ IP/01/528 (9 April 2001, European Commission: Brussels) <http://europa.eu/rapid/press-release_IP-01-528_en.htm>.

¹² S. Besen and J. Raskind, ‘An Introduction to the Law and Economics of Intellectual Property’ (1991) 51(1) *Journal of Intellectual Perspectives* 3, 5.

¹³ Ibid.

¹⁴ W. Landes and R. Posner, *The Economic Structure of Intellectual Property Law* (2003, Cambridge: Harvard University Press) 11.

¹⁵ Ibid., 13.

¹⁶ Ibid.; W. Landes and R. Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *Journal of Legal Studies* 325, 326.

¹⁷ The Berne Convention protects copyright for a term up to 50 years, whereas European Copyright Law protects copyright for up to 70 years

(Berne convention for the protection of literary and artistic works, of September 9, 1886, revised at Stockholm on July 14, 1967 (1967, Geneva: United International Bureaux for the Protection of Intellectual Property) [‘Berne Convention’] Article 7; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Article 1).

¹⁸ M. Barnier, ‘Copyright: Extension on the Term of Protection for Performers’ (12 September 2011, Brussels: European Commission) <http://ec.europa.eu/archives/commission_2010-2014/barnier/headlines/news/2011/09/20110912_en.html>.

¹⁹ E. Hettinger, ‘Justifying Intellectual Property’ (1989) 18 *Philosophy and Public Affairs* 31, 35.

²⁰ J. Locke, *Second Treatise on Government* (1821, London: R Butler), Chapter 5.

²¹ E. Hettinger (1989) 35.

²² I.M. Kirzner, ‘Entrepreneurship, entitlement and economic justice’ (1978) 4(1) *Eastern Economic Journal* 9, 17.

²³ P. Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (1994, Stanford: Stanford University Press) s168.

²⁴ As argued by T. MacCauley in his speech to the House of Commons in 1841, “monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good” (quoted in H.M. Treasury, *Gowers Review of Intellectual Property* (December 2006, London: Stationery Office) at 4.26).

²⁵ L. Bentley and B. Sherman, *Intellectual Property Law*, 4th edition (2014, Oxford: Oxford University Press) 38.

²⁶ A. Drassinower, ‘From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law’ (2009) 34(4) *The Journal of*

Corporation Law 991, 992.

²⁷ K. Olson, ‘The Future of Fair Use’ (2014) 19(4) *Communication Law and Policy* 417, 418.

²⁸ ECLI:EU:C:2011:631 *Football Association Premier League Ltd and Others v QC Leisure and Others* at 186.

²⁹ Infosoc Directive, Article 5(5); Discussed further at section 4.3 of this article.

³⁰ I Katsarova, ‘The challenges of copyright in the EU’ (June 2015, Brussels: European Parliamentary Research Service) <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/564380/EPRS_BRI\(2015\)564380_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/564380/EPRS_BRI(2015)564380_EN.pdf)> 6.

³¹ Such as the use of copyrighted works by the press (Article 5(3)(c)).

³² Such as the use of copyrighted works for educational purposes (Article 5(3)(a)).

³³ Such as the use of copyrighted works in the course of parliamentary proceedings (Article 5(3)(e)).

³⁴ I. Katsarova (2014) 6-7.

³⁵ 17 USC §107 (2006).

³⁶ L. Guibault, ‘Why Cherry-Picking Never Leads to Harmonisation’ (2010) 1 *Journal of Intellectual Property, Information Technology and Electronic Communications Law* 55, 56.

³⁷ Code de la propriété intellectuelle (Intellectual Property Code) (France), Article L122-2.

³⁸ Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JORF n°0235 du 8 octobre 2016 (France), Article 39.

³⁹ Ibid.

⁴⁰ M. Dulong de Rosnay and P. Langlais (2017) 7.

⁴¹ Legge 22 aprile 1941, No. 633, Protezione del diritto d’autore e di altri diritti connessi al suo esercizio (Law for the Protection of Copyright and Neighbouring Rights) GU No. 166 del 16-07-1941 (Italy).

⁴² Decreto legislativo 22 gennaio 2004, n. 42, Codice dei beni culturali e del paesaggio (Code of the Cultural and Landscape Heritage) GU No. 45 SO No. 28 del 24-02-2004 (Italy).

⁴³ Law for the Protection of Copyright and Neighboring Rights (supra note 62), Article 71-sexies and 70.

⁴⁴ Wikimedia, ‘Wiki Loves Monuments 2012 in Italy / MiBAC’ (updated 2 December 2017, Wikimedia.org) <https://commons.wikimedia.org/wiki/ Commons:Wiki_Loves_Monuments_2012_in_Italy/MiBAC>.

⁴⁵ A. Françon and J. Ginsburg, ‘Authors’ Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work’ (1985) 9 *Columbia-VLA Journal of Law and the Arts* 381, 383.

⁴⁶ V. Zlatarski, ‘“Moral” Rights and Other Moral Interests: Public Art Law in France, Russia and the United States’ (1999) 23 *Columbia-VLA Journal of Law and the Arts* 201, 203.

Similarly, Italy has a culture that focuses on the preservation of cultural goods, including strong copyright and moral rights over such goods.⁴⁷ However, the ‘incentive’ argument has featured in justifications for intellectual property law in Italy since the fifteenth century.⁴⁸ The public value of bringing works into being and ensuring they are capable of enjoyment by the wider public is recognised in Italian law, as is evident by the introduction of exceptions and the willingness of some local authorities to allow reproductions in certain specified cases.⁴⁹ Romano argues that there is an increasing trend towards favouring the interests of the public over the interests of the right holder in broader Italian copyright law, but without amendment or clarification of the freedom of panorama in Italian law, this can only be limited.⁵⁰

On the other end of the spectrum, the public interest in architectural works is nothing new in Germany and the United Kingdom. In Germany, the Bavarian Law on the Protection and Ownership of Products of Literature and Art (1840) excluded works of architecture and public monuments from the central standard of copyright protection.⁵¹ The current version of the law has been in place since 1965, the officially reasoning stating that “the establishment of a work of art in public places expresses that the work is thus devoted to the general public.”⁵² It is in this sense that the interests of right holders and the public are balanced - creators of intellectual works make the choice to create or place their works within the public domain. Just as they are not entitled to claim ownership over a piece of the street, likewise they cannot claim ownership over a visual space. This may be seen as an extension of physical public space into the more abstract ‘public domain’ – if it has been placed, by the author, in public, it should be considered a ‘common good’ in the same manner.

Similarly, in the United Kingdom the panorama exception has been implemented in Section 62 of the Copyright, Designs and Patents Act 1988. This states that copyright in architectural works will not be infringed by graphic representation, photograph, film, or visual broad-

cast (three dimensional reproductions excluded).⁵³ There is very little ambiguity about this provision, with little case law arising regarding freedom of panorama in the United Kingdom,⁵⁴ however “the risk to which a citizen would be exposed when photographing or sketching in any urban neighbourhood” was considered sufficient justification for similar provisions well in advance of the Infosoc Directive being passed.⁵⁵ In this regard it seems that the United Kingdom and Germany has considered the full implementation of the panorama exception to be itself drawing an appropriate balance between the interests of right holders and those of the public.

The argument made in this part is that copyright is a legal fiction implemented to incentivise creation and innovation, and the dissemination of creations throughout society. It is, in effect, a limited monopoly right, giving innovators the exclusive right to exploit their creations and as such it is submitted that it should be maintained in law only to the extent that it can be justified by reference to public benefit. It is on this basis - the necessity of justifiability - that this article proceeds.

This is reflected in the Infosoc Directive’s list of optional exceptions - the law recognises that there are indeed cases where the restriction on the public arising from copyright goes too far, and areas of freedom should be carved out of the law to rectify this. However, due to the optional nature of these exceptions, there is a limit to which the public benefit (and therefore the justifiability) of copyright law can be ensured. Civil law jurisdictions such as France and Italy place significant weight on the interests of authors to the extent that, it is submitted, the importance of the public interest is given too little consideration. Even where there is an understanding of the public interest in participating in and experiencing cultural works such as architecture, for instance in Italy (as will be argued in Section 3) the failure to implement a full exception for the use of copyrighted public architectural works may ultimately inhibit public enjoyment of their cultural heritage. This is particularly evident where Member States have dis-

tinguished between commercial and non-commercial works, as we will examine in more detail in Section 3.2.

3. ARCHITECTURE AS A SPECIAL PUBLIC CONCERN

The justifiability of copyright protection of works of architecture depends, as we have discussed, on an appropriate balance being struck between the interests of right holders and those of the public at large. It is clear from examining the applicable law in individual European Union Member States that where this balance is struck will differ markedly from state to state, ultimately due to varying perceptions as to the importance of one interest group in relation to the other. The European Union as a whole, we have noted, emphasises the interests of the author as being of crucial importance, and that exceptions to copyright law require restrictive interpretations in light of this. In this chapter it will be argued not that this emphasis is incorrect, or that exceptions to copyright law should be expansively interpreted, but rather that in balancing the rights of authors and the public at large, the significance of the latter has been understated by certain States. In making this argument discussion will begin with the significant public role played by architecture - socially, politically, and culturally – and will then move on to examine certain respects in which limitations to the panorama exception conflict with this public role.

3.1 The role of architecture in society

As Paul Jones notes, “all but the most functionalist of definitions of architecture would position the built environment as a carrier of social meaning ... Architecture is thus a ‘discourse’, inasmuch as it is a form and a set of practices through which social meanings are communicated and visions of the social world are sustained.”⁵⁶ Similarly, Bertoni and Montagnani state that ‘public art’ works, including architecture, can embody cultural, economic, social, and environmental interests.⁵⁷ In establishing the meanings that architecture carries, we can look at its social and political significance. If architecture is discourse, what is it that architecture tells us? In answering this question we may look at two types of architecture by way of example: social housing (termed ‘council housing’ in the United Kingdom) and monumental nationalist architecture.

The introduction of council housing in 1930s Britain was viewed as a ‘brave new social experiment’, eventually leading to more than a third of the population, at its peak, living in council housing by 1975.⁵⁸ It has been argued to be just, if not more, a significant part of working class history as employment and trade unionism.⁵⁹ In some European states, such as the Netherlands, France, and Sweden, social housing has been treated not as limited to the working classes but as a mechanism for providing housing to wider society.⁶⁰ In other states, such as the UK and Belgium, social housing has been used to raise the living standards of lower income households and increase the efficient functioning of the welfare state.⁶¹ In addition to – and subsumed within – its socio-political function, social housing has historically been and continues to be recog-

nised for its architectural value.⁶² The Barbican Estate in London, a Grade II listed building, is a world famous example of Brutalist architecture, while Le Corbusier’s Unité d’Habitation is a UNESCO World Heritage Site.

Common across all Member States is the demographics making up social housing tenants – the old, the young, ethnic minorities, and low-income single parent households are the majority.⁶³ As a result, social housing is seen by many as part and parcel of their demographic groups, and the political and social realities that are attached to these. Indeed, as Paul Watt has noted, place of residence is increasingly treated as a more significant point of social distinction than other traditional signifiers such as occupation, and that feelings of fear and disgust towards the ‘other’ in society leads to greater spatial distance between these groups.⁶⁴ Similar trends can be seen in the formation of ‘ghettos’ in European states such as Belgium, Germany, Italy, and France.⁶⁵ Consequently, these spatial distinctions between different groups in society – particularly demarcated by socio-economic class and ethnicity – can become key aspects of group identity.⁶⁶

British council housing in particular is often seen as an inextricable part of the lives of working class and ethnic minority British youths. For example, the Barbican estate, Meridian Walk, Trelick Tower, and the Alexandra Estate have all appeared in music videos in the last five years.⁶⁷ Even when the music artists themselves have not grown up in these estates, visually positioning themselves within them can be used as a way to connect themselves with their target audience. In a similar respect, art collective Red Lebanese are famed for photographing life in the French banlieues from an inhabitant’s perspective, with the architecture itself operating as an often explicit and always felt backdrop to the lives of France’s low-income, ethnically diverse populations.⁶⁸



⁴⁷ See, for example, disputes over the reproduction of Michelangelo’s David, discussed in R. Romano (2018) 3.

⁴⁸ R. Romano (2018) 1.

⁴⁹ J. Lobert, B. Isaias, K. Bernardi, G. Mazziotti, A. Alemanno and L. Khadar, ‘The EU Public Interest Clinic and Wikimedia present: Extending Freedom of Panorama in Europe’ (2015) HEC Paris Research Paper No. LAW-2015-1092 <<https://www.ssrn.com/abstract=2602683>> 14.

⁵⁰ R. Romano (2018) 3.

⁵¹ Bayerische Gesetz zum Schutz des Eigentums an Erzeugnissen der Literatur und Kunst gegen Nachdruck (Bavarian Law on the Protection of the Ownership of Products of Literature and Art) (1840, Bayern Ständerversammlung Kammer der Abgeordneten: Bavaria) 460; <<https://play.google.com/store/books/details?id=vZdBAAAACAAJ&rdid=book-vZd-BAAAACAAJ&rdot=1>> (Germany) [Discussed in M. Dulong de Rosnay and P. Langlais (2017) 4].

⁵² Entwurf eines Gesetzes über Urheberrecht

und verwandte Schutzrechte (Draft Law on Copyright and Neighboring Rights) BT-Drs 4/270 23 March 1962 (Germany) Section 76.

⁵³ Copyright, Designs and Patents Act 1988 [c 48] (United Kingdom) Section 62.

⁵⁴ B. Newell, ‘Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography’ (2011) 44 Creighton Law Review 405, 419.

⁵⁵ M. Dulong de Rosnay and P. Langlais (2017) 5.

⁵⁶ P. Jones, The Sociology of Architecture: Constructing Identities (2011, Liverpool: Liverpool University Press) 29.

⁵⁷ A. Bertoni and M. Montagnani (2015) 48.

⁵⁸ A. Ravetz, Council Housing and Culture: The History of a Social Experiment (2003, Abingdon: Routledge) 2.

⁵⁹ Ibid., 6.

⁶⁰ K. Scanlon, M. Fernandez Arrigoitia, and C. Whitehead, ‘Social Housing in Europe’ (2015) 17 European Policy Analysis 1, 2.

⁶¹ Ibid.

⁶² A. Ravetz (2003) 181.

⁶³ K. Scanlon et al (2015) 4.

⁶⁴ P. Watt, ‘Respectability, roughness and ‘race’: Neighborhood place images and the making of working-class social distinctions in London’ (2006) 30(4) International Journal of Urban and Regional Research 776, 779.

⁶⁵ L. Wacquant, ‘Urban Outcasts: Stigma and Division in the Black American Ghetto and the French Urban Periphery’ (1993) 17(3) International Journal of Urban and Regional Research 366, 367.

⁶⁶ Ibid.

⁶⁷ D. Hancox, ‘Attack the block: how grime’s visuals went pop’ (20 April 2017, The Guardian) <<https://www.theguardian.com/music/2017/apr/20/attack-the-block-how-grime-visuals-went-pop>>.

⁶⁸ F. Kinsella, ‘Red Lebanese reveal a different side of Paris’ (26 May 2015, i-D) <https://i-d.vice.com/en_uk/article/bjndv/red-lebanese-reveal-a-different-side-of-paris>.

Going back to architecture as a form of ‘discourse’, in revealing what it is that these social housing projects ‘say’ to us, it is helpful to turn to the thought processes of the architects that created these works. Le Corbusier, architect of the famous Unité d’Habitation in Marseilles and Berlin, who inspired a multitude of high rise social housing projects throughout Europe and beyond, stated that ”we must create a mass-production state of mind.”⁶⁹ Le Corbusier pursued in his architecture a ‘new world order’ in which the needs of society - food, sun, and ”necessary comforts” – are centred.⁷⁰ However, the construction of this world order was only for “elites that must reflect so as to be able to lead”.⁷¹ Ernő Goldfinger, architect of Trellick Tower in London, similarly outlined his vision for cities of the future: “centres of civilisation where men and women can live happy lives. The technical means exist, to satisfy human needs. The will to plan must be aroused. There is no obstacle, but ignorance and wickedness.”⁷²

This interest in designing buildings to pursue social and political aims is still alive and well today, with the 2008 Bauhaus Award for architecture specifically adopting as its theme solutions to housing shortages internationally, particularly in relation to urban poverty.⁷³ The award title ‘Minimum subsistence level housing’ was directly borrowed from the International Congress of Modern Architecture (CIAM) 1929 Conference.⁷⁴ CIAM, specifically organised around the idea of ‘architecture as a social art’, aimed to utilise architecture as a means of furthering certain political and social goals.

On the other end of the spectrum, large-scale, state-funded ‘iconic’ monuments and works of architecture generally are built not merely with an understanding that the work will become part of the lives of the public at large, but will be aimed at making the work ‘socially meaningful’ to the public.⁷⁵ Vale gives the example of Ringstrasse in Vienna, the buildings along which were constructed by a new liberal middle class that, instead of ‘palaces, garrisons, and churches’ chose to install buildings of constitutional government and higher culture, as an expression that building was now in the communal power of the citizenry.⁷⁶ In 20th century Germany, Albert Speer’s ‘Berlin Plan’ was designed to create ‘a Berlin Champs Elysées two and a half times the length of the original’, culminating in a Great Hall designed to be “essentially a place of worship” for Hitler.⁷⁷ Later in Germany’s history, the Reichstag with its transparent dome was erected as a building that should

‘keep no secrets’, to be inserted into a national discourse of transparency and accessibility.⁷⁸ If social housing architecture is ‘discourse’ as to the organisation of society, monumental architecture may be conceived of as ‘discourse’ regarding the identity of society as a political entity.

It is equally possible, of course, to understand other creative works - such as art and literature – as ‘discourse’. Both are capable of being, and indeed are treated as, messages about the world, humanity, society, and individuals, and we nevertheless consider works of art and literature, in general, to be worthy of copyright protection.⁷⁹ But architecture is intended by its creators to relate to the public in a different way. As has been discussed, large scale residential architecture can become hugely culturally significant to its inhabitants and those who live in its vicinity. In many of these cases, residents are part of low-income households with less choice in where they live than those of higher income brackets.⁸⁰ Those who live in surrounding areas are also unable to escape the ‘ugly’ visual presence of these structures.⁸¹ Likewise, large-scale monumental architecture is intended to be visually arresting; to force itself into the psyches of passers-by.⁸² But we need not limit our analysis as such. All buildings become part of public life, whether these are places that we live or work, or whether they are simply part of our surroundings. They become characteristics of neighbourhoods and cities, act as landmarks by which we can physically locate ourselves, and they are unavoidable. We do not ‘consume’ architecture as we do art and literature - architecture is often forced on us whether we like it or not. Likewise, as Jacobs notes, buildings are not merely stand-alone ‘objects’ - their continued survival in the public space requires the support of and continued use by the society at large.⁸³

This public element of architecture is recognised by those who commission and create works of architecture or, at the very least, by council urban planning departments who are able to grant or withhold permission for certain projects. For instance, guidance issued by the Local Government Association in the UK states that “planning is about upholding the wider public interest for the benefit of the whole community and not just individual constituents or particular interests”⁸⁴ While public interest in a building is particularly heightened in cases where public funding is used, it is clear that the public interest in a building will be of great importance regard-

less of whether the building is publicly or privately owned.

What, then, of the subject of architecture’s discourse - the society itself? As has been noted above, while some European Union Member States do allow the public to reproduce and communicate to the public works of architecture and public art, this exception to copyright infringement is optional. Many states do not, as we have seen, allow such reproduction or communication at all except in certain instances, such as in distinguishing between commercial and non-commercial uses. It could be said that this harks back to Le Corbusier’s writings about architecture as a force for social reform – only the few must be given the privilege of working on this reform, of determining the measures that must be taken: “Art is not a popular thing, still less a deluxe whore. Art is a necessary foodstuff for elites that must reflect so as to be able to lead”.⁸⁵ Preventing the public at large from making reproductions of architectural works such as photographs or artwork, has the capacity to remove the public’s ability to create their own ‘discourse’ about the world in which they live. The image of architectural works can have, and are often intended to have, significant impacts on the culture and everyday lives of those who interact with it. As such, the public interest in being able to interpret and communicate these images is hugely significant. Additionally, as we will now go on to discuss in greater detail, while the public interest in reproducing architectural works may be acknowledged in a distinction between commercial and non-commercial works, for example, this distinction suffers badly from a lack of clarity and definition.

3.2 Commercial and non-commercial uses of architectural works

A significant public concern that may arise from certain restricted formulations of the panorama exception is the uneasy distinction between commercial and non-commercial uses. As we have noted in the previous chapter, one way in which states seek to balance the public and private interest in copyright law applicable to architecture is by allowing ‘non-commercial’ uses of such copyrighted work. One example of the application of this criterion can be seen in the case *BUS v Wikimedia Sverige*, in which the Swedish Supreme Court held that including photographs of public sculptures on an internet database was not commercially insignificant and therefore conflicted with the

normal exploitation of the work.⁸⁶ This is despite the fact that the user of the photographs in this case was a non-profit organisation – Wikipedia – with the sole purpose of disseminating knowledge to the public. Furthermore, it held that it was a legitimate interest of the right holder to seek compensation for use of his or her work in this way, despite the database being in the public interest.⁸⁷ Indeed, many commentators have noted the blurred distinction between commercial and non-commercial works, particularly in view of the role of internet in today’s society.⁸⁸ In addition to this, excluding commercial uses from the panorama exception may go too far in privileging the rights of copyright holders, even where commercial purpose is undeniable. Each of these issues will now be addressed in turn.

3.2.1 Educational uses

It must be borne in mind at this point that many educational uses are unaffected by the distinction between commercial and non-commercial uses, for the simple reason that many such uses clearly fall into the latter category.⁸⁹ On the other hand we must not understate the potential impact that this may have on existing educational initiatives as well as the potential for future initiatives and collaborations with commercial ventures.

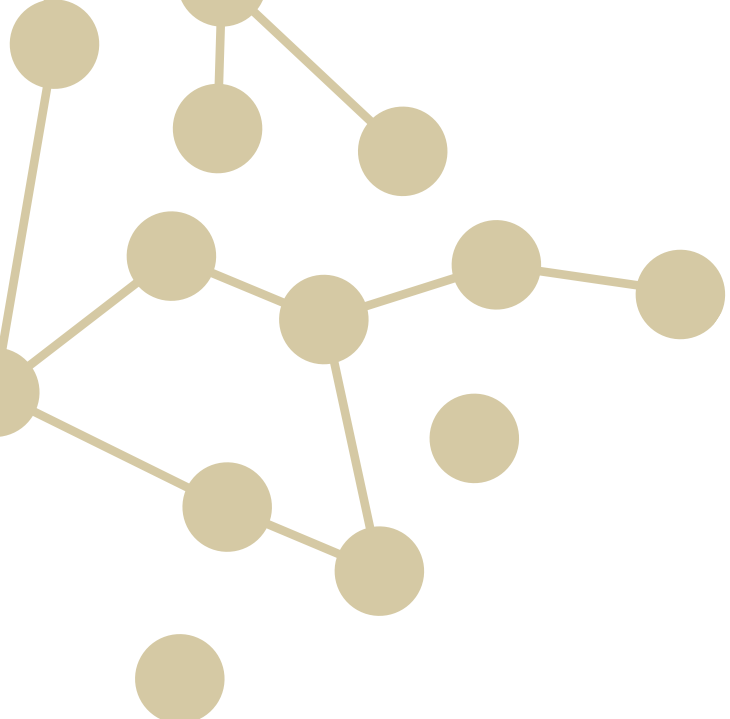
It has been noted that ‘massive open online courses’ (MOOCs) established in collaboration with commercial platforms may be in jeopardy where these utilise reproductions of architectural works (for instance, courses on architecture or public art).⁹⁰ Sweden, for instance, while allowing educational uses, does not extend this exception to the digital sphere.⁹¹ As Lobert and others note, the majority of European universities are engaged in the development of such initiatives, and these are often hosted on third party commercial platforms.⁹² This is, in this sense, a similar concern to that raised by the sharing of images on social media. While the use of copyrighted works is, in itself, non-commercial, its taking place online using third party commercial platforms could be sufficient to render this use an infringement.

⁶⁹ Le Corbusier, *Towards a New Architecture* (Translated by J Goodman) (2007, Los Angeles: Getty Research Institute) (First published 1931) 245.
⁷⁰ Ibid., 157.
⁷¹ Ibid.
⁷² N. Warburton, Ernő Goldfinger: The Life of an Architect (2004, London: Routledge) Chapter 7 <http://nigelwarburton.typepad.com/files/ch7-the-sensation-of-space.pdf>.
⁷³ U. Knöfel, ‘Bauhaus Launches Social Housing Architecture Award’ (11 January 2008, Spiegel Online) <http://www.spiegel.de/internatio-

nal/germany/building-for-the-poor-bauhaus-launches-social-housing-architecture-award-a-528098.html>.
⁷⁴ Ibid.
⁷⁵ P. Jones (2011) 27.
⁷⁶ L.. Vale, *Architecture, Power, and National Identity* (1992, New Haven: Yale University Press) 21.
⁷⁷ L Vale (1992) 23.
⁷⁸ G. Delanty and P. Jones, ‘European Identity and Architecture’ (2002) 5(4) *European Journal of Social Theory* 453, 457.
⁷⁹ With the exception, of course, of pro-piracy or

anti-copyright groups such as the League of Noble Peers.
⁸⁰ See, for example, Greater London Authority, *Housing in London* 2017 (February 2017, London: Greater London Authority) 54.
⁸¹ A. Kearns et al, ‘Notorious Places: Image, Reputation, Stigma. The Role of Newspapers in Area Reputations for Social Housing Estates’ (2012) 28(4) *Housing Studies* 579, 590.
⁸² H. Reed, ‘Monumental Architecture: Or the Art of Pleasing in Civic Design’ 1 *Perspecta* 50, 56.
⁸³ J. Jacobs, ‘A Geography of Big Things’ (2006) 13 *Cultural Geographies* 1, 22.

⁸⁴ Local Government Association, *A councilor’s workbook on planning* (August 2017, London: Local Government Association) <https://www.local.gov.uk/sites/default/files/documents/11.63%20-%20Cllr%20Planning%20workbook_02.pdf> 5.
⁸⁵ Le Corbusier (2007) 157.
⁸⁶ Bildupphovsrätt i Sverige ek för (BUS) vs Wikimedia Sverige (Case no Ö 849-15) [Sweden] at [20].
⁸⁷ Ibid. at [21].
⁸⁸ For example, J. Lobert, B. Isaias, K. Bernardi, G. Mazziotti, A. Alemanno and L. Khadar, ‘The EU Public Interest Clinic and Wikimedia present: Extending Freedom of Panorama in Europe’ (2015) HEC Paris Research Paper No. LAW-2015-1092 <https://www.ssrn.com/abstract=2602683>; M Dulong de Rosnay and P Langlais, ‘Public artworks and the freedom of panorama controversy: a case of Wikimedia influence’ (2017) 6(1) *Internet Policy Review* 1; M. Schaake, ‘The freedom to snap and share’ [9 July 2015, MarietjeSchaake.eu] <https://marietjeschaake.eu/en/the-freedom-to-snap-and-share?color=primary>; J. Reda, ‘Freedom of panorama under threat’ [22 July 2015, JuliaReda.eu] <https://juliareda.eu/2015/06/top-under-threat/>.
⁸⁹ Namely, any educational use that does not utilise a third party platform or otherwise collaborate with a third party.
⁹⁰ J Lobert et al (2015) 9.
⁹¹ Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Act on Copyright in Literary and Artistic Works) [Sweden] Sections 23, 24.
⁹² J. Lobert et al (2015) 9.



3.2.2 Visual depiction of location in tourism, film, and advertising

While Sweden's implementation of freedom of panorama includes commercial uses that take place offline, such as books, calendars, and postcards, other states such as France, and Italy prohibit such commercial uses.⁹³ As we can see from the case *Buren et Drevet v. Lyon*, not even postcards are too small a cause for complaint by architects when the law allows it.⁹⁴ Additionally, the use of architecture in film and advertising is, of course, prohibited under national laws excluding commercial uses from the panorama exception.

For example, in 2015 a French court ruled that beer company Kronenbourg had to obtain prior authorisation for their use of the *Château de Chambord* in the background of one of their advertisements.⁹⁵ This advertisement was one of a series in which Kronenbourg beer appeared alongside the slogan '*le goût à la française*', with a famous French monument or building appearing in the background, such as the *Arc de Triomphe* and the *Tour Eiffel*. As commentators have noted, the *Château de Chambord* is a state-owned property.⁹⁶ Similarly, outside the EU, the Archdiocese of Rio de Janeiro reportedly successfully sued Columbia Pictures for copyright infringement for the appearance of the Christ the Redeemer statue in the film *2012*.⁹⁷

As Jensen notes, the setting of a film is one of its most crucial aspects.⁹⁸ Physical filming locations allow audiences to 'escape' to other parts of the world, and allow stories in these locations to be told with perceived authenticity and believability.⁹⁹ In countries such as France, film producers are required to pay architectural copyright fees in order to release shots in which protected works are visible.¹⁰⁰ If we consider the fact that monuments such as the Christ the Redeemer statue in Brazil, and the *Château de Chambord* in France, are prominent aspects of the physical landscape and history of a state, this becomes somewhat problematic for industries such as film, advertising and tourism, particularly those projects with limited funding who may rely on these landmarks to communicate geographical setting and context to audiences.

Restricting the use of architectural works in these contexts may not strike an appropriate balance between the interests of right holders and those of the public. By excluding commercial works from the panorama exception, this could give the right holder the exclusive ability to authorise or prohibit the recognisable depiction of a particular location in film – an extraordinary degree of power over public space and its portrayal in cultural works.

3.2.3 The difficulty of defining 'commercial' uses in the digital economy

The reality of the internet in 2018 is that most online platforms – “a (technological) basis for delivering or aggregating services/content (in digital format)”¹⁰¹ – are commercial. Revenue may be derived from direct payment, advertising, the sale of end-user data, or acquisition.¹⁰² As was noted in a report for the Committee on Economic and Monetary Affairs, the digital economy is increasingly interwoven with the offline economy, with some companies basing their business model entirely around user generated content such as shared photos.¹⁰³ In the context of the internet, therefore, the distinction between commercial and non-commercial may result in a wide range of behaviours falling afoul of copyright law. Particularly in the context of MOOCs, this may inhibit socially useful activities and prevent further innovations in online education.

Even in contexts less obviously beneficial than education, the internet in general plays an important role in enhancing the public's access to news and facilitating the sharing of information generally (as was noted by the European Court of Human Rights in the case *Times Newspapers v United Kingdom*).¹⁰⁴ One key aspect of this is the sharing of images. Approximately 300 million photos are uploaded on Facebook each day, while social media websites Instagram and Snapchat (with 800 and 255 million users respectively as of January 2018) are entirely image-based.¹⁰⁵ One report on internet traffic growth by network equipment manufacturer Cisco has predicted that video will make up 82% of all internet traffic by 2021.¹⁰⁶ Despite the massive scale of image sharing today, sharing taking place in jurisdictions which have not extended the panorama exception to cover 'commercial' uses of copyright protected works may be infringing copyright law, particularly considering the undeniably profit-focused nature of widely used social media platforms.

In light of this, it is submitted that maintaining a commercial/non-commercial distinction in individual Member States, or implementing this distinction in wider European copyright law, would absolutely fail to strike an appropriate balance between the interests of right holders and those of the public.

3.2.4 The encroaching appropriation of public visual space

Indeed, prohibiting even explicitly commercial uses of copyright protected works does not go far enough to protect the interests of the public in a fair and balanced way. In agreement with the justification given for the German panorama exception, that “the establishment of a work of art in public places expresses that the work is thus devoted to the general public”,¹⁰⁷ prohibiting commercial uses of

architectural works effectively gives right holders the exclusive right to use the visual public space for commercial purposes.

It is worth pointing out that the use of the visual public space is precisely the object of designing the exterior of a building. Prior to the architect building within the visual public space, a member of the public is, in theory, free to use parts of this space, including for commercial purposes. By allowing architects to remove this freedom simply by designing within this space, lawmakers are necessarily allowing architects not only to build on private land but also to encroach on the public domain.

This could become particularly problematic, first, when the architect has built a place where people live and work, and which has developed cultural significance for sections of the community. The example used above is social housing projects, which have been featured in a number of commercial and non-commercial reproductions, particularly in recent years.¹⁰⁸ Giving architects a monopoly over such areas of visual space does not give sufficient weight to the importance of such visual space to the public. Second, as discussed at part 3.2.2 above, when the relevant work of architecture becomes a landmark that can act as visual shorthand for a geographical location, prohibiting its depiction in commercial works grants an unjustified degree of power to the right holder. In this sense, by excluding commercial uses from the panorama exception, copyright law is privileging the rights of copyright holders to an excessive degree.

3.3 Conclusion

This section has argued that the public benefit in using copyrighted works of architecture should weigh particularly heavily in assessing the justification of copyright law. This argument is made in two primary respects: the role

of architecture in society, and the unsuitability of the commercial / non-commercial distinction in allowing socially beneficial uses of copyrighted works. First, it is argued that architecture plays a central role in society, both incidentally, as the setting in which individuals live out their daily lives, and intentionally, as a way of property owners consciously altering public space in the pursuance of various social and political ends. To deny the public the ability to participate fully in this aspect of their lives is not only to objectify the public as an entity that may be talked about only by those who are removed from it. It also denies the reality that architecture exists within public space, and by privatising the visual aspect of this, particularly in urban areas, right holders are taking ownership not only of their creative works, but of previously public areas of visual space.

Second, it is argued that the distinction between commercial and non-commercial works necessarily rules out a number of socially beneficial or otherwise legitimate uses of copyrighted works, such as the uploading of private photos on social media, the use of third-party platforms in online education, or the use of panorama shots in film and advertising. The effective prohibition on the use of public space in all of these cases, it is argued, goes far further than is justified by a balance between private and public interests in copyright law. In conclusion, it is argued that, in an assessment of the appropriate balance between private and public interests, the public interest in the use of architectural works should be given significant weight. This is because architecture plays a far more central role in the lives of the public than other forms of protected work, as well as the fact that prohibiting certain categories of uses under copyright law has the potential to inhibit socially useful or otherwise legitimate activities.

⁹³ See 1.3 above.

⁹⁴ In this case, two artists were unsuccessful in their action against publishers of postcards on which their fountains were visible, as the fountains were not the central feature of the image. Civ. 1ère, 15 March 2005, Place des Terreaux, No 03-14.820 (France) (Discussed in J. Smiers, Arts Under Pressure: Protecting Cultural Diversity in the Age of Globalisation (London: Zed Books) 62.

⁹⁵ V. Chaptal and M. du Besset, 'Domanialité publique : Une autorisation était nécessaire pour photographier le château de Chambord' [11 February 2016, SCP Sartorio & Associés] <<http://www.sartorio.fr/actualites/flashes-d-info-juridique/641-cabinet-avocats-droit-public-domanialite-publique-une-autorisation-etait-necessaire-pour-photographier-le-chateau-de-chambord.html>>.

⁹⁶ Calimaq, 'Décret Chambord : le patrimoine livré à l'arbitraire' [3 April 2017, S.I.Lex] <<http://scinfolex.com/2017/04/03/decret-chambord-le-patrimoine-livre-a-larbitraire>>.

⁹⁷ B. Newell [2011] 407.

⁹⁸ J. Jensen, 'Hollywood Blackout: Impact of New Architectural Copyright Laws on the Filming Industry' [2016] 2 Texas A&M Journal of Property Law 147, 151.

⁹⁹ Ibid., 157.

¹⁰⁰ French Film Commission, 'Film France FAQ' (FilmFrance.net) <<http://www.filmfrance.net/v2/gb/home.cfm?choixmenu=FAQ>>.

¹⁰¹ O. Batura, N. van Gorp, P. Larouche, 'Online Platforms and the EU Digital Single Market' [2015, Rotterdam: e-Conomics] <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_e-economics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf> 2.

¹⁰² Ibid., 4.

¹⁰³ O. Batura, N. van Gorp, 'Challenges for Competition Policy in a Digitalised Economy' [July 2015, Brussels: European Parliament] 18.

¹⁰⁴ Times Newspapers Ltd v United Kingdom (No 1 and 2) no 3002/03 & 23676/03, 10 March 2009 (unreported).

¹⁰⁵ D. Tam, 'Facebook processes more than 500 TB of data daily' [22 August 2012, CNET.com] <<https://www.cnet.com/news/facebook-processes-more-than-500-tb-of-data-daily/>>; Statistica, 'Most popular social networks worldwide as of April 2018, ranked by number of active users (in millions)' [2018, Statistica] <<https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>>.

¹⁰⁶ Cisco, 'Cisco Visual Networking Index: Forecast and Methodology, 2016–2021' [15 September 2017, Cisco.com] <<https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.html>>.

¹⁰⁷ Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (Draft Law on Copyright and Neighbouring Rights) BT-Drs 4/270 23 March 1962 (Germany) Section 76.

¹⁰⁸ For example, music videos.

4. A PROPOSAL FOR HARMONISATION

In this final Section it will be argued that the panorama exception should be made mandatory across the European Union, and extended so that commercial uses of copyrighted public architectural works are permitted under European law. Beginning with an assessment of the impact of a non-harmonised panorama exception, it will be argued that maintaining the status quo fragments the operation of the internal market and fosters uncertainty amongst the public as to what they are and are not allowed to do with copyrighted works of public architecture. It will then be argued that the current law raises serious issues of compatibility with the Digital Single Market as well as principles of competition law. Turning our attention to the other side of the fence, some of the respects in which harmonisation may not be desirable will be addressed, such as in consideration of the need for legislative diversity, and for a high level of protection for authors. The final part of this Section will examine the potential practical realities of an extended panorama exception - how would this be compatible with European law?

4.1 Effects of an non-harmonised panorama exception

A central aim of the European Union is the establishment of the internal market - an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.¹⁰⁹ In pursuance of this aim, the creation of uniform rules throughout the Union, and thereby the fostering of legal certainty, transparency, and predictability, has been key.¹¹⁰ The Infosoc Directive is clear in its emphasis on the need for legal certainty in copyright law,¹¹¹ and this emphasis continues to be maintained in efforts to modernise copyright law for a digital society - the EU has “a duty to promote a clear legal framework for copyright and related rights that can be understood by all stakeholders, in particular the general public, and that ensures legal certainty”.¹¹² In this respect, members of the public should be able to easily determine their legal rights and freedoms under copyright law throughout the internal market. Despite this goal, as we have seen, Article 5 of the Directive

consists of a long and largely optional list of exceptions to copyright protection. These exceptions allow a significant margin of appreciation amongst Member States, allowing the implementation of the Directive to keep their national laws and traditions intact to as great a degree as possible.¹¹³ This high degree of flexibility has been taken advantage of in relation to freedom of panorama, with the degree of protection afforded to works of architecture varying quite wildly throughout the European Union. As Cammisso notes, the European Union is relatively small, allowing citizens the possibility to travel within two or three countries in a single day, all with different legal standards.¹¹⁴ Recording one’s surroundings on Instagram Live in the morning could be perfectly legal and, one two-hour train ride later, the same act could infringe copyright law.

This relates to what Hugenholtz describes as the “single most important obstacle to the creation of the Internal Market”¹¹⁵: the territoriality of copyright law.¹¹⁶ This refers to the principle that each Member State grants and recognises copyright protection in its own territory by reference to its own laws.¹¹⁷ As a result of this, ordinary European citizens are faced with completely different legal norms across different Member States in regard to the same facts.¹¹⁸ Indeed, in the European Commission’s report on the public consultation on the panorama exception, it is clear that, whether or not an individual personally experiences problems in uploading potentially copyrighted images of architectural works, there is uncertainty as to whether their actions are legal or illegal.¹¹⁹ While this issue of legal certainty can only be totally remedied with full harmonisation of copyright law, such as through a single European copyright title or a full list of mandatory exceptions, this is not currently on the horizon.¹²⁰ The Commission has stated that an ‘incremental’ approach is required to slowly take the European Union closer to full harmonisation.¹²¹

4.1.1 Digital Single Market Strategy

In taking incremental steps towards full harmonisation of exceptions to copyright law, it will now be argued that harmonisation of the panorama exception is particularly necessary in light of the European Union’s Digital Single Market Strategy. This strategy is built on three ‘pillars’:

access to digital goods and services, creating an environment for the flourishing of digital networks and services, and maximising the growth potential of the digital economy.¹²² As Cammisso notes, current copyright legislation in force was “adopted before Facebook and YouTube even existed”.¹²³ As part of the Digital Single Market Strategy, the European Parliament adopted European Parliament Resolution of 9 July 2015,¹²⁴ in recognition of the need to adapt European copyright law “in light of the digital revolution and changed consumer behaviour”.¹²⁵ These two aspects – the digital revolution and changed consumer behaviour – are key to why harmonisation of the panorama exception is necessary.

4.1.1.1 The digital revolution

First, in relation to the digital activities of European citizens, we have seen that the decision not to implement the full panorama exception in certain countries could affect every day online activities such as sharing photos online and participating in online educational initiatives. For example, it was stated in the report on the consultation on the panorama exception that architecture students and professors were concerned that the enforcement of copyright law in Member States without freedom of panorama could hamper their present and future work.¹²⁶ These concerns may become more widespread if online educational initiatives, through third-party platforms, continue to be used and developed, as such activities may come to infringe copyright law in even those states with an exception for educational uses. The sharing of images on social media, now considered an essential tool of communication in the digital world,¹²⁷ may be similarly problematic. The consultation into freedom of panorama revealed that more than half of respondents often or occasionally faced problems relating to copyright when uploading images of works of architecture online.¹²⁸

It is obvious in these respects that the law in some Member States fails to take into account current educational and digital practices, and in doing so acts in conflict with the Digital Market Strategy. Turning to the first of the three pillars – providing access to digital goods and services – it is clear how the inhibition of cross-border educational services through the panorama exception conflicts with

this. As was stated in the Gowers report in the context of the United Kingdom, it is important that copyright law allows educational establishments to take advantage of new technology to educate pupils regardless of their education.¹²⁹ Indeed, as this report notes, copyright law that inhibits online educational uses has the potential to disadvantage disabled students or others who are unable to attend classes on campus.¹³⁰

Turning to the second and third of the three pillars – creating an environment for the flourishing of digital networks and services, and maximising the growth potential of the digital economy – the current state of the panorama exception also conflicts with this. If online educational initiatives are at risk of infringing copyright law if they utilise online third party platforms, this introduces the possibility that platforms may be selected to be used for these initiatives not on based ease of use, quality, or the existence of new and desirable platform features, but on their non-commercial nature. This has clear potential to inhibit innovation in digital education, particularly as digital uses almost always carry the potential for revenue raising.¹³¹ One obvious example of how restrictive freedom of panorama has inhibited the flourishing of digital networks and services can be found in BUS v Wikimedia, in which private interests were explicitly privileged over the public interest in an online database facilitating dissemination of knowledge.¹³² This problem is worsened by the lack of legal certainty arising from a non-harmonised copyright law. The risk of falling afoul of copyright law and having to potentially pay compensation to right holders may also potentially inhibit online activities relating to copyright protected architectural works, particularly when one considers that a European citizen may be subject to a range of legal norms of varying familiarity when operating online.

¹⁰⁹ Consolidated Version of the Treaty on the Functioning of the European Union, Article 26 (2008 OJ C 115/47).
¹¹⁰ P. Hugenholtz, ‘Harmonisation or unification of European Union copyright law’ [2012] 38 Monash University Law Review 4, 5.
¹¹¹ Recitals 4, 6 and 7.
¹¹² European Parliament Resolution of 9 July 2015 on the Implementation of 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, 2015 O.J. [C 265] Paragraph Q.
¹¹³ S. McCarthy, ‘The European Copyright Directive and Combinatorial Explosion’ (2013) 19(2) European Journal of Current Legal Issues <<http://webjcli.org/article/view/245/317>>.
¹¹⁴ K. Cammisso, ‘European Parliament Resolution of 9 July 2015 and its Progeny: Why the Digital Age Demands a Single European Copyright Title’ [2018] 17(1) Chicago-Kent Journal of Intellectual Property 37, 43.
¹¹⁵ P. Hugenholtz [2012] 4.
¹¹⁶ Lagardère Active Broadcast v Société pour la perception de la rémunération équitable and others ECLI:EU:C:2005:475 at 46; Berne Convention, Article 5.
¹¹⁷ T. Madiaga, ‘EU copyright reform: Revisiting the principle of territoriality’, Briefing for the European Parliament, PE 568.348 (2015, Brussels: European Parliamentary Research Service) 3.
¹¹⁸ L. Guibault [2010] 58.
¹¹⁹ College of Europe, ‘Replies to the public consultation on the ‘Panorama Exception’ [Final Report] (2017, Brussels: European Commission) 8.
¹²⁰ C. Geiger et al, ‘Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society Adopted by the European Parliament on the 9th July 2015’ [2015, Strasbourg: Centre for International Intellectual Property Studies]. <http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Etudes/CEIPI_statement_on_EU_copyright_reform_final-1.pdf> 2.

¹²¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions Towards a Modern, More European Copyright Framework, COM[2015]0626 (Dec 9 2015) 12.
¹²² European Commission, ‘Shaping the Digital Single Market’ (25 March 2015, European Commission: Brussels) <<https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>>.
¹²³ K. Cammisso [2018] 38.
¹²⁴ European Parliament Resolution of 9 July 2015 on the Implementation of 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.
¹²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final (May 6, 2015), Introduction.
¹²⁶ College of Europe [2017] 15.
¹²⁷ Hugenholtz [2012] 28.
¹²⁸ College of Europe [2017] 6; See also Chapter 4.2.1.
¹²⁹ L. Guibault [2010] 62.
¹³⁰ Ibid.
¹³¹ D. Westkamp, ‘The ‘Three-Step Test’ and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision-Making’ (2008) Journal of the Copyright Society of the USA 1, 9.
¹³² See Chapter 3.4.

4.1.1.2 Changing consumer behaviour

The need for harmonisation is particularly strong when we consider the gap between social norms and legal reality that has developed in Europe, at least partly due to the rise of the digital society.¹³³ The effectiveness and credibility of copyright law in this respect depends on finding a balance between the interests of right holders in maximising their protection and the interest of the public in having access to products of creativity and knowledge.¹³⁴ As is acknowledged by the European Commission, as the internet is becoming the primary means of the dissemination and access of knowledge, people are increasingly expecting to have easy access to literary and artistic works online.¹³⁵ In particular, the increased speed of communication through digital technology has also raised expectations among society as to freedom of communication.¹³⁶

As Svensson and Larson argue in relation to file sharing, the attempt to legislate in conflict with social norms is hazardous, carrying with it the potential to foster distrust in the copyright system and ultimately lead to a failure to secure compliance, which could in turn undermine respect for the law.¹³⁷ If we consider the increasingly common use of image sharing as a form of communication in the digital society, it is clear how this principle has the capacity to apply to implementations of the panorama exception that the public considers too restrictive. Additionally, a 2015 petition against a mandatory panorama exception narrowed to include only non-commercial works suggests that the public does indeed consider this too restrictive, though there is no indication as to whether the signatories of this petition are representative of the European Union as a whole.¹³⁸

While the European Union has a duty to ensure the effective protection of copyrighted works, including public works of architecture, the purpose of copyright law is not simply to maximise economic benefit to authors.¹³⁹ The ultimate goal of the European project is the establishment and maintenance of an internal market. While the territorial nature of copyright law at present prevents this goal from being fully realised, incremental steps – harmonising measures – may be taken. A mandatory panorama exception is one such measure, and one that must be taken if the shorter-term goals of the Digital Single Market Strategy are to be realised. Without a mandatory panorama exception that is extended to include non-commercial uses, it is submitted that copyright law in this area will not be able to fully adapt to the digital revolution and change

in consumer behaviours. It is nevertheless the case that certain stakeholders are in opposition to this. This article will now turn to consider certain arguments against the harmonisation of the panorama exception.

4.2 Is harmonisation necessary?

A major criticism against the harmonisation of European law in general, that is key to this debate in particular, is that it erodes legislative diversity within the European Union. The importance of legislative diversity is emphasised in Article 167(4) of the Treaty on the Functioning of the European Union – “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”¹⁴⁰ The implementation of the panorama exception in European law can be viewed as one such example of where cultural differences have been taken into account. Member States with a strongly ‘public interest’ oriented approach to copyright law, or with a history of the panorama exception in general, have implemented the optional exception to its fullest extent.¹⁴¹ On the other hand, Member States with a tradition of protecting the rights of authors, or with a particularly strong interest in preserving cultural heritage, have limited their implementation of the exception.¹⁴²

The existence of optional exceptions to copyright law in the Infosoc Directive can be taken as clear evidence that legislative diversity continues to be valued by Member States – while the aim is to harmonise copyright law as much as possible, the law has maintained a margin of appreciation within which Member States can adapt the law to suit their own legislative traditions. Additionally, with recent political events such as the financial crisis, the migrant crisis, and Brexit, Rahmatian argues that the EU should be cautious about harmonising European law to a too great extent.¹⁴³ Though opinions on the EU are generally favourable, one 2017 report shows that a median of 53% across nine Member States support a national referendum on their country’s EU membership.¹⁴⁴ Insisting on one particular law, with no room for national variances, may carry the risk of EU citizens identifying less with the EU legal system.¹⁴⁵ This being said, it is not clear that opinion is particularly divided on freedom of panorama, even among legislators.¹⁴⁶ In the words of Commissioner Günther Oettinger, “25 or 26 EU nations” were in favour of freedom of panorama, with France being the only Member State to strongly object.¹⁴⁷

Another point to note in any argument for a mandatory panorama exception is that, while European copyright law does require a balance between private and public interests, it is nevertheless clear that the interests of right holders are to be afforded a high standard of protection. The report on the public consultation on the panorama exception revealed that visual artists and collective management organisations see the proposal for a mandatory panorama exception as having the potential to deprive them of substantial revenues.¹⁴⁸ They argue that those who contribute to the embellishment of European cities should be able to be remunerated for the public display of their works.¹⁴⁹ Concerns have also been raised as to what it could mean to shift copyright law away from this high level of protection. One director of a Belgian collective society expressed concern that a mandatory panorama exception could act as the first step on a path to generally weakened copyright protection – “the next step will be to get the right of reproduction of music and then films. You will see: by now pressing the freedom of panorama, they will want more”¹⁵⁰ While digital technology may have changed consumer’s expectations regarding the ability to access information, this expectation might, from the perspective of some, have little respect for the copyright system as a whole.

As Westkamp notes, across all fields of EU harmonisation, a high level of protection for intellectual property rights is perceived as the ultimate goal.¹⁵¹ Recital (9) of the Infosoc Directive, for instance, states that any harmonisation measures must be taken on the basis of a high level of copyright protection, as this is crucial to intellectual creation. While this article argues that an appropriate balance between public and private rights is not reached in certain Member States, it is nevertheless the case that privileging the interests of copyright holders over those of the public is perfectly consistent with the explicit goal of European copyright law being a high level of protection for copyright protected works.

However, as Cammiso notes, the European Parliament Resolution of 9 July 2015 and the Digital Single Market Strategy in general appear to indicate a move away from an authored cantered approach and towards an emphasis on consumer rights.¹⁵² It is also evident from the recitals to the Infosoc Directive that the EU expects the law to have to adapt to changes in society arising from the digital revolution – “Such differences [in exceptions to copyright] could well become more pronounced in view of the fur-

ther development of transborder exploitation of works and cross-border activities. [...] The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.”¹⁵³ Similarly, the Legal Advisory Board states that rules at the EU level should allow legislative diversity only to the point that they do not hinder the internal market.¹⁵⁴ As has been argued above, while ensuring a high level of copyright protection is important, exceptions to this protection should be introduced where the interests of private actors and the public are no longer appropriately balanced. Not only are the interests of the public particularly pronounced in cases of architectural works, as has been argued, but the current lack of harmonisation in the implementation of the panorama exception is such that the law does indeed directly inhibit the internal market project. While the protection of architectural copyright is a laudable goal, the European Union must take steps to adapt to the changing needs of society.

4.3 Compatibility of harmonisation with the existing copyright system

In arguing for a mandatory exception to copyright applicable to commercial and non-commercial uses of public architectural works, it must be considered how the law will fit into the current European copyright system. The replies to the public consultation on the panorama exception indicate that visual artists and collective management agencies consider that an extended panorama exception of this kind would conflict with the ‘three-step test’ under international law.¹⁵⁵ This test, derived from the Article 9 of the Berne Convention and now contained in Article 5(5) of the Infosoc Directive, states that exceptions to copyright should be permitted (i) only in certain special cases; (ii) provided they do not conflict with the normal exploitation of the work; and (iii) if they do not unreasonably prejudice the legitimate interests of the author.¹⁵⁶ A similar interpretation of the three-step test was made by the judge in the case BUS v Wikimedia Sverige, in which it was stated that obtaining remuneration for the use of the protected work was a legitimate interest of the right holder.¹⁵⁷ It will now be argued that, provided any mandatory exception does not extend to reproductions made on buildings (as is the law in Germany and in the UK)¹⁵⁸ such an exception would be compatible with the three-step test.

¹³³ P. Hugenholtz, ‘Law and Technology: Fair Use in Europe’ [2013] 56(5) Communications of the ACM 26, 26.

¹³⁴ P. Hugenholtz [2012] 7.

¹³⁵ European Commission, ‘Commission Communication on Copyright in the Knowledge Economy [Citizens’ Summary]’ (2009, Brussels: European Commission) <http://ec.europa.eu/internal_market/copyright/docs/copyright-info/citizens_summary16102009_en.pdf>.

¹³⁶ G. Westkamp [2008] 4.

¹³⁷ M. Svensson and S Larsson, ‘Intellectual Property Law Compliance in Europe: Illegal File Sharing and the Role of Social Norms’ 14(7) New Media & Society 1147, 1149.

¹³⁸ Change.org, ‘Save the Freedom of Photography! #saveFoP’ [2015, Change.org] <https://www.change.org/p/european-parliament-save-the-freedom-of-photography-savefop-europarl-en>.

¹³⁹ D. Westkamp [2008] 14.

¹⁴⁰ Consolidated Version of the Treaty on the Functioning of the European Union Article 167 [2008] OJ C 115/47 at Paragraph 4.

¹⁴¹ Such as the United Kingdom and Germany

[See Chapter 3.5 and 3.6].

¹⁴² Such as France and Italy [See Chapter 3.2 and 3.3].

¹⁴³ A. Rahmatian, ‘European Copyright Inside or Outside the European Union: Pluralism of Copyright Law and the “Hererian Paradox”’ [2016] 47(8) International Review of Intellectual Property and Competition Law 912, 920.

¹⁴⁴ B. Stokes, R. Wike and D. Manevich, ‘Post-Brexit, Europeans More Favourable Towards EU’ [2017, Washington: Pew Research Center] <http://assets.pewresearch.org/wp-content/uploads/sites/2/2017/06/06160636/Pew-Research-Center-EU-Brexit-Report-UPDATED-June-15-2017.pdf> 4.

¹⁴⁵ A. Rahmatian [2016] 920.

¹⁴⁶ See also the section ‘Changing consumer behaviour’ above.

¹⁴⁷ C. Spillane, Z. Sheftalovich and N. Vinocur, ‘Banned! Taking pictures of the Eiffel Tower at night’ [9 July 2015, Politico.eu] <https://www.politico.eu/article/banned-taking-pictures-of-the-eiffel-tower-at-night-copyright-law-eu/>.

¹⁴⁸ College of Europe [2017] 5.

¹⁴⁹ Ibid.; This is also reflected in Recital 10 of the

Infosoc Directive: “if authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work”.

¹⁵⁰ A. Louviaux, ‘Photographier dans un lieu public en Belgique: une loi consacre la « liberté de panorama’ [17 July 2016, Tinlot] <http://tinlot.blogs.sudinfo.be/archive/2016/07/17/photographier-dans-un-lieu-public-en-belgique-une-loi-consac-195229.html> quoted in M. Dulong de Rosnay and P. Langlais, ‘Public artworks and the freedom of panorama controversy: a case of Wikimedia influence’ 6(1) Internet Policy Review 1, 9.

¹⁵¹ D. Westkamp [2008] 15

¹⁵² K. Cammiso [2017] 48

¹⁵³ Infosoc Directive, Recital [31]

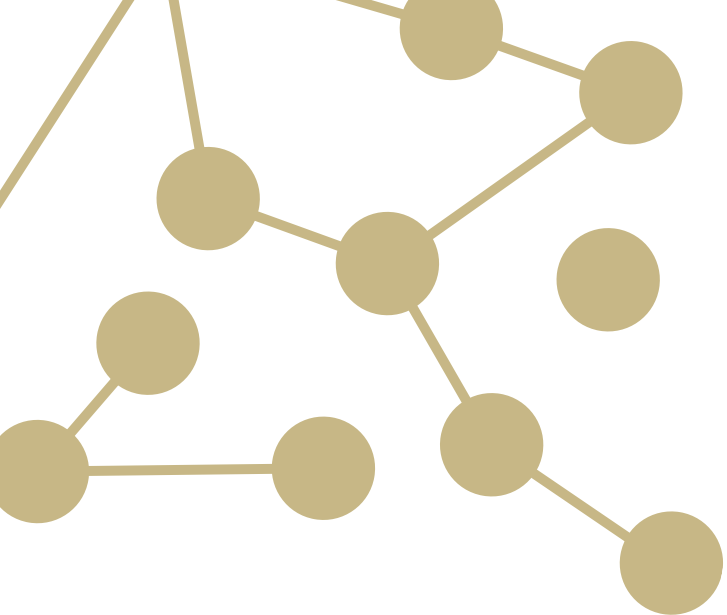
¹⁵⁴ L. Guibault [2010] 57

¹⁵⁵ College of Europe [2017] 27

¹⁵⁶ Berne Convention, Article 9 and Infosoc Directive, Article 5(5)

¹⁵⁷ at 11

¹⁵⁸ See 3.5 and 3.6



4.3.1 Certain special cases

It is not likely to be contested that the panorama exception would comply with the first of the three steps. This exception would be limited to reproductions of public architectural works, and would not extend to reproductions taking place on buildings.

4.3.2 Not in conflict with normal exploitation of the work

The normal exploitation of a work of architecture relates to the creation and use of the work itself, and the fee attached to this. This work can include client consultation, design, budgeting, managing construction, hiring and contracting, and interior design. It is submitted that what is not included in the normal exploitation of architectural works is the reproduction of images of the completed work by the public. It is acknowledged, however, that freedom of panorama must exclude reproductions on buildings in order to comply with this step.

The three-step test was created in a time before the digital world was even conceived of.¹⁵⁹ As Westkamp notes, the test is intended as a way to prevent exceptions to copyright protection from eroding existing markets, and to prevent future uses that may reduce the commercial value of the copyrighted work.¹⁶⁰ While the three-step test operates to ‘reserve’ markets for existing operators, this says nothing of the emergence of entirely new markets that are unrelated to the copyrighted work.¹⁶¹ While in certain states without freedom of panorama, collecting societies and architects may attempt to obtain remuneration for reproductions of their work that take place outside the architecture industry, there is no indication that architectural firms in states with freedom of panorama are unable to obtain a sufficient reward for their creative efforts, or that reproductions of the image of their works lessens their commercial value.

It is submitted that the simple existence of a method of exploitation is not sufficient to render this ‘normal’ under

the three-step test. Reproduction of images of public architecture on the internet, in the context of education, or used in film and photography, does not detract from the commercial value of the original work, and has little relevance to the ordinary operation of the architecture industry. Furthermore, the enforcement of copyright in public architectural works in this way has clear potential to have anticompetitive effects. Newell gives the example of the Sydney Opera House, which is trademarked under Australian law.¹⁶² The Sydney Opera House Trust has previously prevented photographers from taking photos of the Opera House (a major landmark in Sydney Harbour) and selling them as stock photos, suggesting instead that customers purchase a licence to use one of the Trust’s own photos.¹⁶³ While it is important to ensure that copyrighted works are protected, as Hugenholtz argues, copyright law cannot be used as an instrument to conserve monopoly power and maintain outdated business models.¹⁶⁴

4.3.3 Unreasonably prejudice the legitimate expectations of the author

It is submitted that it is neither a legitimate expectation that the public will not reproduce a public work, nor is it unreasonable for the law to allow this. As Westkamp argues, the three-step test was intended to allow for shifts in interests and general societal norms.¹⁶⁵ While it is inevitable that any standard based on an ‘expectation’ is going to be determined, to some extent, by past practice, this standard cannot be used to prevent the law from responding to social change. The key term for our purposes is ‘unreasonably’: is it reasonable for the legitimate expectations of architectural copyright holders to be bypassed? The conclusion must be strongly affirmative. For the reasons given throughout this article - the public interest in contributing to discourse about society, the potentially chilling effect architectural copyright can have on digital technology and educational initiatives, and the uneasy distinction between commercial and non-commercial works - there are strong reasons for the public interest in reproducing copyrighted works to be privileged above the expectations of the author.

In addition, and connected to the argument made in relation to step (ii) above, it is submitted that the author of a public architectural work cannot legitimately expect to demand further revenue from reproductions of his work that are not related to the sale of the design itself, the construction of the design, or reproductions on buildings. As has been argued, copyright law is concerned with protecting the commercial value of creative works – it should not be used as a mean of obtaining further revenue in new and unrelated markets that have little bearing on the commercial value of the original work.

5. CONCLUSION

This article has argued for the introduction of a mandatory exception to European copyright law whereby public architectural works may be used for all purposes, excluding reproductions of works on buildings. This argument began with establishing that copyright must be reformed where it cannot be shown to be clearly justified. With intellectual works being by their nature non-exclusive goods, the artificial imposition of exclusivity by the law on such goods necessarily involves giving the right-holder a monopoly over that good. It is understood that this monopoly ought to be given to the right-holder because it is ultimately in the public interest to do so - it provides creators with an incentive to create, thereby stimulating human progress. Where the public interest in incentivising creation is outweighed by the public interest in free access to the good, however, this justification falls apart. Indeed, this article argues that the public interest in free access to copyrighted works is particularly strong in the case of public architecture.

In looking at the protection of architectural works in the European Union and its individual Member States, it is clear that the optional nature of the current exception for copyrighted public architectural works under Article 5(3)(h) of the Infosoc Directive is such that a range of differing approaches has been taken. As a Union of states with diverse legislative traditions, the perceived weight of the public interest in freely accessing works of architecture varies considerably. Certain states such as France place greater weight on the rights of authors to control the use of their works, and to receive remuneration for such use, and accordingly have limited their implementation of Article 5(3)(h) to only narrow, non-commercial circumstances. On the other hand, lawmakers in states such as Germany have expressed understanding of the public nature of architecture, and that, in a work being permanently placed in public space, it becomes devoted to the general public.¹⁶⁶ It is clear from our examination of copyright law across the Member States that implementation of the panorama exception varies considerably, and, where it has only been partially implemented, this may involve a distinction between commercial and non-commercial uses.

Key to the argument being made in this article is the related argument that the public has a strong interest in using copyrighted public architectural works. This was argued on two primary bases.

First, architecture plays - and is very much intended to play - a central role in public life. Whether simply the environment in which people live or work, or whether it is used to further a particular narrative about a society (such as in the case of nationalist monumental architecture), architecture is used as a means of ordering communities of people. It is submitted that, as such, the public must be free to discuss public architecture as an aspect of their lived environment, whether this discussion takes place through education, art, commentary, or even commercial initiatives. Architects should not, it is argued, be permitted to unilaterally privatise sections of public visual space.

The second basis on which the argument made in this

article rests is that the distinction between commercial and non-commercial uses, relevant when the panorama exception is only partially implemented in Member States, is becoming increasingly blurred. Cross-border educational initiatives that make use of third party platforms may be considered commercial, and even ‘private’ uses of copyrighted works may be considered commercial where these take place on the internet. In this sense, prohibiting ‘commercial’ uses of copyrighted architectural works is far too restrictive on the ability of the public to make use of their physical environment. Greater weight must be given to the public benefit of being able to freely use architectural works, irrespective of whether these uses are commercial or non-commercial.

In the final Section of this article, it is argued that a non-harmonised panorama exception fragments the operation of the internal market. The territorial nature of copyright law is such that European citizens are faced with completely different legal norms across different Member States in regard to the same facts, and as a result there may be uncertainty among European citizens as to the potential legality of their actions. In light of the concerns that have been highlighted in this article regarding internet-based uses of works, a non-harmonised panorama exception is also an obstacle to the realisation of the Digital Single Market Strategy, which aims to further access to digital goods and services to create an environment for the flourishing of digital goods and services, and to maximise the growth potential of the digital economy. Indeed, a mandatory full panorama exception is a necessary step towards the adaptation of European copyright law to the new realities of the digital revolution, such as changing behaviours among European citizens on the internet.

While concerns may be raised to the need to protect the interests of right holders, it is argued that the heightened public interest in free use of public architectural works justifies the introduction of a full mandatory panorama exception, and this is likely to be broadly supported across the European Union. Moreover, such an exception would be compatible with the three-step test, provided that the exception still restricted the reproduction of architectural works on other buildings. In conclusion, it is submitted that the panorama exception should be made mandatory across the European Union, and extended to include both commercial and non-commercial uses.



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¹⁵⁹ D Westkamp (2008) 5.

¹⁶⁰ Ibid., 8.

¹⁶¹ Ibid.

¹⁶² B. Newell (2011) 422.

¹⁶³ Ibid.

¹⁶⁴ P. Hugenholtz (2013) 28.

¹⁶⁵ D. Westkamp (2008) 11.

¹⁶⁶ Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte, Section 76 (n 79).

Balancing the line of design

By Astrid Wilson Roldão

Case Note

– *A study of two recent trade mark cases and what they can tell us about the protection of unconventional trade marks*¹

1. INTRODUCTION

In the summer of 2018, the Court of Justice of the European Union (“CJEU”) ruled in two interesting, and rather different, trade mark cases. The question of whether or not Louboutin’s iconic red sole could be the subject of trade mark protection was at least partly answered by the CJEU in a preliminary ruling on the 12th of June.² Just over a month later, on the 25th of July, the CJEU passed its ruling in the “Kit Kat”-case, bringing this chocolate bar battle to an end.³

Besides dealing with “unconventional” trade marks, the legal issues raised before the CJEU were of a completely different character. However, in addition to providing us with answers to the legal questions at issue, these cases could also demonstrate, in a broader sense, the difficulties of protecting unconventional, or three-dimensional, trade marks.



2 LOUBOUTIN

In the case of Louboutin’s red sole, the District Court of the Hauge (*Rechtbank Den Haag*) requested a preliminary ruling during the infringement proceedings between, on the one hand, Mr Christian Louboutin and Christian Louboutin SAS (hereinafter together “Louboutin”) and on the

other, Van Haren Schoenen BV (“Van Haren”). The case before the referring court concerned Van Haren’s sale of shoes with red soles which, according to Louboutin, infringed the trade mark that had been registered in 2010 (pictured below). The trade mark owned by Mr Christian Louboutin was registered as a Benelux trade mark and was described in the application as a mark consisting of the colour red (Pantone 18-1663TP) applied to the sole of a shoe. Moreover, it was stated that the contour of the shoe was not part of the trade mark, but was intended to show the positioning of the mark.

Van Haren responded by claiming that Louboutin’s trade mark was invalid on the basis of Article 2.1(2) of the Benelux Convention. In the main proceedings, the question thus arose whether or not the exception set out in Article 3(1)(e)(iii) of Directive 2008/95 was applicable to the mark - a mark consisting exclusively of the shape which gives substantial value to the goods shall be a ground of refusal. The referring court pointed to the fact that the trade mark in question consists of a colour applied to the sole of a shoe and that it is thus an element of the product.

Hence, the referring court decided to ask the ECJ how the notion of “shape” should be understood. Could properties such as colour (a two-dimensional aspect of a good) be considered as the shape of the product according to Article 3(1)(e)(iii)?

3 KITKAT

In 2006 Nestlé’s three-dimensional EU trade mark, a reproduction of the appearance of the chocolate bar sold under the name KitKat, was registered by EUIPO. The following year, Mondelez (at the time Cadbury Schweppes and later Cadbury Holdings, now Mondelez) filed an application for a declaration of invalidity of the registration, claiming that Nestlé’s trade mark lacked distinctive character.

In 2011, the Cancellation Division of EUIPO declared the trade mark invalid on the basis that it was devoid of inherent distinctive character. This decision was however annulled by the Board of Appeal who argued that Nestlé had shown that the trade mark had acquired distinctive character in accordance with Article 7(3) of Regulation No 207/2009.⁴

After Mondelez requested annulment of the decision, the General Court found that the Board of Appeal had failed to properly assess whether the trade mark had acquired distinctive character through use. In particular, it had not adjudicated on the perception of the relevant public in all member states of the EU, and had not appraised the evidence put forward by Nestlé in this respect. The General Court thus annulled the decision of the Board of Appeal in its entirety. Both Nestlé and Mondelez, as well as EUIPO, appealed against the judgment.

The CJEU decided to adjudicate the question of acquisition of distinctive character, concerning the interpretation of Article 7(3) in relation to what evidence is required.



4 BALANCING TWO DIFFERENT SETS OF RULES WITHIN THE TRADEMARK FRAMEWORK

In the Louboutin case, the CJEU noted that, while the shape of the product “plays a role in creating an outline for the colour”, a sign is not a shape when registration is not sought for the shape itself but, rather, for the protection of the colour of a specific part of the product.⁵ The CJEU further explained that when the main element of a sign is a specific colour, the sign “cannot be regarded as consisting ‘exclusively’ of a shape”.⁶ Following this, the CJEU answered the question posed by the referring court by concluding that “Article 3(1)(e)(iii) of Directive 2008/95 must be interpreted as meaning that a sign consisting of a colour applied to the sole of a high-heeled shoe, such as that at issue in the main proceedings, does not consist exclusively of a ‘shape’, within the meaning of that provision.”⁷

In the KitKat case, the CJEU came to the conclusion that evidence must be provided that the trade mark has acquired distinctive character through use in the part of the EU where it lacked inherent distinctiveness.⁸ It is thus not sufficient to show that the trade mark has acquired distinctive character in a significant part of the EU.⁹ However, the CJEU also stated that “it is not inconceivable that the evidence provided to establish that a particular sign has acquired distinctive character through use is relevant with regard to several Member States, or even to the whole of the European Union.”¹⁰ Hence, it is not necessary to submit evidence in respect of each member state if the evidence submitted is “capable of establishing such acquisition throughout the Member States of the European Union.”¹¹

The remaining question now is: can these two cases together provide any additional conclusions regarding the protection of unconventional trade marks?

Both the Louboutin case and the KitKat case prove that the limits for what could possibly be registered as a trade mark are being tested. The legal questions are, however, grounded in two different areas of the trade mark system, one relating to the distinctive character of trade marks, the other relating to whether or not a sign consists of the shape of a product. When it comes to protecting trade marks related to the appearance of a product, the trade mark owner must be aware of the relationship between these two areas. Together, the Louboutin and KitKat cases thus illustrate, in a broader sense, how a trade mark owner needs to strike a balance between these two areas. For the trade mark owner, the risk is either crossing over into the realm of design protection, or bringing too little design to the trade mark with the risk of losing protection due to lack of distinctive character. In this sense, the two cases relate to trade marks at risk of crossing the line to two different areas of law.

For the trade mark owner, the trick seems to be passing the design test. If it does so successfully, there is a considerable chance that the trade mark will also be considered distinctive. The risk is, however, that the mark has too much of a design element, and therefore falls outside the scope of trade mark protection. On the other hand, trying to protect the appearance of a product lacking design elements might result in the conclusion that the mark is devoid of distinctive character.

In other words, besides answering the legal questions at issue, these two cases can also demonstrate that protecting the appearance of a product as a trade mark can be a tricky, but rewarding, balancing act when performed with precision.



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¹ This case commentary was written during the autumn of 2018 at Vinge Law Firm in Stockholm, after input and discussion with Jur.Dr. Richard Wessman, lawyer at Vinge.
² C-163/16.
³ Joint cases C-84/17 P, C-85/17 P and C-95/17 P.
⁴ The article is equivalent to Article 7(3) of the new Trade Mark Regulation, No 2017/1001.
⁵ C-163/16 para. 24.
⁶ C-163/16 para. 26.
⁷ C-163/16 para. 27.
⁸ Joint cases C-84/17 P, C-85/17 P and C-95/17 P, para. 75.
⁹ Joint cases C-84/17 P, C-85/17 P and C-95/17 P, para. 78.
¹⁰ Joint cases C-84/17 P, C-85/17 P and C-95/17 P, para. 80.
¹¹ Joint cases C-84/17 P, C-85/17 P and C-95/17 P, para. 83.

Parody in European copyright law and the two sides of the coin

By Ana-Maria Barbu

ABSTRACT

The purpose of this article is to examine the complexity of the concept of parody from dual perspectives, namely as a copyright defence provided by the InfoSoc Directive in Article 5(3)(k)¹ and as a manifestation of the freedom of expression which is guaranteed by the Charter in Article 11.² Mainly, the research identifies if there is a justified need of the European legislator for intervention on the current provisions that concern the European treatment of parody and examines whether the Commission's Digital Single Market intervention is an adequate step forward to modernizing the EU copyright framework.

1. INTRODUCTION

1.1 The Relevant EU Framework

By adopting the InfoSoc Directive, the EU legislator attempted to efficiently implement the four freedoms of the internal market, while relating to compliance with the fundamental principles of law and especially of property, including intellectual property, freedom of expression and the public interest.³ The aim of this instrument was to create a general and flexible legal framework at the Union's level to foster the development of the information society in Europe.⁴ The European Council strongly believed that a harmonised legal framework on copyright and related rights would encourage substantial investment in creativity and innovation, leading in turn to growth and increased competitiveness of European industry.

The outcome of this approach has been criticized by some critics, who have stated that “the effect is of rough harmonization only”.⁶ Particularly, some scholar voices considered that the optional nature of the list in Article 5(3) converted the InfoSoc Directive into a total failure regarding harmonization.⁷

Perhaps not coincidentally, AG Verica Trstenjak referred to the InfoSoc Directive as being a compromise that takes into account the different legal traditions and legal views in the Member States of the European Union, including in particular the common law and the continental European concept of copyright protection.⁸

Far from being subjective, it is noticeable that the InfoSoc Directive is sometimes contradictorily when it deals with the exceptions and limitations provided to the copyright protection. Naturally, existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced given the further development of transborder exploitation of works and cross-border activities.⁹ As the EU legislator stated, Article 5(3) InfoSoc takes due account of the different legal traditions in the Member States while, at the same time, aims to ensure a functioning internal application of these exceptions and limitations.¹⁰

The history of copyright is a complex and rich subject, considering the role that copyright law plays in shaping the notion of authorship, or the impact that copyright has on particular cultural practices. While it is understandable that lobby groups use or abuse the various justifications to further their ends, more problems arise when people begin to believe the rhetoric and assume that copyright law is determined and shaped by these philosophical ideas.¹¹

It is a fact that one of the currencies of the social world is the entertainment content people spread via the Internet, often as mimicry or for humorous purposes, concepts, catch-phrases and pieces of media also known as Internet memes. From a copyright protection perspective, these works may raise debates that acquire primarily the assessment of whether a parody defence can be used in justifying their creation.

The question thus becomes one of risk impact assessment: is the EU legislator choice of not imposing a mandatory exception on parody outdated?

The first step in providing an objective answer to this question it is to define the nature and conditions of the parody and to analyse its relationship with the freedom of expression.

1.2 Exceptions and Limitations to Copyright in the InfoSoc Directive

From an EU law perspective, the copyright protection is concerned with the production and availability of information and creative content for the benefit of society.¹² Modern digital applications such as blogs, podcasts, wikis and video sharing, enabled users to become active actors in the process of content creation and knowledge dissemination.¹³ Article 5(5) of the InfoSoc Directive sets out that “the exceptions and limitations provided for in paragraphs 1, 2, 3 and four shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.”

While the text expressly refers to “limitations” and “exceptions”, it is fair to consider that in practice the meanings of the concepts overlap. In his recent studies at Stockholm University, Johan Axhamn quotes Senftleben's views on the parallel use of both terms as a deliberate choice made to encompass the two different copyright traditions, namely the natural rights – focused continental tradition and the utilitarian approach of the common law. It is apparent that the term “exception” is preferred in the continental systems of law.¹⁴

The common law copyright model is said to be primarily concerned with encouraging the production of new works. In contrast, the civil law Droit d'auteur model is said to be more concerned with the natural rights of authors in their creations. This is reflected in the fact that the civil law model not only aims to secure the author's economic

interests but also aims to protect works against uses that are prejudicial to an author's spiritual interests, through moral rights.¹⁵

1.3 What is a Parody Under the InfoSoc Directive?

Parody is one of the purposes of the facultative exception to the copyright protection provided under Article 5(3) (k) InfoSoc Directive¹⁶, complying with specific requirements thereunder, as well as with the conditions of the three-step-test, as set out in particular in the underlying WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty.

Before the CJEU had the opportunity of ruling in Deckmyn on the definition of this unquestionably broad scope¹⁷, the parody related commonly to an original work by dealing with the content of that work or with its artistic features in an ironic, ridiculing way.¹⁸

1.3.1 Definition of Parody as an EU Autonomous Concept

The InfoSoc Directive does not define the term “parody”, and it does not include an express reference to the national law instruments of the Member States for this purpose. In this regard, The CJEU stated in its Padawan judgement that:

“[A]ccording to settled case-law, the need for a uniform application of European Union law and the principle of equality requires that the terms of a provision of European Union law which makes no express reference to the law of the Member States for determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation”.¹⁹

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

² Charter of Fundamental Rights of the European Union [2000/C 364/01].

³ InfoSoc Directive, Recital 3.

⁴ InfoSoc Directive, Recital 2.

⁵ InfoSoc Directive, Recital 4.

⁶ W. Cornish, D. Llewelyn, T. Aplin, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, London, Sweet & Maxwell, 2013, §13.

⁷ Eleonora Rosati, To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others? In LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition. [LIDC Contributions on Antitrust Law, Intellectual

Property and Unfair Competition], 2017, [In Press], pg. 3, available at: www.ligue.org/uploads/documents/Cycle%202017/rapports%20B%20Rio/UKB.pdf.

⁸ Opinion AG in Padawan, C-467/08, ECLI:EU:C:2010:264, §41.

⁹ InfoSoc Directive, Recital 31.

¹⁰ InfoSoc Directive, Recital 32.

¹¹ L. Bently, B. Sherman, Intellectual Property Law, Oxford University Press, 2018, pg. 37.

¹² Axhamn, Access to information and knowledge in Access To Information And Knowledge: 21st Century Challenges in Intellectual Property and Knowledge Governance / [ed] Dana Beldiman, Cheltenham: Edward Elgar Publishing, 2013, pg. 164.

¹³ Idem, pg. 166.

¹⁴ Idem, pg. 172.

¹⁵ L. Bently, B. Sherman, Intellectual Property Law, Oxford University Press, 2018, p. 36.

¹⁶ The exceptions and limitations in Article 5 refer logically only to the rights covered by the InfoSoc Directive, namely the reproduction right in Article 2, the distribution right for author in Article 4 and the right of communication to the public including making available under Article 3.

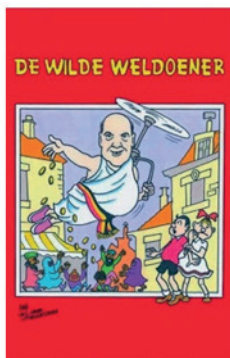
¹⁷ Opinion of AG delivered on 22 May 2015 in Deckmyn, Case C-201/13, ECLI:EU:C:2014:458, §33

¹⁸ Von Lewinski, Silke, M Walter, Michel, European Copyright Law: A commentary, Oxford University Press, 2010, pg. 1055, §11.5.67.

¹⁹ Case C-467/08, Padawan, ECLI:EU:C:2010:620, Judgement issued on the 21 October 2010, §32.



The original work by Vandersteen



The disputed work

The difficult task to define the concept of “parody” came to CJEU in the *Deckmyn* case, when asked by the national judge to assess its nature and meaning under the facultative exception of InfoSoc.

This decision is topical in the EU debate on copyright exceptions and limitations in Article 5 of the InfoSoc Directive, as well as in the discourse around activism – rather than mere activity – of the CJEU in this area of the law.²⁰

The Court clarified that the term must be regarded as an autonomous concept and interpreted uniformly throughout the EU as:

“[M]eaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of ‘parody’, within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.”²¹

1.3.2 Structural and Functional Features of the Parody

The analysis issued by AG Cruz Villalón in the *Deckmyn* case begins with the reminder that any EU law concept must be interpreted by considering the usual meaning of the terms of the provision in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. He

assumed that it might be difficult in a specific case to assign work to caricature, parody or pastiche when these concepts are not in competition with one another. All these concepts have the same effect of derogating from the copyright of the author of the original work, which in one way or another is present in the derived work. The AG believed that it is not necessary to distinguish between these concepts since they are all aimed at setting an exception to the copyright protection.²²

Looking at the dictionary definitions of parody in some languages – which share a common etymological origin, *i.e.* the Greek work “paroidia”, the AG concluded that a parody is, in its most simplified formulation, structurally an imitation and functionally a mocking act.

As regards to its structural dimension, a parody must strike a certain balance between elements of imitation and elements of originality, on the basis that the inclusion of unoriginal elements, in fact, corresponds to the intended effect of the parody.²⁴ The opinion of the AG is fundamentally grounded in the fact that a parody is a dualistic concept:

“To a greater or lesser extent, a parody is always a copy, for it is a work that is never completely original. On the contrary, a parody borrows elements from a previous work (regardless of whether or not that work is, in turn, entirely original), and, as a matter of principle, these borrowed elements are not secondary or dispensable but are, rather, essential to the meaning of the work, as there will be occasion to see. The earlier work, some of whose characteristics are copied, must at the same time be ‘recognizable’ to the public at which the parody is directed. That is also a premise of a parody of an author’s work. In that connection, a parody always entails an element of tribute to, or acknowledgement of, the original work. (...) In addition, a parody is, naturally, always a creation. The alteration to some degree of the original work is part of the genius of the author of the parody. In short, it is the latter who, ultimately, has the most interest in that no confusion should arise between ‘his’ parody and the original, even if he is the author of both.”²⁵

Although relevant for an abstract interpretation of the concept, this distinction does not provide enough instructions on how to practically assess the creativity requirement of a parody. The AG only concluded that it is for the Member States in which the exception provided by

Article 5(3)(k) InfoSoc has been implemented to determine whether a parody entails sufficient creative elements about the parodied work or whether it is little more than a copy with insignificant alterations.²⁶

The AG also explained the functional feature of the parody, by distinguishing between “parody of” *i.e.* when the intention of the parody is directed at or concerned with the original work, and “parody with” *i.e.* when the intention of the parody is directed at a third-party, individual or object, by using the original work. In his analysis, he noticed that criticism of customs, social criticism and political criticism have also, from time immemorial and clearly for conveying a message effectively, made use of the privileged medium entailing the alteration of a pre-existing work, which is sufficiently recognizable to the public at which that criticism is directed.²⁷ The CJEU did not, however, refer in their decision to this category breakdown.

Deducing that disregard for the type of parody, one must pursue through the altering of an earlier work a particular humorous effect; the AG did not doubt that:

“It is that – so to speak – a selective reception that must of itself have a particular effect on the addressees, at the risk of being a complete failure.”²⁸

Some commentators have found the Opinion sometimes confusing²⁹, giving the fact that the AG did not provide further comments on the comic requirement of a parody, limiting himself just to state that the national courts have broad discretion when it comes to determining whether the work in question has the status of a parody.³⁰

The CJEU also established that the message intended by the author of the parody is a factual element, to be determined by the national judge in the light of all circumstances of the case.³¹ In explaining the consequences of addressing a discriminatory message through a parody, *Deckmyn* reminds however that freedom of expression is not an absolute right:

“[H]olders of rights have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message” (a.n. discrimination based on race, colour and ethnic origin).³²

The CJEU clarified though that a parody that is discriminatory might not rely on the parody exception as this

would not constitute a fair balance of the rights of the author of the original work compared with the freedom of expression of the person creating the parody.³³

2. PARODY IN THE LIGHT OF FUNDAMENTAL RIGHTS³⁴

There are authors who believe that intellectual property rights can create scarcity in some types of expression when copyright owners can entirely suppress some forms of speech by seeking injunctions against those who want to express themselves using unauthorized uses of copyright-protected material.³⁵ This situation is likely to happen in legal systems where the parody exception is not implemented, or when it can be counter-claimed on the grounds of moral rights.

The Charter regards intellectual property and freedom of expression as human rights of equal importance, as both are protected under Article 17(2), respectively Article 11. As a result, whenever there is a potential conflict between copyright and freedom of expression, the balance between these two rights must be achieved. Torremans considers human rights law as the intellectual property’s new frontier.³⁶ The author is not surprised that the European Court of Human Rights (ECtHR) did not develop a case-law on the conflict between the copyright and the freedom of expression, believing that there is enough room for individuals to express themselves freely by taking the ideas or non-original expressions or even the protected expressions of one’s work, by exercising an exception if the work has fallen in the public domain.³⁷

The first case ever heard by the ECtHR on this issue was in 2013, when the Court explained that a conviction based on copyright law for illegally reproducing or publicly communicating copyright protected material could be regarded as a violation of the freedom of expression and information under Article 10 of the European Convention for the Protection of Human Right and Fundamental Freedoms. Such interference must be by the three conditions enshrined in the second paragraph of Article 10 of the Convention. This means that a sanction based on copyright law, restricting a person’s freedom of expression, must be pertinently motivated as being necessary for a democratic society, apart from being prescribed by law and pursuing a legitimate aim.³⁸

²⁰ Eleonora Rosati, Just a laughing matter? Why the decision in the *Deckmyn* is broader than parody? in *Common Market Law Review* 52, 2015, pg. 511.

²¹ *Deckmyn*, cit., §15.

The Ipkat: Breaking: Ag Cruz Villalon Says That Certain parodies may be prohibited if against fundamental values of society, <http://ipkitten.blogspot.com/2014/05/breaking-ag-cruz-villalon-says-that.html>.

²² Opinion AG in *Deckmyn*, cit., §48.

²⁴ Idem, §58.

²⁵ Opinion AG in *Deckmyn*, cit., §50-51.

²⁶ Idem, §55.

²⁷ Idem, §64.

²⁸ Opinion AG in *Deckmyn*, cit., §67.

²⁹ Eleonora Rosati, Just a laughing matter? Why the decision in the *Deckmyn* is broader than parody?, cit.

³⁰ Opinion AG in *Deckmyn*, cit., §68.

³¹ Idem, §32.

³² *Deckmyn*, cit., §30 – 31.

³³ Silverman Iona, The parody exception analysed, *Managing Intellectual Property*. 26 (2015), pg. 30.

³⁴ The Charter is sometimes confused with the European Convention on Human Rights. Although containing overlapping human rights provisions, the two operate within separate legal frameworks: the Charter of Fundamental Rights of the European Union was drafted by the EU and is interpreted by the Court of Justice of the European Union, while the European Convention on Human Rights, on the other hand, was drafted by the Council of

Europe in Strasbourg and is interpreted by the European Court of Human Rights. The Charter can be seen as the overarching framework for human rights in the EU, of which the European Convention on Human Rights forms only one part, albeit an important one.

³⁵ Helfer LR and Austin GW, “Rights to freedom of Expression, to Cultural Participation and to benefit from Scientific Advancements” Human Rights and Intellectual Property: Mapping the

Global Interface (Cambridge University Press 2011), pg. 221.

³⁶ Paul Torremans, *Intellectual Property and Human Rights*, Kluwer Law International, 2008, pg. 25.

³⁷ Copyright And The Right To Freedom Of Expression, www.rebe.rau.ro/RePEc/rau/clie-ui/SL13/CLI-SL13-A23.pdf.

³⁸ Idem, pg. 26.

2.1 The ECtHR’s View on Copyright and Freedom of Expression

According to Article 2 TFEU:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Further on, Article 52(3) of the Charter is aligned to at least the threshold of protection guaranteed by the Convention, whenever the right corresponds to both instruments. This compatibility has been recently confirmed by the practice of the CJEU and ECtHR. The Charter has a strong influence on the interpretation of legislation by the CJEU, particularly with its reference to the principle that intellectual property shall be protected.

It is clear from the European provisions that in addition to constitutional protection under Member States’ domestic laws, copyright, as an integral part of intellectual property, enjoys protection under the umbrella of human rights guaranteed by the Convention. In Scarlet Extended, the CJEU reminded that in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.³⁹ The Court considers that an injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the fundamental rights of that Internet Service Provider’s (ISP’s) customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.⁴⁰

Some authors believe that in cases of parody, interferences with the right of freedom of expression and information, based on copyright law, will need to undergo a more careful balancing test between the two fundamental rights.⁴¹

2.1.1 Freedom of Expression as a Human Right

The tensions between copyright law and the freedom of expression were examined by the ECtHR in the case of *Ashby Donald and others v France*.⁴² When they reiterated that the freedom of expression as guaranteed by Article 10 of the Convention is intended to apply to communication using the Internet, whatever the type of message is intended to convey and even when the objective pursued is of lucrative nature, i.e. publication of photographs on a website.⁴³ This case is relevant for our topic as the ECtHR reminds the Member States that freedom of expression is one of the essential foundations of a democratic society, one of the essential conditions for its progress and the fulfilment of everyone and it should be restricted only in situations that imply a so-called “pressing social need”, i.e. when the restriction is prescribed by law, pursues a legitimate aim and is necessary for a democratic society.^{44 45}

The interpretation of the Court is far from meaning that freedom of expression is an absolute right, as this Decision restates that the need to protect the fundamental rights might lead the Contracting States to restrict other rights or freedoms also enshrined in the Convention which becomes a challenge to the national authorities to balance these potentially conflicting interests between two rights.⁴⁶

Following *Ashby Donald*, the ECtHR examined a new alleged violation of the applicants’ right to receive information by sharing copyright protected material, in the case of *The Pirate Bay*. In examining the case, the ECtHR took into account various factors, for example, the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case, and concluded:

“[S]ince the Swedish authorities were under an obligation to protect the plaintiffs’ property rights in accordance with the Copyright Act and the Convention, the Court confirmed that the Swedish judge issued a balanced appreciation of the conflict because there were weighty reasons for the restriction of the applicants’ freedom of expression.”⁴⁷

2.1.2 Copyright as a Human Right

Copyright, as a dimension of the right to property, is recognized as a human right for two reasons: firstly, because it is seen as property, and property in turn seen as human right,⁴⁸ and, secondly, according to a René Cassin, a Nobel Peace Prize winner and principal author of the Universal Declaration of Human Rights, because “[h]uman beings can claim rights by the fact of their creation”.⁴⁹

The case law of the ECtHR explains that the the word “possession” as used in the Convention Article 1 Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights,” and thus as “possessions” for this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.”⁵⁰

In conclusion, although the EU attempted to harmonise substantive law in the area of restrictions to copyright, the choice to provide to the Member States a list of non-mandatory exceptions under the umbrella of Article 5(5) InfoSoc appears to be unfortunate. This article has highlighted that ambiguities have arisen in respect, first, of the definition of the concept of “parody” itself. Since explanations on the nature and scope of this term were not provided anywhere in the work of the EU legislator – not even in the preparatory acts of the InfoSoc, the Member States were left with a significant margin of appreciation and interpretation.

Secondly, the CJEU when called upon to interpret Article 5(3)(k) InfoSoc, and while providing guidance in defining parody, left room for debates on more issues related to the concept (e.g. the purpose of the parody as provided by InfoSoc). Both the CJEU and ECtHR agree that neither copyright nor freedom of expression are absolute rights and remind constantly that both are human rights of equal importance. The EU Courts highlight the obligation of Member States, through national provisions as well as their interpretation and application issued by national judges, of achieving a balance between them in case of conflict.

In the light of the copyright framework, parody is at the moment an exception to the rule of requesting permission from the author to use the initial work. As freedom of expression, parody can be viewed as a dimension of free speech. The EU legislator could perhaps reflect on the modern mechanisms of communication, especially through social media platforms, as well as the new forms of entertainment online and to transform Article 5(3)(k) InfoSoc in a mandatory exception. It is doubted that such a measure could have any negative impact, as long as such a provision would not disrupt the balance desired between the interests of right-holders and parodists.

3. PARODY IN NATIONAL SYSTEMS

This section has the purpose to ascertain and explain the similarities and differences between the approach of three Member States regarding the implementation and interpretation of the InfoSoc exception.

Comparative research provides important insight related to the choice of the EU legislator regarding the non-mandatory character of the parody exception as allowing the Member States to adopt individual solutions, developed by the particular social and political contexts. More than illustrating the equivalence and validity of different approaches and heighten an understanding and respect for them,⁵¹ the objective of this section is to identify better solutions for modernising the EU system.

The choice law of systems seemed appropriate for our article because each chosen Member State views copyright differently: the UK copyright law was built on the utilitarian theory, the Romanian copyright law on the naturalist theory, while the Swedish copyright law proves a rather unique and even controversial approach of the parody concept.

The remarkable difference in the national regulation of copyright limitations becomes understandable in the light of the theoretical groundwork underlying common law and civil law copyright systems. The fair use approach can be traced back to the utilitarian foundation of the Anglo-Saxon copyright tradition that perceives copyright as a prerogative granted to enhance the overall welfare of society by ensuring a sufficient supply of knowledge and information.⁵² Professor Graeme Dinwoodie remembers that this theoretical basis only justifies rights strong enough to induce the desired production of intellectual works. Therefore, the exclusive rights of the authors deserve individual positive legal enactment. Those forms of use that need not be reserved for the right owner to provide the necessary incentive remain free. Otherwise, rights would be awarded that are unnecessary to achieve the goals of the system. In sum, exclusive rights are thus delineated precisely, while their limitation can be regulated flexibly in open-ended provisions, such as fair use. Oversimplifying the theoretical model underlying common law copyright, it might be said that freedom of use is the rule, rights are the exception.⁵³

Dinwoodie looks back into the history of copyright law and notices that the opposite constellation where rights are the rule, follows from the natural law underpinning of continental Droit d’auteur. In the natural law theory, the author occupies centre stage as his work is perceived as a materialization of the author’s personality. The author-centrism of the civil law systems calls on the legislator to safeguard right broad enough to concede to authors the opportunity to profit from the use of their self-expression, and to bar factors that might stymie their exploitation. In consequence, civil law copyright systems recognize flexible, broad exclusive rights. Exceptions, by contrast, are defined narrowly and often interpreted restrictively.⁵⁴

³⁹ Case C-70/10, *Scarlet Extended v SABAM*, ECLI:EU:C:2010:620, Judgement from 24 November 2011, §45.

⁴⁰ Idem, §50.

⁴¹ Dirk Voorhoof , Inger Høedt-Rasmussen, “ECHR: Copyright vs. Freedom of Expression”, 2013, pg. 7, available at: kluwercopyrightblog.com/2013/01/25/echr-copyright-vs-freedom-of-expression/.

⁴² *Ashby Donald and others v. France*, No. 36769/08, ECHR-2013.

⁴³ Idem, §34.

⁴⁴ Idem, §43.

⁴⁵ Idem, §38.

⁴⁶ Idem, §40.

⁴⁷ *Fredrik Neij and Peter Sunde Kolmisoppa (The Pirate Bay) v. Sweden*, No.40397/12, ECHR-2013.

⁴⁸ See Article 1 of Protocol No. 1 of the Convention.

⁴⁹ Buss Krisjanis, Copyright and free speech: the human rights perspective, *Baltic Journal of Law & Politics*, Volume 8, No 2, 2015, pg. 186.

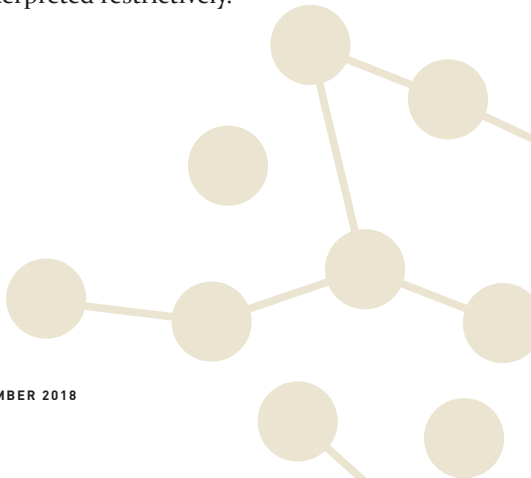
⁵⁰ *Balan v. Moldova*, No. 19247/03, ECHR-2008, §31-32 and §37.

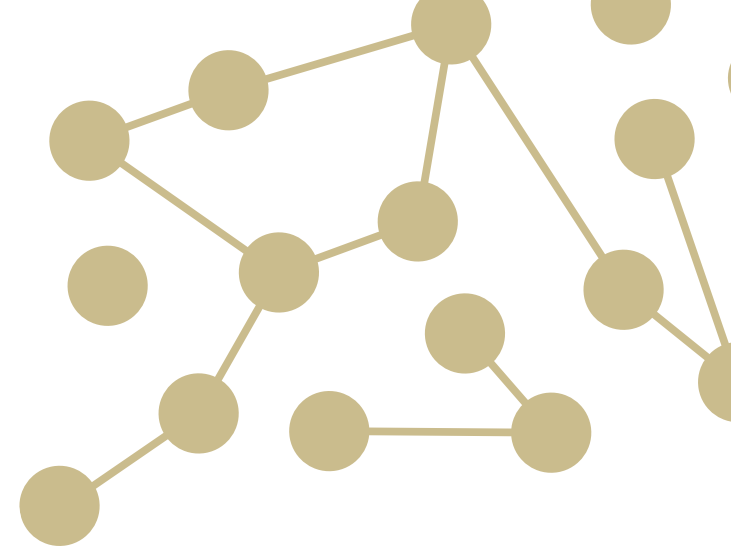
⁵¹ Curran, op. cit.

⁵² Idem.

⁵³ Graeme Dinwoodie, *Methods and perspectives in intellectual property*, Edward Elgar, 2013, pg. 33.

⁵⁴ Idem, pg. 34.





3.1 The UK Approach

At the time of implementing the InfoSoc Directive into its legal system, the UK Government took the view that relevant copyright exceptions already complied with Article 5(3).⁵⁵ Somehow reticent to the possibilities offered by the European provision, the UK, therefore, adopted a narrow list of exceptions to copyright (education, disabilities, libraries and archives, public administration).

The UK copyright law did not provide a special treatment for parody until recently. This involved assessing whether parody could count as criticism or review of a work, whether it is fair for that purpose, and whether implicit acknowledgement that is a prerequisite of effective parody is enough to comply with the sufficient acknowledgement requirement.⁵⁶

However, the numerous legal disputes on the matter demonstrate that many of the British authors of parody were not discouraged by this lack of legal protection. In this context, it is worth mentioning the original poster for the movie *Carry on Cleopatra*, that was withdrawn from circulation after 20th Century Fox successfully brought a copyright infringement claim. The UK court found that the design was based on a painting by Howard Terpning for which Fox owned the copyright and was used to promote the 1963 *Cleopatra* film.



On the 1st of October 2014 “The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014” introduced the exception of parody under Section 30A of the “Copyright, Designs and Patent Act 1988” (CDPA):

*“(1) Fair dealing with a work for caricature, parody or pastiche does not infringe copyright in work.
(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by this section, would not infringe copyright, that term is unenforceable.”*

The provision seems clear about the conditions that should be respected cumulatively by a parody for it to be protected by the new national law: the use of the initial work must be fair, and the purpose of the use must be a caricature, parody or pastiche.

The UK law does not provide a specific provision related to the three-step test in the CDPA, which could be explained by the idea that it is akin to the UK concept of fair dealing. Although using a minimalistic wording (e.g. without including references to the parodied work being published and receiving enough acknowledgement), Section 30A includes the reference to the need for a fair dealing with the original work, so to minimize the potential harm to relevant copyright owners. In spite of a lack of case-law

on this matter, the Guidance released by the UK Intellectual Property Office explains that under the new provision a comedian may use a few lines from a film or song for a parody sketch, a cartoonist may reference a well-known artwork or illustration for a caricature, an artist may use small fragments from a range of films to compose a larger pastiche artwork⁵⁷.

How could one assess if that dealing is fair? Fairness is primarily a British concept. Authors have placed the concept under a situation when a person has made use of someone else’s work, in the absence of a transaction between parties.⁵⁸ Despite being an old concept, fairness can be an elusive one, particularly as there is no statutory criteria or definition and has not been tested about parody. The concept of fairness appears as a multifactor test, in contrast with the 5(5).

The UK Courts found that in deciding the purpose for which the work was used, the fair dealing test does not depend on the subjective intentions of the alleged infringer. It was settled out that under such circumstances an objective criterium must be used.⁵⁹ Further on, the concept was explained as being a question of “degree and impression”. Some judges applied the criterium of a “fair-minded and honest person” to assess if the dealing is fair.

More recently, in *Ashdown v Telegraph Group Ltd*, the Court considered “essential not to apply inflexibly test based on precedent, but to bear in mind that considerations of public interest are paramount.”⁶⁰

In the UK legal framework, a crucial factor in deciding if the dealing is fair is the quantity and quality of what is taken.⁶¹ However, in many cases, use is more likely to be fair when the defendant has re-contextualized the part taken from the initial work, showing that the dealing was transformative.⁶²

The evoking of the existing work should be as slight and discreet as possible, as the parody must be noticeably different from it. In the case of a successful parody, the audience understands that the parodist’s work is referring to earlier work and is expected to know the authorship of that earlier work. To require a parodist to identify expressly the authorship of the work being parodied could in some circumstances seem to require them to admit that the parody had failed.⁶³

Another factor that influences the decision as to whether a dealing is fair relates to the impact and the commercial success that the dealing is probable to have on the market for the initial work.⁶⁴ In this sense, the UK case law has decided that “a dealing by a person with a copyright-protected work for his commercial advantage – and to the actual or potential commercial disadvantage of the copyright owner – is not to be regarded as a fair dealing, unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner”.

The UK legal framework satisfies the EU fair balance standards required in relations between fundamental rights as the parody exception must strike a fair balance between the interests of copyright holders and the freedom of expression of the parodist. In the light of this guarantee, it should be observed that the UK law maintains

a relatively conservative and traditional view, as it currently lacks a statutory defence rooted within the freedom of expression.

As there has been no case-law involving parody after it has been introduced as an exception, it can be assumed that the test used so far is suitable for assessing the fair dealing under the new provision. It is interesting to notice that British users have become more confident about grounding their actions on it. The BBC invoked the new exception about a TV-trailer, after being accused of breaching copyright from “The Sound of Music” soundtrack. The spot was promoting a reality-show about cooking and baking.

The lyrics of the classic tune were changed as it follows:⁶⁶

*“The hills are alive with the sound of music,
With songs, they have sung for a thousand years.
The hills fill my heart with the sound of music.
My heart wants to sing every song it hears.”
“The hills are alive with the smell of baking,
With cakes that we baked for a thousand years.
The hills fill my heart with a love of baking.
I just want to taste every cake that I baked.”*

It can be concluded that the Section 30A takes advantage of the freedom provided by InfoSoc but qualifies the breadth of that freedom by adding a requirement of fairness. Acknowledging the realities of an “age of digital creation and re-mixing,”⁶⁷ the new UK law allows the limited use of someone else’s work. Per a contrary, an act of use that is not fair will still require the grant of permission or license from the copyright owner.

3.2 The Romanian Approach

The Romanian copyright system should be understood as descending from the French intellectual property doctrine which states that:

“The right to respect the work can be considered as a corollary of the right of disclosure, in the sense that the author would not have disclosed his work to the public if he knew in advance that his work would be abusively deformed.”⁶⁸

The Romanian legislator embraced the views of some French authors who even believed that the respect for the work pursues a double purpose: to protect the author’s personality in the form of his expression in the creation and the communication to the public of the work, just as

the author wanted it to be.⁶⁹

Law No. 8 of 10 March 1996 on Copyright and related rights provides the exception of parody in Chapter VI, under Article 35(b): The transformation of a work without the author’s consent and without payment of remuneration is allowed in the following situations: (...) b) if the result of the transformation is a parody or a caricature, provided that the result does not create confusion as to the original work and its author.”

An analysis of this provision illustrates the need for a clear delimitation between the work and the author of the original work and the work and the author of the derivative work must be applied, contrary to the violation of the paternity of the work. The exceptions to copyright are filtered by the Romanian legislator through the triple-step test, as a complementary tool to the requirements of the closed list of limitations. In practice, the Romanian courts have generally used the triple test as a supplementary test to confirm the application of the exceptions and limitations provided by Articles 33 and 34 of the Romanian Copyright Law.

The High Court of Justice settled this matter explaining that the exceptions to copyright protection under the Romanian Law are:

“[S]ubject to multiple conditions, such use not being allowed in all circumstances. (...) These conditions are the following: that the work was made public beforehand, and that the use be one in accordance with good practice, does not affect the normal exploitation of the work and does not prejudice the author or the holders of the exploitation rights.”⁷⁰

⁵⁵ Cornish, op. cit., §11-12.

⁵⁶ Bently, op. cit., pg. 251.

⁵⁷ Bently, op. cit., pg. 251.

⁵⁸ Idem, pg. 254.

⁵⁹ Idem, pg. 224.

⁶⁰ [2001] EWCA Civ, 1142, *Ashdown v. Telegraph Group Ltd*, §71.

⁶¹ Bently, op. cit. pg. 254.

⁶² Idem.

⁶³ Idem.

⁶⁴ CDPA, Section 80B.

⁶⁵ [2001] UKHL, *Newspaper Licensing Agency v*

Marks Spencer, §257.

⁶⁶ Bake Off’s Sound of Music advert is axed after BBC is accused of breaching copyright, Article published in Daily Mail on 3 August 2015, available at: <http://www.dailymail.co.uk/news/article-3183262/Great-British-Bake-Sound-Music-advert-axed-BBC-accused-breaching-copyright.html#ixzz5DIWJRMNW>.

⁶⁷ Intellectual Property Office Online, Exceptions to copyright: Guidance for creators and copyright owners, pg. 5, available at: <https://assets.publishing.service.gov.uk/>

government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf.

⁶⁸ Colombet Claude, *Propriété littéraire et artistique et droits voisins*, Dalloz, Paris, 1999, pg. 255.

⁶⁹ Bellefonds, Xavier Linant, *Droit d’auteurs et droits voisins*, Dalloz, Paris, 2002, pg. 255.

⁷⁰ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, available at www.scj.ro.



On a similar note, The Bucharest Court of Appeals has indicated that the conditions are cumulative, that is, each of the four general conditions provided by this provision needs to be met in order for any limitation provided therein to apply, in addition to the special conditions required to qualify under any of the “special cases” specifically indicated by law.⁷¹

The case-law supports, therefore, the idea that the triple-step test appears to serve as confirmation for situations where the special cases in which use of the work without the consent of the author and without payment would appear to apply and it is, in fact, so used by the Romanian courts. In practice, the courts have tended to verify the meeting of the special conditions first and, where satisfied, verify whether the general conditions are also cumulatively met.⁷²

The Romanian copyright law recognizes freedom of expression as one of the grounds of the exceptions and limitations closed list. This is confirmed by the Romanian High Court that has held that in evaluating the exceptions to copyright in light of the purpose for their establishment, it is the immediate and direct purpose that was to be attained by the exception that is to be kept in mind.

In a case concerning the reproduction, on a blog, of photographs from calendars made by a business magazine featuring their female employees, for the purpose of a satirical article, it was held by the 4th District Court of Bucharest to fall within the exception provided by Art. 33 par. (1) letter b) of the Romanian Copyright Law but also to have been made “within the defendant professional journalist’s right to freedom of expression guaranteed by Art. 30 of the Romanian Constitution and Art. 10 of the

European Convention on Human Rights, being also guaranteed by Art. 31 of the Romanian Constitution and the right to access to public information.”⁷³

The exceptions and limitations are therefore generally assumed to have been enshrined pursuant to the need to ensure a proper balancing of copyright with the exercise of other rights, most relevant being the freedom of expression, the right to information, and the right to education. However, the economic justifications for the implementation of such exceptions and, even more, for properly delimiting their scope, have also been addressed in the literature.⁷⁴

Under Article 35(b) one can create a parody provided that the result does not cause confusion with the *original* work and the author thereof (emphasize intended). The wording used by the Romanian legislator is rather confusing and, *de lege ferenda*, the provision should be rephrased. Article 8(a) expressly guarantees the protection of the derivative work as it follows: “[D]erivative works that have been created from one or more preexisting works are also subject to the copyright protection, namely: (...) b) translations, adaptations, annotations, documentary work, musical arrangements and any other transformation of a literary, artistic or scientific work which is an intellectual creative work.”

Clearly, the intention of the text when referring to the “original” work is to write about the work that has been first made available to the public, and not to question the originality of a parody. Although the claims of damages for copyright infringement are subject to a very small judicial stamp duty tax, irrespective of the amount claimed, the Romanian courts did not hear many cases on this matter. From the jurisprudence collections that are accessible to the public, including those on demand, the research identified one single judgement issued by the Tribunal of first degree Slobozia. The Claimant, who was mayor at the time of the alleged tort of the town Amara, claimed infringement of copyright of the campaign flyer distributed by the local organization of the party where he was politically affiliated. The Defendant has modified the flyer without the party’s consent and replaced the image of the Claimant with a photograph of the actor Al Pacino acting as the well-known crime family leader in the movie “The Godfather”.

The Court considered that the result of the transformation is a mere parody, and since the defendant did not make any statement related to acts of the Claimant that must be supported by evidence, he did not infringe any copyright or moral right of the political party or of any of its members.

In the light of the above, it can be concluded that the regime of exceptions and limitations to copyright under Romanian law is rigid by design and its qualification as an exception, placing the burden of proof on the user and only allows application of the defence where all conditions are cumulatively met.

3.3 The Swedish Approach

The Swedish Copyright Act does not have a provision dedicated to parodying, but the exception can be covered by

Article 4(2) that provides that if the work is created in free association to another work, then the new creation will be novel and independent.

Some authors believe that “the Swedish case shows how copyright was associated with the progress of European civilization in a partly ambiguous way. On the one hand, the supporters of a strong international copyright law saw this as stepping up to the legal and cultural standards of the rest of Europe, on the other hand those who opposed such a law, predominantly the publishers, feared that copyright protection of translated works would make foreign literature too expensive for the Swedish consumers and thus isolate Sweden from the rest of the European culture.”⁷⁵ The Swedish copyright law seems to be rooted in “a growing of Sweden’s literary export, when new authors such as August Strindberg and Selma Lagerlöf became popular abroad, which suddenly made mutual protection of translated works profitable for Swedish publishers.”⁷⁶

Although Sweden reacted with compliance dictated by a will to be accepted as belonging to a common European civilization, as a peripheral part of the old world,⁷⁷ the national framework on copyright and particularly on parody are rather innovative and anticipate well the fast progress of culture and technology.⁷⁸

As noted above, within the Swedish copyright system it is a tradition that parodies are lawful even though there is no explicit article dictating this in the law. This is the situation when it comes to the economic and moral rights of the work.⁷⁹

The preparatory work for the Copyright Act stated that even though a parody is very similar to the original, maybe even containing copied fragments of it, is still to be seen as an independent work and not an adaptation, due to the different effects of the two.⁸⁰ Professor Marianne Levin of Stockholm University highlighted that it is however important not to confuse the parody with the original, because then the parody will lose its intended effect.⁸¹

3.4 Which Approach is Superior?

To conclude, the fair use approach adopted by the UK has the advantage of flexibility. The courts can broaden and restrict the scope of copyright limitations to safeguard copyrights delicate balance between exclusive rights and

the competing social, cultural and economic needs.⁸² The UK still has difficulties of adapting to the rapid development of the digital world and continues to have some rigid approaches, e.g. when it comes to increasing the efficiency of fundamental freedoms defences in national procedures. On the other hand, the Romanian case seems to support the idea that precisely defined exceptions may offer a high degree of legal certainty under the national framework. With a closed catalogue of exceptions and a detailed description of their scope, it becomes foreseeable for Internet users and/or parody authors which forms of use fall under the control of the copyright holder and can serve as a basis for the exploitation of the copyrighted material and which represent an infringement.⁸³ The Swedish system seems the most simple approach of the ones analysed here - compared to the UK and the Romanian systems, the claims brought in the Swedish courts are to be dealt with in a more efficient manner, with minimum risk of subjectivity manifested by the judges.

The Swedish approach could influence in a positive manner the EU legislator’s future copyright reforms, as it supports the idea that the legal protection of parody works could generate a burst of creativity with no negative impact on the authors’ rights. The authors of the InfoSoc Directive developed a system that frustrates from the perspective of both objectives: the present regulation of copyright limitations in the EU offers neither legal certainty nor sufficient flexibility.⁸⁴

4. TO FILTER OR NOT TO FILTER? THAT IS THE QUESTION.

4.1 The Digital Single Market Strategy

In May 2015 the EU Commission released the Digital Single Market Strategy (DSMS) for Europe that targets the steps to be taken towards reducing differences between national systems and connecting them for generating additional growth in the EU.⁸⁵ The DSMS is built on three pillars: better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish, and maximizing the growth potential of the European Digital Economy.⁸⁶

⁷¹ Bucharest Court of Appeals, s. IX civ., Decision no. 67A of 25 February 2014.

⁷² Buta, Paul-George, Report on Romanian Copyright Law for LIDC, Available at: <https://www.ligue.org/uploads/documents/Cycle%202017/rapports%20B%20Rio/RomaniaB.pdf>.

⁷³ 4th District Court of Bucharest, s. civ., Decision no. 1314 of 4 February 2016, confirmed by Bucharest Tribunal, s. III civ., Decision no. 3859 of 14 October 2016.

⁷⁴ Buta, Paul-George, op. cit.

⁷⁵ Fredriksson, Piracy, globalisation and the colonisation of the Commons, published in Global Media Journal, 2009, available at: https://www.researchgate.net/profile/Martin_Fredriksson3/publication/277754662_Piracy_Globalisation_and_the_Colonisation_of_the

[Commons/links/56c64ef908ae0d3b1b603de7/Piracy-Globalisation-and-the-Colonisation-of-the-Commons.pdf?origin=publication_detail](https://www.researchgate.net/profile/Martin_Fredriksson3/publication/277754662_Piracy_Globalisation_and_the_Colonisation_of_the_Commons/links/56c64ef908ae0d3b1b603de7/Piracy-Globalisation-and-the-Colonisation-of-the-Commons.pdf?origin=publication_detail).

⁷⁶ Idem.

⁷⁷ Idem.

⁷⁸ Idem.

⁷⁹ Lisette Karlsson, Copyright and the Parody Problem An examination between the UK, Sweden and Canada, Lund University, 2013, pg. 29.

⁸⁰ Preparatory works of the Swedish Copyright Act, Art. 4.

⁸¹ Lisette Karlson, Copyright and the Parody Problem An examination between the UK, Sweden and Canada, Lund University, 2013, pg. 30.

⁸² Graeme Dinwoodie, Methods and perspectives in intellectual property, Edward Elgar, 2013, pg. 34.

⁸³ Idem.

⁸⁴ Graeme Dinwoodie, op. cit., pg. 37.

⁸⁵ EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, 2015, pg. 2, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>.

⁸⁶ Idem, pg. 3.

Among its ambitious legislative measures, the DSMS aims to modernize copyright rules in the light of the digital revolution and changed consumer behaviours. Regarding the IP reform, the EU Commission noted that:

*“[T]he rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given the growing involvement of these intermediaries in content distribution. Measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content.”*⁸⁷

The DSMS is revealed by the EU Commission to be the result of a durable process of reflection on the evolution of digital technologies and of reflection on how the works are created, produced, distributed and exploited.⁸⁸ Further on, it noted that the DSMS is well-rooted in the current EU copyright framework as the outlined targeted actions aim to adapt it to the new realities, in an effort of achieving the long-term vision to modernize the rules.⁸⁹ Proposed initiatives would encompass a clarification of the rules on the activities of intermediaries in relation to copyright-protected content.

The Commission points out that the evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content.⁹⁰ With regard to this, it further stresses that:

*“In this framework, rightsholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is, therefore, necessary to guarantee that authors and rightsholders receive a fair share of the value that is generated by the use of their works and another subject-matter.”*⁹¹

Article 13 of the proposed Copyright Directive introduces new concepts and interpretations of the liability of the internet service providers but is far from being transparent and unambiguous.

4.2 The Impact Assessed by the Commission

The Commission envisioned the modern EU space as a market in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, along with a high level of consumer and personal data protection, irrespective of their nationality or place of residence.⁹² In this regard, the EU Commission affirmed its mission to achieving a copyright marketplace that works efficiently for all players and gives the right incentives for investment in, and dissemination of, creative content.⁹³

In reaching its proclaimed aim of the new copyright measures, the EU Commission found that intervention at the national level would not be sufficiently efficient to ensure a well-functioning digital single market for the distribution of copyright-protected content and could create new obstacles,⁹⁴ such as fragmentation generated by initiatives from the Member States.⁹⁵

On the point of the copyright framework, the EU Commission noted that:

*“In the areas covered by this section of the [impact assessment], the rationale for EU action stems both from the harmonization already in place (notably in terms of rights) and the cross-border nature of the distribution of content online.”*⁹⁶

It is true that the proposed Copyright Directive is described as being consistent with the existing EU copyright legal framework. If regarding the E-Commerce Directive as not being, strictly speaking, a pillar of the copyright legal framework. It has a horizontal approach, which makes it relevant in some cases of copyright infringement. Despite this obvious tension between the two instruments, there is no general statement regarding the consistency of the proposal with the E-Commerce Directive.⁹⁷ The Commission addressed the issue of the negative impact that the E-Commerce Directive⁹⁸ could have on the development of the Internet in Europe, when Internet intermediary service providers are not liable for the content that they transmit, store or host as long as they act in a strictly passive manner.⁹⁹

The Commission took into consideration the impact

that the DSMS could have on a social level, as well as on fundamental human rights. After analysing these effects individually, the Commission concluded that DSMS might have an impact on copyright as a property right as well as on the freedom to conduct business.¹⁰⁰

4.3 Freedom of Expression Under the Value-gap Proposal

The Explanatory Memorandum issued by the Commission dedicates a paragraph to fundamental rights in a manner that primarily focuses on the importance of Article 17(2) of the EU Charter.¹⁰¹ With regards to fundamental rights, the EU Commission affirmed that:

*“[B]y improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right, protected under Article 17 of the Charter”*¹⁰².

Although crucially relevant to the EU legal order, the balancing exercise with fundamental rights is somehow left aside the topic by the EU legislator with regards to the DSMS Proposal. While the EU Commission does not perform a thorough analysis of a potential conflict between copyright and freedom of expression, it assesses that:

*“[T]his impact is a limited effect on the freedom of expression and information, due to the mitigation measures put in place and a balanced approach to the obligations set by the relevant stakeholders”*¹⁰³

No further explanation is provided by the EU legislator to support this point, be it in the Explanatory Memorandum or in the Impact Assessment.

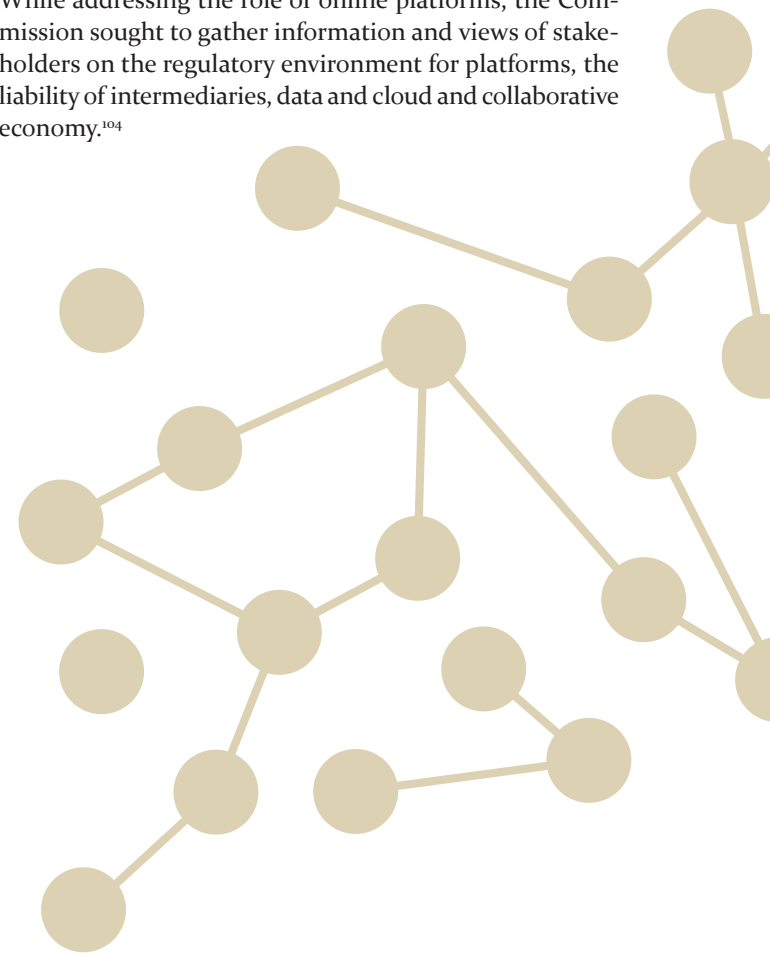
4.4 Public Debates or the Clash of Internet Titans?

The main debates around the DSMS illustrate some irreconcilable views of rightholders and Internet users on how the new measures are compatible with their fundamental rights. Generally, critics maintain that Article 13, in its initial wording, would put rightholders on a preferential position while violating user’s fundamental rights.

Similar concerns were expressed by voices from both the academic and social world. According to Article 52 of the EU Charter:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

The public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy was undertaken in September 2015 and ended on the 6th of January 2016. While addressing the role of online platforms, the Commission sought to gather information and views of stakeholders on the regulatory environment for platforms, the liability of intermediaries, data and cloud and collaborative economy.¹⁰⁴



⁸⁷ Idem, pg. 2.
⁸⁸ EU Commission Staff Working Document Explanatory Note Accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, pg.2, available at: <https://ec.europa.eu/digital-single-market/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>.
⁸⁹ Idem, pg 2.
⁹⁰ EU Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN>.
⁹¹ Idem.
⁹² EU Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, pg. 3.
⁹³ Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules Part 1, [SWD(2016) 301 final] Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, pg. 134.

⁹⁴ Idem, pg. 133.
⁹⁵ Idem.
⁹⁶ Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules Part 1, [SWD(2016) 301 final] Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, pg. 133.
⁹⁷ Bourdillon, Rosati and Others, An academic perspective on the copyright reform, Computer Law & Security Review, [33], 2017, pg. 7.
⁹⁸ Article 15 - “No general obligation to monitor”.
⁹⁹ EU Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, cit., pg 12.
¹⁰⁰ Impact Assessment, cit., pg. 136.
¹⁰¹ Rosati and Others, cit., pg. 7.
¹⁰² Explanatory Memorandum, pg. 9.
¹⁰³ Idem.
¹⁰⁴ EU Commission, Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy, available at: <https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and>.



The EU Commission observed that, as far as online intermediaries and their role in the process of tracking illegal content concerned, the views of the respondents were divided. While some were generally satisfied with the current framework envisaged by the E-commerce Directive and considered that it does not need changes, other respondents shared the opinion that some measures need to be taken, particularly towards a clarification and guidance of the instrument.¹⁰⁵ A majority of respondents considered that different categories of illegal content require different policy approaches, but again opinions differed as to whether and what kind of duties should be imposed on intermediaries. “Right holders generally reported on the growing use of protected content without their authorisation by online platforms or through licensing agreements containing, in their view, unfair terms, complaining about legal uncertainties. (...) Other stakeholders, representing different categories of respondents, argued for the importance of freedom of expression and the applicability of the liability exemption under the e-commerce directive to online platforms”.¹⁰⁶

The DSMS recalled that as the amount of digital content available on the Internet grows, the EU Commission had to identify potential challenges to define the limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the exemptions from liability set out in the E-Commerce Directive. Taking account of the view of some stakeholders that action against illegal content is often ineffective and lacks transparency, the Commission

analysed the need to enhance the overall level of protection from illegal material on the Internet. The test of the Commission also tracked the new measures’ impact on the fundamental right to freedom of expression and information, such as rigorous procedures for removing illegal content while avoiding the take down of legal content, and whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care.¹⁰⁷

The Commission’s starting point in assessing the impact of the proposed measures was that the negotiation position of rightholders is generally affected by the fact that they are not in a position to keep their content away from these platforms: “when uploaded content is infringing, they can only ask the platforms to take down the content, in each individual case, which leads to significant costs for them and appears insufficient to them, given the large scale of uploads.”¹⁰⁸

Further on, the Commission noticed that some platforms have voluntarily taken measures to help rightholders in identifying and monetizing the use of content on their services, through content identification technologies:

“Solutions have been developed both by user uploaded content platforms and technology providers and (...) are applied at the time of upload of the content or later on to verify through an automated procedure whether the content uploaded by users is authorized or not, based on data provided by rightholders. The Commission did, however, acknowledge the identification of some types of content, such as bootleg remixes and DJ sets, or more generally of content that has been transformed or differs significantly from the original content, may be very challenging.”¹⁰⁹

The Commission’s statement might show existing concerns regarding the risks potentially raised by the actions of tracking derivative works that are legally permitted. On this account, the EU Commission stressed that the disabling of access to and the removal of illegal content by providers of hosting services could be slow and complicated, while content that is legal can be taken down erroneously.¹¹⁰ This comment is aimed also to cases of parodies, which at the current stage of technological development is apparent that it can be difficult to be identified as such. The chance that content identification technologies may lead to “false positives” are present, i.e. situations where content is wrongly identified and removed.¹¹¹

This research has identified social online campaigns carried out by civil society associations, that raised questions on negative consequences of the unilateral right of platforms to decide the illegal character of the uploaded content on the freedom of expression.¹¹²

One of these movements is the OpenMedia campaign and was also considered by the the EU Commission¹¹³.

The OpenMedia Campaign was mostly supported by the Internet users, who generally found the existing laws providing a delicate balance between free expression and legal speech to “inhibit abusive behaviour, not free expression of opinion; protect free speech with largely effective checks and balances to protect individual and corpo-

rate rights whilst allowing a society to discuss, learn, create and expand.” The same respondents viewed sharing content online as a cornerstone of “freedom of speech” that allows users to promote a more informed and inclusive world. Secondly, the respondents of the campaign considered that monitoring actions should be a last-resort mechanism because generally, the intermediaries are not qualified to act as judges as “this concern links to automated systems and their inability to detect context, thus potentially unfairly censoring legal speech and expression”.¹¹⁴

Nearly all respondents viewed online copyright infringement as a case-per-case assessment, considering that combining all types of illegal content under the same framework would lead to disproportionate measures.¹¹⁵

It is apparent that Internet users understand the new DSMS measures can have a direct impact on their Internet behaviour, raising concerns regarding the potential negative impact on what and how they will be allowed to spread content on the Internet. Privacy related decisions are heavily context specific, dependent for example, on how much a user is thinking about privacy at the time, along with his or her trust in the other party and often inaccurate assumptions about how data will be used, which could lead the Internet user to not create parody works, even if within the legal framework¹¹⁶. This consequence is generally interpreted by the Internet users as a restriction of their freedom of expression and on a larger scale is perceived by the public as a discouraging factor on people’s creativity.

4.5 Relevant CJEU Case-law in the Value-gap Proposal Debate

Recent judgements from the CJEU reasserting fundamental rights in the online environment stand in stark contrast to the lack of leadership shown by the Member States, which, according to some scholars, appear fearful of ensuring that powerful multinational platform providers are fulfilling the states’ human rights obligations.¹¹⁷

The main proceedings in Case SABAM vs. Netlog¹¹⁸ concerned the compatibility with the EU law of a system that filters information in order to prevent files from being made available which infringe copyright. The claims were brought by SABAM, a Belgian management company which represents authors, composers and publishers of musical works and is responsible for, inter alia, authori-

sing the use by third parties of copyright-protected works of those authors, composers and publishers. The Respondent was Netlog, a company that ran an online social networking platform where every person who registered acquired a personal space known as a ‘profile’ which the user could complete himself and which became available globally.¹¹⁹ The CJEU was essentially asked to verify if Netlog’s social network also offers all users the opportunity to make use of, by means of their profile, the musical and audio-visual works in SABAM’s repertoire, making those works available to the public in such a way that other users of that network can have access to them without SABAM’s consent and without Netlog paying a fee.¹²⁰

The Court stressed that holders of intellectual property rights may apply for an injunction against operators of online social networking platforms who act as intermediaries within the meaning of those provisions, given that their services may be exploited by users of those platforms to infringe intellectual property rights.¹²¹

This prerogative was generally confirmed in the CJEU case-law. However, the Court did point out that a general monitoring action carried out by ISPs is incompatible with the EU standards. Firstly, in the *Scarlet Extended* Case, it had been decided that Member States are allowed to implement national rules that would allow them to order the ISPs to take measures aimed not only at bringing to end infringements already committed against intellectual-property rights using their information-society services but also at preventing further infringements.¹²² Secondly, the Court established that the EU law prohibits national authorities from adopting measures which would require a hosting service provider to carry out general monitoring of the information that it stores.¹²³

¹⁰⁵ EU Commission, Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy, pg. 2, available at: <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

¹⁰⁶ Idem.

¹⁰⁷ Proposal, cit., pg. 12.

¹⁰⁸ Communication from the Commission, cit, pg. 140.

¹⁰⁹ Impact Assessment, cit., pg. 140.

¹¹⁰ Communication from the Commission, cit., pg. 12.

¹¹¹ Impact Assessment, cit., pg. 141.

¹¹² Full Report on Public Consultations, cit., pg. 6.

¹¹³ Idem, pg. 20.

¹¹⁴ Content filtering: illegal, unpopular, and broken, 2017, available on <https://openmedia.org/en/content-filtering-illegal-unpopular-and-broken>.

¹¹⁵ Idem, pg. 20.

¹¹⁶ Emily Taylor, The privatization of human rights: illusions of consent, automation and neutrality, Global Commission on Internet Governance, Chatham House, The Royal Institute of International Affairs, Paper series: no 24, January 2016, pg. 15.

¹¹⁷ Emily Taylor, The privatization of human rights: illusions of consent, automation and neutrality, Global Commission on Internet Governance, Chatham House, The Royal Institute of International Affairs, Paper series: no 24, January 2016, pg. 16.

¹¹⁸ Case C-360/10, SABAM v Netlog, ECLI:EU:C:2012:85, Judgement issued on 16 February 2012.

¹¹⁹ Idem, §15 – 16.

¹²⁰ Idem, §17.

¹²¹ Idem, §28.

¹²² Scarlet Extended, cit., §31-32.

¹²³ See, by analogy, Scarlet Extended § 35 and SABAM v Netlog §32-34.

With regards to a filtering system, the Court found that its implementation would require:

- a) that the hosting service provider identify, within all of the files stored on its servers by all its service users, the files which are likely to contain works in respect of which holders of intellectual-property rights claim to hold rights;
- b) that it determines which of those files are being stored and made available to the public unlawfully; and
- c) that it prevents files that it considers to be unlawful from being made available.¹²⁴

The Court concluded that preventive monitoring of this kind would thus require active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider.¹²⁵

The consistency of the system with the EU law was assessed by CJEU in relation to the protection of human rights. In that regard, the Court observed that filtering systems would ensure the protection of copyright, which is an intellectual-property right, enshrined in Article 17(2) of the Charter. The Court stressed that the right is not inviolable, and it must be balanced against the protection of other fundamental rights.¹²⁶

Although the examination of the Court concerned the relation of copyright with the freedom to conduct a business enjoyed by operators such as hosting service providers, the interpretation issued in Netlog can be extended to other fundamental rights that might enter in conflict with IP rights, such as the freedom of expression.¹²⁷ The findings of the Court that such monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works but also works that have not yet been created at the time when the system is introduced, is relevant in the context of the current debate around the value-gap proposal and can be linked to the general EU approach of parody:

“[T]hat injunction could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another.”¹²⁸

At this stage of technological development, it should therefore not be accepted too quickly that content recognition technologies solve all problems, as they are not able to take into account context in order to avoid suppressing lawful uses of content.¹²⁹

The judgement issued in The Pirate Bay case appears to confirm the view of the new DSMS Copyright Directive, that “it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used thereof.” Until further explanations, this can mean that even if a given platform does qualify for the safe harbour from the E-commerce Directive, it is still subject to injunctive relief. By correlating the Decision of the CJEU with Article 13 DSMS, it would not be unreasonable and incompatible with the EU law to impose to online platforms a duty to take measures even where they fall within the safe harbour.

4.6 Current Negotiations on the Value-gap Proposal

The negotiations on a final version of the proposed Copyright Directive are currently ongoing, with proposals drafted by both the EU Parliament¹³⁰ and the Council of the European Union¹³¹.

Article 14 of the E-commerce Directive provides a balance of different interests (both of rightholders and intermediaries) and, if applied correctly, already grants protection against infringements committed by ‘false’ hosting providers. As such, a revision of Article 14 of the E-commerce Directive would not serve to expose passive hosting providers to the risk of primary liability for making available copyright works provided by third-party users of their services. The situation could differ in relation to secondary liability, but intervention in this area would mean carrying out an extensive harmonisation effort that – so far – has substantially eluded EU legislature.¹³²

In relation to the current EU policy discussion of the so called ‘value gap proposal’, the judgment issued in The Pirate Bay reinforces the position of the EU Commission, especially the basic idea that making available, by a hosting provider, third-party uploaded copyright content may fall within the scope of the right of communication to the public. The Court’s reasoning also prompts a reflection as to whether a hosting provider that is primarily responsible for acts of communication to the public is eligible for the safe harbour within Article 14 of Directive 2000/31.¹³³

Although the rationale underlying the EU Commission’s proposal seems rooted within earlier CJEU case law, the Pirate Bay decision has aligned case law to policy action and might have even gone further than the latter.¹³⁴

The judgment is expected to have substantial implications for future EU and domestic proceedings and prompts a broader reflection on the current EU copyright reform debate.

To conclude, the proposed EU system fails under some circumstances to provide detailed guidance on the content of the remedies that can be sought for detecting illegal content uploaded on the Internet. Although the debates around the DSMS are far from over, it is fair to predict that the national courts and lastly the CJEU will be left with the task of filling out these gaps.

It appears that there are high risks that the ISPs’ will track parodies through automatic filtering and find it as infringing original works. Under the current legal framework, there could be anticipated an increased threat towards parodist treatment online.

5. CONCLUDING REMARKS

The parody exception provided by the InfoSoc Directive has been implemented differently by the Member States, according to various political agendas and was consequently interpreted differently by the national judges.

At this point of EU copyright reform, it is easy to assume that an exclusive and absolute right to control information flows constitutes an interference with the freedom of expression and would have a discouraging effect on the authors of parodies, which would contravene with the legal framework of the Member States where the parody exception was implemented.

Undoubtedly, the EU legislator must ensure future balanced measures that respect the framework of parody, where nationally implemented. With this regard, it should be possible to evolve independent monitoring bodies using the combined efforts of private, voluntary and state vehicles, if this work is done transparently, effectively and responsibly.¹³⁵

At this moment, the parody exception is implemented or partially implemented in 24 out of 28 Member States (counting the UK, for the time being a full member of the EU with the standing obligations to apply EU law in and to the UK).¹³⁶ In this situation, it could be appropriate that the EU legislator reflects on appropriate measures regarding the treatment of the parody works, for reducing and ultimately eliminating the fragmentation of the internal market, as well as ensuring that both IP rights and the freedom of expression enjoy an equivalent level of protection throughout the EU.

¹²⁴ SABAM v Netlog, cit., §36.

¹²⁵ Idem, §37.

¹²⁶ Idem, 40 – 42.

¹²⁷ Idem, §48.

¹²⁸ SABAM v Netlog cit, §50.

¹²⁹ Rosati & Others, cit., pg. 9.

¹³⁰ EU Parliament, Draft compromise amendments on Article 13 and corresponding recitals, 21 February 2018.

¹³¹ Council of the European Union, Proposal for

the DSMS – Mandate for negotiations with the EU Parliament, 23 April 2018.

¹³² Eleonora Rosati, Why a reform of hosting providers’ safe harbour is unnecessary under EU copyright law, pg. 14.

¹³³ Eleonora Rosati, The CJEU Pirate Bay judgment and its impact on the liability of online platforms, pg. 2.

¹³⁴ Idem, pg. 15.

¹³⁵ Emily Taylor, The privatization of human rights: illusions of consent, automation and neutrality, Global Commission on Internet Governance, Chatham House, The Royal Institute of International Affairs, Paper series: no 24, January 2016, pg. 17.

¹³⁶ Info available at: https://europa.eu/european-union/about-eu/countries/member-countries_en.



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The Marrakesh treaty and the approach towards social inclusion

By Harsh Mahaseth

You gave us a Treaty. Better still you gave us a good Treaty - one that will change the lives of millions of people.

Maryanne Diamond, President, World Blind Union¹

ABSTRACT

While there have been numerous measures that have been taken by international institutions, led by the UN, to foster equality, one issue that has received little attention till now has been what scholars have described as the book famine.² Statistics show that the number of published books available in formats accessible for the print disabled people was less than 5% before 2013.³ However, 2013 was a landmark year to combat this problem and eliminate the scarcity of books available for them. On April 20, 2013 the Informal Session and Special Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR)⁴ had prepared a draft version of a text of a Treaty with an aim to facilitate access of readable material to the visually impaired persons and persons with print disabilities. This was subsequently discussed and adopted as the Marrakesh Treaty in the same year. Around six hundred delegates from among one hundred eighty-six member states of the WIPO joined the debate which led to the adoption of the Treaty in the Kingdom of Morocco.⁵

India was the first nation to ratify the Treaty on June 24, 2014 at the twenty-eighth session of the

Standing Committee on the Copyright and Related Rights Act, 2000 in Geneva. On September 30, 2016 the Treaty came into force by formally gathering 20 nations that acceded the Treaty.⁶ Hopefully the number of members joining the Treaty will increase in the coming years. To remove the barriers to accessibility this Treaty plays a vital role for the visually impaired persons and persons with print disabilities.

India is home to 63 million visually impaired people, of whom 8 million are blind. The Accessible India Campaign⁷ is a benchmark for universal access of accessible material for the visually impaired persons. India has also begun implementation of the Marrakesh Treaty into its domestic laws through a multi-stakeholder approach: collaboration with key players i.e. governmental bodies, authorized entities, etc.⁸ This has led to the launch of Sugamya Pustalaya, India's largest collection of online accessible books with over 200,000 volumes of material. It is hoped that Sugamya Pustakalaya will soon become a member of the ABC Book Service, thereby joining an international library-to-library service managed by WIPO in Geneva.

This paper will highlight the Treaty and its applicability, look at the different approaches taken by several developed and a few developing nations and also see how the Indian approach, even though being a developing nation, has been progressive and beneficial to the beneficiaries of the Treaty and should be seen as an inspiration for the other nations.

1. INTRODUCTION

Without books to share, the dream of equal access will remain an unfulfilled dream. The Marrakesh Treaty is much more than a Treaty about books. It is an historic human rights instrument. Access to published works means the potential for blind and partially sighted children and adults to live integrated, productive lives.

Frederick Schroeder, President, World Blind Union (WBU)⁹

The discourse on intellectual property has always had access to knowledge at the forefront, with such a system being seen as old as the Statute of Anne.¹⁰ However, this encouragement for creativity and fostering of innovation has been with its limits. No copyright Treaty grants absolute rights to any individual. Both the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-related Aspects of Intellectual Property Rights require countries to limit copyrights and confine such limitations to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.¹¹ Despite this, the Marrakesh Treaty symbolizes an attempt to bring in a more balanced approach between the authors and users: it not only focuses on the protection of the rights of the author but also recognizes the interests of the persons who are visually impaired as well as people with physical disabilities, that prevent them from holding and manipulating a book.¹²

While this Treaty is a huge step forward towards inclusivity, the culmination of this Treaty took a long time. The WIPO-UNESCO report on this issue (The Report of the Working Group on Access by the Visually and Auditorily Handicapped to Material Reproducing Works Protected by Copyright, Paris, October 25 to 27, 1982) was discussed nearly four decades ago. Promotion of access to knowledge for the visually impaired persons and persons with print disabilities should have been an uncontroversial issue in light of the principles of non-discrimination, equal opportunity, accessibility and full and effective participation as under the Universal Declaration of Human Rights. However, this step met with various issues related to copyright exceptions and limitations making the entire procedure long and complex.¹³

India was the first nation to ratify the Treaty on June 24, 2014 at the twenty-eighth session of the Standing Committee on the Copyright and Related Rights Act, 2000 in Geneva. It took three years for twenty governments to formally join the Treaty so it could enter into force.¹⁴ ¹⁵

The Success of the Treaty lies in the ratification and effective implementation by the member states.

2. PRIMARY OBJECTIVES

The Treaty, aimed at the creation of a solid legal foundation for ensuring the widespread dissemination of accessible content, recognizes in the preamble:

The aim of the Treaty is to build a solid foundation to ensure the widespread dissemination of accessible material recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.¹⁶

¹ Stevie Wonder Hails Landmark WIPO Treaty Boosting Access to Books for Blind and Visually Impaired Persons, WIPO Media Center, Marrakesh/Geneva, June 28, 2013, Available at http://www.wipo.int/pressroom/en/articles/2013/article_0018.html.

² Kartik Sawhney, Perspective: End the 'book famine' with better technology, attitudes and copyright law, The State of the World's Children 2013: Children with Disabilities, UNICEF, Available at https://www.unicef.org/sowc2013/perspective_sawhney.html.

³ Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, SCCR/19/13, WIPO, Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130505.

⁴ Informal Session and Special Session of the Standing Committee on Copyright and Related Rights, SCCR/SS/GE/2/13, WIPO, Available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=29303.

⁵ Supra 1.

⁶ Canada's Accession to Marrakesh Treaty Brings Treaty into Force, WIPO Media Centre, June 30, 2016, Available at http://www.wipo.int/pressroom/en/articles/2016/article_0007.html.

⁷ Accessible India Campaign, Available at <http://accessibleindia.gov.in/content/>.

⁸ Francis Gurry, Making Books Accessible to all, The Hindu, November 01, 2016, Available at <http://www.thehindu.com/opinion/op-ed/Making-books-accessible-to-all/article15005883.ece>.

⁹ Inaugural Marrakesh Treaty Assembly, Accessible Books Consortium, October 10, 2016, Available at http://www.accessiblebook-consortium.org/news/en/2016/news_0013.html.

¹⁰ Statute of Anne, 8 Ann. c. 21.

¹¹ Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) [adopted 15 Apr. 1994, entered into force 1 Jan. 1995] 1869 UNTS 299; [1994] 33 ILM 1197.

¹² J Reinbothe and S von Lewinski, The WIPO Treaties on Copyright [OUP 2015] ch 18; DJ

Gervais, International Intellectual Property: A Handbook of Contemporary Research [Edward Elgar Publishing 2015] 6.

¹³ On Copyright and rights of persons with disabilities: WIPO Treaty for the blind, Kluwer Copyright Blog, April 19, 2013, Available at <http://copyrightblog.kluweriplaw.com/2013/04/19/on-copyright-and-rights-of-persons-with-disabilities-wipo-Treaty-for-the-blind/>.

¹⁴ Canada's Accession to Marrakesh Treaty Brings Treaty into Force, WIPO Media Center,

Geneva, June 30, 2016, Available at http://www.wipo.int/pressroom/en/articles/2016/article_0007.html.

¹⁵ Marrakesh Treaty: Revolution for the print disabled, The Pioneer, October 15, 2016, Available at <http://www.dailypioneer.com/columnists/oped/marrakesh-Treaty-revolution-for-the-print-disabled.html>.

Article 19 of the International Covenant on Civil and Political Rights protects the freedom of expression, which also includes the freedom to seek, receive and impart information and ideas of all kinds.¹⁷ The Treaty has been conceived in line with this as well as the principles enshrined under the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

The primary objective underlying this Treaty is the creation of exceptions and limitations in member states’ copyright laws for the creations and sharing of accessible work. The Treaty attempts to increase the availability of accessible works as different countries will be able to each produce accessible versions of materials which can then be shared with each other instead of duplicating efforts by adopting the same work. As copyright law is territorial, the exemptions will not cover the import and export of the accessible formats. A negotiation must proceed between the right holders to exchange such material across borders.¹⁸

The Treaty recognizes that though different member states have different exceptions and limitations, a uniform international framework needs to be followed to ensure cross-border exchange of books in an accessible format for the visually impaired persons and persons with print disabilities.

It also needs to be ensured that the exceptions within the copyright laws comply with the Three-Step test as laid out in the Berne Convention and later provided in TRIPS Agreement, WCT, etc.

3. BENEFITS

This Treaty will foster a discourse on the book famine and raise awareness regarding the need for policies that benefit the visually impaired persons as well as people with physical disabilities that prevent them from holding and manipulating a book.

The Treaty stresses on the role of educational institutions and how accessible formats for the visually impaired persons can help in an equal access to education. This greater access to education would in turn help in the transformation of our society.

The Treaty also underlines on the need for social integration and cultural participation of the visually impaired

persons. Such is only possible if everyone can avail equal access to knowledge and information.

This Treaty will contribute to poverty alleviation and the development of the national economies. Once information is available in accessible formats, development of individual facilities is certain. Assisting in professional growth, this Treaty aims to make the visually impaired persons more self-sufficient and able to contribute to their local economies.

The Accessible Books Consortium (ABC) was developed by the WIPO to supplement this Treaty. Its aim *is to increase the number of books worldwide in accessible formats (braille, audio and large print) and to make them available to people who are blind, visually impaired or otherwise print disabled*. The ABC is a crucial step in the realisation of the Treaty and its underlying aims. The benefits of the ABC include The ABC Global Book Service, Capacity Building and Accessible Publishing.¹⁹

4. THE WORKS COVERED UNDER THIS TREATY

Article 2(a) of the Marrakesh Treaty defines “works covered”. This refers to the types of material which can be transcribed or distributed under the terms of the Treaty.

A major dispute amongst the developed and developing delegations has been regarding the types of work covered by the Treaty. There were various proposals which covered a spectrum of works. A proposal by the African nations was extensive enough to include “*artistic, literary, dramatic, musical or scientific type, regardless of the mode, format or form of expression*.”²⁰ The proposal by Brazil, Ecuador and Paraguay also included films and non-copyrighted elements of databases.²¹ The motion picture industry²² as well as the United States of America²³ argued that audiovisual works should be excluded. As a result works such as literary and artistic works *in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media* have been covered by the Treaty. This definition is rather narrow as it does not cover the ambit photographic works, cinematographic works, sound recordings, dramatic works, broadcasts, performances, etc. The Treaty only covers published works. The exclusion of audiovisual works, films and databases is seen as a rather unfortunate choice.

“Accessible format copy” refers to a broad format that allows a person to access the content as easily as possible including digital formats as well. It is defined to mean a copy of a work in an alternative manner or form in order to enable people with visual impairments to have access to these works *as feasibly and comfortably as a person without visual impairments or print disabilities*. The scope of this definition is rather expansive.

5. BENEFICIARIES

Article 3 of the Marrakesh Treaty defines “Beneficiary Persons”. The beneficiaries under the Treaty include:

- 1. Blind persons;
- 2. Persons with visual impairment that prevents them from reading like a normal person; and
- 3. Persons, who cannot hold or manipulate a book, or move eyes like a normal person to read a work.

The inclusion of the ‘print disabled’ as a beneficiary has been done to further the objective of non-discrimination and equal opportunity. A print disabled can be anyone who cannot access print due to any form of disability. The definition of beneficiary is given as *someone affected by one or more in a range of disabilities that interfere with the effective reading of printed material*. The exception under the Treaty is aimed at visually disabled persons, people with dyslexia, etc. This definition is broad enough to include persons who are visually impaired as well as people with physical disabilities preventing them from holding a book. However, it does not cover people with auditory issues, mental disability, etc., who also have problems with accessing printed works. Furthermore, Article 3 of the Treaty does not clarify the qualifying indicators for ‘blindness’, ‘visual impairment’, etc. An initial proposal also wanted to include “persons with any other disabilities”²⁴ which was eventually narrowed down by the negotiation parties.²⁵ The Treaty leaves the specifications of the spectrum of impairments and disabilities to be decided by the national laws. It is a hope that all the nations follow a social model of disability and include all those who are in real need.

6. INTERNATIONAL EXCHANGE OF ACCESSIBLE WORKS

Copyright laws are territorial and considering both the jurisdictions of the importer and exporter countries complicates the international exchange of accessible works.²⁶ Such complications have led to duplication in production of accessible formats. Due to this there are exchange possibilities only when special agreements between the nations are undertaken. Countries’ freedom to adopt flexibilities under the Treaty has led to a lack of limitations and exceptions, or adoption of ones that are badly-crafted. At the same time, the territorial nature of copyright has not stopped the international community from adopting minimum standards of protection for copyright and related rights. Moreover, the principle of national treatment means that authors enjoy a minimum level of protection everywhere.

Regulation of the possibility to import and export accessible formats on the international and national level would facilitate the flow of resources between the developing and developed nations and also assisting in better access to the former. This also skips the repetition and reproduction of material preserving resources.

The preamble of the Treaty recognizes the lack of access to the material despite the availability of copyright limitations and exceptions. Recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.

¹⁶ Preamble, Marrakesh VIP Treaty.

¹⁷ International Covenant on Civil and Political Rights art. 19[2], Dec. 19, 1966, 999 U.N.T.S. 171.

¹⁸ Historic Treaty Adopted, Boosts Access to Books for Visually Impired Persons Worldwide, WIPO Media Center, Marrakesh/Geneva, June 27, 2013, Available at http://www.wipo.int/pressroom/en/articles/2013/article_0017.html.

¹⁹ Report on the Accessible Books Consortium, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind,

Visually Impaired or Otherwise Print Disabled (MVT), MVT/A/2/INF/1, August 2, 2017, Available at http://www.wipo.int/edocs/mdocs/govbody/en/mvt_a_2/mvt_a_2_inf_1.pdf.

²⁰ World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers: Proposal by the African Group, 15 June 2010, SCCR/20/11.

²¹ World Intellectual Property Organization,

Standing Committee on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), 25 May 2009, SCCR/18/5.

²² James Love, ‘Knowledge Ecology International (KEI) Opening Statement at Marrakesh Diplomatic Conference’, Knowledge Ecology International, 19 June 2013 <www.keionline.org/node/1754>, visited on 3 December 2013.

²³ Fedro D. Tomassi, ‘Audiovisual Materials in the Classroom and the WIPO Treaty for copyright exceptions for persons with disabilities’, Knowledge Ecology International, 8 June 2013, <www.keionline.org/node/1738>, visited on 4 December 2013.

²⁴ World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), 25 May 2009, SCCR/18/5.

²⁵ Brendan Kirwin, ‘Addressing the “Book Famine”: The WIPO and VIP Accessibility’, 15 August 2012, p. 15, <www.bkirwin.net/scholarship/>, visited on 4 December 2013; Fedro D. Tomassi, ‘Audiovisual Materials in the Classroom and the WIPO Treaty for copyright exceptions for persons with disabilities’, Knowledge Ecology International, 8 June 2013, <www.keionline.org/node/1738>, visited on 4 December 2013.

²⁶ Judith Sullivan Study on Copyright Limitations and Exceptions for the visually impaired [World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR), SCCR/15/7, 20 February 2007] at 58.

7. LIMITATIONS AND EXCEPTIONS IN CROSS-BORDER EXCHANGE

Article 4(2) of the Treaty seeks to address the exceptions created by the member states in their national copyright laws. It seeks to enable “authorized entities” to make accessible format copies of works that are lawfully obtained and to disseminate them amongst legally entitled beneficiaries on a not-for-profit basis. This gives them the right to reproduce, the right to distribute, the right to make it available to public and the right to make changes to the work to convert it into an accessible format. Article 2(c) of the Treaty defines an “authorized entity”. To qualify under this definition of authorized entity, there is no specific process, thus, any entity meeting the criteria can claim to be an authorized entity under this Treaty. The definition is manifold including governmentally recognized, not-for-profit organizations, etc. that provide access to information to beneficiaries on a not-for-profit basis.

Moreover, the Treaty mandates that such copies be shared only with beneficiaries and be made from lawfully obtained copies. However, Article 5(2) of the Treaty read with Article 6 gives the authorized entities access to the material from the importing country without the prior consent of the copyright owner and such material can be distributed to other authorized entities or beneficiaries in other Contracting Parties’ territories. Article 11 does order that the governments carve exceptions in their copyright laws to ensure that the interests of the authors are not unreasonably prejudiced.

The Marrakesh Treaty mandates national laws to allow the cross-border exchange of the works in accessible formats to other member states. However, for this to be done there are two conditions that need to be satisfied:

- 1. The accessible works are exclusively distributed to disabled persons; and
- 2. The limitations and exceptions satisfy the Three-Step Test as laid down in the Berne Convention and later provided in the TRIPs Agreement, WCT, etc.:
 - The exception or limitation must be a special case;
 - The exception or limitation does not conflict with the normal exploitation of the work; and;
 - The exception or limitation does not prejudice the legitimate interests of the copyright holder.

Articles 9 to 14 delegate the administrative functions to

the International Bureau of the WIPO, which in turn will assist in the facilitation of cross-border exchange of accessible formats of material encouraging the voluntary sharing of information. Moreover, an Assembly to maintain and develop the Treaty has also been created with each member state having one representative and one vote each.

Cross-border exchange of copyrighted works in accessible formats is one of the primary aims of the Treaty. Technologically advanced developed nations have the capability to convert works into various formats, whereas the developing nations may not have the same capabilities. The Treaty enables easy access to converted works across borders. This is a giant step for ensuring access. However, since the Treaty text uses the word ‘may’ and gives an impression that this provision is non-mandatory, the US and EU could take advantage of such language.

8. BARRIERS TO ACCESS FOR THE VISUALLY IMPAIRED

As Braille evolves to digital formats, new technologies have presented themselves as more easily produced and distributed accessible works.²⁷ The rapid emergence of technological avenues may obviate the necessity of the Treaty in the coming decade.²⁸ Therefore, governments need to restructure their copyright laws in a positive way in order to ensure that the commitment to the visually impaired persons does not merely remain confined to words.²⁹

The Accessible Books Consortium³⁰ (ABC) is a public-private partnership led by the World Intellectual Property Organization (WIPO). It includes organizations that represent people with print disabilities such as the World Blind Union (WBU); libraries for the blind; standards bodies, and organizations representing authors, publishers and collective management organizations. The goal of the ABC is to increase the number of books worldwide in accessible formats - such as braille, audio, e-text, large print – and to make them available to people who are blind, have low vision or are otherwise print disabled.

The intersection of technology, market failure and copyright laws create a complex access dilemma for the visually impaired that deprives them of equal opportunity.³¹ When a published work is available only in certain electronic forms, it deprives the visually impaired from the use and enjoyment of that work.³²

There are market factors that limit the creation and

distribution of accessible material. Most authors and publishers do not see an economic profit in the market for the visually impaired.³³ The high production costs of the material discourages the creation and distribution. Due to this, the market is primarily served by not-for-profit, non-governmental and charitable organizations.³⁴ As such, due to limited resources the number of accessible works produced and distributed is constrained. Furthermore, the addition of a copyright licensing fee would impose a substantial burden on the already existing constraint.³⁵

A solution that the WIPO employed was through voluntary stakeholder agreements. Through the WIPO Stakeholder Platform publishers opposed to the Marrakesh Treaty they at the same time established a forum in which stakeholders reached voluntary agreements which permitted the lawful transfer of licensed material in accessible formats.³⁶

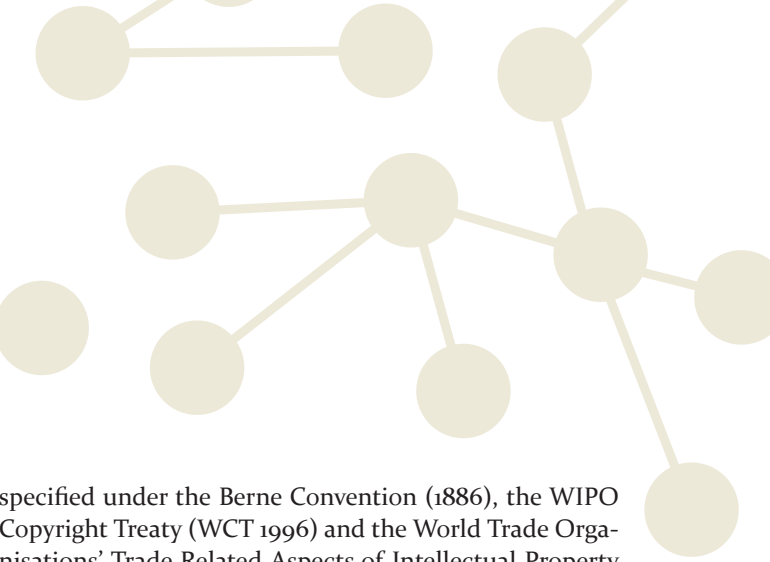
9. THE INTERNATIONAL POSITION

While the signing of this Treaty is a historic and important step, I am respectfully and urgently asking all governments and states to prioritize ratification of this Treaty so that it will become the law of the land in your respective countries and states

Stevie Wonder, Marrakesh/Geneva, June 28, 2013³⁷

A total of 35 nations have contracted to the Marrakesh Treaty.³⁸ Several nations considered making accessible formats for the visually impaired persons as an infringement of copyright law. In a 2007 WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired, it was reported that only 57 countries had created specific exceptions and limitations to copyright for the benefit of the visually impaired persons.³⁹ While some countries permit making such material accessible, some consider cross-border transfer of such material to be an infringement of copyright law.

Thus, member states can carry out their responsibilities envisaged under the other treaties without affecting any of the provisions of this Treaty; however, the member states need to comply with their international obligations as



specified under the Berne Convention (1886), the WIPO Copyright Treaty (WCT 1996) and the World Trade Organisations’ Trade Related Aspects of Intellectual Property Rights (TRIPS, 1995).

9.1. THE BRITISH POSITION

The British Government has made the accessibility of materials for the disabled easier. Previously there were exceptions to copyright law that allowed visually-impaired persons and organizations to make accessible versions of certain materials. However, such exceptions were restricted to certain impairments and not including other forms of impairments, such as dyslexia, while these did not apply to all types of copyright.⁴⁰

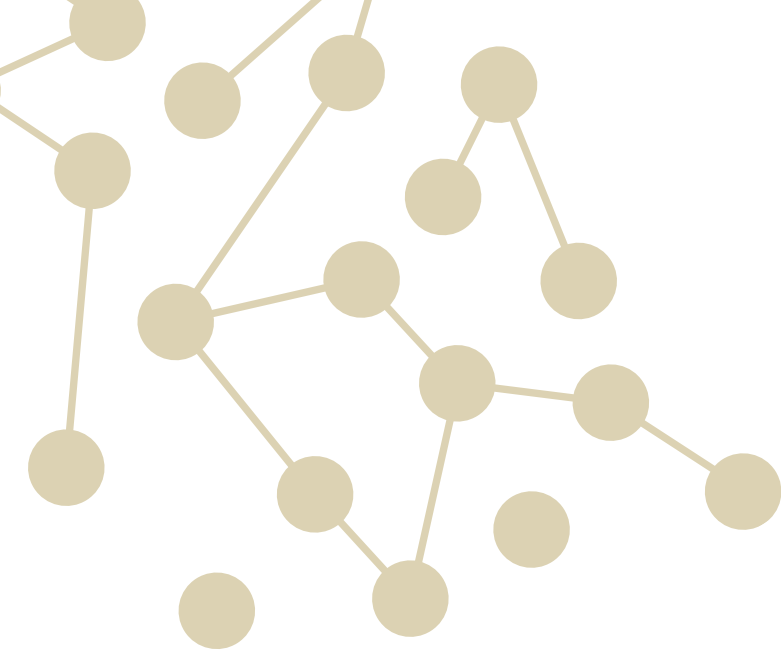
The law has now changed to include anyone who suffers an impairment that prevents them from accessing copyright works and such persons, including not-for-profit organizations and educational establishments, will now be able to benefit from the exception.⁴¹ Furthermore, the law has been simplified so that organizations no longer need to go through a bureaucratic designation process to produce accessible material. The law allows acts such as:⁴²

- Making Braille, audio or large-print copies of books, newspapers or magazines for visually-impaired people
- Adding audio-description to films or broadcasts for visually-impaired people
- Making sub-titled films or broadcasts for deaf or hard of hearing people
- Making accessible copies of books, newspapers or magazines for dyslexic people.

However, it is legal to reproduce material only if suitable accessible copies are not commercially available. Organizations that do produce copies of accessible material have a duty to keep records and provide them to the copyright owner of the material.

²⁷ Marc Maurer, National Federation of the Blind, Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities, 3 [2009], Available at <http://www.copyright.gov/docs/ccr/comments/2009/maurer.pdf>.
²⁸ William Fisher, CopyrightX: Special Event – Negotiating Copyright Treaties, The Berkman Klein Center for internet & Society, YouTube, April 29, 2014, Available at <https://www.youtube.com/watch?v=rWJC5ONg3Sk>.
²⁹ Swaraj Paul Barooah, Guest Post: Translating the Miracle of Marrakesh into Concrete Action – the Journey so Far, SpicyIP, January 25, 2016, Available at <https://spicyip.com/2016/01/guest-post-translating-the-miracle-of-marrakesh-into-concrete-action-the-journey-so-far.html>.
³⁰ Accessible Books Consortium (ABC), Accessible Books Consortium, Available at <http://www.accessiblebooksconsortium.org/portal/en/index.html>.
³¹ United States of America, Statement on Copyright Exceptions and Limitations for Persons with Print Disabilities, 1 (Dec. 14-18, 2009), Available at http://www.uspto.gov/ip/global/copyrights/wiposccr_19session.pdf.
³² Krista L. Cox, The Right to Read for Blind or Disabled Persons, LANDSLIDE, May-June 2012, 32.
³³ Allan Adler, Am. Association Of Publishers, Comments In Response To Notice Of Inquiry On Facilitating Access To Copyrighted Works

For The Blind Or Other Persons With Disabilities 7 [2009], Available at <http://www.copyright.gov/docs/ccr/comments/2009/adler.pdf>.
³⁴ Patrick Hely, A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO, 43 VAND. J. TRANSNAT’L L. 1369, 1372 [2010].
³⁵ Ng-Loy Wee Loon, Visually Impaired Persons and Copyright, 41 INT’L REV. INTELL. PROP. & COMPETITION L. 377 [2010].
³⁶ See Vera Franz, Back to Balance: Limitations and Exceptions to Copyright, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 516, 525-27 [2010].
³⁷ Supra 1.
³⁸ Contracting Parties > Marrakesh VIP Treaty [Total Contracting Parties: 35], WIPO Administered Treaties, WIPO, Available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&Treaty_id=843.
³⁹ World Intellectual Property Organization, Study on Copyright Limitations and Exceptions for theVisually Impaired, 28, SCCR/15/7 [Feb. 20, 2007], Available at <http://www.wipo.int/meetings/en/doc-details.jsp?docid=75696>.
⁴⁰ Exceptions to copyright: Accessible formats for disabled people, Intellectual Property Office, 3, Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375952/Accessible_formats_for_disabled_people.pdf.
⁴¹ Id.
⁴² Id at 4.



9.2. THE AMERICAN POSITION

The Chafee Amendment created a copyright infringement exception to make accessible copies more efficient and to expand access to published works for the blind or other persons with disabilities. This Amendment authorised the reproduction and distribution of previously published works and did not require remuneration to be paid to the author. The American copyright law also provides the defence of fair use when the production of accessible material falls outside of the scope of the Chafee exception.⁴³ However, this has failed to provide better access.⁴⁴ Building upon the precedent of the Chafee Amendment, the Marrakesh Treaty advances the goal of copyright exceptions for the print disabled. The support of the United States would herald a disability-inclusive goodwill and also show that the United States recognizes the copyright barriers for the print-disabled and, even though they have not ratified the CRPD, they are willing to undertake measures to alleviate the barriers present to them.⁴⁵

The United States should support the Marrakesh Treaty as this would increase access to the accessible material not just in the United States, but also worldwide. As the Chafee Amendment has become outdated,⁴⁶ there is an impending need to create a lawful global platform to share accessible material, and the Marrakesh Treaty presents this opportunity. While the Marrakesh Treaty itself is not a means to an end, it does provide an opportunity to update the United States own national laws. By updating and complementing the Chafee Amendment the United States can achieve equitable access and alleviate the copyright barriers for the print-disabled.⁴⁷

9.3. THE EUROPEAN UNION POSITION

Following its adoption in June 2013 there was a slow start to the ratification process which caused the member states to question the legality of ratifying the Treaty.⁴⁸ With the Maltese presidency forming an agreement with the European Parliament on implementing the legislation, a proposal was agreed to which would introduce EU legislation with a mandatory exception to copyright rules, in line

with the Marrakesh Treaty.⁴⁹ This proposal allows beneficiary persons and organizations to make copies of works in accessible formats, and to disseminate them across the EU and in third countries party to the Treaty.

A regulation will implement the Union's obligations under the Marrakesh Treaty with respect to the exchange of accessible format copies for non-commercial purposes between the EU and third countries that are party to the Marrakesh Treaty.⁵⁰ A directive will incorporate the obligations under the Marrakesh Treaty into national domestic legislation. This will ensure an improvement in the availability of accessible format copies for beneficiary persons and their circulation within the internal market. The regulation and the directive will have to be formally adopted by the European Parliament and the Council. Afterwards, the provisions of the directive will be enacted in each national legislation within a maximum period of 12 months. Following the adoption of a Council decision authorising the conclusion of the Marrakesh Treaty, the EU will be able to deposit the ratification instruments of the Treaty.⁵¹

While the EU nations may have a uniform legislation with regards to the Treaty, there is an apparent lack of detail in the EU legislation, as well as some optional provisions, which needs to be advocated against to bring the best possible result for the persons with print disabilities.

EBLIDA, IFLA and EIFL, in cooperation with the European Blind Union, are supporting libraries in the EU nations to make the case for a good transposition. When the legislation is fully transposed in domestic law, libraries can then perform the range of services envisaged by the Treaty: the creation and distribution of accessible format copies to people with print disabilities.⁵²

9.4. THE CANADIAN POSITION

For many years, the unauthorized making of a copy in an accessible format such as braille, electronic text or audio, and its distribution constituted an infringement of the reproduction and distribution rights in Canada. Similarly, the export or import of accessible format copies could trigger infringement liability.

To improve access, the government of Canada amended the Copyright Act in June 2016 with specific provisions on access to copyright works. Bill C-11⁵³ introduced three main changes in the copyright act.⁵⁴

First, the bill permits non-profit organizations acting on behalf of persons with a print disability to reproduce copyrighted works (not films or music) in accessible formats without the permission from the copyright holder, provided that the work is not commercially available in a similar format.

Second, the Bill reduces the restrictions on exporting accessible materials regardless of the authors' nationality by allowing non-profit organizations to make the work available in other countries that are part of the Treaty. Prior to the amendments, cross-border exchanges of an accessible format copy were allowed only where the author of the work was a Canadian citizen, a permanent resident, or a citizen of the destination country.

Third, the Bill also exempts electronic books from the

digital lock rules enacted in the 2012 copyright reforms that protect right-holders against the circumvention of popular consumer products. At the same time, the bill adopts a restrictive approach in the implementation of the Marrakesh Treaty by requiring the non-profit organization to pay royalties to the copyright-holders.

9.5. THE ISRAELI POSITION

In 2014 Israel became the first non-signatory country to amend its copyright law according to the stipulations of the Marrakesh Treaty.⁵⁵ The State of Israel, as a non-signatory, constitutes a unique case for three main reasons. First, in contrast to other Berne Convention member states, Israel's copyright law did not provide an exception for disabled people to use accessible formats of materials protected by copyright. Secondly, even countries that had a particular exception for the disabled were not attentive to the complex meaning of the concept of disability, excluding many disabilities from the scope of the exception they have adopted. Thirdly, the Israeli way of embracing the stipulations of the Marrakesh Treaty showed why the boundaries of intellectual property should not be tied to international agreements only, and that such agreements should be used as a baseline for extending the protection of those they aim to protect.

9.6. THE IRANIAN POSITION

While the authorized entities in countries that are not member states of the Berne Convention, but are members of the WCT, can distribute or make their work available in other jurisdictions, the question regarding a country that is party to neither of them remains unsolved. This has come to be known as the "Berne gap".⁵⁶ Iran is a party to the Marrakesh Treaty but is not to the Berne Convention or the WCT. While Iran can receive accessible copies from

authorized entities, it is not clear whether the authorized entities of Iran can distribute their works to other jurisdictions. The copyright laws in Iran protect the right to distribute copyright works.⁵⁷ However, considering that this will pass the Three-Step Test, the authorized entities will be probably able to distribute their works beyond the jurisdiction of Iran.

9.7. THE CHINESE POSITION

China has ratified the Convention on the Rights of Persons with Disabilities and also signed the Marrakesh Treaty. China has one of the largest population of visually impaired people in the world. With the language having several different pronunciations and homonyms of the words in local dialects, there are pressing challenges to translations in Braille. However, China has several organizations and even the National Research Center for Sign Language and Braille which has been trying to provide accessible material to the blind.⁵⁸ While China's current copyright law has an explicit provision permitting an exception for the creation of braille formats, in order to comply with the Treaty, a new exception will have to be introduced".

9.8. THE FIJIAN POSITION

Fiji has signed the Convention on the Rights of Persons with Disabilities in 2009 but is yet to sign the Marrakesh Treaty. The people with disabilities are likely those of the poorest section of the population who face social stigma, a lack of job preparation and employment opportunities. Fiji can rely on the text of the Marrakesh Treaty in drafting amendments to its copyright laws to allow for the import and export of accessible formats. It needs to include provisions allowing for the creation and distribution of accessible formats.⁵⁹

⁴³ Sony Corp. Of Am., 464 U.S. At 455 N.40; United States Of America, Statement On Improving Accessibility To Copyrighted Works For Blind And Visually Impaired Persons, 1 (May 25-29, 2009), Available at [Http://www.copyright.gov/docs/sccr/statement/us-inter-vention.pdf](http://www.copyright.gov/docs/sccr/statement/us-inter-vention.pdf).

⁴⁴ Patrick Hely, A Model Copyright Exemption To Serve The Visually Impaired: An Alternative To The Treaty Proposals Before WIPO, 43 VAND. J. TRANSNAT'L L. 1392, 1372 (2010).

⁴⁵ James Love, Knowledge Ecology Int'l, Comments To The Copyright Office And The USPTO Regarding The WIPO Draft Proposal To Facilitate Access To Copyrighted Works For Persons Who Are Blind Or Have Other Reading Disabilities 2 (2009), Available At [Http://www.copyright.gov/docs/sccr/comments/2009/comments-2/james-love-knowledge-ecology-international.pdf](http://www.copyright.gov/docs/sccr/comments/2009/comments-2/james-love-knowledge-ecology-international.pdf).

⁴⁶ Scorr Lissner, Association for higher education and disability, Copyright Office Comments 2 (2009), Available at [Http://www.copyright.gov/docs/sccr/comments/2009/lissner.pdf](http://www.copyright.gov/docs/sccr/comments/2009/lissner.pdf).

⁴⁷ Shae Fitzpatrick, Setting Its Sights on the

Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities, 37 B. C. Int'l & Comp. L. Rev. 139 (2014).

⁴⁸ Implementing the Marrakesh Treaty in European Union Member States: A Guide for Libraries, IFLA, EBLIDA, October 1, 2017, 7, Available at http://www.eblida.org/Documents/Marrakesh%20Treaty/01_eu_marrakesh_transposition_guide.pdf.

⁴⁹ Marrakesh Treaty on access to published works for blind and visually impaired persons: EU paves the way for ratification, European Council, Council of the European Union, Available at <http://www.consilium.europa.eu/en/press/press-releases/2017/05/10/marrakesh-Treaty/>.

⁵⁰ Supra 48.

⁵¹ Id.

⁵² Id.

⁵³ Bill C-11: An Act to Amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities), Open Parliament, Available at <https://openparliament.ca/bills/42-1/C-11/>.

⁵⁴ Bassem Awad, How the Marrakesh Treaty makes the Intellectual Property system more inclusive, OpenCanada.org, September 29, 2016, Available at <https://www.opencanada.org/features/how-marrakesh-Treaty-makes-intellectual-property-system-more-inclusive/>.

⁵⁵ Law for Making Works, Performances and Broadcasts Accessible for Persons with Disabilities (Law Amendments) No 5774-2014 (enacted 19 March 2014) [Israel].

⁵⁶ WIPO Standing Committee on Copyright and Related Rights Draft Report of the Informal Session and Special Session held at Geneva, 18 20 April 2013 [SCCR/SS/GE/2/13/3 PROV, 31 May 2013].

⁵⁷ Act for Protection of Authors, Composers and Artists Rights [Copyright Law] 1970 (Iran), Art 3.

⁵⁸ UNDP [2015]. Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific, 47.

⁵⁹ Id at 54.

9.9. THE INDIAN POSITION

In June 2014, India became the first country to ratify the Marrakesh Treaty.⁶⁰ In order to comply with the Treaty India had to proceed with an amendment to the Indian Copyright Act. Under Section 52 of the Act, which concerns with fair use/fair dealing, there exists an added provision Section 52 (i) (zb) regarding" before "exceptions with the exceptions which would not amount to a copyright infringement. This provision permits the conversion of a work into an accessible format exclusively for the benefit of a differently abled people. Although this amendment was introduced much before the Marrakesh Treaty coming into picture, it may have been upheld to be a beacon for other countries during the Marrakesh Conference.

While India does not have access to many books due to the price and stringent intellectual property laws, this Treaty can enable cross-border exchange which would serve the needs of the visually impaired persons ensuring harmonization with regards to the limitations and exceptions. This cross-border exchange allows the abridging of the technological gap found between the developing and developed nations, with the former gaining easy access to the converted material. However, one problem that can be faced is the use of the word ‘may’⁶¹ in the Treaty, thereby making this act optional and non-obligatory, something that the developed nations may take advantage of.

The Accessible India Campaign⁶² is a benchmark for universal access of accessible material for the visually impaired persons. India has also begun implementation of the Marrakesh Treaty into its domestic laws through a multi-stakeholder approach: collaboration with key players i.e. governmental bodies, authorized entities, etc.⁶³ This has led to the launch of Sugamya Pustalaya, India’s largest collection of online accessible books with over 200,000 volumes of material. It is hoped that Sugamya Pustakalaya will soon become a member of the ABC Book Service, thereby joining an international library-to-library service managed by WIPO in Geneva. Today, as the Marrakesh Treaty sits as a benchmark for social inclusion, India’s multi-stakeholder approach should also be seen as a model for other nations to follow.

Bentech has also received a grant from USAID, World Vision and the Australian Government to provide students at the primary level with accessible formats in their mother tongue, in the State of Maharashtra.⁶⁴ This project is expected to reach a target of 30-35 percent of the primary level students within the span of two years. Other multi-lingual nations can evaluate this project and determine its effectiveness in improving literacy rates among its student population.

India has worked with a number of organizations to ensure that the beneficiaries, as defined under Article 3 of the Treaty, can fully enjoy their rights under it and help address the book famine. India has shown that adopting an exception has led to the creation and distribution of accessible copies, and such exception has not made an adverse impact on publishers or has been abused in any way.⁶⁵

It is absolutely necessary for nations to create exceptions for the visually impaired persons and the first step towards this can be the ratification of the Treaty, at the earliest.⁶⁶

10. CONCLUSION

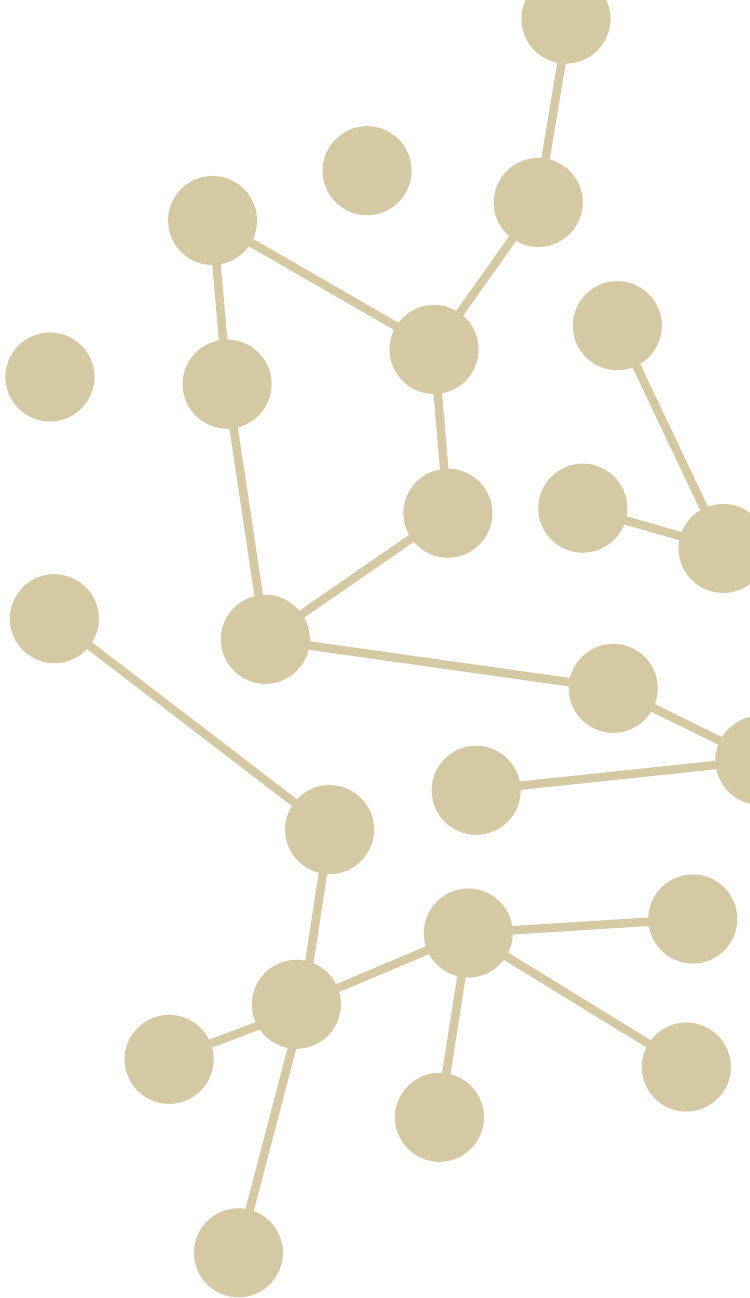
The Marrakesh Treaty proves that positive change can be made even in giant global institutions and against great odds

David Hammerstein, World Blind Union (WBU)⁶⁷.

This Treaty may be the first international legal instrument that seeks to address a specific impediment i.e. the issue of book famine for the visually impaired persons. As Professor Justin Hughes notes, this Treaty provides an alternative narrative of how a compromise can be sought between the social purposes of copyright law vis-à-vis safeguarding the interests of the author.⁶⁸ Such a balance reaffirms the proposition that the competing interests can be reconciled to ensure that copyright law remains an

engine of expression, wealth creation, and cultural renewal. As opposed to the other multilateral intellectual property treaties this is the only Treaty which seeks to limit the scope of copyright protection.⁶⁹

Prior to this Treaty, there was a barrier amongst nations to send accessible format books directly to authorized entities. This led to the authorized entities in some nations being stuck behind national borders and not being able to make the books accessible to the visually impaired persons and persons with print disabilities in other countries. With this Treaty coming into effect, the requirement of cross-border sharing has been reiterated with the accessibility of digital books, e-books, as well, subject to certain limitations and exceptions with no exploitation of the work or anything that may constitute unreasonably prejudice the legitimate interest of the right-holder.⁷⁰ However, only 35 nations have signed this Treaty.⁷¹ The reasons for the non-acceding of the Treaty vary. There seems to be a fear that the Treaty would set a dangerous precedent for the commercially profitable books to enter into ordinary channels of business where the rights of the authors and publishers would be undercut. Therefore, while there were several nations that agreed to sign the Treaty, most of them lacked the political will to ratify it and align their copyright laws with the Treaty’s mandate.⁷² While the Treaty does not take into account the interests of the persons with other disabilities, and does not adequately cover the issues emerging from modern technology, it does provide a crucial legal framework that countries can adopt into their national copyright laws to help in the accessibility revolution, the method to start the elimination of the book famine. To completely end the book famine, countries would need to sign, ratify and implement its provisions, and it looks like India has taken a step forward and this is something that the other nations should look at and take inspiration from. ⁷³



⁶⁰ Manisha Bansode, Shivani Jadhav & Anjali Kashyap, Voice Recognition and Voice Navigation for Blind using GPS, Vol. 3 [4], Intl J. of Innovative Research in Electrical, Electronics, Instrumentation & Ctrl Eng., Apr. 2015, Available at <http://www.ijireeice.com/upload/2015/april-15/UJIREEICE%2020.pdf>.

⁶¹ Supra 16, at Art 5.

⁶² Accessible India Campaign, Press Information Bureau, Government of India, March 09, 2017, Available at <http://pib.nic.in/newsite/printrelease.aspx?relid=159009>.

⁶³ Francis Gurry, Making books accessible to all, The Hindu, November 01, 2016, Available at <http://www.thehindu.com/opinion/op-ed/Making-books-accessible-to-all/article15005883.ece>.

⁶⁴ Pappas, Kristina, ‘Benetech Wins All Children Reading: A Grand Challenge for Development Grant to Improve Literacy for

Primary School Students with Disabilities in India’ [5 February 2015], <http://benetech.org/2015/02/05/benetech-wins-all-children-reading-a-grand-challenge-for-development-grant-to-improve-literacy-for-primary-school-students-with-disabilities-in-india/>. Supra 58, at 29.

⁶⁵ Open Letter to PM Modi on Intellectual Property Rights issues on His Visit to the United States of America in September, 2015, The Centre for Internet & Society, Available at <http://cis-india.org/a2k/blogs/open-letter-on-intellectual-property-rights-issues-during-your-visit-to-the-united-states-of-america-in-september-2015>.

⁶⁷ Supra 9.

⁶⁸ Justin Hughes, The Media Institute, Available at <http://www.mediainstitute.org/IPI/2013/080513.ph>.

⁶⁹ William Fisher, CopyrightX: Lecture 1.4, The

Foundations of Copyright Law: Multilateral Treaties, The Berkman Klein Center for internet & Society, January 20, 2016, YouTube, Available at <https://www.youtube.com/watch?v=00Bq5n7wYn0>.

⁷⁰ Sugandha Nayak, India: Historic Marrakesh Treaty: For Visually Impaired/Print Disabled Persons, Mondaq, September 12, 2013, Available at <http://www.mondaq.com/india/x/262396/Copyright/Historic+Marrakesh+Treaty+For+Visually+Impaired>.

⁷¹ Supra 32.

⁷² Supra 23.

⁷³ The Treaty of Marrakesh explained, World Blind Union, Available at <http://www.worldblindunion.org/english/news/Pages/The-Treaty-of-Marrakesh.aspx>.

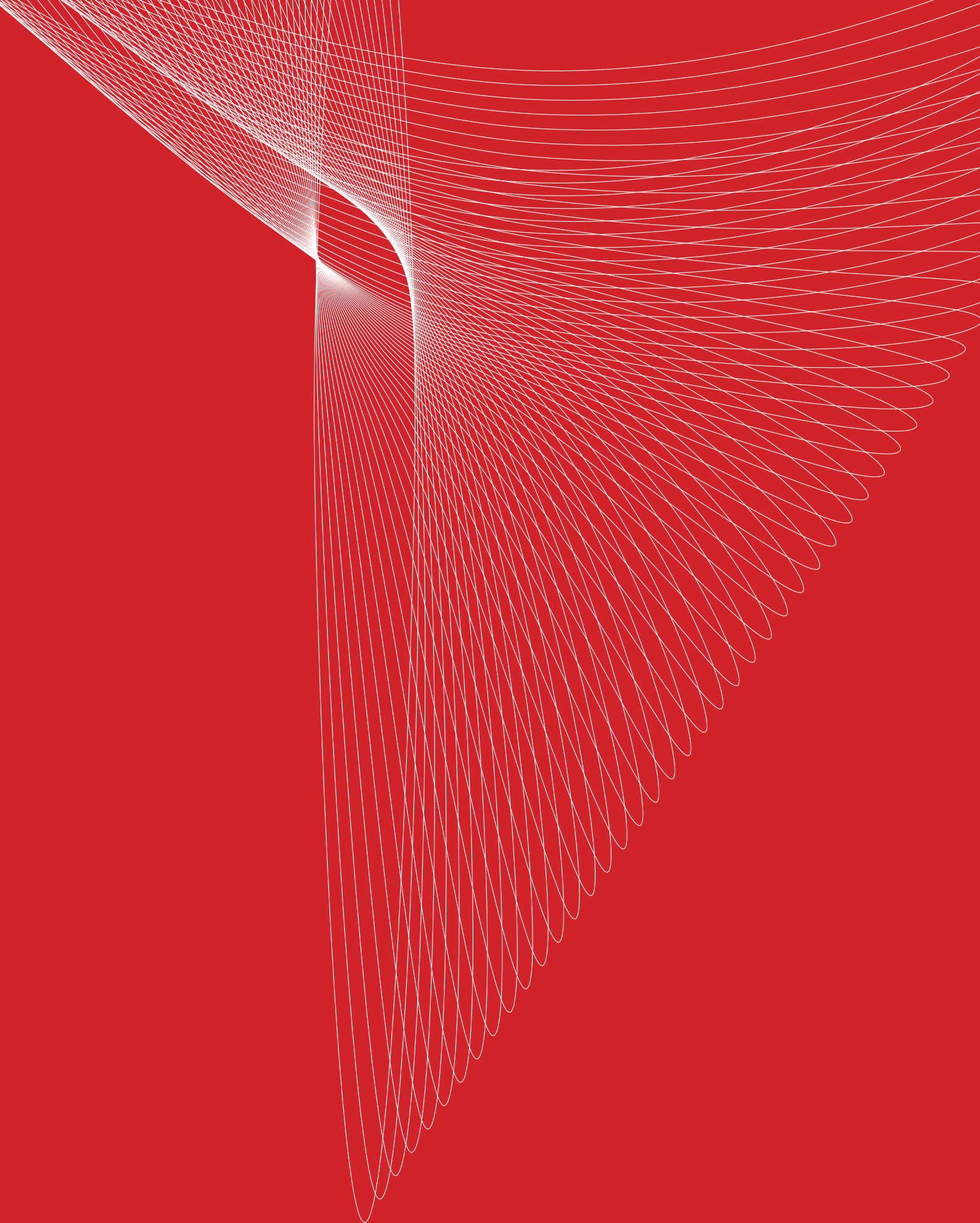


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